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Pierce County Sup. Ct. No. 14-1-04016-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

In re Personal Restraint of:

JOSEPH LEROY FUGLE

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kathryn J. Nelson

BRIEF OF PETITIONER

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I. STATUS OF PETITIONER

Joseph Leroy Fugle, DOC #391887, applies for relief from personal restraint. This is his first court challenge to his restraint. Mr. Fugle was wrongly convicted of harming his stepson MG and is currently incarcerated at the Stafford Creek Corrections Center in Aberdeen, Washington. He is serving a prison sentence of 240 months under the jurisdiction of the Washington State Department of Corrections for rape of a child and child molestation offenses.

The Pierce County Superior Court in Tacoma, Washington, issued its judgment and sentence on August 18, 2016, under cause #14-1-04016-6. Appendix A. Mr. Fugle's trial counsel also represented him in the direct appeal, which this Court affirmed on May 8, 2018 under CoA #49332-2-II. Appendix B. The mandate issued on October 9, 2018. Appendix C.

Mr. Fugle's personal restraint petition is timely under RCW 10.73.090(3)(b), as it has been filed within one year of the mandate of his direct appeal. This Court has jurisdiction under RAP 16.5(a).

The restraint is unlawful because Mr. Fugle's convictions were obtained in violation of the Constitution of the United States, as well as the Constitution and laws of the State of Washington. RAP 16.4(c)(2). Material facts exist which have not been previously presented, which in the interest of justice require vacation of the convictions. RAP 16.4(c)(3). Mr. Fugle has no other remedies available and is proceeding at his own expense. RAP 16.4(7)(d).

II. INTRODUCTION

At age 18, MG reported that a "nightmare" or "flashback," caused him to "recover" memory that Mr. Fugle sexually abused him in the family home. MG did not give details, at least not right away. He later claimed his stepdad abused him "hundreds of times over seven years," from age 7 through 14.

As a high school student, MG received care for a host of physical ailments, including widespread body pain. Rigorous medical testing did not explain his discomfort. An intelligent adolescent, MG was stuck at home, fully dependent on his mom and not participating in typical teenage life. When MG reported what he did, his mom and Mr. Fugle were separated, but still seeing each other. These allegations though, ended their relationship.

A month after the "flashback," MG showed dramatic shaking akin to a grand mal seizure and was rushed to a hospital for emergency care. He had a mental disturbance, but doctors found no physiologic reason why he demonstrated the seizure-like event. According to MG, this "pseudoseizure" caused him to lose all memory of his life's past, with one curious exception. MG said that the details of the "ritualistic" abuse he claimed to have experienced, repressed, and then recovered, survived the memory-erasure.

MG's mother and grandmother comforted him, even though he was saying he did not recall who they were. MG discussed the alleged abuse with doctors, counselors, family, and police. What he reported about having been sexually abused provided a breakthrough in the mystery of his pain. Suddenly, all of MG's health troubles were explained away as symptoms of PTSD.

At trial, MG's treatment providers testified that their patient suffered from PTSD caused by sexual abuse. They endorsed the idea that MG had repressed – and then recovered – trauma memory. Trial counsel did not object. The experts told the jury that MG had PTSD secondary to sexual abuse and fit the profile of a victim. The jury learned that those who treated MG believed him. In closing, the State argued these opinions about PTSD proved that Mr. Fugle had victimized his stepson.

Trial counsel cross-examined MG, his mother, and grandmother, and the treatment providers. Regrettably, e-mails between trial counsel and the prosecutor show he did not interview MG's doctors in advance of trial.

Trial counsel called an expert in memory research, Dr. Daniel Reisberg, who testified that traumatic memories are remembered, not lost. Trial counsel was told before trial that the idea of repressed-recovered memory lacks general acceptance in science but did not make any Frye motion to exclude.

Trial counsel called a neighbor who testified she saw MG shake with his mom at his side, but then relax when she went away, and shake again when she came back. This witness added that MG seemed to know things inconsistent with amnesia. Trial counsel knew other people had seen MG behave in ways suggesting he would pick and choose when to act sick or in need of care. They knew he did not like Mr. Fugle. Trial counsel did not call them to testify.

In his allocution, Mr. Fugle said: "as God as my witness, he knows the truth… I would never do anything like this… for anyone who knows me in my heart, they know the truth as I am innocent." RP 1018.

These wrongful convictions must be reversed.

III. GROUNDS FOR RELIEF

A. Mr. Fugle's constitutional right to a jury trial, under the Sixth Amendment to the federal constitution and article 1, § 21 of the Washington State constitution was violated when expert witnesses testified that they believed the complainant MG suffered from post-traumatic stress disorder caused by the purported sexual abuse.

B. In failing to interview the doctors who opined in court that MG's symptoms meant that he suffered from "[p]ost traumatic stress disorder from prolonged interval sexual abuse," trial counsel rendered ineffective assistance, in violation of Mr. Fugle's constitutional right to counsel under the Sixth Amendment and article 1, § 22.

C. Trial counsel was ineffective in failing to object to the damning expert witness opinions that MG was a sexual abuse victim because he was viewed as showing trauma symptoms in violation of Mr. Fugle's constitutional right to counsel under the Sixth Amendment and article 1, § 22.

D. Under *State v. Florczak*, 76 Wn. App. 55, 74, 882 P.2d 199 (1994), an expert's opinion "that [a complainant's] diagnosis of post-traumatic stress syndrome was secondary to sexual abuse," is an explicit

assertion the expert believes the accusing victim and constitutes manifest constitutional error that can be raised for the first time on appeal. Appellate counsel on direct appeal – the same lawyer who represented Mr. Fugle at trial – was ineffective in failing to argue that Mr. Fugle's right to a jury trial was violated by MG's treatment providers giving these opinions, and this violated Mr. Fugle's constitutional right to counsel on appeal under the Sixth Amendment and article 1, § 22.

E. The introduction of expert opinions that symptoms of PTSD can be reverse-engineered to establish a specific prior cause – unreliable evidence that does not meet the Frye standard – violated Mr. Fugle's constitutional due process right to a fair trial under the Fifth and Fourteenth Amendments and article 1, § 22.

F. The introduction of expert opinion testimony promoting the notion of "repressed-recovered memory" violated Mr. Fugle's constitutional due process right to a fair trial, under the Fifth and Fourteenth Amendments and article 1, § 22, because this unreliable evidence fails to satisfy the Frye standard of admissibility.

G. Trial counsel was ineffective in failing to move to exclude, under Frye, expert opinion testimony that symptoms of a PTSD can be reverse-engineered to establish a specific prior cause, and this violated Mr.

Fugle's constitutional right to counsel under the Sixth Amendment and article 1, § 22.

H. Trial counsel was ineffective in failing to move to exclude, under Frye, expert opinion testimony on "repressed-recovered memory," and this violated Mr. Fugle's constitutional right to counsel under the Sixth Amendment and article 1, § 22.

I. Trial counsel was ineffective for failing to investigate, when he failed to develop and present expert witness testimony that would have undercut the treatment providers opinions that their patient suffered from PTSD caused by the purported sexual abuse, and failed to adequately cross-examine the State's witnesses on the same. These errors violated Mr. Fugle's constitutional right to counsel under the Sixth Amendment and article 1, § 22.

J. Trial counsel was ineffective for failing to call witnesses (next-door neighbors and Mr. Fugle's mother) who would have testified that Mr. Fugle lacked the opportunity to rape his stepson "hundreds" of times over seven years without detection, that MG was biased against his stepdad and did not want him to be in a relationship with his mom, and that MG behaved in ways consistent with a factitious (falsified) disorder, not PTSD. Mr. Fugle's constitutional right to counsel was violated under the Sixth Amendment and article 1, § 22.

K. Each of these errors warrants reversal on its own.

Additionally, the cumulative effect of these irregularities violated Mr. Fugle's constitutional due process right to a fair trial under the Fifth and Fourteenth Amendments and article 1, § 22.

IV. STATEMENT OF THE CASE

A. Mr. Fugle's trial counsel failed to interview MG's doctors before they testified for the prosecution.

About half-a-year after MG's first claim of abuse, on October 8, 2014, the Pierce County Prosecuting Attorney charged Mr. Fugle with one count of child molestation in the first degree, two counts of rape of a child in the first degree, and one count of rape of a child in the second degree. CP 1-3.[1] This was alleged to have happened between 2002 and 2009. *Id.*

When charged, Mr. Fugle worked for the City of Tacoma Public Utilities department. He had been a municipal employee for a quarter century and had no criminal record. Pretrial, and again at sentencing, members of his community who understood the gravity of the accusations, vouched for him as a trustworthy man.[2]

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[1] The information was twice amended, to add Mr. Fugle's date of birth and change some of the alleged incident dates. CP 6-8; CP 56-58.

[2] *See* "Neighborhood of Joe Fugle," dated April 23, 2015, listing sixteen people who said they would welcome his return to the neighborhood, in part because he "has always been an upstanding neighbor and has never shown any signs of misconduct to any of [their] children or any other child." Appendix D. *See also* "Letters in support of defendant," filed for sentencing, with friends and family describing Mr. Fugle as responsible, kind, a great neighbor, and liked by kids." Appendix E.

Jury selection and motions were held from May 31, 2016 through June 2, 2016. RP 1-64. At 4:32PM on Friday, June 3, 2016, the prosecutor emailed Mr. Fugle's attorney that five of MG's doctors would testify:

> In the interest of trying to make things go efficiently, the doctors that, at this moment, I plan on calling are Susan Poole, Justin Steffener, Joy Jones (did the psych consult when MG was hospitalized, her records can be found at bates 142-151), John Daniel (from the Dove Medical Clinic, bates 98-110), and David Tauben (UW Pain Clinic, various pages in bates 241-288)

Appendix F.

In this June 3, 2016 email, the prosecutor wrote:

> You didn't get back to me about setting up interviews with any of them, but if you feel you need it, the court may give us a little time before each testifies.

Appendix F.

In a September 2015 email exchange, the prosecutor notified trial counsel that the five doctors would testify for the State. Appendix G.[3]

In response, trial counsel asked for interviews: "I am unsure as to the expected testimony from all of the doctors, but I would like to interview each of them." *Id*. (PRR 000276). When asked about phone interviews, trial counsel wrote: "I would like to speak with them in person." *Id*. (PRR 000275). The prosecutor asked how long trial counsel

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[3] The Pierce County Prosecuting Attorney's Office disclosed these emails pursuant to Public Records Act request 19-0464. They are numbered PRR _____.

would "need with each," and trial counsel answered: "Half hour to an hour, maybe more, depending on what they say." *Id*. (PRR 000274).

In that September 2015 email exchange, the prosecutor wrote "I am adding Drs. Justin Steffener and Susan Poole to may witness list, as well as a doctor at UW who saw the victim for pain management, David J. Tauben" *Id*. (PRR 000274). The parties expected that the trial date would be continued. Trial counsel deferred on scheduling interviews: "Let's get the new date and then set interviews." *Id*. (PRR 000270).

Undersigned counsel does not know if trial counsel answered the prosecutor's June 3, 2016 email. Appendix H. Trial counsel has not provided any records showing he interviewed Drs. Daniel, Jones, Poole, Steffener, or Tauben, either before, or after the prosecutor's email.[4] Trial resumed on Monday, June 6, 2016, but nothing in the transcript shows that Mr. Fugle's trial counsel asked for time to interview these witnesses.

The jury started weighing the evidence on June 15 and shortly asked "who first diagnosed MG with PTSD" as well as "who first diagnosed MG with dissociative amnesia." Appendix I.[5] The next day, the

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[4] By email, trial counsel has emailed undersigned counsel that "As it relates to interviewing all of the treatment providers, I cannot say for certain whether I interviewed them prior to taking the stand, either in whole or in part. I have a vague recollection that I did, but cannot say for sure. Regardless, I was not necessarily surprised by their respective testimonies." Undersigned counsel's declaration, describing ongoing communications with trial counsel about the case, is attached as Appendix H.

[5] The jury was given a list of witnesses who testified, but the substance of its question on PTSD testimony was not answered. RP 968-76.

presiding juror informed the court the jury would be unable to reach a unanimous verdict. The court ordered the jurors to continue their deliberations. RP 976-79. The next day, on June 17, 2016, the jury convicted on all counts. RP 983-86; CP 183-195.

B. The State elicited testimony to show that MG had "recovered" memory of past abuse in a "nightmare" or "flashback," then went through a seizure-like event that made him forget his family and life – but not the alleged abuse – and is diagnosable with PTSD, a condition that explains his otherwise unknowable health problems.

Mr. Fugle married MG's mother, Jana, in 2002, when MG was 7 years old. RP 89, 93, 218. With MG's two sisters, one older and one younger, the family of five lived in Mr. Fugle's three-bedroom Tacoma home. RP 87-89, 215-19.

At trial, MG testified he was sexually abused by Mr. Fugle, in a "very ritualistic" manner, "hundreds of times," over a course of seven years between 2002 and 2009. RP 100-117. He said the abuse included forceful penetration. *Id.* No one in the family saw these acts and MG said nothing about this before February 2014. RP 128; 236-237.

MG testified he had "kind of locked it away." RP 128. He said he "was threatened… frightened… I had to be able to do something to help me cope with all of that." RP 182-83. He "repressed." RP 171, 183.

MG testified that before February of 2014, he had no conscious sense of having been abused. RP 168. By the June 2016 trial – where he detailed all the evils he said Mr. Fugle did to him, down to descriptions of clothes he, and Mr. Fugle were wearing – MG had discussed his experience of having repressed and recovered memory of the alleged sexual abuse with multiple therapists. RP 210-12.[6]

When MG made his claim, he was 18, having trouble sleeping, and experiencing flashbacks and nightmares. RP 129-30, 166, 169. At the time, his mom had separated from his stepdad. RP 131. Jana told the jury that she had limited contact with Mr. Fugle during the separation. RP 284.

But Mr. Fugle's mom, Jackie Fugle, remembers that Jana and Mr. Fugle were still seeing each other. They would meet up at his parents' home in Puyallup. *See* October 7, 2019 declaration of Jacqueline Fugle. Appendix J. Jackie thought they might reconcile. *Id.*. Trial counsel did not call Jackie as a witness. Mr. Fugle's next-door neighbor, Kirk Van Netta, knew MG and the Fugle family well. Trial counsel knew that Kirk could testify that MG had made it known that he did not like his stepdad and

[6] Wendy Rawlings, for example, treated him with "eye movement desensitization reprogramming," also known as EMDR. RP 655. In her view, the technique, which involves having her patient "thinking and feeling about [a traumatic] event as they're watching [her] fingers go back and forth," is not hypnosis. RP 656, 661, 674-75. But EMDR is controversial: "It's a science versus therapist issue." RP 674.

wanted him and his mom to break-up. Appendix K. Trial counsel did not call Kirk as a witness.[7]

MG claimed in court that he "started getting memories of the sexual abuse" at the beginning of 2014. RP 166. He insisted this happened in a "flashback," in his "waking day," not a nightmare. RP 168. His grandmother Janette is who he had reached out to and she testified that MG complained of nightmares. RP 321. "I was very vague with her about it," MG said. RP 132. Janette testified: "I couldn't necessarily understand everything he was saying and he wasn't giving me any details." RP 318.

When asked how he could distinguish, even for himself, between "a memory that's true and a nightmare dream that's not," MG said he did not know how he could answer such a question. RP 170. He admitted that explaining the difference in how he distinguishes between what's real and what's not real about the past would be hard. RP 184-86. MG was on

[7] Kirk reported that MG was smart, even smart enough to be able to manipulate others, did not like Mr. Fugle, and "openly talked about trying to break up Joe and Jana's marriage." Kirk thought MG "did not like his mom being married to Joe." *See* February 11, 2015 defense investigator's interview with Kirk Van Netta. Appendix K. *See also* October 7, 2019 declaration of defense investigator indicating he provided the interview summary to trial counsel, that Kirk and the other neighbors he interviewed (Kirk's wife Lyn, daughter Mikkel, other neighbors Dawn, Robert, and Nina Pagay) appeared to be credible, and that trial counsel had him subpoena them to trial. Appendix L. When asked about why Kirk, and other neighbor witnesses were not called, trial counsel emailed: "As far as me not calling lay witnesses during trial, the only thing that I can say is that they were all subpoenaed, but I made a decision during trial not to call them. It was a strategic decision."App. H.

morphine when he experienced the "flashback" or "nightmare." RP 163, 204. He said he had no side effects from the drug. RP 208.

Janette had spent ten years working at a sexual assault resource center. RP 307. She knew of at least one publicized claim of repressed-recovered memory, made by a Miss America contest winner in 1991, long before MG was born. RP 516, 519.[8] She said she did not probe for details, but she let her grandson know she believed him, understood he hurt, and offered to help him heal: "I just acknowledged that I felt very bad about it. I'm very sorry about it, and there's help out there." RP 320. She "suggested he try to clarify it for himself." RP 320-22.

MG already had a counselor, but Janette helped him find a trauma specialist, Dr. Poole. RP 327-329.[9] Janette said she did not instruct MG that what he reported was a repressed memory. RP 324. But she may have used the term with him, she believed repression was a possibility, and thought MG's treatment providers would help him with that:

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[8] *See e.g.* Saletan, W. "The Recipe: A cookbook for memories of sexual abuse." Slate, May 26, 2010 (available at https://slate.com/technology/2010/05/the-recipe.html).

[9] In May of 2013, Jana brought MG to Dr. Steffner for counseling. RP 630. She was concerned about MG's "social challenges, withdrawal, and extreme anxiety and depression." *Id*. MG was grieving dropping out of school and losing friendships. RP 634. He showed "agitation and frustration about who he was supposed to be." RP 641. Dr. Steffener diagnosed "Pervasive Developmental Disorder Not Otherwise Specified" and "anxiety not otherwise specified." RP 631-632. In March of 2014, Jana told Dr. Steffener that MG had reported "flashbacks" of abuse, but MG did not want to talk to Dr. Steffener about this. RP 638.

> I didn't suggest it. Could the word have been used sometime? Could have been used, but I never, ever, suggested these were repressed memories or these were – that was for the doctors to figure out with him.

RP 324 (emphasis added).

Janette arranged to be there for MG when he broached the topic with Jana, but he again said little. RP 133 ("[J]ust very vaguely. I never went into a ton of details.")

On April 1, 2014, roughly a month after MG first said anything about a nightmare or flashback involving Mr. Fugle, his sister called Jana with alarming news: "[MG] is having a seizure." RP 239. Medics hurried MG to the hospital and his mom went there too. RP 239, 443. Jana said this event "lasted about five hours" and that when MG "woke up, he didn't know us." RP 240; 244.

The hospital psychiatrist, Dr. Jones, saw MG presenting with confusion. RP 448. MG "was a difficult historian" and Jana supplied history for him. RP 451. Dr. Jones testified that what MG had shown was not an epileptic seizure. He had "physical symptoms of seizures without it coming directly from your brain." RP 449 (emphasis added). She testified these are events which may be related to stress, but for which medical professionals "can't find a physiologic [sic] reason." *Id.*

MG testified that this event, whatever it was, erased all of his memory, but with one key exception:

> I lost the personal relationships. You know, like titles of this is your mom, this is your grandma, this is your sister, that stuff, I lost, <u>but not the sexual abuse memories</u>, which I did have before I had the dissociative amnesia

RP 167 (emphasis added).

MG was reporting that he no longer knew his closest relatives, but the sexual abuse – that he had just "recovered" after having "repressed" it between ages 14 and 18 – was clear in his mind. RP 139-142.

> [F]inally, the seizure stopped. I slept for a while. I woke up and I looked around, and I thought, <u>I don't know any of these people and where am I?</u> You know, is Joe here? And they're like, well, Joe, you know, how do you know Joe? And I was, like, Joe blah, blah, blah, and <u>I told them about the sexual abuse and stuff then, but I said, I don't know these other people. I know Joe. I know he sexually abused me. Is this why I'm here?</u>

RP 143 (emphasis added).

Dr. Jones testified that MG was circumspect. She said MG "remembered having trauma, having had trauma – but he wouldn't – like I said, he wouldn't give me – there was not much historical information about his life prior to coming into the hospital, but [sic] he was able or willing to give – I'm not sure." RP 452-53. Dr. Jones thought MG may have been turning "emotion into a physical pain." RP 456. She diagnosed

him with anxiety disorder, not otherwise specified, and could not rule out a PTSD and somatoform disorder. RP 460-462.

MG said he was given an anti-seizure medication Ativan, but he is allergic to that drug. RP 173. When he was ten, he had an Ativan-induced hallucination. RP 173. He testified he "did not seem to suffer hallucinations during the five-hour-long seizure that I had in 2014." RP 209. But he thought that Ativan dose may have had something to do with his erased memory. RP 452.[10] MG testified the only memories of his life before this hospital admission that he had, were "bad memories… that involve Joe." RP 172.

Jana testified that MG's childhood Ativan-induced hallucination included paranoia: "He started screaming at the top of his lungs about these black blobs that were coming at him, that the – that that he was going to be killed." RP 297.

Trial counsel called MG's peer-aged neighbor Mikkel Van Netta to testify. She ran into MG at a doctor's office a couple of months after this alleged memory-erasing episode. When Jana was present, MG would shake. When Jana left, MG "became a lot more relaxed and he stopped shaking altogether." RP 866. When Jana returned, "he started shaking

[10] A nurse practitioner made a chart note that MG "started having hallucinations and confused memory about sexual abuse he suffered from his step-dad several weeks ago." RP 519. Dr. Poole did not witness MG hallucinating. RP 522.

again." RP 869. When Jana was out of earshot, MG asked Mikkel about her dog – by name – and her husband – by name – and about her moving. RP 862-865.[11]

Trial counsel did not ask Mikkel about how when he played with other kids, MG would run around and act normal, but when Jana showed up, he would "literally climb into bed and act as if he could not move a muscle." Appendix M, Mikkel Van Netta investigator interview.[12] Trial counsel did not call Mikkel's dad Kirk to testify that he once saw the EMT's respond to MG's house, with MG acting as if he was having a seizure, but it looked faked or that Jana doted on MG hand and foot. App. K. Kirk's wife, Lyn, had seen MG exaggerate symptoms of health problems before. He was on crutches for 6 months for a sprained ankle and spent 9 months recovering from having his tonsils removed. MG had lied to all four of her children and Lyn believed that MG lied about the amnesia to manipulate people. Appendix N.

All three of the Pagay family members, Dawn, Robert, and Nina, had seen MG use a walker when with his mother, but not when away from her Appendix O (Investigator interviews of Dawn, Robert, and Nina

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[11] The prosecutor recalled MG and Jana and they said they had discussed Mikkel's life between themselves after MG's allegedly memory-erasing event. RP 902, 906-07.

[12] Mikkel stopped interacting with him because she thought he was feigning his health problems to get attention from his mother. *Id.*

Pagay). Dawn and Robert had concerns Jana complains of pain and maladies and wondered if MG was influenced by that.[13] When interviewed on February 1, 2015 Nina believed MG had replaced his Facebook page, because posts on the old one would contradict his claims of amnesia. *Id.*

MG had history of unexplainable problems that predated the hospitalization for "pseudoseizure." His mother testified that when he was a junior, he developed "ulcers" and pain. Jana said:

> He was headed to an Ivy League school… it's like his body just gave out. It's just, he was – he had head-to-toe pain. He had muscle weakness. He had fatigue. He – he was pretty much bed-bound by pain and by fatigue.

RP 228-29; *see also* RP 135-36; RP 161; RP 313-317 (grandmother Janette testified about MG's physical problems without a diagnosis).

After the hospitalization, MG went to Dr. Poole "for the sexual abuse." RP 245-246. He testified he stopped seeing Dr. Steffener "because he doesn't specialize in PTSD and sexual abuse trauma." RP 151. Jana and her son talked with care providers about the alleged sexual abuse. RP 138, 156. MG denied the idea that discussing his claims of abuse with his relatives, Dr. Steffener, Dr. Poole, the EMDR technician Wendy Rawlings, and his out-of-state counselor, starting in 2014, influenced what he ultimately testified to alleged to the jury in 2016. RP 188-89.

[13] Jana testified she had health problems, physical and otherwise. RP 287, 294.

C. Without objection, MG's doctors testified for days about how their patient was a victim of childhood trauma whose symptoms prove the disputed criminal charges.

Dr. Tauben, MG's pain medicine doctor is credentialed with decades of experience. RP 697-70. MG was his patient long before alleging that he had been sexually abused. Dr. Tauben sent MG to all kinds of specialists and subspecialists to try to diagnose MG's complaints of generalized pain. RP 710. All testing results turned up normal, with "no abnormalities." *Id.* Still, MG presented with "multiple muscle points that were unusually abnormally tender to press upon." RP 711.

Dr. Tauben testified that MG reported his pain produced "complete interference with all activity, complete interference with his enjoyment of life, complete interference with his ability to initiate and maintain sleep." RP 711. MG was coming into the clinic "with a wheeled walker" and "felt it wasn't fair." RP 714. Dr. Tauben was concerned and testified that it was important for him not to challenge MG's self-report:

> That is very important as a pain physician that we don't blame people for things in their head. They get pretty upset when they think what is going on is in their brain, even though that is the experience of pain that is perceived. People don't like it when you say it is in your head because they feel so badly in their body.

RP 716 (emphasis added).

Dr. Tauben was intent on figuring out what was wrong with MG. The attempts to arrive on a diagnosis involved "many specialists at

different sites." RP 715. As of March 4, 2014, Dr. Tauben had no answer and neither did his patient. RP 716. But that changed on July 3, 2014. MG was with Jana and said "he had seven years of sexual abuse." RP 717, 750. He had not said that to Dr. Tauben before. MG reported he had dissociated amnesia and was recalling memories of sexual abuse by his stepdad, Mr. Fugle. RP 718. Dr. Tauben noted verbatim that Jana said: "Still married but won't be for long." RP 718.

He had MG answer a four-item self-report instrument, that took "20 seconds." RP 750.

> I administered a four question screener for PTSD. He was positive on that screen questionnaire indicating nightmares, avoidance, flashbacks, and disassociation which are the four cardinal symptoms associated with PTSD.

RP 719.

At this point, trial counsel asked permission to voir dire the witness outside the presence of the jury. RP 720. Trial counsel wanted to know if diagnosing PTSD is part of Dr. Tauben's practice. RP 720. Trial counsel wanted to know if Dr. Tauben treats PTSD. RP 721. Trial counsel wanted to know if Dr. Tauben had diagnosed MG with PTSD: "In your diagnosis of PTSD – you did diagnose PTSD?" RP 722.

Trial counsel wanted to know what Dr. Tauben thought about the relationship between MG's pain and PTSD: "Are you able to say that his

pain that he's experienced all these years are related to PTSD?" RP 723. Dr. Tauben answered yes, and yes again when trial counsel asked if he held this opinion to within a reasonable degree of medical certainty. RP 723. Trial counsel asked a few more questions about MG's family's history of fibromyalgia. RP 724.

At the end of this mid-trial witness voir dire, the judge asked if Mr. Fugle's trial counsel had a specific objection and trial counsel answered: "Not based on his testimony." RP 724.

When trial resumed, the prosecutor asked Dr. Tauben to share with the jury his "final diagnosis."

> Post traumatic stress disorder <u>from prolonged interval sexual abuse</u>. Physical symptoms generated by central nervous system sensitization <u>consequent to abuse exposure</u>.
> …
> [MG's] [w]idespread muscle pain and his fatigue <u>could be fully accounted for</u>, <u>in my judgment and experience</u>, <u>by the early life sexual abuse exposure</u>.

RP 725 (emphasis added). He based his opinions on:

> DSM-5 diagnosis of post traumatic stress disorder, my intensive clinical experience working with people with this, and in association with chronic pain, his physical findings, the detailed history and his co-occurring conditions that included a label of fibromyalgia, possibly, without certainty, the abdominal pain symptoms which is a common syndrome, fatigue and widespread pain.

Id.

He asserted that the normal medical testing results "helped support that there was no other likely medical explanation to account for his symptom complex." RP 726. He testified that his conclusion "meets the term of what may be called a diagnosis by exclusion, you have excluded all the other conditions because it is a complicated diagnosis, involves lots of different domains of one's mind, body, spirit." RP 726 (emphasis added).

For the jury, the prosecutor had Dr. Tauben affirm that "all" of his testimony – which included the explicit assertion of believing that MG had PTSD caused by the sexual abuse Mr. Fugle was charged with – were opinions he held to within a reasonable degree of medical certainty. RP 737. On cross-examination, Dr. Tauben agreed that he had accepted what MG told him. RP 737-739. He said he did not suggest anything to MG. RP 752. Treating the disputed sexual abuse as an established fact, the prosecutor asked Dr. Tauben this question:

> Q: When you learned from [MG] that he had been sexually abused, did his symptoms that he had been describing to you then make sense?
>
> A: Then I administered the questionnaire to validate indeed my expectations were correct. At that point, it was quite clear. We had specific discussion about how the symptoms could, would, and in my view likely were the cause [sic] of what he reported to me that had occurred in his earlier life.

RP 754 (emphasis added).

Other experts who treated MG testified for the prosecution about trauma, PTSD, and repression/suppression/dissociation. The hospital psychiatrist, Dr. Jones, discussed these things at length. "PTSD is a disorder that occurs when somebody has experienced trauma." RP 433, 434-440 (discussing symptoms of PTSD). Dr. Daniel testified, to a reasonable degree of medical certainty, that people who have PTSD can exhibit "symptoms like [MG] was displaying, like chronic fatigue, the pain and weakness." RP 513-514.

MG's trauma counselor, Dr. Poole testified on multiple PTSD-related topics and the "comprehensive" trauma therapy she does for her trauma patients. RP 536-587. Her testimony on the subject was interwoven with summaries of what MG had told her about allegedly being abused by Mr. Fugle.[14] She said MG had come to see her "because he wanted to deal with the symptoms and struggle he was having <u>after having been sexually abused by his stepfather Joe</u>." RP 551-52 (emphasis added).

She told the jury what MG told her about his seizure-like event and the prosecutor used Dr. Poole's expertise to validate MG's claims about this causing him selective memory loss. RP 553-54. She diagnosed MG

[14] "So he reported that the abuse began when he was 7 years old. It began with first, with being forced to touch genitals and his genitals being touched… It then progressed, at the age of about 8 to 9, with being forced to perform oral sex and receive oral sex, and then at the age of 12 with – with penis and anal penetration, and it went from the ages of 7 to 14." RP 553.

with PTSD and dissociative amnesia. *Id.* Like Dr. Tauben, Dr. Poole testified that MG was harmed by the very sexual abuse that "Joe" was being tried for: "he was struggling, also, with the ramifications of, you know, some of the physical impairments he was having as well as the emotional." RP 558.

Without objection, Dr. Poole testified about trauma, memory repression-recovery:

> when a child is being abused chronically over years and it's happening in the home… particularly if they're being threatened, which was in the case of [MG]… in order to cope with that and go about their daily living, <u>they kind of have to suppress that</u>. So, you know, <u>he was being terrified</u>… <u>he had been threatened</u> that his mother would be killed… he had been threatened about the harm himself, and so it was – what can happen is, <u>as a coping mechanism, those memories get suppressed</u>.

RP 561 (emphasis added).

Dr. Poole testified that "suppressed" memories of trauma can return when the victim feels "safer" and that suppression-recovery is the same thing as dissociative amnesia. RP 562-63. She testified that all of MG's problems – "chronic fatigue, amnesia, chronic pain, dissociative amnesia, and flashbacks" – were consistent with what she knows "can come from childhood trauma." RP 565. Dr. Poole emphasized that trauma can affect a child's physical health. *Id.* She made it clear she believed the

"constellation of [MG's] symptoms, as a group, to include flashbacks," indicated that trauma and PTSD were the root cause of his ills. RP 583.

As a therapist, Dr. Poole accepts what a patient tells her, so the therapeutic relationship remains strong, and trusting. RP 578. She testified she does not need to psychological testing for her clinical work:

> [S]ome people do, but we also can just rely on a solid clinical interview… I rarely do them. Usually clinical interview is sufficient for the purpose of therapy.

RP 579.

If she were to evaluate someone for a courtroom setting, Dr. Poole testified a simple interview would not do:

> If I was doing an assessment, a forensic assessment, then I would need to do those evaluations, but in my role as a therapist, that's not necessary to do therapy.... <u>A forensic assessment would be if, for instance, for, like, legal reasons, you would hire on an independent person who comes, a psychologist, who just assesses the person to make the diagnosis without a clinical therapeutic relationship with them</u>, that led to a therapeutic relationship with them.

RP 586 (emphasis added).

Dr. Poole felt justified in believing MG because he reminded her of her other patients, of other trauma victims. "Everything he said and his symptom presentation was all very consistent with treatment I've done with, you know, hundreds of other PTSD victims." RP 587.

Dr. Poole referred MG to Wendy Rawlings, the self-described "educated technician" who administered the "controversial" EMDR guided imagery therapy. RP 654.[15]

> We talked about what he thought had happened with the abuse. He organized his memories into where they happened and that the bedrooms they happened in as the family moved. He also organized his reactions to them into what he called episodes and flashbacks…. Flashbacks were partial memories that he was having, that he was having, yeah, incomplete memories.

RP 663 (emphasis added).

Talking about the "movement desensitization" part of her therapy, Ms. Rawlings said,

> in the beginning, as he got on the train, so to speak, and we were doing this, he had a really hard time moving through that. And so sometimes when that happens, it helps to have the client talk, so I just ask him to talk about his – what he was feeling, not what he was thinking or any of the traumatic material, but just what he was feeling, and that kind of got him over the hump.

RP 658-59 (emphasis added).

Ms. Rawlings maintained she did not try to help MG remember or develop memories. RP 674. She did say how she got MG to talk, while

[15] "It's all happening internally. And they come up with that goal. They feel in their body where it feels, and that's really important because the trauma is experienced in a physical way, not just in a mental way. And so they feel the trauma in their body. Then they follow my fingers, and the idea is they move their eyes from left to right, and that's really important. And we'll do this for a little while. And I tell my clients it's kind of like getting on a train. You're kind of watching the scenery go by. It's pretty effortless. You're not doing anything but just sitting and watching this scenery go by. That's what happens with traumatic memory, traumatic feelings. You're just kind of watching it go by." RP 658-59 (emphasis added).

having him follow her moving fingers, that this changed his brain processes, and got him to progress with his trauma-related feelings:

> And so sometimes if I can get my clients to start talking, it will kick their left brain in enough. And when we're doing this (indicating), we're moving from right brain to left brain, as the eyes move. They're stimulating -- it's called bilateral stimulation, and you're moving from the right to the left brain. And so I thought, by kicking -- by having him talk, it would kick in that left brain a little bit, and it did. And he was able to start progressing through that fear, the feeling of fear that he had, and – and then he connected, reconnected with his body.

RP 667-68 (emphasis added).

D. A 2019 Declaration of psychologist Dr. Gerald Rosen on the pitfalls in diagnosing PTSD, proper procedures for conducting a forensic psychological assessment, and the lack of general scientific acceptance for the idea that memory can be repressed and recovered.

Dr. Gerald Rosen's is Board Certified in Clinical Psychology by the American Board of Professional Psychology (ABPP). He holds an appointment as clinical professor emeritus with the Department of Psychology at the University of Washington, where he taught from 2001 to 2017. Much of his career has been devoted to the study of posttraumatic stress disorder (PTSD).[16] Dr. Rosen has been qualified as an expert

[16] Dr. Rosen edited the book "Posttraumatic Stress Disorder: Issues and Controversies," (John Wiley & Sons, England, 2004); and co-edited for the Journal of Anxiety Disorders special issue on "Challenges to the PTSD Construct and its Database" (2007); and co-edited with B. Christopher Frueh a text entitled "Clinician's Guide to Posttraumatic Stress Disorder," published by John Wiley & Sons, USA (July, 2010). His CV describes over four decades of scientific contributions to the study of psychology. Appendix P.

witness throughout Washington on cases where the mental condition of the party was at issue and has conducted many independent psychological examinations, including under CR 35. Appendix Q.

Dr. Rosen explains that "PTSD symptoms cannot on their own prove the validity of an alleged stressor that is claimed to have caused the symptoms." App. P. (Rosen, P8.) In stark contrast with what Dr. Tauben and Dr. Poole told the jury, Dr. Rosen states that "[i]t is a logical fallacy to conclude that the presence of posttraumatic psychiatric symptoms (e.g., nightmares, flashbacks) corroborates the occurrence of a traumatic event." *Id.*

Published scientific studies show that individuals do, at times, misreport symptoms, and "misrepresent their exposure to events alleged to have caused PTSD." (Rosen, P10.) Peer reviewed journal articles "document PTSD diagnosed war veterans who never were deployed to a combat zone"[17] and others that "document falsified reports of sexual harassment and sexual assault."[18] *Id.*

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[17] Falsified claims of exposure to traumatic events have been documented among veterans. E. Lynn and N. Belza (1984), *Factitious post-traumatic stress disorder: the veteran who never got to Vietnam,* Hospital and Community Psychiatry, 35, 697-701. Also, L. Sparr and L. Pankratz (1983), *Factitious post-traumatic stress disorder,* American Journal of Psychiatry, 140, 1016-1019. The problem of veterans who never served in Vietnam but who claimed combat related PTSD is discussed in B.G. Burkett & G. Whitley (1998), *Stolen Valor: How the Vietnam generation was robbed of its heroes and its history,* Dallas: Verity Press, Inc. Frueh and colleagues documented the extent of the problem, finding that only 41% of 100 PTSD-diagnosed veterans had evidence of combat exposure in their military records. B.C. Frueh, J.D. Elhai, A.L. Grubauh, J.

"[M]otives and psychiatric issues that can lead to misreporting and simulation of illness are diverse and complex." (Rosen, P11). Certainly "psychotic disorders, factitious disorders, and other motivations including a desire to explain a dysfunctional life can account for the presentation of PTSD-like syndromes." *Id.* (footnote omitted). Critically, "[h]ealth professionals have no demonstrated ability to detect, on the basis of an individual's presentation during interviews, when information is falsely or inaccurately reported." (Rosen, P12.) Instead of remining objective, those who provide treatment "assume that a patient is motivated to report problems as accurately as possible for the purpose of developing an effective and relevant treatment plan." (Rosen, P13.)

Monnier, T.B. Kashdan, J.E. Sauvageot, et al. (2005). *Documented combat exposure of US veterans seeking treatment for combat-related post-traumatic stress disorder.* British Journal of Psychiatry, 186, 467-472.

[18] A. Trankell (1958), *Was Lars sexually assaulted? A study on the reliability of witnesses and of experts,* Journal of Abnormal and Social Psychology, 56, 385-395. A more extensive study on false rape allegations is reported by E.J. Kanin (1994), *False rape allegations,* Archives of Sexual Behavior, 23, 81-92. In this study of police investigations over a nine year period, in a Midwestern town in America, 41% of the total disposed rape cases were officially withdrawn, as determined by "the complainant's admission that no rape had occurred and the charge, therefore, was false." Also see MD. Everson & B.W. Boat (1989), *False allegations of sexual abuse by children and adolescents,* American Academy of Child and Adolescent Psychiatry, 230-235; W. O'Donohue & A.H. Bowers (2006), *Pathways to false allegations of sexual harassment,* Journal of Investigative Psychology and Offender Profiling, 3, 47-74; and A. DeZutter, R. Horselenberg, & P.J. van Koppen (2018), *Motives for filing a false allegation of rape,* Archives of Sexual Behavior, 47, 457-464.

The fields of psychiatry and psychology recognize there is a fundamental conflict when a treatment provider serves as an expert in court. P13, fn.10.[19]

Dr. Rosen points out that therapists base their opinions on a belief that what is reported to them by the patient is true. This is why "numerous authorities" have cautioned professionals to "use a "multi-method" approach to assessment if they will be testifying in court." (Rosen, P14). He quotes one such guide for psychological assessment:

> "Disastrous results can ensue if a psychologist enters court merely on the basis of his therapeutic interaction with a patient, and tries to render valid opinions in a particular case based on this therapeutic insight, without doing the investigative work necessary in any forensic case... Clinical interview is never sufficient; interviews must be supplemented by careful review of records, history-taking, and interviews with family, friends, or employees."
>
> Conducting appropriate psychological testing is likewise a necessity. Such testing should include symptom validity measures designed to detect poor effort, underperformance, and exaggeration.

Id. (footnotes omitted) (emphasis added).

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[19] See L.HG. Strasburger, T.G. Gutheil, & A. Brodsky (1997), On wearing two hats: Role conflict in serving as both psychotherapist and expert witness, *American Journal of Psychiatry*, 154, 448-456. Also, S.A. Greenberg & D.W. Shuman (1997), Irreconcilable conflict between therapeutic and forensic roles, *Professional Psychology: Research and Practice*, 28, 50-57. Consider also the ethical guidelines developed by the American Academy of Psychiatry and the Law (1995): "Treating psychiatrists should generally avoid agreeing to be an expert witness or to perform evaluations of their patients for legal purposes because a forensic evaluation usually requires that other people be interviewed and testimony may adversely affect the therapeutic relationship." Document available on the web at http://www.emory.edu/AAPL/ethics.htm

Dr. Rosen opines that "[i]ndividuals can hold unfounded beliefs and false memories that they sincerely believe. Research shows that false beliefs and memories can be readily created through suggestion, guided imagery techniques, dream interpretation, and other sources of misleading information." (Rosen, P15) (footnotes omitted). For example, some who "suffer distress because they believe they were abducted by aliens demonstrate how memories of non-existent trauma can exert influence as if the events really happened." (Rosen, P16) (footnote omitted). Research has shown that people with such bizarre sensations, "likely have misinterpreted episodes of sleep paralysis during which hypnopompic hallucinations are confused with alien beings." *Id.*

The presence of "posttraumatic psychiatric symptoms do not necessarily establish that something horrific must have happened," because those who sincerely believe they were traumatized – when they were not – can show similar symptomology as real trauma victims. *Id.* In other words, if one were to diagnose PTSD from symptoms alone, it would be impossible to detect a false positive error.

Dr. Rosen also declares, again with substantial support from published authority, that the concept of memory repression and recovery, is not generally accepted in science. (Rosen, P17, P18.) Controversies surrounding traumatic and repressed memories are so intense, they were

referred to as the "memory wars." (Rosen, P17.) The scientific community has rejected repression:

> In the psychological community on the whole, there is no general acceptance of the idea that recovered memories can serve to validate the occurrence of distant and previously forgotten events. The scientific community is in agreement that recovered memories cannot be accepted as accurate, nor used to establish the occurrence of an event, in the absence of corroborating evidence.

P17 (emphasis added).[20]

Dr. Rosen understands this case "involves an individual who claims to have experienced brutal sexual abuse over a period of years, for which he had absolutely no recall, and later recovered memories in part based on the content of nightmares, after which he presented with the symptoms of posttraumatic stress disorder." (Rosen, P19.) He also understands that MG's treatment providers accepted what he had to say and "worked with his presenting problems in a manner consistent with their role as therapist." *Id.* Then, without conducting an objective forensic evaluation, MG's treatment providers came into court to talk about their patient and their view that his apparent symptoms corroborated the alleged recalled abuse and could be labeled PTSD. *Id.*

[20] Dr. Rosen mentions, as proof of both the controversy around claims of repressed-recovered memories – and also as proof that the concept is unreliable – "the phenomenon of "retractors" (i.e. individuals who repudiate recovered memories of childhood abuse), and multi-million dollar judgements against therapists who employed recovered memory therapies and fostered the reporting of false memories." P18 (footnotes omitted).

Dr. Rosen concluded, and informs the Court, that:

> Presenting a therapists' diagnostic impressions – in the absence of an independent forensic psychological evaluation and objective testing to test rival hypotheses and/or in the absence of instructions regarding the limits of data upon which therapists rely – would constitute a disservice to the trier of fact.

(Rosen, P20-21) (footnote omitted).

E. A 2019 Declaration of cognitive psychologist Dr. Daniel Reisberg debunks MG's treatment providers' claims that memories may be suppressed, repressed, or dissociated – and recovered.

Dr. Reisberg is a research psychologist, whose expertise is in cognitive psychology. His specialty is "the completeness and accuracy of human memory." (Reisberg, P2.) He testified for the defense at trial. RP 768-858.[21] The prosecutor interviewed him before trial and Dr. Reisberg indicated then that he believed "M.G.'s memories were (at best) unreliable and (more strongly) likely to be false memories." (Reisberg, P5.)

He explained:

> M.G.'s claims about having "recovered" a memory of repeated, traumatic sexual abuse were inconsistent with what we know about memory on the whole. I indicated that if the pattern M.G. reported was not working like a memory would, then it probably was not a memory. 5/10/16 RP18. I was concerned that it appeared M.G.'s memories may have been encouraged or maybe even motivated by events in his counseling process. 5/10/16 RP21. I was concerned that M.G.'s first alleged claim of memory of abuse, to his grandmother, was not recorded. 5/10/16 RP22. Consequently we would never know exactly how that conversation unfolded; I

[21] Attached as Appendix R is his September 24, 2019 declaration. His updated CV is included too. Appendix S.

> suggested, therefore, that there was a substantial danger that M.G's grandmother played more of an active role in the emergence of M.G's memories than her report suggests. 5/10/16 RP22.

(Reisberg, P4).

Dr. Reisberg opined that MG's account of losing awareness – from age 14 to 18 – that he was repeatedly raped between the age of 7 and 14 – was clearly not in line with how memory works: "My view of this point was (and is) rooted in scientific findings that show that events like the ones M.G. alleged are highly memorable, and so would, at a high level of probability, never have been forgotten in the first place." (Reisberg, P5, P-7-10 (published authority supporting these opinions).

At his pretrial interview, Dr. Reisberg alerted the lawyers that the concept of dissociative amnesia (or repression or suppression) "is regarded with some substantial amount of skepticism by the scientific community," and may not pass the Frye test. (Reisberg, P5); 5/10/16 RP25. "[P]eople remember traumatic events," which is one of many reasons why scientists do not accept that repression exists. (Reisberg, P9-10.)

Some *clinicians* may disagree, but this concept is "absolutely not" accepted within the *scientific* community. (Reisberg, P10-11); RP 789-791. He testified: "anybody who's looked carefully and scientifically at the evidence says it's probably not real." RP798. In his 2019 declaration, Dr. Reisberg is emphatic about the state of the science: "Note, therefore,

both that claims endorsing the repression notion are not generally accepted, and also that claims rejecting the repression notion are generally accepted." (Reisberg, P12) (emphasis in the original).

In 2019, at request of undersigned counsel, Dr. Reisberg reviewed the trial testimony of the State's expert witnesses, including opinions given by MG's family doctor Dr. Daniel and MG's trauma therapist, Dr. Poole. Dr. Reisberg concludes that the jury deciding Mr. Fugle's case was exposed to unreliable testimony: "some of the opinions given by Dr. Daniel and Dr. Poole at trial – especially their opinions about "repression," "suppression," and "dissociation," were opinions that lack general acceptance in the scientific community." (Reisberg, P13-25.)

For example, Dr. Poole's claims that "all of [her] childhood trauma people" experience a "period of memories that come up over the course of time as certain new nightmares and flashbacks come back and that they've come in and present a new memory and another memory as they come up in time," cannot be confirmed, and certainly not as her claim of "memories that have been lost and then found again." (Reisberg, P14.) The same criticism applies to Dr. Daniel, who told jurors that "Dissociative amnesia [is] a psychiatric condition where, due to extreme psychological trauma, the memory is suppressed, causes a disruption of the memory as well as their identity, and the awareness is lost." RP 506 (emphasis added).

> Again, the prevailing view is that trauma leads to long-lasting and intrusive memories, not "suppression." There is no general acceptance of the idea that trauma causes a trauma victim the inability to access a formed memory. What Dr. Daniel testified to would not satisfy the Frye standard requirement of general acceptance.

(Reisberg, P16-17) (emphasis added).

Dr. Poole testified that "a dissociative flashback is different from a regular memory, and a dissociative flashback would be one in which you actually feel like you were reliving the traumatic memory." RP 545. If a court wanted to know if this assertion of Dr. Poole's met the Frye standard of admissibility, Dr. Reisberg would state that the answer is no, "there is no general acceptance for Dr. Poole's assertion that a flashback is a special type of genuine memory. To the contrary… there is general acceptance that a "flashback" cannot be reliably understood as "a playback." (Reisberg, P18.)

Because "flashbacks" can blend truth with fiction, a subjective report of the experience of a "flashback," "does not in and of itself prove the existence of the event thought to have occurred in the past." (Reisberg, P18.) Dr. Reisberg declares that Dr. Poole's testimony on this point "is an unjustified suggestion that flashbacks and nightmares can cause a true (and "repressed") memory to be recovered." P20.

As a memory researcher with over four decades of experience, Dr. Reisberg confidently state "there was no "repression" and "recovery" here." (Reisberg, P21.) He opines that:

- M.G.'s reports do not function as memories generally function, and so, on that basis, may not be genuine memories.
- If he had actually experienced these events, he would not have forgotten them.
- In the alternative, if the events were extremely traumatic, the processes of consolidation would have been disrupted; therefore, no memory record would have been established; therefore there would be no "memory" that potentially could be recovered; therefore no legitimate "recovery" would be possible.

Id.

In his expert opinion, MG's "flashbacks, the conversations with his grandmother and perhaps with counselors[,] provide a plausible alternative view – that his reports are essentially memory illusions, memories for events that did not occur." (Reisberg, P21).

F. 2019 Declaration of Dr. Mark Whitehill expressing agreement with Dr. Rosen and Dr. Reisberg's views and explaining the importance of Mr. Fugle's neighbors' observations that MG did not consistently appear.

In 2015, Dr. Whitehill authored a declaration in support of trial counsel's successful motion to access MG's counseling and medical records but then did not assist further with the matter. In 2019, undersigned counsel asked Dr. Whitehill to take a second look at the case,

and he did so. Appendices T and U. In 2019, Dr. Whitehill reviewed more case materials than in 2015. (Whitehill, P2-3, paragraph 6.)[22]

Dr. Whitehill understands that the treatment providers' diagnoses of PTSD and dissociative amnesia were "used to bolster the state's theory that M.G. was abused by the defendant as alleged." (Whitehill, P3.) Dr. Whitehill finds this problematic, much as Dr. Rosen did:

> The diagnoses were conferred by clinicians seen by M.G., and were not the result of an independent Rule 35 examination (IME) of the complainant. Therapeutic bias in diagnostic assessment is well-established in the research literature in light of a clinician's uncritical acceptance of the clients' self-report and the focus on the subjective reality of the client.

(Whitehill, P3).

Dr. Whitehill states that if MG had submitted to an independent forensic assessment, "which would include objective psychometric testing as well as an assessment of the possible presence of malingered or factitious symptoms," the problem of therapeutic bias may have been ameliorated. (Whitehill, P3.)

Dr. Whitehill also agrees with Dr. Rosen that it is a "logical fallacy" for an evaluator to say that symptoms "reflect the presence of a

[22] In 2015, trial counsel gave Dr. Whitehill case discovery on the case, defense pretrial interviews of MG and his mother and grandmother, and MG's records once those were produced. Dr. Whitehill has now also seen Dr. Reisberg's 2016 trial testimony and his 2019 declaration, Dr. Rosen's 2019 declaration, a summary of MG's treatment providers' trial testimony about trauma, PTSD, and alleged effects on MG, and the defense witness interviews of the Van Netta and Pagay neighbors. Excerpts of the trial record provided to Dr. Whitehill are attached. Appendix V.

particular stressor." (Whitehill, P4.)[23] He notes that this record includes potential sources of trauma different from the disputed sexual abuse, *e.g.* Mr. Fugle's alleged physical aggression toward his wife or her nervous breakdown. (Whitehill, P4-5.)

Dr. Whitehill agrees with Dr. Reisberg that "M.G.'s reported "recovery," at age 18, of memories of having been repeatedly and severely sexually abused between the ages of 7 and 14 is inconsistent with research on memory and depends on the discredited theory of "repression." (Whitehill, P5) (citations omitted) (emphasis added). He agrees with Dr. Reisberg's 2019 conclusions that Dr. Poole's testimony about "recovery" and "repression" "fails to meet the Frye standard of general acceptance and should have been excluded." *Id.*

Dr. Whitehill's re-review of MG's records – along with what the Van Netta and Pagay neighbors had to say about the complainant – now leads him to suspect "the presence of a rival hypothesis that may explain M.G.'s symptomatic presentation: that of a factitious disorder." (Whitehill, P5.) A factitious disorder is a condition in which a person, without a malingering motive, acts as if they have an illness by deliberately

[23] According to Dr. Whitehill, Dr. Tauben's ready acceptance that "M.G.'s ostensive PTSD derived from "prolonged interval sexual abuse" reflects another example of the logical fallacy of "affirming the consequence." *Id.*

producing, feigning, or exaggerating symptoms, purely to attain (for themselves or for another) a patient's role. *Id.*

Dr. Whitehill did not have the benefit of the Van Netta and Pagay witness declarations when the matter was pending, but finds them probative and relies on them in his current assessment:

> Neighbor Dawn Pagay asserted in interview that M.G.'s mother, Jana, believed M.G. was so compromised in his ability to walk that she purchased a walker for him; <u>however, when his mother was not around, M.G. appeared to walk with without difficulty</u>, an observation also witnessed by Dawn's husband, Robert.
>
> Another long-time neighbor, Lynn Van Netta, saw evidence that <u>M.G. was exaggerating physical health complaints to garner attention from his mother</u>, who he believed was spending more time with her husband, Mr. Fugle. Lynn's husband, Kirk, reported that he had counseled M.G. and had learned that <u>M.G. was intent on breaking up his mother's marriage to Fugle</u>. The Van Nettas' daughter, Mikkel, who often socialized with M.G., reported <u>that he behaved normally, without physical limitations, until his mother was present; he would then act as if he were severely physically disabled.</u>

(Whitehill, P6) (emphasis added).

Much like Dr. Rosen, Dr. Whitehill believes that a multi-modal approach is necessary for a reliable forensic psychological assessment. Given that there was a basis to suspect the presence of a factitious disorder, Dr. Whitehill asserts that the shortcut taken by Dr. Tauben to conclude that MG suffered from "post-traumatic stress disorder from prolonged interval sexual abuse," was a mistake. *See* RP 725, 750.

Dr. Whitehill opines that making the diagnosis, as Dr. Tauben did, "falls below the standard of care to confer a psychiatric diagnosis." (Whitehill, P7.) What was needed was "objective testing" to include "validity scales necessary to rule out the presence of secondary gain for the display of psychiatric symptoms." (Whitehill, P7.)

Dr. Whitehill concludes that the facts of this case do not ring true:

> In my 32 years of clinical practice, I have never encountered a fact pattern as unusual as reported here: the claim by an 18-year-old that he had no memory of seven years of sexual abuse; that the reported abuse was particularly severe and included anal rape; that the reported abuse occurred at a frequency as high as twice a week; that the reported abuse occurred during late childhood and early adolescence (at a time memory capabilities are well-developed); and that the reported abuse in its entirety was recollected following a pseudo-seizure.

Id.

V. ARGUMENT

PETITIONER'S RESTRAINT IS UNLAWFUL PURSUANT TO RAP 16.4 (c)(2) and (3).

A. Mr. Fugle's constitutional right to trial by jury was violated when the complainant's treatment providers testified that they believed his accusations.

1. A defendant's constitutional right to a fair trial by jury bars witnesses from expressing opinions of guilt.

An accused is guaranteed the right to a fair trial by an impartial jury. U.S. Const. amend. VI; Wash. Const. art. 1, §§ 3, 21, 22. The Sixth Amendment right to a fair trial is binding upon the States through the due process clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 158-59, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). "The right to have factual questions decided by the jury is crucial to the right to trial by jury." *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). "The concept of the jury as the arbiter of disputed facts appears to predate recorded history." *Id.* at 589. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

Because it is the jury's role to decide factual questions, witnesses may not express opinions as to the guilt of the defendant in criminal trials. *State v. Montgomery*, 163 Wn.2d at 591; *State v. Demery*, 144 Wn.2d 753,

759, 30 P.3d 1278 (2001). A witnesses "may not testify as to the guilt of defendants, either directly or by inference." *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002). In a child sexual abuse case, "[a]n improper statement as to an opinion of guilt may be implied from a testimonial opinion that a child claiming sexual abuse is telling the truth." *State v. Borsheim*, 140 Wn. App. 357, 374, 165 P.3d 417 (2007), *citing State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (child sex abuse convictions reversed because counselor testified that he believed 9-year-old complainant was not lying.)

Sharing with a jury that a therapist diagnosed a complainant with a condition like "rape trauma syndrome," that by its name conveys the expert's view that sexual abuse trauma is responsible for the complainant's symptoms, plainly violates the constitutional right to a jury trial and is reversible error. *State v. Black*, 109 Wn.2d 336, 348-49, 745 P.2d 12 (1987) ("whether it be denominated as a form of "post-traumatic stress disorder", "rape trauma syndrome" or otherwise" such expert opinion is unfairly prejudicial and inadmissible.)

In fact, an expert's testimony "that her diagnosis of post-traumatic stress syndrome was <u>secondary to sexual abuse</u>," is so improper that it qualifies as manifest constitutional error, meaning, an error reviewable even if raised for the first time on appeal. *State v. Florczak*, 76 Wn. App.

55, 74, 882 P.2d 199 (1994) (emphasis added). *Accord State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007) (holding that even a "nearly explicit statement by the witness that the witness believed the accusing victim," constitutes manifest constitutional error).

2. Like in *Black* and *Florczak*, Dr. Tauben's assertion that MG had PTSD "from prolonged interval sexual abuse," and Dr. Poole's diagnosis of PTSD to help MG "deal with the symptoms and struggle he was having after having been sexually abused by his stepfather Joe," were explicit assertions that the patient was truthful and the accused guilty.

The Washington Supreme Court prohibits an expert asserting that the complainant is a sex offender In *State v. Black*, a rape counselor testified she believed the complainant suffered from "rape trauma syndrome," because the complainant exhibited a specific profile of symptoms thought to be shared by rape victims. 109 Wn.2d at 348. The counselor testified: "In every rape victim that I have seen they exhibit consistent symptoms... For example, body soreness, guilt, shame, feelings about the trial, nightmares, flashbacks, these are common symptoms that rape victims experience. There is a specific profile for rape victims and [R.J.] fits in." *Id.* at 339.

The *Black* court agreed with the defense challenge that presenting this diagnostic opinion violated Mr. Black's right to have the jury determine the disputed facts for itself:

> The defendant contends that expert testimony on rape trauma syndrome is unfairly prejudicial because it constitutes an opinion as to the guilt of the defendant, thereby invading the exclusive province of the finder of fact. We agree.

State v. Black, 109 Wn.2d at 349.

The Court confirmed that the rape counselor's opinion was two errors in one. The counselor had vouched for the complainant as a truthteller. The counselor simultaneously condemned the accused as guilty.

> The danger of prejudice is especially acute where, as here, the expert expressly uses the term "rape trauma syndrome." As one court cogently notes, "[t]he term itself connotes rape."… It carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped…. It constitutes, in essence, a statement that the defendant is guilty of the crime of rape.

Id. at 349 (internal citations omitted) (emphasis added).

MG's treatment providers repeatedly testified he told them about the disputed childhood sexual abuse and his problems, that they declared what he reported as symptoms of trauma, and particularly consistent with MG being a victim of childhood sexual abuse. RP 553 ("So he reported that the abuse began when he was 7 years old. It began with first, with being forced to touch genitals and his genitals being touched…") [24] None

[24] Q. Okay. In treating Mitchell, was everything that he -- he told you about, what he experienced, the symptoms, et cetera, consistent with what you would expect from someone who suffered childhood trauma based on your experience and your training? A. Yes. Everything he said and his symptom presentation was all very

used the term "rape trauma syndrome," but both diagnosed MG with PTSD. With Dr. Tauben, the diagnosis was explicitly *secondary to sexual abuse*. With Dr. Poole, a therapist MG was sent to deal *with the sexual abuse*, who focused *on the sexual abuse*, and who explained her work with MG was to "deal with the symptoms and struggle he was having after having been *sexually abused by his stepfather Joe*," the conclusion that is what her diagnosis was for is inescapable. RP 551-52, 558, 565, 578, 583.

Only the jury may decide whether Mr. Fugle is or is not a sex offender. Both doctors testimonies was constitutional error under *Black*, which held that opinion testimony that PTSD was caused by sexual abuse is just as a pernicious violation of the constitutional right to a jury trial as testimony that a complaint suffers from "rape trauma syndrome." "[W]e do not share the view, espoused by some courts, that an expert witness' decision to avoid the term "rape trauma syndrome" thereby renders such testimony admissible." *Id.* (emphasis added).

> In *State v. Allewalt*, 308 Md. 89, 517 A.2d 741 (1986), for example, the court allowed an expert witness to testify that the alleged victim suffered from a form of "post-traumatic stress disorder" with rape as the likely stressor. The court suggested that the same testimony would be inadmissible had it been labeled as testimony on "rape trauma syndrome". *Allewalt*, at 98, 108, 517 A.2d 741. We find such semantic distinctions unpersuasive. In the present case, the testimony of rape counselor Bermensolo, whether it be denominated as a form of "post-traumatic stress disorder",

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consistent with treatment I've done with, you know, hundreds of other PTSD victims. RP 587.

> "rape trauma syndrome" or otherwise, was unfairly prejudicial and hence inadmissible.

State v. Black, 109 Wn.2d at 349.

"[T]he State may not introduce expert testimony which purports to scientifically prove that an alleged rape victim is suffering from rape trauma syndrome," including when calling that condition PTSD secondary to sexual abuse. *Id. State v. Florczak*, decided a few years after *Black*, confirms this point.

The defendant in *State v. Florczak* argued that her constitutional right to a jury trial was violated when the court allowed a prosecution's witness to testify about a complainant's alleged PTSD. 76 Wn. App. at 58. A therapist had interviewed a young child, including about symptoms she displayed that appeared to be consistent with trauma: "anger, aggression, issues with trust, nightmares, had indicated her sense of betrayal, problems with self-esteem, events that represented incidents of the trauma, irritability, wetting." *Id*. at 62. The therapist diagnosed PTSD, relying on the observed symptoms. She was asked if: "a child who is suffering from post-traumatic stress disorder [sic], is that consistent with a child who has suffered sexual abuse?" *Id.*

The therapist answered: "When we give the child post-traumatic stress, it can be to any traumatic event. It is secondary, in this case, in [KT]'s case, to sexual abuse." *Id.*

The therapist's assessment that the child had PTSD – up to the point where the therapist was allowing for the possibility non-sexual trauma was responsible for the child's symptoms – "did not usurp the jury's function of weighing the evidence to decide whether KT was in fact sexually abused." *Id.* at 74. But when the therapist opined the child's PTSD was caused by "sexual abuse," the testimony had crossed-over into an impermissible and unconstitutional comment on the defendants' guilt:

> However, constitutional error did occur when, after being asked whether a diagnosis of post-traumatic stress syndrome is "consistent with a child who has suffered sexual abuse", Wilson stated, "[w]hen we give the child post-traumatic stress, it can be to any traumatic event. It is secondary, in this case, in [KT]'s case, to sexual abuse." By stating that her diagnosis of post-traumatic stress syndrome was secondary to sexual abuse, Wilson rendered an opinion of ultimate fact—i.e., whether KT had been sexually abused—which was for the jury alone to decide.

State v. Florczak, 76 Wn. App. at 74.

The Court held that "this segment of [therapist] Wilson's testimony also amounted to an opinion [the two defendants] were guilty, either individually or jointly, of sexually abusing KT. Admitting that evidence invaded the province of the jury." *Id.* The *Florczak* Court declared this to be a manifest constitutional error, or error that is "harmless only if the

untainted evidence is so overwhelming that it necessarily supports a guilty verdict." *Id.*

Under the facts of that case, where the police had found a photograph of one of the co-defendant's and the victim exposing their genitalia, and where a medical exam showed history of sexual abuse (presence of a bacterial germ found in sexually active adult women), the untainted evidence was overwhelming and the error harmless. *Id.* at 75.

3. The State's experts Dr. Tauben and Dr. Poole explicitly asserted that MG was a rape victim. This was manifest constitutional error that requires reversal.

On the record in this case, it is clear these two State's experts asserted their belief in MG's accusation and his stepdad's guilt. Dr. Tauben's diagnosis of "post-traumatic stress disorder <u>from prolonged interval sexual abuse</u>," with the specifier that MG had "physical symptoms generated by central nervous system sensitization <u>consequent to abuse exposure</u>," was the worst of the lot. RP 725 (emphasis added). His words – those of an established physician – were resolute. He testified to the jury that in his "judgment and experience," MG's symptoms "could be fully accounted for… by the early life sexual abuse exposure." RP 725. This was an explicit comment on MG's credibility and Mr. Fugle's guilt. Under *Florczak*, this was manifest constitutional error.

What Dr. Poole testified to was equally insidious. She testified that she had accepted what MG had told her, considered his symptoms, and concluded the commonalities between what she knew of sexually abuse meant he had PTSD because he himself had been abused. Dr. Poole testified she "did ask him to go through the timeline," of the sexual abuse… "it was exactly the same… it all came from him." RP 565. Her testimony also constituted manifest constitutional error.

Any error that infringes on a constitutional right is presumed prejudicial and the State must show that the error was harmless beyond a reasonable doubt. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The error is harmless only if overwhelming untainted evidence necessarily leads to a finding of guilt. *State v. Florczak*, 76 Wn. App. at 75; *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); *Parker v. Randolph*, 442 U.S. 62, 70–71, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979); *Brown v. United States*, 411 U.S. 223, 231, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973).

The "'overwhelming untainted evidence' test… insur[es] that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict." *State v. Guloy*, 104 Wn.2d 426.

Mr. Fugle's trial counsel failed to object. And when he became Mr. Fugle's appellate counsel, he failed to raise this issue under RAP 2.5(a). Both times, counsel rendered ineffective assistance.

Failure to make an adequate record prevents a reviewing court on direct appeal from deciding an issue. *State v. Wheaton*, 121 Wn.2d 347, 365, 850 P.2d 570 (1993) (appellate court will decline to review issue if the record inadequate). The Washington Supreme Court has ruled that when appellate counsel is ineffective, for failing to raise a constitutional violation on appeal which would have warranted a new trial, the proper remedy is to allow a new trial for that issue raised in a PRP rather than prove actual prejudice. *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291, 300 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005). This Court should apply the "overwhelming untainted evidence" test to Mr. Fugle's Petition, the review standard he would have been entitled to had the issue been properly raised on direct appeal.

This court must reverse due to the ineffective assistance of appellate counsel for failure to make this claim of reversible error. But even looking at the case through the traditional PRP standard,[25] there is

[25] "A personal restraint petitioner must prove either a (1) constitutional error that results in actual and substantial prejudice or (2) nonconstitutional error that 'constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010) (internal quotation marks omitted) (quoting *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672,

actual and substantial prejudice. In this case, there was no corroboration, no physical evidence, and multiple reasons to doubt the accuser's reliability and question his motive.

MG's therapists testified day after day about trauma, sexual abuse, PTSD, and how MG's symptoms mean he is a victim and that he was victimized by his stepdad. Even if the other providers, like Wendy Rawlings, Dr. Jones, Dr. Daniel, or Dr. Steffener did not make as explicit of a claim that MG was a traumatized rape victim as Dr. Tauben or Dr. Poole did, the combination of their testimony on the whole made it clear that all of them believed their patient MG.[26] In *Florczak*, there was some discussion of victim impact, but at Mr. Fugle's trial, this was endless.

The charging period of the case was 2002-2009, yet the State emphasized that MG's problems persisted well into 2016. MG testified he cannot drive "because of [his] disabilities," continues to suffer from and is in treatment for "overwhelming flashbacks of the sexual abuse memories," and endures repeated "pseudoseizures." RP 153-157. "Some of the different symptoms and traumas that I suffer on a day-to-day basis that

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101 P.3d 1 (2004)). The petitioner must prove the error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

[26] For an example of what might not be error, or harmful error of this type, the Court could look to *State v. Madison*, 53 Wn. App. 754, 761, 770 P.2d 662 (1989). There, it was only "arguably improper" to ask a CPS caseworker a single question whether a child complainant's behavior was "typical of a sex abuse victim."

make my life very difficult to live." RP 213-14. His mother testified: "His health has not improved, maybe even gotten worse in some respects... He requires a lot of help... uses a walker... needs a wheelchair... has had a couple [pseudoseizures] in the past year." RP 268.

The evidence presented was not just that the therapists believe MG is a victim, the evidence presented was that they believe the sexual abuse in question caused him incredible damage. When she testified she diagnosed MG with PTSD, Dr. Poole had already told the jury about countless effects of trauma and PTSD, including that the condition "rewires, oftentimes, the brain." RP 539. Dr. Tauben testified that early life trauma damages "the developing brain." RP 704. He testified that those who suffer from PTSD may manifest physical symptoms such as chronic pain. RP 705. He testified that all of MG's widespread pain could be fully explained by the sexual abuse and the jury could have reasonably inferred that MG's ongoing pain was included in that. RP 705, 726 (doctor testifying "there was no other likely medical explanation to account for his symptom complex.")In closing argument, the trial prosecutor told the jury that three categories of evidence proved the State's case: a) what MG testified to, b), what MG told his therapists, and, c) how his therapists interpreted what he told them.

> What is the evidence that you heard that sexual contact and sexual intercourse occurred? [MG's] testimony. [MG] telling his counselors and his doctors what happened to him, what the defendant did to him. The fact that [MG] was diagnosed with PTSD is, to a certain extent, evidence that it happened. It's circumstantial evidence, right? It's circumstantial evidence that he suffered sexual abuse. It's evidence that trauma occurred.

RP 919 (emphasis added).

The trial prosecutor explicitly argued that the PTSD that MG was diagnosed was secondary to sexual abuse, just as Dr. Tauben had said:

> Obviously, there's an argument that any trauma can lead to PTSD. But when taken with the other testimony in the context with everything else that you heard about, no evidence of any other kind of trauma, it is, again, circumstantial evidence, which has the same weight as direct evidence, that [MG] was sexually abused by the defendant.

RP 919.

The erroneously admitted opinions of Dr. Tauben and Dr. Poole supported the State's argument. RP 697, 699, 725 (diagnosis of "[p]ost traumatic stress disorder from prolonged interval sexual abuse" by physician Dr. Tauben); RP 551-54 (Dr. Poole diagnosing MG with PTSD after he told her about being sexually abuse by Mr. Fugle and described his physical symptoms). This constitutional error impacted the jury's deliberations about the case and about PTSD.

In fact, the State cannot now take the position there is no reasonable possibility that Dr. Poole and Dr. Tauben's opinions influenced

the case, because the State, on direct appeal, already told this Court these opinions were in fact crucial to their case. On direct appeal, the State quoted these two doctors' opinions (Page 8 of State's response brief, CoA #49332-2-II) ("MG disclosed the sexual abuse to his providers… Dr. David Tauben, who specializes in pain medicine, diagnosed MG with "[p]ost traumatic stress disorder from prolonged interval sexual abuse" and connected MG's widespread muscle pain and fatigue to his sexual abuse exposure."). *Id*. at P25, 26.

The evidence against Mr. Fugle certainly was not overwhelming. Additionally, in terms of the sheer volume of opinion testimony presented, the impact of the error here was far worse than in many other cases ordered reversed for new trials.[27]

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[27] E.g. *State v. Dunn*, 125 Wn. App. 582, 584, 105 P.3d 1022 (2005) (reversing child rape and child molestation convictions, because the trial court erroneously admitted "the opinion of a physician's assistant that a child had probably been sexually abused despite the absence of any physical signs of abuse" because the opinion "usurped the function of the jury to determine guilt.") *State v. Carlson*, 80 Wn. App. 116, 129, 906 P.2d 999 (1995) (in a case with "no physical evidence and no independent witness to the charged events," reversible error for pediatrician to testify that she concluded an alleged victim of child molestation had been abused, because the pediatrician found the child credible); *State v. Alexander*, 64 Wn. App. at 154 (child sex abuse convictions rape reversed because counselor told jury complainant was not lying); *State v. Fitzgerald*, 39 Wn.App. 652, 656–57, 694 P.2d 1117 (1985) (error for trial court to allow a pediatrician to testify children complainants had been molested where physical examinations were inconclusive and doctor's opinion was based on her assessment the children were truthful); People v. Singh, 186 A.D.2d 285, 285, (N.Y. App. Div. 1992) (reversing after psychotherapist had given prejudicial testimony that complainant "stated that she had insomnia, difficulty sleeping, nightmares, depression and "intrusive memories", including memories about being sexually abused by her father" and holding that expert testimony on PTSD or rape trauma syndrome is inadmissible to prove that a rape occurred).

B. MG's treatment providers should not have been permitted to testify that PTSD symptoms can prove the existence of a prior traumatic event, or that memories of trauma can be repressed and recovered, because these ideas do not have general acceptance in the scientific community and are not reliable.

1. Under the Frye standard, expert opinions that have not gained general acceptance in the relevant scientific community cannot be put to a jury.

Under Frye[28], expert testimony is admissible in court if and only if:

> (1) the scientific theory or principle upon which the evidence is based has gained general
> acceptance in the relevant scientific community of which it is a part; and
>
> (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.

Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn.App. 168, 175, 313 P.3d 408 (2013), *rev. denied*, 179 Wn.2d 1019 (2014) (quoting *State v. Sipin*, 130 Wn.App. 403, 414, 123 P.3d 862 (2005)). "Both the theory underlying the evidence and the methodology used to implement the theory must be generally accepted in the scientific community for evidence to be admissible under Frye." *Id.*

The Frye standard recognizes that since judges may themselves not be able to assess the reliability of scientific evidence, they must turn to experts in the scientific field to help them determine the admissibility of

[28] *Frye v. United States*, 293 F. 1013, 34 A.L.R. 145 (D.C.Cir.1923).

proffered testimony. *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999). Under the Frye standard, what matters is "whether the theory has achieved general acceptance in the appropriate scientific community." *Lake Chelan Shores*, 176 Wn.App at 175-76 (*quoting State v. Riker*, 123 Wn.2d 351, 359-60, 869 P.2d 43 (1994)). "[T]he core concern… is only whether the evidence being offered is based on established scientific methodology." *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993).

"The rationale of the Frye standard, which requires general acceptance in the relevant scientific community, is that expert testimony should be presented to the trier of fact only when the scientific community has accepted the reliability of the underlying principles." *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996) (emphasis added). "If there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted." *Id.*, *quoting State v. Canaday*, 90 Wn.2d 808, 887, 585 P.2d 1185 (1978).

The reliability of the scientific methods "depends upon three factors: (1) the validity of the underlying principle, (2) the validity of the technique applying that principle, and (3) the proper application of the technique on a particular occasion." *Sipin*, 130 Wn.App. at 414-15 (*citing inter alia* Gianelli, The Admissibility of Novel Scientific Evidence: Frye

v. United States, a Half–Century Later, 80 Colum. L.Rev. 1197, 1201 (1980)).

"The trial court's gatekeeper role under Frye involves by design a conservative approach, requiring careful assessment of the general acceptance of the theory and methodology of novel science, thus helping to ensure, among other things, that 'pseudoscience' is kept out of the courtroom." *State v. Copeland* 130 Wn.2d at 259.

"[I]f there is a significant dispute between qualified experts as to the validity of scientific evidence," then general acceptability is not met. *State v. Kunze*, 97 Wn.App. 832, 853, 988 P.2d 977, *review denied*, 140 Wn.2d 1022 (2000). (*citing State v. Cauthron*, 120 Wn.2d at 887).

Science is the core of the issue. The Frye standard – and the caselaw addressing what the standard means – depends on *scientific* theory, *scientific* community, *scientific* methodology, *scientific* evidence. Ideas which may be superficially attractive, but which have not gained general acceptance among *scientists*, have no place in court. *State v. Copeland*, 130 Wn.2d at 259.

2. Reverse-engineering the existence of a prior traumatic event when PTSD symptoms are observed, does not meet the *Frye* standard

When a clinician's "personal experience is used as a basis for generalized statements regarding the behavior of sexually abused children

as a class, the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used, and therefore should be subject to the standard set forth in *Frye*." *State v. Jones,* 71 Wn. App. 798, 818, 863 P.2d 85 (1993)

One of the core concerns with this type of evidence, is that what may be observed "is not specific to sexual abuse, but may be produced by other traumatic events in the life of the child." *Id*. The *"*use of generalized profile testimony, whether from clinical experience or reliance on studies in the field, to prove the existence of abuse is insufficient under *Frye*." *Id.* at 820. *Accord Kelso v. Olympia Sch. Dist.*, 8 Wn.App. 1072 (unpublished) (available at 2019 WL 2184982, at *1 (Wash. Ct. App. May 21, 2019) (Case number 48942-2-II.)

In *Kelso,* a forensic psychologist concluded that three children suffered from PTSD, from "some type of traumatic stressor," and then asserted he could tell what that was. *Id.* at 2.

This is the "affirming the antecedent" logic error described by Dr. Rosen, Dr. Reisberg, and Dr. Whitehill in their declarations.)[29] *See e.g.*

[29] This psychologist's process has much in common with how MG's doctors developed their diagnoses of him. "[C]onsistent with having suffered a trauma, it is evident that she is burdened by chronic and severe situational stress. Overt symptom constellations are associated with separation anxiety, social anxiety, and obsessive-compulsive trends…. As is common among traumatized children…" *Id.,* at 2. About a second child, the psychologist wrote: "This anxious, emotionally fragile nine-year old [sic] presents a symptom complex consistent with having suffered sexual trauma." *Id.*

(Rosen, P8) "[i]t is a logical fallacy to conclude that the presence of posttraumatic psychiatric symptoms… corroborates the occurrence of a traumatic event.")

The *Kelso* trial judge ruled the testimony inadmissible under *Frye* and this Court affirmed: "Because an expert cannot use trauma symptoms to prove abuse, let alone determine the identity of an abuser, we hold that Dr. Wynne's opinions are inadmissible under *Frye*." *Id.* at 8.

"The purpose of emotional therapy is not the determination of historical facts, but the contemporary treatment and cure of the patient." *Tyson v. Tyson*, 107 Wn.2d 72, 79, 727 P.2d 226 (1986), *overturned due to legislative action*. Dr. Poole is a clinician and her diagnosis was based MG's self-report, what she knows from experience to by the typology of a trauma victim, and of a childhood sexual abuse victim in particular. Likewise, Dr. Tauben based his decision to diagnose MG with PTSD on his clinical experience and a four-item self-report checklist that took MG all of 20 seconds to fill out. This may have been fine, when it comes to making a treatment plan for a patient. But courtroom settings are different and demand more.

Dr. Rosen and Dr. Reisberg and Dr. Whitehill's 2019 declarations describe why – and how – psychologists who would offer opinions in

court guard against the risk of incorrectly diagnosing PTSD.[30] Given the absence of corroboration of MG's claims, there was an absolute need for objective testing, to include symptom validity measures, review of outside records, and collateral contacts. As Dr. Whitehill explains, the observations of the Van Netta and Pagay neighbors (consistent with the possibility of a factitious disorder or malingering) suggest that the shortcuts taken by Dr. Poole and Dr. Tauben produced "disastrous" results that Dr. Rosen warned against in his declaration.

a. The introduction of Dr. Poole and Dr. Tauben's PTSD diagnoses violated Mr. Fugle's constitutional due process right not to have to defend against unreliable evidence.

Under Frye, *Jones* and *Kelso*, Dr. Tauben and Dr. Poole's questionable diagnoses should have been excluded.[31] The introduction of the testimony violated Mr. Fugle's constitutional due process rights[32] and

[30] *E.g.* (Whitehill, P7); (Rosen, P 12-14).

[31] E.g. (Whitehill, P3.) (discussing that Dr. Poole conducted no testing and Dr. Tauben's self-report four-item checklist lacked symptom validity measures.) *See also* (Reisberg, P21) "[T]he various claims made by the treatment providers, aimed at bolstering M.G.'s claims, involve specific assertion after specific assertion that does not stand up to scientific scrutiny, and which would not satisfy the Frye standard."

[32] The admission of unreliable evidence violates the Fourteenth Amendment's Due Process Clause. *Manson v. Brathwaite*, 432 U.S. 98, 113–14, 97 S. Ct. 2243, 2252–53, 53 L. Ed. 2d 140 (1977). Mr. Fugle asserts he has shown that the admission of the diagnoses of PTSD as MG's therapists made them rendered his trial so arbitrary and fundamentally unfair as to violate constitutional due process. *Pennywell v. Rushen*, 705 F.2d 355, 357 (9th Cir.1983).

to the extent trial counsel could have prevented this, the failure to request a Frye hearing was ineffective assistance of counsel.

b. Defense counsel should have moved to exclude claims of repressed-recovered memory, because these specious ideas have been rejected under the *Frye* standard in Washington.

The notion of "recovery" of "repressed," "suppressed," or "dissociated" memories is discredited and lacks general acceptance in the scientific community. But, the jury deciding the State's case against Mr. Fugle was repeatedly exposed to expert opinions about repressed-recovered memories that lack general acceptance in the scientific community. Petitioner relies on Dr. Reisberg's declaration that details what evidence that was presented should have been excluded under Frye. Dr. Reisberg's pretrial interview made it known that expert witness opinions at issue in the case did not satisfy the general acceptance requirement of the Frye standard. *See* Dr. Reisberg 5/10/16 RP25 (stating that dissociative amnesia "is regarded with some substantial amount of skepticism by the scientific community" and may not "pass the Frye test."); Appendix R. (Dr. Reisberg 9/19/19 declaration at P6) (stating that he held that opinion then and holds it now).

Defense counsel was ineffective in developing all the necessary facts to make the argument and in not failing to bring a Frye motion to exclude this prejudicial testimony. The declarations of Drs. Reisberg,

Rosen, and Whitehill, show there is a robust factual (scientific) basis to keep they myth of repressed memory out of court. A review of relevant law shows that such a Frye motion would have been successful.

"Perhaps no area of the law has been more productive of controversy than that of the reliability and admissibility of testimony, expert and otherwise, relating to repressed recollection." *State v. Quattrocchi*, 681 A.2d 879, 881 (R.I. 1996). *See also Doe v. Maskell*, 679 A.2d 1087 (Md. 1996), *cert. denied*, 519 U.S. 1093, 117 S.Ct. 770, 136 L.Ed.2d 716 (1997) (Court of Appeals of Maryland noting serious disagreement in the psychological community concerning repression theory and concluding it is "unconvinced that repression exists as a phenomenon separate and apart from the normal process of forgetting.")

Not that unlike MG and Mr. Fugle's relationship, the complainant in *Quattrocchi* spent most of her life living with that defendant, as he was her mother's boyfriend. At age nineteen and while feeling depressed and suicidal, the complainant allegedly experienced a series of "flashbacks" that led her to believe that Quattrocchi, a paternal figure to her, had sexually abused her when she was four. *State v. Quattrocchi*, 681 A.2d at 881. She first discussed this with her mother, then her therapists.

Much like what happened with M.G., her treatment providers diagnosed the complainant with post-traumatic stress disorder. *Id.* at 880.

At trial, her doctor and psychiatric nurse testified about the diagnosis and the "ten or fifteen full memories of abuse" that she said had allegedly come to her in "flashbacks." *Id.* Quattrocchi's counsel was denied a Frye hearing and the complainant's treatment providers testified about repressed-recovered memory. *Id.* at 881. On appeal, the Supreme Court of Rhode Island reversed:

> [W]hen such testimony is offered, particularly expert testimony relating to the basis for such repression of recollection and for the diagnosis of PTSD, which provides the rationale for such repression and flashbacks, the trial justice should exercise a gatekeeping function and hold a preliminary evidentiary hearing outside the presence of the jury in order to determine whether such evidence is reliable and whether the situation is one on which expert testimony is appropriate.

Id. at 883–84.

In reversing the conviction, the *Quattrocchi* Court explicitly held that the failure to hold the preliminary hearing was similar to erroneously admitting an alleged confession without first analyzing its voluntariness. *Id*. at 884, *citing Jackson v. Denno*, 378 U.S. 368, 380, 84 S.Ct. 1774, 1783, 12 L.Ed.2d 908 (1964). Critically, when the case was remanded – and the trial court finally conducted the Frye hearing – the State's evidence on repression was rejected.[33]

[33] On remand, the trial court ruled that "The state has not met is burden of establishing that repressed recollection is reliable and admissible as scientific evidence." The charges against Quattrocchi were dismissed. The history of the case is detailed in the National Registry of Exonerations. Available at:

In a New Hampshire sexual abuse case, one trial court held a "a two-week admissibility hearing on the issue of repressed memories" and ruled that the evidence did not meet Frye. *State v. Hungerford*, 697 A.2d 916, 919-20 (New Hampshire, 1997). There too "the State failed to meet its burden of proving that there was general acceptance of the phenomenon of repressed memories in the psychological community." *Id.* Dr. Elizabeth Loftus, formerly of the University of Washington, and co-author of the seminal text debunking repression, testified at the *Hungerford* evidentiary hearing, as did six other psychological professionals. *Id.*, *citing to* E. Loftus & K. Ketcham, The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse 215–17 (1994) (describing repression as "a process of selective amnesia in which the brain snips out certain traumatic events and stores the edited pieces in a special, inaccessible memory 'drawer.'")

In a unanimous opinion, the Supreme Court of New Hampshire agreed with the trial court that testimony espousing theories of repression and recovery have no business in court. The *Hungerford* court found that

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https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3966, (last accessed September 23, 2019). The trial court order is also available at *State v. Quattrocchi*, 1999 WL 284882 (R.I. Super. April 26, 1999) (unpublished) ("The areas of consensus regarding repressed recollection remain greatly clouded by continuing and overriding division and discrepancy within the applicable fields. The status of dissension within the scientific discipline as to repressed recollection renders potential expert testimony of little assistance to the trier of fact to date.")

there was controversy, not general acceptance, and pointed out it was not even possible to quantify just how many claims of repressed-recovered memories were false accusations. *State v. Hungerford*, 697 A.2d at 926-929. The 2019 declarations of Dr. Reisberg, Dr. Rosen, and Dr. Whitehill, echo this point.[34]

As Dr. Reisberg and Dr. Rosen explained, people remember, not forget trauma. The New Hampshire Supreme Court found this fact compelling as well: "[t]he scientific literature supports the conclusion that, in general, people remember traumatic events well." *Id*. at 927.

To date, no Washington State appellate court has said whether claims of repressed-recovered memory meet, or fail, the Frye standard. But at least one trial court which analyzed the question in our state – and held a proper hearing – ruled the evidence inadmissible. *Mensch, et. al. v. Pollard, et. al.*, Cause No. 93-2-01427-5, Whatcom County Superior Court; s*ee also* S. Staurset, M. Adams, "Repressed Memory: Trial court finds "recovered memory" testimony lacking in scientific reliability."

[34] Controversies surrounding traumatic and repressed memories are so intense, they have been referred to as the "memory wars." McNally has persuasively documented that memories of trauma are seldom, if ever, truly forgotten. Rather, as documented in McNally's review on memory research, trauma is remembered all too well. R.J. McNally (2003), Remembering trauma, Cambridge, MA: The Belknap Press of Harvard University Press; also, R.J. McNally (2004), The science and folklore of traumatic amnesia, Clinical Psychology: Science and Practice, 11, 29-33.

WACDL Defense Magazine, Feb. 1999. Appendix W.[35] Legal commentators have suggested this was the right result. C.M. Smith, "Recovered Memories of Alleged Sexual Abuse: An Analysis of the Theory of Repressed Memories Under the Washington Rules of Evidence," Seattle University Law Review, Vol. 18:51 (1999) (arguing notion of repressed-recovered memories is not admissible in Washington, under Frye and otherwise.)

More recently, other jurisdictions have also rejected this evidence. Just in 2012, the Supreme Court of North Carolina affirmed a "trial court's decision to suppress expert testimony evidence of repressed memory." *State v. King*, 733 S.E.2d 535 (N. Carolina 2012). So did the Supreme Court of Minnesota: "expert testimony on the theory of repressed and recovered memory… is inadmissible." *Doe v. Archdiocese of St. Paul*, 817

[35] The Washington Association of Criminal Defense Lawyers (WACDL) is an association of attorneys practicing criminal defense law in our state. To promote its mission of supporting the criminal defense community through education and the exchange of information, WACDL distributes a monthly publication and the outcome of the Frye hearing in *Mensch v. Pollard* warranted inclusion in this professional journal. The factual allegations were apparently similar to what Mr. Fugle was forced to defend against. The authors reported that the trial court found "it is not generally accepted in the relevant scientific community that a person can suffer total, traumatic amnesia for numerous, repeated instances of abuse occurring over a period of years" and "that there simply were not sufficient valid scientific studies that could corroborate the validity of total, traumatic amnesia for long-term childhood sexual abuse." *Id*. The trial court's Frye ruling is also discussed in the Court of Appeals' unpublished order rescinding an initial grant of discretionary review in the matter. *See Mensch v. Pollard*, 99 Wn. App. 1005 (2000) (unpublished) (available at 2000 WL 62968) ("[A]fter a pretrial evidentiary hearing, the trial court [ruled] expert testimony on repressed memory is inadmissible at trial.")

N.W.2d 150, 154 (Minn. 2012) (appellate court convinced after reviewing record from a three-day Frye hearing on the issue).

In failing to properly investigate the issue and in failing to challenge repressed-recovered memory evidence, trial counsel rendered ineffective assistance that prejudiced Mr. Fugle. Regrettably, Mr. Fugle's trial counsel never discussed with Dr. Reisberg the possibility of making a Frye challenge to this type of evidence pretrial, even though Dr. Reisberg raised the issue in his pretrial interview with the prosecutor, calling it "highly controversial territory… massively controversial." (Reisberg, P6.) Dr. Reisberg does not mince words about this: "the scientific evidence allegedly showing repression is (at best) ambiguous and arguably flawed, while the scientific evidence showing the opposite of repression (i.e., robust memories for traumatic events) is substantial." (Reisberg, P9-10.) The motion would have been successful.[36]

Had a Frye motion been made, and granted, only a layperson could hypothesize about such a thing. But as it was, Mr. Fugle faced not MG's grandmother's claims about Miss America's repression, he faced Dr. Poole's expert testimony on the issue. What she testified to was damning.

[36] "There is no compelling evidence in favor of repression. I mean, again, that contest between the scientist and the clinicians, it's just not an even contest in any way." RP 852, 855.

Dr. Reisberg concludes that the jury deciding Mr. Fugle's case was exposed to unreliable testimony: "some of the opinions given by Dr. Daniel and Dr. Poole at trial – especially their opinions about "repression," "suppression," and "dissociation," were opinions that lack general acceptance in the scientific community." (Reisberg, P13-25.) For example, Dr. Poole's testimony that MG's "flashbacks and nightmares is the way in which that the memories returned," lacks general acceptance. RP 560-61. Same with her suggestion that suppressed memories are not forgotten: "It is a problem with retrieval." RP 562. Same with Dr. Daniel's claim that with dissociative amnesia, "memory is suppressed," but remains available for "recovery" later. RP 506.

MG (and his mother and grandmother) testified they believe in his claimed repression. Dr. Poole validated MG's claim that he repressed memory of the abuse he said he had experienced out of fear. RP 561. And she added that it makes sense that MG would have recovered memory once he felt safer. Critically, Dr. Reisberg writes: "I know of no scientific basis for these assertions. <u>What Dr. Poole testified to would not satisfy the Frye standard requirement of general acceptance</u>." P21; P22 (emphasis

added). Even what Dr. Poole testified to about the DSM diagnosis of dissociative amnesia does not meet Frye.[37]

In contrast, "The prospect that M.G.'s reports were false memories (i.e., sincere recollection of events that actually never occurred) is well-grounded in scientific research." (Reisberg, P21) (emphasis added). Dr. Reisberg remains prepared to testify to these opinions, which he holds these opinions to within a reasonable degree of scientific certainty. *Id.* P25.

Because there was no objection, no pretrial Frye hearing, in closing, the prosecutor was able to tell the jury they should consider repression to be real, because some mental health professionals "believe dissociative ammunition, [sic] disassociation, repressed memory exists." RP 930. Because there was no objection, no Frye hearing, the prosecutor was able to tell the jury they should literally ignore science and scientists:

> [Dr. Reisberg] He testified in his position, from his perspective, from scientists' perspective, it doesn't exist because there's no hard evidence for it,
> …
> The scientists have to have independent confirmation when someone is reporting that they remember, but that doesn't mean that repression doesn't exist.

[37] Dr. Poole testified that the concept of repressed-recovered memories is the same as a DSM diagnosis of dissociative amnesia. RP 563. But this is not true: "The diagnosis is about memory loss. Dissociative amnesia in the DSM says nothing about recovery of memories. Dr. Poole's assertions have no scientific grounding." (Reisberg, P25.)

RP 933.

Testimony on repressed-recovered memories has been excluded in courtrooms across the nation, including here in Washington, but at Mr. Fugle's trial, the prosecutor, having urged the jurors to discount the scientists, invited them to just judge this for themselves: "I submit to you, and again, use your common sense and experiences, make inferences." *Id.* Leaving decision-making about evidence this controversial to individual jurors violated Mr. Fugle's due process rights.

c. Mr. Fugle's PRP should be granted and the matter reversed for a new trial, or in the alternative, for a reference hearing to settle the *Frye* issue.

In this Petition, Mr. Fugle has made a sufficient showing to establish that the jury deciding his case was exposed to prejudicial "pseudoscience" evidence that had no business in court. This violated his due process right not to have to defend against unreliable evidence, brought with it actual and substantial prejudice, which is why Mr. Fugle's convictions should be reversed.

In the alternative, this Court should remand for a reference hearing to settle the Frye issue. *Accord State v. Quattrocchi*, 681 A.2d at 884; *see also C.A.H. v. Holden*, A11-1707, (unpublished) (2012 WL 3892121, at *7 (Minn. Ct. App. Sept. 10, 2012) (appellate court finding that trial court erred in denying a Frye hearing, "abused its discretion by admitting the

evidence on repressed memory, including [] diagnosis of [plaintiff] with dissociative amnesia," and also that "[a]dmission of repressed-memory evidence and [plaintiff's dissociative amnesia] diagnosis was plainly prejudicial."

C. Mr. Fugle's constitutional right to counsel was violated when trial counsel failed to investigate, failed to object to improper opinion of guilt testimony, failed to contest and object to the admission of unreliable evidence, and failed to call witnesses who could have testified that MG was biased against Mr. Fugle, feigned illness when it suited him, and was unlikely to have been victimized "hundreds" of times over seven years without the neighbors noticing.

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004). Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. *Strickland*, 466 U.S. at 687-88. Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 298 (1993) ("A defendant is

denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different *but for* the attorney's conduct.").

To obtain relief on collateral review based on constitutional error, Mr. Fugle must demonstrate by a preponderance of the evidence that he was actually and substantially prejudiced by the error. *Davis*, 152 Wn.2d at 671-72; *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 793 P.2d 506 (1990). But "if a personal restraint petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice." *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

As set out in the grounds for relief and the facts section of this Petition, trial counsel failed to properly and fully investigate by: not interviewing MG's treating doctors, failing to develop evidence – like what Dr. Rosen presents in his declaration, that would have countered the State's claims of PTSD, and in failing to call the Van Netta and Pagay neighbors. Mr. Fugle received ineffective assistance of counsel which led to his conviction of crimes he did not commit.

Here, it appears that much of these shortcomings stemmed from counsel's initial failure to investigate the case, meaning, the failure to

interview MG's five treatment providers. It appears from the record that trial counsel, especially regarding the damaging PTSD diagnosis opinions from Drs. Tauben and Poole, did not anticipate just how much emphasis the State was going to place on that testimony.

When Dr. Tauben began to answer questions about false memories, questioning the concept, trial counsel asked to be heard outside the presence of the jury. Trial counsel complained about the scope and substance of what the State wanted Dr. Tauben to testify to. RP 732-733 ("Your Honor, my issue, is first of all, he hasn't been designated as an expert… I wasn't given notice of this… You are supposed to give notice to people if you are going to call them for testifying as an expert witness in a field, in any field, number one.")

Trial counsel did not reference having interviewed Dr. Tauben and it is highly unlikely he had:

> What I have been given – first of all, he saw this particular individual four times. <u>I assumed he was going to</u> testify related to seeing this individual, based on not designating him as an expert witness… What I have been provided, which is a CV provided Friday dated February 22 of this year, there is nothing about memory on there.

RP 733 (emphasis added). The court did not let Dr. Tauben say more about false memories.

Counsel should have been prepared to cross-examine the State's witnesses, essentially with every line in Dr. Rosen's report. Each of the studies cited therein, could have been turned into an effective cross-

examination question. It was not enough to let Dr. Poole say that it is "sufficient" for her to base a clinical diagnosis on an interview with a patient. She – and Dr. Tauben – should have been fiercely cross-examined as to all of the standards and studies, cited by Drs. Rosen, Reisberg, and even Whitehill, that undercut the State's case, especially regarding the alleged PTSD and repressed-recovered memories.

Trial counsel should have certainly been preemptively objecting to the PTSD diagnosis opinion of guilt testimony as a first line of defense. A motion to exclude under Frye, would have been the proper second line of defense. Barring that, in a case of this seriousness, with the types of complex forensic psychological issues at play as here, there should have been a third line of defense at the ready. That would have been the assistance of an expert, with opinions like those of Dr. Rosen, or perhaps Dr. Whitehill, or both.

Dr. Reisberg is a memory researcher, but not a PTSD expert, and there are meaningful differences in what Dr. Rosen brings to the analysis of the case. Dr. Whitehill, on the other hand, brings to the case his own experience with malingering and factitious disorders. This viable hypothesis was not explored by trial counsel, not developed, and not presented to the jury. This was a failure to investigate and it was prejudicial.

Mikkel Van Netta testified that she saw MG shake when with Jana, then get better, then shake again. Her parents were subpoeoaned and should have been called for similar reasons. The Pagay family members should have been called for similar reasons. Certainly the State had all the witness it could testify that MG needed a walker or wheelchair or could not do anything under his own power. MG's credibility was at issue, especially when it comes to the validity of his medical concerns. This evidence should have been presented. Mr. Fugle's mother should have been called too, to talk about MG's attachment to Jana, his on/off medical ailments. In a case this thin on evidence, there was no strategic reason to back off from putting these lay witnesses on.

Moreover, since Dr. Whitehill finds this compelling, and reasonable to rely on as a psychologist, the neighbor witnesses who knew MG and his feigned illnesses, should have been called. But, these neighbor witnesses could have offered even more. They could have provided relevant, admissible evidence of MG's bias against his stepdad. If MG really disliked Mr. Fugle, that should have been admitted. His prior statement to Kirk that he wanted to break up Joe and Jana, should have come in as evidence of motive and bias.

It is well-established that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary." *Strickland*, 466 U.S. at 691. "'A lawyer who fails adequately to investigate, and to introduce into evidence [information] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance.'" *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999) (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999)) (alteration in original).

Trial counsel has an affirmative duty to investigate, and the failure to investigate can be ineffective assistance of counsel. *State v. A.N.J.*, 168 Wn.3d 91, 110-12, 225 P.3d 956 (2010); *In re Pers. Restraint of Brett*, 142 Wash.2d 868, 882–83, 16 P.3d 601 (2001); *see also* Am. Bar Ass'n, Standards For Criminal Justice Prosecution Function And Defense Function 4–41(a) (3d 1993) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.").[38] A reasonable investigation "includes investigating all reasonable lines of defense, especially the defendant's most important defense." *Davis*, 152 Wn.2d at 721 (internal quotations omitted).

[38] Available at www.abanet.org/crimjust/standards.

Here, the defense was denial and an assertion of innocence. Trial counsel was ineffective.

VI. CONCLUSION

While Mr. Fugle's Petition raises several meritorious grounds for relief, there is no doubt that the admission of Dr. Tauben and Dr. Poole's opinions that MG was suffering from PTSD secondary to sexual abuse was a serious and prejudicial violation of Mr. Fugle's constitutional right to trial that absolutely requires reversal. The remaining issues are equally meritorious, but if the Court grants a reversal on the right to a jury trial claim, it need not necessarily address the claims pertaining to evidence admissibility under Frye or the prejudice to Mr. Fugle from his trial counsel's ineffective assistance.

For the reasons set forth above, Petitioner Joseph Fugle respectfully requests this Court reverse his conviction and remand to superior court for a new trial, or in the alternative, for a reference hearing.

VII. OATH

I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

DATED this 8th day of October 2019 at Seattle, Washington.

Respectfully submitted,
GORDON & SAUNDERS, PLLC

Mick W. Woynarowski, WSBA #32801
Jason B. Saunders, WSBA #24963
Kimberly N. Gordon, WSBA #25401
Attorneys for Joseph L. Fugle

DECLARATION OF DOCUMENT SERVICE AND FILING

I, Robert J. Gross, state that on this 8th day of October, 2019, I caused the foregoing **Personal Restraint Petition** to be filed in the Court of Appeals, Division II, and served a true and correct copy of the same to be served in the manner indicated below:

[X]	Joseph Fugle DOC #391887 Stafford Creek CC 191 Constantine Way Aberdeen, WA 98520	(x) U.S. Mail ( ) Email ( ) _____

Signed in Seattle, Washington on this 8th day of October, 2019.

X_____
Robert J. Gross
Paralegal

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON, Plaintiff v. JOSEPH LEROY FUGLE Appellant	)))))))	CoA No. _____ INDEX TO PRP APPENDICES

APPENDIX	DATE	DOCUMENT
A	8/18/2016	Judgment and Sentence
B	5/8/2018	Decision of Division II of the Court of Appeals, CoA #49332-2-II
C	10/9/2019	Mandate
D	4/23/2015	"Neighborhood of Joe Fugle" expression of support pending trial
E	8/17/2016	Letters in Support of the Defendant
F	6/3/2016	Email from prosecutor Kara Sanchez to trial counsel Wayne Fricke
G	9/--/2015	Emails between prosecutor and trial counsel re: interviewing State's witnesses
H	10/8/2019	Declaration of Mick Woynarowski
I	6/15/2016	Jury question to the trial court about PTSD diagnoses

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J	10/7/2019	Declaration of Jacqueline Fugle
K	2/11/2015	Summary of Interview of Kirk Van Netta
L	10/8/2019	Declaration of Ronald M. Bone
M	2/17/2015	Summary of Interview of Mikkel Van Netta
N	2/12/2015	Summary of Interview of Lyn Van Netta
O	2/__/2015	Summaries of Interviews with Nina, Dawn, and Robert Pagay
P	8/21/2019	Declaration of Gerald Rosen
Q	6/__/2019	CV of Gerald M. Rosen, Ph.D.
R	9/19/2019	Declaration of Dr. Daniel Reisberg
S	4/15/2019	CV of Daniel Reisberg
T	9/3/2015	Declaration of Mark B. Whitehill, Ph.D.
U	10/4/2019	Declaration of Mark B. Whitehill, Ph.D.
V	9/__/2019	Trial excerpts sent to Mark Whitehill
W	2/__/1999	WACDL Article re: Repressed Memory

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APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOSEPH LEROY FUGLE Defendant. SID: WA27802237 DOB: 06/25/1938	CAUSE NO. 14-1-04016-6 JUDGMENT AND SENTENCE (FJS) [X] Prison [X] RCW 9.94A.712\9.94A.507 Prison Confinement [ ] Jail One Year or Less [ ] First-Time Offender [ ] Special Sexual Offender Sentencing Alternative [ ] Special Drug Offender Sentencing Alternative [ ] Alternative to Confinement (ATC) [ ] Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8 [ ]Juvenile Decline [ ]Mandatory [ ]Discretionary

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 6/17/16 by [ ] plea [X] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	CHILD MOLESTATION IN THE FIRST DEGREE/DV (139)	9A.44.083 10.99.020 9.94A.535 9.94A.535(3)(n)		07/14/02-07/13/03	PCSD 141120495
II	RAPE OF A CHILD IN THE FIRST DEGREE/DV (136)	9A.44.073 10.99.020 9.94A.535 9.94A.535(3)(n)		07/14/03-07/13/07	PCSD 141120495

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COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
III	RAPE OF A CHILD IN THE FIRST DEGREE/DV (136)	9A.44.073 10.99.020 9.94A.535 9.94A.535(3)(n)		07/14/03-07/13/07	PCSD 141120495
IV	RAPE OF A CHILD IN THE SECOND DEGREE/DV (137)	9A.44.076 10.99.020 9.94A.535 9.94A.535(3)(n)		07/14/07-07/13/09	PCSD 141120495

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the SECOND AMENDED information.

[X] The State has pleaded and proved that the crime charged in Count(s) I, II, III & IV involve(s) domestic violence.

[ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

[ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

NONE KNOWN OR CLAIMED

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9	X	149-198 MONTHS		149-198 MONTHS	LIFE $50,000
II	9	XII	240-318 MONTHS		240-318 MONTHS	LIFE $50,000
III	9	XII	240-318 MONTHS		240-318 MONTHS	LIFE $50,000
IV	9	XI	210-280 MONTHS		210-280 MONTHS	LIFE $50,000

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

[ ] within [ ] below the standard range for Count(s) _____.

[ ] above the standard range for Count(s) _____.

[ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [ ] found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

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2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

_____

[ ] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

_____

2.6 [ ] **FELONY FIREARM OFFENDER REGISTRATION.** The defendant committed a felony firearm offense as defined in RCW 9.41.010.

[ ] The court considered the following factors:

[ ] the defendant's criminal history.

[ ] whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

[ ] evidence of the defendant's propensity for violence that would likely endanger persons.

[ ] other: _____

[ ] The court decided the defendant [ ] should [ ] should not register as a felony firearm offender.

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [ ] The court DISMISSES Counts _____ [ ] The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE		
RTN/RJN	$ _____	Restitution to: _____
	$ _____	Restitution to: _____
	(Name and Address--address may be withheld and provided confidentially to Clerk's Office).	
PCV	$ 500.00	Crime Victim assessment
DNA	$ 100.00	DNA Database Fee
PUB	$ _____	Court-Appointed Attorney Fees and Defense Costs
FRC	$ 200.00	Criminal Filing Fee
FCM	$ _____	Fine

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OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

$_____ Other Costs for: _____

$_____ Other Costs for: _____

$ 800.00 TOTAL

[/] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[ ] shall be set by the prosecutor.

[x] is scheduled for _____

[ ] RESTITUTION. Order Attached

[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than $ per month commencing . RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[ ] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of $_____.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[x] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT

The defendant shall not have contact with [redacted] (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence).

[x] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

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4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4a Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days unless forfeited by agreement in which case no claim may be made. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

_____ months on Count _____ _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

_____ months on Count _____ _____ months on Count _____

CONFINEMENT. RCW 9.94A.712. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count I Minimum Term: 210

Count I Minimum Term: 149 Months Maximum Term: Life

Count II Minimum Term 240 Months Maximum Term: Life

Count III Minimum Term 240 Months Maximum Term: Life

The Indeterminate Sentencing Review Board may increase the minimum term of confinement.

Actual number of months of total confinement ordered is: 240 months up to life subject to ISRB

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[ ] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with

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juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

_____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

_____

Confinement shall commence immediately unless otherwise set forth here: _____

_____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: to be calculated by DOC

4.6 [ ] **COMMUNITY PLACEMENT** (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[ ] **COMMUNITY CUSTODY** (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

The defendant shall be on community custody for:

Count(s) _____ 36 months for Serious Violent Offenses

Count(s) _____ 18 months for Violent Offenses

Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

[X] **COMMUNITY CUSTODY** is Ordered for counts sentenced under RCW 9.94A.712, 1507 from time of release from total confinement until the expiration of the maximum sentence:

Count I _____ until _____ years from today's date [X] for the remainder of the Defendant's life.

Count II _____ until _____ years from today's date [X] for the remainder of the Defendant's life.

Count III _____ until _____ years from today's date [X] for the remainder of the Defendant's life.

(B) While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform

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affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit to electronic monitoring if imposed by DOC. The defendant's residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The court orders that during the period of supervision the defendant shall:

[ ] consume no alcohol.

[X] have no contact with: [illegible]

[X] remain [X] within [ ] outside of a specified geographical boundary, to wit: [illegible]

[ ] not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

[X] participate in the following crime-related treatment or counseling services: [illegible]

[ ] undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[X] comply with the following crime-related prohibitions: [illegible]

[X] Other conditions: [illegible]

[ ] For sentences imposed under RCW 9.94A.702, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.

4.7 [ ] WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: [illegible]

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CONFINEMENT. RCW 9.94A.712. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count IV Minimum Term: 210 months Months Maximum Term: Life

Count I Minimum Term: 149 months Months Maximum Term: Life

Count II Minimum Term 240 months Months Maximum Term: Life

Count III Minimum Term 240 months Months Maximum Term: Life

The Indeterminate Sentencing Review Board may increase the minimum term of confinement [X]

COMMUNITY CUSTODY is Ordered for counts sentenced under RCW 9.94A.712, from time of release from total confinement until the expiration of the maximum sentence:

Count I until ____ years from today's date [X] for the remainder of the Defendant's life.

Count II until ____ years from today's date [X] for the remainder of the Defendant's life.

Count III until ____ years from today's date [X] for the remainder of the Defendant's life.

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 RESTITUTION HEARING.

[X] Defendant waives any right to be present at any restitution hearing (sign initials): J.F.

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5.5 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW) where the victim is a minor defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register at the time of your release and within three (3) business days from the time of release.

2. Offenders Who Leave the State and Return: If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three (3) business days after moving to this state. If you are under the jurisdiction of this state's Department of Corrections, you must register within three (3) business days after moving to this state. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within three (3) business days after starting school in this state or becoming employed or carrying out a vocation in this state.

3. Change of Residence Within State and Leaving the State: If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in person signed written notice of your change of residence to the sheriff within three (3) business days of moving. If you change your residence to a new county within this state, you must register with that county sheriff within three (3) business days of moving, and must, within three (3) business days provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address in the new county to the county sheriff with whom you last registered. If you move out of Washington State, you must send written notice within three (3) business days of moving to the county sheriff with whom you last registered in Washington State.

4. Additional Requirements Upon Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within three (3) business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within three (3) days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within three (3) business days prior to arriving at the institution. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within three (3) business days prior to beginning to work at the institution. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within three (3) business days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to

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attend the school. You must notify the sheriff within three (3) business days prior to arriving at the school to attend classes. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within three (3) business days of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within three (3) business days after losing your fixed residence, you must provide signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new countywithin three (3) business days after entering the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within three (3) business days of the entry of the order. RCW 9A.44.130(7).

[X] The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.712./507

5.8 [ ] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: [illegible]

DONE in Open Court and in the presence of the defendant this date: 8/18/16

JUDGE [signature]
Print name _____

Deputy Prosecuting Attorney
Print name: Kara Sanchez
WSB # 35552

Attorney for Defendant
Print name: Wayne Fiedler
WSB # 16530

Defendant
Print name: Joe Fugle

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: _____

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CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 14-1-04016-6

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date:

_____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

_____
Court Reporter

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

IDENTIFICATION OF DEFENDANT

SID No. WA27802237 Date of Birth 06/25/1958
(If no SID take fingerprint card for State Patrol)

FBI No. 729675AH7 Local ID No. CHRI#2014294203S

PCN No. 541286311 Other

Alias name, SSN, DOB:

Race:						Ethnicity:		Sex:	
[ ]	Asian/Pacific Islander	[ ]	Black/African-American	[X]	Caucasian	[ ]	Hispanic	[X]	Male
[ ]	Native American	[ ]	Other: :			[X]	Non-Hispanic	[ ]	Female

FINGERPRINTS

Left four fingers taken simultaneously	Left Thumb

Right Thumb	Right four fingers taken simultaneously

I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk,

Dated: 3/13/16

DEFENDANT'S SIGNATURE:

DEFENDANT'S ADDRESS:

Office of Prosecuting Attorney
930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

X sex offense
____ serious violent offense
____ assault in the second degree
____ any crime where the defendant or an accomplice was armed with a deadly weapon
____ any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed;

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC;

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

X (I) The offender shall remain within, or outside of, a specified geographical boundary: _____
[illegible] CCO

X (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: [illegible]

X (III) The offender shall participate in crime-related treatment or counseling services;

____ (IV) The offender shall not consume alcohol; _____

X (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

X (VI) The offender shall comply with any crime-related prohibitions.

X (VII) Other: [illegible] CCO

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOSEPH LEROY FUGLE, Defendant.	CAUSE NO. 14-1-04016-6 Corrected Filed ~~STIPULATION~~ ON PRIOR RECORD AND OFFENDER SCORE (~~Plea of Guilty~~)

Upon the entry of a plea of guilty in the above cause number, charge CHILD MOLESTATION IN THE FIRST DEGREE/DV ; RAPE OF A CHILD IN THE FIRST DEGREE/DV ; RAPE OF A CHILD IN THE FIRST DEGREE/DV ; RAPE OF A CHILD IN THE SECOND DEGREE/DV, the defendant JOSEPH LEROY FUGLE, hereby stipulates that the following prior convictions are HIS complete criminal history, are correct and that HE is the person named in the convictions. The defendant further stipulates that any out-of-state convictions listed below are equivalent to Washington State felony convictions of the class indicated, per RCW 9.94A.360(3)/9.94A.525:

ALL CURRENT CONVICTIONS, THIS CAUSE NUMBER

Count	Crime	Date of Sentence	Sentencing Court (County & State)	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
I	CHILD MOLEST 1ST DEGREE/DV		PIERCE, WA	07/14/03 - 07/13/03	A	V	A	CT 1: N/A CT 2: 3 CT 3: 3 CT 4: 3	FELONY
II	RAPE OF CHILD 1ST DEGREE/DV		PIERCE, WA	07/14/03 - 07/13/07	A	V	A	CT 1: 3 CT 2: N/A CT 3: 3 CT 4: 3	FELONY
III	RAPE OF CHILD 1ST DEGREE/DV		PIERCE, WA	07/14/03 - 07/13/07	A	V	A	CT 1: 3 CT 2: 3 CT 3: N/A CT 4: 3	FELONY
IV	RAPE OF CHILD 2ND DEGREE/DV		PIERCE, WA	07/14/07 - 07/13/09	A	SV	A	CT 1: 3 CT 2: 3 CT 3: 3 CT 4: N/A	FELONY

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[ ] The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

OTHER CURRENT CONVICTIONS, OTHER CAUSE NUMBERS (if any)
[X] None Known or Claimed, or:

Crime	Date of Sentence	Sentencing Court	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
NONE KNOWN								

PRIOR CONVICTIONS INCLUDED IN OFFENDER SCORE (if any)
[X] None Known or Claimed, or:

Crime	Date of Sentence	Sentencing Court	Date of Crime	A or J Adult Juv	Type of Crime	Class	Score by Ct	Felony or Misdemeanor
NONE KNOWN								

The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9	X	149-198 MONTHS		149-198 MONTHS	LIFE, $50,000
II	9	XII	240-318 MONTHS		240-318 MONTHS	LIFE $50,000
III	9	XII	240-318 MONTHS		240-318 MONTHS	LIFE $50,000
IV	9	XI	210-280 MONTHS		210-280 MONTHS	LIFE $50,000

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

The defendant further stipulates:

1) Pursuant to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), defendant may have a right to have factors that affect the determination of criminal history and offender score be determined by a jury beyond a reasonable doubt. Defendant waives any such right to a jury determination of these factors and asks this court to sentence according to the stipulated offender score set forth above.

2) That if any additional criminal history is discovered, the State of Washington may resentence the defendant using the corrected offender score without affecting the validity of the plea of guilty;

3) That if the defendant pled guilty to an information which was amended as a result of plea negotiation, and if the plea of guilty is set aside due to the motion of the defendant, the State of Washington is permitted to refile and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution;

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4) That none of the above criminal history convictions have "washed out" under RCW 9.94A.360(3)/9.94A.525 unless specifically so indicated. If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation.

Stipulated to this on the 18 day of August, 2016.

KARA E. SANCHEZ
Deputy Prosecuting Attorney
WSB # 35502

JOSEPH LEROY FUGLE

WAYNE C PRICKE
WSB # 16530

cad

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOSEPH LEROY FUGLE Defendant.	CAUSE NO. 14-1-04016-6 ORDER FOR BIOLOGICAL SAMPLE DRAW FOR DNA IDENTIFICATION ANALYSIS

THIS MATTER having come on regularly before the undersigned Judge for sentencing following defendant's conviction for:

[X] A felony sex offense, which occurred after July 1, 1990, as defined by RCW 9.94A.030, to wit: Child Molestation 1° Rape of a Child 1 + 2, and/or

[ ] A violent offense, which occurred after July 1, 1990, as defined by RCW 9.94A.030, to wit: _____, and/or

[ ] Any felony offense for which a conviction was obtained after July 1, 2002, to wit: _____.

Pursuant to RCW 43.43.754, therefore, it is hereby ordered that the defendant provide a biological sample to be used for DNA identification analysis as follows:

PLACE TO BE TESTED

[ ] (Out-of-Custody) Report immediately to the Pierce County Sheriff's Office located on the 1st Floor of the County City Building, 930 Tacoma Ave S, Tacoma, Washington for a biological sample draw.

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

[ ] (Out-of-Custody) Contact your CCO or other DOC representative to make an appointment to submit a DNA sample. Your sample must be submitted within 60 days of today's date or the date you are released from jail, whichever comes later.

[X] (In-Custody DOC) Submit to the biological sample draw by the Department of Corrections.

[ ] (In-Custody PC Jail) Submit to biological sample draw by the Pierce County Jail.

DONE IN OPEN COURT this 18th August day of July, 2016.

JUDGE

Presented by:

KARA E SANCHEZ
Deputy Prosecuting Attorney
WSB# 35502

Approved as to form:

WAYNE C FRICKE
Attorney for Defendant
WSB# 16557

JOSEPH LEROY FUGLE
Defendant

Office of Prosecuting Attorney
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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JOSEPH LEROY FUGLE, Defendant. Physical description: SEX MALE; RACE WHITE ; EYES BLUE; WEIGHT 165; HEIGHT 5'9"; DATE OF BIRTH 06/25/1958	CAUSE NO. 14-1-04016-6 (Clerk's Action Required) ORDER PROHIBITING CONTACT (Sexual Assault) POST CONVICTION

THIS MATTER having come before the undersigned Judge of the above-entitled court, and the court having considered the records and files herein and being fully advised in the premises, now, therefore,

IT IS HEREBY ORDERED pursuant to Laws of Washington 2006, Chapter 138 (HB 2976) that the defendant shall have no contact, directly or indirectly, in person, in writing, by telephone, or electronically, either personally or through any other person, with:
M.G._____DOB[redacted]

THIS order shall remain in effect for at least two (2) years following the expiration of any sentence or imprisonment and subsequent period of community supervision, conditional release, probation, or parole.

☒ Expires: (Non-Expiring) (Class A)
☐ Expires: Ten (10) years (Class B)
☐ Expires: Five (5) years (Class C)
☐ Expires: Two (2) years (Gross Misdemeanor)
or until modified or terminated by the court. It is further

ORDERED that the Clerk of the Court shall forward a copy of this order on or before the next judicial day to the Law Enforcement Support Agency (LESA), who shall enter it in the computer-based intelligence system available in this state used by law enforcement to list outstanding warrants.

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

WARNINGS TO THE DEFENDANT: Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. You can be arrested even if any person protected by the order invites or allows you to violate the order's prohibitions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.

You can be arrested even if any person protected by this order invites or allows you to violate the order's provisions. You have the sole responsibility to avoid the persons protected or to refrain from violating the order's provisions. Only the court can change this order.

NOTICE TO: Sheriff of Pierce County, Chief of Tacoma Police Department and ALL PEACE OFFICERS:
YOU ARE HEREBY DIRECTED to maintain a record of this Order Prohibiting Contact and enforce its provisions.
PLEASE NOTIFY the Pierce County Prosecuting Attorney's Office, 930 Tacoma Avenue South, Room 946, Tacoma, Washington 98402 (253) 798-7400 if the defendant violates the terms of the Order.

DATED this 18 August day of July, 2016.

Judge

Copy received:

Defendant

Entry noted:

Defense Counsel

Victim: M.G.

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

May 8, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSEPH LEROY FUGLE, Appellant.	No. 49332-2-II UNPUBLISHED OPINION

SUTTON, J. — Joseph L. Fugle appeals his convictions and sentence for one count of first degree child molestation, two counts of first degree rape of a child, and one count of second degree rape of a child. Fugle's convictions resulted from seven years of sexual abuse Fugle committed against his stepson, MG.[1] Fugle argues that the trial court erred by admitting expert testimony regarding delayed disclosure by child victims and by excluding evidence of a list of potential victims MG provided to the police during the investigation. Fugle also argues that the jury's verdicts were not based on sufficient evidence. Finally, Fugle argues that the trial court miscalculated his offender score by failing to consider two of his convictions as the same criminal conduct.

[1] Because MG was a child at the time of the abuse, we use initials to protect his privacy. General Order 2011-1 of Division II, *In Re The Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases* (Wash. Ct. App.).

The trial court did not err by admitting the State's expert testimony or by excluding the list of potential victims provided by MG. And, the jury's verdicts are supported by sufficient evidence. Finally, the trial court did not abuse its discretion by failing to consider two of Fugle's convictions as the same criminal conduct. Accordingly, we affirm.

In his Statement of Additional Grounds (SAG),[2] Fugle claims that he was denied his right to an impartial jury based on several alleged incidents that occurred during voir dire. Because Fugle has failed to include the transcript of the voir dire in the record, we decline to consider Fugle's SAG claim.

FACTS

Between late February and early March 2014, MG, then 18 years old, began having flashbacks about sexual abuse committed by Fugle. The abuse started when MG was age 7 and lasted until MG was age 14. Shortly after MG began having the flashbacks, he reported the abuse to his grandmother, Jeanette Jepson. Then Jepson and MG reported the abuse to MG's mother, Jana Fugle.[3] Shortly after disclosing the abuse to Jepson and Jana, MG suffered a pseudoseizure[4] that resulted in his hospitalization. After MG was stabilized and regained consciousness, he had lost all personal memories except for his memories about the abuse.

---

[2] RAP 10.10.

[3] For clarity, we refer to people with the same last name as Fugle by their first names. We intend no disrespect.

[4] A pseudoseizure is a term for a seizure that occurs without corresponding epileptic brain activity.

MG reported the abuse to law enforcement. The State charged Fugle with one count of first degree child molestation, two counts of first degree rape of a child, and one count of second degree rape of a child. Fugle's jury trial began on May 31, 2016.

I. MG'S TRIAL TESTIMONY

MG testified that he moved into Fugle's home with Jana and his two sisters, when Jana and Fugle married in 2002. MG was seven years old at the time. MG testified that the abuse began shortly after his family moved into Fugle's house. The abuse began with Fugle entering MG's bedroom and fondling MG's genitals. The abuse progressed from fondling to digital penetration, to oral sex, and then to anal sex. MG also recounted some incidents that occurred outside of the home. MG testified about one specific incident that occurred while they were parked in a car. Fugle performed oral sex on MG while MG's four-year-old cousin was in the car with them. The abuse ended when MG was 14 years old.

MG testified that Fugle would make threats about what would happen if MG disclosed the abuse. Fugle threatened to hurt MG. At times, he also threatened to mutilate MG's genitals. Fugle also threatened to hurt or kill Jana and MG's sister.

MG also testified that when he was age 18, he began having flashbacks about the abuse. Fugle had left the house approximately six months before MG began having flashbacks about the abuse. After the flashbacks started, MG called Jepson and told her about his flashbacks. Later, MG also disclosed the abuse to Jana.

Prior to the flashbacks starting, MG had been suffering from numerous medical problems. When MG was age 16, he had to have his gallbladder removed. Then, in October 2012, MG began

suffering body pain, muscle weakness, and chronic fatigue. MG saw numerous medical professionals to diagnose the cause of the pain and fatigue.

In March 2014, MG suffered a pseudoseizure while having a flashback of the abuse. MG was hospitalized for the pseudoseizure. After the pseudoseizure, MG suffered from dissociative amnesia. As a result of the dissociative amnesia, MG lost all memories except his memories of the abuse. MG continued having pseudoseizures for another year and a half. At the time of trial, MG was still suffering from pain and fatigue.

Approximately two months after MG was hospitalized for the pseudoseizures, he decided to report the abuse to law enforcement. MG first met with an advocate from Rebuilding Hope, a sexual abuse advocacy center. The advocate arranged for MG to give an initial statement to law enforcement officers. Then MG gave another statement to Detective Darren Moss, Pierce County Sheriff's Department.

At trial, during cross-examination, Fugle asked MG if he gave Detective Moss a list of the names of other people that MG believed might have been abused by Fugle. The State objected. The trial court sustained the objection and ruled,

> Well, I'm going to sustain the objection to the extent that you're not allowed to ask about what happened to these other people, were they verified or were they not verified. But you can certainly ask him questions about the other people he thought might get hurt and bring out how this letter -- how this list, if he remembers giving one to anyone, developed and who was responsible for it, and that will put into context some of the other things he said about his memory.

III Verbatim Report of Proceedings (VRP) at 199. Then the following exchange took place,

> [DEFENSE]: So [MG], just a few more questions, I hope. Did you provide a list of people you thought might have been abused by [Fugle] to the detective?
>
> [MG]: Yes.
>
> [DEFENSE]: Did you draw up that list?

> [MG]: Yes. I gave them some names.
>
> [DEFENSE]: Was that a list that developed through your memories that came back?
>
> [MG]: The list that I gave them was one and then just a couple possibilities, and Jana gave them some.
>
> . . . .
>
> [MG]: Yes, the ones that I listed to the detectives were of my own.
>
> [DEFENSE]: Okay. And did those names come up from your flashbacks or nightmares?
>
> [MG]: Only the one: Joel.

III VRP at 200-01. In response, the State also asked MG questions about the list,

> [STATE]: Okay. The list of names that you gave the detective, the names that are on there, did those all come from your memory?
>
> [MG]: I only told him a couple. Jana herself went and told the detectives a list of names of people to check out that was separate from my thing, was not --
>
> [STATE]: How did you -- how did you recall who those people were in the interview with the detective if you were still suffering from the dissociative amnesia?
>
> [MG]: Well, Joel, I do actually have from the memory. I can pick him out, he's one of the only people with a face. If I look at a picture, in my memory, that clicks for me. And so I knew Joel, and then I know Joel has a brother, Colby, so I knew those two at least being connected. And I don't think I ever suggested anybody else to the detectives.

III VRP at 208. Fugle also asked MG whether any of the people he has spoken to about the abuse contributed to him continuing to develop his memories about the abuse. MG denied that anyone helped him develop his memories. He also testified that all his memories were based on his own recollections.

II. EXPERT TESTIMONY

Two experts testified at trial. The State called Keri Arnold, a forensic interviewer, to testify about delayed disclosure by child victims. Fugle called Dr. Daniel Reisberg, an expert on memory.

A. KERI ARNOLD

Prior to trial, Fugle filed a motion in limine to exclude Arnold's testimony. Fugle argued that Arnold's testimony should be excluded because the case was about memory rather than delayed disclosure. The State argued that the case contained elements of both because the abuse occurred from the time MG was age 7 until he was age 14 and that this entire period was a period of delayed disclosure. The trial court reserved ruling on the motion in limine until after the State made an offer of proof.

In the State's offer of proof, Arnold testified that she was a forensic interviewer with 13 years of experience. She received training in delayed disclosure because delayed disclosure was common among children who were victims of abuse. She also received training on the reasons why children may delay disclosure. Also, based on her experience interviewing children, she had seen many of the typical reasons that children would delay disclosure. She testified that, in her opinion, if a child is abused for seven years without making any disclosures, that would be considered a delayed disclosure. And, Arnold testified about the difference between script memory and episodic memory and how that effects interviewing children. Arnold also testified that she did not interview MG, nor did she review any facts or documents specific to MG's case.

After the State's offer of proof, the trial court ruled,

> Okay. I'm going to allow the testimony. I do find that it does provide expert information to jurors that they may not otherwise know and that I do believe it's relevant in part to some portions of what is alleged to have happened in this case.

> But by the same token, defense counsel has leeway to point out all of the ways that this testimony is not pertinent to other parts of the case and can also make clear what her scope of expertise is and what it isn't.

IV VRP at 383. The trial court ruled that Arnold was not permitted to testify to anything specific to MG or his case.

Arnold then testified that delayed disclosure refers to "the delay in time between when a first event of alleged abuse occurs and when that abuse is disclosed." IV VRP at 392. She explained that many of the reasons for delayed disclosure are related to fear. The fears include fear of physical harm, fear of not being believed, fear that the offender would go to jail, fear that it will breakup the child's family, or fear the child will lose his or her home. She also testified that many children state that the fear comes from direct threats made by the offender.

Arnold also testified that script memory is a type of memory related to events that happen with great frequency and regularity. When a script memory is developed, it is often difficult to isolate details of one specific instance unless there is something about the specific incident that is significantly different. An episodic memory is related to one specific instance. Many children who suffered prolonged abuse develop a script memory and forensic interviewers often try to pinpoint specific details such as a unique location or a holiday in order to isolate an episodic memory.

B. DR. DANIEL REISBERG

Dr. Reisberg is a psychologist who specializes in the study of memory. Specifically, Dr. Reisberg has worked on a variety of topics related to memory, such as assessing how well people remember, what people remember, and the best ways to find out what people remember. Dr. Reisberg reviewed most of the information related to MG's case and was able to testify to specific

opinions regarding MG's memory. Dr. Reisberg offered opinions on false memories, repressed memories, dissociative amnesia, and flashbacks.

After providing background information about memory, Dr. Reisberg testified to his specific opinions about MG's case. Overall, Dr. Reisberg testified that the facts of this case were not consistent with how memory works. First, Dr. Reisberg testified that because the abuse of MG was repeated over a long period of time and MG continued to be exposed to triggers even after the abuse ended, it was very unlikely that his memories of the abuse would have gone away at any point. Second, Dr. Reisberg opined that MG's memories had an unnatural amount of detail considering that they were supposed to have been suppressed for approximately four years. Third, Dr. Reisberg had never seen a pattern in which a person forgot all positive memories but maintained negative memories. The defense then rested.

III. VERDICT AND SENTENCING

During the second day of deliberations, the jury sent the trial court a note stating that they would not be able to reach a unanimous verdict. The trial court chose not to declare a mistrial at that time and required the jury to continue to deliberate.

After further deliberations, the jury reached a verdict and found Fugle guilty of all four counts. The jury also found that MG and Fugle were family or household members. And the jury found aggravating factors, specifically that Fugle used his position of trust to facilitate the commission of the crime and that the crime was a part of an ongoing pattern of sexual abuse.

At sentencing, the State calculated Fugle's offender score at 9 for each count.[5] Fugle argued that his offender score should be calculated at 6 because the two counts of first degree rape of a child should be counted as the same criminal conduct. The trial court ruled that based on *State v. French*,[6] the two counts were not the same criminal conduct. The trial court calculated Fugle's offender score at 9. The trial court imposed a standard range sentence. Fugle appeals his convictions and sentence.

ANALYSIS

I. EXPERT TESTIMONY

Fugle argues that the trial court erred by admitting Arnold's testimony because MG's credibility was not put in issue. We disagree.

The trial court has the discretion to permit expert testimony tending to corroborate the testimony of a witness whose credibility is in issue. *See State v. Holland*, 77 Wn. App. 420, 427, 891 P.2d 49 (1995). "An expert's opinion that it is not uncommon for a sexual abuse victim to delay reporting the abuse is appropriate when . . . the credibility of the victim has been put in issue." *Holland*, 77 Wn. App. at 427; *see also State v. Petrich*, 101 Wn.2d 566, 575-76, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988).

Fugle incorrectly asserts that Arnold's testimony was inadmissible because MG's credibility was not challenged specifically on the basis of his delayed disclosure. However, the

[5] Fugle had no prior criminal history. However, under RCW 9.94A.525(17)—all current and prior sex offenses count for three points when the conviction is for a sex offense.

[6] *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006).

law does not require that a witness's credibility be challenged specifically on the basis of delayed disclosure before expert testimony about delayed disclosure may be admitted to corroborate the witness's story. *See Petrich*, 101 Wn.2d at 574-75. As our Supreme Court has explained,

> Petitioner also correctly assumes that corroborating testimony intended to rehabilitate a witness is not admissible unless the witness's credibility has been attacked by the opposing party. *State v. Froehlich*, 96 Wn.2d 301, 635 P.2d 127 (1981). An attack on credibility is not found merely by evaluating cross[-] examination tactics; several factors taken in conjunction may show a challenge to credibility. *See Froehlich*, at 305. In particular cases, the credibility of a witness may be an inevitable, central issue. *See e.g., United States v. Arroyo-Angulo*, 580 F.2d 1137, 1146-47 (2d Cir.), *cert. denied*, 439 U.S. 913 (1978). Cases involving crimes against children generally put in issue the credibility of the complaining witness, especially if defendant denies the acts charged and the child asserts their commission. An attack on the credibility of these witnesses, however slight, may justify corroborating evidence.

Petrich, 101 Wn.2d at 574-75. Therefore, the admissibility of Arnold's testimony turns on whether MG's credibility was challenged generally, not on whether Fugle specifically argued that the delayed disclosure undermined MG's credibility.

Fugle admits his cross-examination was meant to demonstrate "that [MG] had no memory, and the memories that he did have were false memories based in fiction, not fact." Br. of Appellant at 10. As the State correctly points out, this admission demonstrates that MG's credibility was at issue, even if his credibility was not challenged specifically on the basis of the delayed disclosure. Because MG's credibility was at issue, it was appropriate for the trial court to admit expert testimony if that testimony corroborated MG's testimony. *See Petrich*, 101 Wn.2d at 574-75.

Here, MG testified that four years after the abuse ended, when he was age 18, he began having memories about the abuse. MG began to recall that Fugle's threats kept MG from reporting the abuse during the seven years that the abuse was occurring. And, Fugle specifically cross-

examined MG about Fugle's threats. Arnold's testimony, that delayed disclosure was common among child victims and delayed disclosure was often the result of direct threats by the offender, corroborated some of MG's testimony.

Because MG's credibility was at issue and Arnold's testimony corroborated some of MG's testimony, the trial court did not abuse its discretion by admitting Arnold's testimony. Accordingly, the trial court did not err by admitting Arnold's testimony.

II. LIMITING CROSS-EXAMINATION

Next, Fugle argues that the trial court erred by limiting the scope of MG's cross-examination. The trial court did not abuse its discretion by limiting the scope of cross-examination to the existence of the list rather than the accuracy of the list. Accordingly, the trial court did not err.

The right to confront witnesses is guaranteed by both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Lile*, 188 Wn.2d 766, 781-82, 398 P.3d 1052 (2017). "Cross-examination is the 'principal means by which the believability of a witness and the truth of his testimony are tested.'" *Lile*, 188 Wn.2d at 782 (quoting *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). But the right to cross-examine witnesses is not absolute and the scope of cross-examination lies within the trial court's discretion. *Lile*, 188 Wn.2d at 782; *see also State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (right to confront witnesses is "limited by general considerations of relevance").

We review the trial court's decision to limit the scope of cross-examination for a manifest abuse of discretion. *Lile*, 188 Wn.2d at 782. A manifest abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *Lile*, 188

Wn.2d at 782. As our Supreme Court has explained, under the manifest abuse of discretion standard, "We need not agree with the trial court's decision for us to affirm that decision. We must merely hold the decision to be reasonable." *Lile*, 188 Wn.2d at 782.

Here, the trial court allowed Fugle to cross-examine MG on whether he created the list of other persons that he "thought might have been abused" by Fugle, the list came from his memories, and he actually remembered the people on the list. III VRP at 200. Now, Fugle also argues that he should have been permitted to cross-examine MG regarding the *accuracy* of the list,

> Given that the question was restricted, the defense was unable to impeach the witness regarding his other allegations that were no less suspect than the allegations involving himself and Mr. Fugle. In a situation where all created memories were suspect, it was even more important that the defense was afforded the opportunity to question the accuracy of [MG]'s memory in order to impeach the credibility of the very memory.

Br. of Appellant at 12. In other words, in addition to cross-examining Fugle regarding the existence of the list and whether the list came from MG's memories—memories of people he claimed he had forgotten—Fugle wanted to explore the accuracy of the substantive information that MG provided on the list.

The State argues that this line of questioning would be inappropriate because MG did not testify that he remembered that the people on the list were abused. Because MG only testified that he provided a list of people that he thought may have been abused, and MG did not testify as to why he thought the people might have been abused, questions related to the accuracy of the list would not have been relevant to impeach MG's testimony.

Under ER 401, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable

than it would be without the evidence." Because MG never testified that he remembered anyone on the list was actually abused by Fugle, questioning MG about the accuracy of the list would not make the accuracy of his other memories more or less probable. Therefore, questions regarding the accuracy of the list were not relevant to impeach MG's testimony. Thus, the trial court did not abuse its discretion by limiting the scope of MG's cross-examination to relevant evidence.

Because a defendant has no constitutional right to cross-examine a witness on irrelevant or otherwise inadmissible evidence, Fugle's right to confront witnesses was not violated by the trial court's ruling limiting the scope of MG's cross-examination. Therefore, the trial court did not err by limiting the scope of MG's cross-examination.

III. Sufficiency of the Evidence

Fugle argues that the jury's verdicts are not supported by sufficient evidence because the verdicts are "based on nothing more than rank speculation and guess work." Br. of Appellant at 14. MG's testimony is sufficient evidence to support the jury's verdicts. Therefore, Fugle's sufficiency of the evidence argument fails.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, the evidence permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn therefore. *Salinas*, 119 Wn.2d at 201. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations

are for the trier of fact and are not reviewable on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Fugle primarily bases his sufficiency of the evidence argument on *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992). In *Alexander*, Division One of this court held that there was insufficient evidence to support the jury's verdicts because "the inconsistencies in [the victim's] testimony regarding when the abuse occurred, and whether [some of the] incidents occurred at all, were extreme." 64 Wn. App. at 158. Fugle even admits that the court's holding in *Alexander* was based on the extreme inconsistencies in the victim's testimony. Br. of Appellant at 14 ("the alleged victim's testimony was so filled with extreme inconsistencies"; "the alleged victim directly contradicted herself"). *Alexander* does not dictate reversal in this case. Here, MG's testimony was substantially consistent. Accordingly, there are not "extreme" inconsistencies that require reversal of Fugle's convictions.

Fugle also argues that there was insufficient evidence to support the jury's verdicts because his expert testified that MG's accounts of how he recovered his memories about the abuse and his dissociative amnesia were inconsistent with how memory functions. However, this is an issue of credibility for the jury to determine. By finding Fugle guilty on all charges, it is clear that the jury found MG's account credible and the jury did not find Dr. Reisberg's testimony credible—or at least, the jury did not find Dr. Reisberg's testimony compelling enough to undermine MG's testimony. We do not review credibility determinations or reweigh evidence on appeal. *Camarillo*, 115 Wn.2d at 71. Accordingly, Fugle's argument, that there was insufficient evidence to support the jury's verdicts because his expert's testimony undermined MG's testimony, fails.

The jury found Fugle guilty of first degree child molestation, first degree rape of a child, and second degree rape of a child. To prove first degree child molestation, the State must prove the offender had "sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083. To prove first degree rape of a child, the State must prove that a person had "sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073. And to prove second degree rape of a child, the State must prove that a person had "sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076. After thorough review of the record, it is clear that MG's testimony is more than sufficient to establish the elements of the charged crimes. Accordingly, viewed in the light most favorable to the State, there was sufficient evidence to support the jury's verdicts.

IV. Same Criminal Conduct

Finally, Fugle appeals his sentence because he argues that the trial court should have found that the two counts of first degree rape of a child were the same criminal conduct. The trial court did not abuse its discretion by finding that the two counts of first degree rape of a child were not the same criminal conduct. Therefore, Fugle's offender score was properly calculated at nine, and we affirm his sentence.

We will not disturb the trial court's same criminal conduct determination absent an abuse of discretion or misapplication of the law. *State v. Chenoweth*, 185 Wn.2d 218, 220-21, 370 P.3d 6 (2016). Under this standard, if the record supports only one conclusion regarding whether crimes

constitute the same criminal conduct, the sentencing court abuses its discretion in arriving at a contrary result. *State v. Aldana Graciano*, 176 Wn.2d 531, 537-38, 295 P.3d 219 (2013). But if the record adequately supports either conclusion, the matter is within the trial court's discretion. *Graciano*, 176 Wn.2d at 538.

Whenever a person is sentenced for two or more current crimes, each crime will be counted separately in his or her offender score unless the trial court makes a finding of fact that two or more of the offenses constituted the same criminal conduct. RCW 9.94A.589(1)(a). Offenses are the "same criminal conduct" when the offenses "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

Fugle argues that it "is apparent that the court must conclude that the conduct occurred during the same time period and against the same victim." Br. of Appellant at 15. Fugle bases this assertion on the fact that the two charges were charged over the "same time period." Br. of Appellant at 15. Fugle's argument lacks a basis in the law. To be considered the same criminal conduct, the offenses must occur at the same time, not during the same time period. RCW 9.94A.589(1)(a). Accordingly, "the same time period" is not sufficient to demonstrate that the charges were the same criminal conduct.

And here, the trial court based its same criminal conduct finding on *State v. French*. In *State v. French*, the defendant was convicted of multiple counts of rape of a child for raping his step-daughter over a five-year period. *State v. French*, 157 Wn.2d 593, 597, 141 P.3d 54 (2006). On appeal, the defendant argued that the rapes should have been considered the same criminal conduct for calculating his offender score. *French*, 157 Wn.2d at 612. The trial court correctly

found that the rapes were not the same criminal conduct because the rapes occurred over several years and "were sequential, not continuous or simultaneous." *French*, 157 Wn.2d at 613-14.

French would not control the trial court's same criminal conduct finding if the jury found that the two counts of first degree rape of a child were based on a single incident that included both oral and anal sex. However, as Fugle recognizes, "Given that the testimony included statements that the conduct was ongoing and included the same acts both together and separate, it is within the court's discretion to find that the conduct was the same for sentencing purposes." Br. of Appellant at 16. Because the acts also occurred on separate occasions, it was within the trial court's discretion to find that the two counts of first degree rape of a child were not the same criminal conduct.

Here, it was within the trial court's discretion to find that the two counts of first degree rape of a child were not the same criminal conduct, therefore the trial court did not abuse its discretion by finding that the two counts of first degree rape of a child were not the same criminal conduct. *Graciano*, 176 Wn.2d at 538. Because the trial court did not abuse its discretion by finding that the two counts of first degree rape of a child were not the same criminal conduct, the trial court properly calculated Fugle's offender score at nine. Accordingly, we affirm Fugle's sentence.

SAG

In his SAG, Fugle claims that his convictions should be reversed based on events that occurred during jury selection. Specifically, Fugle claims that he was denied his right to an impartial jury because some of the jurors had already decided that he was guilty before trial began because of the nature of the charges. He also alleges that some jurors stated that they did not

believe the State would incur the time and expense of a trial if the defendant was not guilty. And Fugle asserts that, although these jurors were challenged for cause, the trial court denied the challenges. However, because the voir dire was not part of the record on appeal, we decline to consider Fugle's SAG claim.

We will not review arguments that rely on matters outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995). Under RAP 9.2(b), it is the appellant's responsibility to designate those portions of the record that are necessary for us to review the appellant's arguments. RAP 9.2(b) also provides,

> A verbatim report of proceedings provided at public expense should not include the voir dire examination or opening statement unless appellate counsel has reason to believe those sections are relevant to the appeal or they are requested by the client for preparing a Statement of Additional Grounds.

However, this provision of RAP 9.2(b) does not apply here because there was no order of indigency entered in this case and the verbatim report of proceedings was not prepared at public expense. Here, Fugle was responsible for arranging for the transcription of all portions of the verbatim report of proceedings necessary for us to review the issues raised on appeal, but Fugle specifically arranged for the verbatim reports of proceedings to be transcribed without including voir dire. Because Fugle has failed to provide us with the record necessary for review of the issues he raises regarding voir dire, any facts regarding voir dire are outside the record. Therefore, we decline to consider the issues Fugle raises regarding voir dire.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

SUTTON, J.

We concur:

JOHANSON, P.J.

BJORGEN, J.

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LEROY JOSEPH FUGLE, Appellant.	No. 49332-2-II MANDATE Pierce County Cause No. 14-1-04016-6

The State of Washington to: The Superior Court of the State of Washington
in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on May 8, 2018 became the decision terminating review of this court of the above entitled case on October 3, 2018. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 9th day of October, 2018.

Derek M. Byrne
Clerk of the Court of Appeals,
State of Washington, Div. II

Britta Ann Halverson
Pierce County Prosecuting Attorney
930 Tacoma Ave S Rm 946
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Wayne Clark Fricke
Attorney at Law
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Hon. Kathryn J. Nelson
Pierce County Superior Court Judge
930 Tacoma Ave South
Tacoma, WA 98402

Joseph Leroy Fugle
DOC#391887
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

APPENDIX D

Neighborhood of Joe Fugle

April 23, 2015

To whom it concerns,

Understanding that Joe has been accused of accusations of sexual misconduct by his stepson M[redacted], we as his neighbors have no apprehension of him moving back into his house that has been vacated by Jana and that Joe has cleaned up. Joe has always been an upstanding neighbor and has never shown any signs of misconduct to any of our children or any other child. If anything Joe has only been supportive and caring towards our families. Joe has owned his home longer than most of us and we are looking forward to having him back in the neighborhood. This letter is to show not only our support for Joe, but hoping that it will allow Joe to move back into his own home.

Name Print	Signature	Address	Phone
Madelyn Van Natta	Madelyn Van Natta	2012-105th St East Tac	(253)720-5464
Rick Van Natta	Rick Van Natta	2012 105th St E Tac	253-720-5462
Mikkel Van Natta	Mikkel Van Natta	2012 105th St E Tac	(253)312-6810
Dawn Pagay	Dawn Pagay	2015 105th St E Tac	253-686-4347
Bob Pagay	Bob Pagay	2015 105th St E. Tac	253-686-1189
Kim Harper	Kim Harper	205 105th St E Tac	253-261-3974
Wayne LeDoux	Wayne LeDoux	2016 105th St E	253-686-3255
Grey LeDoux	[illegible]	2016 105th St E	253-324-7415
Rose Rodriguez	Rose Rodriguez	2101 105th St E	253 534-3162
Glen White	Glen White	2107 105th St E	
CLIFFORD J. RIO	Clifford J. Rio	2112 105th St. E	253-535-0849
Edwin J. Bowmer	Edwin Bowmer	2108 105th St. E	253-681-1020
PENNY BOWMER	Penny Bowmer	2108-105th St. E.	253-307-3301
Mark Klumpenhower	Mark Klumpenhower	2102 105th St. E.	253-538-1104
Robert Eckles	Robert Eckles	2117 105th St E	253-228-7694

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, v. JOSEPH LEROY FUGLE, Defendant.	)	NO. 14-1-04016-6 LETTERS IN SUPPORT OF THE DEFENDANT

ATTACHED hereto are letters in support of the defendant for consideration at Sentencing.

RESPECTFULLY SUBMITTED this 17 day of August, 2016.

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

By: _____
Wayne C. Fricke
WSB #16550

HESTER LAW GROUP, INC., P.S.
1008 SOUTH YAKIMA AVENUE, SUITE 302
TACOMA, WASHINGTON 98405
(253) 272-2157

From: Devin Wally <dwally2@msn.com>
Date: Tuesday, August 16, 2016 10:44 AM
To: Wayne Fricke <wayne@hesterlawgroup.com>
Subject: Joe Fugle

Hello I'm Joe's nephew and I feel I need to say a bit about the accusation that has been made against him mainly the timeframe. As a former member of the Mormon religion I thought I would bring up the topic of Seminary. Seminary is when young WOMEN go and do bible studies before they go to school. In order to get to the study groups they would need a ride. My uncle would drive my cousin to these studies. The studies would take place in the early mornings in which Joe would drop off Andrea and proceed to work. My uncle has only ever tried to provide for his family and his friends. He has never touched me or my brother in any inappropriate manner and in my opinion incapable of such an action. For what it's worth [redacted] has never approved of Joe and Jana at any point of them being together and has stated to me numerous times his hatred towards Joe. Thank you for you time and all the best.
Devin Walsworth

Sent from my Verizon, Samsung Galaxy smartphone

On 8/16/16 8:13 AM, "Matt Wolford" <wolford10@gmail.com> wrote:

>To whom it may concern:
>
>My name is Matt Wolford and I am writing today to defend the character
>of Joe Fugle. My wife Ashley has known Joe for 15+ years, since she
>moved next door to Joe as a young teenager. I met Joe in 2005 after
>meeting my wife and would run into Joe often while visiting my
>in-laws. In fact, in 2012, my wife and I moved in with my in-laws
>next door to Joe and during that period of time, Joe would frequently
>stop over to say hello. I never felt uncomfortable around Joe and I
>never experienced any behavior from Joe that would even slightly be
>considered aggressive. Joe was always very kind, polite, and would
>always take the time to ask how things are going. My wife and I were
>happy to invite Joe to our wedding in Maui and we are thankful he
>attended. I would describe Joe as a great neighbor, someone that I
>could trust to look out for us and someone that would lend a helping
>hand when one was needed.
>
>Please take my word, someone who has known Joe for over a decade, that
>Joe is kind, peaceful, and far from aggressive.
>
>Thank you for your time.
>
>Matt Wolford

On 8/15/16 8:51 PM, "Dawn Pagay" <imhis3A@aol.com> wrote:

PGPAO-19-0464-Gross_Fugle: PRR 000181

>My name is Dawn Montgomery and I've lived next door to Joe Fugle since
>February 1999. Joe has always been a kind gentle personality. I've
>never heard him raise his voice in all the years I've know him. The
>neighborhood kids all liked Joe, he had cartoons or computer games for
>them to play with as his door was always wide open in the warm weather
>for all his neighbors and friends to come in and out. Joe is a peace
>maker not a fighter. He is a kind and giving person and what is
>happening to him is wrong and disgusting. I hope the truth sets him free.
>
>Sincerely,
>Dawn Montgomery
>
>Sent from my iPhone

On 8/15/16 7:49 PM, "Bob Pagay" <bpagay06@aol.com> wrote:

>To whom it may concern, my name is Robert Pagay. I have been Joe Fugles
>nieghbor since 1999. In all these years, I have never seen or
>witnessed Joe loose his temper. I have known him to be a calm and level
>headed person. we have been friends since the day my family and I moved
>in next door to him. Our friendship was such that we both had an open
>door policy with each other. We would just knock on the door as we
>entered each others homes.
>
>Robert Pagay
>
>Sent from my iPad

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, v. JOSEPH LEROY FUGLE, Defendant.	)	NO. 14-1-04016-6 SUPPLEMENTAL LETTER IN SUPPORT OF THE DEFENDANT

ATTACHED hereto is a letter in support of the defendant for consideration at Sentencing.

RESPECTFULLY SUBMITTED this 17th day of August, 2016.

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

By: _____
Wayne C. Fricke
WSB #16550

HESTER LAW GROUP, INC., P.S.
1008 SOUTH YAKIMA AVENUE, SUITE 302
TACOMA, WASHINGTON 98405
(253) 272-2157

David W. Montgomery, Psy.D.
Clinical Psychologist # 1389

Village Office Park
Moss Bay Counseling
3805 108th Ave NE #120
Bellevue, WA 98004
425-827-5095

RE: Joe Fugle

To whom it may concern,

For the interest of the court I have willingly offered to write this letter of support for Joe. Though I am a licensed psychologist in the State of Washington specializing in the treatment of children and adolescents, I am writing primarily as a friend and neighbor of the Fugle family and Joe in particular. Given this, I have not performed any psychological testing upon Joe though my ongoing knowledge of this man and his family may provide some experienced and predictive knowledge of Joe at a personal level. The following comments are based upon limited knowledge but are believed to be accurate.

I have known Joe as the son of Larry and Jackie Fugle for almost sixteen years, their family having a second home in the Cle Elum area no more than one hundred feet away from my residence. Besides having been very good friends for this entire period of time, the Fugues have a history of being highly involved in community projects, organizational meetings and have hosted a number of social gatherings. Generally speaking there is not a more highly appreciated and regarded family in the Wagon Wheel Development. Though my contact with Joe has been less than that with his parents, I have engaged in a number of community and recreational activities with Joe. He has always been a friendly and jovial man who took pleasure in community involvement, social opportunities and helping others. I have also followed Joe's deep commitment and involvement in the Dragon Boats racing program and have met him at these events on occasion.

The allegations that have been put upon Joe are certainly troubling. Obviously by this writing, I have no information that would support the accusations or even the propensity for such actions. Rather, the information I and others in our community have suggest that Joe is a responsible and

positive member of our community as well as an engaged and caring step father. Admittedly I have limited knowledge of Joe's marriage and family yet all indicators have suggested that he stepped into a broken family which benefitted from Joe's involvement both from a emotional and financial perspective. Personally I have only witnessed Joe as a step father on several occasion but at these times his communication with them appeared non-remarkable.

There are very few ways to predict the future. In psychology we rely largely on presentation, assessment tools and most importantly the past. Thus to predict what a person is most likely to do next we look to what they have done before. Thus the alcoholic or thief will likely re-offend in the future without some form of intervention, either mandatory or voluntary. Though I am no historian of Joe's life these abuse allegations appear to have no predictable warning indicators. Joe to my knowledge, or to anyone's knowledge I know, has never been accused of or even considered as capable of committing such abusive actions.

I have been informed that a professional, a psychologist possibly, has suggested that the abuse Joe has been accused of probably occurred before. I am throughly dismayed by such a formalization without any previous reports or accusations being leveled at Joe. Such an allegation or even the hypothesis is both reckless and professionally unethical. I have also been informed that the accusing young man's own sister has referred to his allegations as complete "bullshit." In addition he noted on at least one occasion that he "would do anything he needed to get Joe out of his family." Further, supposedly the accuser and Joe had a miserable relationship from the beginning of the marriage and if we are to follow the expected path to molestation then the Joe would have spent a significant amount of time "grooming" the child for the later abuse. On the contrary this typical grooming behavior did not appear to happen.

In summary, the factors involved in this case are extremely troubling. The allegations that could incarcerate Joe for a significant amount of time and change his life forever are seemingly being based upon the report of a very hurt and angry young man. The degree to which Joe has played a role in this hurt and anger seems to be unclear except by the young man's report. Given the reported lack of evidence that supports the accusations and also the statement from a family member that this is being fabricated in a retaliatory action for some reason, I would hope the court would defer this decision until significant evaluative measures can be completed upon all involved.

Sincerely,

Dr. David W. Montgomery 8/16/2016

APPENDIX F

Subject: medical witnesses

Date: Friday, June 3, 2016 4:32:38 PM Pacific Daylight Time

From: Kara Sanchez

To: Wayne Fricke

Wayne,
In the interest of trying to make things go efficiently, the doctors that, at this moment, I plan on calling are Susan Poole, Justin Steffener, Joy Jones (did the psych consult when MG was hospitalized, her records can be found at bates 142-151), John Daniel (from the Dove Medical Clinic, bates 98-110), and David Tauben (UW Pain Clinic, various pages in bates 241-288).

This doesn't mean I won't find that I want someone else to also testify, but this is my plan at this point. Also, I think the first doctor I would call is Susan Poole on Tuesday, depending on how things go schedule-wise on Monday.

You didn't get back to me about setting up interviews with any of them, but if you feel you need it, the court may give us a little time before each testifies.

Thanks.

Kara E. Sanchez
Deputy Prosecuting Attorney
Special Assault Unit
Pierce County Prosecutor's Office
930 Tacoma Ave. S. Room 946
Tacoma, WA 98402
(253) 798-2669
(253) 798-3601 Fax

APPENDIX G

Kara Sanchez

From: Wayne Fricke <Wayne@hesterlawgroup.com>
Sent: Tuesday, September 08, 2015 1:32 PM
To: Kara Sanchez
Subject: Re: Fugle

Let's get the new date and then set interviews.

Sent from my iPhone

On Sep 8, 2015, at 1:30 PM, "Kara Sanchez" <ksanche@co.pierce.wa.us> wrote:

> I think we have to move it, if you want to have time to get the counseling records. The detective has to retrieve all of them, then the court has to review them.
>
> Kara E. Sanchez
> Deputy Prosecuting Attorney
> Special Assault Unit
> Pierce County Prosecutor's Office
> 930 Tacoma Ave. S. Room 946
> Tacoma, WA 98402
> (253) 798-2669
> (253) 798-3601 Fax
>
> **From:** Wayne Fricke [mailto:Wayne@hesterlawgroup.com]
> **Sent:** Tuesday, September 08, 2015 1:30 PM
> **To:** Kara Sanchez
> **Subject:** Re: Fugle
>
> Is this trial date being moved ?
>
> Sent from my iPhone
>
> On Sep 8, 2015, at 1:28 PM, "Kara Sanchez" <ksanche@co.pierce.wa.us> wrote:
>
> > You might want to provide your availability for the following weeks, since we're unlikely to accomplish everyone's interview in one afternoon.
> >
> > Kara E. Sanchez
> > Deputy Prosecuting Attorney
> > Special Assault Unit
> > Pierce County Prosecutor's Office
> > 930 Tacoma Ave. S. Room 946
> > Tacoma, WA 98402
> > (253) 798-2669
> > (253) 798-3601 Fax
> >
> > **From:** Wayne Fricke [mailto:Wayne@hesterlawgroup.com]
> > **Sent:** Tuesday, September 08, 2015 1:27 PM

To: Kara Sanchez
Subject: Re: Fugle

Half hour to an hour, maybe more, depending on what they say.

Sent from my iPhone

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> We need to know how long you will need with each.
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> **From:** Wayne Fricke [mailto:Wayne@hesterlawgroup.com]
> **Sent:** Tuesday, September 08, 2015 12:49 PM
> **To:** Kara Sanchez
> **Cc:** Lisa Wanner
> **Subject:** Re: Fugle
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> I can do anytime next week, with the exception of Monday morning. I would like to speak with them in person.
>
> Wayne C. Fricke
>
> Attorney
>
> Hester Law Group, Inc., P.S.
> 1008 S. Yakima Ave., Suite 302
> Tacoma, WA 98405
> office (253) 272-2157
> fax (253) 572-1441
> email wayne@hesterlawgroup.com
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>
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From: Kara Sanchez <ksanche@co.pierce.wa.us>
Date: Thursday, September 3, 2015 1:49 PM
To: Wayne Fricke <wayne@hesterlawgroup.com>
Cc: Lisa Wanner <lwanner@co.pierce.wa.us>
Subject: RE: Fugle

Wayne,
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To: Kara Sanchez
Subject: Fugle

Kara,

I am unsure as to the expected testimony from all of the doctors, but I would like to interview each of them. Thanks.

Wayne

Wayne C. Fricke
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Kara Sanchez

From: Kara Sanchez
Sent: Tuesday, September 08, 2015 3:35 PM
To: Wayne Fricke
Subject: RE: Fugle

The victim, at least the last I knew on Friday, would sign a medical release for the records, but only to allow the court to review them first. The court granted that request. So, the detective is supposed to be getting the signed waivers and then gathering the records to turn over to the court. Casey said that method was ok with him. The victim I believe will be signing waivers for the three counselors from here in WA:
Dr. Justin Steffener
Dr. Susan Poole
Dr. Wendy Rowlings

Dr. Dana Harding is in Texas, and he may be signing a waiver for her as well, but, those records are maintained in Texas and if he chooses not to, our courts don't have the authority to order them released.

I believe he is also signing a waiver for someone he saw in 2006, Ms. Fugle mentioned that he did see one back then, I think she phrased it as "anger issues" victim was having with the defendant. I'm not sure who that counselor is, but I got the impression from Ms. Fugle – who was present in court on Friday – that he was going to sign a waiver as to that counselor, too.

The Court agreed to review the records in camera to determine what portions are relevant. We set a hearing for this Friday to see how much progress has been made with getting the waivers and the records themselves. As of now, I haven't heard from the detective on that status.

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From: Wayne Fricke [mailto:Wayne@hesterlawgroup.com]
Sent: Tuesday, September 08, 2015 3:08 PM
To: Kara Sanchez
Subject: Re: Fugle

He did, but it was unclear to me what the status of the records is.

Wayne C. Fricke

Attorney

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From: Kara Sanchez <ksanche@co.pierce.wa.us>
Date: Tuesday, September 8, 2015 1:31 PM
To: Wayne Fricke <wayne@hesterlawgroup.com>
Subject: RE: Fugle

Also, seeing as how we are now getting counseling records, I am adding Drs. Justin Steffener and Susan Poole to my witness list, as well as a doctor at UW who saw the victim for pain management,
David J. Tauben.

Did Casey tell you what the outcome of Friday's hearing was?

Kara E. Sanchez
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To: Kara Sanchez
Cc: Lisa Wanner
Subject: Re: Fugle

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Wayne C. Fricke

Attorney

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Cc: Lisa Wanner <lwanner@co.pierce.wa.us>
Subject: RE: Fugle

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Kara Sanchez

From: Kara Sanchez
Sent: Tuesday, September 08, 2015 1:38 PM
To: Lisa Wanner
Subject: RE: Fugle

Also, Wayne now says let's wait until we get a new trial date (hearing in this Friday) before we schedule them.

Kara E. Sanchez
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(253) 798-2669
(253) 798-3601 Fax

From: Lisa Wanner
Sent: Tuesday, September 08, 2015 1:34 PM
To: Kara Sanchez
Subject: RE: Fugle

Do you have any contact info. for the ones I listed?

From: Kara Sanchez
Sent: Tuesday, September 08, 2015 1:28 PM
To: Lisa Wanner
Subject: FW: Fugle

Kara E. Sanchez
Deputy Prosecuting Attorney
Special Assault Unit
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Subject: RE: Fugle

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Subject: Fugle

Kara,

I am unsure as to the expected testimony from all of the doctors, but I would like to interview each of them. Thanks.

Wayne

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Kara Sanchez

From: Kara Sanchez
Sent: Tuesday, April 26, 2016 8:52 AM
To: Wayne Fricke
Subject: RE: Fugle

Yes. If your phone has 3-way conferencing abilities, what's usually easiest is if you contact him, then conference me in.

Kara E. Sanchez
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Pierce County Prosecutor's Office
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From: Wayne Fricke [mailto:Wayne@hesterlawgroup.com]
Sent: Tuesday, April 26, 2016 8:51 AM
To: Kara Sanchez <ksanche@co.pierce.wa.us>
Subject: Re: Fugle

I will contact him today to find out if those days work. Are you intending on a phone interview?

Wayne C. Fricke

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From: Kara Sanchez <ksanche@co.pierce.wa.us>
Date: Tuesday, April 26, 2016 8:49 AM
To: Wayne Fricke <wayne@hesterlawgroup.com>
Subject: RE: Fugle

How about next Tuesday, 10:30 or later, or anytime in the afternoon, or Wednesday, same times. I could do Monday afternoon if he isn't available any other time, but I would rather not.

If I don't start trial on the 5th, then I will have more availability between May 9 and May 20.

Thanks.

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From: Wayne Fricke [mailto:Wayne@hesterlawgroup.com]
Sent: Tuesday, April 26, 2016 7:49 AM
To: Kara Sanchez <ksanche@co.pierce.wa.us>
Subject: Re: Fugle

I will arrange a time—give me some available days and times and we can do a joint conference.

Wayne C. Fricke

Attorney

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From: Kara Sanchez <ksanche@co.pierce.wa.us>
Date: Monday, April 25, 2016 12:38 PM
To: Wayne Fricke <wayne@hesterlawgroup.com>
Subject: Fugle

Wayne,
Is Dr. Reisberg ok with me calling to speak with him without you, or does he want you present also? My availability these days is limited, as I am now assistant team chief and the days are pretty full. I don't know if you wanted to interview any of the doctors that saw the victim, but if so, we're running out of time. I plan to add all of the doctors whose records we most recently received to the witness list.

Thanks.

Kara E. Sanchez

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Cc: Lisa Wanner
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APPENDIX H

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON, Plaintiff v. JOSEPH LEROY FUGLE Appellant	)))))))	CoA No. _____ DECLARATION OF MICK WOYNAROWSKI

DECLARATION OF MICK WOYNAROWSKI

I, Mick Woynarowski, declare as follows:

1. I am an attorney with the Law Offices of Gordon & Saunders, PLLC. Our firm represents Joseph Fugle in this Personal Restraint Petition.
2. In the course of our work on this matter, I have obtained and reviewed records from trial counsel Mr. Wayne Fricke (who was also Mr. Fugle's appellate counsel), records from the State, obtained by way of a PRA request, and the trial court record. I

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1000 Second Ave., Ste.2220
Seattle, WA 98104

have also spoken with witnesses and others who have familiarity with the case and the issues presented herein.

3. I am the primary author of the Petition, which alleges, in part, that Mr. Fugle's constitutional right to counsel was violated when his trial counsel rendered ineffective assistance. In the course of my work on the case, I have had communications with Mr. Fricke, about his prior representation of Mr. Fugle.

4. I had asked Mr. Fricke to consider writing a declaration pertaining to the case. He has not done so to date. He indicated to me that he will likely write a declaration of his own at some point, but cannot do so on the short notice we are working with. (I emailed Mr. Fricke about this only on 9/20/19.) I certainly understand and respect that decision.

5. We have met in person and we have exchanged some emails about the case as well. We met on 9/25/19 at Mr. Fricke's office.

6. I explained, in general, what issues I was going to raise on Mr. Fugle's behalf, and why. I provided trial counsel with the three new expert reports, a summary of PTSD-related testimony, and some selected caselaw.

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7. I do not intend to speak for Mr. Fricke and would certainly rather that he submit his own declaration to the court. But, because of my obligation to certify the petition, and also because of my ethical responsibilities, I feel obligated to communicate to the Court the general gist that I understand Mr. Fricke's position to be regarding several of the points I am making on Mr. Fugle's behalf. It is certainly likely that Mr. Fricke if testifying about this or writing a declaration of his own, would say something more or even different.
8. Regarding the question of whether Mr. Fricke interviewed the five treatment providers referenced in the September 2015 and June 3, 2016 emails Mr. Fricke exchanged with the prosecutor, Ms. Kara Sanchez. I have not come across any documents indicating that the treatment providers were interviewed and Mr. Fricke has not shared any with me. Based on the June 3, 2016 email, the trial court record, and an email I received from Dr. Tauben just today, I believe that a fair review of the record shows that Mr. Fricke did not interview these witnesses.
9. However, on this point, Mr. Fricke had emailed me the following, which I feel obligated to share with the Court: *"As it relates to*

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Seattle, WA 98104

interviewing all of the treatment providers, I cannot say for certain whether I interviewed them prior to taking the stand, either in whole or in part. I have a vague recollection that I did, but cannot say for sure. Regardless, I was not necessarily surprised by their respective testimonies."

10. This morning I received an email response from one of MG's treatment providers, Dr. David Tauben, whom we had asked about the possibility that he was interviewed by Mr. Fricke before trial. Dr. Tauben reports: "*I have only vague recall of this testimony, and none of any meetings with Mr Fricke, and my calendar schedule review shows only my trip to Pierce county courthouse. I had a brief meeting with "Nina" just prior to my appearance. I do not recall any details of this conversation. Ordinarily I would have had some discussion prior with the legal representatives that would have been on my calendar, which I cannot now find, and if so would very likely have submitted med-legal billing. I'll ask my business office to see if such was done; so, please confirm relevant dates or at least a range of them (my courtroom appearance shows on my schedule to have been on June 13th, 2016.)*"

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Seattle, WA 98104

11. Regarding the issue of a potential violation of Mr. Fugle's constitutional right to a jury trial, which I argue occurred when Dr. Tauben and Dr. Poole testified about the PTSD diagnosis secondary to sexual abuse, Mr. Fricke wrote: "*As it relates to the testimony from the providers regarding something similar to "rape trauma syndrome", I would have to review there testimony to see the specifics, something I cannot do in the limited period of time. Obviously, I sought to limit any testimony that supported the credibility of the accuser. To the extent that I failed to object to specific testimony and State v. Black or any other cases indicate that my objections should have been made, then so be it. I will say that I am not convinced that Black goes as far as you believe it does."*

12. Regarding the issue of a Frye hearing, being potentially helpful to Mr. Fugle, Mr. Fricke wrote: *"I did not ask for a Frye hearing because the State identified no expert witness testimony on repressed memory."*

13. Regarding the issue of lay witnesses – the neighbor Van Netta and Pagay families – Mr. Fricke wrote: *"As far as me not calling lay witnesses during trial, the only thing that I can say is that*

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1000 Second Ave., Ste.2220
Seattle, WA 98104

they were all subpoenaed, but I made a decision during trial not to call them. It was a strategic decision."

14. Mr. Fricke has not explained to me what was behind the decision to change strategy and not call as witnesses those who had been subpoenaed.

15. Last, I understand that Mr. Fricke takes issue with what Dr. Whitehill has written in his 2019 declaration. As I understand it, Mr. Fricke was surprised, in part about the opinions that Dr. Whitehill's 2019 declaration includes things that Dr. Whitehill did not talk to Mr. Fricke about in 2016.

16. Again, I do not mean to speak for him on this, but in order to make sure this Court has an understanding of what I have been informed of, I felt obligated to include this. One of the things that Mr. Fricke has said: *"I accepted his opinion and moved on. It surprises me greatly with all of the information that he was provided, that he mentioned nothing even remotely similar to what he now states. I would have loved to have it and would have certainly listed him as an expert witness."* As I understand it, Mr. Fricke made the decision not to use Dr. Whitehill in the case because – Mr. Fricke says – Dr. Whitehill's assessment of

GORDON & SAUNDERS, PLLC
1000 Second Ave., Ste.2220
Seattle, WA 98104

the case back in 2016 favored the State's claims that MG was a victim of sexual abuse. On this point, Mr. Fricke wrote he "*probably did not ask him if there may be other causes, more than anything because I certainly would not want to have an expert come in and waiver as to his testimony.*"

17. I was not privy to their past communications and have no record of thereof. I do not know how either Dr. Whitehill or Mr. Fricke would talk about this if the question was explored more fully, for example at a reference hearing. It is ultimately trial counsel's decision whether to prepare a witness declaration in a prior case. I undoubtedly have not captured all of Mr. Fricke's thoughts and memories on this, but felt that sharing this information is the best course of action for the time being.

18. My understanding is that Mr. Fricke still believes, as he expressed at sentencing, that this may be a case of actual innocence. I respect that given the timeframe we are under, and the serious nature of the case he has chosen not to execute a declaration at this time.

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Seattle, WA 98104

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

SIGNED in Seattle, Washington, this 8th day of October, 2019.

Mick Woynarowski
WSBA #32801

GORDON & SAUNDERS, PLLC
1000 Second Ave., Ste.2220
Seattle, WA 98104

mick@gordonsaunderslaw.com

From: David J. Tauben <tauben@uw.edu>
Sent: Tuesday, October 8, 2019 7:32 AM
To: Kimberly Gordon
Cc: mick@gordonsaunderslaw.com; Feon Jawort
Subject: Re: Time sensitive -- question about prior case in which you testified

Ms Gordon,
I have only vague recall of this testimony, and none of any meetings with Mr Fricke, and my calendar schedule review shows only my trip to Pierce county courthouse. I had a brief meeting with "Nina" just prior to my appearance. I do not recall any details of this conversation. Ordinarily I would have had some discussion prior with the legal representatives that would have been on my calendar, which I cannot now find, and if so would very likely have submitted med-legal billing. I'll ask my business office to see if such was done; so, please confirm relevant dates or at least a range of them (my courtroom appearance shows on my schedule to have been on June 13th, 2016.)

Sincerely,
David Tauben, MD
Chief, Division of Pain Medicine
University of Washington

On Oct 4, 2019, at 9:59 AM, Kimberly Gordon <kim@gordonsaunderslaw.com> wrote:

> Dr. Tauben,
>
> I am reaching out to you about a 2016 Pierce County Superior Court case in which you gave testimony, *State v. Joseph Fugel.* My associate, Mick Woynarowski, and I are post-conviction counsel for Mr. Fugel. We are trying to assess the representation he received by the attorney he had at the time. That attorney's name was Wayne Fricke.
>
> I first want to emphasize that I am not seeking any information about Mitchell Gilbert, the patient that you treated (and about whom you testified.) My sole question is this: do you recall whether Mr. Fricke interviewed you prior to your giving testimony at trial? If it occurred, this interview could have happened in the days or weeks before trial, or immediately before your testimony. If the interview occurred it is likely\, that the prosecutor would also have been present. Our current review of the case records suggests that no such interview occurred. We are trying to assess whether that conclusion is correct.
>
> This is time sensitive in that we have pleadings due next Wednesday. We would like to be as certain as possible about our conclusions before we file this pleading, in order to avoid unnecessary work by everyone involved at a later date. As such, we appreciate your time and information. I can be reached by e-mail or at 206-340-6034.
>
> Very Truly Yours,
>
> Kim Gordon
>
> <image001.png>

APPENDIX I

INFORMATION REQUST

1) WHO first diagnosed MG with PTSD
2) WHO FIRST diagnosed MG with DISSACOCIATIVE AMNESIA.
3) WHO Referred MG TO WENDI RAWLINGS.
4) Request a list of All the witnesses and their TITLES.

TONY TIX
Tony Tix
PRESIDING JURROR
JUNE 15th 2016

APPENDIX J

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON, Plaintiff v. JOSEPH LEROY FUGLE Appellant	)))))))	CoA No. _____ DECLARATION OF JACQUELINE A. FUGLE

DECLARATION OF JACQUELINE FUGLE

I, Jacqueline Fugle, declare as follows:

1. I love my son Joseph "Joe" Fugle very much. He is a good man and I know that he is innocent of what he was convicted of. What M.G. accused him of did not happen.
2. My son had told me that before this accusation, M.G. talked about wanting to break up Joe and Jana. He wanted them apart. I think that M.G. did not want Jana and Joe to be together. Accusing Joe got rid of him for good.
3. Joe and Jana separated when they started divorcing, but they kept on talking and seeing each other. Joe moved out of their house in Tacoma and was living with his father Larry and me in our house in Puyallup. Jana would come over to our house to

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see Joe there. They would go out to dinner together. This happened more than once.

4. When we would stay at our cabin by Cle Elum, Jana would come and meet with Joe at our house. It sure seemed like they might get back together. M.G. must have known that.
5. M.G. is smart. I think he was capable of making a false accusation against Joe to get what he wanted. When Joe was defending his case, I told this to his lawyer, Mr. Wayne Fricke.
6. Jana was a nice person, but she always seemed to baby M.G. She also seemed to be sick a lot herself, as did M.G.
7. It seemed to me that when M.G. wanted attention, he would say he was feeling sick or bad, or act crippled. It seemed like he wanted to get attention from his mother or grandmother. When he would come over to the cabin, he stuck with Jana, and did not want to go play with the other kids or his sister.
8. There were times when I saw M.G. acting sick when he wasn't. I remember him coming home to us with crutches, over one Thanksgiving. He sprained his ankle in September, but still supposedly needed crutches. One of the other kids in the house took M.G.'s crutches away from him, to tease him or something

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like that. M.G. ran – got up and ran – after that kid like there was nothing wrong with him. I was in the kitchen, M.G. ran from out of the rec room to the front door.

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

SIGNED in Seattle, Washington, this 7th day of October, 2019.

Jacqueline Fugle

Jacqueline A. Fugle

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Seattle, WA 98104

APPENDIX K

Summary of Interview

Re: Joseph Leroy Fugle
Cause#: 14-1-04016-6
by Ronald M. Bone, Private Investigator
date drafted February 11, 2015

Interview of Kirk VanNetta

Kirk VanNetta, age 57, was telephonically contacted on his cellular telephone, number 253-720-5462 on February 11, 2015 by Investigator Bone regarding his knowledge of Joseph Fugle. He was aware Fugle had been charged with sexually abusing his stepson, M[redacted] G[redacted] (currently 19 years old). The alleged sexual abuse purportedly occurred when G[redacted] was seven years old and continued until he was 14 years old during the years between 2002 and 2009. VanNetta understood G[redacted] recently disclosed the sexual abuse and Fugle was charged in the fall of 2014. VanNetta was informed Bone was an investigator for Fugle's defense attorney, Wayne Fricke, and thereafter, provided the following information.

Kirk VanNetta and his family lived next door to Joseph Fugle and his family for 11 years. Fugle moved out of his house about a year or more ago and Fugle's wife and the children recently moved to Texas. Kirk and his wife have four children, a son currently 13 years old, a daughter currently 16 years old, another daughter currently 20 years old and a son currently 22 years old. Fugle's family consisted of his wife, Jana Fugle, and Joseph and Jana's adopted daughter, Cortney, who would currently be about 15 or 16 years old, and M[redacted] and an older daughter Andrea, who would be about 23 years old. M[redacted] and Andrea were Jana's children from a prior marriage. The two families' children were constantly in and out of one another's houses as they grew up.

Kirk works as a Chaplain. He currently works for MultiCare Health Services in Pierce County and has for the past 12 years. Kirk would be described as an extremely open person who immediately engages people he meets in conversation. In his daily work and in his daily life he tries to connect with people at a deeper level than just simply engaging them in superficial conversation. Kirk views himself as a "good judge of people" and believes he has the ability to "read people" quite well.

When Joseph Fugle, whom Kirk called Joe, lived next door, Joe had "an open door policy." Which meant that Kirk would simply walk right into Joe's house if he knew Joe was home without first knocking on the door. Kirk also had an open door policy, which met Joe would also simply walk right into the VanNettas' home if he knew anyone was home.

When VanNeatts first moved next door to Joe, Cortney was quite young and Kirk watched her grow up. The VanNettas viewed Cortney as one of their family members, treating her like a daughter. As an example, if she did not like what was for dinner at her house, Cortney would come over to the VanNettas' house to eat supper with them.

Kirk VanNetta

M[redacted] would have been about eight years old when Kirk met him. It seemed to Kirk that M[redacted] was at the VanNettas' house almost daily for the first few years they lived next to each other. Cortney certainly was. Kirk did not have much interaction with the oldest daughter, Andrea. The VanNettas also had a foreign exchange student living with them at one time. She and M[redacted] seemed to be close friends. Kirk described M[redacted] as an extremely bright person and a straight 'A' student when he applied himself. Kirk commented, "He (M[redacted]) was a really smart kid." Kirk also viewed M[redacted] as smart enough to be able to manipulate others.

Kirk only met M[redacted]s biological father, Dana Gilbert, a few times. M[redacted] did tell Kirk that he did not necessarily want to be around his father. M[redacted] did not explain why he did not want to be with his dad, but Kirk simply had the impression they were not very close to one another.

Jana told the VanNettas about the allegations against Joe. Kirk immediately ridiculed the notion that Joe could have been sexually abusing M[redacted] over a seven-year period without anyone knowing it was occurring. He confronted Jana and told her he did not believe the allegations. Kirk told Jana that over the years he had often caught M[redacted] lying about one thing or the other, but he had never once thought Joe had told him anything that was untrue. Jana did not want to hear Kirk's protest and they have not spoken about the allegations since.

Kirk does not view M[redacted] as trustworthy. He wholeheartedly believes Joe was a trustworthy person. Kirk commented that if it was M[redacted]'s word against Joe's word, anyone who knew both of them would know Joe was telling the truth.

Since the families so frequently interacted with one another, and both families had open door policies at their houses, Kirk was certain Joe would not have been able to lead some type of secret life as a pedophile. In addition, if M[redacted] was being harmed, almost daily apparently, M[redacted] would not have been able to remain quiet about something of such magnitude. M[redacted] surely would have said something to one of Kirk's children or even inadvertently said something that revealed his deep dark secret if the sexual abuse was occurring.

After learning about the allegations, Kirk never spoke to M[redacted] about them. He also never spoke to Cortney about the allegations.

Kirk was aware M[redacted] has claimed he was suffering from amnesia. Kirk has never witnessed any bouts of amnesia by M[redacted], meaning any time Kirk has been around M[redacted], his memory and recall has seemed normal. As an example, Kirk had not seen M[redacted] for quite some time, but when he walked into M[redacted]'s house one day, M[redacted] glanced up and immediately said "hi Kirk."

Kirk was suspicious of M[redacted]s claim of amnesia. At the same time, he was aware that M[redacted] ate a very poor diet. When M[redacted] was in about the 10th grade, he became a vegan or vegetarian of some sort. From what Kirk saw, M[redacted]s diet was so lacking nutrients that M[redacted]s health could have deteriorated. Around the same time, M[redacted] was beginning to

spend the majority of his time indoors and apparently in his bedroom. Kirk understood M[redacted] was constantly playing video games on a computer he had in his bedroom. M[redacted] was proficient at computers.

When M[redacted] was in about the eighth grade, Jana and Joe asked Kirk to speak with him in his capacity as a Chaplain. M[redacted] had been seeing a series of different counselors and none of the counseling sessions appeared to be working out. M[redacted] did have some issues that Kirk was helping him work through, but it always seemed to Kirk that M[redacted] did not want to change his behavior, he only wanted other people to change the way they interacted with him. M[redacted] was going through a period of time where he seemed to be "mad at everyone and everything." M[redacted] felt that anything going wrong in his life was someone else's fault.

M[redacted] had told Kirk that he did not like Joe. M[redacted] openly talked about trying to break up Joe and Jana's marriage. Whenever Kirk attempted to learn exactly why he wanted to break up their marriage, M[redacted] could not provide specific details. Kirk had the impression M[redacted] "simply didn't like Joe" for no good reason and he did not like his mom being married to Joe.

It was not uncommon for one of Kirk's kids to tell him M[redacted] was lying or exaggerating something about Joe to Jana. One of Kirk's children would come from visiting at M[redacted]s house when M[redacted] Joe and the Kirk's child were the only ones there. When Jana would come home, M[redacted] would tell Jana that Joe had "been mean to me" or make similar comments. Kirk's child would tell him that there was no way Joe could have done anything to M[redacted] when Jana was gone for a short period of time, because Kirk's child was there the entire time and Joe had not even spoken to M[redacted], let alone done anything to him. It seemed M[redacted] enjoyed creating conflict between Jana and Joe.

Kirk arrived home from work one day when there was an ambulance next door. Kirk went over to see what was happening and M[redacted] was on the floor "shaking." M[redacted] was claiming to be having a "seizure." Kirk immediately thought it appeared to him that M[redacted] was faking the seizure. The EMTs (emergency medical technicians) felt the same way and indicated their opinion to Kirk. M[redacted] was taken to a hospital by the EMTs, but Kirk was certain that was simply the medical professionals following protocol as opposed to a true medical need.

Kirk of course has been inside Joe's house numerous times. He finds it nearly physically impossible for Joe to have secretly sexually abused M[redacted] for seven years without anyone else in the household suspecting something was going on. It was not a large home and it would be hard to imagine activity occurring in a bedroom without people wondering what was happening. Since M[redacted] would lie to Jana and say Joe had been mean to him, Joe purposefully tried to not be alone in the house with M[redacted]. If M[redacted] was going to be the only one home, Joe would come over to the VanNettas' house or invite one of the VanNettas children or Kirk over to watch television with him.

Kirk would often see Joe in the morning while they were both leaving for work. He never saw or sense anything awry in Joe's demeanor. Kirk was the type of person that focused a little

more intensely on people's behavior because of his work and believes he would have noticed even slight changes in Joe's behavior if Joe was secretly an active pedophile and certainly would have noticed any change in M[redacted]s behavior if he was being abused to the extent he has now claimed.

Kirk was aware M[redacted] was using a walker to get around and has seen him use a walker from his house to Jana's car. Jana has says she has to "provide 24 hour-care" to M[redacted] Kirk has asked Jana if M[redacted] needs around the clock attention, it may be better if he was in a nursing home or similar care facility. Kirk has the impression Jana wants to be viewed as the mother who gives all her time to her son, M[redacted] even if it was not the right thing to do for his wellbeing. [redacted]

Kirk was a bit suspect of M[redacted]s need for constant care. He remembered one time when he and his wife were visiting Joe and Jana one evening. M[redacted] would have been in his early teens, before he began claiming he suffered from so many different health problems. The four of them were sitting around talking and enjoying each other's company when M[redacted] sent Jana a text message via their cell phones. The message read "I'm hungry." Jana left the group and made M[redacted] something to eat and took it up to him in his room. Kirk knew M[redacted] was more than capable of getting himself something to eat if he was hungry, but Jana did it for him. [redacted]

Kirk wanted to make it perfectly clear, that in his opinion, based on over a decade of observation and interaction with Joe and M[redacted] he absolutely did not believe Joe ever sexually abused or harmed M[redacted] in anyway. [redacted]

Kirk hopes that with M[redacted] now living in Texas, and having his mom, Jana, all to himself, without Joe being around, if M[redacted] may actually recant and admit his allegations against Joe are untrue. M[redacted] may view the move to Texas as "winning the war," meaning getting his mom away from Joe, and may acknowledge what his has accused Joe of doing was a lie.

[redacted]

APPENDIX L

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON, Plaintiff v. JOSEPH LEROY FUGLE Appellant	)))))))	CoA No. _____ DECLARATION OF RONALD M. BONE

DECLARATION OF RONALD M. BONE

I, Ronald M. Bone, declare as follows:

1. I am a Washington state licensed private investigator and have been one since 2013. I am a retired Special Agent of the Federal Bureau of Investigation, after a 23-year career.
2. I was hired by Joseph Fugle's trial counsel, Mr. Wayne Fricke to conduct discrete investigative tasks, mainly interviewing potential witnesses. Mr. Fugle's post-conviction counsel asked me to review my records on the case and I have done so.
3. At Mr. Fricke's request, I interviewed Mr. Fugle's neighbors, the Van Nettas (Kirk, Lyn, Mikkel) and the Pagays (Dawn, Robert, Nina). I wrote reports of what I asked them and what they told me. I gave the reports to Mr. Fricke.

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4. If when I interview a witness it appears to me, they are exaggerating or obviously motivated or biased, or if I believe that I am being lied to, I make it my practice to note this and alert the lawyer I am working for.
5. When I interviewed the members of the Van Netta and Pagay families, I did not get any such impression.
6. After I gave him the interview reports, Mr. Fricke had me serve subpoena to Van Netta and Pagay witnesses to appear at trial on Mr. Fugle's behalf. I did not discuss with Mr. Fricke any decisions he made later regarding calling, or not calling, any witness for trial.
7. I have worked on many cases in my career. This is one that stands out. For example, I still remember that the Van Netta and Pagay families talked about seeing the complainant MG behaving in ways that were not consistent with him being as sick as he was supposed to be. The Van Netta and Pagay family members were also clear that they were close to the Fugles and never saw anything in their time as neighbors that would lead them to believe that the allegations against Mr. Fugle were true.

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Seattle, WA 98104

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

SIGNED in Tacoma, Washington, this 7th day of October 2019.

Ronald M. Bone

Ronald M. Bone

GORDON & SAUNDERS, PLLC
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Seattle, WA 98104

APPENDIX M

Summary of Interview

Re: Joseph Leroy Fugle
Cause#: 14-1-04016-6
by Ronald M. Bone, Private Investigator
date drafted February 17, 2015

Interview of Mikkel VanNetta

Mikkel "Mikki" VanNetta, age 22, was telephonically contacted on her cellular telephone, number 253-312-6810 on February 17, 2015 by Investigator Bone regarding her knowledge of Joseph Fugle. She was aware Fugle had been charged with sexually abusing his stepson, M[redacted] G[redacted] (currently 19 years old). The alleged sexual abuse purportedly occurred when G[redacted] was seven years old and continued until he was 14 years old during the years between 2002 and 2009. VanNetta understood G[redacted] recently disclosed the sexual abuse and Fugle was charged in the fall of 2014. VanNetta was informed Bone was an investigator for Fugle's defense attorney, Wayne Fricke, and thereafter, provided the following information.

Mikkel VanNetta lived with her parents and siblings next door to Joseph Fugle and his family, which included Jana (Fugle) and their children and stepchildren, Cortney, M[redacted] and Andrea. Mikkel, who goes by Mikki, was friends with all three of the neighbor children, but mostly "hung out" with M[redacted] Mikki was home-schooled, so she did not attend the same school as Mitchell.

From the time her family moved in next door to M[redacted]s, when Mikki would have been 10 or 11 years old, until M[redacted] was a senior in high school, Mikki commented that she was around M[redacted] "every day." She routinely and regularly went to his house for visits and also spend the night on numerous occasions. Mikki would spent the night as a guest of M[redacted]'s older sister, Andrea, who was about a year older then Mikki, or even as a guest of M[redacted].

Mikki was aware of the allegations M[redacted] has made against Joe from conversations with her mother (Lyn VanNetta). Mikki does not believe Joe ever sexually abused M[redacted]. She cannot understand why M[redacted] would make such a claim, but was confident his accusations were false.

Mikki stopped hanging around M[redacted] about the time he was a senior in high school. She could no longer tolerate his deceitful behavior. M[redacted] did have health issues related to his gallbladder when he was in about the 10th grade. For unexplainable reasons, M[redacted] continued to feign a series of illnesses after that. One possible explanation would be that M[redacted]s mother, Jana, gave M[redacted] so much attention when he was indeed sick, that he wanted to continue to have her nearly undivided attention.

Mikki would be with M[redacted] and everything would seem to be fine with him. M[redacted] would be running around and playing like all the other kids. Just before his mother was to arrive home, M[redacted] would literally climb into bed and act as if he could not move a muscle. When

Mikkel VanNetta

Mikki would ask M[redacted] why he was acting that way, when she knew he was faking, M[redacted] would get upset and walk away. She was never able to get M[redacted] to explain why he was acting the way he was acting. Mikki stopped hanging around with M[redacted] when "he decided he was sick." She commented, "I couldn't put up with his crap (deceit)."

From the first time Mikki met M[redacted], he openly talked about wanting to break up Joe and Jana's marriage. For unexplained reasons, M[redacted] did not want his mother to be married. Mikki would ask M[redacted] directly what Joe had ever done to him and M[redacted] never had any explanation. He would not answer or walk away in a "huff." If Joe was secretly sexually abusing M[redacted] M[redacted] could have easily said something to Mikki or given some indication that there was indeed something very wrong going on, but he never did.

Mikki has come to believe M[redacted] has faked a series of illnesses simply to have his mother's attention directed toward him instead of toward Joe. Mikki witnessed a number of times when Jana would show affection toward Joe and suddenly Mitchell would start "acting out."

There were also countless times when Mikki would have been with M[redacted] for an extended period of time and then Jana would arrive home. M[redacted] would tell Jana that Joe had been "yelling at me all day" or similar statements. Mikki knew without a doubt that Joe had not yelled at M[redacted] at all the entire day, and actually had not even spoken to either Mikki or M[redacted] during the time they were together. Mikki viewed those false allegations against Joe to Jana as M[redacted]s way of creating ongoing tension between Joe and Jana.

Mikki happened to be at a hospital last June, 2014 when M[redacted] and Jana were there. This was during a period of time when M[redacted] was claiming to be suffering from amnesia. Jana walked M[redacted] over to Mikki and introduced him as if M[redacted] would not know who Mikki was because of his amnesia. M[redacted] was standing there "shaking" the way he had in the past. Mikki believes he was faking some kind of ongoing health problem which caused him to shake uncontrollably.

Jana walked away from Mikki and M[redacted] and "miraculously" M[redacted] stopped shaking. Then M[redacted] started asking Mikki about a variety of things that were going on in her life. He asked Mikki about her dog, her husband, her husband's (military) deployment, and their new apartment. Looking back, Mikki was completely incensed by M[redacted]s behavior. Not only was he faking as if he was physically ill, but it was obvious that he was also faking his amnesia.

There was never a time that Mikki was around Joe that she had some suspicions about his behavior. She never walked into her neighbor's house unexpectedly, or came around a corner unannounced, to where she saw or heard anything that caused her to think Joe was leading some kind of secret double life as a child abuser. She actually viewed Joe as a very "open and honest person." Mikki commented that Joe was the kind of person she felt comfortable talking to about most anything.

Mikkel VanNetta

Mikki explained that her younger brother spent a lot of time alone with Joe. Whenever their mother was going shopping, or on some other errand that her little brother did not want to go on, he would ask if he could go over to Joe's house. Mikki saw her brother sitting and watching television with Joe on many occasions or simply following Joe around while Joe did household chores. If Joe had ever harmed her brother, Mikki was certain her brother would have disclosed that information and he never did.

Due to the way M[redacted] treated Joe, Joe actually tried not to spend time with M[redacted] If Jana went on a trip alone, M[redacted] would go stay with his biological father so Joe would not have to be with him at the house. Mikki was convinced M[redacted] was lying about Joe sexually abusing him for as long as seven years.

APPENDIX N

Summary of Interview

Re: Joseph Leroy Fugle
Cause#: 14-1-04016-6
by Ronald M. Bone, Private Investigator
date drafted February 12, 2015

Interview of Lyn VanNetta

Lyn VanNetta, age 49, was telephonically contacted on her cellular telephone, number 253-720-5464 on February 12, 2015 by Investigator Bone regarding her knowledge of Joseph Fugle. She was aware Fugle had been charged with sexually abusing his stepson, M[redacted] G[redacted] (currently 19 years old). The alleged sexual abuse purportedly occurred when G[redacted] was seven years old and continued until he was 14 years old during the years between 2002 and 2009. VanNetta understood G[redacted] recently disclosed the sexual abuse and Fugle was charged in the fall of 2014. VanNetta was informed Bone was an investigator for Fugle's defense attorney, Wayne Fricke, and thereafter, provided the following information.

Lyn VanNetta and her husband, Kirk VanNetta, and their four children, moved in a house next to Joseph Fugle's home, in December 2002. Lyn called Joseph, "Joe." Joe had married Jana (Fugle) in June, 2002, and Joe and Jana had an adopted daughter, Cortney, and Jana's two children from her prior marriage, M[redacted] and Andrea G[redacted] living with them.

Lyn enjoy a very positive relationship with Joe. He was easy-going and very likable. She felt as if she could talk to Joe about any subject, at any time. Lyn had enjoyed a good relationship with Jana. Over the last couple years Lyn has distanced herself from Jana. Lyn does not believe the allegations made by M[redacted] against Joe are true and it has strained her relationship with Jana. For unknown reasons, Jana has apparently believed M[redacted]s absurd allegations that Joe sexually abused him over a seven-year period of time.

Being neighbors with Joe for 12 years, and frequently interacting and socializing with him during that time, Lyn believes she would have suspected something terrible was happening between him and M[redacted], considering how egregious the allegations made by M[redacted] against Joe are. Lyn's four children, especially her two youngest children, currently 13 years old and 16 years old, visited with Joe frequently. Her son, who was four years old when they moved in next door to Joe, never wanted to go shopping with his mother. He would beg Lyn to allow him to stay with Joe while she went shopping. She often allowed her son to stay over at Joe's house when she was gone.

There was never a time she ever suspected something might have happened to one of her children when they were alone with Joe. After the allegations made by M[redacted] became known, Lyn actually questioned her children about their time alone with Joe. The children were old enough to understand exactly what Lyn was asking them and they found her questions laughable. Her youngest two children, currently age 13 and 16 actually said something to the effect of "Are you kidding me mom? Joe?" The entire VanNetta family does not believe

Lyn VanNetta

M[redacted]s allegations against Joe. Each family member have individually and separately been lied to by M[redacted] and they have mentioned it to Lyn.

Cortney came to the VanNettas' house in February 2014 and mentioned something about M[redacted] saying Joe had abused him. Lyn immediately discounted Cortney's statement as just another ridiculous story being told by M[redacted]. Lyn believes the full scope of M[redacted]s claims did not surface for a couple more months.

Lyn noticed from the beginning of Joe and Jana's marriage that M[redacted] did not like Joe. M[redacted] would have been seven or eight years old when they got married and Lyn assumed M[redacted] was not adjusting well to the divorce and then remarriage. The way M[redacted] treated Joe from the very beginning of the marriage was so toxic that Joe actually tried to avoid M[redacted]. Nothing Joe could do would please M[redacted] so Joe simply did not spend a lot of time with him. Joe was never rude, just simply did not seek out activities to do with M[redacted] one-on-one.

Lyn had been with Joe when M[redacted] told Jana that Joe had "hit me." Lyn knew that Joe had not done anything to M[redacted] and M[redacted] was completely making up the allegation. When Jana and Joe were first married, M[redacted] was routinely making up those types of allegations and that was what led Joe to simply avoid being alone with M[redacted].

Lyn believes M[redacted]s claim of suffering from amnesia to be a complete fabrication. In actions and deeds, M[redacted] has not been able to convince Lyn that he suffered from amnesia. Lyn commented, "It's (M[redacted]s amnesia) a joke . . . his way to continue manipulating people."

Lyn provided the following example as a way M[redacted] manipulated others, particularly his mother. Joe had been in a snowmobile accident and was in the hospital. Jana called Lyn during the middle of the night from the hospital and told her that M[redacted] had either fallen and hurt his back or was suffering from a severe back spasm. Lyn went next door and could hear M[redacted] "wailing" as she approached the house. M[redacted] explained that he had been yelling for help for the past two hours. After surveying the situation, Lyn did not believe M[redacted] was hurt.

Lyn went back to her house and got some outdated muscle relaxation pills. The prescription medicine was so old it would have been completely ineffective from a medical perspective. Taking one of the pills would be like "taking a sugar pill." She brought the medicine to M[redacted] and explained it was prescription muscle relaxation medicine and gave it to him. A short time later, when Jana arrived home from the hospital, Lyn went back over to their house. M[redacted] was now walking around as if nothing had ever happened and commented about how well the medicine had worked. Lyn knew from that moment that M[redacted] had faked the entire episode. Lyn believes M[redacted] was upset that his mother was caring for Joe, so he concocted the back pain story to get sympathy for himself.

Lyn VanNetta

Lyn recalled the time M[redacted] was on crutches for six months because of a sprained ankle. It also took M[redacted] nine months to recover from having his tonsils removed.

Jana and Joe did have to work on their marriage. If they were working through a particular issue and were becoming closer to one another, M[redacted] would suddenly suffer some type of episode. M[redacted] would insist on his mother's undivided attention on his problem.

Lyn does not believe Joe ever sexually abused M[redacted]. Lyn commented, "I would still trust Joe with any of my children... but I would never trust M[redacted] about anything."

[redacted]

[redacted]

APPENDIX O

Summary of Interview

Re: Joseph Leroy Fugle
Cause#: 14-1-04016-6
by Ronald M. Bone, Private Investigator
date drafted February 1, 2015

Interview of Nina Pagay

Nina Pagay, age 20, was telephonically contacted on February 1, 2015 by Investigator Bone regarding her knowledge of Joseph Fugle and M[redacted]G[redacted]. She was aware Fugle had been charged with sexually abusing M[redacted] G[redacted] (currently 19 years old), who was his stepson. The alleged sexual abuse purportedly occurred when G[redacted] was 7 years old and continued until he was 14 years old during the years between 2002 and 2009. Pagay understood G[redacted] recently disclosed the sexual abuse and Fugle was charged in the fall of 2014. Pagay was informed Bone was an investigator for Fugle's defense attorney, Wayne Fricke, and thereafter, provided the following information.

Nina lived in the house next door to Joe and Jana Fugle and their children, Andrea Gilbert, who would now be about 23 or 24 years old, M[redacted]G[redacted] age 19 and Cortney Fugle, who would be 14 to 16 years old. Nina lived next door with her parents, Bob and Dawn Pagay.

Nina was fairly close to M[redacted] as they were growing up. At times, they talked and "hung-out" a few times each week. They attended the same middle and high school together. She was in one grade higher than him.

Nina's parents told her about the allegations made by M[redacted] against Joe. Nina's reaction was "not a chance that happened." Often during the alleged seven years that M[redacted] said he was being sexually abused by Joe, Nina saw and talked to M[redacted] daily. Nina was convinced M[redacted] could not have kept a terrible secret like that from her. M[redacted] was a "very dramatic kid." M[redacted] openly talked about anything and everything with Nina. It seemed to her that M[redacted] could not keep any kind of secret, even if he was asked by a close friend to keep something a secret.

M[redacted] did exaggerate stories, but Nina took it as M[redacted]s need to have "drama" in his life. He openly talked about personal things to Nina, such as talking about "girl crushes." M[redacted] often talked about not liking Joe. M[redacted] apparently did not like the fact his mother divorced his biological father and married Joe. She married Joe when M[redacted] was at an age he probably did not fully understand why his parents had gotten a divorce. That at least was always Nina's impression.

Nina never talked to M[redacted] about the allegations. She also never talked to Cortney or Jana about M[redacted]'s allegations. She has not been around any of them in a situation where she could ask them about it.

Nina Pagay

Nina has been Facebook 'friends' with M. Sometime last year, M deleted his Facebook account and started a new one. She believes he deleted his original Facebook profile because it had postings and pictures on it that would contradict some of the claims he has recently been making. M has claimed to have suffered from amnesia. Nina heard he was talking about recognizing particular words but not knowing the meaning of the words. Based on his postings, which he would have typed and placed on his Facebook page, Nina was certain M was not having trouble with his vocabulary. M was the type of kid that always wanted to prove how smart he was to other people so he used "big words."

Nina has also had conversations with M when he talked about things they had done together in the past. There was never any time that M was talking to her when he claimed not to remember events from their past. She believes he was lying about suffering from amnesia. Nina only recently heard about his claim of suffering from amnesia so she never did challenge him about it.

In addition, just like his mother, Jana, M has been claiming he suffered from numerous ailments and afflictions. Jana always seemed to be suffering from some type of unnamed illness and then M began to also always be sick. During high school, M began missing a lot of school because he was out sick. Nina, however, never heard complete explanations of why M was sick. She does not believe M needs to walk with the aid of a walker, as he currently does. For whatever reason, he was faking his inability to walk without assistance.

Knowing that M has accused Joe of sexually abusing him between the ages 7 and 14 years old, Nina believes his accusations are untrue. When M was 10 to 14 years old or so, Nina was often at M's house. During those years, Andrea often kept to herself. It was very common for Andrea to be in her bedroom alone reading. Nina would be with M in his bedroom, right next to Andrea's room. Nina could heard Andrea moving around in her room and she was certain Andrea could heard what was happening next door in M's room. In other words, if Joe was abusing M in M's bedroom, and anyone was upstairs, to include Andrea, they would hear what was happening.

In addition, Nina wondered how M could comfortably invite her to visit him in his room, if that was the place all the absolutely terrible sexual abuse was occurring. It did not make any sense at all to Nina and she believes M was lying about the abuse.

Summary of Interview

Re: Joseph Leroy Fugle
Cause#: 14-1-04016-6
by Ronald M. Bone, Private Investigator
date drafted January 31, 2015

Interview of Robert Pagay

Robert "Bob" Pagay, age 52, was telephonically contacted on January 31, 2015 by Investigator Bone regarding his knowledge of Joseph Fugle. He was aware Fugle had been charged with sexually abusing his stepson, M[redacted] G[redacted] (currently 19 years old). The alleged sexual abuse purportedly occurred when G[redacted] was 7 years old and continued until he was 14 years old during the years between 2002 and 2009. Pagay understood G[redacted] recently disclosed the sexual abuse and Fugle was charged in the fall of 2014. Pagay was informed Bone was an investigator for Fugle's defense attorney, Wayne Fricke, and thereafter, provided the following information.

Bob Pagay and his wife, Dawn Pagay, were next door neighbors to Joseph Fugle, who goes by Joe. When Bob first met Joe, about 15 years ago, Joe lived alone. About 10 years ago, Joe married Jana (Fugle) and Jana and her two children, Andrea Gilbert and M[redacted] G[redacted] moved into Joe's house. Jana and Joe also had a younger daughter, Cortney (Fugle), who they adopted. Cortney was 3 or 4 years old, M[redacted] was 6 or 7 years old and Andrea was the oldest when they moved in next door. Bob and Dawn have a daughter, Nina, around M[redacted]s age. They attended the same school.

Bob and Dawn and Joe and Jana often socialized together. The Fugle's had a hot tub in their backyard and sometimes the couples all socialized around the hot tub. Joe frequently came to Bob's house for coffee in the morning. Most often it would be on a weekend morning when Joe was not working. Bob and Dawn also went to Joe's house for coffee in the morning on occasion. Whenever they would get together for coffee it was unannounced. They did not have to arrange to meet for coffee, they simply just went over to one or the others' house.

Bob was so familiar with Joe and Jana, that he simply lightly knocked on the door and then opened it and went inside. Joe also simply opened Bob's door and announced his presence. Bob actually did not want Joe to knock on the door because Bob and Dawn's dogs would start barking. Bob never went into Joe's house on an unannounced visit and discovered anything whatsoever of an inappropriate nature. Certainly no indication that Joe was sexually abusing or harming M[redacted] in any way.

Bob would often see Joe as both of them left their houses in the morning to head toward work. They would greet each other with a wave or a greeting. Since they would both be on a time schedule, they normally did not stop and talk to each other in the morning.

Bob Pagay

When Bob came to understand the full scope of M's allegations against Joe, that Joe had molested and raped M over a period of seven years, Bob immediately and absolutely did not believe it. Bob never saw anything in Joe's character or behavior that would lead him to believe Joe was capable of committing those crimes. Knowing Joe the way Bob believed he knows him, the allegations "didn't make sense... sounded like a bunch of lies." Bob believes M has fabricated the accusations. Bob never saw M act in any way around Joe that caused Bob to suspect in the slightest that Joe could be secretly molesting M.

Until recently, Jana, M and Cortney remained living next door. Joe had moved out of the house about a year ago. Jana, M and Cortney have since moved to the state of Texas.

Bob was aware M has claimed he suffers from numerous health problems. Bob does not believe M's claims. M walks with a four-wheeled walker, the type often used by an extremely fragile elderly person. Bob has seen Jana help M out of their car and awkwardly give M a "piggyback" into the house. The way M carries on about whatever he claims he was suffering from, it leaves the impression he should be receiving full time care in an assisted living facility. In other words, he acts as if he was so debilitated that he cannot care for himself, but somehow he remains living with his mother.

At other times, Bob has seen M walking about normally. Bob understood that M has told others he suffered amnesia. Bob has not talked to M in quite some time so does not know how M's amnesia has affected him. Bob, however, has serious doubts that M actually has suffered amnesia. Since Bob believes M was lying about the sexual abuse allegations, it was likely he was also lying about suffering from amnesia.

Jana was also often sick. She was sick so often Bob began to assume she was a hypochondriac. He has some doubts about some of the different and varied illnesses she claimed to be suffering from. Bob cannot help but wonder if M was simply copying Jana's behavior.

Summary of Interview

Re: Joseph Leroy Fugle
Cause#: 14-1-04016-6
by Ronald M. Bone, Private Investigator
date drafted January 31, 2015

Interview of Dawn Pagay

Dawn Pagay, age 47, was telephonically contacted on her cellular telephone, number 253-686-4347, on January 31, 2015 by Investigator Bone regarding her knowledge of Joseph Fugle. She was aware Fugle had been charged with sexually abusing his stepson, M[redacted] G[redacted] (currently 19 years old). The alleged sexual abuse purportedly occurred when G[redacted] was seven years old and continued until he was 14 years old during the years between 2002 and 2009. Pagay understood G[redacted] recently disclosed the sexual abuse and Fugle was charged in the fall of 2014. Pagay was informed Bone was an investigator for Fugle's defense attorney, Wayne Fricke, and thereafter, provided the following information.

Dawn Pagay and her husband Bob Pagay lived next door to Joseph Fugle when Fugle lived alone in the house next to them. She knows Joseph Fugle as 'Joe.' The Pagays have known Joe for at least 14 years. Approximately 10 years ago, Joe got married to Jana (Fugle). Jana and her two children, Andrea Gilbert and M[redacted] G[redacted] along with Cortney (Fugle), who Joe and Jana adopted, moved into Joe's house.

Dawn became friends with Jana. In addition, Dawn and Bob's daughter, Nina, was close in age to M[redacted]. Nina and M[redacted] attended the same schools and were close to one another, on and off, as they grew up. Dawn recalled photographs of the two of them on the first day of school.

During the last 10 years, until about a year ago, Dawn and Bob and Joe and Jana often socialized together. They would enjoy barbecues during the summer and also went out to dinner on occasion. Dawn considered Jana a good friend.

It was very common and routine for Joe to stop by Dawn and Bob's house for coffee on a weekend morning. Since all three of them were somewhat early risers, they would have coffee together around 7 or 8 AM. Their morning coffee gatherings were not scheduled, Joe would simply stop by the Pagay's house or the Pagays would go over to Joe's house for coffee in the morning. Jana did sleep in longer than the three of them so she normally did not join them.

Dawn also knew Dana Gilbert, who was Jana's former husband. Dana was Andrea and M[redacted]s biological father. Andrea was a few years older than M[redacted]. It seemed that during the first year that Jana and the kids lived at Joe's, Dana visited Andrea and M[redacted] frequently. Over time Dana's visits tapered off. When Andrea was an older teenager and was going through a period of rebellious behavior, she did move in with Dana. M[redacted] never lived with Dana after moving into Joe's house.

Dawn Pagay

Over time, Dawn began to realize that Jana had numerous health concerns. Jana often complained about headaches and stomach ailments. It was not uncommon for Jana to go to a hospital emergency room during the middle of the night to be treated for some type of health issue. Jana's trips to the emergency room were so commonplace that she was sometimes refused treatment. Apparently, medical personnel were concerned Jana was simply a "drug seeker," referring to someone who feigned physical pain so they would be prescribed pain medicine. Dawn did wonder if Jana was in deed suffering from the conditions she claimed to have because her afflictions were always hard to pin point, not something like cancer or heart disease or the like. Dawn quite frankly wondered if Jana was exaggerating her maladies if she in fact had any.

Joe and Jana's adopted daughter, Cortney, "adored Joe." Cortney followed Joe around and always wanted to go with him wherever he was going. Dawn recalled seeing Joe ride bicycles with Cortney. She did not necessarily remember M[redacted] riding bikes with Joe and Cortney.

M[redacted] was older than Cortney and Dawn often saw M[redacted] "picking on her (Cortney)." In Dawn's opinion, M[redacted] had a serious "anger management problem." She saw and heard M[redacted] "screaming and cursing" out of anger frequently. Since Joe was M[redacted] and Andrea's stepfather, he did not discipline them. Jana, however, also did not seem to properly disciplined M[redacted] and Andrea either. Dawn was often taken aback at how disrespectful M[redacted] could talk to Joe, even in front of Jana and other neighbors.

Dawn does not believe M[redacted]s sexual assault allegations against Joe. Dawn's younger sister was abused by their mother's boyfriend, so Dawn does have some experience in recognizing signs of sexual abuse. During those seven years of alleged abuse by Joe of M[redacted] Dawn never saw any signs whatsoever of abuse.

Dawn wholeheartedly supported Joe, commenting "oh my gosh no way," referring to the ideal that Joe could of been sexually abusing M[redacted] over a period of seven years without Jana or one of the neighbors realizing it. It was not uncommon for Dawn to pick M[redacted] up from school or some other event and give him a ride home at Jana's request. M[redacted] never gave any indication to Dawn that he was afraid of Joe or did not want to be around Joe because Joe was hurting him. Dawn was aware that M[redacted] did not like Joe, but she believed M[redacted] was "full of crap" regarding the abuse allegations.

M[redacted] was a "momma's boy" and a "loner." The way Jana treated M[redacted] and the way M[redacted] responded to Jana's treatment, likely caused M[redacted] to want to have "his mama all to himself" so Joe had to go, referring to Joe leaving the household. About a year or year and a half ago, Jana apparently told law enforcement that Joe had physically abused her in some way. Joe had to move out of the house. Dawn does not believe Jana's allegation either.

On one occasion, Dawn walked into Jana and Joe's house when there was an ongoing family argument. Jana and her children, M[redacted] and Andrea, were yelling and screaming and cussing

at one another and at Joe. Joe had tears streaming down his eyes as he calmly tried to reason with the three of them. It struck Dawn that Joe was the only "normal" person involved in the argument. She did not completely recall what the commotion was all about, but was certain she did not hear anyone, including M[redacted] say it was about Joe abusing or hurting Mitchell in any way.

About a year or year and half ago, Joe had to move out of the house because Jana claimed he had physically abused her. Dawn was not certain, but believes Jana may have told the police Joe had hit her. Jana obtained a court order barring Joe from the house. Dawn went to see Joe the day after he had to move out. He was at his parent's house. When Dawn arrived, Joe began to cry and said he had never done anything to Jana and could not understand why she was doing what she was doing to him. [redacted]

Dawn exchanged text messages with Jana the next day or so after visiting with Joe at his parent's. In her text messages, Dawn challenged Jana's claims that Joe had harmed her and told Jana she did not believe her. Dawn never talked to Jana in person about her claims against Joe or about M[redacted]s accusations of sexual abuse by Joe. [redacted]

Dawn did recall telling Jana that she thought M[redacted]'s allegations of sexual abuse by Joe were "ridiculous." Dawn cannot recall for sure, but she either sent Jana a text message or told her in a phone conversation something to the effect of "why are you ruining his (Joe) life, he is a good man and doesn't deserve this treatment." [redacted]

Dawn had been in Joe and Jana's house many times. It was not a large home. She remembered many times being downstairs in the house and hearing Courtney talking in her bedroom upstairs. Dawn also remembered being downstairs talking to Joe and hearing Jana upstairs talking on her phone in a bedroom. The upstairs bedrooms are all right next to each other and share common walls. Dawn cannot imagine someone being in one bedroom and not being able to hear what was happening in the room next door. [redacted]

M[redacted] was now moving around with the aid of a "walker," the type often used by an elderly person. Jana would assist M[redacted] in getting in and out of the car. Dawn believes M[redacted]s inability to walk without the aid of a walker was a complete put-on. Dawn has seen M[redacted] walking normally when Jana has not been around. [redacted]

Dawn had heard that M[redacted] has claimed he was suffering from amnesia. Dawn's daughter, Nina, has recently spoken to M[redacted]. Nina told Dawn that she believed M[redacted] was faking his claim of amnesia. M[redacted] was easily able to recall activities he had done with Nina or Nina knew about without any problem whatsoever. Dawn said M[redacted]'s claim of suffering from amnesia was "bull crap." [redacted]

When M[redacted] was in high school, Dawn recalled taking him to Joe's place of employment after school. M[redacted] was participating in some type of school project where he had to "shadow" a worker. Dawn finds it odd that if M[redacted] was so frightened of Joe that he would not tell

anyone he was being regularly abused for years, but he was comfortable going to Joe's work. M[redacted] was alone with Dawn on a number of occasions when she was driving him to or from an event at Jana's request and M[redacted] never gave Dawn any indication that he was being abused by Joe or anyone. M[redacted] openly talked about a number of topics, so it was not as if he was hesitant to talk to Dawn.

Dawn did not know if M[redacted] had his own personal computer. She did know that M[redacted] routinely communicated with Nina via computer-based social media. Dawn did not recall M[redacted] ever saying anything inappropriate of a sexual nature when he was around her.

Dawn reiterated that she did not believe M[redacted]s allegations he made against Joe. During the period of time M[redacted] claimed Joe was sexually abusing him, Dawn frequently interacted with both M[redacted] and Joe. Dawn was certain that the abuse could not occur for seven years without her or her husband or another neighbor "realizing it... no way."

APPENDIX P

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

In Re Personal Restraint of: JOSEPH LEROY FUGLE	COA No. _____ (Pierce County No. 14-1-04016-6) DECLARATION OF DR. GERALD ROSEN

I, Gerald M. Rosen, Ph.D., declare under penalty of perjury and in accordance with the laws of the State of Washington:

1. I am over the age of eighteen years, am competent to testify, and have personal knowledge of the matters stated herein.

2. Since 1976 I have been licensed as a clinical psychologist in Washington State and have practiced in Seattle, Washington. I also hold a license with the State of Alaska and am Board Certified in Clinical Psychology with the American Board of Professional Psychology (ABPP). In addition to clinical work with numerous patients over the span of my practice, I have been involved academically. I currently hold an appointment as clinical professor emeritus with the Department of Psychology at the University of Washington, where I was a clinical professor from 2001 to 2017.

3. I have devoted a substantial portion of my career to the study of posttraumatic stress disorder. I have edited a text entitled "*Posttraumatic Stress Disorder: Issues and Controversies,*" (John Wiley & Sons, England, 2004); served as guest co-editor for the *Journal of Anxiety Disorders* special issue on "Challenges to the PTSD Construct and its Database" (2007); and co-edited with B. Christopher Frueh a text entitled "*Clinician's Guide to Posttraumatic Stress Disorder,*" published by John Wiley & Sons, USA (July, 2010). Attached to this declaration as Exhibit A is a true and correct copy of my curriculum vitae, including my work as author or co-author of more than 80 professional articles pertaining to the study of psychology.

4. During a period spanning more than 25 years, I have served as an expert witness – forensic psychologist – in numerous court cases where the mental condition of the party was at issue. I have conducted many independent psychological examinations, including pursuant to Civil Rule 35. I have been qualified as an expert witness in courts throughout Washington.

5. I understand that the trial in this criminal case, *STATE OF WASHINGTON V. JOSEPH LEROY FUGLE*, involved witness testimony regarding posttraumatic stress disorder and also "repressed/recovered memories." I have been asked by Mr. Fugle's post-conviction counsel, to draw on my expertise to clarify professional and scientific issues that relate to these two issues and should have been presented to the trier of fact at the time of trial.

6. American psychiatry's system for classifying psychiatric disorders is provided in the Diagnostic and Statistical Manual (DSM).[1]

7. As specified in various editions of the DSM, the diagnosis of posttraumatic stress disorder (PTSD) requires the occurrence of a traumatic event (Criterion A: the stressor criterion), in response to which an individual must experience severe reactions that cause significant distress or impairment in social, occupational, or other important areas of functioning (symptom criteria).

8. PTSD symptoms cannot on their own prove the validity of an alleged stressor that is claimed to have caused the symptoms. It is a logical fallacy to conclude that the presence of posttraumatic psychiatric symptoms (e.g., nightmares, flashbacks) corroborates the occurrence of a traumatic event. This error in reasoning is an example of "affirming the consequent" wherein it is argued "If A leads to B, then the presence of B affirms the occurrence of A." It is as if to say, "Sexual abuse (A) can lead to PTSD (B); given PTSD (B): therefore there was sexual abuse (A). The logic behind such reasoning requires the assumption that A is the only possible cause of B.[2]

9. It is well-known that the symptom criteria of many psychiatric disorders, and certain medical complaints such as pain, are subjective and can be misreported.

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[1] The 5th edition of the DSM was published in 2013, replacing the DSM-IV-TR (2000).

[2] W.S. Jevons (1888, New Edition). *Elementary lessons in logic: deductive and inductive: with copious questions and examples, and a vocabulary of logical terms*. London and New York: Macmillan. Available on line at https://mises-media.s3.amazonaws.com/Elementary%20Lessons%20in%20Logic_2.pdf

Individuals can present symptoms they never had; symptoms they experienced at one point in time that are no longer present; and/or symptoms for which issues of causality or severity are misrepresented or misunderstood.[3] Invalid or misleading symptom reporting does not corroborate the occurrence of a past event.

10. In addition to misreporting symptoms, individuals can misrepresent their exposure to events alleged to have caused PTSD. Published articles in peer review journals document PTSD diagnosed war veterans who never were deployed to a combat zone.[4] Published articles also document falsified reports of sexual harassment and sexual assault.[5]

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[3] See, R. Rogers (1988), *Clinical Assessment of Malingering and Deception*, New York: Guilford Press. Also, L. Pankratz (1998), *Patients Who Deceive: Assessment and Management of Risk in Providing Health Care and Financial Benefits*, Springfield: Charles C. Thomas. For a historical perspective, see J. Collie (1912), Malingering and Feigned Sickness, London: Edward Arnold. Also, J.B. Lewis & C.C. Bombaugh (1896), Stratagems and Conspiracies to Defraud Life Insurance Companies: An Authentic Record of Remarkable Cases, Baltimore: James H. McClellan.

[4] Falsified claims of exposure to traumatic events have been documented among veterans. E. Lynn and N. Belza (1984), *Factitious post-traumatic stress disorder: the veteran who never got to Vietnam*, Hospital and Community Psychiatry, 35, 697-701. Also, L. Sparr and L. Pankratz (1983), *Factitious post-traumatic stress disorder*, American Journal of Psychiatry, 140, 1016-1019. The problem of veterans who never served in Vietnam but who claimed combat related PTSD is discussed in B.G. Burkett & G. Whitley (1998), *Stolen Valor: How the Vietnam generation was robbed of its heroes and its history*, Dallas: Verity Press, Inc. Frueh and colleagues documented the extent of the problem, finding that only 41% of 100 PTSD-diagnosed veterans had evidence of combat exposure in their military records. B.C. Frueh, J.D. Elhai, A.L. Grubauh, J. Monnier, T.B. Kashdan, J.E. Sauvageot, et al. (2005). *Documented combat exposure of US veterans seeking treatment for combat-related post-traumatic stress disorder.* British Journal of Psychiatry, 186, 467-472.

[5] A. Trankell (1958), *Was Lars sexually assaulted? A study on the reliability of witnesses and of experts*, Journal of Abnormal and Social Psychology, 56, 385-395. A more extensive study on false rape allegations is reported by E.J. Kanin (1994), *False rape allegations*, Archives of Sexual Behavior, 23, 81-92. In this study of police investigations over a nine year period, in a Midwestern town in America, 41% of the total disposed rape cases were officially withdrawn, as determined by "the complainant's admission that no rape had occurred and the charge, therefore, was false." Also see MD. Everson & B.W. Boat (1989), *False allegations of sexual abuse by children and adolescents*, American Academy of Child and Adolescent Psychiatry, 230-235; W. O'Donohue & A.H. Bowers (2006), *Pathways to false allegations of sexual harassment*, Journal

(footnote continued...)

11. *Malingering* refers to the "intentional reporting of symptoms for personal gain." (DSM-5, p326). *Factitious Disorders* involve "the falsification of medical or psychological signs and symptoms in oneself or others that are associated with identified deception... The diagnosis requires demonstrating that the individual is taking surreptitious actions to misrepresent, simulate, or cause signs or symptoms of illness or injury in the absence of obvious external rewards. Methods of illness falsification can include exaggeration, fabrication, simulation, and induction." (DSM-5, p. 325). The motives and psychiatric issues that can lead to misreporting and simulation of illness are diverse and complex.[6] Lacoursiere (1993) observed that psychotic disorders, factitious disorders, and other motivations including a desire to explain a dysfunctional life can account for the presentation of PTSD-like syndromes.[7]

12. Health professionals have no demonstrated ability to detect, on the basis of an individual's presentation during interviews, when information is falsely or inaccurately reported.[8] In one study six actors simulated PTSD alleged to have

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of Investigative Psychology and Offender Profiling, 3, 47-74; and A. DeZutter, R. Horselenberg, & P.J. van Koppen (2018), *Motives for filing a false allegation of rape,* Archives of Sexual Behavior, 47, 457-464.

[6] L. Pankratz (1998), *Patients Who Deceive,* Springfield, Ill: Charles C. Thomas

[7] R.B. Lacoursiere (1993), *Diverse motives for fictitious post-traumatic stress disorder,* Journal of Traumatic Stress, 6, 141-149.

[8] See P. Ekman and M. O'Sullivan (1991), *Who can catch a liar?*, American Psychologist, 46, 913-920, who found that mental health professionals performed no better than chance at identifying who told the truth. There also exists in the medical literature numerous articles on "standardized patients", actors that present simulated problems for the purpose of training

(footnote continued...)

resulted from motor vehicle accidents. Thus, both the non-existent accident and the symptom criteria of PTSD were feigned. Despite comprehensive assessments, that included interviews, tests, and psychophysiological assessments conducted at a PTSD-specialty clinic, all six actors were erroneously diagnosed as valid PTSD cases.[9]

13. The role of a treating mental health professional differs from that of a forensic expert. Treating professionals strive to establish rapport with a patient, develop a therapeutic alliance, and work with the patient's reported belief models. Treating professionals assume that a patient is motivated to report problems as accurately as possible for the purpose of developing an effective and relevant treatment plan. Forensic experts, on the other hand, recognize that individuals may misreport information in the context of litigation. Forensic experts do not develop a therapeutic alliance, but instead question a person's self-report, consider all relevant hypotheses,

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physicians and/or program evaluation. In one study evaluating medical costs, physicians only detected 11.5% of the standardized patients (P.J. McLeod, R.M. Tablyn, D. Gayton, R. Grad, L. Snell, L. Berkson, & M. Abrahamowicz (1997), *Use of standardized patients to assess between-physician variations in resource utilization*, Journal of the American Medical Association, 278, 1164-1168). In another study, only 8% of standardized patients were identified as definitely not genuine. When the standard was lowered to "probably" not genuine, the rate of identification was still only 24% (J. Gordon, F. Sanson, & N.A. Saunders (1988), *Identification of simulated patients by interns in a casualty setting*, Medical Education, 22, 533-538.) Raifman captured the heart of this issue when he stated: "A good poker player probably knows better than a mental health professional whether or not a person is lying. A psychiatrist is a doctor, not a lie-detector." L.J. Raifman (1983), *Problems of diagnosis and legal causation in courtroom use of post-traumatic stress disorder*. Behavioral Science and the Law, 1, 115-130.

[9] E.J. Hickling, E.B. Blanchard, E. Mundy, and T.E. Galovski (2002), *Detection of malingered MVA related posttraumatic stress disorder: An investigation of the ability to detect professional actors by experienced clinicians, psychological tests and psychophysiological assessment*, Journal of Forensic Psychology Practice, 2, 33-54.

review other sources of data, and conduct psychological testing when appropriate.[10]

14. Because therapists rely on what their patients report, they are more vulnerable to base opinions on inaccurate and/or misleading information than are forensic experts. This point has been emphasized by numerous authorities who caution professionals to use a "multi-method" approach to assessment if they will be testifying in court.[11] Consider this guidance by one authority in the field of psychological assessment: "Disastrous results can ensue if a psychologist enters court merely on the basis of his therapeutic interaction with a patient, and tries to render valid opinions in a particular case based on this therapeutic insight, without doing the investigative work necessary in any forensic case... Clinical interview is never sufficient; interviews must be supplemented by careful review of records,

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[10] See L.HG. Strasburger, T.G. Gutheil, & A. Brodsky (1997), On wearing two hats: Role conflict in serving as both psychotherapist and expert witness, *American Journal of Psychiatry*, 154, 448-456. Also, S.A. Greenberg & D.W. Shuman (1997), Irreconcilable conflict between therapeutic and forensic roles, *Professional Psychology: Research and Practice*, 28, 50-57. Consider also the ethical guidelines developed by the American Academy of Psychiatry and the Law (1995): "Treating psychiatrists should generally avoid agreeing to be an expert witness or to perform evaluations of their patients for legal purposes because a forensic evaluation usually requires that other people be interviewed and testimony may adversely affect the therapeutic relationship." Document available on the web at http://www.emory.edu/AAPL/ethics.htm

[11] Williams, Lees-Haley & Djanogly discussed the limits of self-report and observed: "An important concern in forensic evaluations is locating all relevant data and reaching reasonable conclusions based on the data. A thorough review of all potentially relevant sources improves the likelihood of locating data that may clarify the true extent of loss. These sources include pre- and post injury medical and psychological records, school records, depositions, patient interviews, and psychological tests." [C.W. Williams, P.R. Lees-Haley, & S.E. Djanogly (1999), *Clinical scrutiny of litigants' self-reports*, Professional Psychology: Research and Practice, 30, 361-367]. Simon noted: "A credible forensic psychiatric evaluation of a PTSD claimant requires a thorough examination of the claimant's psychiatric and medical history, including review of prior medical, psychiatric, and other pertinent records." Eldridge stated, "The assessor should use a multi-modal method of assessment wherever possible." G.D. Eldridge (1989), *Contextual issues in the assessment of post-traumatic stress disorder*, Journal of Traumatic Stress, 4, 7-23. Also see chapters in J.P. Wilson and T.M. Keane (Eds), *Assessing Psychological Trauma and PTSD*, 1997, New York: The Guilford Press.

history-taking, and interviews with family, friends, or employees."[12] Conducting appropriate psychological testing is likewise a necessity. Such testing should include symptom validity measures designed to detect poor effort, underperformance, and exaggeration.[13]

15. Individuals can hold unfounded beliefs and false memories that they sincerely believe.[14] Research shows that false beliefs and memories can be readily created through suggestion, guided imagery techniques,[15] dream interpretation,[16] and other sources of misleading information.[17] The earliest demonstration of an implanted memory is thought to have been provided by Bernheim who in 1884 hypnotized a woman, suggested that she had witnessed the rape of a little girl, and demonstrated this woman's willingness to report the implanted and false memory to a designated

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[12] D.L. Shapiro (1984), *Psychological Evaluation and Expert Testimony: A Practical Guide to Forensic Work*, New York: Van Nostrand Reinhold Co.

[13] Administering psychological tests is consistent with a multi-method approach to assessment when addressing issues before a Court. Also consider the *Specialty Guidelines for Forensic Psychologists*, published by Division 41 of the American Psychological Association and the American Board of Forensic Psychology, states: "As an expert conducting an evaluation, treatment, consultation, or scholarly/empirical investigation, the forensic psychologist maintains professional integrity by examining the issue at hand from all reasonable perspectives, actively seeking information which will differentially test plausible rival hypotheses."

[14] Tourangeau states: "In short, memory is not judgment-free. What we retrieve from memory often consists of our current beliefs about an incident, beliefs that reflect what we actually experienced (and remember), what we did not experience but infer, and what we learned later on." R. Tourangeau (2000), *Remembering what happened: memory errors and survey reports,* In A.A. Stone, J.S. Turkkan, C.A. Bachrach, J.B. Jobe, H.S. Kurtzman, & V.S. Cain (Eds., 2000), *The Science of Self-Report,* Mahwah, N.J.: Lawrence Erlbaum Associates.

[15] L. Patihis & M.H. Pendergrass (2019), *Reports of recovered memories of abuse in therapy in a large age-representative U.S. National Sample: Therapy type and decade comparisons,* Clinical Psychological Science, 7, 3-21.

[16] G.A. Mazzoni, E.F. Loftus, A. Seitz, & S.J. Lynn (1999), *Changing beliefs and memories through dream interpretation,* Applied Cognitive Psychology, 13, 125-144.

[17] C.J. Brainerd & V.F. Reyna (2005), *The science of false memory, New York: Oxford University Press.*

representative of the law.[18]

16. Individuals who suffer distress because they believe they were abducted by aliens demonstrate how memories of non-existent trauma can exert influence as if the events really happened; if of course we assume that alien abductions exist only in imaginations. Research finds that individuals who report abductions by space aliens likely have misinterpreted episodes of sleep paralysis during which hypnopompic hallucinations are confused with alien beings.[19] As bizarre as this might sound, the belief by these individuals that they were abducted can be associated with the symptoms of posttraumatic stress disorder. Thus, it has been shown that these individuals demonstrate similar psychophysiological reactivity to script-driven trauma imagery as do other groups of trauma survivors (e.g., sexual assault). [20] In other words, a sincere though unfounded belief in the occurrence of trauma can generate emotional reactions similar to those provoked by the recall of combat, rape and other real events. These findings further demonstrate why posttraumatic psychiatric symptoms do not necessarily establish that something horrific must have happened.

17. Additional concepts concerning trauma and memory are mired in debate

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[18] G.M. Rosen, M. Sageman, & E. Loftus (2004), *A historical note on false traumatic memories,* Journal of Clinical Psychology, 60, 137-139.

[19] R.J. McNally & S.A. Clancy (2005), *Sleep paralysis, sexual abuse, and space alien abduction,* Transcultural Psychiatry, 42, 113-122.

[20] R.J. McNally et al. (2004), *Psychophysiological responding during script-driven imagery in people reporting abduction by space aliens,* Psychological Science, 15, 493-497.

including the notion that traumatic memories can be totally repressed or banned from consciousness, while still exerting an influence on an individual's behavior.[21] Also in controversy are the origins and reliability of "recovered memories"-- memories that are recalled after extended periods of unawareness. In the psychological community on the whole, there is no general acceptance of the idea that recovered memories can serve to validate the occurrence of distant and previously forgotten events. The scientific community is in agreement that recovered memories cannot be accepted as accurate, nor used to establish the occurrence of an event, in the absence of corroborating evidence. For example, the American Psychiatric Association (1993) cautioned, "It is not known how to distinguish, with complete accuracy, memories based on true events from those derived from other sources;" the American Medical Association, Council on Scientific Affairs (1994) noted, "The AMA considers recovered memories of childhood sexual abuse to be of uncertain authenticity, which should be subject to external verification;" the Australian Psychological Society (1994) concluded, "The available scientific and clinical evidence does not allow accurate, inaccurate, and fabricated memories to be distinguished in the absence of independent corroboration;" and the American Psychological Association (1995)

[21] Controversies surrounding traumatic and repressed memories are so intense, they have been referred to as the "memory wars." McNally has persuasively documented that memories of trauma are seldom, if ever, truly forgotten. Rather, as documented in McNally's review on memory research, trauma is remembered all too well. R.J. McNally (2003), *Remembering trauma*, Cambridge, MA: The Belknap Press of Harvard University Press; also, R.J. McNally (2004), *The science and folklore of traumatic amnesia*, Clinical Psychology: Science and Practice, 11, 29-33;

provided this guidance: “At this point it is impossible, without other corroborative evidence, to distinguish a true memory from a false one.”

18. Accompanying controversies that surround recovered memories is the phenomenon of "retractors" (i.e. individuals who repudiate recovered memories of childhood abuse),[22] and multi-million dollar judgements against therapists who employed recovered memory therapies and fostered the reporting of false memories.[23]

19. I understand the present case involves an individual who claims to have experienced brutal sexual abuse over a period of years, for which he had absolutely no recall, and later recovered memories in part based on the content of nightmares, after which he presented with the symptoms of posttraumatic stress disorder. Treating professionals accepted this individual's reporting and worked with his presenting problems in a manner consistent with their role as therapist. Then, at trial, these treating professionals instructed the trier of fact that the patient's symptoms corroborated the occurrence of the recalled abuse. Unfortunately, their drawing this conclusion was purely speculative, rested on the logical fallacy of affirming the consequent, and did not consider the various paths by which pseudo-PTSD can

[22] H. I. Lief & J. Fetkewicz (1995), *Retractors of false memories: The evolution of pseudo-memories,* Journal of Psychiatry and Law, 23, 411-435. Also, J. de Rivera (2000),, *Understanding persons who repudiate memories recovered in therapy,* Professional Psychology: Research and Practice, 31, 378-386.

[23] A. Lipton (1999), *Recovered memories in the courts.* In S. Taub (Ed.), Recovered memories of child sexual abuse: Psychological, social, and legal perspectives on a contemporary mental health controversy, Springfield, Il: Charles C. Thomas Publisher.

present. I further understand that a physician testified that otherwise undiagnosed physical problems were explained by the patient's diagnosis of PTSD which then corroborated the veracity of recalled events. This physician's testimony only served to increase the level of unfounded extrapolations offered by health care providers.

20. As a psychologist with over forty years of experience, including decades of work as a forensic psychologist in cases where the mental condition of the party was at issue, I can confidently state that any trier of fact would require an awareness and understanding of matters reviewed in this declaration if they were tasked with judging issues related to trauma, the etiology of PTSD, recovered memories, and/or the multiple paths by which individuals can present with psychiatric disorder. Certainly this is the type of information I have provided to triers of fact (including juries and judges) in past cases.

21. Presenting a therapists' diagnostic impressions – in the absence of an independent forensic psychological evaluation and objective testing to test rival hypotheses and/or in the absence of instructions regarding the limits of data upon which therapists rely– would constitute a disservice to the trier of fact. To summarize from previous points in this declaration: A competent and reliable forensic assessment of an alleged psychiatric disorder, including PTSD, requires: (a) a thorough evaluation of all presenting problem(s); (b) an assessment of the individual's beliefs as to what caused the alleged problems; (c) an exploration of all reasonable competing hypotheses; evaluation of treatment efforts to date; and (e) an

assessment of the individual's prognosis with recommendations for future treatment.[24]

22. I hold the opinions I have expressed in this declaration to within a reasonable degree of psychological certainty.

I hereby declare under penalty of perjury under the laws of the State of Washington, and specifically RCW 9A.72.085, that the foregoing statements are true and correct to the best of my knowledge.

DATED this 21st day of August, 2019

Gerald M. Rosen, Ph.D.
Seattle, Washington

[24] See previous footnotes with reference to the Specialty Guidelines for Forensic Psychologists; the need for multi-method assessments; and differences between the roles of a therapist vs forensic expert.

APPENDIX Q

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CURRICULUM VITAE

EDUCATION

B.S.	University of Pittsburgh, Pittsburgh	1967
M.S.	University of Wisconsin, Madison	1971
Ph.D.	University of Wisconsin, Madison	1972

PROFESSIONAL EXPERIENCE

Clinical Internship
University of Washington School of Medicine, Seattle — 1972 - 1973

Visiting Assistant Professor and Research Associate
Department of Psychology, University of Oregon, Eugene — 1973 - 1976

Behavior Science Coordinator
Providence Family Medical Center, Seattle — 1976 - 1978

Private Practice, Clinical Psychology
Seattle, WA — 1976 - Current

LICENSES & CERTIFICATIONS

Washington #487	1976 - Current
Alaska #553	2005 - Current
American Board of Professional Psychology (ABPP) Clinical Psychology (#6039)	2005 - Current

DEPARTMENT OF PSYCHOLOGY: UNIVERSITY OF WASHINGTON

Clinical Associate Professor	1990 - 2000
Clinical Professor	2001 - 2017
Clinical Professor Emeritus	June, 2017 - Current

PROFESSIONAL AFFILIATIONS & ACTIVITIES

Fellow: Association for Psychological Science (APS)
Member: American Psychological Association (APA)

Chair, Task Force on Self-Help Therapies. Sponsored by the Committee on Scientific and Professional Ethics and Conduct (CSPEC), American Psychological Association (1978-1979)

Chair, Task Force on Do-It-Yourself Therapies. Sponsored by the Board of Professional Affairs (BPA), American Psychological Association (1990-1991)

Consultant, Public Affairs Office, American Psychological Association. Development of a brochure on post-traumatic stress disorder, *"Reunion and Re-entry: A guide for returning military personnel and loved ones* (1991)

Invited Participant: Emory Summit on Issues in Professional Psychology Education. Sponsored by the Society for the Science of Clinical Psychology (SSCP) and the Society of Clinical Psychology (SCP), American Psychological Association. Meetings held in Atlanta, Georgia in September 2017 and September 2018. Ongoing participation with Task Force concerned with maintaining science-based continuing education programs for clinical psychologists.

JOURNAL ACTIVITIES

Editorial Board Member

Journal of Consulting and Clinical Psychology (1977 - 1978)

Contemporary Psychology (1979 - 1985)

Scientific Review of Mental Health Practice (2002 - 2009)

Psychological Injury and Law (2011 - 2016)

Guest Editor

Journal of Anxiety Disorders (2007; Vol. 21, Issue 2). Special issue on, "*Challenges to the PTSD construct and its database,"* Rosen GM, & Frueh BC (eds.).

Ad Hoc Reviewer

American Psychologist • American Journal of Community Psychology

American Journal of Psychiatry • Annals of Family Medicine • Archives of General Psychiatry

Behavior Modification • Behavior Therapy • Behavioural & Cognitive Psychotherapy

British Journal of Psychiatry • Clinical Psychological Science • Cognitive Therapy & Research •

Contemporary Psychology • Depression & Anxiety • Journal of Abnormal Psychology

Journal of Applied Behavior Analysis • Journal of Behavior Therapy & Experimental Psychiatry

Journal of Child & Adolescent Psychotherapy • Journal of Clinical Psychiatry

Journal of Clinical Psychology • Journal of Consulting & Clinical Psychology

Journal of Traumatic Stress • Professional Psychology: Research & Practice

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[Revised 6/19]

APPENDIX R

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

In Re Personal Restraint of: JOSEPH LEROY FUGLE	COA No. _____ (Pierce County No. 14-1-04016-6) DECLARATION OF DR. DANIEL REISBERG

I, Daniel Reisberg, Ph.D., declare under penalty of perjury and in accordance with the laws of the State of Washington:

1. I am over the age of eighteen years, am competent to testify, and have personal knowledge of the matters stated herein.

2. I am trained as a scientist and hold a Ph.D. in Experimental Psychology from the University of Pennsylvania (1980).

3. My field of study, research psychology, is the scientific arm of psychology. Using the generally accepted scientific method and standard tools of science, research psychology asks systematic questions about behavior, emotion, and cognition. The opinions I offer in this declaration are carefully rooted in scientific research. What I offer here, I believe to a reasonable degree of scientific certainty.

4. From 1986 to 2019, I taught at Reed College in Portland, Oregon, and held an

endowed chair. My official title is now the Patricia and Clifford Lunneborg Professor of Psychology Emeritus, as I retired recently. In my time at Reed College, I worked in (and continue to work in) the area of cognitive psychology.

5. Cognitive psychology is the scientific study of how people perceive the world, how they remember what they have perceived, and how they think about (and draw conclusions from) information they have gained. Within this domain, my own work has focused on the completeness and accuracy of human memory.

6. Many of the details of my professional work are described in my CV, attached herein. My extensive professional activities (which continue) include my own research and writing about memory. This work demands that I maintain a current and complete knowledge of other researchers' work in my field of study.

7. I serve as the Associate Editor for the Journal of Applied Research in Memory & Cognition. In that role, I read and evaluate a broad range of scientific papers submitted for publication. I am primarily responsible for papers that describe research relevant to forensic issues. For those papers, I oversee the peer-review process and serve as "gate keeper" in deciding which of the submitted papers reach the quality standard that the journal, one of my field's major publications, insists on. This activity obviously contributes to the breadth and currency of my knowledge.

8. In addition to my academic and research pursuits, I have consulted extensively with attorneys and law enforcement on a range of topics involving memory, including both adult's memory and children's memory, and memory

reports from witnesses, victims and suspects. I have conducted memory-related trainings for the Detective Division of the Portland Police Bureau, the Oregon Paralegal Association, and other groups of investigators. I have given lectures to many criminal justice groups, including: the Judiciary Committees of the Oregon Legislature, the Oregon State Bar, the 2018 Sexual Assault Task Force of the Oregon Legislature, various chapters of the American Inns of Court, the Oregon Criminal Defense Lawyers Association, the Idaho Association of Criminal Defense Lawyers, the Multnomah County District Attorney's Office, and the Washington State King County Prosecuting Attorney's Office.

9. I have been recognized as an expert and allowed to testify as to my scientific opinions on issues of memory in federal court and in state courts in Alaska, California, Colorado, Idaho, Illinois, Montana, Nevada, New Hampshire, Oregon, and Washington. I have also consulted on cases (in civil, criminal, and military courts) in other jurisdictions.

10. In 2015, I was contacted by defendant Joseph Fugle's trial lawyer, Wayne Fricke, and I agreed to serve as a consultant in the case; Mr. Fricke eventually decided to call me (and did call me) as an expert witness in the case.

11. I know that the case against Mr. Fugle began when his stepson, M.G., at age 18, claimed to have "recovered" a memory of being sexually abused for years by Mr. Fugle. M.G. claimed he was abused between the ages of 7 and 14. The prosecution's theory, supported by M.G.'s counselors, was that the trauma allegedly suffered by

M.G. caused him to "suppress" or "repress" or "dissociate" all memory of the sexual abuse between ages 14 and 18.

12. Mr. Fricke asked that I rely on my work as a memory researcher to assist in defending Mr. Fugle against these allegations. I was to help the finder of fact understand how memories function and what a science-based assessment of memory might involve.

13. Mr. Fricke provided me with discovery on the case, including several witness interviews and some medical records pertaining to complainant M.G. I was not asked to prepare a written report, but I was interviewed (pre-trial) by the prosecutor. In preparing this declaration, I reviewed the transcript of that May 10, 2016 interview.

14. In my interview, I explained that M.G.'s claims about having "recovered" a memory of repeated, traumatic sexual abuse were inconsistent with what we know about memory on the whole. I indicated that if the pattern M.G. reported was not working like a memory would, then it probably was not a memory. 5/10/16 RP18. I was concerned that it appeared M.G.'s memories may have been encouraged or maybe even motivated by events in his counseling process. 5/10/16 RP21. I was concerned that M.G.'s first alleged claim of memory of abuse, to his grandmother, was not recorded. 5/10/16 RP22. Consequently we would never know exactly how that conversation unfolded; I suggested, therefore, that there was a substantial danger that M.G's grandmother played more of an active role in the emergence of M.G's memories than her report suggests. 5/10/16 RP22.

15. I reported at the time that I believed the M.G.'s memories were (at best) unreliable and (more strongly) likely to be false memories – *i.e.*, recollection of events that actually had never occurred. I had (and have) several reasons for this assertion. 5/10/16 RP34. First, and perhaps most important, M.G's claim of the memories disappearing (i.e., his claim of having forgotten all about the events for a period of several years) is inconsistent with how memory behaves. My view of this point was (and is) rooted in scientific findings that show that events like the ones M.G. alleged are highly memorable, and so would, at a high level of probability, never have been forgotten in the first place.

16. Second, M.G. said he "recovered" his memories in a dream, nightmare or flashback. However, research tells us that nightmares and flashbacks are an unreliable source of information about the past. Therefore, memories emerging from these influences cannot be counted as reliable.

17. There was also uncertainty regarding the external influences M.G. had been exposed to (including his conversation with his grandmother) during the 'emergence' of this memory. This uncertainty opens the possibility that these influences may have led M.G. in a number of ways, and this possibility amplifies the concern about the reliability of M.G.'s report. Last, I reported that I had concerns about M.G.'s history of hypogonadism, a condition known to be associated with memory disorder. 5/10/16 RP35.

18. My understanding is that the state's main response to these concerns rested on the notion that M.G.'s memory had been hidden from view for four years through the mechanism of dissociative amnesia. When asked in the interview about this notion, however, I said that the concept of dissociative amnesia "is regarded with some substantial amount of skepticism by the scientific community." 5/10/16 RP25. I flagged for the lawyers that for this reason, dissociative amnesia may not "pass a Frye test." *Id.* I held (and hold) the same opinion regarding the related ideas that memories can be hidden from view through "repression" or "suppression." I understood at the time that a party in Washington State would be precluded from offering opinions not accepted by the scientific community under the Frye test.

19. I understand that in Washington State courts, under the Frye standard, expert witnesses may give opinion testimony where: (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.

20. I do not recall Mr. Fugle's defense counsel ever discussing with me the option of making a Frye challenge on behalf of Mr. Fugle. He did not ask me to testify in any Frye hearing.

21. If Mr. Fugle's defense counsel had asked me to testify in a Frye hearing on a motion to exclude expert witness opinion testimony on the claim that there is such a

thing as "repression," "suppression," or "dissociative amnesia," I would have been willing to testify to keep these commonly-offered but highly contentious claims from reaching the jury.

22. I pointed out that while some clinicians believe in the concept of "repression," most scientific researchers take the opposite view. Researchers are (among other considerations) guided by the consistent finding that, when someone experiences trauma, "something painful, it tends to produce a stronger, clearer memory rather than amnesia." *Id.* People remember traumatic events. 5/10/16 RP31. This pattern is, of course, exactly the opposite of what advocates of "repression" (or "dissociative amnesia") assert, and this is a large part of the reason why I stated in the interview that dissociative amnesia is "straying into highly controversial territory… massively controversial." 5/10/16 RP32.

23. The scientific evidence in support of my view comes from many sources. Some studies, for example, have worked with children who, because of injury, needed to visit a hospital emergency department. These children do not "lose" the memory of these (often traumatic) visits; instead, they show memory for these visits even years afterward.[1] Another source of evidence comes from children who have

[1] *See,* for example, Burgwyn-Bailes, E., Baker-Ward, L., Gordon, B. N., & Ornstein, P. A. (2001). Children's memory for emergency medical treatment after one year: The impact of individual differences variables on recall and suggestibility. Applied Cognitive Psychology, 15, S25–S48; Peterson, C. (2010). "And I was very very crying": Child self-descriptions of distress as predictors of recall. Applied Cognitive Psychology, 24, 909–924; Peterson, C. (2012). Children's autobiographical memories across the years: Forensic implications of childhood amnesia and eyewitness memory for stressful events. Developmental Review, 32, 278–306; Peterson, C., & Warren, K. L. (2009). Injuries, emergency rooms, and children's

(footnote continued...)

gone through a medical treatment experience that is arguably sexually threatening. A voiding cystourethragram (VCUG) is a diagnostic procedure that involves (among other steps) medical professionals (masked and wearing heavy aprons, as a guard against radioactivity) shining lights on and manipulating a child's genitals and injecting fluid (through a catheter) into the child's urethra. The child is then asked, while surrounded by watching adults, to urinate onto a table (usually into a towel or cup). In some cases, this procedure has to be repeated for a single child. Various studies have asked whether children "lose" the memory of this traumatic experience and they do not. Children who are at least three years old at the time of the VCUG procedure reliably remember this experience.[2] Studies like these led one prominent scholar to comment that "most children experiencing severe trauma report having difficulty not thinking about it, and often suffer from intrusive memories."[3] Again, this is the opposite of what one might expect based on notions like repression.

24. Other memory studies also confirm that traumatic experiences are well

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memory: Factors contributing to individual differences. In J. A. Quas & R. Fivush (Eds.), Emotion and memory in development: Biological, cognitive, and social considerations (pp. 60–85). New York: Oxford University Press.

[2] *E.g.*, Baker-Ward, L., Ornstein, P. A., & Starnes, L. P. (2009). Children's understanding and remembering of stressful experiences. In J. A. Quas, & R. Fivush (Eds.), Emotion and memory in development: Biological, cognitive, and social considerations (pp. 28–59). New York: Oxford University Press; Edelstein, R. S., Alexander, K. W., Goodman, G. S., & Newton, J. W. (2004). Emotion and eyewitness memory. In D. Reisberg & P. Hertel (Eds.), Memory and emotion (pp. 308–346). New York: Oxford University Press; Salmon, K., Price, M., & Pereira, J. K. (2002). Factors associated with young children's long-term recall of an invasive medical procedure: A preliminary investigation. Developmental and Behavioral Pediatrics, 23, 347–352.

[3] Fivush, R. (2002). The development of autobiographical memory. In H. L. Westcott, G. M. Davies, & R. H. C. Bull (Eds.), Children's testimony: A handbook of psychological research and forensic practice (pp. 55–68). New York: Wiley.

(footnote continued...)

remembered (accurately, completely, and for many years). Some studies have focused on individuals who have been exposed to documented sexual or physical abuse. The evidence shows that these episodes were well-remembered. Indeed, one group of authors conclude from their evidence that "the greater the traumatic impact experienced, the more accurate the later memory." [4]

25. In addition, the research community has scrutinized some of the published studies that are routinely cited as (allegedly) documenting the pattern of repression or dissociative amnesia. One such study, when examined, involved the "recovery" of a memory that was, in fact, almost certainly false – and hence not a "recovered memory" at all.[5] Another such study, when examined, offers no compelling evidence that the "recovered" memories were lost for some time; hence there is no reason to believe this study involved the recovery of once-lost memories.[6] It seems, then, that the scientific evidence allegedly showing repression is (at best) ambiguous and arguably flawed, while the scientific evidence showing the opposite of repression

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[4] Goodman, G.S., Quas, J.A., Goldfarb, D., Gonzalves, L, & Gonzales, A. (2018). Trauma and long-term memory for childhood events: Impact matters. *Child Development Perspectives, 13,* 3-9; Goldfarb, D., Goodman, G.S., Larson, R.P., Eisen, M.L. & Qin, J. 2018). Long-term memory in adults exposed to childhood violence: Remembering genital contact nearly 20 years later. *Clinical Psychological Science, 7,* 381-396.

[5] Corwin, D., & Olafson, E. (1997). Videotaped discovery of a reportedly unrecallable memory of child sexual abuse: Comparison with a childhood interview videotaped 11 years before. *Child Maltreatment*, *2*, 91–112. For scrutiny, *see* Geis, G., & Loftus, E. F. (2009). *Taus v. Loftus*: Determining the legal ground rules for scholarly inquiry. *Journal of Forensic Psychology Practice*, *9*, 147–162; Loftus, E. F., & Guyer, M. J. (2002*a*). Who abused Jane Doe?: The hazards of the single case study: Part I. *Skeptical Inquirer*, *26*, 24–32; Loftus, E. F., & Guyer, M. J. (2002*b*). Who abused Jane Doe?: Part 2. *Skeptical Inquirer*, *26*, 37–40, 44; Tavris, C. (2008). Whatever happened to "Jane Doe"? *Skeptical Inquirer*, *32*, 28–30.

[6] Williams, L. M. (1994). Recall of childhood trauma: A prospective study of women's memories of child sexual abuse. *Journal of Consulting and Clinical Psychology*, *62*, 1167–1176; Williams, L. M. (1995). Recovered memories of abuse in women with documented child sexual victimization histories. *Journal of Traumatic Stress*, *8*, 649–673.

(*i.e.*, robust memories for traumatic events) is substantial.

26. For the reasons just described, I reported that I thought it was "vanishingly unlikely" that post-traumatic stress disorder (PTSD) and the dissociative amnesia that M.G. was diagnosed with could explain what M.G. had described about his memories. 5/10/16 RP27.

27. If M.G.'s reports are not actual memories, the question must be raised of what, instead, these reports involve. I noted in my interview that M.G.'s therapist Wendy Rawlings's approach to treatment, called "guided visualization," is something known for distorting memory and for creating false memories. 5/10/16 RP39. "[F]unctionally, EMDR is a form of hypnosis." 5/10/16 RP40.

28. Defense counsel Mr. Fricke called me as a witness at trial and I testified about my knowledge of how memory works. RP768-861. I did not watch M.G., his family physician Dr. John Daniel, or his trauma therapist, Dr. Susan Poole, testify. Recently, Mr. Fugle's post-conviction counsel provided me with trial testimony of all three of these witnesses, including their respective testimony about "repressed-recovered memories."

29. At trial, I explained that clinical psychologists believe there exists a pattern which has been called repression, suppression, or dissociative amnesia. RP 789. This trio of notions involves different claims about the specific mechanisms involved, but the trio of proposals shares the claim that there exists some mechanism that can push a painful memory into the unconscious mind, so that the person has the memory but

is completely unaware of it, and that at some future point, the "repressed," "suppressed," or "dissociated" memory can be "recovered" or brought back into the conscious mind. RP 790.

30. Consistent with what I said to the lawyers in my pretrial interview, I testified that this concept is "absolutely not" accepted within the scientific community. RP 790-791.

31. At trial (just as in the pre-trial interview), I explained that there is "a small mountain of evidence" that suggests that traumatic memories are lasting, not lost. RP 791 ("It's exactly the opposite of repression. Horrible, horrible things produce memories that you're stuck with, whether you like it or not.")

32. I testified there is no general acceptance of what "repression" may be or what allegedly causes it. RP 795. Indeed, some who endorse notions like repression argue that this self-defense mechanism can be triggered by any painful event; other authors suggest that only painful memories involving sexual topics can be repressed; other authors suggest that only repeated painful events are repressed; and still others claim that only painful events involving some sort of betrayal (e.g., by a parent or caretaker) are repressed. It seems, then, that there is not general acceptance of claims even within the community of authors who assert that repression (or related mechanisms) exist.

33. Across these differences, though, those who believe in "repression" (or the related ideas of suppression and dissociative amnesia) suggest that some mechanism

acts on memories that are painful or anxiety-provoking for the person who holds these memories. This mechanism is thought to defend and protect the person, by keeping these aversive memories out of the person's conscious thoughts. Finally, a key shared notion of these hypotheses is that these memories remain in some hidden form, which is why they supposedly can in some circumstances be recovered.

34. The idea is "only controversial in the sense that my mental health colleagues believe it's real and anybody who's looked carefully and scientifically at the evidence says it's probably not real." RP798. I testified that the idea that repressed memories exist is not generally accepted in the scientific community. RP824. Again, the scientific community maintains that painful or traumatic events are better remembered than other (non-traumatic) events. This consistent finding is in large part why I believe it is generally (albeit not universally) accepted that claims about repression misrepresent how memory actually functions. Note, therefore, both that claims <u>endorsing</u> the repression notion <u>are</u> <u>not</u> generally accepted, and also that claims <u>rejecting</u> the repression notion <u>are</u> generally accepted.

35. On cross-examination, I reiterated that as far as we can tell, repression does not exist. RP843. I explained that the evidence that some clinicians rely on to say that repression does exist is, for lack of a better term, "lousy." RP843. I was unequivocal about this in my testimony: "It's not the case that one group of experts says one thing and one group of experts says the other thing. Instead, one group of experts has evidence on their side and the other group of experts just has their beliefs

with no evidence to go with it. So it's not an even contest here." RP 844; 852 ("There is no compelling evidence in favor of repression. I mean, again, that contest between the scientist and the clinicians, it's just not an even contest in any way.") To the extent clinicians claim there is such a thing as repression, they are "overstepping their training." RP 855.

36. Now that I have reviewed the transcripts of their testimony, I believe that some of the opinions given by Dr. Daniel and Dr. Poole at trial – especially their opinions about "repression," "suppression," and "dissociation," were opinions that lack general acceptance in the scientific community.

37. I base this declaration on my knowledge as a scientifically trained research psychologist who specializes in cognitive psychology, with a focus on memory. In thinking about these issues, I have defined the relevant scientific community as the one that I belong to, namely research psychologists who use the scientific method to study cognition, including memory. I recognize that the broader community of psychologists includes clinicians who provide mental-health counseling and treatment to patients through various modalities. *E.g.* RP 577 (Dr. Poole testifying "I'm not a research psychologist. I'm a clinician.")

38. Dr. Poole testified at length about dissociative amnesia and repressed-recovered memories but admitted that she is not a memory expert and does not testify about how memory works. RP 577 ("Correct. Clinician.") Note, then, that Dr. Poole (by her own testimony) is not a member of the "relevant scientific community"

specified by the Frye rule. Clinicians like Dr. Poole may develop opinions about cognition, and even memory, but are unlikely to do so through the application of the scientific method, the way that research psychologists like myself would.

39. I know that some non-researcher clinicians assert that "recovered memories" exist based on what they have seen in their counseling practice. I read that Dr. Poole's opinions about memory processes were allegedly borne out of her clinical practice. RP 585 (Dr. Poole testifying: "[I]n all of my childhood trauma people, there's a period of memories that come up over the course of time as certain new nightmares and flashbacks come back and that they've come in and present a new memory and another memory as they come up in time.") Here I note, though, that Dr. Poole would generally have no access to the several pieces of evidence needed to confirm these claims. For example, her only evidence for the accuracy of these "memories" is the report of her "child trauma people," and, with no way to confirm these reports, she has no way to assert that they actually are memories, much less memories that have been lost and then found again. Likewise, Dr. Poole is relying on the reports from her "child trauma people" that these "memories" were actually and fully lost from view for some period of time. Here I note, however, that research tells us that people routinely make errors about what they did or did not know at particular points in term, or what they were or were not aware of at particular points

in time.[7] Hence the issue that the memory was at some point "lost" is as unclear here as the issue of whether there is an actual memory of a genuine event. It is on these grounds that Dr. Poole's claims do not approach the standard of proof required for assertions within the scientific community.

40. Thus, Dr. Poole's claims lack scientific merit. In addition, as already noted, her claims are inconsistent with claims about memory generally accepted in the scientific community. As a result, the claims offered by Dr. Poole would not satisfy the Frye requirement of general acceptance. In addition, the scientific community does not generally accept the idea that a "dissociative flashback" – including one that comes with feelings of "smells, sights, sounds," – is a "playback" of a true memory. Dr. Poole's testimony about flashbacks, therefore, would not satisfy the Frye requirement of general acceptance.

41. The scientific community also does not generally accept as true the idea that fear and being threatened by an abuser cause memories to be "suppressed." Dr. Poole testifying to the contrary would not satisfy the Frye requirement of general acceptance.

42. The scientific community does not generally accept as true the idea that memories are "recovered" when the threat that allegedly caused suppression is taken

[7] Schooler, J. W. (1999). Discovered memories and the "delayed discovery doctrine": A cognitive case based analysis. In S. Taub (Ed.), *Recovered memories of child sexual abuse: Psychological, social, and legal perspectives on a contemporary mental health controversy* (pp. 121–141). Springfield: Charles C. Thomas; Roese, N. J., & Vohs, K. D. (2012). Hindsight bias. *Perspective on Psychological Science*, *7*, 411–426.

away. Dr. Poole testifying to the contrary would not satisfy the Frye requirement of general acceptance.

43. The existence of a DSM diagnosis of dissociative amnesia does not prove that the concept of "repressed-recovered memories" is real or generally accepted. Dissociative amnesia is about forgetting, not about remembering. It is important to note that none of the diagnostic criteria for this disorder reference memory recovery. As such, the diagnosis on its own does not support any claim that there is general acceptance for the alleged phenomenon of repressed and recovered memory.

44. Turning to the specific testimony given at trial by M.G.'s family physician, Dr. Daniel, the doctor testified that: "Dissociative amnesia [is] a psychiatric condition where, due to extreme psychological trauma, the memory is suppressed, causes a disruption of the memory as well as their identity, and the awareness is lost." RP 506.

45. Here I note that Dr. Daniel is a medical doctor, not a researcher, much less a researcher specializing in memory. In any case, I believe that Dr. Daniel's claim that "memory is suppressed," was intended to mean that (a) the person is no longer aware that the memory exists, but (b) the memory does exist and is potentially recoverable. If that is his intended meaning, most research psychologists would say that the opposite of this is true. Again, the prevailing view is that trauma leads to long-lasting and intrusive memories, not "suppression." There is no general acceptance of the idea that trauma causes a trauma victim the inability to access a formed memory.

What Dr. Daniel testified to would not satisfy the Frye standard requirement of general acceptance.

46. M.G.'s trauma therapist, Dr. Susan Poole, testified that "dissociative amnesia, and flashbacks" can be caused by childhood trauma. RP566. It is true that traumatic experiences can produce "flashbacks." But, as already noted, a "flashback" cannot be understood as a simple "replay" of an original event.[8] Those who study memory recognize that flashbacks are not "pure" memories.

47. Instead, flashbacks contain a mix of memory (often combining elements from multiple episodes) along with some amount of anxiety-rooted fantasy about what might have happened, and some amount of anxiety-rooted fantasy about how things could have been even worse. The classic example is that of a war veteran who had a flashback of walking through the battlefield, surrounded by corpses, and, the flashback included the sensation that the corpses jump up and start yelling at.[9] Again, there is no general acceptance in the scientific community for the idea that a "flashback" is proof that the individual lived through what they are reporting to be having a "flashback" of.

48. Dr. Poole also testified that "a dissociative flashback is different from a regular memory, and a dissociative flashback would be one in which you actually

[8] McNally, R. J. (2003). *Remembering trauma*. Cambridge, MA: Belknap Press of Harvard University Press.

[9] McNally, R. (2003). Page 105-106.

feel like you were reliving the traumatic memory. So at that point in time, when you're in the memory, you cease to be in the space that you are in and you're reexperiencing the feelings, smells, sights, sounds of the trauma, for instance." RP 545.

49. In contrast to many of Dr. Poole's other claims, there is general acceptance for the idea that a "flashback" is the often-described pattern where an individual feels like they are reliving an earlier event. But there is no general acceptance for Dr. Poole's assertion that a flashback is a special type of genuine memory. To the contrary, as already discussed, there is general acceptance that a "flashback" can not be reliably understood as "a playback."

50. Furthermore, an individual's assertion that they experienced what to them felt like a "flashback," does not in and of itself prove the existence of the event thought to have occurred in the past. People can feel as if they are reliving a traumatic event – even if there was no such event (as in the example of corpses leaping up and shouting at the soldier). In general, "flashbacks" can include the merging together of real elements with fictitious ones.

51. Dr. Poole testified: "We commonly see, with trauma, some form of dissociative amnesia for certain memories." RP546-47. If her claim here is that trauma causes "repression" or "suppression" of memories, there is no general acceptance of that idea. What she testified to would not meet the Frye requirement of general acceptance.

52. Dr. Poole's assertion about amnesia is, however, ambiguous. On one side, she seems to be talking about repression – the notion that memories can be hidden and potentially then recovered. On the other side, she may be suggesting that trauma causes memories to be erased (and not just hidden) and so lost forever. On the latter point, there is, in fact, general acceptance for the idea that extreme trauma can interrupt the biological process of memory consolidation, with the result that the memory is never moved into enduring form. This means that some people who undergo extreme trauma never record the event into long-term storage. But, if there is no enduring memory established, then there is no possibility for "recovering" the memory at some later point in time (because there is nothing to recover).

53. Notice, then, that the implication is the same on either of these interpretations of "amnesia." If the claim is "repression," the scientific evidence raises powerful questions about whether the proposed mechanism exists, and, if the mechanism does not exist, then there is no chance of memory recovery. Alternatively, if the claim is some sort of "erasure," then the mechanism (the disruption of consolidation) is well-documented, but here too there is no chance of memory recovery.

54. Dr. Poole also testified that "dissociative amnesia is an inability to recollect parts of one's memory." RP 546-47. Dr. Poole added that it is "very common where, over time, different memories will come back in time." *Id.* There are several problems here. As already alluded to, the "memories" that Dr. Poole observes in her professional work may not be actual memories (i.e., reflections of genuine past

events) at all. In addition, even if the reports are accurate, we might worry that they may be (what researchers sometimes call) "second-hand memories" – information gleaned from some other person or source, but now mistakenly claimed as first-hand recollection.

55. I read that Dr. Poole testified that M.G. "began to have flashbacks and nightmares is the way in which that the memories returned." RP 560-61. She testified this is something that can happen, based on her training and experience. *Id.* The mention that "memories returned" is an unjustified suggestion that flashbacks and nightmares can cause a true (and "repressed") memory to be recovered. What she testified to would not satisfy the Frye standard requirement of general acceptance.

56. Similarly, Dr. Poole claimed to the jury that fear can cause initial "repression":

> [W]hen a child is being abused chronically over years and it's happening in the home, there's no opportunity for that child to -- if they feel like -- particularly if they're being threatened, which was in the case of [M.G.], they're being taught and coerced into being silent. So they don't have any way -- in order to cope with that and go about their daily living, they kind of have to suppress that. So, you know, he was being terrified that if he told, that his -- he had been threatened that his mother would be killed. He had been threatened about the harm himself, and so it was -- what can happen is, as a coping mechanism, those memories get suppressed.
> RP 561

57. There are multiple problems with this testimony. One, Dr. Poole appears to have accepted as true what M.G. told her: that he was abused for years, that he was threatened that he would be harmed, threatened his mother would be harmed. Two,

Dr. Poole went on to testify that the "recovery" of the memory comes about because the trauma victim is feeling safer. I know of no scientific basis for these assertions. What Dr. Poole testified to would not satisfy the Frye standard requirement of general acceptance.

58. In my opinion, as a scientist who has studied memory for four decades, there was no "repression" and "recovery" here. As I indicated above, M.G.'s reports do not function as memories generally function, and so, on that basis, may not be genuine memories. If he had actually experienced these events, he would not have forgotten them. In the alternative, if the events were extremely traumatic, the processes of consolidation would have been disrupted; therefore, no memory record would have been established; therefore there would be no "memory" that potentially could be recovered; therefore no legitimate "recovery" would be possible.

59. In addition, other considerations (M.G.'s flashbacks, the conversations with his grandmother and perhaps with counselors) provide a plausible alternative view – that his reports are essentially memory illusions, memories for events that did not occur. More important, the various claims made by the treatment providers, aimed at bolstering M.G.'s claims, involve specific assertion after specific assertion that does not stand up to scientific scrutiny, and which would not satisfy the Frye standard.

60. The prospect that M.G.'s reports were false memories (*i.e.*, sincere recollection of events that actually never occurred) is well-grounded in scientific research, with studies showing that people can claim to remember large-scale,

elaborate, emotional, and detailed episodes that have no factual basis.[10] In addition, as I testified at trial, "there is no one path that leads to false memories. You can get false memories because somebody suggested it to you. You can get false memories because it comes from a dream. You can get false memories because it comes from a flashback. Lots of evidence that suggests people can produce false memories as part of psychotherapy. If a therapist is convinced that someone might have been abused as a child and tries to work with the person to help them process those memories, that's the jargon that's often used by therapists. So lots of paths. It does not have to be deliberate planting from the outside." RP 814.

61. I read that Dr. Poole also testified that she thinks a "suppressed" memory would come back in the absence of a stressor.

> Q. Well, <u>based on your training and experience, is there something that can cause them to suddenly come back</u>?
> A. And that -- yes, there could be. <u>Certainly, just the fact of being older and suddenly being -- perceiving being safer. The memories -- at some point, the subconscious realizes that it does not have to protect in the same way</u>. There may have been an event or something that had that occur as well, but he did not report on what that triggering event was to me.
> RP 563.

62. I know of no scientific justification for this. I understand that this is something Dr. Poole says she has observed in her subjective experience as a

[10] There are many examples, but for an especially clear case, see Shaw, J. & Porter, S. (2015). Constructing rich false memories of committing crime. *Psychological Science,* 26, 291-301.

therapist, but what she testified to certainly would not satisfy the Frye standard requirement of general acceptance.

63. Dr. Poole's testimony on this point does contain an element of truth, although her testimony misrepresents the scientifically established facts. It is true that all of us have memories that we cannot access. When a suitable hint or cue comes along, we do find the memory. This pattern is called "retrieval failure" to describe the time when we have a memory but cannot find it. The situation is akin to the everyday experience of losing your keys: You know the keys are somewhere in your house but you cannot find them. Later, some reminder comes into view, and so, perhaps, you recall that you were wearing your green jacket when you came home, and you then locate your keys in the jacket pocket.

64. Retrieval failure is the result of the ordinary working of memory; it is not a defense mechanism, it is not associated with memories of any particular type, it is not specifically associated with the sort of painful memories that you might hope to protect yourself against.

65. I know of no evidence to support Dr. Poole's claim that retrieval failure is driven by motivation or self-protection. I know of no evidence that "recovery" from retrieval failure depends on a person feeling safe. Instead, retrieval failure is undone when the person finds some cue that leads them back to the target memory. In short: Dr. Poole made claims that lack any scientific basis. The claims that fear causes

suppression and that feeling safe causes recovery, are not generally accepted in the scientific community and would not satisfy the Frye standard.

66. Scientific research also leads to deep skepticism about Dr. Poole's implication that M.G.'s amnesia (from age 14 until 18) can be understood as retrieval failure. Retrieval failure is most likely if a person shifts their physical and mental context, so that they are no longer encountering cues or suggestions that might remind them of the target event. Retrieval failure is then lifted if someone returns to that physical and mental context, because then of course the person encounters relevant memory cues. In the instant case, my understanding is that M.G. continued to live with Mr. Fugle (the alleged abuser) both during the time of the alleged abuse and during the time when M.G. is alleged to have "suppressed" or "repressed" memory of the same abuse. Thus there was no departure from a context, and no return to a context. From the standpoint of how science defines and understands retrieval failure, therefore, this is not at all a setting in which retrieval failure is likely. Hence Dr. Poole's claim of retrieval failure is not a plausible explanation. Any testimony, therefore, suggesting that M.G.'s memory loss involved a "problem with retrieval" is not generally accepted in the relevant scientific community.

67. I read that Dr. Poole testified that the concept of "repressed-recovered" memories was the same as a DSM diagnosis of dissociative amnesia:

> Q. And is that also -- is that the same thing as dissociative amnesia?
> A. Yes. That's -- right.
> RP 563.

68. This is, I believe, a mischaracterization of the dissociative amnesia diagnosis. The diagnosis is about memory loss. Dissociative amnesia in the DSM says nothing about recovery of memories. Dr. Poole's assertions have no scientific grounding.

69. Mr. Fugle's trial counsel, Mr. Fricke, did not discuss with me making a pretrial Frye challenge to the admissibility of opinions on "repressed-recovered memories." If he had done so, I would have offered the same opinions as those set out above, including the fact that the concept of "repressed-recovered memories" is not generally accepted by the scientific community. I would have been prepared to so testify at a Frye hearing. I remain available to so testify in court now.

70. I hold the opinions I have expressed in this declaration to a reasonable degree of scientific certainty.

I hereby declare under penalty of perjury under the laws of the State of Washington, and specifically RCW 9A.72.085, that the foregoing statements are true and correct to the best of my knowledge.

DATED this 19 day of September, 2019

Daniel Reisberg, Ph.D.
Portland, Oregon

APPENDIX S

15 April 2019

VITA

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Education: B.A. Swarthmore College, Psychology and Philosophy, 1975
M.A. University of Pennsylvania, Psychology, 1976
Ph.D. University of Pennsylvania, Psychology, 1980

Positions: Assistant Professor, New School for Social Research, 1980–1986.
Assistant Professor, Reed College, 1986–1989.
Associate Professor, Reed College, 1989–1993.
Visiting Scientist, Applied Psychology Unit, Medical Research Council, Cambridge, England, 1994.
Professor, Reed College, 1993–2013.
Patricia & Clifford Lunneborg Professor of Psychology, 2013–present.
Also: Department Chair, 1995–97, 2002–04, 2006–07, 2009–2011, 2012–2014.

Honors and Awards:

High Honors, Swarthmore College, 1975
Sigma Xi (Promoted from Associate Member to Member, May 1984)
Phi Beta Kappa
National Science Foundation Graduate Fellow, 1975-78
University of Pennsylvania University Fellow, 1978
National Institute of Mental Health Predoctoral Fellow, 1978-80
Fellow of the American Association for the Advancement of Science (elected to the rank of Fellow in October, 1994)
Fellow of the Western Psychological Association (elected to the rank of Fellow in September, 1995)
Visiting Fellow of the British Psychological Association (September, 1999)
Fellow of the American Psychological Association, Division 3 (Experimental Psychology; elected to the rank of Fellow in August, 1999)
First-place team (with James Kalat and Nancy Felipe Russo) in the WPA's "Psychology Jeopardy" (April, 2000)
Fellow of the Association for Psychological Science (Elected to the rank of Fellow in January, 2007)

For the readers' convenience, recent additions to my CV are boxed.

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As editor of this volume, I am also the author of Chapter 1 (*Introduction to the Handbook*) and Chapter 64 (*Epilogue: Looking Forward)*.
[The paperback edition of this volume was released in January 2014.]

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82. Porter, D., Moss, A. & Reisberg, D. (2014). The impact of the appearance-change instruction on identification accuracy for same-race and cross-race identifications. *Applied Cognitive Psychology, 28,* 151-160.

b 83. Reisberg, D. (2014). *The science of perception and memory: A pragmatic guide for the justice system*. New York: Oxford University Press. [Available in print or as an eBook readable on almost any electronic device.]

b 84. Reisberg, D. (2015). *Cognition: Exploring the Science of the Mind, 6th edition*. New York: Norton. [Available in print or as an eBook.]

85. Reisberg, D., Simons, D., & Fournier, L., *Editors*. (2016). Are we there yet? A special forum assessing when and whether psychological research is ready for use in the justice system. *Journal of Applied Research in Memory and Cognition, 5,* 233-317.

86. Reisberg, D., Simons, D., & Fournier, L. (2016). An introduction to the JARMAC forum. *Journal of Applied Research in Memory and Cognition, 5,* 233-235.

Publications (continued; *books marked with* **b**):

b 87. Reisberg, D. (2019). *Cognition: Exploring the Science of the Mind, 7th edition*. New York: Norton.

88. Reisberg, D. & Davis, D. (2019). The psychologist as courtroom educator. In Youngren, J.N. & Stein, C.T. (Eds.) *Forensic Psychology in Military Courts-Martial*. Washington, D.C.: APA Press. [In press.]

89. Davis, D. & Reisberg, D. (2019). The psychologist as military trial consultant. In Youngren, J.N. & Stein, C.T. (Eds.) *Forensic Psychology in Military Courts-Martial*. Washington, D.C.: APA Press. [In press.]

90. Reisberg, D. & Heuer, F. (2019). Emotion and recall. In Pozzulo, J., Pica, E., & Sheahan, C. (Eds.) *Memory and sexual misconduct: Psychological research for criminal justice*. NY: Taylor & Francis. [In press.]

91. Kenchel, J.M., Greenspan, R.L., Reisberg, D., & Dodson, C.S. (2019). "In your own words, how certain are you?" Post-identification feedback distorts verbal and numeric expressions of eyewitness confidence. *Manuscript under review*.

Papers presented at meetings:

Reisberg, D. Preselective processing: Does an identification stage exist? Paper presented at the meetings of the Eastern Psychological Association, New York, April 1975.

Chambers, D. and Reisberg, D. Can images have alternate interpretations? Paper presented at the meetings of the Eastern Psychological Association, Baltimore, April 1984.

McLean, J., Goldfield, A. and Reisberg, D. Lipreading with fully audible stimuli: Speech perception is an amodal process. Paper presented at the meetings of the Eastern Psychological Association, Baltimore, April 1984.

Reisberg, D., Heuer, F. and O'Shaughnessy, M. Predicting the vividness of autobiographical memories. Paper presented at the meetings of the Psychonomic Society, San Antonio, Texas, November 1984.

Winters, L. and Reisberg, D. Mental practice. Paper presented at the meetings of the Eastern Psychological Association, Boston, March 1985.
(Also published as: Does imagined practice help in learning a motor skill? *Resources in Education*, Document #SP026624, 1986.)

O'Shaughnessy, M., Winters, L. and Reisberg, D. The cognitive component of perception. Paper presented at the meetings of the Eastern Psychological Association, Boston, March 1985.

Reisberg, D. and Chambers, D. Images, pictures and percepts. Paper presented at the meetings of the Society for Philosophy and Psychology, Toronto, May 1985.

Reisberg, D. and Heuer, F. Imagery vividness reliably (but negatively!) predicts visual memory. Paper presented at the meetings of the Psychonomic Society, Boston, November 1985.

Papers presented at meetings (continued):

Reisberg, D., Smith, J.D. and Sonenshine, M. Can subjects detect ambiguity in auditory imagery? Paper presented at the meetings of the Eastern Psychological Association, New York, April 1986.

Chambers, D. and Reisberg, D. What governs the phenomenal appearance of mental images? Paper presented at the meetings of the Eastern Psychological Association, New York, April 1986.

Reisberg, D. and Chambers, D. The intensionality of mental images. Paper presented at the meetings of the Cognitive Science Society, Amherst, August 1986.

Reisberg, D., Chambers, D. and Rueger, W. Mental images as mental representations: What does an image *resemble*? Paper presented at the meetings of the Psychonomic Society, New Orleans, November 1986.

Reisberg, D. External representations and the advantages of externalizing one's thought. Paper presented at the meetings of the Cognitive Science Society, Seattle, August 1987.

Heuer, F. and Reisberg, D. Vivid memories of emotional events: The accuracy of remembered minutiae. Paper presented at the meetings of the Psychonomic Society, Seattle, November 1987.

Chambers, D. and Reisberg, D. Images are not everywhere dense: An image of a duck does not include a rabbit's nose. Paper presented at the meetings of the Eastern Psychological Association, Buffalo, N.Y., April 1988.

Baxter, D. and Reisberg, D. Auditory imagery is not ambiguous. Paper presented at the meetings of the Western Psychological Association, San Francisco, April 1988.

Wilson, M. and Reisberg, D. Two species of auditory imagery. Paper presented at the meetings of the Western Psychological Association, San Francisco, April 1988.

Reisberg, D., Smith, D. and Baxter, D. "Pure" and "enacted" auditory images. Paper presented at the meetings of the Psychonomic Society, Chicago, November 1988.

Chambers, D. and Reisberg, D. What an image includes depends on what an image means. Paper presented at the meetings of the Psychonomic Society, Chicago, November 1988.

Dodson, C. and Reisberg, D. Does post-event misleading information erase prior memories? Paper presented at the meetings of the Oregon Academy of Sciences, Portland, February 1989.

Reisberg, D. and Heuer, F. The consequences of vivid imagery: An empirical handle on the function of phenomenal states? Paper presented at the meetings of the Society for Philosophy and Psychology, Tucson, April 1989.

Reisberg, D., Lenoir, G. and Heuer, F. Anticipations and after-thoughts: How far does the "present" extend? Paper presented at the meetings of the Psychonomic Society, Atlanta, November 1989.

Papers presented at meetings (continued):

Reisberg, D. Do laboratory studies of imagery bear on what we call "being imaginative"? Paper presented at the meetings of the Society for Philosophy and Psychology, College Park, Maryland, June 1990.

Reisberg, D. Shades of Watson: Auditory imagery and its relation to inner speech. Distinguished Guest Lecture delivered at the Workshop on Imagery and Cognition, Aberdeen Scotland, August 1990.

Reisberg, D., Smith, J. David, and Wilson, M. Subvocalization and auditory imagery: Interactions between the "inner ear" and the "inner voice." Paper presented at the meetings of the Psychonomic Society, New Orleans, November 1990.

Reisberg, D. and Logie, R. The ins and outs of working memory. Paper presented at the conference on Imagery, Creativity, and Discovery, Nashville, May 1991.

Reisberg, D. and Chambers, D. Images depict, images describe. Paper presented at the meetings of the Society for Philosophy and Psychology, San Francisco, June 1991.

Logie, R. and Reisberg, D. The nature of rehearsal in working memory. Paper presented at the International Conference on Memory, Lancaster, England, July 1991.

Reisberg, D. and Gossett, D. Some subjects are not influenced by how a problem is framed. Paper presented at the meetings of the Psychonomic Society, San Francisco, November 1991.

Karbo, W. and Reisberg, D. Post-event misinformation about actions: Remembering actions that never occurred. Paper presented at the meetings of the Oregon Academy of Sciences, February 1992.

Reisberg, D. Voices, music and hallucinations: What is auditory imagery? Invited address presented at the meetings of the Western Psychological Association, Portland, May 1992.

Reisberg, D. Emotion and learning. Invited paper presented at the Fifth Conference on the Neurobiology of Learning and Memory, University of California, Irvine, October 1992.

Logie, R. and Reisberg, D. Inner eyes and inner scribes: A partnership in visual working memory. Paper presented at the Fourth European Workshop in Imagery and Cognition, Tenerife, December 1992.

Reisberg, D. What is contained within an image? Evidence from massive failures to make discoveries from imagery. Paper presented at the Seventh International Conference on Event Perception and Action, Vancouver, B.C., August 1993.

Reisberg, D., Karbo, W., and Scully, J. The laboratory creation of false memories: How generalizable? Paper presented at the annual meetings of the Psychonomic Society, Washington D.C., November 1993.

Reisberg, D. and Heuer, F. The complex interaction between memory and emotion. Paper presented at the Practical Aspects of Memory Conference, College Park, Maryland, July 1994.

Papers presented at meetings (continued):

Canseco-Gonzales, E., Hutchinson, M., Reisberg, D., Robinson, S., and Vigileos, A. Arithmetic and bilingualism: Why can't I add in Spanish? Paper presented at the meetings of the Oregon Academy of Science, February 1995.

Koch, Z. and Reisberg, D. Motoric support for visual imagery: Is imagery visual, spatial, or movement-based? Paper presented at the meetings of the Oregon Academy of Science, February 1995.

Porter, R. and Reisberg, D. Autobiography and memory. Paper presented at the meetings of the Modern Languages Association, Chicago, December 1995.

Reisberg, D. and Koch, Z. A role for motoric support in (so-called) visual imagery. Paper presented at the meetings of the Psychonomic Society, Los Angeles, November 1995.

Reisberg, D. and Usui, V. The role of subvocalization in auditory imagery and working memory. Paper presented at the meetings of the Psychonomic Society, Chicago, November 1996.

Reisberg, D. Cognition: Where is the state of the art? Invited paper presented at the meetings of the National Institute for the Teaching of Psychology, Tampa, FL, January 1997.

Schwartzreich, E. and Reisberg, D. Individual differences in perception: The relationship between Inattentional Blindness and Spearman's *g*. Poster presented at the 4th Annual Meeting of the Cognitive Science Association for Interdisciplinary Learning, Hood River, OR, August 1997.

Reisberg, D. What do we know about emotion's effects on memory? Paper presented at special conference, "Memory Overwhelmed: Interdisciplinary Approaches to Trauma." Atlanta, GA, October 1997.

Reisberg, D. Mental imagery for musical timbre. Paper presented at the 5th Annual Meeting of the Cognitive Science Association for Interdisciplinary Learning, Hood River, OR, August 1998.

Miner, N., Boelter, D., and Reisberg, D., Verbal overshadowing of face memory: When *doesn't* it occur? Paper presented at the Annual Meetings of the Society for Applied Research in Memory and Cognition (SARMAC), Boulder, CO, July 1999.

Reisberg, D. Imagery: The state of the art. Keynote address presented at the meetings of the British Psychological Society, York, England, September 1999.

Reisberg, D. Internal representations, external representations, and the intensionality of mental imagery. Invited paper presented at *Intensionality and the Natural Mind*, Washington University in St. Louis, March 19-20, 1999.

Reisberg, D., Heuer, F., and Laney, C. Memory and emotion: Comparing memory for visually-arousing and thematically-arousing events. Paper presented at the meetings of the Psychonomic Society, New Orleans, November 2000.

Reisberg, D. Thinking out loud: The contrasts between stimulus-based and imagery-based discovery. Keynote address presented at the meetings of the meetings of the NorthWest Cognition and Memory (NoWCaM) Society, Vancouver, B.C., May, 2001.

Papers presented at meetings (continued):

Goard, M. and Reisberg, D. Retrieval-induced forgetting in the recall of complex episodes. Paper presented at the meetings of the Psychonomic Society, Orlando, FL, November 2001.

Laney, C., Heuer, F. and Reisberg, D. Thematic-arousal, visual-arousal, and memory for emotional events. Paper presented at the meetings of the Society for Applied Research in Memory and Cognition (SARMAC), Aberdeen, Scotland, July, 2003.

Reisberg, D. and Heuer, F. Remembering emotional events. Paper presented at the meetings of the annual Cognitive Science And Interdisciplinary Learning (CSAIL) meeting, Hood River, Oregon, July, 2003.

Reisberg, D. Presentation as part of *"The 10th Mind and Life Conference: Exchanges between Buddhism and Biobehavioral Science with His Holiness the XIVth Dalai Lama,"* Massachusetts Institute of Technology, September, 2003.

This event featured candid discussions between the Buddhist and scientific communities about the nature of mental imagery (that is the session in which I was participating), emotion, and the nature of attention and concentration. The Dalai Lama was a central participant in all of the discussions. Recordings of this meeting are available on video, and a 2006 book provides a broad summary of our discussions.

Weingarten, E. and Reisberg, D. What makes a police photo line-up *suggestive?* Paper presented at the annual meetings of the Psychonomic Society, Vancouver, B.C., November, 2003.

Reisberg, D. Memory for emotional events – The need for some distinctions. Invited Distinguished Speaker address delivered at the meetings of the Sixth Tsukuba International Conference on Memory: Memory and Emotion, Tsukuba, Japan, March 2005.

Reisberg, D. Remembering emotional events – Getting beyond a simple "arousal model." Invited address delivered at the meetings of the Western Psychological Association, Portland, Oregon, April 2005.

Getz, S. and Reisberg, D. The effects of training on imagery skills. Paper presented at the Mind and Life Summer Research Institute, Garrison, NY, June 2005.

Ogle, C. and Reisberg, D. A comparison of elimination, sequential and simultaneous lineup procedures. Paper presented at the meetings of the Association for Psychological Science, New York, NY, May 2006.

Kushlev, K. and Reisberg, D. The effects of mindfulness on the emotional experience of choosing. Paper presented at the meetings of the Western Psychological Association, Portland, OR, April 2009.

Houston, M. and Reisberg, D. Do jurors trust their own eyes over the expert when presented with finger print evidence? Paper presented at the meetings of the American Psychology-Law Society, New Orleans, LA, March 2014.

Newirth, K. et al. Out of the lab and into the courtroom: How and why eyewitness experts are important in criminal cases. Full day workshop presented at the meetings of the American Psychology-Law Society, Atlanta, GA, March 2016.

Papers presented at meetings (continued):

Kenchel, J. & Reisberg, D. Eyewitness confidence: Post-identification feedback affects both verbal and numerical expressions. Paper presented at the meetings of the NorthWest Cognition and Memory Association, Vancouver, BC, May 2016.

Kenchel, J., Reisberg, D., & Dodson, C.S. "In your own words, how certain are you?" Post-identification feedback powerfully distorts verbal expressions of witness confidence. Paper presented at the meetings of the American Psychology-Law Society, Seattle, WA, March 2017.

Reisberg, D. Invited discussant: Symposium on 'Why memory matters: Errors (and solutions) in criminal investigations.' Paper presented at the meetings of the American Psychology-Law Society, Memphis, TN, March 2018.

Extramural activities / Community Service (*partial list*):

Committee of Examiners for the Graduate Record Examination (GRE) Psychology Test, Educational Testing Service, 1992-1998.

Director and organizer, Reed College's Second Annual Conference on Music and the Liberal Arts: *In the ear of the beholder – The psychology of music perception*. (February, 2000).

Presentation at the Multnomah Athletic Club as part of Reed College's Luncheon Seminars: *Eyewitness Testimony and the Fallibility of Memory: Implications for the Criminal Justice System*. (March, 2000).

Presentation for the Detective Division, Portland Bureau of Police: *Using the science of memory to improve police work*. (September, 2000).

Presentation for the Reed College Board of Trustees: *The Fallibility of Memory*. (October, 2000).

Presentation for the Oregon State Bar, Continuing Legal Education (CLE) Program: *The science of memory and eyewitness testimony*. (Portland, OR; October, 2000).

Presentation for the Multnomah County District Attorney's Office, Continuing Legal Education (CLE) Program: *Expert witnesses on eyewitness memory*. (Portland, OR; January, 2001).

Member, Advisory Board for the City of Portland's Bureau of Police Long-Term Training and Development Action Plan (2001 - 2002)

Presentation for Reed College's 'Reed on the Road' series: Eyewitness testimony and The Fallibility of Human Memory. (San Francisco; March, 2002).

Presentation for the annual meeting of the National Defender Investigator Association: *Detecting false memories*. (Portland, OR; April, 2002).

Presentation for the Federal Public Defender's Office, Continuing Legal Education (CLE) Program: *Eyewitness identification: When is it likely to be reliable, and when not?* (Portland, OR; May, 2003).

Extramural activities / Community Service (*partial list*; continued):

Presentation for Metropolitan Public Defenders, Continuing Legal Education (CLE) Program: *Evaluating eyewitness identifications*. (Portland, OR; July, 2003).

Two-part presentation for the Oregon Criminal Defense Lawyers Association Program (CLE). *Eyewitness identifications: How accurate are they?* and *False memories: Remembering things that never happened*. (Portland, OR; December 2003).

Presentation for Congregation Neveh Shalom. *When and how should religious beliefs evolve? Possible lessons from the Tibetan Buddhists*. (Portland, OR, February, 2004.)

Presentation for the American Inn of Court. *Questioning a witness: Scientific, legal and professional issues*. (Portland, OR, March, 2004.)

Presentation for the Oregon Society for Clinical Hypnosis. *From the laboratory to the Dalai Lama: What do know about visualization skill?* (Portland, OR: February, 2006).

Presentation for the Oregon Criminal Defense Lawyers Association, as part of their Juvenile Law Seminar: Allegations of Sexual Abuse (CLE). (Newport, OR; April, 2006).

Interview for *Viewpoints,* a nationally-syndicated weekly radio broadcast, highlighting current affairs, and featured on over 340 stations. *Eyewitness testimony: Can we trust it?* (March 2007; available as an mp3 download at < www.mediatracks.com/vp0712 >.)

Member, Advisory Panel for the American Psychological Association's Board of Scientific Affairs, reviewing the *National Standards for High School Psychology Curricula,* July 2007.

Two part presentation for the King County (WA) Prosecutor's office (CLE). Scientific research on eyewitness memory: Is it probative? Is it prejudicial? Is it useful? Part 1: Identification procedures; Part 2: Eyewitness narratives & the problem of false memories. (Seattle, WA: September 2007).

Presentation for the 12th Annual Insurance Fraud Conference, a year meeting sponsored by the insurance industry's International Association of Special Investigation Units (IASIU). Witness Interview Techniques. (Portland, OR: October 2007).

Two part presentation for Detective Division, Portland Bureau of Police, co-presented with Sergeant Wayne Svilar. Can we use what we know about memory to improve interview procedures? and Improving identification procedures. (Portland, OR: October 2007).
[This presentation was over-subscribed in advance, and, when given, was very well received. Therefore, we offered an 'encore' performance in November 2007.]

Presentation for fraud investigators, SAIF corporation. Interviewing witnesses: A scientific perspective. (Salem, OR: October 2008).

Extramural activities / Community Service (*partial list;* continued):

Presentation for Premium Auditors Training, SAIF corporation. *Detecting lies, and getting complete information: What can a scientific perspective tell us about interviewing?* (Salem, OR: October 2008).

Presentation for the 29th annual meeting of the Oregon Paralegal Association. What can you learn from witnesses; what can't you learn? (Bend, OR: October 2008).

Presentation for the Oregon Criminal Defense Lawyers Association, as part of their Juvenile Law Seminar: Working with younger children (CLE). Interviewing young children: The view from the laboratory. (Newport, OR; April, 2009).

Presentation for Premium Auditors Training, SAIF corporation. *Getting the best interview you can – Worries about honesty and memory accuracy*. (Kelso, WA: April, 2009).

Presentation for "OTIS" – the "Old Timers Investigator Society" (a group of investigators working for attorneys). Evaluating Witness I.D.'s. (Portland, OR: June, 2009).

Presentation for Metropolitan Public Defenders (CLE). *Getting the best of, and the most from, witness narratives*. (Portland, OR: October 2009).

Presentation for the National Association of Paralegals. *Preparing witnesses, learning from witnesses*. (Portland, OR: October 2009).

Presentation for the Oregon Criminal Defense Lawyers Association (CLE): *Mastering & controlling the trial venue: A new perspective*. (Co-presented with Laura Graser; Portland OR: December 2010). *This presentation focused on the effects of pre-trial publicity, building on what we know about jurors' memory and judgment processes. How (and when) does pre-trial publicity influence a jury? How effective are the standard "remedies" to pre-trial publicity's impact?*

Interview on Oregon Public Radio's *Think Out Loud* program: "Changing the Child Sex-Crime Law." Broadcast March 28, 2011.

Presentation for the Oregon Criminal Defense Lawyers Association (CLE): *Using and choosing expert witnesses*. (Co-presented with Sara Snyder; Newport, OR: September 2011).

Interview on Oregon Public Radio's *Think Out Loud* program: "Memory and Eyewitness Evidence." Broadcast November 2, 2011.

Presentation for the Oregon Criminal Defense Lawyers Association (CLE): *Evaluating (and improving) eye-witness identifications*. (Portland, OR: December 2011).

Invited testimony before a joint meeting of the House and Senate Judiciary Committees: The Science of Eyewitness I.D.'s. (Salem, OR: May 2012).

Interview on KATU television news, re: "Witnesses can be wrong; task force to look at how." (Portland, OR: May 2012).

Extramural activities / Community Service (*partial list;* continued):

Presentation for the Oregon Criminal Defense Lawyers Association (CLE): *Oregon's new 2012 Interviewing Guidelines*. (Co-presented with Dr. Wendy Bourg and Lisa Maxfield; Newport, OR: April 2013).

Presentation for the Oregon Criminal Defense Lawyers Association (CLE): *Classen, Lawson and Eyewitness Law: The scientific evaluation of eyewitness identifications*. (Bend, OR: June 2013).

Presentation at the Center for Advanced Study in the Behavioral Sciences, Second Annual Behavioral Science Summit, on *Creativity & Innovation*. (Palo Alto, CA: July 2013).

Chair, External Evaluators Committee for the Psychology Department at Whitman College. (Walla Walla, WA: September 2013).

Presentation for Lewis & Clark Amnesty International Chapter: Wrongful Conviction: The Troy Davis Case. (Portland, OR: April 2014).

Presentation for the Oregon Criminal Defense Lawyers Association (CLE): *Oregon's New Protocol for Collecting Identification Evidence*. (Eugene, OR: January 2015; also broadcast statewide as a "webinar").

Interview on WWL radio on "The Think Tank," hosted by Garland Robinette, re: "People confess to crimes they didn't actually commit." (New Orleans, LA: February 2015).

Interview on National Public Radio on "Philosophy Talk," hosted by John Perry and Ken Taylor, re: "Your Lying Eyes: Memory, Perception, and Justice." Recorded before a live audience October 2015; broadcast November 2015 (and available online via iTunes and other podcast outlets).

Presentation for the Oregon Innocence Project (CLE): *The courts' view of psychological science: The sequential lineup as a 'case study'*. (Portland, OR: February 2016).

Two part presentation for the APA Division 42 Forensic Assessment Conference: *Perception and memory in forensic settings: Current controversies,* and also *Detecting Liars: Separating science and pseudo-science*. (Pasadena, CA: April 2016).

Presentation for the Idaho Association of Criminal Defense Lawyers: *The scientific assessment of I.D. evidence: Moving beyond Manson*. (Sun Valley, ID: March 2017).

Presentation for Metropolitan Public Defenders: *Detecting Lies and Liars: Update on the State of the Art*. (Hillsboro, OR: August 2017, and Portland, OR: October, 2017).

Invited testimony before the Oregon State Legislature's Joint Interim Task Force on Testing of Sexual Assault Forensic Evidence Kits. (Salem, OR: June 2018).

Appearance on the Netflix series, *American Vandal,* season 2; presented as "James Milbank, Professor of Psychology." (September, 2018.)

Extramural activities / Community Service (*partial list;* continued):

Appearance on KGW news, "Our memories are far from perfect: Expert explains the science of accurate memories." [Background discussion for reporting on sexual assault accusation against Supreme Court nominee.] (October, 2018.)

Presentation for the American Inn of Court. *Perception and memory: Strengths and weaknesses*. (Medford, OR, May, 2019.)

Consultant and expert witness in judicial proceedings.

My courtroom testimony spans a range of issues, all focused on the scientific examination of how people perceive the world, remember what they have perceived, and think about what they remember. (These are central concerns in cognitive psychology.) Specific topics for testimony have included the proper procedures for eliciting children's memories; eyewitness identifications and also their narrative reports on crimes; earwitness identifications of someone's voice; memory for conversations; the evaluation of confession evidence; and *jurors'* memory for pretrial publicity. I have been recognized as an expert (and allowed to testify) in Alaska, California, Colorado, Idaho, Illinois, Montana, Nevada, New Hampshire, Oregon, and Washington, and also in federal court. I have also consulted on civil, criminal, administrative and military cases in many other jurisdictions.

Professional activities (*partial list*):

Service as Editor:

Applied Cognitive Psychology	(*Editorial board,* 2004-2010)
Cognitive Science	(*Editorial board*, 1990-1998)
Journal of General Psychology	(*Consulting editor,* 1984-2000)
Journal of Mental Imagery	(*Associate Editor*, 1988- 2009)
Memory & Cognition	(*Consulting editor*, 1993-1998)
Psychological Bulletin	(*Associate Editor,* 2000-2002)
Psychological Science	(*Editorial Board*, 1998- 2006)
Review of General Psychology	(*Editorial Board,* 2006-2011)
Emerging Trends in the Social & Behavioral Sciences: Interdisciplinary Directions	(*Consulting editor*, 2012-)
Journal of Applied Research in Memory & Cognition	(*Associate Editor,* 2015-)
Philosophical Psychology	(*Editorial Advisory Board*, 1990-)
The PsychReport	(*Board of Scientific Advisors*, 2013- 2017)
The Behavioral Scientist	(Appointed as Founding Columnist, 2017)

Professional activities (*partial list,* continued):

Service as Reviewer (*partial list*):

Applied Cognitive Psychology
Behavioral and Brain Sciences
Cognition & Emotion
Cognitive Psychology
Current Directions in Psychological Science
Emotion
Experimental Neurology
European Journal of Cognitive Psychology
International Journal of Psychology
Journal of Applied Developmental Psychology
Journal of Experimental Child Psychology
Journal of Experimental Psychology: General
Journal of Experimental Psychology: Human Perception & Performance
Journal of Experimental Psychology: Learning, Memory and Cognition
Journal of Memory and Language
Journal of Police and Criminal Psychology
Law and Human Behavior
Legal and Criminological Psychology
Memory
Memory & Cognition
Neurobiology of Learning & Memory
Perception & Psychophysics
Psychological Bulletin
Quarterly Journal of Experimental Psychology: Human Experimental Psychology

Member or former member:

American Psychological Association (Member, Division 3)
Elected Fellow of Division 3 in 1999
American Psychology-Law Society
Association for Psychological Science
Oregon Academy of Science
Psychonomic Society
Society for Applied Research in Memory and Cognition
Society for Philosophy and Psychology
Executive Committee, 1989-1992, 1996 - 1999
Western Psychological Association
Elected Fellow in 1995
Program Review Committee, 1999, 2000, 2003, 2004.

Addendum 1: Community Service at Reed College:

1987-8	Chair:	Human Subjects Committee
	Member:	Technological Resources Committee
1988-9	Chair:	Division of Philosophy, Education, Religion and Psychology Search Committee in Psychology Technological Resources Committee
	Member:	Administration Committee Human Subjects Committee
1989-90	Chair:	Human Subjects Committee
	Member:	Committee on Academic Policy and Planning (CAPP)* Judicial Review Committee Search Committee in Linguistics Committee on Alcohol and Drug Policy
1990-91	(On sabbatical, Fall semester)	
	Member:	Search Committee in Anthropology
1991-92	Chair:	Division of Philosophy, Education, Religion and Psychology
	Member:	Committee on Academic Policy and Planning (CAPP)* Search Committee in Psychology
1992-93	Chair:	CAPP Ad Hoc Subcommittee on Cognitive Science Search Committee in Psychology
	Member:	Committee on Advancement and Tenure (CAT)* Human Subjects Committee
1993-94	(On leave, Fall semester; Vollum Sabbatical, Spring semester)	
1994-95	Member:	Committee on Academic Policy and Planning (CAPP)* President's Ad Hoc Committee to Review Admissions & Recruiting
	Chair:	Search Committee in Psychology
1995-96	Chair:	Psychology Department Search Committee in Psychology
	Member:	College Computing-Policy Committee Off-campus Study Committee

* Elected Committee.

Addendum 1 (*continued)*: Community Service at Reed College:

1996-97	Chair:	Psychology Department Search Committee in Psychology
	Member:	College Computing-Policy Committee
1997-98	Chair:	Search Committee in Psychology
	Member:	Committee on Academic Policy and Planning (CAPP)* Search Committee in Computer Science
1998-99	Chair:	Search Committee in Psychology (Developmental) Committee on Academic Policy and Planning (CAPP)* CAPP Subcommittee Investigating Class Size
	Member:	Search Committee in Computer Science
1999-2000	[Half time because of sabbatical]	
	Chair:	Search Committee in Psychology (Developmental & Clinical)
2000-01	Member:	Committee on Academic Policy and Planning (CAPP)* Search Committee in Psychology (Behavioral Neuroscience) Search Committee for Reed College President
2001-02	[Half time because of leave]	
	Member:	Search Committee for Reed College President
2002-03	Chair:	Department of Psychology Paid Leave Award Committee
	Member:	Committee on Advancement and Tenure (CAT)* [elected Faculty Secretary in the Spring term] Search Committee in Political Science Search Committee in Anthropology
2003-04	Chair:	Department of Psychology
	Member:	Committee on Academic Policy and Planning (CAPP)*
2004-05	Member:	Committee on Academic Policy and Planning (CAPP)* CAPP Subcommittee on FTE planning

* Elected Committee.

Addendum 1 (*continued)*: Community Service at Reed College:

2005-06	[Half time because of sabbatical]	
	Member:	CAPP Subcommittee on Thesis Loads Search Committee in Psychology (Psychobiology)
2006-07	Chair:	Department of Psychology Search Committee in Psychology (Clinical Psychology)
	Member:	Search Committee in Psychology (Psychobiology) Paid Leave Awards Committee Human-Subjects Research Committee
2007-08	Chair:	Search Committee in Psychology (Cognitive Psychology)
	Member:	Paid Leave Awards Committee
2008-09	[Half time because of leave]	
	Member:	Grievance Review Panel
2009-10	Chair:	Department of Psychology Ad Hoc Committee on Advising Search Committee in Psychology (Cognitive Neuroscience)
	Member:	Physical Plant Committee
2010-11	Chair:	Department of Psychology Search Committee in Psychology (Cognitive Neuroscience) Search Committee in Psychology (visiting position in Cognition)
	Member:	Physical Plant Committee
2011-12	[Sabbatical year]	
2012-13	Chair:	Department of Psychology
2013-14	Chair:	Department of Psychology Sabbatical Fellowship Awards Committee
2014-15	Member:	Undergraduate Research Committee Physical Plant Committee
2015-16	[Half time because of leave]	
	Member:	Grievance Review Panel Safety Committee
2016-17	Chair:	Sabbatical Fellowship Awards Committee
	Member:	Library Board Search Committee in Psychology (visiting position in Developmental)

APPENDIX T

E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

September 03 2015 9:51 AM

KEVIN STOCK
COUNTY CLERK
NO: 14-1-04016-6

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, v. JOSEPH LEROY FUGLE, Defendant.	)	NO. 14-1-04016-6 DECLARATION OF MARK B. WHITEHILL, Ph.D.

I, Mark B. Whitehill, Ph.D., state as follows:

I am over the age of eighteen and competent to be a witness herein.

That the defense asked that I engage in a consultative review of materials relative to the case of State v. Fugle (Pierce County Cause No. 14-1-04016-6). Defendant Joseph Lee Fugle is charged in Pierce County Superior Court with Child Molestation in the First Degree, 2 counts of Rape of a Child in the First Degree, and Rape of a Child in the Second Degree. The alleged victim, M.G., is the defendant's stepson, now 20 (DOB: 07-14-95).

In the service of that request I examined the following documents:

1. Amended Information (10-08-14)

2. Declaration for Determination of Probable Cause (10-08-14)

3. Defense Investigative Interviews of:

a. Jeanette Ruth Jepson (06-15-15)

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b. M.G. (06-15-15)

c. Jana Lee Fugle (06-15-15)

4. Police Investigative Reports (Pierce County Sheriff's Office No. 14-112-0495)

5. Medical Records of M.G (Franciscan Health System): 03-31-14 to 04-01-14

Several aspects of these materials raise concern:

1) M.G. claims that the abuse occurred when he was between the ages of 7-14, yet he only "recalled" the abuse when he was 18 years of age (early March 2014). It is highly unusual for a teenager not to recall abuse that occurred in the mid-teen years;

2) M.G. reported experiencing hallucinations, which speaks to the presence of a severe mental health condition that raises questions about his capacity to differentiate fact from fantasy. Indeed, during a hospital admission on 03-31-14 following reported memory loss and seizures, he was administered Haldol (haloperidol) -- an antipsychotic -- subsequent to which he was described as being "much improved."

3) Likewise, M.G.'s report of "amnesia," "confusion," and a medical diagnosis of "pseudo-seizures" raises questions about the reliability of his memories.

4) The first "memories" of M.G. experienced of the alleged sexual abuse occurred during nightmares, which is highly unusual for someone of his age, and may have been affected by the medication he was taking at that time (possibly morphine or Ativan). It is noteworthy that M.G. appears to have difficulty distinguishing between nightmares and actual memories;

5) M.G. has reported seeing a host of counselors (i.e., Justin Stephener, Susan Poole, Dana Harding) who have helped him "figure out" that he was abused. It is important to determine how his counselors may have helped him "figure

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out" and/or reinforced his recollection of sexual abuse by the defendant, either implicitly or explicitly;

6) M.G. reported experiencing physical abuse by the defendant, as did the defendant's estranged wife (M.G.'s mother); anger at such abuse may result in exaggerated or falsified claims of other abusive conduct.

7) Because this case began based on a nightmare of an incident allegedly occurring many years prior, without any contemporaneous memories of the alleged event, it is important to have access to all of the counseling records surrounding the disclosures to determine whether they are truly memories or are based on falsely created recollections.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and information.

Signed at Lakewood, Washington this 2 day of September, 2015.

Mark B. Whitehill, Ph.D.
Licensed Psychologist
Certified Sex Offender Treatment Provider
Clinical & Forensic Psychology, Inc., P.S.

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APPENDIX U

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

In re the Personal Restraint of: JOSEPH LEROY FUGLE	COA No. _____ (Pierce County Cause No. 14-1-04016-6) DECLARATION OF MARK B. WHITEHILL, Ph.D.

I, MARK B. WHITEHILL, Ph.D., declare under penalty of perjury and in accordance with the laws of the State of Washington that:

1. I am over 18 years of age and am competent to testify. I make the following declaration based upon my personal knowledge, information, and beliefs.
2. I am a licensed psychologist in the State of Washington and have been so licensed since August 1987. I have been a Certified Sex Offender Treatment Provider ever since certification standards were promulgated in July 1991. I have also been licensed as a psychologist in the State of Alaska.
3. My practice is nearly exclusively focused on issues at the interface of psychology and law, with a special emphasis on sexual abuse and trauma. In that capacity, I have evaluated over 1200 criminal defendants and have testified on an estimated 200 occasions in federal, state, municipal, and military courts, both here and abroad, on a variety of issues pertinent to the above-captioned case, including sexual dangerousness, allegations of child sexual abuse, and posttraumatic stress disorder. I have conducted over 150 forensic investigations of child sexual abuse

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that have arisen in the context of child custody, dependency, and criminal proceedings, and I have treated over 800 known sex offenders in treatment programs I developed in Washington, Alaska, and Wisconsin, including 12 so-called "sexually violent predators" subject to the provisions of RCW 71.09.060. As a clinician, I have treated over 300 survivors of sexual abuse.

4. I previously submitted a declaration in this case dated September 2, 2015, in which I requested access to counseling/medical records of the complaining witness, M.G., the stepson of the defendant, now 24 (DOB: 07-14-95). At that time I also reviewed charging documents and defense investigative interviews of Jeanette Ruth Jepson (M.G.'s grandmother), Jana Lee Fugle (the defendant's wife), and M.G. (all dated 06-15-15). I have since reviewed the aforementioned records of M.G. that were released under protective order.

5. On 08-18-16, Defendant Fugle was found guilty by jury of Child Molestation in the First Degree, two counts of Rape of a Child in the First Degree, and Rape of a Child in the Second Degree. Fugle's post-conviction counsel, Mick Woynarowski, has provided me with additional information and has asked that I speak to issues concerning questionable information that was presented to the jury as well as information that trial counsel did not present in open court.

6. In the service of this request, I have received the following new information.

    a. Declaration of Daniel Reisberg, Ph.D.: 09-19
    b. Declaration of Dr. Gerald Rosen: 08-21-19
    c. Letter to Judge Nelson by M.G. 07-25-16
    d. Trial testimony of Dr. Daniel Reisberg: 06-14-16
    e. Interview of Mikkel Van Netta by Ronald M. Bone: 02-17-15
    f. Interview of Kirk Van Netta by Mr. Bone: 02-11-15

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g. Interview of Lyn Van Netta by Mr. Bone: 02-11-15

h. Interview of Nina Pagay by Mr. Bone: 02-01-15

i. Interview of Robert Pagay by Mr. Bone 01-31-15

j. Interview of Dawn Pagay by Mr. Bone: 01-31-15

k. Handwritten Statement of Jeanette Ruth Jepson: 04-22-14

l. Spreadsheet developed by Mr. Woynarowski, "State v. Fugle – Witness Testimony about Trauma, PTSD, and Alleged Effects on M.G.": Undated

7. Issues.

a. Testimony was presented at trial that M.G. was diagnosed with *Post-traumatic stress disorder* (PTSD) and *Dissociative amnesia*; the latter diagnosis was invoked to explain how, after experiencing a "pseudo-seizure" in March 2014, M.G. suddenly recognized that he had been raped and molested by his stepfather over a seven-year period between the ages of 7 and 14. The presence of these putative "diagnoses" was in turn used to bolster the state's theory that M.G. was abused by the defendant as alleged.

Opinion. The diagnoses were conferred by clinicians seen by M.G., and were not the result of an independent Rule 35 examination (IME) of the complainant. Therapeutic bias in diagnostic assessment is well-established in the research literature in light of a clinician's uncritical acceptance of the clients' self-report and the focus on the subjective reality of the client.[1] A proposed remedy, not sought by trial counsel, was to have had M.G. submit to an IME, which would include objective psychometric testing as well as an assessment of the possible presence of malingered or factitious symptoms.

[1] See Hugaboom, D. (2002). The different duties and responsibilities of clinical and forensic psychologists in legal proceedings. The Review. A Journal of Undergraduate Student Research, 5 27-31.

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Opinion. The diagnosis of PTSD does not indicate that a particular trauma caused the condition. In his declaration, Dr. Rosen accurately identified the logical fallacy that occurs when symptoms are claimed to reflect the presence of a particular stressor ("affirming the consequence"). While it is true that PTSD is diagnosed primarily on the symptoms emerging from exposure to a traumatic event,[2] many types of trauma have been implicated in the manifestation of PTSD symptoms.[3,4]

Noteworthy is evidence from the complainant's mother, who identified other significant traumata in the life of the family during the time Fugle was in the home, including her being the recipient of domestic violence by Fugle (Unsworn Statement of Jana Lee Fugle, p. 7, lne. 7; p. 10, lns. 24-25), her own medical difficulties ("depression and oppression"; p.14, lns. 24-25), the loss of M.G.'s great-grandparents (p.13, lne. 7), Jana's self-reported "nervous breakdown" (p. 13, lne. 9); and Fugle's reported problematic management of the children -- including M.G. ("constantly badgering them, micromanaging them"; p. 16, lns. 4-5), and engaging in what appears to be physical abuse of them via use of the "Wisdom Maker" (p. 16, lne. 10). M.G. acknowledged that Fugle was "physically aggressive" towards him (Therapy Note of Dana Harding, Ph.D., 02-26-15), and Jana reported that M.G. was also exposed to Fugle's physical abuse of his sister (Jana statement p. 17, lns. 7-10), which reflects the well-documented trauma of vicarious traumatization.[5,6] M.G.'s

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[2] Author (2013). Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). New York: American Psychiatric Association.

[3] *https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml*

[4] *https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967*

[5] *https://www.tendacademy.ca/resources/defining-vicarious-trauma-and-secondary-traumatic-stress*

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reported symptoms, if genuine, could be a result of exposure to these events, or to other heretofore undisclosed events not found in the record or presented at trial.

Opinion: M.G.'s reported "recovery," at age 18, of memories of having been repeatedly and severely sexually abused between the ages of 7 and 14 is inconsistent with research on memory[7,8] and depends on the discredited theory of "repression."[9,10,11] Dr. Reisberg's recent declaration correctly identified how trial testimony by Dr. Poole about MG.'s "recovery" of "repressed memories" of years of sexual abuse fails to meet the Frye standard of general acceptance and should have been excluded.[12]

Opinion: Review of M.G.'s medical records from multiple clinics at the University of Washington (2013 and early 2014 -- in advance of his report of sexual abuse) suggests the presence of a rival hypothesis that may explain M.G.'s symptomatic presentation: that of a *factitious disorder*[13] in light of the

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[6] Margolin, G. & Vickerman, K.A (2007) Post-traumatic stress in children and adolescents exposed to family violence: 1. Overview and issues. Professional Psychology: Research and Practice, 38(6): 616-629.

[7] *https://www.jimhopper.com/child-abuse/recovered-memories/* Dr. Hopper raises a number of points relevant to this case, including 1) There is strong evidence that people can sincerely believe they have recovered a memory or memories of abuse by a particular person, but actually be mistaken. 2) There is strong evidence that such memories have led to accusations about particular events that never happened and accusations of people who never committed such acts, and 3) One of the preventable causes of these tragedies is incompetence by therapists, who sometimes contribute to the creation of false memories and/or believe them without good reason.

[8] *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3794469/*. Collectively, studies suggest that adults and children with histories of child sexual abuse can have particularly accurate retention of traumatic childhood events and that child abuse does not necessarily lead to memory loss or extreme error. Moreover, basic memory processes in maltreatment victims do not appear to differ from those of non-maltreated controls.

[9] Hope, H.G. & Hudson, J.I. (1995) Can memories of childhood sexual abuse be repressed? Psychological Medicine, 25, 121-126.

[10] A summary of the literature can be found at *https://www.psychologytoday.com/us/blog/open-gently/201504/we-dont-repress-painful-childhood-memories*

[11] Trial testimony of Daniel Reisberg, Ph.D., illustrated this point unambiguously: Counsel: *"Is (repression) generally accepted in the scientific community?"* Witness: *"Absolutely not."* (Reisberg Testimony, p. 790, lns. 23-25).

[12] Reisberg declaration, p. 25, lns.9-10.

[13] A factitious disorder is a condition in which a person, without a malingering motive, acts as if they have an illness by deliberately producing, feigning, or exaggerating symptoms, purely to attain (for themselves or for another) a patient's role. *https://en.wikipedia.org/wiki/Factitious_disorder*

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multiplicity of symptoms he reported[14] and the general absence of objective medical findings in support of them. Review of the notes of each of the mental health therapists seen by M.G.[15] – who appeared to rely exclusively on M.G.'s self-report in the formulation of their assessment of his mental health condition – did not explore this hypothesis, and there is no evidence that they had access to and reviewed his medical records.

In fact, statements by multiple people with knowledge of M.G. offer support to this hypothesis. Neighbor Dawn Pagay asserted in interview that M.G.'s mother, Jana, believed M.G. was so compromised in his ability to walk that she purchased a walker for him; however, when his mother was not around, M.G. appeared to walk with without difficulty, an observation also witnessed by Dawn's husband, Robert.

Another long-time neighbor, Lynn Van Netta, saw evidence that M.G. was exaggerating physical health complaints to garner attention from his mother, who he believed was spending more time with her husband, Mr. Fugle. Lynn's husband, Kirk, reported that he had counseled M.G. and had learned that M.G. was intent on breaking up his mother's marriage to Fugle. The Van Nettas' daughter, Mikkel, who often socialized with M.G., reported that he behaved normally, without physical limitations, until his mother was present; he would then act as if he were severely physically disabled.

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[14] Among the many diagnoses proffered on 11-21-13 by examining physician Tal Gazitt, M.D., and on 12-13 13 by Mitzi Leah Murray, M.D. : 1) fibromyalgia and diffuse musculoskeletal discomfort along with chronic fatigue; 2) question of restless leg syndrome; 3) tachycardia, unexplained; 4) muscle weakness; 5) livedo reticularis; 6) history of eosinophilic esophagitis and gastroenteritis; 7) obstructive sleep apnea; 8) testosterone deficiency; 9 episodes of loss of consciousness ; 10) history of testicular torsion; and 11) chronic constipation with delayed stomach emptying.

[15] This includes Susan Poole, Ph.D., who saw him for 23 sessions between May and December 2014; Wendy Rawlings, M.S., LMHC, who saw him for five sessions between July and September 2014; and Justin Steffener, Psy.D., who saw him for 26 sessions between February and October 2015.

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Opinion. Trial testimony by David Tauben, M.D., a board-certified physician in internal medicine and pain medicine, was used to bolster the state's argument that complainant M.G. suffered PTSD as, he claimed, no medical diagnosis accounted for his multiplicity of reported physical symptoms. There is no evidence that Dr. Tauben considered factitious disorder as a rival hypothesis, and his claim that he diagnosed PTSD in M.G. on the basis of a four-item questionnaire[16] falls below the standard of care to confer a psychiatric diagnosis, as no objective testing was conducted incorporating the validity scales necessary to rule out the presence of secondary gain for the display of psychiatric symptoms.[17] Furthermore, that Dr. Tauben readily accepted that M.G.'s ostensive PTSD derived from *"prolonged interval sexual abuse"* reflects another example of the logical fallacy of "affirming the consequence."

Opinion: In my 32 years of clinical practice, I have never encountered a fact pattern as unusual as reported here: the claim by an 18-year-old that he had no memory of seven years of sexual abuse; that the reported abuse was particularly severe and included anal rape; that the reported abuse occurred at a frequency as high as twice a week; that the reported abuse occurred during late childhood and early adolescence (at a time memory capabilities are well-developed); and that the reported abuse in its entirety was recollected following a pseudo-seizure.

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[16] Taubin trial testimony: Counsel: *"At this visit on July 3, 2014, did you diagnose (M.G.) with PTSD?"* Witness: *"Yes, I administered a four-question screener for PTSD. He was positive on that screen questionnaire indicating nightmares, avoidance, flashbacks, and disassociation which are the four cardinal symptoms associated with PTSD."*

[17] Secondary gain, a well-known phenomenon in mental health, may manifest itself in many ways, including the invention or exaggeration of symptoms for an ulterior purpose. *https://www.ncbi.nlm.nih.gov/pubmed/10172109*

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8. Conclusion

Trial counsel did not call me as a witness at Fugle's 2016 trial, likely because he had decided, following a brief phone consultation with me, that I could not provide assistance beyond authoring a declaration in support of a motion to release M.G.'s medical records. As noted, since that time I have reviewed a great deal of supplemental information about the case, including multiple witness statements, the trial testimony and declaration of Dr. Reisberg, and the declaration of Dr. Rosen. An analysis of these data, along with the information shared with me by trial counsel, form the basis for the opinions contained herein, which I hold to a reasonable degree of psychological certainty. I am prepared to testify in court abort them and/or assist Fugle's post-conviction counsel in preparing cross-examination of the state's witnesses, as needed.

DATED and signed this 4 day of October, 2019, at Lakewood, Washington.

MARK B. WHITEHILL, Ph.D.

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APPENDIX V

STATE V. FUGLE - WITNESS TESTIMONY ABOUT TRAUMA, PTSD, AND ALLEGED EFFECTS ON M.G.		
RP	WITNESS	TESTIMONY
	MG	**ALLEGED VICTIM, he claimed sexual abuse between ages 7-14, "repressed" memory until age 18, when "recovered" in "flashback/nightmare" in March of 2014, then supposed amnesia-causing pseudo-seizure at start of April 2014, gave trial testimony at age 20, June of 2016**
137	MG	testified his was diagnosed with "small fiber neuropathy and chronic fatigue"
139	MG	March of 2014, "started getting a flashback of the abuse, and then I started seizing… I had my memory swap thing."
150	MG	started seeing psychologist Dr. Susan Poole for **"issues related to the sexual abuse"**
151	MG	diagnosed with PTSD and seen by Dr. Poole for **"PTSD and sexual abuse trauma"**
152	MG	had to drop out of high school because of his illness
152	MG	cannot drive "because of [his] disabilities"
153	MG	continued to experience pseudoseizures that were "always paired with overwhelming flashbacks of the sexual abuse memories"
154	MG	after reporting this in Washington, then moving to Texas, saw another provider, non-testifying witness Dr. Dana Harding, "for the sexual abuse, PTSD, trauma"
157	MG	suffered from pseudoseizures for "about a year and a half" after his hospitalization
157	MG	"during the seizure… all that I could do was the traumatic memory that was coming up."
158	MG	"I still have that all-over body pain and weakness and stuff. I still have pretty significant PTSD, if that's counting in what you're looking for. And I still have the androphobia."
211	MG	**"as a child, I filed away the sexual abuse memories so that I would be able to function and survive during the regular memories, and so I had dissociated the sexual abuse as a way to cope"**
	Jana Fugle	**MG's MOTHER, WIFE OF DEFENDANT JOE FUGLE**
241	Jana Fugle	the pseudoseizures were alarming to his family: "he was on the floor, his arms and legs shaking, his head shaking, his eyes rolled back in his head. It was obvious he didn't have control over his body. He wasn't responsive."
241	Jana Fugle	after the first one, MG had other pseudoseizures; he had one after seeing "a picture of Joe" Fugle.
244	Jana Fugle	MG's amnesia is far-reaching. He didn't know people in the family and he didn't know anybody friend-wise.

245	Jana Fugle	MG started seeing Dr. Susan Poole, because MG's other therapist, Dr. Steffner, his "specialty is not sexual abuse."
246	Jana Fugle	Why did MG see Dr. Poole? **"For the sexual abuse." And his diagnosis at the time was dissociative amnesia and PTSD.**
247	Jana Fugle	Even at time of trial, MG sees non-testifying witness Dr. Dana Harding, who also specializes in trauma therapy like Dr. Poole.
268	Jana Fugle	MG's "health has not improved, maybe even gotten worse in some respects… He requires a lot of help. The use of a shower chair. I have to help shower him and dry and dress him. His arms can't hold up that long. He uses a walker. He needs a wheelchair if -- for any kind of a big event or doctor appointment or anything like that."
278-79	Jana Fugle	MG no longer undergoing testing to find out what is causing some of his physical problems.
286	Jana Fugle	defense asking open-ended questions re: nightmares: "He's haunted by these memories every day."
296	Jana Fugle	defense asking open-ended questions: Jana testifies that Courtney has "secondary PTSD."
	Grandma	**MG'S MATERNAL GRANDMOTHER**
315	Grandma	MG headed for Ivy League college, but then got sicker
317	Grandma	Doctors who treated MG never found a physical cause for his chronic fatigue and the weakness and pain. Prosecutor's next question: "At some point, did M[redacted] tell you about the defendant, his stepfather, sexually abusing him?" "A: Yes."
320	Grandma	When MG told her that he believed he had been sexually abused by Mr. Fugle, the grandmother said to she "felt very bad about it," was "very sorry about it," and told him "there's help out there."
325	Grandma	Grandmother tried to be supportive. Testified she observed MG "in the middle of a PTSD episode... curled-up" and shaking.
333	Grandma	Grandma, who had been a King County Sexual Assault Resource Center volunteer/employee for years, several times referred to her experience with "victims" and used this in answering questions about MG. e.g. 334-35 ("we never tell a victim they should report or should not report")
	Dr. Joy Jones	**HOSPITAL PSYCHIATRIST**
427-33	Dr. Joy Jones	State presented her credentials as a psychiatrist, in some detail, and emphasized that her current role at the hospital is to evaluate and assess patients.

433	Dr. Joy Jones	"PTSD is a disorder that occurs when somebody has experienced trauma."
434	Dr. Joy Jones	symptoms may include anxiety, being hypervigilant, being jumpy, having difficulty sleeping, nightmares, flashbacks, avoiding things that remind them of trauma, incluidng a particular person
435	Dr. Joy Jones	other symptoms may include panic attacks, emotional dysregulation, depression, memory problems, including amnesia, "usually surrounding the traumatic event"
439-40	Dr. Joy Jones	Dr. Jones has diagnosed PTSD in hundreds of patients, including in the military when she served, and she's also treated patients for PTSD
443	Dr. Joy Jones	Evaluated MG on April 1, 2014, at the hospital, during the supposed pseudoseizure episode
449	Dr. Joy Jones	MG presented with an altered mental state, maybe a pseudoseizure
450	Dr. Joy Jones	Pseudoseizure "It can look like a person is having a grand mal, like shaking, tremors, not being conscious"
452	Dr. Joy Jones	MG told her he was "having amnesia" and "thought it might be related to medication"
452	Dr. Joy Jones	MG told her "he remembered having trauma, having had trauma"
456	Dr. Joy Jones	assessed MG and described him as: 18 year old with a history of trauma. Likely has PTSD."
456	Dr. Joy Jones	Dr. Jones thought MG may be "somatizing," meaning, "turning [] emotion into a physical symptom."
458	Dr. Joy Jones	people with PTSD may be missing chunks of memory
461	Dr. Joy Jones	Diagnosis was anxiety disorder (not otherwise specified), likely PTSD, and somatoform disorder as a "rule out"
463	Dr. Joy Jones	Dr. Jones testified that sexual abuse is trauma that can lead to PTSD
483-84	Dr. Joy Jones	A pseudoseizure may be a result of trauma from an earlier time.
490	**Dr. John Daniel**	**FAMILY PHYSICIAN**
498	Dr. John Daniel	MG has fibromylagia, those who have it, present with muscle aches and body aches and fatigue, and the cause for it is not clearly identified as yet.
501	Dr. John Daniel	MG's pain had not improved
503	Dr. John Daniel	February 2014, MG's pain had worsened
506	Dr. John Daniel	MG had been diagnosed with "a disorder called dissociative amnesia," which is "psychiatric condition where, due to extreme psychological trauma, the memory is suppressed, causes a disruption of the memory as well as their identity, and the awareness is lost"
507	Dr. John Daniel	Dr. Daniel was told, by granfmother, that MG had been sexually abused years before.

510	Dr. John Daniel	Dr. Daniel testified that MG "was seeing one Dr. Darby for the dissociative disorder and for possible PTSD… I think psychiatrist made that diagnosis"
513-14	Dr. John Daniel	Dr. Daniel testified, with a reasonable degree of medical certainty, that people who have PTSD can exhibit "symptoms like [MG] was displaying, like chronic fatigue, the pain and weakness."
515	Dr. John Daniel	Dr. Daniel himself did not make the dissociative amnesia and PTSD diagnoses
519	Dr. John Daniel	When grandmother took MG to see Dr. Daniel, grandmother told nurse practitioner "that her grandson's memory has repressed this sexual abuse just like a former Miss America."
519	Dr. John Daniel	Nurse practitioner notes also state that: "the patient started having hallucinations and confused memory about sexual abuse he suffered from his step-dad several weeks ago."
519	Dr. John Daniel	MG never told Dr. Daniel himself that he was sexually abused
532	**Dr. Susan Poole**	**MG'S PSYCHOLOGIST, SAW CLIENT TO PROVIDE TRAUMA-THERAPY**
536	Dr. Susan Poole	Dr. Poole works "with adolescents and adults, so one of my specialty areas is working with adolescents and young adults in particular, and then I specialize in working with abuse and trauma, post traumatic stress disorder, and mood disorder and anxiety disorder."
537	Dr. Susan Poole	Dr. Poole is familiar with both PTSD and dissociative disorders.
539	Dr. Susan Poole	Dr. Poole does "comprehensive" work with trauma: "the many ways in which trauma affects not only the person's sense of self but also kind of their physiology, how it rewires, oftentimes, the brain, and how that all works and creates symptoms."
541	Dr. Susan Poole	In her practice, she has treated patients for PTSD: "unfortunately, many times."

543-44	Dr. Susan Poole	**Dr. Poole explaining the DSM diagnostic criteria for PTSD:**"**So, first of all is you have -- you have to have directly experienced or witnessed the event.** You then have to have a number of what are called intrusion symptoms, and so those are things such as intrusive memories, flashbacks, nightmares, what are often intense distress or reactivity to triggers or reminders of events. And then there is also persistent avoidance of stimuli, so they -- people with PTSD typically will evidence some form of trying to avoid such triggers, which would make sense, or -- and/or reminders of people or places or things that remind them of the traumatic event. And then there is also -- next criteria is what are called negative alterations in cognitions and mood, cognitions being thoughts, related to the traumatic event. So that's where you often have -- one of the criteria is inability to remember important aspects of traumatic events. persistent what are called negative beliefs about oneself and the world. Distortions about how -- what types of -- what might have caused them or the consequences of the trauma on them. Negative emotional states. Just fear, horror depression. It affects people's interests and activities, and often a marked feeling of detachment from other people because they have trust issues and problems connecting. Then the last set of criteria is regarding arousal and reactivity with a traumatic event. So that is things like irritable and angry behavior, outbursts, hypervigilance, startle responses, problems with concentration, sleep disturbance, things like that.
545	Dr. Susan Poole	"Q. Can a dissociative disorder also be seen in conjunction with PTSD? A. Yes. So dissociative symptoms are part of some of the PTS criteria, so it can be listed as PTSD. In order to make both diagnoses, it has to do with the complexity and how much beyond the -- like he -- you can make both criteria, but yes."

545-46	Dr. Susan Poole	So, dissociative disorder -- dissociation is basically when -- it's a disturbance in -- normally, people -- we have an integrated sense of ourselves. We have an integrated sense in who we are, our memories, our sensations, our identity, all of those things. And dissociative disorders, we have a breakdown in that process. So people will have some type of incongruence between that experience. So typically, that might be seen -- for instance, an example would be a dissociative flashback in PTSD. So in that case, a dissociative flashback is different from a regular memory, and a dissociative flashback would be one in which you actually feel like you were reliving the traumatic memory. So at that point in time, when you're in the memory, you cease to be in the space that you are in and you're reexperiencing the feelings, smells, sights, sounds of the trauma, for instance. So that would be an example of dissociative flashback. People have other forms of dissociation where they lose periods of time, days where they -- they're operating in their lives and then they completely forget periods of time.
546	Dr. Susan Poole	people who have dissociative amnesia frequently have PTSD
546-47	Dr. Susan Poole	So dissociative amnesia is an inability to recollect parts of one's memory. So they can be entirely general for all memories. It can be specific. We commonly see, with trauma, some form of dissociative amnesia for certain memories. That's very common where, over time, different memories will come back in time, but it can be all the way to extreme of having no memories for periods of time. It can also be specific to certain types of relationships as well.
547	Dr. Susan Poole	with dissociative amnesia, you might not forget every -- like, you'll remember procedural memories. You'll remember maybe how to drive your car or ride your bike or things you do to operate in life, but certain, like, autobiographical memories will be forgotten. Q. And what are autobiographical memories? A. Memories, sorry, about one's self and one's life history.
547	Dr. Susan Poole	Ex. 9, DSM 5 dissociative amnesia criteria introduced

548	Dr. Susan Poole	So, for dissociative amnesia, first of all, there has to be an inability to recall important autobiographical information, usually of a traumatic or stressful nature that is inconsistent with ordinary forgetting. That's the first criteria. The second is the symptoms cause significant distress or impairment in social, occupational, or other areas of functioning. And the third criteria is that disturbance is not attributable to physiological effects of a substance, neurological, or other medical condition. And then it just, you know, gets into other, not that are explained by other disorders, so -- Q. Okay. Is that all of the criteria? A. That's all the criteria.
549	Dr. Susan Poole	Each has to be met
549	Dr. Susan Poole	Dr. Poole treats adolescents, for child hood trauma, and childhood trauma can include sexual abuse. [Next question: "Dr. Poole, do you have a patient named [M.G.]?
551-52	**Dr. Susan Poole**	**Dr. Poole testifies M.G. came to see her "because he wanted to deal with the symptoms and struggle he was having after having been sexually abused by his stepfather Joe. "**
552	Dr. Susan Poole	Dr. Poole testified what M.G. told her: "he reported to me is that, about seven weeks prior to seeing me, he had begun to recover suppressed memories that had come back in the form of flashbacks and nightmares of having been sexually abused, and that had occurred for a course of a couple of weeks. And then after a few weeks -- and he had reported that to several other people during that period of time. After a couple weeks of that, he developed seizures and he started to seize and when he was having a flashback, which resulted in emergency medical treatment which took him to the hospital. **And he was given Ativan while in the hospital, which he's allergic to, and he got very confused and thought that Joe was coming to kidnap him at that point.**And so, this went on for several hours in the hospital, and after having -- a**fter he stabilized, that's when he realized he had developed dissociative amnesia for other memories in his life but he still had the memories of the traumatic events.** And so at the time of coming in was about four weeks prior to that all occurring, and he was wanting to address all of that."
553	Dr. Susan Poole	Dr. Poole testified that M.G. described physical symptoms that he had been having: "he has pain, chronic pain, and chronic fatigue and shaking and pain sensitivity, and so he was also struggling with that as well."

553	**Dr. Susan Poole**	**Dr. Poole testified in detail what M.G. said to her: "Q. Okay. Did he, at that initial session, tell you when the abuse occurred with his stepfather? A. Yes. So he reported that the abuse began when he was 7 years old. It began with first, with being forced to touch genitals and his genitals being touched, and then into finger penetration of his anus. It then progressed, at the age of about 8 to 9, with being forced to perform oral sex and receive oral sex, and then at the age of 12 with -- with penis and anal penetration, and it went from the ages of 7 to 14."**
553	**Dr. Susan Poole**	**"obviously he had dissociative amnesia"**
554	**Dr. Susan Poole**	**Dr. Poole diagnosed M.G. with PTSD and dissociative amnesia. Q. Did he, in your opinion, meet the criteria listed in the DSM for those diagnoses? A. Yes, uh-huh.**
554	**Dr. Susan Poole**	**Dr. Poole testified that "vey commonly" will "someone who has PTSD and maybe related dissociative disorder, or not, exhibit symptoms like chronic pain, chronic fatigue?"**
555	Dr. Susan Poole	Dr. Poole testified she began a course of trauma therapy, individual therapy, for M.G.
557	Dr. Susan Poole	Ex. 10, typed treatment notes
558	**Dr. Susan Poole**	**Dr. Poole testified that in therapy, she noted that M.G. was impacted by the sexual abuse (that the jury was supposed to be deciding the existence of): "he was struggling, also, with the ramifications of, you know, some of the physical impairments he was having as well as the emotional,"**
558	Dr. Susan Poole	"traumatic memories are encoded in the brain differently than non-traumatic memories, and so what can happen is very subtle reminders, things like smells or sounds or a sensation -- it's very sensory -- or an emotion will trigger an intense flashback or memory, and some of those can be to the point of being dissociative."
558-59	Dr. Susan Poole	"So a part of therapy is helping someone learn how to both identify those triggers so that they can be aware of, you know, the process that's happening, as well as how does one ground themselves during that. And by grounding, we mean try and come back into the present and the here and now and recognize that they're safe and the memory is not what's really occurring at this time.... So there was a lot of work that was done around that. And then, over the course of time, he began to talk, you know, increasingly more about some of the details, some of those memories."
559	Dr. Susan Poole	M.G. covered some ofhte sexual abuse in treatment

560	Dr. Susan Poole	Dr. Poole testified she did not try to help him develop memories: "we have to be careful we do not want to help try to insert any type of memories that's not there. So the memories are never -- I never ask or try to pull and draw from memories."
560-61	Dr. Susan Poole	Prosecutor asked if M.G. reported how "they", "the memories of the sexual abuse," came to him, and Dr. Poole said: "I just know that he began to have flashbacks and nightmares is the way in which that the memories returned."
561	Dr. Susan Poole	Dr. Poole testified this is something that can happen, based on her training and experience.
561	Dr. Susan Poole	"when a child is being abused chronically over years and it's happening in the home, there's no opportunity for that child to -- if they feel like -- **particularly if they're being threatened, which was in the case of M[redacted]** they're being taught and coerced into being silent. So they don't have any way -- in order to cope with that and go about their daily living, they kind of have to suppress that. So, you know, **he was being terrified** that if he told, that his -- **he had been threatened** that his mother would be killed. **He had been threatened** about the harm himself, and so it was -- **what can happen is, as a coping mechanism, those memories get suppressed."**
562	Dr. Susan Poole	Dr. Poole testified about how and why such a suppressed memory would come back: "Q. Well, based on your training and experience, is there something that can cause them to suddenly come back? A. And that -- yes, there could be. Certainly, just the fact of being older and suddenly being -- perceiving being safer. **The memories -- at some point, the subconscious realizes that it does not have to protect in the same way.** There may have been an event or something that had that occur as well, but he did not report on what that triggering event was to me."
562	Dr. Susan Poole	Dr. Poole testified that repressed memories are not forgotten memories. Q. Okay. Now, when that happens, again, in your training and experience, it's not that the memories are completely gone, right? A. Correct. Q. Because then -- A. **No, they are not forgotten. It is a problem with retrieval.**"
563	Dr. Susan Poole	**"Q. And is that also -- is that the same thing as dissociative amnesia? A. Yes. That's -- right."**
563	Dr. Susan Poole	So in M[redacted]s case, **in your opinion, as a psycholgist and his psychologist, did he suffer dissociative amnesia twice? A. Yes**. So basically, he would have had dissociative amnesia as a child where he was suppressing those memories so he can go about his daily life, and then had the second incident that occurred later after the hospitalization.

563	Dr. Susan Poole	But the amnesia was to "other relationships and memories," not "the sexual abuse."
563	Dr. Susan Poole	Dr. Poole saw MG over the few weeks up to trial, "for support during this time."
564	Dr. Susan Poole	In the pre-trial sessions, Dr. Poole "kind of reviewed his statuss and his symptoms… we talked about coping with the anxiety of being on the stand, and he was having an increase in, you know, flashbacks. He was being flooded with memories."
564	Dr. Susan Poole	Dr. Poole: "we talked about ways in which he can cope with the memories. I also suggested that he consider trying and gain more sense of control around the memories coming back."
565	Dr. Susan Poole	Dr. Poole "did ask him to go through the timeline," of the sexual abuse… "it was exactly the same… it all came from him."
565	Dr. Susan Poole	How did you address/treat the pseudoseizures: **"So, for pseudoseizures, well, what are called non-epileptic seizures, basically what that is is that's in the class of what are called conversion disorders. And so that is what are presented as seizures and when someone, you know, has them, they look as though they're having seizures but there's not epileptic activity occurring in the brain.** So first of all, that has to be diagnosed separately with a neurologist first. But then, again, he -- it comes back to the same thing is it's being triggered by trauma memories, so it goes back to the same type of grounding skills that you do for the -- the flashbacks. So settling that all down also settles the seizures down. And in fact, that did decrease and actually disappeared, stopped occurring during the time in which he was in Texas, I believe."

566	Dr. Susan Poole	Q. Okay. All right. **Are the things that M[redacted] reported to you, that he was suffering from chronic fatigue, amnesia, chronic pain, dissociative amnesia, and flashbacks and things like that, in your training and experience, are those all consistent with what you have come to know can come from childhood trauma? A. Yes.** I mean, childhood trauma affects all aspects of the self. It doesn't affect someone's identity. **It affects their actual physiology.** The thing about the child is the child is developing, and that means they have a developing brain and a developing body. And children's brains and bodies, and brains, in particular, are meant for taking in information and learning and adapting to that. It's very, what we call, have a lot of elasticity. **When you have prolonged ongoing trauma occurring, that effects the development of the brain and the body, and so you see these really complex syndromes of pain syndrome and multiple -- I think at one point he had, I believe, a gallbladder removed. I've seen those -- gallbladder in particular, for some reason -- with several patients. So it affects not only how the brain develops but also that constant level of cortisol and stress levels in the body that develops in the body. So you see all of that hang together.**
567-68	Dr. Susan Poole	It is important to know family history of the individual who may suffer from PTSD or tauma. In this family there is history of chronic fatigue, for mother and grandmother, and fibromylagia as well. That could be unrelated to PTSD.
569	Dr. Susan Poole	When asked if M.G.'s fatigue could also be related to sleep apnea, Dr. Poole answered: "Beyond my scope of practice to comment on the medical." "That would be for the medical doctor to diagnose that."
571	Dr. Susan Poole	In a 6/4/14 meeting, Dr. Poole noted that MG was "resistant to discussing specific memories."
572	Dr. Susan Poole	Q: And then was it your understanding he was getting more and more memories as he was working with you? He was not -- well, he predominantly -- **I think he had the memories**. He started talking about them more when he was working with me, but **then I believe some memories came back in flashbacks, but predominantly I think he had them**.... A. Um, yes, flashbacks. New flashbacks would come back."
573	Dr. Susan Poole	Some new memories was that "he was being triggered by people coming up behind him and being in certain positions."
577	Dr. Susan Poole	Dr. Poole admitted she is not a memory expert, "I'm a clinician… I'm not a research psychologist. I'm a clinician."
577	Dr. Susan Poole	Q: you don't testify to how memory works, specifically, right? A. Correct. Clinician.
578	Dr. Susan Poole	It is "common of all trauma people [to worry] whether they're going to be believed"

578	Dr. Susan Poole	Dr. Poole accepts what a patient says and bases her treatment on what the patient is telling her, so the relationship remains strong, and is trusting.
579	Dr. Susan Poole	It is "not necessarily" common to give a patient psychological testing for diagnosis, "some people do, but we also can just rely on a solid clinical interview… I rarely do them. Usually clinical interview is sufficient for the purpose of therapy."
580	Dr. Susan Poole	Dr. Poole said MMPI is "not commonly" used to diagnose PTSD or dissociative amnesia. "there's different, I suppose, scales on disassociation people can use," **but she does not do that in her practice.**
582-83	Dr. Susan Poole	REDIRECT: Q. The symptoms that M[redacted] presented with, is it possible that any one symptom could be caused by something else other than PTSD? A. Well, it depends on the symptoms, I guess. Some -- I mean, some symptoms, for instance flashbacks, things like that would not make sense out of the context of PTSD. Q. Like the chronic fatigue could be something else? A. That, yes, uh-huh. (Witness answers affirmatively.) Q. Okay. The pain could be something else? A. Right.
583	Dr. Susan Poole	Q. But when M[redacted] s symptoms, taken as a constellation of symptoms, as a group, to include flashbacks, what does that point to for you? A. So if you look at the dissociative disorders as well as the -- particularly the non-epileptic seizures, that's also -- those often show an etiology or a root cause of trauma and the PTSD, so they hang together. Like I said, and then physiological, but that was for the other doctors to diagnose that part.
584	Dr. Susan Poole	Dr. Poole said it is "very common" that MG was in the beginning resistant to discussing details, because in treating trauma "you have to develop a sense of trust with the clinician that you're going to be safe in that space. So it often takes a period of time before they start to disclose more memories.
584	Dr. Susan Poole	Q. And is it unusual in your opinion that someone like in M[redacted] s circumstance, what he described, wouldn't be able to say, you know, on this date, this happened, on this date, this happened, on this date, that happened? A. Correct. I mean, this wasn't one event. This occurred over a seven-year span of childhood, so many.
585	Dr. Susan Poole	Dr. Poole has "a clinical context" of how memory works: "in all of my childhood trauma people, there's a period of memories that come up over the course of time as certain new nightmares and flashbacks come back and that they've come in and present a new memory and another memory as they come up in time."

586	Dr. Susan Poole	"there's research that shows that a good solid clinical interview is what's necessary for the purposes of doing therapy. If I was doing an assessment, a forensic assessment, then I would need to do those evaluations, but **in my role as a therapist, that's not necessary to do therapy.**.. A forensic assessment would be if, for instance, for, like, legal reasons, you would hire on an independent person who comes, a psychologist, who just assesses the person to make the diagnosis without a clinical therapeutic relationship with them, that led to a therapeutic relationship with them."
586	Dr. Susan Poole	**Defense counsel also asked you, in your role, do have accept what patients are telling you as fact? A. Yes**
587	Dr. Susan Poole	**Q. Okay. In treating M[redacted], was everything that he -- he told you about, what he experienced, the symptoms, et cetera, consistent with what you would expect from someone who suffered childhood trauma based on your experience and your training? A. Yes. Everything he said and his symptom presentation was all very consistent with treatment I've done with, you know, hundreds of other PTSD victims.**
588	Dr. Susan Poole	Dr. Poole does not do EMDR, but MG was doing EMDR parallel to treatment with her, and MG said thought that between the EMDR and therapy with Dr. Poole, that some ofo the flashbacks and nightmares had slowed down and quieted.
623	**Dr. Justin Steffner**	**GENERAL THERAPIST, BEFORE THE ALLEGATION OF SEXUAL ABUSE, ASSESSED MG WITH Pervasive Developmental Disorder Not Otherwise Specified,**
624	Dr. Justin Steffner	PsyD and licensed psychologist
626	Dr. Justin Steffner	does assessments and therapy
630	Dr. Justin Steffner	May 2013, MG's mother brought him in "and expressed a lot of challenges ofer the past several years medically, and then at the same time just social challenges, withdrawal, and extreme anxiety and depression"
630	Dr. Justin Steffner	the medical history and describing chronic fatigue and potential fibromyalgia and just a lot of difficulties in functioning with either of those, which weren't necessarily fully diagnosed yet. Just having a lot of symptoms and that, having the gallbladder removed, and since then, decline in academics, was a high achiever and to the extent of -- I believe it was fulfilling several quarters in -- in a month's time. So yeah, just very persistent in his academics, and so a lot of difficulties, though, academically being able to fulfill the last credits.

631	Dr. Justin Steffner	testing administered: full mental history. There was obsessive compulsive scale, the CY-BOCS; Behavioral Scales for Children, so the BASC. There was the ADOS. There was some D-KEFS, some selected subtests; and there was the Rorschach; and the MACI, so the Millon Adolescence Clinical Scales. Q. What are some of the things that you mentioned in there? ADOS? A. ADOS. That is the autism spectrum, so the Autism Diagnostic Observation Schedule.
632	Dr. Justin Steffner	Diagnosis was PDD NOS, so Pervasive Developmental Disorder Not Otherwise Specified, and that is on spectrum of autism. And so that was from DSM-IV-TR, and so now everything is under one umbrella of autism. There was anxiety not otherwise specified. So those were the primary diagnoses.
633	Dr. Justin Steffner	MG "demonstrated some markings of being on the autism spectrum but he wasn't diagnosed as autistic, per se"
633	Dr. Justin Steffner	Re: anxiety: was more around certain aspects of daily life that were coming up, and so it wasn't meaningful criteria for an extended period of time, but it would have heightened spikes
634	Dr. Justin Steffner	MG had problems with communication: "would intellectualize, so dismiss a lot of his emotional processing and come up with reasonable and logical reasons for things occurring, which oftentimes made it hard for him to relate to what he was experiencing at the time"
634	Dr. Justin Steffner	MG was experiencing grief: "Grief, yeah, over loss of not being able to complete school at what he thought was a reasonable time, loss of friendships and/or distance from, you know, peers over the past several years of -- of having medical issues."
636	Dr. Justin Steffner	MG had a lot of difficulty initially just trusting me and trusting therapy process
637	Dr. Justin Steffner	the beginning of March of 2014, M[redacted] started -- at least it was reported to me by M[redacted] and his mother, Jana, that going through significant difficulties, and **M[redacted] reported to me that -- was having difficulty sleeping and -- and having flashbacks of -- of when he was younger and that they were of a sexual nature but at the same time he was pretty hesitant about revealing to me anything specific...** then... MG was hospitalized" and family sought out another therapist and trauma advocate
637	Dr. Justin Steffner	MG's mother "called and mentioned that he -- **he had been having trouble sleeping, and then, and then when he came into session, he -- he -- I believe that he said that he was having flashbacks of when he was younger"**

638	Dr. Justin Steffner	Q. Did he tell you flashbacks of what when he was younger? A. Only that he -- he believed that he was sexually abused and -- but after trying to ask more about it, there wasn't anything else revealed and really hesitant to even bring that up. Q. Who was hesitant to bring that up? A. Oh, M[redacted] just felt really vulnerable and did not want to talk about it.
639	Dr. Justin Steffner	MG later told Dr. Steffner that he was diagnosed with PTSD and dissociative amnesia
641	Dr. Justin Steffner	MG still had "rigidities within thinking" and also received counseling for difficulties with interactions with his family; and "agitation and frustration about who he was supposed to be"
643	Dr. Justin Steffner	Dr. Steffner did not suggest anything to MG about his sexual abuse memories
644	Dr. Justin Steffner	MG was frustrated that no one was able to come up with an explanation for his physical health issues
646	Dr. Justin Steffner	trauma can cause anxiety
647	Dr. Justin Steffner	MG's physical problems were substantial. "He'd be really shaky coming in. He'd often need that initial part to just kind of settle into the seat. Even the seating arrangement was difficult for him. Sitting for a prolonged period of time, about an hour, was a challenge. Usually need just a cup of water or something to get going." He eventually got a walker.
649	**Wendy Rawlings**	**EMDR THERAPIST, MG SAW HER AT RECOMMENDATION OF TRAUMA COUNSELOR DR. POOLE**
653	Wendy Rawlings	certified in hypnotherapy and EMDR
654	Wendy Rawlings	up to 40% of her caseload are "people there because of trauma"
655	Wendy Rawlings	familiar with PTSD and symptoms
656	Wendy Rawlings	EMDR is an approved treatment for PTSD

658-59	Wendy Rawlings	"The third -- the third to the seventh steps are actually the MDR, so they come up with something, a goal, usually together, that they want to clear. And a lot of times, I don't even know what the trauma is. **It's all happening internally.** And they come up with that goal. They feel in their body where it feels, and that's really important because the trauma is experienced in a physical way, not just in a mental way. And so they feel the trauma in their body. Then they follow my fingers, and the idea is they move their eyes from left to right, and that's really important. And we'll do this for a little while. **And I tell my clients it's kind of like getting on a train. You're kind of watching the scenery go by. It's pretty effortless**. You're not doing anything but just sitting and watching this scenery go by. That's what happens with traumatic memory, traumatic feelings. You're just kind of watching it go by. And then every once in a while, I say, "Stop. Clear your mind. Tell me what you're thinking and feeling." They tell me, not what they are seeing the train but what they are thinking right then, what they are feeling. And then have them get back on until it's cleared. And we know it's cleared when I ask them to feel it, I'll say, "Okay. Now, on a one to ten scale, how disturbing or how hard or how intense is that feeling?" When that feeling goes from whatever it is until down to a one or a two and they are not -- they're not experiencing any negative emotion around it, then we know we're done with that particular one."
660	Wendy Rawlings	With EMDR, "the PTSD symptoms decrease considerably. Sometimes they completely resolve"
661	Wendy Rawlings	EMDR is not hypnosis of hypnotherapy
662	Wendy Rawlings	Rawlings saw MG as a patient from July 2014 to September 2014
663	Wendy Rawlings	MG "felt like he had PTSD trauma… was seeing another therapist… they agreed that they would refer… him over to me to work with the trauma. He alleged sexual abuse, and he had a lot of other health issues, physical issues, difficulty walking, et cetera. **He had a -- he had a lot of hypersensitivity to -- to people and surroundings, high startle reflex, trouble sleeping. He didn't like to be left alone.**"

663	Wendy Rawlings	**"We talked about what he thought had happened with the abuse. He organized his memories into where they happened and that the bedrooms they happened in as the family moved.** He also organized his reactions to them into what he called episodes and flashbacks. And episodes were just kind of where he went into what's called an abreaction where he -- **if you were to see it from the outside in, you would see trembling and shaking. He stops talking. It almost looks a little like a seizure, but he's emotionally remembering something. Flashbacks were partial memories that he was having, that he was having, yeah, incomplete memories."**
664	Wendy Rawlings	**MG said the abuse started with molestation, touching over clothing, and masturbation, and then progressed to digital peneteration and oral sex, and then anal sex as he became older."**
664	Wendy Rawlings	Rawlings did not lead MG
665	Wendy Rawlings	Physically, MG was "was extremely tired. He was using a walker or a wheelchair -- I can't remember which -- never under his own steam.
667-68	Wendy Rawlings	he had a high startle response, very afraid to be left alone, so in the -- in the beginning, as he got on the train, so to speak, and we were doing this, he had a really hard time moving through that. And so sometimes when that happens, it helps to have the client talk, so I just ask him to talk about his -- what he was feeling, not what he was thinking or any of the traumatic material, but just what he was feeling, and that kind of got him over the hump. **As a side note, they've done a lot of research on trauma brain scans and things. Beth Van Der Kolk is the researcher that does a lot with brain scans. They have a look at brains that are fright, flight, and freeze, which are the three things we do when we're traumatized, and that the verbal area in the left brain when we're in trauma does not work. It's called Broca's area, and it doesn't work.** And so sometimes **if I can get my clients to start talking, it will kick their left brain in enough.** And when we're doing this (indicating), we're moving from right brain to left brain, as the eyes move. They're stimulating -- it's called bilateral stimulation, and you're moving from the right to the left brain. And so I thought, by kicking -- by having him talk, it woudl kick in that left brain a little bit, and it did. And he was able to start progressing through that fear, the feeling of fear that he had, and --- and then he connected, reconnected with hsi body. When he gets so fearful, he just kind of leaves. **It's depersonalization or disassociation, so he just kind of leaves."**
669	Wendy Rawlings	three sessions of EMDR, also some cognitive behavioral therapy

669	Wendy Rawlings	In progress past his fear, Rawlings said MG came to believe "I have other people in my life. I have Jana. I have my grandmother. I have people that I can -- I can go to to help me. I'm not this stuck little kid."
671	Wendy Rawlings	Rawlings said she does not talk during the EMDR, except to say "We're almost done. Just stay with it."
671	Wendy Rawlings	She's "like a technician. You knokw, educated technician to kind of help them get in touch with where they need to be or where they want to be to heal."
672	Wendy Rawlings	She did not try to help MG develop memories or remember what happened.
674	Wendy Rawlings	**cross** yes, some think EMDR is controversial… "It's a science versuse therapist issue."
674	Wendy Rawlings	patient is not in a trance
675	Wendy Rawlings	AS MG recalled memories "he would shake. He would quit talking. He would put his head down. It would last for anywhere from 10 to 30 seconds."
	Wendy Rawlings	**basically no other cross**
676	Wendy Rawlings	Rawlings thinks EMDR will be validated: "I think using brain scans, the science will become settled on that, but we're kind of in the middle of that right now
677	Wendy Rawlings	EMDR around since 1989
677-78	Wendy Rawlings	dissociation can be common with trauma, "it is one of the symptoms"
678	Wendy Rawlings	Rawlings said that 50% of her clients have had some dissociation, "Again, mine's anectodal, but it's very common."
697	**Dr. David Tauben**	**MG'S PAIN MEDICINE MEDICAL DOCTOR, DECADES OF EXPERIENCE, Chief of the Division of Pain Medicine at the University of Washington. Clinical professor in the departments of medicine and anesthesia and pain medicine.**
697-70	Dr. David Tauben	Physician with 34 years of experience, highly credentialed, board certified in intrnal medicine. Also board certified in pain medicine.

704	Dr. David Tauben	Familiar with PTSD and symptoms, testifies: "Post traumatic stress disorder had been originally described after wartime events where individuals experienced catastrophic loss of life threatening their integrity as a human being in general. It has been recognized that civilians also experience this. It dates back to the 1980s with Robert Endo and other research psychologists that **with early life trauma, experiencing violence in the home, substance abuse addiction, sexual abuse, physical abuse of one's self or family member is also associated with significant poor health outcomes, and over the past five years in particular it has been increasingly recognized as a disorder that commonly presents in a chronic pain setting. Based on the developing brain, particularly in early life, and the impact of those traumas on a brain function, both its structure -- so the actual hardwiring** **changes as well as its function. This is also associated with a number of other conditions** Traumatic brain injuries can produce these disorders as well. Traumatic brain injury is also part of a pain problems. It is a very important part of the practice of a best evidence based practice of pain medicine."
705	Dr. David Tauben	**People with PTSD may manifest actual physical symptoms such as chronic pain: "Yes. In fact, we just completed a study of our own patients from, I believe it was 2014 to 2015. We asked our patients to complete a questionnaire before they come. We have embedded questions related to PTSD in the questionnaire. In that group, we identified over 35 percent of all patients presented in our clinic met the diagnosis for PTSD." [READS AS CAUSATION.]**
706	Dr. David Tauben	**MG was referred to the pain clinic "for evaluation of unexplained widespread pain, associated neurological and endocrinological difficulties"**
707	Dr. David Tauben	first seen in January 23, 2014
707	Dr. David Tauben	a different doctor, "rheumatologist who had completed a series of exhaustive evaluations and was looking for some additional input as to the cause of his problems"

708-09	Dr. David Tauben	**MG's complaints: "generalized body pain. He was 18 years old at the time. His description was his muscles hurt, and he felt weak and fatigued. He indicated he felt weakness even as a much younger person. He recalled preschool.** Over time, his weakness worsened. He fell behind his other peers. He made some efforts to increase his muscle mass. **Then things worsened in 2011 when he developed some gastrointestinal symptoms, worsening abdominal pain which led to a gallbladder removal at a young age, which was entirely normal at the time. His pain and weakness continued to progress. By October 2012, about a year and a half previously, he dropped out of high school, feeling too weak and too tired, unable to attend class, keep his focus**. Although he only had six more courses, which he felt was very frustrating, he could no longer manage. Multiple workups, of course, to understand this. **He saw Dr. Krick in Tacoma, the rheumatologist who did a workup, all of which was normal**. He saw neurologist Dr. Ma -- M-a -- which failed to come up with an additional diagnosis. Dr. Kimmell, an endocrinologist, hormone expert. Some evidence that he had reduced testosterone level for his age. He was placed on some supplements, but otherwise structural aspects were normal. He had seen a Dr. Urakawa -- U-r-a-k-a-w-a -- in Puyallup. **He was placed on a number of medications which did not lead to any improvement in his pain.**
710	Dr. David Tauben	He went to University of Washington and saw a subspecialist, Dr. George Krick and Dr. Scott Polick, in November of 2013. **A number of proposed diagnoses were made which led to further referrals, including a genetics referral, to exclude a condition called Ehlers-Danls, which was negative.** He had some bone scans. He was treated on a number of additional medications, which failed to control the symptoms, and **no abnormalities were found**. He was seen by the physician who referred him to me after a workup that was quite extensive that includes not only the rheumatologist but a bone specialist, **which was again normal**. **All the other disorders were excluded, other than a somewhat reduced testosterone level.** He had been on a whole host of medications that included morphine and other opioids, as well as drugs that are associated with management of muscle pain including Lyrica, brand name, which is actually well advertised. People may have heard of that. It gave him some relief. Big description of his symptoms, which if you would like me to read through, I could. B**ottom line is he had pain throughout every body part, which was quite intense. It produced tremendous interference with his activity. In fact, complete interference with all**

711	Dr. David Tauben	**activity, complete interference with his enjoyment of life, complete interference with his ability to initiate and maintain sleep. He couldn't walk regularly. He reported on our initial intake a very high level of psychological distress.** He felt significant side effects from the medications he was being provided for his pain, in particular the morphine. He had several falls. We also evaluated his compliance with treatment. We checked the Washington State Prescription Monitoring Program. He was completely compliant and showed **no evidence of addiction, misuse or abuse of his prescriptions**. We went through all the medications he had been on, his past history. We identified that he was living with his 14-year-old sister. His mother had recently separated from his father. He indicated, in fact, he couldn't complete school, as I mentioned. Didn't smoke or drink. He had a variety of other complaints that included depression, anxiety, difficulty sleeping, verbal disturbance, morning stiffness, lack of strength, pain in his legs when he walked, abdominal pain and tremor. **We reviewed previous diagnostic studies, which were essentially normal from a neurological perspective.**
712	Dr. David Tauben	**His physical exam was remarkable for multiple muscle points that were unusually abnormally tender to press upon.** He had variable but somewhat reduced muscle strength. We also found he had an abnormal beat to his muscles, very excessive response to a flick of his ankle where his foot would just go into a steady state of -- we call it clonus, the up and down motion, which was abnormal. That prompted us to expand the possibility of different disease states that might be contributing to his difficulties.
713	Dr. David Tauben	**The doctor kept looking for a cause:** "Being an internist, I keep drilling down. Excluded the fact he didn't have a low cortisol level, which can produce nausea and fatigue and weakness, and that was normal. Based on the abnormal reflex I described what we call clonus, we evaluated his spine to be certain he didn't have a lesion in the spine, disease of the spine that could represent a spinal cord injury. His spine was completely normal on the additional imaging. Based on the neurological finding and without the other identifiers to account for that, I subsequently sent him to an neurologist to finish off the workup, which was the last step to his neurological evaluation."
714	Dr. David Tauben	MG was working with Dr. Steffner. **It was noted that "he couldn't read. He couldn't remember anything. He felt it wasn't fair, and came in with a wheeled walker because he was unable to even walk normally at that time."**

715	Dr. David Tauben	**"I was hoping we were done with the workup. I ruled out the possibility of a very rare tumor that lives on the adrenal glands that can lead to the abnormal pulse rate. That proved to be normal."**
715	Dr. David Tauben	"We confirmed he was taking his medication as expected, as opiates can be misused. He was perfectly compliant with our drug testing. Then I wanted to have him see the original neurologist because of his specialty in movement disorders. Dr. Semma was added as well. **At that point, I was still completing the complicated workup because it involved many specialists at different sites."**
716	Dr. David Tauben	**As of March 4, 2014, there was no diagnosis: "We had not discussed it. I was concerned about the degree of psychological distress**. I wanted to complete the biomedical workup. **That is very important as a pain physician that we don't blame people for things in their head. They get pretty upset when they think what is going on is in their brain, even though that is the experience of pain that is perceived. People don't like it when you say it is in your head because they feel so badly in their body. We do know the brain and body are remarkably well connected. In fact, tightly connected. The experience in the body and perception of the experiences in the brain have tight linkage.** As a pain physician, we focus very much on what we call the biopsychosocial, which means the biology, the organic body, the social environment one lives in, and the psychological interaction between those two. I was wrapping up biomedical, but became more and more focused on the social and psychological aspects which was already engaged in some of those treatments. That was the purpose of the July visit was to now go forward with the next steps. By that point the workup -- the biomedical workup had been fully completed."
717	Dr. David Tauben	"The possibility that this may represent a small fiber neuropathy was raised. It was not felt to be likely enough to even pursue the workup with our neurologist as we went through the possibilities. In my view, that would not account for his pain problem or other fatigue. I have treated hundreds of people with small fiber neuropathy. From a pain perspective, that was not consistent. He had no additional recommendations; electrodiagnostic studies had been normal."
717	Dr. David Tauben	**Then, on July 3, 2014: "Notably at that time, he identified additional history which he felt comfortable enough to report, that he had seven years of sexual abuse he had identified back in March. He had not reported it."**

718	Dr. David Tauben	**MG told Dr. Tauben he had "disassociated amnesia, which is a characteristic of PTSD. He was recalling memories of sexual abuse from step dad. Mom was present. She stated, and I quote, "Still married but won't be for long."**
718	Dr. David Tauben	MG had not told Dr. Tauben earlier about this.
719	Dr. David Tauben	**Q: At this visit on July 3, 2014, did you diagnose him with PTSD?** **A: Yes, I administered a four question screener for PTSD. He was positive on that screen questionnaire indicating nightmares, avoidance, flashbacks, and disassociation which are the four cardinal symptoms associated with PTSD.**
719	Dr. David Tauben	**Q Where do those come from?** **A They come from considerable research, largely out of the Department of Defense, which was attempting to integrate the PTSD diagnosis in the military and veterans population at the primary care level where one could administer these questions quickly. It correlates quite well with what is called a PCL, which is the much more extensive questionnaire that is administered by doctors in psychology and doctors of psychiatry. This is a tool for which primary care people, we pain medicine folks, administer as our screening evaluation. Q Is it related at all to the criteria set out in the DSM?** **A Yes.** **Q Are you familiar with the DSM?** **A DSM-5, in fact, which identifies these and other criteria. There is a fairly consistent correlation of these four domains in the DSM-5.**
720	Dr. David Tauben	Q The four-question screening you talked about, where did the information come from that there were nightmares and flashbacks and things like that? A From the patient. Q M[redacted] described those to you? A Yes.
721	Dr. David Tauben	**OUTSIDE THE PRESENCE OF THE JURY** Dr. Tauben testified that he diagnoses PTSD, and treats it, he diagnosed MG with PTSD based on what he said, "plus all the medical workup that had no other accounting for those symptoms," and that the "pain presentation [MG] presented to me with would ceratainly be fully accounted for that [PTSD]" AND THAT TO WITHIN A REASONABLE DEGREE OF MEDICAL CERTAINTY, on a more probable than not basis, the PTSD he diagnosed is the cause of the pain MG has been experiencing for all these years. **DEFENSE COUNSEL HAD NO SPECIFIC OBJECTION TO MAKE TO THE COURT**

725	Dr. David Tauben	**Q Doctor, what was your final diagnosis and impression for M[redacted]G[redacted]?** **A My note reads: Post traumatic stress disorder from prolonged interval sexual abuse. Physical symptoms generated by central nervous system sensitization consequent to abuse exposure. Q What does that mean, "physical symptoms generated by central nervous system sensitization," what does that mean?** **A Widespread muscle pain and his fatigue could be fully accounted for, in my judgment and experience, by the early life sexual abuse exposure.**
725	Dr. David Tauben	Q What were you basing this diagnosis and impression on? A DSM-5 diagnosis of post traumatic stress disorder, my intensive clinical experience working with people with this, and in association with chronic pain, his physical findings, the detailed history and his co-occurring conditions that included a label of fibromyalgia, possibly, without certainty, the abdominal pain symptoms which is a common syndrome, fatigue and widespread pain.
726	Dr. David Tauben	**Q Did it include the fact so many other things had been ruled out from testing, et cetera? A That helped support that there was no other likely medical explanation to account for his symptom complex. Q Is that what is known commonly as a differential diagnosis?** **A Differential diagnosis is when you go through the full list of all the things that could be causing the problem that are known. It also meets the term of what may be called a diagnosis by exclusion, you have excluded all the other conditions because it is a complicated diagnosis, involves lots of different domains of one's mind, body, spirit.**
728	Dr. David Tauben	**Q Is it unusual in your experience that what ultimately you diagnosed M[redacted] with was not what you identified up front as the cause of his chronic pain and fatigue?** **A It is not unusual….** The fact that such a high percentage of patients present with this diagnosis at our clinic is remarkable... **It is regularly underrepresented.** People don't put it in the record. I mention it to the patients and they will often say -- they will often cry when they bring it up. They cry because it is the first time anyone brought up such as important issue in their mind. Seems to be relief...
730	Dr. David Tauben	Dr. Tauben said they are "quite careful about not suggesting" anything to patients… "We just ask, has there ever been an overwhelming threat to your personal integrity."
731	Dr. David Tauben	Dr. Tauben also testified that he has been trained and taought abour false memories.

731	Dr. David Tauben	Dr. Tauben: "about 20 years ago when there was a concern that people would be given suggestions about what might have happened and there was a regression back into childhood which was often coached. A lot of clinical concern, many articles, many discussions among experts which I was a participant as a learner. Subsequent research and publications that have indicated that is much less likely."
731-34	Dr. David Tauben	DISCUSSION OF NOTICE TO DEFENSE COUNSEL; AWAY FROM JURY
737	Dr. David Tauben	**MG would shake when Dr. Tauben saw him**
737	Dr. David Tauben	All of Dr. Tauben's testimony has been to a reasoanable degree of medical certainty.
737-38	Dr. David Tauben	All of Dr. Tauben's "finding of PTSD from prolonged sexual abuse comes from him," "That is correct."
738-39	Dr. David Tauben	**When it came to this claim, Dr. Tauben accepted what MG had to say.**
740	Dr. David Tauben	EMDR is an approved treatment for PTSD
740	Dr. David Tauben	chronic pain can be associated with fibromyalgia, and there was a report of that condition in this family
742	Dr. David Tauben	MG reported he had weakness in his body in preschool
742	Dr. David Tauben	When MG had his gallbladder removed, that did not alleviate his abdominal pain, "that was not abnormal. **That was the wrong diagnosis."**
744	Dr. David Tauben	MG had sleep apnea which can lead to fatigue
745	Dr. David Tauben	MRI of the spine showed no spinal disease. And normal cortisol and adrenalin metabolite levels.
745	Dr. David Tauben	There was an EEG, "an abnormal diffused slowing of the background rhythm compatible with generalized encephalopathy.... A It means if there was an abnormality characterized by slow wave, it was presumed -- encephalopathy just means the brain isn't working normal... could be the effect of medications..."
747	Dr. David Tauben	**Before the July 3, 2014 meeting, Dr. Tauban "had the clinical expectation" that there would be a PTSD finding…** because of his "The inkling that the present case is occurring with any individual presenting with difficult to explain, widespread pain symptoms and fatigue at that age with a host of normal evaluations previously. As we discussed, about a third of the patients will have that in that presentation."
748	Dr. David Tauben	"My expectation was we were going to be able to move toward the diagnosis and confirm it at the July visit."
749	Dr. David Tauben	Dr. Tauben testified he did not suggest this was going to happen to MG

749	Dr. David Tauben	The 4-question instrument: What were the questions? How many questions did you ask him? A The four questions. It is a written set. He was handed the document and read through it. That is how it is validated. Patients are not given my speech about it. They read the words and check off yes, no.Q Four questions? A That is correct.
750	Dr. David Tauben	This happened during a 20-45 minute meeting, there was no discussion of the sexual abuse, and the 4-question test took "20 seconds."
753	Dr. David Tauben	Dr. Tauben explained why he did not diagnose fibromylagia: Q Why was your final diagnosis for M[redacted] PTSD and not fibromyalgia? A Because the fundamental condition that needed specific treatment is the PTSD. **Symptoms of fibromyalgia are secondary symptoms to the presence of PTSD.**
753	Dr. David Tauben	Dr. Tauben suspected PTSD, because "this is not an uncommon clinical presentation, and the time course that it may take to get to the bottom of things."
754	Dr. David Tauben	**Dr. Tauben had high confidence in the PTSD diagnosis: Q When you learned from M[redacted] that he had been sexually abused, did his symptoms that he had been describing to you then make sense?** **A Then I administered the questionnaire to validate indeed my expectations were correct. At that point, it was quite clear. We had specific discussion about how the symptoms could, would, and in my view likely were the cause of what he reported to me that had occurred in his earlier life.**
756	Dr. David Tauben	Dr. Tauben did not ask MG if he experienced any trauma in preschool.
758	Dr. David Tauben	Dr. Tauben did not have history of MG experiencing pain in preschool
759	Dr. David Tauben	MG self-reported long-standing muscle pain and weakness, which he said started when he was in preschool… he did not feel fit as compared to his other peers… didn't say how things got worse, only that they did
		[END]

APPENDIX W

Repressed Memory

Trial court finds "recovered memory" testimony lacking in scientific reliability.

BY SVERRE O. STAURSET AND MICHAEL L. ADAMS

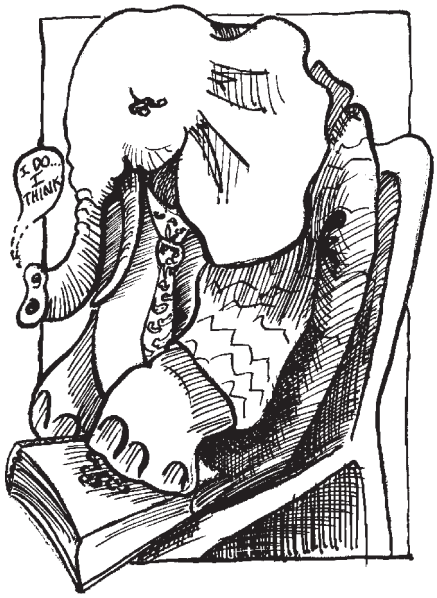
Most criminal defense attorneys representing persons charged with child sexual abuse have confronted the lengthy statute of limitations for these crimes. Practitioners have also been confronted with victims' claims of "repressed memories" of sexual abuse.

A recent ruling by Whatcom County Superior Court Judge Steven J. Mura may bring much needed help in defending against these types of cases. While motions based on the statute of limitations on sexual abuse are rarely successful, "repressed memory" cases are vulnerable to a motion in limine as outlined below.

In August 1993, the plaintiffs, a mother and daughter, filed suit in Whatcom County Superior Court, claiming that their father/grandfather had sexually abused them. *Mensch, et. al. v. Pollard, et. al.*, Cause No. 93-2-01427-5. The plaintiff mother claimed that she had been repeatedly and brutally sexually abused from shortly after birth in 1952 until age nine, in 1961. She further claims that she "repressed" all memories of sexual abuse until she saw a TV program about sexual abuse in spring 1991.

The plaintiff daughter likewise claimed repeated sexual abuse from age six months through four years at the hands of the same defendant. She also claimed to have "repressed" all memory of the events until she recovered them in dreams while away at boarding school. Both plaintiffs claim to have recovered their memories at approximately the same time and in a like manner. Both claimed to have a "knowing" feeling that they had been sexually abused but no specific detail or visual images. The details developed over time and, for the mother, solidified after being sent to a clinic for survivors of incest or sexual abuse. This referral was made without evaluation or psychological testing by an expert.

After several years of discovery, our client, the defendant, made a motion in limine requesting that the trial court find that the concept of "repressed memories" was not generally accepted in the scientific community and, therefore, not admissible



under ER 702.

The evidentiary hearing on the motion was held on August 26-27, 1998, before the Honorable Steven J. Mura. The first issue the trial court dealt with was which evidence test to apply: the venerable *Frye* test or the federal *Daubert* test set forth by the U.S. Supreme Court in 1993. The plaintiffs claimed that *Frye* only applied to criminal cases and that, in a civil case, the evidence should be judged by the *Daubert* test. The defendant argued that the *Frye* test should be applied. Interestingly, our appellate courts have not definitively answered this question.

After the defendant's review of *State v. Cauthron*, 120 Wn.2d 879 (1993), *Reese v. Stroh*, 74 Wn.App. 550 (1994), *State v. Gentry*, 125 Wn.2d 570 (1995), *State v. Smith*, 130 Wn.2d 215 (1996), and *State v. Copeland*, 130 Wn.2d 244 (1996), the trial court agreed that the appropriate standard to use in analyzing the scientific concept was the *Frye* test. The trial court felt that the Washington Supreme Court had backed away from accepting the *Daubert* test based on their criticism of the *Daubert* test in *State v. Copeland.*

On the issue of repressed memory, Dr. John Yuille, a memory research expert from the University of British Columbia, testified for the plaintiffs. The defendant presented Dr. Elizabeth Loftus, a memory research expert from the University of Washington, and Dr. Rex Frank, a forensic and clinical psychologist from San Antonio, Texas.

The concept of "repressed memories" posits that a person can suffer repeated episodes of sexual abuse over a period of many years and yet have no memory of the sexual abuse. Proponents of "repressed memories" claim that the memories of sexual abuse are banished to an inaccessible part of the psyche as a protective mechanism. These "repressed memories" are somehow recalled by some external stimuli or through various quasi-therapeutic methods: truth serum, focused imagery, hypnosis, regression therapy, etc. Pop psychology books (e.g., *The Courage to Heal*) advocate this concept of "repression."

Of interest to litigation attorneys is that the concept of "repressed memories" first appeared in a reported deci-

sion in the Washington case of *Tyson v. Tyson*, 107 Wn.2d 72 (1986). In *Tyson*, the Washington Supreme Court refused to apply the discovery rule to "repressed memory" cases to extend the statute of limitations. Shortly after the *Tyson* decision, the legislature overruled *Tyson* by extending the statute of limitations for "repressed memory" cases and applying the discovery rule, not only to knowledge of the abuse, but to a full appreciation of the damage caused by sexual abuse. RCW 4.16.340. In the legislative findings, the legislature found that repressed memories may occur, though there was, and is, no scientific evidence to support such a finding. It is interesting to note that many jurisdictions throughout the country have quoted from the reasoning of the *Tyson* decision when dealing with their own statute of limitations in "repressed memory" cases.

At the hearing, the plaintiffs argued that the legislative findings amounted to acceptance of the concept of repressed memories as a matter of law. The trial judge ruled that admissibility of scientific evidence was for the court to decide, not the legislature.

The court found that it is generally accepted in the relevant scientific community that an individual may suffer dissociative amnesia for singular, unique traumatic events. However, the court found that it is not generally accepted in the relevant scientific community that a person can suffer total, traumatic amnesia for numerous, repeated instances of abuse occurring over a period of years. For example, while a person could suffer amnesia for a traumatic event like storming the beach at Normandy, that same person would not suffer traumatic amnesia for every traumatic event that occurred in World War II.

The court held that there simply were not sufficient valid scientific studies that could corroborate the validity of total, traumatic amnesia for long-term childhood sexual abuse. In fact, numerous psychological studies indicated that over 70 years of research has failed to demonstrate scientific support for the concept of "repressed memories." In addition, numerous professional organizations have issued statements urging extreme caution when dealing with allegations of "repressed memories." Trial courts from other jurisdictions (California, Maryland and New Hampshire) have similarly rejected "repressed memories," labeling the concept "junk science."

The defendant had asked the court to exclude expert and lay witness testimony, reasoning that if the concept was not generally accepted, neither expert nor lay witnesses should be able to impart testimony based on such an unreliable concept to a jury. The court declined to exclude lay witness testimony deriving from "repressed memories," believing that to do so would make the court a "gatekeeper" on the issue of credibility. Interestingly, however, the trial court stated: "If this court were permitted by existing law or the extension of existing law to the facts of this case to be a gatekeeper with regard to the testimony of the lay witnesses, then the court would conclude that such testimony is, as a matter of law, unreliable until such time as the relevant scientific community through future scientific testing can find that repressed memories of this nature are reliable."

The trial court further noted that there is currently great debate within the psychological community as to whether or not a "repressed memory" that follows a claim of total, traumatic amnesia of repeated, long-term events of sexual abuse is reliable as to the alleged core events.

The trial court also held that it is not generally accepted within the relevant scientific community that there is any method or technique by which an expert can testify that a memory is accurate or inaccurate.

Lastly, the plaintiffs' expert, Dr. Yuille, evaluated both plaintiffs using Statement Validity Analysis (SVA). SVA employs a series of criteria to determine if an allegation is credible. SVA supposedly distinguishes between the credibility of the allegation and the credibility of the person making the allegation. SVA is apparently used in inquisitorial jurisdictions in Europe.

The trial court rejected SVA, noting, first, that SVA is not generally accepted in the relevant scientific community as being a valid method by which an expert could be entitled to render an opinion as to the credibility of a witness. Second, the court noted that the plaintiffs' expert had previously testified that SVA is not scientifically valid or accepted within the relevant scientific community. Third, even if SVA were generally accepted in the scientific community, the court held that such testimony would usurp the function of the jury, rendering such testimony inadmissible. Fourth, the factors employed by SVA are not beyond common understanding of an ordinary juror (i.e., demeanor, manner while testifying, etc.).

The trial judge ruled that admissibility of scientific evidence was for the court to decide, not the legislature.

Therefore, the court ordered that, in plaintiffs' case in chief, plaintiffs were precluded from using expert witnesses on the subject of "repressed memories" because the concept of "repressed memory" for long-term childhood sexual abuse has not gained general acceptance in the relevant scientific community.

The defendants were represented by WACDL member Sverre O. Staurset and Michael L. Adams (Law Offices of Sverre O. Staurset, P.S.) of Tacoma. The plaintiffs were represented by Todd C. Nichols (Cogdill Nichols & Rein) of Everett.

The parties have agreed to take these issues up on appeal prior to trial.

Sverre O. Staurset and Michael L. Adams are in private practice in Tacoma.

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Trial Court Case Number:	14-1-04016-6
Trial Court County:	Pierce County Superior Court
Signing Judge:	Kathryn J. Nelson
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