

FILED  
Court of Appeals  
Division II  
State of Washington  
1/29/2020 4:03 PM

NO. 54108-4-II  
Pierce County Sup. Ct. No. 14-1-04016-6

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

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In re Personal Restraint of:

JOSEPH LEROY FUGLE

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

The Honorable Kathryn J. Nelson

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REPLY BRIEF OF PETITIONER

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## **I. ARGUMENT IN REPLY**

Joseph Fugle's constitutional right to a fair jury trial was violated when prosecution experts opined that they believed the complainant, the charged accusations, and that the disputed sexual abuse caused him to suffer post-traumatic stress disorder (PTSD).

Mr. Fugle's counsel failed to adequately prepare for and defend the complex, but factually weak, case. Counsel's ineffective performance at trial was compounded by the same counsel's deficient performance again on direct appeal. Mr. Fugle has properly pursued this Petition Restraint Petition (PRP) to ask that this Court now remedy these prejudicial constitutional errors.

The State's response includes misstatements of the record, a misunderstanding of post-conviction review, and a misreading of controlling authority. Moreover, the State's pleading fails to address expert declarations developed in Mr. Fugle's petition that support his claims that the erroneous admission of unreliable evidence – about the complainant's alleged PTSD and alleged repressed-recovered memories – led to his wrongful convictions.

This Court should reverse for a new trial.

A. Expert opinion testimony that complainant MG suffered from PTSD secondary to the disputed sexual abuse violated Mr. Fugle's constitutional right to a jury trial.

“Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007), citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) and *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

When an expert proclaims that a complainant suffers from rape trauma syndrome or PTSD due to sexual abuse, the testimony invades the province of the jury and violates the constitutional right to a jury trial that exists to protect the accused. “[E]xpert 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.” *State v. Black*, 109 Wn.2d at 349. Expert testimony “that [a complainant’s] diagnosis of post traumatic stress was secondary to sexual abuse” is an explicit assertion the witness believes the complaint’s accusation. *State v. Florczak*, 76 Wn. App. 55, 74, 882 P.2d 199 (1994).

B. MG's doctors who testified their patient had PTSD due to sexual abuse did so as expert witnesses and the State's claim to the contrary is not a fair summary of the record.

Under RAP 10.3(a) and (b) – applicable to a PRP through RAP 16.10(d) – both parties are required to include a “fair statement of the facts.” In breach of this obligation, the State has chosen to contend that “[w]hile several of MG’s health providers testified at trial, none testified as an expert. Only the Defendant called an expert witness.” BOR at 2. This is false.

The trial prosecutor presented MG’s psychologist, Dr. Susan Poole, as an expert witness through eliciting testimony of her credentials, educational background, professional licensure, and specialty in treating trauma. RP 533-38. The trial prosecutor relied on Dr. Poole’s qualifications to have her testify at length about topics outside a lay juror’s experience or knowledge, namely, diagnostic criteria for PTSD and dissociative amnesia. RP 538-49.

The trial prosecutor used Dr. Poole’s status as an expert to share her opinions with the jury about the alleged – but disputed – sexual abuse. Dr. Poole testified about PTSD, about what MG reported to her, and her diagnosis of her patient. Dr. Poole’s testimony conveyed that she believed

that Mr. Fugle had sexually abused his stepson MG, causing him to suffer from PTSD.<sup>1</sup>

Under ER 702, “a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.” Here, the trial prosecutor had Dr. Poole affirm that her opinions that MG had dissociative amnesia – which she viewed as evidence of PTSD – were beliefs Dr. Poole held not as a lay person, but “as a psychologist and his psychologist.” RP 563.

The trial prosecutor likewise introduced MG’s pain doctor, Dr. David Tauben, as a credentialed physician. RP 697-70. After eliciting his opinions – which included the explicit assertion that MG had PTSD secondary to the sexual abuse – the trial prosecutor had Dr. Tauben confirm for the jury that the physician held “all” of his opinions about MG to within a reasonable degree of medical certainty. RP 737. A lay witness would not be asked such a question.

The trial prosecutor qualified Dr. Poole (a psychologist) and Dr. Tauben (a physician) as credentialed expert witnesses, precisely to present

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<sup>1</sup> *E.g.* Dr. Poole testified she treated MG because of his “symptoms and struggle... after having been sexually abused by his stepfather.” RP 551. The psychologist opined that MG’s alleged memory repression and recovery (“dissociative symptoms”) established the PTSD diagnosis. RP 545-46. She told the jury that flashbacks – like those that MG had reported to her – occur when a trauma victim is “reexperiencing” trauma. *Id.* The expert even told the jury how she believed that MG had been harmed by that which the jury was supposed to decide for itself. RP 558, 566.

their opinions about MG and Mr. Fugle to the jury. But the State's response attempts to mislead this Court – twice – into believing something different: “In this case, only one witness was qualified as an expert, Dr. Daniel Reisberg.” BOR at 15. This, again, is false.

C. The State misunderstands that Mr. Fugle's PRP is the proper vehicle for raising his constitutional claims, including that his counsel was ineffective at trial and on direct appeal when he failed to argue that the prosecution's experts' opinions violated Mr. Fugle's constitutional right to a jury trial under *Black* and *Florczak*.

There is no disputing that trial counsel failed to object to Dr. Poole and Dr. Tauben's testimony and again failed to raise the constitutional right to a jury trial issue on direct appeal.<sup>2</sup> But contrary to what the State's response asserts, these lawyering deficiencies do not foreclose review. At issue is Mr. Fugle's constitutional right to counsel which is why this post-conviction challenge is necessary.

A post-conviction challenge is absolutely the proper vehicle from bringing ineffective assistance of counsel claims. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013), *citing*, RAP 16.11(b); *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) (attorney has duty to research the relevant law); *Porter v. McCollum*, 558 U.S. 30, 40, 130 S.Ct. 447, 175 L.Ed.2d 398

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<sup>2</sup> This was ineffective assistance of counsel. PRP 4-5, 51, 72-77.

(2009) (ineffective assistance where trial counsel “ignored pertinent avenues for investigation of which he should have been aware.”)

A petitioner in a personal restraint petition may raise new issues, “including errors of constitutional or nonconstitutional magnitude.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004). Mr. Fugle can certainly allege that an evidentiary ruling was wrong - even in the absence of an objection - if he argues that trial counsel's failure to object was ineffective assistance of counsel. For example, a trial counsel's failure to request a *Frye* hearing can be raised as a constitutional ineffective assistance of counsel claim. *State v. Sosa*, 198 Wn. App. 176, 185, 393 P.3d 796 (2017).<sup>3</sup>

Each accused person is entitled to representation by counsel who knows the law, makes proper objections at trial, and advances meritorious claims on appeal when necessary. As explained in the petition, Mr. Fugle had the unique misfortune of being represented on direct appeal by the same lawyer who failed to protect his constitutional right to a jury trial in Pierce County Superior Court. On direct appeal, counsel should have argued pursuant to *Black* and *Florczak* that the case be reversed for a new trial.

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<sup>3</sup> In its response, the State cites to several cases to propose that there can never be review in the absence of a contemporaneous objection. *E.g.* BOR at 18. This is simply not so.

The constitutional right to a jury trial is so fundamental to our system of justice, that impermissible opinion testimony like that which was wrongly introduced in Mr. Fugle’s trial, constitutes manifest constitutional error. This means the error can be reviewed on direct appeal even in the absence of a contemporaneous objection. *State v. Florczak*, 76 Wn. App. at 72-74 (confirming Florczak’s trial counsel did not object to the offending opinion). Mr. Fugle’s appellate counsel could have – and should have – made the argument on direct appeal.

But when counsel does not understand the law, object, or do the things that an effective attorney would do, a personal restraint petition is the proper avenue for relief. *In re Pers. Restraint of Davis*, 152 Wn.2d at 671; PRP 51, 72-73, 78.

The State’s suggestion that these errors never be reviewed is not well-taken and its citation to direct appeal cases that discuss the concept of “invited error” – but do not involve post-conviction ineffective assistance of counsel claims – is inapposite. BOR at 14. Trial counsel who misunderstands the law and fails to object is not inviting error. *State v. Kylo*, 166 Wn.2d 856, 861-62, 215 P.3d 177 (2009) (also observing counsel’s obligation to research the law). Certainly here, where trial counsel pursued a direct appeal, but again failed to allege that the experts’ opinions violated his client’s constitutional right to counsel, there was

nothing deliberate or strategic about the unfortunate mistake. *Accord* RP 7-8 (trial court granting defense counsel’s motion to keep prosecution witnesses from making statements “that go to the credibility of whether something happened or didn’t happen.”)

Pursuant to binding precedent that explains how personal restraint petitions function, the constitutional right to a jury trial error should be reviewed as if appellate counsel had properly raised it in the first place. 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 insist that the petitioner prove actual prejudice. *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291(2004), *as amended on denial of reconsideration* (Jan. 20, 2005). This means that when it comes to this issue, it is the State’s burden to disprove harm, as opposed to Mr. Fugle’s burden to establish prejudice.

This Court should recognize the constitutional error in terms of Mr. Fugle’s PRP and judge its harm under the “overwhelming untainted evidence,” which would have applied on direct appeal. *In re Orange*, 152 Wn.2d at 814 (holding that appellate counsel’s “failure to raise the [winning constitutional] courtroom closure issue was not the product of “strategic” or “tactical” thinking, and it deprived Orange of the

opportunity to have the constitutional error deemed per se prejudicial on direct appeal” and granting relief under that standard); *State v. Florczak*, 76 Wn. App. at 58 (noting that “[m]anifest constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily supports a guilty verdict,” and applying that standard even in the absence of an objection).

That is the review standard Mr. Fugle would have been entitled to if the issue had been properly raised on direct appeal in the first place. PRP at 51.

D. The State has misread key caselaw: *Florczak* controls while it is *Kirkman* that is distinguishable.

Under *Black*, *Florczak*, and *Kirkman*, expert testimony that an alleged victim suffers from PTSD secondary to sexual abuse or from rape trauma syndrome is the type of manifest constitutional error that can be reviewed for the first time on appeal even in the absence of a timely objection.

In its response, the State insists *Florczak*’s counsel objected to the offending opinion testimony.<sup>4</sup> That is not true. 76 Wn. App. at 72-74 (unobjected-to testimony that complainant was diagnosable with PTSD

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<sup>4</sup> See e.g. BOR at 11, citing *Black* and *Florczak* (“The Defendant relies on cases in which the defendants made timely objections to expert testimony before the trial court and renewed their challenges in the direct appeal.”) (emphasis added). *Id.* (“Those cases are distinguishable. Here, the Defendant made no timely objection.”).

secondary to sexual abuse had to be reviewed on direct appeal because it was manifest constitutional error). The State's gross misreading of the case guts its argument that *Florczak* is inapplicable to Mr. Fugle's situation.

The State's response also misconstrued the facts and holding of *Kirkman*. BOR at 2, 14-18. This Court should carefully review the text for itself, because *Kirkman* certainly does not stand for what the State cited the case for. In reality, *Kirkman* supports Mr. Fugle's claims. The State's suggestion that *Kirkman* altered precedent and eliminated claims that improper opinion testimony violates the right to jury trial is inaccurate.

While Mr. Fugle has raised the constitutional violation of his right to a jury trial in this PRP, he reiterates that under *In re Orange*, the prejudice analysis of his claim has to be what he would have been entitled to had the issue been properly argued on direct appeal. It is essential to correctly determine and use the review standard that would have applied to his claim had it been made in that earlier procedural posture.

1. *State v. Florczak* held that informing a jury that a complainant suffers from PTSD secondary to sexual abuse is manifest constitutional error reviewable even in the absence of an objection.

In *Florczak*, defense counsel did not object when the complainant's counselor (Wilson) gave testimony that violated that defendant's constitutional right to a jury trial.

Waiver. The State is correct that neither defense counsel ever objected to Wilson's testimony on the grounds that she was not qualified as an expert or that the Frye standards were not met. The only objection defense counsel made to Wilson's testimony was that KT's statements were not admissible under ER 803(a)(4). Counsel never mentioned Frye and never challenged Wilson's credentials.

*State v. Florczak*, 76 Wn. App. 55 at 72 (emphasis in original).

The Court of Appeals reviewed the error as an error of constitutional magnitude:

However, because a constitutional error is implicated here, the requisite 4-step analysis must be undertaken... Thus, the reviewing court must first determine whether the error raises a constitutional issue, then determine whether the error is manifest. If the error is manifest, [the court] will address the merits of the issue. Finally, if error was committed, [the court] will apply a harmless error analysis.

*State v. Florczak*, 76 Wn. App. 55 at 73 (internal citations omitted) (emphasis added).

The *Florczak* Court held that the counselor's diagnosis of PTSD secondary to sexual abuse was an explicit expression of belief that the

abusers had told the truth about being a victim. *Id.* at 74. It was also an explicit expression of belief that the accused were guilty:

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. Because only Terrell and Florczak were implicated as the possible abusers, this segment of Wilson's testimony also amounted to an opinion that they were guilty, either individually or jointly, of sexually abusing KT. Admitting that evidence invaded the province of the jury.

*Id.* at 74, citing *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993).

Just like mental health counselor Wilson from *Florczak*, Dr. Tauben also diagnosed MG with PTSD arising “from prolonged interval sexual abuse.” RP 717-19, 725. In fact, because Dr. Tauben described the abuse as “prolonged” and added that all of MG’s PTSD “could be fully accounted for, in [his] judgment and experience, by the early life sexual abuse exposure,” Dr. Tauben’s testimony was even more egregious than that which occurred in the *Florczak* case. *Id.*

The *Florczak* court concluded that telling a jury that the complainant has a diagnosis of post-traumatic stress syndrome secondary to sexual abuse is manifest constitutional error: “manifest constitutional error, that is, error that had practical and identifiable consequences in the trial of the case.” *Florczak*, at 74 (internal quotation and citation omitted).

The same manifest constitutional error in *Florczak* applies to Mr. Fugle's trial.<sup>5</sup> This Court is now obligated to assess the impact of the error. Critically, this error is presumed to be harmful and it is the State's burden to attempt to show otherwise.

"Manifest constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily supports a guilty verdict." *Florczak*, at 74-75, citing *Jones*, 71 Wn.App. at 813. Pursuant to *In re Orange*, this is the review standard that applies now to Mr. Fugle's case, not because it is a direct appeal, but because ineffectiveness of appellate counsel cannot deprive a defendant of a more favorable standard of review. PRP at 51.

In *Florczak*, the untainted overwhelming evidence was so persuasive that the conviction stood even after the manifest constitutional error was recognized. 76 Wn.App. at 75. But that untainted evidence truly was overwhelming and included physical proof that the child had been abused.<sup>6</sup> None of those things are present in Mr. Fugle's case.

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<sup>5</sup> Even if she did not utter the phrase "secondary to sexual abuse" when she testified, psychologist Dr. Poole also made it known she was diagnosing MG with PTSD because of the alleged sexual abuse. What she said was also "a nearly explicit statement by the witness that the witness believed the accusing victim," that qualifies as manifest error. *Kirkman*, at 936.

<sup>6</sup> The victim in the case showed signs of physical trauma, a physician testified that the medical exam was "consistent with a history of sexual abuse,"

2. *Under Kirkman, an explicit or nearly explicit statement by the witness that the witness believed the accusing victim remains an impermissible opinion that is reviewable as manifest constitutional error.*

As discussed in Mr. Fugle’s Petition, the *State v. Black* case involved a rape counselor testifying 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; *see* PRP 43-48. The State Supreme Court made clear such testimony “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.” *Id.* at 349. The “rape trauma syndrome” term “carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped” and is “in essence, a statement that the defendant is guilty of the crime of rape.” *Id.* at 349 (internal citations omitted).

Critically, the State Supreme Court explained that the impermissible opinion testimony invades the exclusive province of the jury “whether [the testimony] is denominated as a form of ‘post-traumatic stress disorder’ [or] ‘rape trauma syndrome.’” *Id.* (emphasis added). When *Florczak* was decided, the case was a straightforward application of *Black*.

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and there was a “photograph showing [one of the defendants and the child] exposing their genitalia.” *State v. Florczak*, 76 Wn. App. at 75.

The State's citation to *Kirkman* for the notion that "[t]he challenge to opinion testimony is also not a constitutional issue [sic] where the Washington Supreme Court has held that a defendant's right to a jury trial is not violated by the expression of witness opinion, because the jury is not bound by it," is a gross misstatement. BOR at 2. The *Kirkman* Court cited to *Black* as good law, and *Black* remains good law, just as *Florczak* remains good law.

*Kirkman* did not overrule precedent that has – for decades – prohibited the introduction of witness's opinions on matters that are the jury's to decide, namely, the credibility of the accuser and the guilt of the accused. To the contrary, *Kirkman* cited this line of cases, including *Black* and *Demery*, favorably. And the *Kirkman* court reaffirmed the long-standing rule that "a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right." *Id.* (citations omitted) (emphasis added).

The result in *Kirkman* was strictly fact-driven and the facts of *Kirkman* were starkly different than the facts of Mr. Fugle's case. In *Kirkman*, there was no manifest constitutional error to review in the case, because no witness had given an opinion as to the victim's credibility. *Id.* at 929. Of course, no witness in *Kirkman* or its companion case ever

testified that those victims were diagnosable with PTSD secondary to the alleged sexual abuse.

All that the doctor there testified to was that the results of the victim's physical examination could be consistent with what that child had reported:

I'm trying to think of how to phrase this. I found nothing on the physical examination that would make me doubt what she'd said, or was there anything that would necessarily confirm it. There was no damage, it was a normal examination.

...

The physical examination doesn't really lead us one way or the other, but I thought her history was clear and consistent.

*Id.* at 929 (emphasis added).

On those facts, the State Supreme Court concluded that the physician's cautious words were not a clear comment on the child's credibility, because the physician "actually testified that his findings neither corroborated nor undercut [the child's] account." *Id.* at 930. Since the witness had not commented on the accuser's credibility, what he testified to was not improper.

In the companion case in *Kirkman*, the same physician again "did not come close to testifying on any ultimate fact," because he "never opined that [defendant] Candia was guilty nor did he opine that C.M.D.

was molested or that he believed C.M.D.'s account to be true.” *Id.* at 931-933.<sup>7</sup>

In defending Kirkman and Candia’s convictions, the State argued that the examining physician had not given any opinion as to the victim’s credibility or the guilt of the accused. *Id.* at 929-30. That is the narrow holding that the *Kirkman* court adopted: “We agree with the State... The Court of Appeals erroneously deemed Dr. Stirling's testimony as “clearly” an improper opinion implying Kirkman's guilt.” *Id.* at 930.

The State’s argument here that Kirkman held “opinion testimony claims do not constitute manifest constitutional error,” or are nothing more than “simple rhetoric,” is unfounded and unjustifiable. BOR at 14, 15. Both “explicit or almost explicit” expressions that the accuser is credible

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<sup>7</sup> In Candia’s case, the physician said even less than in Kirkman’s trial:

Dr. Stirling testified about findings from a physical examination [and] about statements of [the child] during those examinations about abuse. After establishing that there was no physical evidence of sexual contact, the State asked Dr. Stirling, “Do you have an opinion with medical certainty whether the findings you observed are consistent with the history of abuse you were given?” [and] Dr. Stirling stated, “I would say the findings—to have no findings after receiving a history like that is actually the norm rather than the exception.... I would be very surprised if her assailant were able to actually insert his penis into her vagina.”

*Kirkman*, 159 Wn.2d at 931–32 (internal record citations omitted).

or the accused guilty, are impermissible opinions that still constitute manifest constitutional error:

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error. “Manifest error” requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

*Kirkman*, at 936.

The State’s suggestion that “the challenged testimony” in Mr. Fugle’s case is somehow “less explicit than that held to be proper in *Kirkman*,” is false. BOR at 16. The physician in *Kirkman* told that jury that his examination “doesn’t really lead us one way or the other” and added that he “thought her history was clear and consistent.” *Id.* at 929. That was not an expression of an opinion of credibility or guilt.

In contrast, Dr. Tauben never hesitated when he testified that MG’s “[w]idespread muscle pain and his fatigue could be fully accounted for, in my judgment and experience, by the early life sexual abuse exposure.” RP 725 (emphasis added). Dr. Tauben emphasized there was no ambiguity whatsoever as to his opinions: “there was no other likely medical explanation to account for [MG’s] symptom complex.” RP 726.

Dr. Tauben even testified that no other explanations – other than his opinion that MG had PTSD secondary to sexual abuse – were viable.<sup>8</sup> Even when cross-examined, he did not waver. *See e.g.* RP 754 (“it was quite clear” that MG’s symptoms were caused “in my view” by what MG had reported “had occurred in his earlier life.”)

The State grossly misread *Florczak* and failed to accurately report on the fact-based holding of *Kirkman*. Its responsive arguments lack merit. Mr. Fugle’s constitutional right to a jury trial was violated, the error is reviewable, and the error calls for reversal.

E. The State should be precluded from arguing the opinion testimony did not prejudice Mr. Fugle’s right to a fair trial, when it argued at trial that the PTSD diagnoses were proof he committed the offenses.

Testimony about MG and his alleged PTSD permeates the record and the violation of Mr. Fugle’s constitutional right to a jury trial requires reversal. The State cannot prove this wrongfully admitted expert opinion did not contribute to trial outcome, certainly not when the trial prosecutor argued to the jury that the doctors’ diagnoses proved the alleged crimes.

In closing argument, the trial prosecutor said this:

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

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<sup>8</sup> Dr. Tauben testified that he made “a diagnosis by exclusion, [meaning] you have excluded all the other conditions.” RP 726.

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. 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 (emphasis added).

The trial prosecutor argued that the PTSD diagnosis proved the abuse, but the State now writes the trial prosecutor did not do so:

“Nor did the prosecutor conclude or argue that PTSD proved the abuse. Rather, she observed that "any trauma can lead to PTSD." RP 919. Because prolonged sexual abuse was alleged, PTSD was circumstantial evidence, but not proof, of the allegation. RP 919. "The definitive evidence . . . is [MG' s] description, his testimony." *Id.*”

BOR at 20.

This argument should be rejected. The trial prosecutor argued to the jury that the PTSD diagnosis was proof of guilt. The trial prosecutor told the jury that while the diagnosis was circumstantial evidence, that evidence “has the same weight as direct evidence.” RP 919. The jury instructions told the jury the same thing and the State’s response should not obfuscate.

F. The State's evidence at trial was weak and unreliable.

The overarching weakness of the State's case highlights the prejudicial impact of this wrongfully admitted testimony. It belies logic to think that hundreds of criminal acts occurred, inside the family home, with neighbors next door, for seven years from 2002 through 2009, without anyone noticing or suspecting anything. Of course, MG himself said nothing until 2014. RP 100-117; 128; 236-237.

Victims of sexual abuse may certainly delay reporting such crimes. But this is not just a delayed disclosure case. Here, the State's theory of the case was that MG fully "repressed" and then miraculously "recovered" memories of the alleged abuse.<sup>9</sup> This has been the State's theory even though scientists, on the whole, see the concept of repression and recovery as invalid. PRP 27-41 and PRP Appendices P, R, and U (expert witness declarations explaining this is a discredited theory, detailing how much of MG's clinicians' testimony was error, and specifying that "disastrous results can ensue" when a clinician, not an independent forensic psychologist, "enters court merely on the basis of his therapeutic interactions with a patient").

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<sup>9</sup> MG is claiming these are things he did not have conscious knowledge of: "I didn't start getting the memories back until February or something of '14." RP136. These are memories he said he regained. RP 133. These alleged "memories," by MG's own admission, came to him during a period of disturbed sleep when he was experiencing flashbacks, nightmares, and taking morphine. RP 129-30, 163, 166, 169, 204.

In fact, much of the State's case relies on shaky speculation, not reliable evidence. *Id.* The prosecution's theory of the case relied on the idea that MG had a "pseudoseizure," but even the hospital psychiatrist testified the dubious event is one for which there is no medical explanation. RP 449; RP 456, 460-62 (MG's emotionality may have been behind his physical presentation).

In support of his petition, Mr. Fugle submitted detailed sworn declarations from three expert psychologists, Dr. Rosen, Dr. Reisberg, and Dr. Whitehill, each of which is supported by a wealth of scientific authority. The State has not attempted to address these declarations, including Dr. Rosen's learned observations about what a proper assessment of potential PTSD would have to include and how what MG's clinicians did was "purely speculative, rested on the logical fallacy of affirming the consequent, and did not consider the various paths by which pseudo-PTSD can present." PRP Appendix P, at 11-12.

As set out in his declaration and that of Dr. Whitehill, the whole process by which MG's clinicians concluded that their patient suffered from PTSD, was grossly inadequate. PRP 27-33; 37-41; Appendix U, at 7 (Dr. Whitehill's opinion that Dr. Tauben's approach "falls below the standard of care to confer a psychiatric diagnosis, as no objective testing was conducted.")

Furthermore, the prosecution's theory embraced the idea that MG developed selective retrograde amnesia, but scientists who study trauma would agree that is not how memory of trauma works. *See e.g.* PRP 33-37 (discussion of Dr. Reisberg's trial testimony and 2019 declaration).

MG's claims are certainly sensational and that is likely why the State has spent so much of its response repeating what he said. But at the same time, the State failed to take on the substance of the scientific evidence that Mr. Fugle has put forth before the Court. The State's response does not even mention Dr. Rosen by name, let alone address the information presented in his declaration. Likewise, the State's response fails to address the underpinnings of Dr. Reisberg's declaration, where he explains that repressed-recovered memory evidence lacks scientific support. When it comes to defending what were the cornerstones of the State's case, there apparently is not much of a response to make. This Court should treat these omissions as concessions that the State is unable to refute Mr. Fugle's evidence.<sup>10</sup>

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<sup>10</sup> As explained in the petition, the scientific evidence offered by Mr. Fugle now, demonstrates that his trial counsel was ineffective in not moving to exclude both the shoddy PTSD diagnoses and the unreliable repressed-recovered memory testimony. What Dr. Rosen, Dr. Reisberg, and Dr. Whitehill had to offer should have been investigated and presented as it is exculpatory. That too was a prejudicial failure of trial counsel. PRP at 6, 73.

The State does not address the fact that at first, by his own admission, MG “was very vague,” with his claims, to the point that his grandmother “couldn’t necessarily understand everything he was saying.” RP 132-33, 318. The State says nothing about the fact that when MG experienced his allegedly memory-reversing pseudoseizure, he was on a medication that induced hallucination in him when he was a child. RP 173, 209, 452, 519 (hospital chart note noting that MG had “started having hallucinations and confused memory.”) The State offers nothing in rebuttal to Mr. Fugle pointing out that EMDR therapy – which was used to help MG process his feelings about his reported memories – is controversial. RP 674.

The inescapable truth about this case is that MG was an unreliable witness making incredulous claims. There is no doubt that the PTSD diagnosis was used to push the jury toward conviction. Had it not been for Dr. Poole and Dr. Tauben vouching for MG’s credibility, Mr. Fugle would have been acquitted.<sup>11</sup> Instead, he was wrongfully convicted.

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<sup>11</sup> Even with this extraordinarily prejudicial opinion testimony at play, the jury struggled with what to do with the case, which is why there can be no confidence in the verdict they did finally reach. RP 976-79 (jury indicating that it may not be able to be unanimous). *See also* PRP 51-52 (discussion of weaknesses in State’s case), PRP at 55 (citations to similar cases reversed for a new trial due to erroneous introduction of impermissible witness opinions.)

G. This court must remedy the fact that Mr. Fugle’s constitutional right to a counsel was violated and reverse for a new trial on that basis

1. *The record shows trial counsel did not interview MG’s treatment providers and the State’s attempt to confuse this truth is unavailing.*

E-mails between the trial prosecutor and Mr. Fugle’s trial counsel document that five of MG’s doctors were scheduled to testify against the accused. (Appendix G to PRP.) These e-mails document that trial counsel wanted to interview these State witnesses, in person. (Appendix G, PRR 000270, 274-76). But he never did. (Appendix F to PRP) (prosecutor’s June 3, 2016 email to Mr. Fugle’s counsel: “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.”)

At this point in time, that trial counsel has produced no records contradicting these e-mails and cannot “say for certain” that he conducted the necessary interviews. (PRP Appendix H). Trial counsel references “a vague recollection that [he] did but cannot say for sure.” *Id.* On his end, Dr. Tauben has no recall of any meeting with Mr. Fugle’s attorney and no related billing or scheduling records. (PRP Appendix H).

The only reasonable inference from this record is that Mr. Fugle’s trial counsel began and conducted the trial without having ever interviewed five of the prosecution’s experts. The consequences were

disastrous. Trial counsel failed to keep the State's witnesses from presenting unreliable evidence, failed to keep the State's witnesses from giving opinions as to MG's credibility and his client's guilt, and failed to develop and present exculpatory evidence. PRP at 72-77.

If the State could produce even the slightest bit of evidence that the doctors – including Dr. Tauben – were interviewed, they surely would have done so. Without such evidence, the State cannot credibly claim that the interviews took place. And because the interviews did not take place, Mr. Fugle has shown that his counsel's investigation into the allegations was deficient.<sup>12</sup>

2. *The State claims that the prosecution witnesses did not reverse-engineer a PTSD diagnosis, but that is precisely what the record shows.*

In his opening brief, Mr. Fugle set out for the Court those portions of the record that describe how Dr. Tauben diagnosed MG with PTSD by using a “four question screener,” that took all of “20 seconds.” RP 719, 750. Prior, Dr. Tauben could not explain MG's symptoms. RP 710-11, 714-16. Once MG told Dr. Tauben that “he had seven years of sexual abuse,” Dr. Tauben decided his patient was diagnosable with PTSD,

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<sup>12</sup> 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); PRP at 76-77.

specifically, “from prolonged interval sexual abuse.” RP 717-19, 725, 750 (no suspect other than stepdad at issue).

Put another way, the doctor observed symptoms, heard his patient suggest a cause, and without independent knowledge as to whether the alleged cause ever occurred, the doctor concluded that it had, just as his patient claimed it did. Going backwards from what MG had told him, Dr. Tauben presented, at the State’s behest, his “final diagnosis,” of “[p]ost traumatic stress disorder from prolonged interval sexual abuse. Physical symptoms generated by central nervous system sensitization consequent to abuse exposure.” RP 725. This is reverse-engineering, even if that specific label for Dr. Tauben’s evaluation process was not used at trial.<sup>13</sup>

The State would have this Court believe that Dr. Tauben was less than sure. BOR at 19. But Dr. Tauben did not equivocate. He testified that MG’s “[w]idespread muscle pain and his fatigue could be fully accounted for... by the early life sexual abuse exposure.” RP 725.

There was no ambiguity whatsoever as to his opinions. At the State’s behest, Dr. Tauben repeated that “there was no other likely medical explanation to account for [MG’s] symptom complex.” RP 726 (emphasis added). The State’s expert witness thus eliminated any other possible

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<sup>13</sup> See BOR at 18-19.

explanation for MG's distress and the jury was left with the expert's opinion that MG had PTSD secondary to sexual abuse. RP 726 (Dr. Tauben testifying that he made "a diagnosis by exclusion, [meaning] you have excluded all the other conditions.") Even when cross-examined, he did not waver in his opinions.<sup>14</sup>

When it came time to argue the case, the trial prosecutor emphasized for the jury that the diagnoses of PTSD was compelling circumstantial evidence of Mr. Fugle's guilt. RP 919. The prosecutor literally argued that the symptoms proved the disputed cause.

But, as explained in the petition, 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." *State v. Jones*, 71 Wn. App. 798, 820, 863 P.2d 85 (1993). PRP, at 58-62, *also discussing 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) (affirming trial court order excluding plaintiff's expert's claims that children were abused because they exhibited trauma symptoms).

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<sup>14</sup> See e.g. RP 754 (Dr. Tauben testifying that the questionnaire correctly validated his expectations and that "it was quite clear" that MG's symptoms were caused "in my view" by what MG had reported "had occurred in his earlier life.")

The State may now be trying to muddy the water to sidestep the authority of *Jones* and *Kelso*, but as a threshold question, the Court should reject the notion that Dr. Poole and Dr. Tauben did not reverse-engineer their diagnoses, because that is precisely what they did.

This attempt to avoid the controlling law is unpersuasive. So is the State's failure to discuss the specific evidence that Mr. Fugle developed and put forth in his Petition for why Dr. Poole's and Dr. Tauben's methodology lacks general acceptance and would have been subject to exclusion under *Frye*. See PRP 27-41; 56-62; PRP Appendices P, R, U (Drs. Rosen, Reisberg, and Whitehill discussing the "affirming the antecedent" error that occurs when an evaluator accepts that a claim of trauma is true without proof of the same).

This Court should treat the State's failure to discuss *Jones* or *Kelso* as a concession that the cases control. This Court should treat the State's failure to discuss the substance of the 2019 declarations of Dr. Rosen, Dr. Reisberg, and Dr. Whitehill as a concession that what they have to say cannot be refuted.

Accordingly, this Court should find that Mr. Fugle has demonstrated that his trial counsel's failure to object under *Frye* to Dr.

Poole and Dr. Tauben's diagnoses was deficient performance and a violation of his constitutional right to counsel.<sup>15</sup>

3. *The State's response fails to rebut Mr. Fugle's claim that a Frye motion to exclude testimony about repressed-recovered memories would have been successful.*

At trial, the prosecution claimed that MG had repressed – and then recovered – memories. MG himself testified that before February of 2014, he had no conscious sense of having been abused. RP 168. He said he had “repressed” memories and his grandmother testified she may have talked with him about repression. RP 171, 183, 324. *See also* 139-142. MG's therapy included talking about repression. RP 210-12. The State recognizes that prosecution witnesses told the jury that memories of trauma can be repressed and recovered. BOR at 21 (“It is true that they did so.”)

If the motion to exclude testimony on repressed-recovered memories would have been granted and enforced, most of what the State's experts testified to would have been excluded. MG's claims would have been laid bare for what they were: a confabulation.

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<sup>15</sup> Mr. Fugle would note that this is a ground for reversal independent from the constitutional right to a jury trial issue. If the Court felt that additional facts needed to be developed to decide whether a *Frye* challenge to the diagnoses would have been successful in this case, then the matter should be remanded for a reference hearing. *In re Pers. Restraint of Yates*, 177 Wn.2d at 18; RAP 16.11(b).

While the State's response discusses repressed-recovered memories in generalities, the State has not discussed, let alone refuted, the expert and legal support that Mr. Fugle developed for this point in his petition. *Compare* PRP at 27-41, 62-71, *with* BOR at 20-25. The State has certainly not offered any expert declaration on the subject as Mr. Fugle has. PRP Appendices P, R, U<sup>16</sup> (expert witness declarations describing their decades of experience as forensic psychologists and detailing why what Dr. Poole and Dr. Tauben testified to about their patient reflected their uncritical acceptance of the clients' self-report and the focus on the subjective reality of the client, which is an improper way of forming and presenting psychological testimony in court).

Nor has the State addressed the wealth of pertinent caselaw cited and discussed by Mr. Fugle, including multiple examples of how other jurisdictions have found this very type of testimony to be inadmissible under *Frye*. PRP 62-71 (analysis of appellate court decisions from Rhode Island, Maryland, New Hampshire, North Carolina, Minnesota, as well as a publicly discussed Whatcom County Superior Court matter).

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<sup>16</sup> As an aside, Mr. Fugle's counsel had an obligation to exclude the evidence outright. To the extent the State suggests that there was no inadequate performance, or no error, only because Dr. Reisberg testified in the defense case that scientists reject the myth of repressed-recovered memories, that argument is unavailing. *e.g.* BOR at 2. Mr. Fugle had a right not to face that type of unreliable evidence in the first place.

That too should be viewed as a concession. *State v. Logan*, 102 Wn. App. 907, 911 n.1 10 P.3d 504 (2000) (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”) (internal quotation omitted).

The cases that the State does cite are just not on point. But one, however, is worth mentioning as it is an example of how dangerous the unreliable myth of repressed-recovered memories can be.

In *Webb v. Neuroeducation Inc., P. C.*, 121 Wn. App. 336, 351, 88 P.3d 417 (2004), this Court held that a parent falsely accused of sexual abuse could sue his child’s counselor. Apparently, in *Webb*, a guardian ad litem had discovered and “opined [the child’s] alleged recovered memories of abuse were implanted through the suggestions of [one counselor] and reinforced through counseling with [another.]” *Id.* at 341. Dr. Rosen’s declaration references the tragic reality that others have been similarly victimized by clinicians who, like Wendy Rawlings or Dr. Poole for example, are subjectively convinced that repressed-recovered memories are real. PRP Appendix P at 11 (mentioning litigation “against therapists who employed recovered memory therapies and fostered the reporting of false memories.”)

4. *This Court should treat that State's failure to respond to Mr. Fugle's evidence that trial counsel failed to present exculpatory expert evidence as additional concessions.*

The State apparently has no answer for Mr. Fugle's claim that failure to present exculpatory expert evidence was deficient and prejudicial performance. PRP at 73-75. (discussion of how what Dr. Rosen and Dr. Whitehill offer would have weakened the prosecution case and increased likelihood of acquittal).

As explained above, the problem likely began with trial counsel's failure to interview the State's witnesses. But the deficiencies in representation cannot be reduced down to the question of whether a better-represented Mr. Fugle would have been able to obtain a court order compelling MG to submit to an examination to determine whether he had a factitious disorder. BOR 28-29. Certainly Dr. Whitehill's 2019 declaration is strong evidence to believe that MG should have undergone a thorough and objective forensic assessment. PRP 37-41; Appendix T. Dr. Rosen also explains that diagnosing MG with PTSD, but without any objective testing, was a grave error. PRP 27-33; Appendix U.

The fundamental lawyering deficiency was the failure to investigate, because as now shown, a more thorough investigation would have allowed Mr. Fugle's trial counsel to call Dr. Rosen and Dr. Whitehill. Adequately prepared counsel would have been both fighting to keep out

unreliable evidence and fighting to present compelling admissible evidence that contradicted what MG's treatment providers believed. The declarations of Dr. Rosen, Dr. Reisberg, and Dr. Whitehill, show that this was possible. They show why trial counsel was ineffective.

When it comes to the lay witnesses – who knew MG and could have testified as to his selective sickness – they certainly would not have been excluded as “cumulative.” BOR at 29. Yes, the Pagays and the VanNettas had testimony to offer that was largely consistent, which is why it would have been believable and compelling. But these neighbors' observations of MG acting sick in front of his mother, and then well in front of others, spanned multiple events across multiple settings. As set out in the petition, the evidence was relevant, admissible, and probative as to one of the key issues in the case: MG's motivation and credibility.

Again, Mr. Fugle believes that he has presented plenty of evidence to warrant a reversal for a new trial due to counsel's failure to object to inadmissible evidence and failure to develop and present exculpatory evidence. To the extent the Court may have unanswered questions as to these issues, remand for an evidentiary hearing would be required.<sup>17</sup> *In re Pers. Restraint of Yates*, 177 Wn.2d at 18; RAP 16.11(b).

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<sup>17</sup> For example, the State has taken issue about the offer of proof regarding Kirk VanNetta, who could have testified that he knew the Fugle family

## II. CONCLUSION

Mr. Fugle has been wrongfully convicted of a heinous crime he did not commit. His petition provided the Court with the necessary grounds to reverse. Contrary to what the State has put forth in its response, Mr. Fugle's post-conviction challenge is the proper and necessary vehicle for correcting errors that occurred in the lower court, including those due to ineffectiveness of his trial and appellate counsel.

What Mr. Fugle argued in his petition remains compelling even after a fair consideration of the State's response. If anything, the State's failure to address much of the evidence and authority he presented, demonstrates that his claims have merit and that a new trial is needed.

The violation of Mr. Fugle's constitutional right to a jury trial requires reversal for a new trial as does the violation of his right to counsel. In the event the Court concludes that it needs additional facts to resolve the scientific questions of improper PTSD diagnosis, repressed-

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well, did not believe that Mr. Fugle had the opportunity to commit these offenses, and viewed MG as someone who exaggerated symptoms of his illness for his own gain. Mr. VanNetta did not have a preexisting relationship with Joe and did not favor Joe over Jana. He would have been a compelling witness. (*See* Appendix to Reply Brief of Petitioner). In contrast, the State's reliance on what Mr. Fugle's ex-wife submitted for sentencing, and not as a sworn witness, is not at all persuasive. Mr. Fugle asserts that he has already proved actual prejudice and that a new trial should be ordered without getting deeper into the disputed facts. *In re Yates*, 177 Wn.2d at 18. He most certainly has made a required prima facie showing, so if "the merits of the contentions cannot be determined solely on the record," available now, then a reference hearing is required. *Id.* (internal citations omitted).

recovered memory testimony, or trial counsel's failure to present exculpatory evidence like Dr. Rosen or the uncalled lay witnesses, it should remand for an evidentiary hearing.

With the understanding that this petition involves a complex set of facts, Mr. Fugle prays for this Court's careful and attentive consideration of all the issues he has raised.

DATED this 29<sup>th</sup> day of January 2020 at Seattle, Washington.

Respectfully submitted,  
GORDON & SAUNDERS, PLLC

/s/ Mick W. Woynarowski

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 29<sup>th</sup> day of January, 2020, I caused the foregoing **Reply Brief of Petitioner** 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<br>DOC #391887<br>Stafford Creek CC<br>191 Constantine Way<br>Aberdeen, WA 98520              | (x) U.S. Mail<br>( ) Email<br>( ) _____ |
| [X] | Teresa Chen<br>Deputy Prosecuting Attorney<br>Pierce Cty Pros Atty's Ofc<br>Teresa.chen@piercecountywa.gov | (x) Appeals court e-service             |

**Signed** in Seattle, Washington on this 29<sup>th</sup> day of January, 2019.

X /s/Robert J. Gross  
Robert J. Gross  
Paralegal

APPENDIX TO REPLY  
BRIEF OF PETITIONER

Declaration of Kirk Van Natta

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

In Re Personal Restraint of:

JOSEPH LEROY FUGLE

COA No. 54108-4  
(Pierce County No. 14-1-04016-6)

DECLARATION OF  
KIRK VAN NATTA

I, Kirk Van Natta, 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 was subpoenaed as a defense witness for my neighbor Joe Fugle's trial. I was ready to testify, but I was not called as a witness. This is what I would have been able to share with the Court.
3. My family lived next door to Joe's family for 11 years and we had similarly aged kids. I knew him, his wife Janna, his step-son M.G., and Janna's two daughters very well. We were neighbors and friends. We had an open-door policy with each other. We wouldn't even knock on the door, just come right in. I knew M.G. from when he was about 8 years old.
4. My wife, Lyn, knew the Fugle family well also. She homeschooled our kids, so she was often home. Their kids and our kids spent time together at our house and their house. M.G.'s sister, Courtney in particular, spent a lot of time with our family.

5. Joe was just like a typical dad. I have never thought that there was anything inappropriate about him. I trusted him with my kids. My son, Connor, who is a year younger than M.G., spent a lot of time with Joe. They would go to the store together, lots of places, just the two of them alone. I know that my kids would have said something if there had been an issue. There never was.
6. When Joe and Janna separated, Joe moved in with his parents. Joe was still making the house payment. Joe and Janna were still talking. I kept mowing the lawn. It looked like they might get back together and I was hoping they would work it out.
7. The accusation that Joe had sexually assaulted his stepson M.G. was completely unexpected and unbelievable. When I heard about it, I told Jana I did not believe this, and cut off all ties with Janna and M.G. I told my kids to stay away. I thought that if Joe could be falsely accused, that so could anyone, including me. I believe that Joe is innocent.
8. I think that if it came to Joe's word against M.G.'s, anyone who knew them both would believe Joe. There is no way that M.G. could have been the victim of something like this without people finding out.
9. I had a similar work schedule to Joe's. We both left for work early in the morning. I would have noticed if Joe was acting strange.
10. Their house was not large; it is hard to imagine something going on, year after year, without anyone noticing. I also know that Joe would avoid being alone with M.G., because M.G. had lied to Jana and would say things like that Joe was mean to him.

11. I know that M.G. did not like Joe. I think this had more to do with how Janna treated M.G., than with anything else. Janna absolutely doted on M.G. She would let him do whatever he wanted. Joe, on the other hand, would say no to M.G.
12. M.G. was incredibly dependent on his mother. She would bend over backwards for him. I remember being at their house, before M.G.'s health supposedly deteriorated. M.G. had texted his mother, "I'm hungry," and Jana left the group and went to fetch food for him. M.G. was in the house. He was capable of getting himself something to eat, but Jana did it for him anyways. This sort of thing was a regular occurrence.
13. I got the impression that Janna wanted to be seen as a mother who did everything for her child, even if that may not be in his best interest. She would tell me that she had to provide "24 hour-care" to her son.
14. When M.G. was in middle school, Janna and Joe asked me to counsel him. I have some pastoral counseling experience and am now a chaplain. Janna and Joe had concerns about M.G.'s behavior. He had gone to some other counselors. I met with him for counseling about three times. I did this as a favor to Janna, who asked me to do it, because of conflict M.G. was having in their family and with Joe.
15. The idea was to provide M.G. with some spiritual care, to help him with whatever was going on in his life, his issues, and help him think of the future. M.G. refused to work with me on his situation. It seemed M.G. enjoyed creating conflict between Janna and Joe. M.G. did not like that his mother married Joe.
16. I clearly remember he told me that he was going to get Joe and Janna to break up.

17. At the time I had known M.G. for four years. He could have easily told me if Joe had done something to him, but he didn't. M.G. never said anything to me about Joe doing anything harmful to him.
18. I asked him about the conflict with Joe and I asked if there was anything physical going on. I am also a teacher and would have to make a report if something was wrong. M.G. said there was nothing going on.
19. I don't recall the specifics, but one of the reasons that I stopped trying to counsel M.G. was that he was not honest with me. He would tell me *Joe did something*, I'd go check it out, and find out from Janna and Joe that Joe had not even been home. I thought that if M.G. cannot be truthful, there was no reason to keep on with the attempt at counseling him. I did not want to waste my time.
20. When M.G. started high school, he seemed like a regular kid, talented, smart. In the 10<sup>th</sup> grade, he was into acting in school plays. He was a very good actor.
21. M.G.'s health declined when he was in his junior year of high school. I remember that he kept a terrible diet and I think that is how it started. He would not eat regular food like the rest of their family or ours. He started getting sickly. He said he was going to keep a vegan diet, but I saw him eat a lot of unhealthy snacks. It's like he was a "junk food vegan," relying on junk food to add calories to his diet. At this time, M.G. became like a hermit, avoiding contact with the other kids and people around him.
22. It was not clear to me what, if anything, was actually wrong with M.G. I do remember hearing about an incident where Janna was out of her house and asked my wife to come over because M.G. was supposedly in a lot of pain. Lynn gave M.G. a placebo

and he supposedly came out of his “pain” right away. That sort of thing happened more than once.

23. I was home one time when medics came and M.G. was shaking, supposedly in a “seizure.” I know he was taken by the ambulance to the hospital, but when I saw him, I immediately thought he was faking it.

24. At times M.G. would act sick – certainly around his mother – but other times he didn’t. I remember that our family hosted foreign exchange students, girls from Italy and Netherlands, and M.G. was attracted to them. I remember that he would perk up and not show signs of being sick at all when trying to talk to these girls.

25. I also know that after M.G. supposedly developed amnesia, he saw my daughter and recognized her. That made no sense.

26. I remain available and prepared to testify to what I know about Joe, Janna, and M.G.

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 \_\_\_\_ day of \_\_\_\_\_, 2020

[signed copy on next page]

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Kirk Van Natta

Tacoma, Washington

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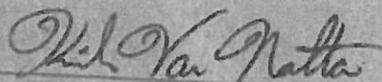
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I hereby declare under penalty of perjury under the laws of the State of Washington, and specifically RCW 9A.72.085, that the foregoing statements are true and correct to the best of my knowledge.

DATED this 29 day of Jan, 2020



Kirk Van Natta

Tacoma, Washington

# GORDON & SAUNDERS PLLC

January 29, 2020 - 4:03 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54108-4  
**Appellate Court Case Title:** Personal Restraint Petition of Joseph Leroy Fugle  
**Superior Court Case Number:** 14-1-04016-6

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Reply Brief of Petitioner Joseph Fugle

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