FILED
Court of Appeals
Division II
State of Washington
8/17/2018 4:34 PM

No. 51029-4

No. 97456-0

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

In re Personal Restraint Petition of

VINCENT L. FOWLER,

Petitioner

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

REPLY BRIEF OF PETITIONER

JOHN HENRY BROWNE
Attorney for Petitioner

LAW OFFICES OF JOHN HENRY BROWNE, P.S.
800 Norton Building
801 Second Avenue
Seattle, WA 98104-3414
(206) 388-0777

TABLE OF CONTENTS

Page

I. INTRODUCTION……...……..1

II. ARGUMENT…… ……..……...4

A. THE PETITION IS TIMELY…….…..… 4

1. The Petition was Due by October 19, 2017……..…..…5

2. Even if Mr. Fowler's Petition was due Earlier, Equitable Tolling Applies and Excuses Any Purported Untimeliness……8

B. REVERSAL IS REQUIRED DUE TO TRIAL COUNSEL'S MULTIPLE INSTANCES OF PREJUDICIAL INEFFECTIVE ASSISTANCE.....16

1. Failure to Interview Lyndsey Warner…….....….16

2. Failure to Interview Monica Boyle…….....20

3. Failure to Prepare Mr. Fowler to Testify at Trial…....22

4. Kibbe's Ineffective Assistance Forced Him to Call Natalie McMahon to Testify, which Itself was Ineffective Assistance……...23

5. Failure to Admit Evidence of Nestor Gatchalian as an Other Suspect…….....…….24

6. The Numerous Instances of Deficient Performance Collectively Mandate Relief…….....…..25

III. CONCLUSION……25

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Hipple v. McFadden, 161 Wn.App. 550, 255 P.3d 730 (2011)…….12

In re Bonds, 165 Wn.2d 135, 196 P.3d 672 (2008)…….....….8-9, 10

In re Carter, 172 Wn.2d 917, 263 P.3d 1241 (2011)……..……9-10

In re Haghighi, 178 Wn.2d 435, 309 P.3d 459 (2013)……...10

In re Hoisington, 99 Wn.App. 423, 993 P.2d 296 (2000)……8

In re Mines, 190 Wn.App. 554, 364 P.3d 121 (2015)…….10-11

In re Skylstad, 160 Wn.2d 944, 162 P.3d 413 (2007)……..5-6, 7

In re Sorenson, 200 Wn.App. 692, 403 P.3d 109 (2017)…….6, 7

State v. Contreras-Rebollar, 177 Wn.2d 563, 303 P.3d 1062 (2013)……..6

State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014)……...24

State v. Harper, 35 Wn.App. 855, 670 P.2d 296 (1983)……....18

State v. Jackson, 46 Wn.App. 360, 730 P.2d 1361 (1986)……....18

State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009)….……...….6, 7

State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002)……..…8, 10

State v. Lopez, 190 Wn.2d 104, 410 P.3d 1117 (2018)……18-19

State v. Siglea, 196 Wash. 283, 82 P.2d 583 (1938)...…….5

State v. Thomas, 110 Wn.2d 859, 757 P.2d 512 (1988)……18

State v. Visitacion, 55 Wn.App. 166, 776 P.2d 986 (1989)……...20

TABLE OF AUTHORITIES—cont'd

Page

Torgerson v. State Farm Mut. Auto. Ins. Co.,
91 Wn.App. 952, 957 P.2d 1283 (1998)……....17

FEDERAL AND OUT-OF-STATE CASES

Baldayaque v. United States, 338 F.3d 145 (2d Cir.2003)……..13, 14

Gibbs v. Legrand, 767 F.3d 879 (9th Cir. 2014)……13

Holland v. Florida,
560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010).....13

Maples v. Thomas,
565 U.S. 266, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012)……...13

Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003)…….....13-15

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS

CrR 3.5…….…3

ER 404……...18

ER 405……...……..2

ER 406……...….2, 17, 18

RCW 10.73.090.……..……..……....1, 5

I. INTRODUCTION

Mr. Fowler hereby submits this Reply to correct the State's many mischaracterizations, misrepresentations, and misstatements and assert that his petition is not only timely, but also meritorious on the issues.

First, because the trial court exercised discretion in striking the legal financial obligations after remand from the Supreme Court for reconsideration, the Order Amending J&S entered on October 19, 2016 made the judgment final for purposes of RCW 10.73.090. Mr. Fowler's placeholder petition filed on October 18, 2017 is thus timely.

Next, Mr. Fowler's former attorney John Crowley, who resigned in lieu of certain disbarment, abandoned him by failing to communicate, failing to file a PRP, and failing to forward his file to present counsel. Under any analysis, equitable tolling applies. While the State argues that equitable tolling requires bad faith or other misconduct by the state, the cases are clear that the misconduct must be by someone other than the complainant—but not necessarily the State. Attorney abandonment, indeed, constitutes bad faith by another and triggers application of equitable tolling.

On the merits, it is equally clear that defense counsel Craig Kibbe was ineffective and that but for his deficient performance, the result would have been different. Kibbe failed to properly investigate the case, failed to

interview material witnesses, failed to properly prepare Mr. Fowler to testify, failed to assist present counsel in trying to obtain relief for Mr. Fowler and, instead, submitted a non-credible self-serving declaration *on behalf of the State*! Kibbe was thus not only ineffective, but he is now also in cahoots with the State in attempting to explain away his deficient prejudicial performance. It seems interesting that counsel represented that he no longer had Mr. Fowler's file, could not remember much about the case, and was thus unable to contribute to any post-convictions efforts, yet he was able to recall that his investigator, Sandy Francis, interviewed Lindsey Warner, and he was also able to recall the contents of the report.

As to Ms. Warner, the State contends that her testimony would have been inadmissible. But, had counsel known of the rumor that the alleged victims' mother had coached them, this should have prompted additional investigation to discover the source. That person's testimony would be admissible—had counsel engaged in adequate investigation. Mr. Fowler's "three-foot rule" likewise would have been admissible as habit, pursuant to ER 406, and his character for sexual decency admissible under ER 405(a)(1).

The State's arguments with respect to Monica Boyle are baseless and confusing. The State seems to acknowledge that Kibbe should have contacted her, but the State then asserts that her proposed testimony—that

the alleged victim never spent the night at her apartment and that Mr. Fowler never had any guests at her place—somehow would not have been helpful when she, in fact, directly contradicts the alleged victim and was the basis for the missing witness instruction. The issue is rather simple: had counsel interviewed Boyle, Mr. Fowler would not have testified and there would have been no missing witness instruction.

The State and Kibbe claim that Mr. Fowler knew he was going to testify *at trial* and that Kibbe regularly met with him. The only evidence of this is Kibbe's statement to the trial court that he anticipated that Mr. Fowler would testify *at the 3.5 hearing* and his self-serving declaration *for the State*. There is no mention that he and Mr. Fowler had ever discussed the likely substance of his *trial* testimony or whether he might testify *at trial*—only that Kibbe told Mr. Fowler what a 3.5 hearing is and what might happen.

The State's contentions as to Natalie McMahon are misconstrued and meritless. Due to Kibbe's failure to locate and interview Monica Boyle, the State requested a missing witness instruction. Kibbe recalled McMahon to show that Boyle was not uniquely within the control of the defense, but her damning testimony was that Boyle still resided in the area and was easy to reach. Trying to sanitize the obvious prejudice, the State points to an excerpt from the appellate Court to demonstrate that the missing witness instruction caused no prejudice, but the Court was clear that the lack of prejudice was

because there was no dispute that the girls spent the night with Mr. Fowler and the State focused on Kibbe's failure to call Boyle rather than on the missing witness instruction. Had Kibbe been effective, he would have interviewed Boyle and called her as a witness; his failure to do so resulted in a prejudicial missing witness instruction accompanied by testimony from McMahon that made the defense look unprepared, stupid, and guilty.

The State's claim that there is no evidence tying Nestor Gatchalian, who was in the same bed during Mr. Fowler's alleged abuse of A.C.G., is baseless. The State's citation to inapposite cases is merely a distraction. What is important is that (1) Kibbe stated on the record that he thought the evidence was inadmissible pursuant to the Rape Shield law, which it is clearly not, thus demonstrating his ineffectiveness, and (2) admission of such evidence likely would have changed the result at trial.

The State, finally, argues against cumulative error, which Mr. Fowler never raised. Mr. Fowler, rather, noted that under the United States Supreme Court's constitutional jurisprudence, claims of ineffective assistance are viewed cumulatively, not piecemeal.

II. <u>ARGUMENT</u>

A. THE PETITION IS TIMELY

As the trial court exercised its discretion and eliminated Mr. Fowler's legal financial obligations after remand from the Supreme Court,

the Order Modifying Judgment and Sentence made his judgment final for purposes of RCW 10.73.090 on October 19, 2016. Mr. Fowler's initial placeholder petition filed on October 18, 2017 was thus timely.

Even if the deadline was earlier, equitable tolling applies due to former post-conviction counsel John Crowley's abandonment of Mr. Fowler and resignation in lieu of disbarment.

1. The Petition was Due by October 19, 2017

Pursuant to RCW 10.73.090(1), a personal restraint petition must be filed within one year of when the judgment and sentence is "final." A judgment becomes final on either the date that the trial court files it with the clerk or the date of the appellate mandate. RCW 10.73.090(3). Here, the Mandate was issued on May 2, 2016, but the trial court entered an Order Amending J&S on October 19, 2016.

As the State seems to recognize, in both the state and federal realms, "[i]n a criminal proceeding, a final judgment 'ends the litigation, leaving nothing for the court to do but execute the judgment.'" In re Skylstad, 160 Wn.2d 944, 949, 162 P.3d 413 (2007) (citations omitted). As in Skylstad, in this case, after entry of the appellate mandate, "more need to be done than simply executing the judgment—the superior court still had to determine [the] sentence." Id. at 950 (citing, e.g., State v. Siglea, 196 Wash. 283, 286, 82 P.2d 583 (1938) ("In a criminal case, it is the sentence that constitutes the

judgment against the accused, and, hence, there can be no judgement against him until sentence is pronounced."). The Court was unequivocal that "judgment could not be final until his sentence was final." Id. As to an appellate mandate, the Court further made clear that the mandate must terminate review of both the conviction(s) *and* the sentence. Id. at 953; see also State v. Contreras-Rebollar, 177 Wn.2d 563, 565, 303 P.3d 1062 (2013) (holding that a supplemental personal restraint petition is timely where it is filed more than one year after entry of the appellate mandate, but before resentencing because the judgment and sentence was not yet final at the time of the mandate).

The State is correct that where "only corrective changes are made to a judgment and sentence by a trial court on remand, there is nothing to review on appeal." In re Sorenson, 200 Wn.App. 692, 699, 403 P.3d 109 (2017) (citations omitted). The State is also correct that where the trial court exercises its discretion on remand, this gives rise to an appealable issue. State v. Kilgore, 167 Wn.2d 28, 216 P.3d 393 (2009). The logical corollary is that where the trial court exercises discretion on remand, the judgment and sentence cannot be final until the court files it with the clerk.

Here, the Supreme Court entered an Order dated March 31, 2016 remanding the case to the trial court "to reconsider the discretionary legal financial obligations …" See Brief of Respondent (Resp.) at Appendix C.

The appellate mandate issued on May 2, 2016—after the Supreme Court's Order, but prior to imposition of sentence. Under Skylstad, the judgment was not final because there was no sentence.

On remand, moreover, the trial court, indeed, exercised its discretion by striking some of the *discretionary* legal financial obligations. Pursuant to Sorenson and Kilgore, then, because the trial court chose to exercise its discretion, the judgment and sentence was not final until the court entered its Order Amending Judgment and Sentence.

The State's argument makes little sense and misconstrues the Supreme Court's remand Order. The State contends that the trial court had discretion to *reimpose* the LFOs, but instead struck them. Resp. at 10.

In reality, the remand Order specifically instructed the trial court to reconsider the issue: "the case is remanded to the Superior Court to reconsider the imposition of the discretionary legal financial obligations …" Resp. at App. C. Upon reconsideration, the court exercised its discretion and eliminated some of the *discretionary* LFOs. Had the court done nothing new and merely imposed the same LFOs, there would have been no exercise of discretion. Here, though, the court opted to eliminate the costs of appointed counsel, a discretionary act.

As Mr. Fowler thus had no sentence at the time that the appellate court issued its Mandate and the trial court exercised its discretion on

remand, the case did not become final until October 19, 2016, the date of the Order Amending J&S.

2. Even if Mr. Fowler's Petition was due Earlier, Equitable Tolling Applies and Excuses Any Purported Untimeliness

It seems clear that this is an appropriate case to apply equitable tolling: Crowley engaged in bad faith, deception, *and* false assurances and Mr. Fowler, who had relied upon Crowley, exercised due diligence by hiring present counsel as the deadline to submit his petition approached.

The State, though, misconstrues the relevant case law to contend that in the context of a personal restraint petition, the State must be the cause of the "bad faith, deception, or false assurances." There is no explicit case support for this contention.

The State, interestingly, asserts that Mr. Fowler failed to cite to any "Washington case where the doctrine has been applied because of non-State actor malfeasance." Resp. at 14. The State then cites to two cases cited by Mr. Fowler, In re Hoisington, 99 Wn.App 423, 993 P.2d 296 (2000), and State v. Littlefair, 112 Wn.App. 749, 51 P.3d 116 (2002), both of which involved "non-State actor malfeasance." See Resp. at 14-15. The State seems to believe that these cases were rejected by the Court in In re Bonds, 165 Wn.2d 135, 196 P.3d 672 (2008). The Bonds plurality held that equitable tolling is warranted where justice requires and where the predicates

for the doctrine—"bad faith, deception, or false assurances by the defendant and the exercise of due diligence by the plaintiff"—are met. Id. at 141. In a criminal case, the State is the plaintiff and the defendant, obviously, is the defendant. The State's interpretation is thus amiss.

As the State notes, yet ignores, the Bonds Court even clarified that in prior cases, the Court "adhered rather strictly to the statute of limitation applicable to post-conviction attack" and "suggested a rule, synonymous to the rule in civil cases, which would make equitable tolling available only in instances where the petitioner missed the filing deadline **due to another's malfeasance**." See Resp. at 14 (quoting Bonds, supra, at 142) (emphasis added). Here, Mr. Fowler missed the deadline on account of Crowley's malfeasance and exercised diligence by hiring new counsel.

The Court in In re Carter, a unanimous decision with a two-justice concurrence, clarified the Bonds plurality decision: (1) all justices agreed that equitable tolling was available to some degree; (2) the four justice plurality held that equitable tolling is very narrow and available only where justice requires and the aggrieved party exercises due diligence and shows "'bad faith, deception, or false assurances' **by another**"; (3) the two-justice concurrence agreed that equitable tolling was unavailable to Bonds, but would have expanded the doctrine beyond the predicates of bad faith, deception, or false assurances; and (4) the three-justice dissent

would have applied the doctrine and held that equitable tolling is available whenever justice requires. 172 Wn.2d 917, 928-29, 263 P.3d 1241 (2011). Summarizing Bonds, the Carter Court enunciated that the plurality held that equitable tolling was inapplicable "because the petitioner failed to show that his untimely filing was caused by **another's** bad faith, deception, or false assurances." Id. at 929 (emphases added). The Court thus "recognize[d] that equitable tolling of the time bar may be available in contexts broader than those recognized by the Bonds plurality," but still "only in the narrowest of circumstances and where justice requires." Id.

Perhaps in recognition of its meritless position, the State posits that Mr. Fowler is not eligible for equitable tolling because his attorney—rather than the court or immigration officials—committed the misfeasance. But, in Littlefair, supra, it was a combination of errors by counsel, the court, and immigration officials—not solely government actors. Immigration officials, moreover, are not State actors and have independent federal jurisdiction. In the most recent iteration of the standard for equitable tolling, the Court in In re Haghighi repeated that the doctrine requires "the predicates of bad faith, deception, or false assurances." 178 Wn.2d 435, 449, 309 P.3d 459 (2013). There is no requirement that the State must commit such misconduct.

In In re Mines, cited by the State, the petitioner argued for application of equitable tolling where his former appellate attorneys failed to

research the possibility of an ineffective assistance of counsel claim, his former post-conviction attorneys failed to raise the issue in the initial timely petition, and new counsel filed a motion far beyond the one-year time bar to amend the petition to include an ineffective assistance claim. 190 Wn.App. 554, 568-69, 364 P.3d 121 (2015). The Court rejected the invitation to apply equitable tolling because the petitioner failed to "address how bad faith, deception, or false assurances caused his former lawyer to ignore the public trial issue in the timely-filed personal restraint petition." Id. at 569.

Here, by contrast, Crowley accepted the Fowlers' money and was supposed to work on and file a personal restraint petition, but never did so. This is not a case where the attorney performed poorly, missed an issue, or engaged in "garden variety neglect"; Crowley failed to perform at all. He strung the Fowlers along for a lengthy period of time, provided false assurances, and neglected to provide any notice that he was the subject of Bar grievances or that he resigned in lieu of disbarment. Crowley still had/has Mr. Fowler's file, which present counsel repeatedly tried to obtain from both him and Kibbe—neither of whom assisted Mr. Fowler in any way in his quest to obtain relief.

In the context of legal malpractice actions, the continuous representation rule tolls the statute of limitations until the end of an attorney's representation of a client in the same matter in which the alleged

malpractice occurred. Hipple v. McFadden, 161 Wn.App. 550, 557, 255 P.3d 730 (2011) (citations omitted). The test for determining when a representation ends is a question of fact; "where there is a unilateral withdrawal or abandonment, the representation ends when the client actually or reasonably should have no expectation that the attorney will provide further legal services." Id. at 559.

Mr. Fowler relied upon retained counsel, and only when he finally realized that Crowley was not going to get the petition filed, he hired present counsel. Mr. Fowler sporadically communicated with Crowley through June of 2017, during which time Crowley misled him as to the progress of the petition. See Supplemental Petition as Ex. D. Mr. Fowler is not very legally savvy and, contrary to the State's assertions, was unaware of many of the issues raised on his behalf. While he knew that Kibbe was ineffective in a variety of ways, he did not have the resources to, for example, find and interview Monica Boyle, and he was unaware of the other suspect issue.

Mr. Fowler, more importantly, had an expectation that Crowley would fulfill his legal, ethical, and contractual obligations and file a petition. Only as the October 19, 2017 deadline approached did Mr. Fowler come to the realization that Crowley had abandoned him and he needed new counsel. "Abandoned by counsel, [Mr. Fowler] was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to

protect himself *pro se*. In these circumstances, no just system would" blame Mr. Fowler for the default." Maples v. Thomas, 565 U.S. 266, 271, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012).

In federal courts, equitable tolling is warranted where (1) "petitioner has been pursuing his rights diligently" and (2) some extraordinary circumstance stood in petitioner's way and prevented timely filing. Gibbs v. Legrand, 767 F.3d at 885 (9th Cir. 2014) (quoting Holland v. Florida, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (add'l citation omitted)). This standard is analogous to the Washington standard—diligence by the petitioner and misconduct by another. The State's argument, which relies upon the canard that the State must commit the misconduct, misses the point. Equitable tolling applies to habeas petitions, and gross attorney misconduct may constitute such an extraordinary circumstance.

Here, Crowley's trifecta of bad faith, deception, and false assurances surely constitute both the state predicates for equitable tolling as well as extraordinary circumstances that prevented timely filing. The federal cases are thus in accord with Washington jurisprudence and seem to mandate application of the doctrine.

The State attempts to distinguish the factually analogous Gibbs, Spitsyn v. Moore, 345 F.3d 796 (2003), and Baldayaque v. United

States, 338 F.3d 145 (2d Cir.2003) as based upon a flexible and fact specific approach, but under the State standard, a court must likewise engage in the same inquiry to determine whether the predicates of bad faith, deception, or false assurances are present and whether the petitioner exercised due diligence.

In Baldayaque, the Court held that the bad faith, deception, false assurances/ extraordinary circumstances prong was met where the petitioner retained counsel to file a habeas petition, counsel did no legal research, counsel never spoke or met with the petitioner, and counsel filed an untimely motion rejected by the district court. 338 F.3d at 152-53. As to due diligence, the Court did remand for further proceedings, but noted that the lower court should consider, among other things: (1) petitioner's efforts at the earliest possible time to secure post-conviction counsel; (2) petitioner's lack of funds to hire another attorney; (3) counsel's false assurances; (4) counsel's failure to communicate; (5) petitioner's lack of education; and (6) petitioner's incarceration and attendant lack of direct access to other forms of legal assistance. Id. at 153.

While the Spitsyn Court also remanded for further proceedings to assess the petitioner's due diligence, the Court emphasized that without his file, which counsel kept until two months after the filing deadline, "it seems unrealistic to expect Spitsyn to prepare and file a meaningful

petition on his own within the limitations period." 345 F.3d at 801. The Court further held that the petitioner was not unreasonable in failing to hire another attorney because he and his mother hired counsel and made attempts to contact him so that it was

> not evident that they should have concluded in time to hire another attorney that [counsel] was going to fail them completely. Non-responsiveness may be unprofessional, but it is hardly unheard of. By the time he gave up on [counsel], or reasonably should have been expected to have given up on him, Spitsyn could have concluded that it was too late to get a new attorney to file a petition on time, **especially since [counsel] still had the files for the case**."

Id. at 801-802 (emphasis added).

The same rationale applies here—except that present counsel *never* received a copy of Mr. Fowler's file from either Crowley or Kibbe and was forced to reconstruct the file through requests pursuant to the Public Records Act and by the good graces of the Kitsap County Prosecuting Attorney's Office.

As Mr. Fowler thus failed to file to file a timely petition due to Crowley's bad faith, deception, and false assurances, and Mr. Fowler acted with due diligence in retaining new counsel *before* the deadline and before any notice from Crowley or anybody else regarding Crowley's resignation in lieu of disbarment, equitable tolling is warranted under both the state and federal standards.

B. REVERSAL IS REQUIRED DUE TO TRIAL COUNSEL'S MULTIPLE INSTANCES OF PREJUDICIAL INEFFECTIVE ASSISTANCE

Trial counsel's failure to: properly and adequately investigate and prepare for trial; communicate with Mr. Fowler, heed his suggestions, and prepare his trial testimony—particularly Mr. Fowler's "three-foot" rule as to children as verified by Lyndsey Warner; contact and interview Monica Boyle, whose proffered testimony would have directly contradicted AG's account, seriously impugned her credibility, obviated the need for Mr. Fowler's unprepared testimony, and likely led to a different verdict on Count I; and pursue Nestor Gatchalian as an other suspect, which would have been admissible, seriously impugned ACG's credibility, and likely led to a different verdict on Count III, each, standing alone, warrant reversal of all counts. The cumulative prejudicial impact of such deficient performance, furthermore, likely undermined the jury's verdict on all counts, thus mandating reversal—or at the very least a reference hearing.

1. Failure to Interview Lyndsey Warner

As Ms. Warner had relevant, admissible, and exculpatory information to share, counsel's failure to interview her constitutes ineffective assistance.

The State first argues that the rumor that the alleged victims' mother coached their statements to law enforcement and their trial

testimony is inadmissible. Had counsel contemporaneously interviewed Ms. Warner, he would have discovered the rumor and been prompted to engage in additional investigation to discover the source of the rumor. The girls' mother, Zeny Cardwell, initially did not believe their allegations against Mr. Fowler, and only when they reported the misdeeds of their brother did they say anything about Mr. Fowler. Perhaps their mother coached them to say this to deflect from Nestor. We cannot know this because Kibbe failed to properly investigate. It actually does not seem that Kibbe even interviewed Ms. Cardwell.

With respect to Mr. Fowler's "three-foot rule" *as to children*, this should have been admissible as habit pursuant to ER 406, which provides: "Evidence of the habit of a person … whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person … on a particular occasion was in conformity with the habit …" Habitual behavior means "semi-automatic, almost involuntary and invariably specific responses to fairly specific stimuli" which "can be excluded only if the court determines the conduct does not reach the level of habit or routine." Torgerson v. State Farm Mut. Auto. Ins. Co., 91 Wn.App. 952, 962, 957 P.2d 1283 (1998).

Had Kibbe undertaken sufficient investigation, he would have found out more about Mr. Fowler's three-feet rule from members of Mr.

Fowler's family, especially brother Darryl, who Mr. Fowler asked Kibbe to contact—and which is in the court record—and who personally addressed the court about the continuances and counsel's aloofness.

In addition to ER 406, ER 404(a)(1) provides another basis for admission in permitting "evidence of a pertinent trait of character offered by an accused." In State v. Thomas, our Supreme Court held that in a rape of a child prosecution, evidence of the accused's character for sexual morality and decency was admissible and that the following instruction is proper: "Any evidence which bears upon good character and good reputation of the defendant should be considered by you, along with all other evidence, in determining whether or not the defendant is guilty." 110 Wn.2d 859, 867, 757 P.2d 512 (1988).

The State claims, in a footnote, that there is a split amongst the appellate divisions on this issue. Resp. at 30 n.1. But, the outlier Division One case, State v. Jackson, 46 Wn.App. 360, 730 P.2d 1361 (1986), preceded Thomas so that its continuing vitality is questionable. The State ignores the fact that this Division is unequivocal that "the specific trait pertinent to [a charge of child molestation or rape of a child] is sexual morality and decency." State v. Harper, 35 Wn.App. 855, 860, 670 P.2d 296 (1983). More recently, our Supreme Court found ineffective assistance in a child molestation prosecution where trial counsel failed to

"investigate reputation evidence or call reputation witnesses" and counsel admitted that there was no tactical reason to support such negligence. State v. Lopez, 190 Wn.2d 104, 113, 410 P.3d 1117 (2018). Analogous to this case, the defendant identified the potential witnesses, but counsel neglected to follow through. Id.

As to the means of admission by reputation, Darryl Fowler, Ms. Warner, Kineshia Lewis, and Monica Boyle were all knowledgeable and available—had Kibbe adequately investigated.

Natalie McMahon's stricken testimony that she had received complaints that Mr. Fowler was hanging around children at the playground is non-responsive to Mr. Fowler's reputation for sexual morality and decency. At worst, it shows that he likes children—even if he does not want them climbing on him.

The State relies upon Kibbe's non-credible and self-serving declaration to argue that his investigator interviewed Ms. Warner. Resp. at 33. It seems paradoxical, though, that Kibbe could not (or would not) forward any files to present counsel—claiming that he had sent everything to Crowley—but he now recalls, in his declaration *on behalf of the State*, that his investigator interviewed Ms. Warner and produced a report, the contents of which he now somehow remembers. The State did not include the alleged report—if it exists—as an exhibit. More importantly, the mere

fact that Mr. Kibbe chose to align himself with the State rather than Mr. Fowler speaks volumes as to his allegiances. His prior on the record representations that he did not think evidence of Nestor Gatchalian as an other suspect could overcome the rape shield statute—easily disprovable with less than five minutes of actual legal research—demonstrates his lack of credibility and disingenuousness.

The State, finally, tries to negate Mr. Fowler's three-foot rule *as to children* by virtue of the fact that he has changed *babies'* diapers. Changing a diaper is not a choice—it is an obligation. Refusing to allow children to come near him is, indeed, a choice, and one that he enforces.

2. Failure to Interview Monica Boyle

For nearly thirty years, Washington courts have recognized that a failure to interview relevant witnesses can constitute ineffective assistance of counsel. See, e.g., State v. Visitacion, 55 Wn.App. 166, 776 P.2d 986 (1989). The Visitacion Court was persuaded by an "expert affidavit from a very experienced Washington criminal defense attorney," who stated that under the circumstances of the case, he could not "conceive of any reason, tactical or otherwise, for not contacting witnesses" and that "[r]eliance on the police reports was no substitute …" Id. at 173.

John Henry Browne, who is familiar with the intricacies of this case, is also a very experienced Washington criminal defense attorney—

with nearly ten years of professorial experience. In his Affidavit in Support of Petition, a copy of which is attached hereto as Exhibit A, Mr. Browne notes that trial counsel is supposed to interview every witness listed in the police reports and should try to interview all witnesses endorsed by the client. He further states that there was no tactical reason in this case for Kibbe to not interview Ms. Boyle where she was named in the police reports, her apartment was an alleged crime scene, the alleged victim described her dog, and Mr. Fowler stated that he had stayed there. Mr. Browne, finally, diagnoses that:

> (1) [Ms. Boyle] would have testified that the alleged incident with A.G. never happened; (2) there would have been no prejudicial missing witness instruction; (3) Mr. Kibbe would not have had to recall Natalie McMahon, whose testimony that Ms. Boyle was easily reachable was rather damning; and (4) as a result, the outcome of the case likely would have been different.

Id. Detective Davis also would not have been recalled to discuss Ms. Boyle's dog and Mr. Fowler's failure to mention the dog in his interview.

Ms. Boyle was a very important witness with exculpatory information, but Kibbe never contacted her. His lame excuse that he did not know her location is unconvincing—that is why attorneys have investigators. And, in light of Ms. McMahon's testimony that Ms. Boyle was still in the area and had left a forwarding address, Kibbe's excuse merits even less credence. Ms. Boyle's testimony that the alleged incident

never happened surely would have changed the result at trial and eliminated any need for Mr. Fowler to testify. This is the very essence of an ineffective assistance claim.

3. Failure to Prepare Mr. Fowler to Testify at Trial

Mr. Fowler was forced to testify without having reviewed the discovery and with only 15 minutes of preparation due to Kibbe's failure to interview the material witnesses. This is, again, ineffective assistance.

The State disingenuously contends that the record demonstrates that Mr. Fowler was prepared to testify at trial. It does not. Pre-trial, Kibbe represented to the court:

> I've spoken to my client about basically what a 3.5 hearing is and what would likely occur. I'm not sure exactly if we've agreed to stipulate or not. I do anticipate Mr. Fowler testifying to many if not all of the facts -- he did give a fairly lengthy statement to law enforcement. But we haven't agreed to stipulate, at this point, and we have not had a hearing.

VRP I at 16.

There is no evidence—notwithstanding his self-serving and non-specific declaration—that Kibbe ever prepared Mr. Fowler to testify. When and how did he prepare Mr. Fowler to testify? Mr. Fowler explicitly recalls meeting with Kibbe for 15 minutes during the noon recess to prepare and then testified. This is insufficient.

Mr. Fowler, more importantly, would not have testified had

counsel done his job, interviewed the relevant witnesses, and had Ms. Boyle testify that Mr. Fowler never had children at her apartment. Contrary to the State's assertions, yes, the result would have been different had Ms. Boyle testified and Mr. Fowler exercised his right to silence.

4. Kibbe's Ineffective Assistance Forced Him to Call Natalie McMahon to Testify, which Itself was Ineffective Assistance

As previously noted, the defense looked stupid and unprepared when Ms. McMahon testified that Ms. Boyle still lived in the area, and the Court granted the State's request for a missing witness instruction—with its adverse inference—with respect to Ms. Boyle. All of this was caused directly by Kibbe's failure to locate, interview, and call to the stand Ms. Boyle. This is ineffective assistance.

While the appellate court found a lack of prejudice in the missing witness instruction, the very nature of the adverse inference is prejudicial. The Court, moreover, found that there was no dispute that the girls had been alone with Mr. Fowler, there was no dispute they spent the night with him, and the State highlighted the failure to call Ms. Boyle when discussing Mr. Fowler's credibility. Resp. at 38-39.

Again, had Kibbe been effective, he would have had Ms. Boyle testify and thereby obviated the need for Mr. Fowler to testify or the prejudicial missing witness instruction. This is ineffective assistance

5. Failure to Admit Evidence of Nestor Gatchalian as an Other Suspect

As Nestor had previously sexually assaulted his sisters and was in the bed at the time A.G. alleged that Mr. Fowler touched her, this evidence was clearly admissible.

The State cites to inapposite cases involving no physical nexus between the other suspect and the alleged offense. Here, by contrast, Nestor was in the same bed at the same time and had a history of molesting his sisters.

Kibbe's representations about the rape shield law, which the State wisely ignores, seems to demonstrate that Kibbe actually conducted no legal research and misrepresented his efforts to the trial court.

The State, finally, misapprehends Mr. Fowler's argument. There is no suggestion that Washington's other suspect jurisprudence is unconstitutional; rather, pursuant to the constitutional right to present a complete defense and basic precepts of "relevance, foundation, and similar prerequisites to admissibility established by the Washington Rules of Evidence," the evidence was admissible. See State v. Franklin, 180 Wn.2d 371, 373, 325 P.3d 159 (2014).

Given that evidence of Nestor as an other suspect was relevant, admissible, and likely would have directed a different outcome as to Count

III and also perhaps the other counts, counsel's failure to present such evidence constitutes ineffective assistance. Relief is thus required.

6. The Numerous Instances of Deficient Performance Collectively Mandate Relief

Given trial counsel's many deficiencies and the clear prejudice resulting therefrom, relief is mandated due to the aggregated prejudicial impact of the numerous instances of ineffective assistance. This is not, as the State contends, a cumulative error claim. See resp. at 47-48.

III. CONCLUSION

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

DATED this 17th day of August, 2018.

Respectfully submitted,

/s/_Craig Suffian_____
Craig Suffian, WSBA #52697
Attorney for Vincent L. Fowler

LAW OFFICES OF JOHN HENRY BROWNE, P.S.
800 Norton Building
801 Second Avenue
Seattle, WA 98104-3414
(206) 388-0777

EXHIBIT A

No. 51029-4-II

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

IN RE PERSONAL RESTRAINT PETITION OF VINCENT L. FOWLER	AFFIDAVIT OF JOHN HENRY BROWNE IN SUPPORT OF PETITION

STATE OF WASHINGTON)
)
County of King)

I, John Henry Browne, duly sworn upon oath, states:

1. I have been a licensed criminal defense attorney in the State of Washington since 1972. During this time, I have represented hundreds, maybe thousands, of clients charged with serious offenses.

2. In addition to practicing felony criminal defense for the past 45 years, I taught Criminal Practice at the Seattle University School of Law for five years and founded the Criminal Trial Practice Program at that institution. I also taught Criminal Law and Procedure at the University of Washington for four years. I was named as an Oxford Fellow in 1999.

3. As a matter of sound trial practice, I (or an associate or an investigator) interview every witness mentioned in the police reports, and I/we try to interview every potential witness endorsed by the client.

4. In October of 2017, Darryl Fowler, the Petitioner's brother, contacted me to see if my firm was available to work on this case. When I met with Darryl, I told him that the attorney they had hired, John Crowley, resigned from the practice of law in lieu of disbarment. Darryl was unaware of Crowley's resignation, but had decided to retain different counsel because the one-year time bar was rapidly approaching and the Fowlers could not contact Crowley, who had done nothing on their behalf.

LAW OFFICES OF JOHN HENRY BROWNE, P.S.
NORTON BUILDING, SUITE 800
801 SECOND AVENUE
SEATTLE, WASHINGTON 98104
(206) 388-0777 • FAX: (206) 388-0780

5. I have reviewed the discovery, pleadings, and other materials related to Mr. Fowler's case.

6. In my expert opinion as an experienced litigator with more than 45 years of major felony trial practice as well as a professor with nine years of teaching experience and one year as an Oxford Fellow, there is no possible tactical reason to account for the failure of Mr. Fowler's trial counsel, Craig Kibbe, to locate and interview Monica Boyle. One of the alleged sexual assaults occurred in her home while she was present and while Mr. Fowler was staying at her place; A.G. specifically recalled playing with Ms. Boyle's dog; and Mr. Fowler told both law enforcement and Mr. Kibbe that he was staying with Ms. Boyle at the time of the alleged incident with A.G.

7. Rather than having a cooperative defense witness corroborate Mr. Fowler's not guilty plea and likely prevent him from having to, personally, testify, the Court issued a missing witness instruction against Mr. Fowler for his failure to produce Ms. Boyle. Had Mr. Kibbe contacted Ms. Boyle and elicited her proposed testimony: (1) she would have testified that the alleged incident with A.G. never happened; (2) there would have been no prejudicial missing witness instruction; (3) Mr. Kibbe would not have had to recall Natalie McMahon, whose testimony that Ms. Boyle was easily reachable was rather damning; and (4) as a result, the outcome of the case likely would have been different.

FURTHER YOUR AFFIANT sayeth naught.

John Henry Browne

SUBSCRIBED AND SWORN to before me on this 17th day of August, 2018.

NOTARY PUBLIC in and for the State of Washington, residing at Seattle, Washington. My commission expires July 21, 2021.

KIMBERLY HENNESSEY
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
JULY 1, 2021

LAW OFFICES OF JOHN HENRY BROWNE, P.S.
NORTON BUILDING, SUITE 800
801 SECOND AVENUE
SEATTLE, WASHINGTON 98104
(206) 388-0777 • FAX: (206) 388-0780

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on August 17, 2018 I caused to be served electronically a copy of the Reply Brief of Petitioner in the Division II Court of Appeals, which will serve a copy on the Kitsap County Prosecutor.

DATED at Seattle, Washington, this 17th day of August, 2018.

LAW OFFICES OF JOHN HENRY BROWNE, P.S.

/s/ Kimberly Hennessey_____
Kimberly Hennessey

LAW OFFICES OF JOHN HENRY BROWNE, P.S.

August 17, 2018 - 4:34 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51029-4
Appellate Court Case Title:	Personal Restraint Petition of Vincent L Fowler
Superior Court Case Number:	13-1-00466-4

The following documents have been uploaded:

- 510294_Answer_Reply_to_Motion_20180817161939D2961320_7423.pdf
  This File Contains:
  Answer/Reply to Motion - Reply to Response
  The Original File Name was FOWLER PRP Reply Combined and Filed.pdf

A copy of the uploaded files will be sent to:

- KCPA@co.kitsap.wa.us

Comments:

Sender Name: Lorie Hutt - Email: lorie@jhblawyer.com
Filing on Behalf of: John Henry Browne - Email: johnhenry@jhblawyer.com (Alternate Email: lorie@jhblawyer.com)

Address:
801 2nd Avenue, Suite 800
Seattle, WA, 98104
Phone: (206) 388-0777

Note: The Filing Id is 20180817161939D2961320