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

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*In re the Personal Restraint of*

VINCENT L. FOWLER,

Petitioner.

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REGARDING THE JUDGMENT AND SENTENCE ENTERED BY  
THE SUPERIOR COURT OF KITSAP COUNTY

Superior Court No. 13-1-00466-4

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BRIEF OF RESPONDENT

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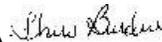
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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED June 12, 2018, Port Orchard, WA   
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether even Fowler’s “placeholder” petition was untimely because time for filing the petition ran from when the mandate issued?

2. Whether even if the time for filing ran from the date the order amending the judgment, the claims in Fowler’s supplemental brief do not relate back to the empty “placeholder” petition?

3. Whether Fowler fails to meet the requirements for equitable tolling by showing that (1) the State impeded his ability to timely file his petition through bad faith, deception, or false assurances or (2) that he acted with due diligence?

4. Whether Fowler is incorrect that the time bar set forth in RCW 10.73.090 can be waived pursuant to RAP 18.8?

5. Whether Fowler fails to show counsel’s trial preparation was ineffective where:

a. Lyndsey Warner’s proposed testimony about a “rumor circulating around the complex” and Fowler’s purported “three foot rule” would not have been admissible nor have changed the outcome even if it were;

b. Monica Boyle’s proposed testimony contradicts the testimony of both the victim and of Fowler, and their statements to

the police;

c. Fowler's claim that he did not know he was going to testify is refuted by the record; and

d. Counsel acted reasonably when he called Natalie McMahon to rebut the notion that Boyle was uniquely within Fowler's control after the State successfully requested a missing witness instruction regarding Boyle?

6. Whether Fowler fails to demonstrate that the victims' brother was a viable other suspect where the evidence regarding the brother's abuse of the victims amounted to no more than inadmissible propensity evidence where there was no evidence that he committed the crimes of which Fowler was convicted?

7. Whether, where no expert has offered any opinion that Fowler's victims fabricated their accusations against him, his claim that counsel was ineffective in this regard fails to meet minimum standards for relief?

8. Whether Fowler fails to demonstrate cumulative error?

## **II. RESPONSE**

The State respectfully moves this court for an order dismissing the petition with prejudice because it is untimely and substantively without

merit.

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

#### **A. PROCEDURAL HISTORY**

Vincent L. Fowler was charged by information filed in Kitsap County Superior Court with one count of first-degree rape of a child and two counts of first-degree child molestation, involving two sisters, ACG and AG. A jury found Fowler guilty as charged. CP 60-61.<sup>1</sup>

Fowler appealed to this Court, *State v. Fowler*, No. 45774-1-II, which ultimately transferred the case to Division III for decision. App. A. Division III affirmed:

Vincent Fowler appeals his conviction for two counts of first degree child molestation and one count of first degree rape of a child. He contends the trial court erred by (1) commenting on the evidence when it gave missing witness and non-corroboration jury instructions, (2) improperly giving an unconstitutional missing witness instruction, and (3) imposing \$1,135 in legal financial obligations (LFOs) for court-appointed counsel without making the requisite findings on his ability to pay. We disagree with Mr. Fowler's contentions and affirm his conviction.

*State v. Fowler*, No. 33227-6-III, Op., at 1 (Aug. 18, 2015) (App. B).

The Supreme Court granted review, but “only on the issue of imposition of discretionary legal financial obligations and the case is

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<sup>1</sup> Record references are to the record from Fowler's direct appeal, which the Court transferred to the present proceeding on April 11, 2018.

remanded to the Superior Court to reconsider the imposition of the discretionary legal financial obligations consistent with the requirements of *State of Washington v. Nicholas Peter Blazina*, 182 Wn.2d 827 (2015).” *State v. Fowler*, No. 92244-6, Order, at 1-2 (Mar. 31, 2016) (App. C).

The mandate issued on May 2, 2016. App. D. An order amending the judgment in compliance with the mandate was entered on October 19, 2016. App. E.

Fowler filed a purported “placeholder” personal restraint petition (titled “Petition for Review”) in the superior court on October 18, 2017. That petition did not contain any grounds for relief. He filed a supplemental petition on March 26, 2018.

## **B. FACTS**

AG<sup>2</sup> was born February 5, 2001. 1RP 96. She was 12 at the time of trial. 1RP 97. Fowler was her mother’s friend. 1RP 97. AG was nine or ten when she first met Fowler. 1RP 98. Fowler would visit when they were at the home of AG’s friend in Port Orchard. 1RP 98. At one point they lived there. 1RP 98.

AG was alone once with Fowler. It was the only time she ever spent

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<sup>2</sup> In accordance with this Court’s General Order 2011-1, the victims will be referred to by their initials. The State will follow the initial used in the Fowler’s direct appeal brief. Thus, ACG is the victim born in 2003 and identified in Counts I and II and AG is the victim born in 2001 and referenced in Count III of the first amended information. *See* CP 17-19.

the night at Fowler's apartment. 1RP 108. She was playing with his dog and then they were going to play video games. 1RP 98. Fowler's roommate Monica Boyle was there. 1RP 99. Boyle left and Fowler fixed them some canned food for dinner. 1RP 99. After dinner AG played with the dog a bit and then went to sleep on the couch in the living room. 1RP 100. She went to sleep before Fowler. 1RP 110. She was wearing a shirt and jeans with shorts and underwear under the jeans. 1RP 100.

She woke up when she felt Fowler unzipping her pants and rubbing her vagina. 1RP 101. He was rubbing her on top of her clothes. 1RP 101. She turned over and got up and went to the bathroom. 1RP 102. When she turned over Fowler quickly went back to the floor and pretended to be sleeping. 1RP 102.

After going to the bathroom, AG came back and sat on the couch, awake, for the rest of the night. 1RP 102. AG was nine or ten at the time. 1RP 103.

AG told her friend the next day. 1RP 103. She also told her brother. 1RP 103. She told her mother, but she did not believe her.

Fowler later apologized to her and said he was drunk and "didn't know," and would not "do it again, if he did." 1RP 106. She told her mother about it a few weeks after it happened. 1RP 111. Her conversation with Fowler was after that. 1RP 111.

ACG was 10 years old at the time of trial. 1RP 117. ACG was nine or ten when she met Fowler. 1RP 120. She once spent the night in a house with Fowler. 1RP 120. It was at Gina's, near the Albertson's in East Bremerton 1RP 120. Gina, ACG, AG, their mother, and her brothers were also there. 1RP 120.

She had fallen asleep on the couch. 1RP 121. Fowler was sleeping on the other couch. 1RP 121. She woke up when he touched her. 1RP 121. He had pulled her pants and underwear down to her knees. 1RP 122. He touched her vagina with her hands. 1RP 122. Her mother, who was sleeping in the bedroom, got up to use the bathroom and he stopped. 1RP 123. When her mother came out, ACG went and told her mother she wanted to sleep with her. 1RP 123.

ACG usually slept in the bedroom when she spent the night at Gina's. 1RP 129. The first incident occurred the only time she slept on the couch. 1RP 129. She had fallen asleep there after skating. 1RP 130.

A second incident occurred in the same house, two days after the first. 1RP 125, 132. ACG's mother, sister, and brothers were in the house. ACG was sleeping on the bed in the bedroom. 1RP 125. Her sister and older brother were also in the bedroom. 1RP 125. She was wearing a Hello Kitty skirt and underwear. 1RP 125. Fowler came in and touched her vagina. 1RP 125. He touched her under the skirt but on top of her underpants. 1RP 126.

Her brother rolled over and Fowler stopped and left the room.. 1RP 126.

ACG talked to her sister about the incident. 1RP 127. She also talked to a woman at the prosecutor's office. 1RP 127. She did not tell anyone else because she was scared they would not believe her. 1RP 128.

The authorities were investigating an unrelated case when the victims disclosed Fowler's involvement. 1RP 89. The case was referred to Bremerton Police Detective Kenny Davis to investigate. 1RP 89. He reviewed the recorded statements of the victims made to the child interviewer. 1RP 89. He spoke with Natalie, the apartment manager, and with the victims' mother. 1RP 90. Fowler was arrested and Davis interviewed him. 1RP 90-91. After waiving his rights, Fowler denied the allegations. Fowler did admit that he knew them and was around them at the time of the alleged acts. 1RP 92. Fowler knew their mother and had spent time with the girls. 1RP 92.

AG indicated that the incident occurred in Port Orchard at Fowler's apartment there. 1RP 92. Fowler acknowledged that he had lived at that apartment and associated with the friend that AG had mentioned. 1RP 93. AG stated that when at Fowler's apartment, she would sleep on the couch and Fowler slept on the floor on the night of the incident. 1RP 93. Fowler admitted that when AG stayed at his apartment, she would sleep on the couch and he would sleep on the floor. 1RP 93.

With regard to ACG's claim, Fowler admitted that he was around her when the family lived with Gina. 1RP 93. Fowler stated that he was 46 years old. 1RP 94.

The prosecutor's office child interviewer interviewed both girls. 2RP 159. The interviewer related the contents of ACG's interview, which was generally consistent with her trial testimony. 2RP 161-64.

Fowler testified that the dog woke AG up. 2RP 196. He denied ever having contact with the girls. 2RP 196, 207.

In rebuttal, Detective Davis confirmed that Fowler never mentioned the dog during their 35-minute recorded interview. 2RP 219.

#### **IV. AUTHORITY FOR PETITIONER'S RESTRAINT**

The authority for the restraint of Vincent L. Fowler lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on January 10, 2014, as amended on October 19, 2016, in cause number 13-1-00466-4, upon Fowler's conviction of first-degree rape of a child and two counts of first-degree child molestation. CP 95, App. E.

#### **V. ARGUMENT**

##### **A. THE PETITION IS UNTIMELY.**

Fowler argues that the issues raised in his supplemental petition

should be deemed timely. This claim is without merit because even his “placeholder” petition was late, Washington does not in any event recognize “placeholder” petitions filed to defeat the time bar, and he fails to show that the doctrine of equitable tolling applies.

***1. The time for filing the petition ran from when the mandate issued on May 2, 2016.***

RCW 10.73.090(1) provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

A Washington court judgment becomes final when the mandate from the direct appeal issues. *See* RCW 10.73.090(3)(b). The mandate issued in his direct appeal on May 2, 2016. Thus to be timely, his petition should have been filed by May 2, 2017.

In his brief Fowler assumes, without supporting argument, that the time for filing his petition ran from when the trial court entered the order amending the judgment on October 19, 2016, thus rendering his “placeholder” petition timely filed on October 18, 2017. *See, e.g.*, Supp. Brief, at 2, 14. He is incorrect.

The Supreme Court has explained that, pursuant to RCW 10.73.090 “a judgment becomes final when all litigation on the merits ends.” *In re Skylstad*, 160 Wn.2d 944, 949, 162 P.3d 413 (2007). Under *Skylstad*,

however, 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) (citing *State v. Barberio*, 121 Wn.2d 48, 51, 846 P.2d 519 (1993), and *State v. Kilgore*, 167 Wn.2d 28, 40, 216 P.3d 393 (2009)). Under such circumstances, the time bar begins to run when the mandate issues. *Sorenson*, 200 Wn. App. at 700.

In *Kilgore* the Court explained that finality occurs “when the ‘availability of appeal’ ha[s] been exhausted.” *Kilgore*, 167 Wn.2d at 43 (quoting *In re St. Pierre*, 118 Wn.2d 321, 327, 823 P.2d 492 (1992) and *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)). The fact that the trial court had discretion to reexamine a defendant’s sentence on remand is not sufficient to prevent finality. The rules of appellate procedure require that the trial court exercise its discretion in order to give rise to an appealable issue. *Kilgore*, 167 Wn.2d at 43.

Here, while the trial court had the discretion following the Supreme Court’s remand to exercise its discretion and reimpose the discretionary LFOs after considering Fowler’s ability to pay, it did not. Instead it, simply struck them. *See* App. E (noting ex-parte entry of order). This left no appealable issue, and as such the judgment was final when the mandate issued. Because Fowler did not file even his “placeholder” petition within

this statute of limitations, and fails to identify any exception under RCW 10.73.100 that applies to his claims, it should be dismissed.

***2. Even if the time ran from the date the order amending the judgment was filed on October 19, 2016, the claims in Fowler’s supplemental brief do not relate back to the empty “placeholder” petition.***

Even if Fowler had until October 19, 2017, to file his petition, rendering the “placeholder” timely, the issues raised in his supplemental brief would still be untimely. Washington courts allow an amendment to a PRP, but only if the amendment itself is timely filed. *In re Haghghi*, 178 Wn.2d 435, 446, 309 P.3d 459 (2013). Washington law bars the amendment from relating back to the time of the filing of the personal restraint petition for purposes of complying with the one-year time limit. *Id.* As such even were the “placeholder” petition, which was devoid of any claim for relief, timely, the issues now before the Court would not be.

***3. Fowler fails to meet the requirements for equitable tolling that he show (1) that the State impeded his ability to timely file his petition through bad faith, deception, or false assurances and (2) that he acted with due diligence.***

Apparently recognizing that his claims are untimely, Fowler nevertheless seeks to invoke the doctrine of equitable tolling. This contention must fail as well.

Equitable tolling “permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed.” *In re*

*Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008) (plurality opinion). A petitioner who seeks to benefit from the equitable tolling doctrine must demonstrate that the petition or amended petition was untimely due to bad faith, deception, or false assurances. *Bonds*, 165 Wn.2d at 141-42, 144. As the party seeking relief, the petitioner bears the burden of establishing the applicability of equitable tolling. *Bonds*, 165 Wn.2d at 144.

In *Haghighi*, a majority of the Supreme Court adopted these standards for invocation of the equitable tolling doctrine:

Consistent with the general rules and policies governing PRPs, we find it both unwise and unnecessary to expand the doctrine beyond the traditional standard. RCW 10.73.090's time bar promotes finality of judgments, a principle especially important in this context because a petitioner cannot obtain federal habeas corpus relief until his or her judgment is final. Any lower standard would require the courts to constantly define the doctrine's boundaries and call into question the statutorily established finality.

*Haghighi*, 178 Wn.2d at 448. Further the Court determined that "the general framework governing PRPs" required a more limited role for equitable tolling than in other contexts. *Haghighi*, 178 Wn.2d at 448. The Court observed that a personal restraint petitioner has the right to make numerous timely challenges in the form of appeals or other motions, but could also take advantage of other means of suspending the statute of limitations, such as the grounds listed in RCW 10.73.100. *Id.* To construe the doctrine expansively would thus provide limited benefit to petitioners at the cost of

unnecessary ambiguity in the law. *Id.* Thus the Court limited its applicability to a limited set of circumstances:

Consistent with the narrowness of the doctrine’s applicability, principles of finality, and the multiple avenues available for postconviction relief, we apply the civil standard [for equitable tolling] and require the predicates of bad faith, deception, or false assurances.

*Haghighi*, 178 Wn.2d at 448-49.

As noted, the Court in *Haghighi* adopted the “bad faith, deception, or false assurances” civil standard of equitable tolling. That standard was set forth in *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). *See Bonds*, 165 Wn.2d at 141. *Millay* required the party invoking the doctrine to show both the exercise of diligence *and* bad faith, deception, or false assurances by the opposing party. *Millay*, 135 Wn.2d at 206. The Court explicitly noted that “due diligence” requires “more than good faith.” *Id.*

Here Fowler fails to show due diligence on his own part, or bad faith, deception, or false assurances on the part of the State. Indeed the record shows *no* bad faith, deception or false assurances on the part of the State. To the contrary, Fowler was specifically orally advised of the time limit when he was sentenced:

THE COURT: Now, finally, petition or motion for collateral attack must be done within one year from today’s date unless there’s other certain conditions that attach.

A collateral attack means a motion to withdraw

guilty plea -- that doesn't apply here -- personal restraint petitions, habeas corpus petitions, motions to vacate judgment, motions for new trials, and motions to arrest judgment. Those need to be filed either one year after the judgment becomes final unless something else has happened.

RP (1/10/14) 23. He was also advised in writing on his judgment and sentence, which included reference to the relevant statutes:

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

CP 101.

Fowler cites *nothing* the State did that in any way impeded his ability to file a timely petition. He cites no Washington case where the doctrine has been applied because of non-state actor malfeasance. The two Court of Appeals cases he does cite appear to have been disapproved of by the Supreme Court in *Bonds*:

[I]n both [*In re*] *Carlstad*[, 150 Wn.2d 583, 80 P.3d 587 (2003),] and [*In re*] *Benn*, [134 Wn.2d 868, 952 P.2d 116 (1998),] we adhered rather strictly to the statute of limitation applicable to post-conviction collateral attack. And though we did not foreclose equitable tolling in *Carlstad*, we suggested a rule, synonymous to the rule in civil cases, which would make equitable tolling available only in instances where petitioner missed the filing deadline due to another's malfeasance. *The Court of Appeals, however, has applied equitable tolling less sparingly. See Hoisington, 99*

Wn. App. 423, 993 P.2d 296 (equitably tolling one-year time limit where court failed on three occasions to address petitioner's meritorious attack on his guilty plea); *State v. Littlefair*, 112 Wn. App. 749, 51 P.3d 116 (2002), *review denied*, 149 Wn.2d 1020, 72 P.3d 761 (2003) (applying equitable tolling in split decision, where, due to mistakes by petitioner's attorney, the court, and the immigration service, petitioner was unaware until after a one-year time limit that he would be deported if he pleaded guilty).

*Bonds*, 165 Wn.2d at 142 (emphasis supplied). The rejection of these cases is further borne out by the Court's rejection of Bond's contention that his claim should have been equitably tolled because of court inaction. *Bonds*, 165 Wn.2d at 143. More to the point here, the Court specifically rejected the notion that inaction on the part of collateral counsel justifies invocation of the doctrine:

We first note that there is no constitutional right to counsel in post-conviction collateral attacks. ... Moreover, while Bonds's contention may be true, nothing prevented Bonds from timely asserting the public trial issue himself. Indeed, we require a pro se petitioner to comply with applicable rules and statutes and hold them to the same responsibility as an attorney.

*Bonds*, 165 Wn.2d at 143. Furthermore, even if *Hoisington* and *Littlefair* survived *Bonds*, in both those cases the Court of Appeals found at the very least negligence on the part of government actors: the courts and immigration officials. Fowler can point to no such misfeasance here.

Other cases have reached similar conclusions. In *In re Mines*, 190 Wn. App. 554, 569, 364 P.3d 121 (2015), former appellate counsel declared

that the petitioner wanted her to look into the public trial issue, and that she agreed to do so, but did not. The Court rejected the petitioner’s equitable tolling claim, noting that “appellate counsel’s inaction, even if it constitutes a false assurance, did not affect Mr. Mines’ ability to file a timely petition . . . He does not address how bad faith, deception, or false assurances caused his former lawyer to ignore the public trial issue in [the previously filed] timely-filed personal restraint petition.” *Mines*, 190 Wn. App. at 569; *see also State v. Martinez-Leon*, 174 Wn. App. 753, 762, 300 P.3d 481, *review denied*, 179 Wn.2d 1004 (2013) (that counsel did not specifically advise defendant that a 365–day sentence on his assault conviction would result in definite deportation did not justify application of doctrine); *State v. Robinson*, 104 Wn. App. 657, 669, 17 P.3d 653, *review denied*, 145 Wn.2d 1002 (2001) (delay in mail delivery was a “garden variety claim of excusable neglect” and not grounds for equitable tolling).

Nor does Fowler show he acted with due diligence, as the standard requires. His brother’s declaration states as follows:

On or about September 2, 2015, I retained attorney John Crowley to prepare a personal restraint petition on Vinnie’s behalf. In between that time and October 6, 2017, I and other members of my family attempted to contact Crowley numerous times, but to no avail. Eventually, it reached the point where his voicemail box was full. Crowley had never communicated with any of us and, to our knowledge, did no work on Vinnie’s case. As Vinnie’s petition was due on October 18, 2017, I decided to retain different counsel.

Supp. Brief, Exh. F. A reasonably diligent person would not wait for over two years of inaction by a lawyer before seeking alternative avenues by which to proceed. The Court should bear in mind that the due diligence standard requires “more than good faith.” *Millay*, 135 Wn.2d at 206; *see also Bonds*, 165 Wn.2d at 143 (“nothing prevented Bonds from timely asserting the ... issue himself.”); *State v. Howerton*, 1 Wn. App.2d 1031, 2017 WL 5665662, at \*5 (Nov. 27, 2017),<sup>3</sup> *review denied*, \_\_\_ Wn.2d \_\_\_ 2018 WL 1616645 (Apr. 4, 2018) (petitioner’s reliance “on the assurances of his attorneys to protect his legal interests” did not establish bad faith, deception, or false assurances or the exercise of diligence).

Moreover, a review of Fowler’s declaration shows that he was aware of the claims he is presenting at the time of trial. Supp. Brief, Exh. D. In *Haghighi*, the Court refused to apply equitable tolling where the petitioner “knew all the facts relevant to his ineffective assistance of counsel claim when he filed his initial appeal.” *Haghighi*, 178 Wn.2d at 449. In short Fowler also fails to show that he acted with due diligence. Since he has met neither prong of the equitable tolling threshold, his petition should be dismissed as untimely.

Apparently recognizing that his claim is untenable under

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<sup>3</sup> Unpublished; *see* GR 14.1(a).

Washington law, Fowler cites to numerous federal cases he asserts support his position. The first case Fowler cites, *Maples v. Thomas*, 565 U.S. 266, 132 S. Ct. 912, 922, 181 L. Ed. 2d 807 (2012), involved a federal habeas corpus petition regarding an Alabama death penalty case. Under federal law, a state prisoner's habeas claims may not be entertained by a federal court if the state court declined to address the claims because the prisoner failed to meet a state procedural requirement and the state judgment rests on independent and adequate state procedural grounds. *Maples*, 565 U.S. at 280. State procedural rules are ordinarily considered independent state grounds. *Id.* Federal jurisprudence also provides an exception to the general rule if "the prisoner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as a result of the alleged violation of federal law." *Maples*, 565 U.S. at 280 (editing the Court's).

In *Maples* the defendant missed the deadline to file an appeal from the denial a trial-court level post-conviction motion. His post-conviction attorneys had filed a motion on his behalf, but subsequently left their law firm. But Maples was not personally notified of the court's decision, and when the notices to his attorneys were returned unopened, the court clerk did not make any further attempt at service. Counsel for the state then notified the defendant personally after the time for the appeal had passed. The Court concluded that Maples had satisfied the cause and prejudice

standard:

*In the unusual circumstances of this case, principles of agency law and fundamental fairness point to the same conclusion: There was indeed cause to excuse Maples' procedural default. Through no fault of his own, Maples lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court's denial of postconviction relief. As just observed, he had no reason to suspect that, in reality, he had been reduced to pro se status. Maples was disarmed by extraordinary circumstances quite beyond his control. He has shown ample cause, we hold, to excuse the procedural default into which he was trapped when counsel of record abandoned him without a word of warning.*

*Maples*, 565 U.S. at 289 (emphasis supplied).

First it should be noted that the cause and prejudice standard is rather different than the equitable tolling standard adopted by the Washington Supreme Court. As previously discussed, equitable tolling requires two elements: (1) bad faith, deception, or false assurances by the opposing party, and (2) due diligence. "Cause" under the federal rule on the other hand requires only that "something *external* to the petitioner, something that cannot fairly be attributed to him, impeded his efforts to comply with the State's procedural rule." *Maples*, 565 U.S. at 280 (internal editing omitted, emphasis the Court's). Unlike Washington's standard, where the malfeasance must be attributable to the State, the federal standard only requires that it be attributable to someone other than the petitioner. The federal standard is thus inconsistent with the Washington Supreme Court's

formulation of the equitable tolling doctrine. As such this Court lacks the authority to import the federal standard into Washington jurisprudence. *State v. Gore*, 101 Wn.2d 481, 681 P.2d 227 (1984) (once the Washington State Supreme Court decides an issue of state law, that interpretation is binding on all lower courts until overruled by the Supreme Court).

Moreover, as noted above, Fowler did not act with due diligence. With full knowledge of the deadline, he stood by for two years while his attorney did nothing. On the other hand, once Maples learned of the court's order and the filing deadline, he took immediate action to obtain other representation. *Maples*, 565 U.S. at 277.

Fowler's reliance on *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010), is also misplaced. That capital case involved whether the federal deadline for a state petitioner to file a habeas petition was subject to equitable tolling. *Holland*, 560 U.S. at 634, 650. Central to the Court's opinion was the proper standard for the equitable tolling doctrine.

The Court noted that it had previously established the standard a petitioner must meet for equitable tolling to apply in federal habeas proceedings: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544

U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)). While the diligence prong is certainly consistent with the Washington Supreme Court's formulation, the second prong is not.

The Court specifically rejected "mechanical rules" in favor of a "case-by-case" approach that was to be applied with "flexibility." *Holland*, 560 U.S. at 649-50. The Court did not decide whether the circumstances in that case met the requirements for tolling however, instead remanding for the lower courts to make that determination. *Holland*, 560 U.S. at 653-54. This, however, is the precise formulation the Washington Supreme Court in *Bonds* and *Haghighi* rejected: "we find it both unwise and unnecessary to expand the doctrine beyond the traditional standard" and therefore "we apply the civil standard ... and require the predicates of bad faith, deception, or false assurances." *Haghighi*, 178 Wn.2d at 448-49. As noted above, this Court is bound by that holding.

Moreover, like *Maples*, and unlike *Fowler*, *Holland* acted diligently, *Holland*, 560 U.S. at 653, which is still required under the federal formulation of equitable tolling. *Holland*'s post-conviction counsel failed to notify him when the Florida Supreme Court denied him post-conviction relief. At that time he had 12 days left to file a federal habeas petition, which counsel failed to do. But as soon as *Holland* learned that his state-court post-conviction appeal had been denied, he immediately filed a pro se habeas

petition in federal court. *Holland*, 560 U.S. at 640.

The other cases also provide little support for Fowler’s argument. *Gibbs v. Legrand*, 767 F.3d 879, 885 (9th Cir. 2014), applied *Holland*’s “flexible, fact-specific approach.” As discussed, that approach is contrary to the Washington Supreme Court’s precedent.

*Spitsyn v. Moore*, 345 F.3d 796, 801 (9th Cir. 2003), applied the same approach: “As a discretionary doctrine that turns on the facts and circumstances of a particular case, equitable tolling does not lend itself to bright-line rules.” Moreover, the court did not hold that the doctrine was satisfied; it remanded for the district court to determine if the petitioner had acted with due diligence, because the “existing record d[id] not clearly answer that question.” *Id.*, at 802.

Fowler also is incorrect that *Baldayaque v. United States*, 338 F.3d 145 (2nd Cir. 2003), held that “equitable tolling [was] proper where counsel failed to file any habeas petition, conducted no legal research, and failed to communicate with the client.” Supp. Brief, at 21. To the contrary, while that court held that the petitioner satisfied the “flexible” first prong of the federal version of the doctrine, it like the court in *Spitsyn*, remanded for further development of the facts regarding due diligence. *Baldayaque*, 338 F.3d at 153.

Here, as a personal restraint petitioner, Fowler “must state with

particularity facts that, if proven, would entitle him to relief, and he must present evidence showing his factual allegations are based on more than speculation and conjecture.” *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). As discussed previously Fowler has failed to show he acted with due diligence. Moreover, since those facts are uniquely within his control, his failure to present them in his petition or supplemental brief should not entitle him to a reference hearing. And again, the Washington Supreme Court, unlike the federal courts, has held that equitable tolling is not appropriate where nothing prevented the petitioner from filing a pro se petition. *Bonds*, 165 Wn.2d at 143.

Finally, *In re Marriage of Olsen*, 183 Wn. App. 546, 557, 333 P.3d 561 (2014), while discussing *Maples* and *Holland* declined to apply them to the facts of the case. Moreover, at issue in that case was not equitable tolling but whether attorney misfeasance could be grounds for relief under CR 60(b). The case fails to justify Fowler’s proposal to depart from controlling Supreme Court precedent.

Fowler fails to meet the standards set forth by the Washington Supreme Court to warrant the application of the doctrine of equitable tolling to excuse the untimeliness of his petition. Moreover, he fails to explain what authority this Court would have to follow the contrary non-constitutional standards applied in federal court. His petition is untimely and should be

dismissed.

**4. RAP 18.8 does not permit the waiver of the time bar set forth in RCW 10.73.090.**

Finally, Fowler's reliance on RAP 18.8 is misplaced. The Supreme Court has rejected Fowler's argument that provisions of the Rules of Appellate Procedure allow for an exemption to the time bar:

Moreover, we already rejected this very argument in *In re Benn*, 134 Wn.2d 868, 952 P.2d 116 (1998), where we recognized that the RAPs neither provide for a "relating back" procedure analogous to CR 15(c) nor allow the petitioner to add a later untimely claim. Thus, under both *Bonds* and *Benn*, an "amended" PRP does not relate back to the original filing and any "amendment" or new claim must be timely raised.

*Haghighi*, 178 Wn.2d at 446. Because Fowler fails to show equitable tolling is appropriate in this case, his petition is untimely and should be dismissed.

**B. STANDARD OF REVIEW.**

Even were his petition timely, Fowler fails to show he would be entitled to either relief in this Court or to a reference hearing. The merits of his claims will be addressed in the following sections of this brief. The following standards of review apply to all his claims.

The petitioner in a PRP must first prove error by a preponderance of the evidence. *In re Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015). Then, if the petitioner is able to show error, he must also prove prejudice. *Crow*, 187 Wn. App. at 421.

To obtain relief, the petitioner must show either constitutional or nonconstitutional error. *In re Cook*, 114 Wn.2d 802, 810-11, 792 P.2d 506 (1990). If the error is constitutional, the petitioner must demonstrate that it resulted in actual and substantial prejudice. *In re Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). “Actual and substantial prejudice, which ‘must be determined in light of the totality of circumstances,’ exists if the error ‘so infected petitioner’s entire trial that the resulting conviction violates due process.’” *Crow*, 187 Wn. App. at 421 (quoting *In re Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985)).

This actual prejudice standard places the burden upon the petitioner, as opposed to the harmless error standard on direct appeal, because “[c]ollateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *In re Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982). If the error is nonconstitutional, the petitioner must meet a stricter standard and demonstrate that the error resulted in a fundamental defect which inherently resulted in a complete miscarriage of justice. *In re Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015).

In addition, the petitioner must state with particularity facts that, if proven, would entitle him to relief, and he must present evidence showing his factual allegations are based on more than speculation and conjecture.

RAP 16.7(a)(2); *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). A petitioner cannot rely on conclusory allegations. *Cook*, 114 Wn.2d at 813-14. To support a request for a reference hearing, the petitioner must state with particularity facts which, if proven, would entitle him to relief. *In re Dyer*, 143 Wn.2d 384, 397, 20 P.3d 907 (2001). If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief *Id.* If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. *Id.*

If the petitioner fails to make a prima facie showing of either actual or substantial prejudice or a fundamental defect, the Court should deny the PRP. *In re Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). If the petitioner makes such a showing, but the record is not sufficient to determine the merits, the Court should remand for a reference hearing. *Yates*, 177 Wn.2d at 18. But if the Court is convinced that the petitioner has proven actual and substantial prejudice or a fundamental defect, the petition should be granted. *Id.*

All of Fowler's claims allege that trial counsel was ineffective. In order to overcome the strong presumption of effectiveness that applies to

counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687. Fowler fails to meet these standards, and for the following reasons his petition should be dismissed.

**C. FOWLER FAILS TO SHOW THAT COUNSEL'S TRIAL PREPARATION WAS INEFFECTIVE.**

Fowler first claims that counsel was ineffective for failing to investigate and present testimony from various witnesses, for not preparing him to testify, and for calling Natalie McMahon. This claim is without merit because he fails to identify any admissible testimony that would have changed the outcome of trial.

*1. Lyndsey Warner's proposed testimony about a "rumor circulating around the complex" and Fowler's purported "three foot rule" would not have been admissible nor have changed the outcome even if it were.*

Warner claims that trial counsel never contacted her, despite Fowler's "explicit instruction to defense counsel Craig Kibbe to contact me because he believed that I would make a good witness on his behalf." Supp. Brief of Petitioner, Exh. E, ¶ 10. Contrary to this assertion, Fowler fails to meet his burden of showing that Warner had any admissible testimony to offer, or that her testimony could have changed the outcome of the proceedings.

Warner asserted that she had heard rumors that the victims' mother coached them to accuse Fowler:

While I am unfamiliar with the alleged victims, I used to work with Zeny Caldwell and lived at the Olympic Pointe Apartments, the same complex as Monica Boyle and where the first incident allegedly occurred. The rumor circulating

around the complex was that Zeny coached her children to blame Vinnie in an attempt to deflect blame from her son, Nestor Gatchalian, the girls' older brother who was convicted of sexually assaulting both girls over a period of years. I cannot specifically recall to whom Zeny disclosed that she influenced her children to accuse Vinnie as a means to divert attention from Nestor.

Supp. Brief of Petitioner, Exh. E, ¶ 8.

First, this statement is hearsay, and Fowler identifies no basis for Warner to testify regarding alleged rumors. Such statements are generally not admissible and do not support a claim for relief in a personal restraint petition. *In re Benn*, 134 Wn.2d 868, 935, 952 P.2d 116 (1998).

Moreover, even were Warner's claim admissible, its introduction would have made little sense from a defense perspective because the allegation of coaching contradicts the factual history of the case. The girls' mother was the one who reported their brother Nestor to the police, and kicked him out of the house. App. F; App. G, at 1, 3. The report noted that the mother was very supportive of the girls:

The caller states that the mother reported that Nestor, Jr. was in the home when the girls made their disclosure and the mother demanded that he leave the home immediately. The caller states that the mother has stated that she will not allow contact between Nestor, Jr. and the girls. The caller states that the mother appears to be very supportive of the girls. The caller states that the mother is in the process of acquiring services for the girls through the Kitsap Sexual Assault Center.

App. F.

On the other hand, when AG told her that Fowler had molested her, the mother *never* reported it to the police. 2RP 174. If she had coached her children to blame Fowler to exonerate the brother, one would expect that she would not have reported her son and would have called the police when the allegation against Fowler arose. Further, such a theory would have contradicted the defense argument that AG was not to be believed because even her own mother did not. 2RP 279-81. As such, even if counsel failed to contact Warner as alleged, Fowler would be unable to show prejudice.

The remainder of Warner’s declaration pertains to her feelings regarding Fowler’s conduct with her own children, and Fowler’s alleged “three-foot rule” that he had about being near children. Supp. Brief of Petitioner, Exh. E, ¶¶ 4, 5 & 7. Fowler again fails to point to any relevant admissible evidence that Warner could have supplied.

Although under ER 404(a)(1), evidence of “a pertinent trait of character offered by an accused” may be admissible,<sup>4</sup> such evidence is subject to the requirements of ER 405(a) that proof be made by testimony

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<sup>4</sup> Whether reputation for sexual morality is a “pertinent trait” in a child sex case is the subject of a split among the divisions of this Court. *Cf. State v. Jackson*, 46 Wn. App. 360, 365, 730 P.2d 1361 (1986) (trial court in statutory rape prosecution properly excluded testimony concerning defendant’s reputation for sexual morality and decency because it was not a pertinent character trait) and *State v. Griswold*, 98 Wn. App. 817, 829, 991 P.2d 657 (2000) (rejecting *Jackson* and holding that sexual morality was a pertinent character trait in child molestation case), *overruled on other grounds, State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). Because the proposed testimony is foundationally inadequate and does not establish prejudice, the Court need not resolve this split to reject this claim.

as to reputation in the community. *State v. O'Neill*, 58 Wn. App. 367, 370, 793 P.2d 977 (1990). Fowler offers no evidence that Warner's claims are admissible reputation evidence.

As noted, the rule requires that proof of a character trait be by evidence of reputation in the community. This Court has noted that the comment to ER 405 specifically states:

This section differs from Federal Rule 405 in that the *Washington rule does not permit proof of character by testimony in the form of an opinion*. Previous Washington law has not permitted the introduction of opinion testimony to prove a person's character. The drafters of the Washington rule felt that the policy established by decisional law was preferable to that of the federal rule.

*State v. Mercer-Drummer*, 128 Wn. App. 625, 632, 116 P.3d 454 (2005) (emphasis the Court's). This testimony can only be made through a character witness who is knowledgeable about the defendant's reputation in the community for the character trait at issue. *State v. Callahan*, 87 Wn. App. 925, 934, 943 P.2d 676 (1997). The community from which the opinion is sought must be neutral and general. *See State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

Thus, in order to admit such reputation testimony, a defendant must establish both that the character witness is familiar with the defendant's community and that the witness's testimony is based on the community's perception of that person with regard to the character trait. *Callahan*, 87

Wn. App. at 935. A witness's personal opinion is not sufficient to lay a foundation for the admission of such testimony. The community from which the opinion is sought must be both neutral and general. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

Nothing in Warner's declaration addresses Fowler's reputation in the general community nor establishes her neutrality. *See State v. Gregory*, 158 Wn.2d 759, 805, 147 P.3d 1201 (2006), *overruled on other grounds*, *State v. W.R.*, 181 Wn.2d 757 (2014). As such Fowler fails to show that this evidence would have been admissible. As such counsel cannot be found to have been deficient in not presenting this evidence.

Moreover, even were the statements admissible, ER 404(a)(1) goes on to provide that such character evidence is also admissible "by the prosecution to rebut the same." As such, Warner's proposed testimony regarding Fowler's conduct with her children regarding his alleged lack of predisposition to molest children, could thus have opened the door to testimony that was disallowed by the trial court:

Q. Ms. McMahon, you indicated that you confronted the Defendant, which is why you recognized him.

Why did you confront him?

A. I was receiving complaints that he was hanging around the children at the playground --

2RP 255.

Additionally, it should be noted that trial counsel disputes the claims

Warner makes in her declaration:

[D]efense investigator Sandy Francis did interview Ms. Warner by phone on 9/19/13. Ms. Francis wrote a report. Ms. Warner indicated that Fowler had never done anything to her children. Nothing appears in the report about a "three foot rule." Warner had never met nor seen Fowler with the victims in this case.

App. M, at 1-2.

Finally, in addition to the foregoing, the evidence regarding the so-called three foot rule was contradicted by Fowler's own statements. Fowler told the police that he had changed diapers in the past. App. H, at 3. Fowler fails to show either deficient performance or prejudice with regard to Warner. This claim should be rejected.

***2. Monica Boyle's proposed testimony contradicts the testimony of both the victim and of Fowler, and their statements to the police.***

It is also difficult to understand Fowler's contentions regarding Boyle. In her declaration, she disputes the victim's contention that he molestation occurred in her apartment:

No young girls ever spent the night in my apartment as Fowler's guests. I never allowed Fowler to have any guests of any age or gender in the apartment. I clearly recall that no young girls ever spent the night in my apartment, on the couch or anywhere else. It is not the case that I don't remember, or that I'm not sure. I am certain that no such thing ever occurred.

I was always there overnight while Fowler was a roommate.

I would not have and did not permit Fowler to have anyone stay overnight, and he did not have anyone stay overnight, ever.

Supp. Brief of Petitioner, Exh. G. But Fowler's own trial testimony directly contradicts this statement:

Q. At some point, did any of the kids spend the night at your apartment --

A. Yes. [AG].

Q. Okay. And when we're talking about your apartment, are we talking --

A. Monica's.

Q. -- Monica's?

A. Yes.

Q. And how many nights did [AG] spend the night there?

A. Just one night.

2RP 192. He reiterated this testimony on cross-examination. 2RP 214-15.

He further testified that Boyle was there with him when he arrived with AG:

Q. And when you get back to your apartment, who was there?

A. Monica, roommate.

2RP 193. Moreover, in his statement to the police Fowler said that he stayed with Boyle. App. H, at 1. He further stated that AG had spent the night with him at that apartment several times. App. H, at 2.

Thus regardless of whether counsel did or should have contacted Boyle, it difficult to see how her testimony would have assisted Fowler. Moreover, during trial, counsel asserted, without dispute from Fowler, that

Fowler did not know where Boyle was:

Your Honor, Mr. Fowler has indicated that he doesn't know where she is, so I'm not sure where we would have sought to seek her, if we had -- I mean, I'm still of the opinion that this is not a witness of fundamental importance.

2RP 242. That the apartment manager<sup>5</sup> had seen Boyle in a store months before trial does not establish that counsel could have located her at that time. Fowler fails to show either deficient performance or prejudice. This claim should be rejected.

**3. *Fowler's claim that he did not know he was going to testify is refuted by the record.***

Fowler argues that he did not learn that he was going to testify until 15 minutes before he did. Supp. Brief of Petitioner, at 30, *Id.*, Exh D. This claim is belied by the trial record. Fowler testified on October 3, 1013. 2RP 185. Counsel, however, indicated on September 30, three days earlier, that Fowler would be testifying. 1RP 16. This claim is thus contrary to the record. Trial counsel confirms the record:

I met with Fowler regularly and often during the course of my representation of him. The defense of this case was ultimately one of general denial. We did not know whether Fowler would need to testify but did prepare for that eventuality. His testimony was well conceived and consistent with his theory of the case.

App. M, at 2.

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<sup>5</sup> See discussion regarding Natalie McMahon, *infra*.

Moreover, he fails to identify what, if anything would have differed had Fowler been more prepared. He identifies no testimony he would have given that would have been different. Nor does he suggest the outcome would have been different if Fowler had not testified. This claim lacks any substance and should be rejected.

**4. *Counsel acted reasonably when he called Natalie McMahon to rebut the notion that Boyle was uniquely within Fowler's control after the State successfully requested a missing witness instruction regarding Boyle.***

Fowler next faults counsel for recalling Natalie McMahon in attempt to show that Monica Boyle was not uniquely within Fowler's control. McMahon was the property manager at the apartment complex where Boyle lived and where the assault on AG took place. 2RP 180. The State called her to testify regarding when Fowler was staying in the complex. 2RP 181-82, 184. She was the State's last witness. 2RP 185.

Fowler then testified, 2RP 185-216, after which the defense rested. 2RP 216. In pertinent part, he testified that Boyle's dog woke him in the middle of the night:

Q. All right. So do you remember anything waking you up during the middle of the night?

A. The puppy.

Q. Okay. And what happened with the puppy?

A. It came in – I was on the floor. It came and licked me on the face. So I pushed the dog off me. And then I noticed it jumped up on the couch, and it jumped up on

[AG]. So I took the puppy off [AG], and I called Monica because I thought she was in the back room. But she came out the kitchen. I said, You let the dog out. And she said she didn't realize she left the door open. And so she just came from the kitchen and put the dog back up.

Q. Do you remember did [AG] wake up?

A. Yeah. She woke up because the dog was licking her.

2RP 195-96.<sup>6</sup> He further claimed that he stood up and talked to Boyle for about five minutes. 2RP 196.

The State presented rebuttal evidence through Detective Davis, who contradicted Fowler's testimony regarding the presence of a dog when AG was in Boyle's apartment. 2RP 219-21. The State again rested. 2RP 221.

During the subsequent conference on the instructions, the State requested a missing-witness instruction regarding Boyle. 2RP 226. Counsel objected to the instruction. 2RP 226-27, 229-31, 232-33. The court withheld ruling at that point, giving the parties the weekend to bring anything further to its attention. 2RP 235.

On Monday, counsel argued that the State had not met the requirement that the "absent witness was peculiarly within the other party's power to produce,"<sup>7</sup> asserting that the defense did not know where Boyle

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<sup>6</sup> AG testified that no dog jumper on her while she was asleep. 1RP 111.

<sup>7</sup> See *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) (quoting *United States v. Williams*, 739 F.2d 297, 299 (7th Cir.1984)).

was. 2RP 238. He offered to have McMahon testify that Boyle had not lived in the apartment since 2011,<sup>8</sup> with the explanation that counsel was only calling her to rebut the instruction:

Frankly, if the Court did not give the instruction, I'm not seeking to have her testify. But if the Court is inclined to give this instruction, I think the Defense needs to be given an opportunity to explain -- because I do have -- my way of thinking -- explanations for the missing witness instruction, primarily the fact that there's unrefuted evidence that we don't know of the location of this person.

2RP 242.

McMahon testified, consistently with counsel's offer of proof, that Boyle had moved out some two years before trial. 2RP 255. Counsel then argued in closing that based on that testimony, there was no evidence that Boyle was readily available to the defense. 2RP 284.<sup>9</sup> Counsel's decision to call McMahon was not deficient performance.

In light of this chain of events, it is further difficult to see how Fowler can demonstrate prejudice. As this Court noted on direct appeal with regard to the missing witness instruction, there is none:

Both A.G. and A.C.G. testified about what happened to them. The child I interviewer from the prosecutor's office independently testified and verified the girls' I version of events remained consistent throughout the entire trial period. There was no dispute the girls had been alone with Mr.

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<sup>8</sup> Trial was in October 2013.

<sup>9</sup> Counsel's primary argument was that Boyle had nothing of consequence to add to the case. 2RP 281-84.

Fowler. There was no dispute the girls spent the night with Mr. Fowler. During closing, the State did not focus on the missing witness inference; rather the State referenced Mr. Fowler's failure to call Ms. Boyle when discussing Mr. Fowler's credibility and then briefly argued the inference in its rebuttal. Moreover, the jury was told not to apply the inference unless certain conditions were met; if the evidence was not all that critical, the jury would not apply the inference.

App. B, at 16. Fowler again fails to show either deficient performance or prejudice. This claim should be rejected.

**D. FOWLER FAILS TO DEMONSTRATE THAT THE VICTIMS' BROTHER WAS A VIABLE OTHER SUSPECT.**

Fowler next claims that counsel was ineffective for not offering evidence that the victims' brother Nestor was the perpetrator of the offenses. This claim is without merit because although Nestor was found guilty of also molesting the girls, there is no evidence tying him to the incidents charged in this case, and the proposed other-suspect claims are no more than inadmissible propensity evidence.

***1. Facts***

Nestor Gatchalian was arrested and charged with molesting his sisters on December 20, 2012. App. I. He pled guilty and a juvenile disposition was filed on January 16, 2013. App. J.

The charges were the result of a DSHS report filed on November 20, 2012. App. F. During the investigation of the charges against Nestor, the

allegations regarding Fowler came to light. App. K; App. L.

There were three incidents involving ACG and Nestor that took place at the Chieftain Motel, another at the Jordan house on Clare Avenue, and the third at the Olympic Avenue home. App. G, at 1-2. All three incidents involved Nestor putting ACG's hand or foot on his penis. *Id.*

AG described Nestor abusing her on multiple occasions. When she was nine years old, and they were living on Ninth Avenue, he rubbed her private area with his hand. When they were living at Griffin Glen on Mariah Lane, Nestor made her rub his penis while they were sitting in the living room. While in the same residence, Nestor took her into the bathroom on multiple occasions and anally raped her. He anally raped her again when they were staying at Jordan's house. App. G, at 2. Finally, at the Olympic Avenue residence, Nestor made her sit in his lap while he rubbed his private on her butt. *Id.*, at 3.

AG testified to a single incident where Fowler molested her: the events at Boyle's apartment at Olympic Pointe. 1RP 98-102. ACG testified to two incidents at Jordan's house, once on the couch and once in the bedroom. 1RP 120-26. In the second incident, Fowler stopped when Nestor, who was asleep in the same bed, stirred. 1RP 126, 134.

2. ***The evidence regarding Nestor's abuse of the victims amounted to no more than inadmissible propensity evidence where there was no evidence that he committed***

*the crimes of which Fowler was convicted.*

A criminal defendant has a constitutional right to present a defense under the federal and state constitutions. *State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996). The defendant does not, however, have a constitutional right to present evidence that is irrelevant or otherwise inadmissible. *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010).

A defendant thus does not have an absolute right to present other-suspect evidence without first establishing a foundation that connects another person with the crime charged. *Maupin*, 128 Wn.2d 918. The defendant has the burden to establish relevance and to show a “clear nexus between the other person and the crime.” *State v. Rafay*, 168 Wn. App. 734, 800 285 P.3d 83 (2012), *review denied*, 176 Wn.2d 1023, *cert. denied*, 134 S. Ct. 170 (2013). The nexus must be “a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party.” *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932). “Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose.” *Id.* Essentially, the evidence the defense seeks to admit must show that the purported other suspect took some step that indicates their intention to act on motive or opportunity. *Id.* There may not be the necessary nexus even in situations where the purported other suspect had motive and made threats to the victim. *State v. Kwan*, 174 Wash. 528, 25

P.2d 104 (1933).

In addition to analyzing the foundational requirements, before admitting other-suspect evidence, the trial court must engage in a balancing test to determine whether the probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury. *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014). In determining the probative value of other-suspect evidence, the court must determine whether the evidence has a logical connection to the crime—not based on the strength of the State’s evidence. *Id.* The trial court has the responsibility to focus the trial by excluding evidence that has only a very weak logical connection to the central issues. *Franklin*, 180 Wn.2d at 378.

Whether other-suspect evidence should be admitted is inherently a fact-based decision. The State will therefore review a number of decisions that may be compared to Fowler’s case.

In *State v. Strizheus*, 163 Wn. App. 820, 262 P.3d 100 (2011), *review denied*, 173 Wn.2d 1030 (2012), the defendant was charged with attempted murder for stabbing his wife, Valentia. At the time of the incident, Valentia indicated that Strizheus had stabbed her. Some time after the incident, their son made a sort-of confession to stabbing his mother. At the time of the confession, the son was drunk. The son had a history of malicious mischief against his mother. At the time of the stabbing, the son was the respondent

in a no contact order with his mother as the protected party. Subsequent to the stabbing, the son assaulted his mother. He later recanted his confession. Prior to trial, Valentia claimed she had no memory of the stabbing. The defendant moved for admission of other-suspect evidence, alleging that his son had opportunity, motive to commit the assault as well as prior and post-incident domestic violence incidents against his mother. The court excluded the other-suspect evidence holding there was no evidence that established a nexus or physical evidence that connected the son to the stabbing. *Strizheus*, 163 Wn. App. at 832. The court noted that no eyewitness placed him at the scene and that there were no witnesses who presented evidence who contradicted the State's version of the facts. *Id.* Additionally, the defendant could not show evidence that the son took any steps that showed he intended to act on his alleged motive. *Id.*

In *State v. Wade*, 186 Wn. App 749, 346 P.3d 838 (2015), the Court excluded other-suspect evidence that the victim's ex-boyfriend may have committed the murder. There, the victim had been strangled and her body had been hidden in a closet. Wade's DNA was found at the scene and surveillance cameras at the victim's apartment complex entrance showed Wade coming and going from the apartment. The victim's boyfriend had strangled the victim years earlier and had actually left several threatening messages on her voicemail three months prior to the murder. There was no

evidence, however, to connect him to the murder. The Court noted that the ex-boyfriend had a bad character, had a violent history and had an actual motive to harm the victim. *Id.* Nevertheless, this evidence was not sufficient because it did not lead to a “nonspeculative” link between the crime and the ex-boyfriend. *Wade*, 186 Wn. App

The same principles apply here. This is not a case where there was any suggestion that the girls were confused about who molested them. Indeed, the revelations regarding Fowler came out during the interview regarding Nestor’s crimes. *All* the evidence regarding Nestor came from the same sources as evidence regarding Fowler. There is no other suspect. There were two sets of reported crimes and two respective suspects: Nestor and Fowler. Nothing in the investigation, pretrial statements, or trial testimony suggests any doubt or confusion on the part of AG and ACG regarding who did what to them. There simply is no evidence that Nestor committed the crimes with which Fowler was charged. As such, there was no logical theory, no “train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party.” *State v. Downs*, 168 Wash. at 667. Indeed all that pointed to Nestor is that he is also a child molester. This is not other suspect evidence; it is propensity evidence and inadmissible.

**3. *This Court is bound by the Supreme Court’s prior holding that Washington’s other suspect rule is constitutional.***

To the extent that Fowler is suggesting that Washington’s other-

suspect rule as it has been uniformly applied is unconstitutional under *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), see Supp. Brief of Petitioner, at 32, 35, he is incorrect. In *Holmes*, the Court addressed a South Carolina rule allowing the exclusion of third party suspect evidence when the evidence against the defendant was strong, “even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues.” *Holmes*, 547 U.S. at 329.

But the *Holmes* court noted its approval of the rule in Washington when the evidence was speculative or remote or did not tend to prove or disprove a material fact. *Holmes*, 547 U.S. at 327. This Court has therefore held that *Holmes* does not support the claim that Washington’s other suspect limitation is unconstitutional. *Rafay*, 168 Wn. App. at 802-03, 285 P.3d 83 (2012); *Strizheus*, 163 Wn. App. at 833–35.

Moreover, and more importantly, the Supreme Court has distinguished Washington’s rule from that at issue in *Holmes*. *Franklin*, 180 Wn.2d at 381-82. Instead it found that *Downs* and its progeny were consistent with *Holmes*. *Id.* Fowler’s claim must therefore be rejected to the extent he would substitute federal evidentiary standards because it would require this Court to exceed its authority by not following controlling Supreme Court precedent. See *State v. Gore*, 101 Wn.2d 481, 681 P.2d 227

(1984) (once the Washington State Supreme Court decides an issue of law, that interpretation is binding on all lower courts until overruled by the Supreme Court).

4. *Because Fowler fails to show that other-suspect evidence regarding Nestor would have been admissible or would have affected the outcome, his claim of ineffective assistance must fail.*

For the reasons previously discussed, Fowler fails to show that evidence that Nestor was an other suspect would have been admissible. As such counsel cannot be deemed deficient for not seeking to introduce evidence regarding Nestor's abuse of his sisters. For the same reason he cannot show prejudice. Moreover, even were the evidence admissible, Fowler also fails to show that admission of the evidence would have affected the outcome of trial.

**E. SINCE NO EXPERT HAS OFFERED ANY OPINION EVIDENCE THAT FOWLER'S VICTIMS FABRICATED THEIR ACCUSATIONS AGAINST HIM, HIS CLAIM THAT COUNSEL WAS INEFFECTIVE IN THIS REGARD FAILS TO MEET MINIMUM STANDARDS FOR RELIEF.**

Fowler also alleges that "counsel also had a further duty to seek an expert to discover whether the sisters might have fabricated the allegations against Mr. Fowler to deflect attention from Nestor or to somehow normalize their awful situation." Supp. Brief of Petitioner, at 37. This

contention is based on the utmost speculation and does not present a basis for relief.

Where a post-conviction claim that counsel should have hired an expert is not accompanied by any evidence of what such an expert would have said, the “the evaluation of any prejudice [would be] highly speculative.” *In re Davis*, 188 Wn.2d 356, 376, 395 P.3d 998 (2017). “Without supporting declarations from relevant experts, [such a claim] is entirely too speculative to meet [the defendant’s] burden of showing ineffective assistance of counsel.” *Davis*, 188 Wn.2d at 379; *cf. State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995) (remanding for reference hearing where defendant presented expert’s affidavit related to facts of case). Fowler has not meet these minimal requirements to state a claim. This claim should therefore be rejected.

**F. FOWLER FAILS TO DEMONSTRATE CUMULATIVE ERROR.**

Fowler finally claims that he is entitled to relief on the grounds of cumulative error. This claim is without merit because he fails to show any error, much less that such error accumulated to deny him a fair trial.

The cumulative error doctrine applies when several errors occurred at the trial court level, none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App.

668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994)

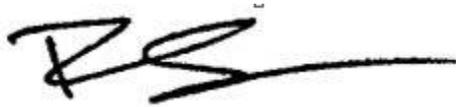
Fowler asserts that his claims combined require reversal. However, Fowler offers nothing beyond a boilerplate contention that there is cumulative error. He fails to show how these alleged errors combined to prejudice his right to a fair trial. This claim should be rejected.

## VI. CONCLUSION

For the foregoing reasons, Fowler's untimely petition should be denied.

DATED June 12, 2018.

Respectfully submitted,  
TINA R. ROBINSON  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal line extending to the right.

RANDALL A. SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney  
kcpa@co.kitsap.wa.us



# **APPENDIX A**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,  
Respondent,

v.

CESAR BELTRAN, JR.,  
Appellant.

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STATE OF WASHINGTON,  
Respondent,

v.

VINCENT L. FOWLER,  
Appellant.

---

MAURICE BAKER,  
Appellant,

v.

DAVID and CHRISTIE HAWKINS,  
Respondents.

---

STATE OF WASHINGTON,  
Respondent,

v.

DONALD ORMAND LEE,  
Appellant.

---

STATE OF WASHINGTON,  
Respondent,

v.

HARVEY MADDUX,  
Appellant.

---

ORDER TRANSFERRING CASES

No. 45893-4-II

No. 45774-1-II

No. 46575-2-II

No. 45823-3-II

No. 46108-1-II

FILED  
COURT OF APPEALS  
DIVISION II  
2015 MAR 31 PM 3:16  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

STATE OF WASHINGTON,  
Respondent,

No. 46082-3-II

v.

JEFFREY ALLEN ROETGER,  
Appellant.

---

NINA FIREY,  
Appellant,

No. 46388-1-II

v.

TAMMIE MYERS, et al,  
Respondents.

---

VFW 3348 FOUNDATION,  
Appellant,

No. 46498-5-II

v.

ALBERT BREDE and SANDY BREDE,  
Respondents.

---

STATE OF WASHINGTON,  
Respondent,

No. 46093-9-II

v.

JASON PAUL JOSEPH HERNANDEZ,  
Appellant.

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The Court has determined that these cases may be decided without oral argument. It has further been determined that to expedite their review, they are transferred from Division Two to

Division Three of the Court of Appeals. CAR 21(a). It is

**SO ORDERED.**

**DATED** this 31<sup>st</sup> day of March, 2015.

**FOR THE COURT:**

*Johanson, C.J.*  
CHIEF JUDGE, Division Two

I Concur:

\_\_\_\_\_  
CHIEF JUDGE, Division Three

# **APPENDIX B**

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

STATE OF WASHINGTON,	)	No. 33227-6-III
	)	
Respondent,	)	
	)	
v.	)	
	)	
VINCENT L. FOWLER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

BROWN, A.C.J. — Vincent Fowler appeals his conviction for two counts of first degree child molestation and one count of first degree rape of a child. He contends the trial court erred by (1) commenting on the evidence when it gave missing witness and non-corroboration jury instructions, (2) improperly giving an unconstitutional missing witness instruction, and (3) imposing \$1,135 in legal financial obligations (LFOs) for court-appointed counsel without making the requisite findings on his ability to pay. We disagree with Mr. Fowler’s contentions and affirm his conviction.

FACTS

Mr. Fowler met A.G. and A.C.G.’s homeless mother through a friend. A.G. was either nine or ten when she met Mr. Fowler, and A.C.G. was eight or nine. Mr. Fowler occasionally watched over the girls and gave them food, rides, and a place to stay.

One night, A.G. stayed at Mr. Fowler's apartment. According to A.G., Mr. Fowler's roommate, Monica Boyle,<sup>1</sup> was not present the entire night. A.G. said she played with the dog before falling asleep on the couch in the living room. Mr. Fowler slept on the floor. She woke up when she felt something unzip her pants; she was wearing a shirt and jeans and had shorts and underwear underneath her jeans. Over her clothes, A.G. felt Mr. Fowler touch her vagina. A.G. turned over, got up, and went to the bathroom. She noticed her zipper was undone. When she returned, Mr. Fowler was pretending to sleep on the floor. A.G. sat awake for the rest of the night. A.G. told her friend the next day. She told her brother, her sister, and her mom; her mom did not believe her. A.G. said Mr. Fowler apologized to her, said he was drunk, and he told her if he had done it, he would not do it again. A.G. continued to spend time with Mr. Fowler after this incident, but she felt safe because they were not alone.

A.C.G. experienced two similar incidents with Mr. Fowler. The first occurred while A.C.G. and her family were at a friend's house. A.C.G. fell asleep on one couch in the living room while Mr. Fowler fell asleep on the other couch. She woke up when he touched her. Mr. Fowler had pulled her pants and underwear down to her knees and was touching the inside of her vagina with his hands. He stopped touching her when her mom, who was sleeping in the bedroom, got up to use the bathroom. When her mom came out of the bathroom, A.C.G. told her mom she wanted to sleep with her.

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<sup>1</sup> While Mr. Fowler testified his roommate's name was Monica Boyd, all references to her after his testimony are to Monica Boyle.

The second incident occurred in the same house, two days after the couch incident. A.C.G. was asleep on the bed in the bedroom; A.G. and their older brother were also sleeping on the bed. A.C.G. wore a skirt and underwear. Mr. Fowler came into the bedroom and touched A.C.G.'s vagina under her skirt but on top of her underwear. He stopped touching her when her brother moved.

Both A.G. and A.C.G. talked with a child interviewer at the prosecutor's office. Detective Kenny Davis reviewed the girls' statements and spoke with Natalie McMahon, the apartment manager, and the girls' mom. He interviewed Mr. Fowler, who denied the allegations but admitted he knew the girls, had spent time with them, and was around them during the relevant time frame.

At trial, Mr. Fowler again denied the allegations. Regarding the incident with A.G., Mr. Fowler testified Ms. Boyle and her dog were at the apartment. He fell asleep on the floor while Ms. Boyle and A.G. sat on the couch watching a movie. In the middle of the night, the dog woke him up by licking his face. He pushed the dog off him, but the dog jumped onto A.G. and licked her, which caused her to awaken. He took the dog off A.G. and called to Ms. Boyle, who came out of the kitchen to get the dog. He talked with Ms. Boyle for five minutes before going back to sleep on the floor. A.G. was already asleep on the couch and was still asleep when he left the next morning. While Mr. Fowler mentioned he lived with Ms. Boyle during his interview with Detective Davis, he never mentioned a dog or that she was present that night.

Because of Mr. Fowler's testimony, the State requested a missing witness jury instruction. The court gave the instruction over Mr. Fowler's objection. Mr. Fowler was convicted of two counts of first degree child molestation and one count of rape of a child in the first degree. Without objection, the court imposed \$1,135 in LFOs for court-appointed attorney fees. Mr. Fowler appealed.

## ANALYSIS

### A. Judicial Comment Claims

The issue is whether the non-corroboration instruction (No. 8) and the missing witness instruction (No. 9) constituted judicial comments on the evidence.

Preliminarily, Mr. Fowler objected to the missing witness instruction at trial, but he did not object to the non-corroboration instruction. Because the claimed errors allege constitutional errors, we consider the issue. See *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). We review constitutional challenges to jury instructions de novo, looking at them within the context of the instructions as a whole. *Id.* at 721.

"Article IV, section 16 of the Washington Constitution prohibits a judge from conveying his or her personal perception of the merits of the case or giving an instruction that implies matters of fact have been established as a matter of law." *State v. Steen*, 155 Wn. App. 243, 247, 228 P.3d 1285 (2010). The purpose behind this provision is to prevent the jury from being influenced by the court's opinion. *State v. Elmore*, 139 Wn.2d 250, 275, 985 P.2d 289 (1999). Because the jury is the sole judge of the weight of testimony, "[t]he touchstone of error in a trial court's comment on the

evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); see also *In re Detention of R.W.*, 98 Wn. App. 140, 144, 988 P.2d 1034 (1999) (a court makes an impermissible comment on the evidence when it instructs the jury as to the weight it should give certain evidence). A court’s comment on the evidence is presumed prejudicial, and the State must show no resulting prejudice. *Lane*, 125 Wn.2d at 838-39.

First, Mr. Fowler contends jury instruction 8 contained a judicial comment on the evidence. Instruction 8 states: “In order to convict a person of Child Molestation in the First Degree and/or Rape of a Child in the First Degree it is not necessary that the testimony of the alleged victim be corroborated.” Clerk’s Papers (CP) at 45. Instructions accurately stating the applicable law are not comments on the evidence. *State v. Zimmerman*, 130 Wn. App. 170, 180-81, 121 P.3d 1216 (2005). RCW 9A.44.020(1) provides “[i]n order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.” See also RCW 9A.44.073 (defining rape of a child in the first degree); RCW 9A.44.083 (defining child molestation in the first degree).

Similar non-corroboration instructions have been upheld. In *State v. Malone*, 20 Wn. App. 712, 714-15, 582 P.2d 883 (1978), the court found a substantially similar instruction was not a comment on the evidence nor was it erroneously given because it was a correct statement of Washington law, was pertinent to the issues presented, its

phrasing did not convey the court's opinion on the alleged victim's credibility, and the court had a duty to instruct the jury on pertinent legal issues. *See also Zimmerman*, 130 Wn. App. at 181-83 (noting even though the Washington Supreme Court Committee on Jury Instructions recommends against such an instruction, the court was bound to hold giving such an instruction was proper based on *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949)). Here, the trial court's instruction was based on RCW 9A.44.020(1). The instruction was a neutral and accurate statement of the law; it did not contain facts nor did it convey the court's belief in any testimony.

Mr. Fowler incorrectly argues additional *Clayton* language is needed in instruction 8 telling the jury they decide credibility and including the standard of proof. *See Clayton*, 32 Wn.2d at 572, 577.<sup>2</sup> This issue was addressed in *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009). The *Johnson* court, seeing "no clear pronouncement from [the Washington] Supreme Court on whether the additional language is necessary to prevent an impermissible comment on the evidence under article [IV], section 16," held the one-sentence instruction was "not an erroneous

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<sup>2</sup> *Clayton* instructed:

You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

*Clayton*, 32 Wn.2d at 572.

statement of the law.” *Id.* at 936. However, the court cautioned trial courts should consider giving the additional language and omission of that language may be an impermissible comment on the alleged victim’s credibility. *Id.* at 936-37. Here, the trial court did separately instruct them on credibility and the standard of proof. Looking at the instructions as a whole, we conclude giving the non-corroboration instruction was not error.

Second, Mr. Fowler next contends jury instruction 9 contained a judicial comment on the evidence. Instruction 9 states:

If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person’s testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:

- (1) The witness is within the control of, or peculiarly available to, that party;
- (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
- (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
- (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
- (5) The inference is reasonable in light of all the circumstances.

The parties in this case are the State of Washington and Vincent L. Fowler.

CP at 46. Again, an instruction stating the applicable law pertaining to an issue in the case is not a comment on the evidence. *R.W.*, 98 Wn. App. at 145. This instruction is an accurate statement of the law. The instruction did not instruct the jury on the weight to give certain evidence but does allow the jury to draw inferences; it does not convey the court’s feelings on the evidence. Instruction 9 does not comment on the evidence.

### B. Missing Witness Instruction

Mr. Fowler first contends the missing witness instruction generally violates due process by shifting the burden of proof onto him and encouraging the jury to make an unreliable, irrational inference of his guilt. Second, Mr. Fowler contends instructing the jury on the missing witness doctrine was improper under these facts.

The missing witness doctrine permits the State to “point out the absence of a ‘natural witness’ when it appears reasonable that the witness is under the defendant’s control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable.” *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). Because the doctrine subjects the defendant’s theory of the case to the same scrutiny as the State’s theory, the State is allowed to argue and the jury can infer the missing witness’ testimony would have been unfavorable to the defendant. *Id.* Over Mr. Fowler’s objection, the trial court allowed the State to argue to the jury that Ms. Boyle’s testimony would have been unfavorable to Mr. Fowler; the court also gave a jury instruction to that effect.

Initially, we address Mr. Fowler’s due process arguments. Constitutional challenges may be raised for the first time on appeal. RAP 2.5(a). “Due process requires the State bear the ‘burden of persuasion beyond a reasonable doubt of every essential element of a crime.’” *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994) (quoting *Francis v. Franklin*, 471 U.S. 307, 313, 105 S. Ct., 1965, 85 L. Ed. 2d

344 (1985)). In meeting its burden of proof, the State may use evidentiary devices including inferences and presumptions. *Id.*

In order to determine whether an inference instruction, such as the missing witness instruction, violates a defendant's right to due process, appellate courts "must determine whether the instruction was only part of the State's proof supporting an element of the crime or whether the State relied solely on the inference." *State v. Reid*, 74 Wn. App. 281, 285, 872 P.2d 1135 (1994). If the inference was the sole basis for finding guilt, the inference must satisfy the reasonable doubt standard. *Id.* at 285-86; see also *Hanna*, 123 Wn.2d at 710-11 (discussing such an inference as a mandatory presumption). However, "[i]f the inference was only part of the proof, due process requires the presumed fact to flow more likely than not from proof of the basic fact." *Reid*, 74 Wn. App. at 285 (quoting *Hanna*, 123 Wn.2d at 710) (internal quotation marks omitted); see also *Hanna*, 123 Wn.2d at 710 (discussing such an inference as a permissive inference or presumption).

Both parties agree the missing witness instruction is a permissive inference. A permissive inference "do[es] not relieve the State of its burden of persuasion because the State must still convince the jury the suggested conclusion should be inferred from the basic facts proved." *Hanna*, 123 Wn.2d at 710. As such, permissive inferences are allowed "when there is a rational connection between the proven fact and the inferred fact, and the inferred fact flows more likely than not from the proven fact." *State v. Ratliff*, 46 Wn. App. 325, 331, 730 P.2d 716 (1986) (internal quotation marks omitted).

Whether an inference is allowed is determined on a case-by-case basis. *Hanna*, 123 Wn.2d at 712 (stating the State is entitled to an inference if it introduces facts supporting the inference to the degree required by due process and the jury is free to reject the inference if it gives more weight to the defendant's version of facts).

The missing witness instruction given in Mr. Fowler's case satisfies due process. A rational connection exists between the inferred fact (Ms. Boyle's testimony would have been unfavorable) and the proven fact (Mr. Fowler's testimony that Ms. Boyle was present and could have corroborated his story about the dog). The inferred fact flows more likely than not from the proven fact: if Mr. Fowler's version of events was true and the case was essentially a credibility contest, he would have called someone, such as Ms. Boyle, to corroborate his testimony. We are satisfied such an instruction does not impermissibly shift the burden of proof. *Montgomery*, 163 Wn.2d at 599.

Mr. Fowler cites to numerous out-of-state cases to support his contention the instruction is unconstitutional. But we need not resort to persuasive authorities when our precedent sufficiently guides us. Moreover, the majority of these cases have not found the instruction violates due process. See, e.g., *State v. Tahair*, 172 Vt. 101, 109, 111 n.3, 772 A.2d 1079 (2001); *State v. Malave*, 250 Conn. 722, 737-38, 737 A.2d 442 (1999); *Russell v. Com.*, 216 Va. 833, 835-36, 223 S.E.2d 877 (1976). Mr. Fowler argues the historical reasons for the missing witness doctrine are no longer relevant; while this limits the prevalence of the doctrine in modern times, it does not mean the doctrine is unconstitutional. As for Mr. Fowler's concerns about strategic reasons not to

call witnesses, the instruction itself states there must be no satisfactory explanation for the witness' absence. The court ruled on this outside the presence of the jury, and Mr. Fowler was able to raise his arguments, including strategic arguments.

Next, we address whether the trial court properly gave the instruction. Mr. Fowler argues the instruction was improper because (1) Ms. Boyle's testimony was not material, (2) Ms. Boyle was not particularly available to Mr. Fowler, and (3) the instruction shifted the burden of proof. We do not disturb a trial court's decision about whether to give a missing witness instruction absent a clear showing of an abuse of discretion. *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336 (1998). We review de novo whether legal error in jury instructions could have misled the jury. *Montgomery*, 163 Wn.2d at 597.

The missing witness doctrine applies equally to the State and the defense. *State v. Blair*, 117 Wn.2d 479, 488, 816 P.2d 718 (1991). Because a criminal defendant does not have to present evidence, the State cannot suggest a defendant has this burden. *Montgomery*, 163 Wn.2d at 597. However, the missing witness doctrine allows the State to argue a missing witness' testimony would have been unfavorable to the defendant. *Id.* at 598. In light of these two competing considerations, the limitations on the application of the missing witness doctrine "are particularly important when, as here, the doctrine is applied against a criminal defendant." *Id.* The missing witness doctrine applies only if four elements are met: (1) the missing witness' testimony must be material and not cumulative; (2) the missing witness must be "particularly under the

control of the defendant rather than being equally available to both parties”; (3) the witness’ absence must not be satisfactorily explained;<sup>3</sup> and (4) application of the doctrine must not shift the burden of proof. *Id.* at 598-99.

*Blair* illustrates when the missing witness inference is permissible. The defendant was arrested for unlawful delivery of a controlled substance; after searching the defendant’s home, officers found slips of papers with handwritten names and notations that appeared to represent his drug transactions. *Blair*, 117 Wn.2d at 481-83. The defendant testified most of the entries represented personal loans or money won playing cards, but he called only one witness listed on the slips of paper to corroborate this claim. *Id.* at 482-83. In finding the State properly argued the missing witness doctrine during closing, the Washington Supreme Court held the comments did not infringe on the defendant’s constitutional rights or shift the burden of proof because the witnesses were all personal and business acquaintances known only to the defendant, listed solely by first name, and were peculiarly available to him. *Id.* at 490-92.

By contrast, *Montgomery* illustrates a situation where the trial court erred in giving a missing witness instruction. *Montgomery*, 163 Wn.2d at 599. Despite being arrested for possession of pseudoephedrine with intent to manufacture methamphetamine, the defendant testified he purchased the ingredients for innocent reasons. *Id.* at 584-85, 587. The defendant said his grandson and his landlord could corroborate his explanation; neither testified. *Id.* at 596-97. On cross-examination, the

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<sup>3</sup> Although the State provides an argument concerning this element, Mr. Fowler does not. Thus, for purposes of this appeal, it is assumed this element is met.

State elicited the information the grandson could not testify because he was in school. *Id.* at 597. This was an adequate explanation for the grandson's absence. *Id.* at 599. As to the landlord, the court found the landlord was not peculiarly within the defendant's control. *Id.*

As it relates to the first element, Ms. Boyle's testimony would have been material and not cumulative. Mr. Fowler testified on direct Ms. Boyle was present in the apartment the night of the incident. In refuting A.G.'s testimony that it was Mr. Fowler's act of unzipping her pants that awoke her, he testified Ms. Boyle's dog woke up A.G. After taking the dog off of A.G., he called for Ms. Boyle, who came out of the kitchen. Ms. Boyle and Mr. Fowler then talked about this for five minutes before she put the dog away. Thus, according to Mr. Fowler, the sole thing that happened to A.G. that night was the dog jumped on her. Ms. Boyle was allegedly in the apartment and retrieved the dog. Contrary to Mr. Fowler's assertions, her testimony would not have been limited to whether or not a dog was in the apartment that night; rather, she could have corroborated Mr. Fowler's version of events that the dog jumping on A.G. woke her up rather than Mr. Fowler unzipping her pants.

Regarding the second element, Mr. Fowler asserts Ms. Boyle was not under his control. He points to the following as support: (1) the State knew about Ms. Boyle after A.G. mentioned Mr. Fowler's roommate during her pre-trial interview, (2) the State got Ms. Boyle's name from the apartment manager, and (3) the apartment manager had a forwarding address for Ms. Boyle. Mr. Fowler reads this element too narrowly.

Whether a witness is peculiarly available to one party does not mean the witness is in court or is subject to the subpoena power. *Blair*, 117 Wn.2d at 490. Rather, a witness is peculiarly available to one party if there is

such a community of interest between the party and the witness, or the party [has] so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that [her] testimony would have been damaging.

*State v. Davis*, 73 Wn.2d 271, 277, 438 P.2d 185 (1968), *overruled on other grounds by State v. Abdulle*, 174 Wn.2d 411, 275 P.3d 1113 (2012). “The rationale for this requirement is that a party will likely call as a witness one who is bound to him by ties of affection or interest unless the testimony will be adverse, and that a party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be.” *Blair*, 117 Wn.2d at 490. Thus, availability turns on the relationship between the party and the witness. *State v. Cheatam*, 150 Wn.2d 626, 653, 81 P.3d 830 (2003).

While the State knew about Ms. Boyle, they had no reason to suspect she was present at the apartment during the incident until Mr. Fowler testified at trial. Mr. Fowler never mentioned her or the dog to the police or the State until this time. The State had no motivation to call Ms. Boyle as a witness, despite the fact the State certainly could have subpoenaed her. Rather, there was a community of interest between Mr. Fowler and Ms. Boyle. While Mr. Fowler testified he did not know where she was, he did have

a superior opportunity for knowledge of her as a witness. Ms. Boyle was particularly available to Mr. Fowler.

Lastly, Mr. Fowler argues the missing witness instruction shifted the burden of proof. But nothing in the State's comments said Mr. Fowler had to present any proof on the question of his innocence, and the State was entitled to argue the reasonable inference from the evidence presented. Mr. Fowler testified specifically about Ms. Boyle's presence and her dog. He had a personal relationship with Ms. Boyle. During closing, Mr. Fowler reminded the jury of the State's burden of proof. Moreover, the jury was instructed counsel's comments are not evidence, the State had the burden of proving each element of each crime beyond a reasonable doubt, and Mr. Fowler was presumed innocent. We conclude the missing witness instruction was warranted.

Even if the missing witness jury instruction was not warranted, it was harmless beyond a reasonable doubt. Improper jury instructions can be harmless error if the jury was properly instructed on the State's burden. *Montgomery*, 163 Wn.2d at 600. "An erroneous instruction is harmless if, from the record in [the] case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (quoting *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002) (finding error where jury was presented with two competing interpretations of undisputed events and what those events meant about defendant's intent and the State repeatedly referenced the missing witnesses).

Both A.G. and A.C.G. testified about what happened to them. The child interviewer from the prosecutor's office independently testified and verified the girls' version of events remained consistent throughout the entire trial period. There was no dispute the girls had been alone with Mr. Fowler. There was no dispute the girls spent the night with Mr. Fowler. During closing, the State did not focus on the missing witness inference; rather the State referenced Mr. Fowler's failure to call Ms. Boyle when discussing Mr. Fowler's credibility and then briefly argued the inference in its rebuttal. Moreover, the jury was told not to apply the inference unless certain conditions were met; if the evidence was not all that critical, the jury would not apply the inference. And contrary to Mr. Fowler's contention, as discussed above, the instruction did not constitute a judicial comment on any witnesses' credibility.

#### C. LFOs

The issue is whether the trial court erred by imposing \$1,135 in LFOs for the costs of court-appointed counsel without inquiring into Mr. Fowler's financial circumstances. Despite not objecting at trial, Mr. Fowler contends we should review his claim because he mounts a constitutional and statutory challenge: the trial court's action impermissibly chills the exercise of his Sixth Amendment right to counsel. "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." *State v. Blazina*, No. 89028-5, slip op. at 4 (Wash. Mar. 12, 2015). We exercise our discretion and decline review because no

extraordinary facts are shown. See *State v. Duncan*, 180 Wn. App. 245, 255, 327 P.3d 699 (2014).

RCW 10.01.160(1) provides a trial court may require a defendant pay costs, including costs of court-appointed counsel. See *State v. Wimbs*, 74 Wn. App. 511, 516, 874 P.2d 193 (1994). Statutes are presumed constitutional, and the party challenging a statute's constitutionality, here Mr. Fowler, must show the statute's unconstitutionality beyond a reasonable doubt. *State v. Blank*, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997).

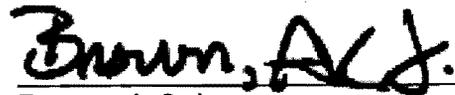
In *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992), the Washington Supreme Court held formal findings of fact on ability to pay are not required for recoupment of costs under RCW 10.01.160. The court stated a sentencing court has discretion to impose repayment obligations, and a defendant is protected from abuse of that discretion by RCW 10.01.160's directive that ability to pay be considered and provision for modification of imposed LFOs if a defendant cannot pay. *Id.* Similarly in *Blank*, the Washington Supreme Court reconsidered "whether, *prior* to including a repayment obligation in defendant's judgment and sentence, it is constitutionally necessary that there be an inquiry into the defendant's ability to pay, his or her financial resources, and whether there is no likelihood that defendant's indigency will end." *Blank*, 131 Wn.2d at 239 (reconsidering in light of RCW 10.73.160 which provides for recoupment of appellate costs from a convicted defendant). In holding the Constitution does not require an inquiry into ability to pay at the time of sentencing, the *Blank* court

No. 33227-6-III  
*State v. Fowler*

relied on (1) the holding in *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), and (2) case law holding mandatory monetary assessments may be imposed against indigent defendants at sentencing without any per se constitutional violations. *Blank*, 131 Wn.2d at 239-42. Neither *Blank* nor *Curry* have been overruled, and Mr. Fowler does not provide any persuasive argument to the contrary.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



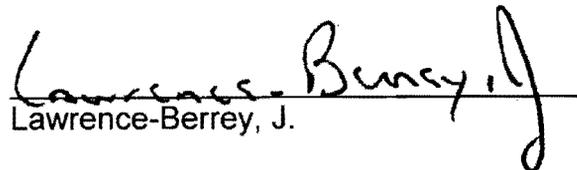
Brown, A.C.J.

WE CONCUR:



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Korsmo, J.



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Lawrence-Berrey, J.

# **APPENDIX C**

# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON, )  
)  
Respondent, )  
)  
v. )  
)  
VINCENT L. FOWLER, )  
)  
Petitioner. )  
)  
\_\_\_\_\_ )

NO. 92244-6

## ORDER

C/A NO. 33227-6-III

Filed *EM*  
Washington State Supreme Court

*E* MAR 31 2016

Ronald R. Carpenter  
Clerk *by h*

This matter came before the Court on its March 30, 2016, En Banc Conference. The Court considered the Petition and the files herein. A majority of the Court agreed that the superior court in imposing discretionary legal financial obligations on the Petitioner in connection with his criminal conviction did not adequately address his present and future ability to pay based on consideration of his financial resources and the nature of the burden that the payment of discretionary costs would impose, as required by RCW 10.01.160(3) and this court's decision in *State of Washington v. Nicholas Peter Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Pursuant to that decision, the superior court must conduct on the record an individualized inquiry into the Petitioner's current and future ability to pay in light of such nonexclusive factors as the circumstances of his incarceration and his other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under GR 34. Accordingly,

IT IS ORDERED:

That the Petition for Review is granted only on the issue of imposition of discretionary legal financial obligations and the case is remanded to the Superior Court to reconsider the imposition of

Page 2  
Order  
92244-6

the discretionary legal financial obligations consistent with the requirements of *State of Washington*  
*v. Nicholas Peter Blazina*, 182 Wn.2d 827 (2015).

DATED at Olympia, Washington this 31<sup>st</sup> day of March, 2016.

For the Court

Madsen, C.J.  
CHIEF JUSTICE

# **APPENDIX D**

**FILED**  
MAY - 2 2016  
WASHINGTON STATE  
SUPREME COURT

# THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	<b>M A N D A T E</b>
	)	
Respondent,	)	No. 92244-6
	)	
v.	)	C/A No. 33227-6-III
	)	
VINCENT L. FOWLER,	)	Kitsap County Superior Court
	)	No. 13-1-00466-4
Petitioner.	)	

---

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington  
in and for Kitsap County

The Order of the Supreme Court of the State of Washington issued on March 31, 2016, which granted review only on the issue of imposition of discretionary legal financial obligations and remanded the case to the trial court to reconsider the imposition of the discretionary legal financial obligations consistent with the requirements of *State of Washington v. Nicholas Peter Blazina*, 182 Wn.2d 827 (2015), is now final. This cause is mandated to the superior court from which the appellate review was taken for further proceedings in accordance with the attached true copy of the Order.

No cost bills having been timely filed, pursuant to RAP 14.4, costs are deemed waived.

Page 2  
No. 92244-6  
MANDATE



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Court at Olympia, Washington, this 2<sup>nd</sup> day of May, 2016.

A handwritten signature in black ink, reading "Susan L. Carlson". The signature is written in a cursive style and is positioned above a horizontal line.

SUSAN L. CARLSON

Acting Clerk of the Supreme Court  
State of Washington

cc: Hon. Anna M. Laurie, Judge  
Clerk, Kitsap County Superior Court  
Jodi Backlund  
Manek Mistry  
Randall Sutton  
Reporter of Decisions

# **APPENDIX E**

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IN OPEN COURT  
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DAVID W. PETERSON  
KITSAP COUNTY CLERK

14-G-00215-4 ✓

IN THE KITSAP COUNTY SUPERIOR COURT

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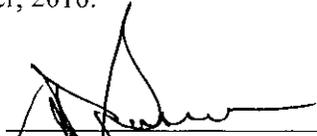
STATE OF WASHINGTON,	)	
	)	No. 13-1-00466-4
Plaintiff,	)	
	)	ORDER AMENDING J&S
v.	)	
	)	
VINCENT L. FOWLER,	)	
Age: 50; DOB: 09/07/1966,	)	
	)	
Defendant.	)	

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court on the motion of the Prosecution for an Order Amending J&S; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, it is hereby-

ORDERED, ADJUDGED, AND DECREED that the J&S is amended to impose only the following legal financial obligations (LFOs): \$500 victim assessment, \$200 filing fee and \$100 DNA/Biological sample fee. All other LFOs are waived. It is further

ORDERED, ADJUDGED, AND DECREED that all other conditions of the Judgment and Sentence remain in effect..

DATED this 19<sup>th</sup> day of Oct. September, 2016.

  
JEFFREY P. BASSETT  
JUDGE

ORDER; Page 1 of 2



Tina R. Robinson, Prosecuting Attorney  
Special Assault Unit  
614 Division Street, MS-35  
Port Orchard, WA 98366-4681  
(360) 337-7148; Fax (360) 337-4949  
www.kitsapgov.com/pros

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PRESENTED BY--

APPROVED FOR ENTRY--

STATE OF WASHINGTON

  
\_\_\_\_\_  
CAMI G. LEWIS, WSBA NO. 30568  
Deputy Prosecuting Attorney

  
\_\_\_\_\_  
Kibbe, WSBA NO. 31692  
Attorney for Defendant

Prosecutor's File Number-13-196498-5

ORDER; Page 2 of 2



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# **APPENDIX F**

ASSN  
423



**Law Enforcement Report**

To: Bremerton PD  
 From: JASON FROST  
 RE: CA Referral # 2711276  
 CA's Action Screen Out

Report Received from LE Agency:  
 Date CA Received: \_\_\_\_\_ LE Report Number: \_\_\_\_\_

INCIDENT INFORMATION	
Incident Address 1720 Olympic Avenue Bremerton WA 98312	Primary Caregiver Address 1720 Olympic Avenue Bremerton, WA 98312
Incident Date 11/20/2012	Incident Time 11:16AM

PERSONS INVOLVED				
Name (AKA's) - Person ID	DOB	Role	Address	Phone
ZENY M. CARDWELL - 2200973	04/08/1977	Household Member, Intake Name, Parent/Parental Role, Subject	1720 Olympic Avenue Bremerton, WA 98312	(360)204-9389
NESTOR C. GATCHALIAN - 2516481	11/30/1995	Household Member, Victim	Homeless Bremerton, WA 98312	
ALENA GATCHALIAN - 2200975	02/05/2001	Household Member, Victim	1720 Olympic Avenue Bremerton, WA 98312	(360)204-9389
ANAMAE C. GATCHALIAN - 3181447	05/03/2003	Household Member, Victim	1720 Olympic Avenue Bremerton, WA 98312	(360)204-9389
FELIX GATCHALIAN - 3077591	04/09/2007	Household Member	1720 Olympic Avenue Bremerton, WA 98312	(360)204-9389
Cameron Fisher - 101182816		Referrer	C/O: Agape Unlimited Bremerton, WA	(360)373-1529

ALLEGED CRIME(S)

SAFETY ALERTS  
 Danger to LE:  
 Registered Sex Offender:  
 Sexually Aggressive Youth:

ADDITIONAL INFORMATION  
 Child Name \_\_\_\_\_ Previous Referral # \_\_\_\_\_ Child School or Daycare Information \_\_\_\_\_



### Law Enforcement Report

NESTOR C. GATCHALIAN, ALENA GATCHALIAN, ANAMAE C. GATCHALIAN		
<p><b>Brief Narrative</b>          The caller is Cameron Fisher, Agape Unlimited, 360-373-1529. The mother, Zeny, was in the room while the call was being made and provided additional information as needed.</p> <p>The caller states that the mother, Zeny, reported this morning that 11 year old Alena and 9 year old Anamae reported for the first time last night that their brother, Nestor, Jr., has been having the girls "touch him" for "a long time." The caller states the mother reported that the children did not provide additional details about the touching and no timeframes were provided, but it was clear from the context that the girls meant that Nestor has been making the girls touch his penis and that the touching has been ongoing.</p> <p>The caller states that the mother reported that the girls made their disclosure when they discovered that an uncle who had been living in the home and who the girls consider a protective person would soon be leaving. The caller states that Nestor, Jr. has not lived in the home for some time, but he has provided care for the children in the past.</p> <p>The caller states that the mother reported that Nestor, Jr. was in the home when the girls made their disclosure and the mother demanded that he leave the home immediately. The caller states that the mother has stated that she will not allow contact between Nestor, Jr. and the girls. The caller states that the mother appears to be very supportive of the girls. The caller states that the mother is in the process of acquiring services for the girls through the Kitsap Sexual Assault Center.</p>		

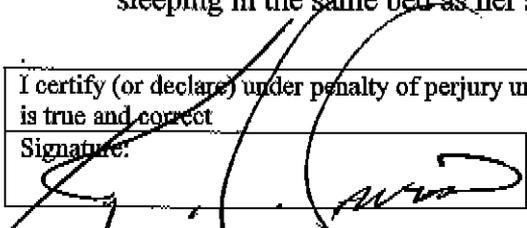
# **APPENDIX G**

## STATEMENT OF PROBABLE CAUSE

Clerk Code \_\_\_\_\_

**CERTIFICATE OF PROBABLE CAUSE****SUSPECT NAME: Nestor C. Gatchalian (DOB 11/30/95)****COURT:**  Superior  District  Juvenile  Bremerton Municipal**AGENCY CASE NUMBER: B12-011408****ARREST CRIME: RAPE OF A CHILD 1ST DEGREE  
CHILD MOLESTATION 1<sup>ST</sup> DEGREE  
INCEST 1<sup>ST</sup> DEGREE  
INCEST 2<sup>ND</sup> DEGREE****ARREST DATE & TIME: 12/19/12 2015****ARREST LOCATION: 1907 9<sup>th</sup> Street  
Bremerton, Wa**

- On 11-21-12 I received a CPS referral regarding the sexual assault of eleven year old ACG (02/05/01) and her nine year old sister, AG (05/03/03), by their seventeen year old brother, Nestor C. Gatchalian (11/30/95). The girls disclosed to their mother, Zeny Cardwell, that Nestor had been molesting them over a period of time.
- On 11/29/12, ACG and AG were interviewed at the Kitsap Co. Prosecutor's Special Assault Unit (SAU). Both girls appeared developmentally normal for their respective ages and promised to tell the truth. They were interviewed separately.
- In her interview, ACG reported that Nestor molested her on three different occasions. In one of those incidents, AGC said her family, which consists of her mother and three other siblings, were staying at the Chieftain Motel in Bremerton. They were all in the bed and Nestor was at the bottom of the bed. Nestor grabbed her foot and put it on his penis. ACG said she pulled her foot away.
- Another incident occurred at the home of her mother's friend, Gina Jordan, located at 2890 Clare Avenue in Bremerton. ACG said in that incident, she was sleeping in the same bed as her siblings when Nestor grabbed her hand and put it

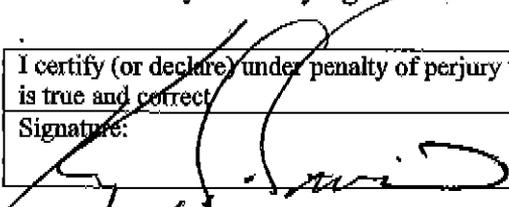
I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct		
Signature: 	Print Name: Detective Kenny D. Davis	Badge # 423
Date 12/19/12	Place: Bremerton, Wa.	Bremerton Police Department
	Case #: B12-011408	Page / of 4

### STATEMENT OF PROBABLE CAUSE

on the bare skin of his penis. ACG said it felt hairy and he made her move her hand on his penis. ACG said that happened when she was eleven years old.

- ACG said the last incident occurred this past November at the home they reside in now located at 1720 Olympic Avenue in Bremerton. ACG said she was lying on the bed and Nestor was sitting on her bed when he grabbed her foot and put it on his penis. She said he told her he wanted to show her how to break a foot. ACG pulled her foot away and told him to stop. She said Nestor got up pulled up his pants and left.
- ACG said when her family lived at Griffin Glen Apartments, Nestor would take AG into the bathroom and do stuff to her. ACG said she does not know exactly what Nestor was doing to AG.
- In her interview, AG described an incident when she was nine years old that occurred at the home of her aunt, Michelle Cardwell, located at 1907 9<sup>th</sup> Street in Bremerton. AG said she was sleeping on the couch in the living room when Nestor pulled down her pants and underwear and rubbed the bare skin of her private with his hand.
- AG also described an incident that occurred when she and her family lived at Griffin Glen Apartments located at 5163 Mariah Lane in unincorporated Kitsap County/ East Bremerton. AG said she and Nestor were alone in the living room when Nestor made AG touch his private. AG said Nestor put her hand on his private and made her rub it. AG described Nestor's private as wet and dry. She said he had a blanket over his lap. AG said he stopped when he heard someone coming.
- AG said on numerous occasions while the family lived at the Griffin Glen Apartments, Nestor would take her into the bathroom and lock the door. AG said this was usually after she had done something wrong and was in trouble. AG said Nestor would pull her pants and underwear down, make her bend over and hold onto the toilet and say she was sorry 100 times while he put his private in and out of her butt. AG said her butt felt wet after Nestor would do this. AG said when she pooped afterwards, it was hard to get the poop out and it stung when she peed. AG said she believed she was eight years old when they lived at Griffin Glen.
- AG described another incident when Nestor put his private in her butt when her family was staying at the home of Gina Jordan, her mom's friend, in Bremerton.

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

Signature: 	Print Name: Detective Kenny D. Davis	Badge # 423
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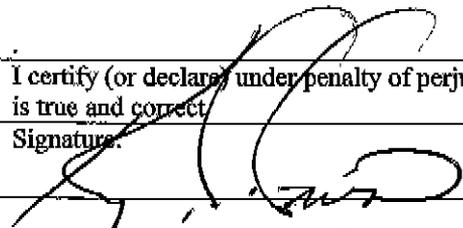
Date 12/19/12	Place: Bremerton, Wa.	Bremerton Police Department
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Case #: B12-011408	Page 2 of 4
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## STATEMENT OF PROBABLE CAUSE

AG said she was in the living room when no one else was there but her and Nestor. AG said she was lying on her stomach and Nestor put his private in her butt.

- AG disclosed an incident that occurred since she and her family have been living at their current residence on Olympic Avenue in Bremerton. AG said one day when she got home from school, Nestor made her sit on his lap while he rubbed his private against her butt. AG said this happened on one occasion.
- After the interview, the girls' mother, Zeny Cardwell, advised the child interviewer that Nestor might be staying with her sister, Michelle Cardwell.
- I contacted Michelle Cardwell at her residence in an attempt to find Nestor. She claimed Nestor was not staying with her and provided no helpful information to me.
- I contacted Zeny Cardwell, who told me she has not heard from Nestor since she kicked him out of the house. Zeny explained to me that she is a recovering drug addict and during her addiction, she and her children moved around a lot.
- I contacted the Kitsap County Juvenile Probation and noted Nestor has an outstanding probation violation warrant. He does not attend school.
- I completed a "Wanted Person" flyer for Nestor Gatchalian and distributed it to the patrol and special operations divisions.
- On 12/19/12 at approximately 2015, I was off duty when I was contacted by BPD Patrol Officer Steven Forbragd, who advised me he had arrested Nestor Gatchalian for his juvenile warrant at 1907 9<sup>th</sup> Street, the home of Nestor's aunt, Michelle Cardwell (ref. B12-012280). I asked Officer Forbragd to take Nestor to the Bremerton Police Department and I responded to interview him.
- At approximately 2135, I began my interview with Nestor Gatchalian. I informed him that our interviews were recorded both audio and visually and asked him if that was ok with him. He said it was. I read Nestor his Miranda Warning and additional Juvenile Warning from a departmental form. He acknowledged understanding his rights, waived them, and signed the form, indicating in the appropriate space that he wished to continue our conversation.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.		
Signature: 	Print Name: Detective Kenny D. Davis	Badge # 423
Date 12/19/12	Place: Bremerton, Wa.	Bremerton Police Department
Case #: B12-011408		Page 3 of 4

### STATEMENT OF PROBABLE CAUSE

- During our interview, I confronted Nestor with the disclosures of both ACG and AG. Throughout the interview, Nestor denied sexually assaulting either of his sisters.
- At approximately 2205, I arrested Nestor Gatchalian for the above mentioned charges. He was transported and booked into the Kitsap County Juvenile Detention Center.

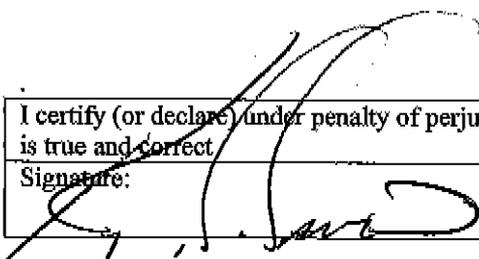
**ACG is eleven years old. Her sister, AG, is nine years old. Their brother, Nestor Gatchalian, is seventeen years old. The victims are under twelve years old and Nestor is at least thirty six months older than them. They are not married. He had sexual contact with ACG and sexual intercourse with AG, knowing they were his sisters by blood.**

**ACG disclosed that on two different occasions, Nestor grabbed her foot and rubbed it against his penis through his clothing. On one occasion, he grabbed her hand and made her rub his bare penis.**

**AG disclosed that on one occasion, Nestor pulled down her pants and underwear and rubbed her bare vagina with his hand. On another occasion, Nestor grabbed AG's hand and made her rub his bare penis. AG disclosed that on numerous occasions, Nestor penetrated her anus with his penis.**

**Based on the clear and credible disclosures of both ACG and AG, I had probable cause to and did arrest Nestor C. Gatchalian for RAPE OF A CHILD 1<sup>ST</sup> DEGREE, CHILD MOLESTATION 1<sup>ST</sup> DEGREE, INCEST 1<sup>ST</sup> DEGREE and INCEST 2<sup>ND</sup> DEGREE.**

**Report to prosecutor .**

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.		
Signature: 	Print Name: Detective Kenny D. Davis	Badge # 423
Date: 12/19/12	Place: Bremerton, Wa.	Bremerton Police Department
	Case #: B12-011408	Page 4 of 4

# **APPENDIX H**

**SUPPLEMENTAL REPORT**

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Investigator: (423) DAVIS, KENNY

Date / Time: 8/1/2013 13:52

Thursday

Supplement Type: FOLLOW UP

Race: Sex: DOB: Age:  
Employer:

Home Phone:

**FOLLOW UP INVESTIGATION:**

On 04/11/2013 I was informed by Warrant Officer Hughes that he had located and arrested Fowler on the felony warrant issued for his arrest in this case. I asked that Fowler be brought to the police department for an interview. Fowler was brought to the police department and placed in an interview room in the detective division.

I began my interview and informed Fowler that our interviews were recorded both audio and visually and asked if that was okay with him. He said that it was. I asked Fowler if he understood that he was under arrest right now. He said, "Yes". I then read Fowler his Miranda warnings from a departmental form. Fowler acknowledged understanding his rights, waived them, and signed the waiver in the appropriate space indicating he wished to continue our conversation.

I told Fowler I wanted to speak with him about his association a couple of years ago with a lady by the name of Zeni Cardwell. Fowler indicated that he did not know who Zeni Cardwell was. I told him he may have known her by a different name at that time. I told him she had two daughters by the name of Alena and AnnaMae. Fowler then recalled who she was and said he knew her as "Marie". He indicated he knew her through Marie's association with a mutual friend, Stacey Bills. Fowler said he believed they were living in the same apartment complex and one day she was at Stacey's house when he met her.

I asked Fowler what his relationship was with Cardwell. He said they were just friends. I asked him if they had ever had a romantic relationship. He said they had had sex before. I asked Fowler when that was. He said a couple of years ago. I asked Fowler where that apartment complex was in Port Orchard. He said it was at Olympic Pointe Apartments in Port Orchard. I asked him what street that was on. He said Orlando Street. I asked Fowler what apartment he lived in. He thought for a moment and then said he believed it was apartment "A-301", but he wasn't certain. I asked Fowler who he was staying with. He said a girl named Monica Boyle.

I told Fowler later on there was a person by the name of Gina or Virginia Jordan. He asked if she stayed in Bremerton. I told him she did. Fowler remembered staying there for a couple of weeks. Fowler said Marie left him there and disappeared for a couple of weeks. Fowler said when she came back after a couple of weeks, she took him back home. I asked him if Virginia was there during this time and he said yes. I asked Fowler where Marie was during that time and he said he had no idea. Fowler said Marie wasn't gone the entire time. She would come in and sleep maybe for a day and then she would say she had to make a run and she would be gone for another four days or so.

I asked Fowler if Cardwell had a drug problem that he was aware of. He said yes, she was on meth. Fowler said Virginia's house is where he had sex with Cardwell. I asked him if while he was staying at Virginia Jordan's house, he looked after Cardwell's children while she was gone. Fowler said there was a boy, Felix and a girl, AnnaMae. I asked him where Cardwell's other two children were at that time. Fowler said Nestor was in and out of the house and Alena stayed with a friend of hers in Bremerton. Fowler said Alena was there about three or four times and then the rest of the time she was at a friend's house. I clarified with Fowler that mostly there was only Felix and AnnaMae at Virginia's house when he was there. He said that was correct.

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Fowler said there was no running water at this house and he used to have to walk to the gas station to get water for them.

I asked Fowler when he went back to Port Orchard and he said he believed it was in June of 2011. I asked Fowler if he saw Cardwell after that. He said yes he had seen her plenty of times after that. Fowler said Cardwell had called him after that asking if she could stay with him because she had been in a shelter and she didn't like the shelter. Fowler would have to ask the girl named (Kenesha) he was staying with at the time if Cardwell and her kids could come and stay. Fowler said he helped Cardwell move into the place she is staying at now.

Fowler said Cardwell did not say why. Fowler said he thought maybe it was because Cardwell was in a drug free house and couldn't talk to him. I asked Fowler if he had a drug problem and he said no he didn't do drugs. I asked Fowler if he had an alcohol problem and he said he drinks and he drank while he was working, but since he is not working, he doesn't drink now.

I asked Fowler how he would describe his relationship with AnnaMae and Alena. He said he would describe it as friends. Fowler said when he helped Cardwell move in to her current residence, they would ask him to spend the night or to move in with them. He said when he was around them he always watched TV with them or movies and fixed them something to eat. Fowler said last year he believes Alena and Stacey Bills' daughter, Alicia Bills, stayed a couple of days with him at his girlfriend, Kenesha house. I asked Fowler when that was. He said around April or May of last year. I asked Fowler what Kenesha's last name was and he said Lewis. He said she lives in Port Orchard.

I explained to Fowler that during the course of a separate investigation I conducted regarding someone who had molested AnnaMae and Alena, the girls also disclosed some things about Fowler. He asked if that was AnnaMae and Alena and I said yes. I told him Alena disclosed that this happened when she stayed the night with him once. Fowler said Alena had stayed a couple of times with him at Kenesha's house and also when he stayed with Stacey Bills she had stayed there a few times. I told him Alena disclosed that when this happened she was sleeping on the couch and he was on the floor. Fowler said that is correct. Whenever Alena slept over, she slept on the couch and he slept on the floor. He said that would have been at either Kenesha's house or his apartment when that occurred. I told Fowler that Alena disclosed that she woke up to find Fowler touching her on her vagina on the outside of her clothes. Fowler said he never did that. I continued that when she woke, Fowler stopped touching her and went back to the floor. I told him Alena said she went to the bathroom and noticed her zipper was down on her pants. Fowler said that wasn't true and it was a lie.

I told Fowler AnnaMae was then interviewed and AnnaMae disclosed when she was staying at Virginia's house, on at least two occasions she awoke to Fowler touching her vagina. I told Fowler AnnaMae disclosed that he had his finger inside her vagina. Fowler said he had never slept in the same room with AnnaMae. I told him regardless of whether he slept in the same room with her; he could certainly walk into the room where she was at. Fowler denied this as well.

I told Fowler that based upon my investigation there was no doubt in my mind that this had occurred. I told Fowler I was more interested in the question as to why this happened. He said it didn't happen. Fowler said he would have no problem taking a lie detector test and he didn't know if their mother coaxed them into saying this. I asked him why their mother would coax them into saying this. Fowler said because he owed her \$50.00. Fowler said if he touched them, why would they call him and want him to come and pick them up. Fowler maintained that these children did not fear him and would call him all the time to come and get them. I explained to Fowler that many times these things go on for years even with family members and children don't disclose them until much later. I told Fowler that sometimes the perpetrator develops a relationship

**SUPPLEMENTAL REPORT**

**THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY**

with the children to the extent that the children think the molestation is okay. Fowler maintained that he did not touch either of the girls.

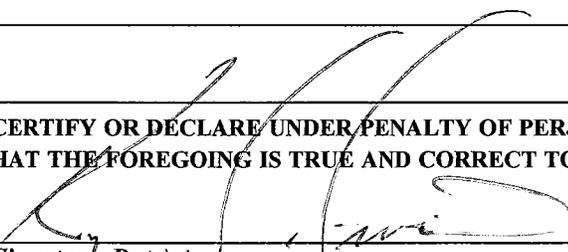
I told Fowler that I noted while looking into his history that he was investigated for possible child molestation on another girl named Dakota Blake (ref. K11-012674). Fowler said he wasn't investigated for that. The police asked him a few questions about if he babysat her and he said yes and if he ever changed her diaper, and he said yes. I told him that that girl identified him as the monster when asked if anyone ever hurt her. She said the monster. When asked who the monster was Dakota said Fowler.

Fowler continued to deny touching Alena or AnnaMae and stated that if he was being charged, he was going to end this interview. I explained to Fowler that he was under arrest at this time for one count of Rape of a Child in the First Degree. I then left the interview room and arranged a transport for Fowler to the jail.

Report to prosecutor.

Detective Kenny Davis

**I CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.**

  
*(Signature, Date)*  
**(423) DAVIS, KENNY**  
KITSAP COUNTY, WA

08-01-13

# **APPENDIX I**

ORIGINAL

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FILED  
KITSAP COUNTY CLERK  
12 DEC 20 AM 10:40  
DAVID W. PETERSON  
BY \_\_\_\_\_ DEPUTY

IN THE KITSAP COUNTY SUPERIOR COURT  
JUVENILE DIVISION

STATE OF WASHINGTON, )  
 ) No. **12 8 00641 9**  
Plaintiff, )  
 ) INFORMATION  
v. )  
 ) (Total Counts Filed - 1)  
NESTOR CARDWELL GATCHALIAN, )  
Age: 17; DOB: 11/30/1995, )  
12R049532 )  
Respondent. )

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney, TODD L. DOWELL, WSBA NO. 18505, Deputy Prosecuting Attorney, and hereby alleges that contrary to the form, force and effect of the ordinances and/or statutes in such cases made and provided, and against the peace and dignity of the STATE OF WASHINGTON, the above-named Respondent did commit the following offense(s)-

**Count I**  
**Child Molestation in the First Degree**

On or between May 3, 2011 and November 30, 2012, in the County of Kitsap, State of Washington, the above-named Respondent, being at least thirty-six (36) months older than the victim, had sexual contact with another person who was less than twelve (12) years old and not married to the perpetrator, to-wit: ANG, dob 02/05/2001, and, ACG, dob 05/03/2003; contrary to the Revised Code of Washington 9A.44.083.



Russell D. Hauge, Prosecuting Attorney  
Juvenile Criminal Division  
614 Division Street, MS-35  
Port Orchard, WA 98366-4681  
(360) 337-5500; Fax (360) 337-4949  
www.kitsapgov.com/pros

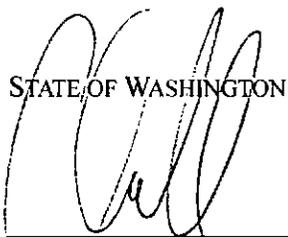
A handwritten signature in black ink, appearing to be "D. Hauge", located at the bottom right of the page.

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JIS Code: 9A.44.083 Child Molestation I

I certify (or declare) under penalty of perjury under the laws of the State of Washington that I have probable cause to believe that the above-named Respondent committed the above offense(s), and that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED: December 20, 2012  
PLACE: Port Orchard, WA

STATE OF WASHINGTON  


TODD L. DOWELL, WSBA No. 18505  
Deputy Prosecuting Attorney

All suspects associated with this incident are—  
Nestor Cardwell Gatchalian



1 **RESPONDENT IDENTIFICATION INFORMATION**

2 NESTOR CARDWELL GATCHALIAN Alias Name(s), Date(s) of Birth, and SS Number  
3 Transient Nester D. Gatchalian, 11/30/1995  
4 Nestor D. Gatchalian, Jr., 11/30/1995

5 [Address source--(1) Kitsap County Jail records if Respondent in custody, or law enforcement report noted below if Respondent not in  
6 custody, or (2) Washington Department of Licensing abstract of driving record if no other address information available]

7 Race: Asian Or Pacific Sex: Male DOB: 11/30/1995 Age: 17  
8 Islander  
9 D/L: [drivers license number] D/L State: [drivers' license SID: [s.i.d. number] Height: 500  
10 state name]  
11 Weight: 120 JUVIS: Unknown Eyes: Brown Hair: Black  
12 DOC: Unknown FBI: [fbi number]

13 **LAW ENFORCEMENT INFORMATION**

14 Incident Location: 1720 Olympic Avenue, Bremerton, WA [Incident Address Zip]  
15 Law Enforcement Report No.: 2012BP011408  
16 Law Enforcement Filing Officer: Kenny Nmi Davis, 423  
17 Law Enforcement Agency: Bremerton Police Department - WA0180100  
18 Court: Kitsap County Superior Court (Juvenile), WA018025J  
19 Motor Vehicle Involved? No  
20 Domestic Violence Charge(s)? No  
21 Law Enforcement Bail Amount? n/a

22 **CLERK ACTION REQUIRED**

23 In Custody  
24 Appearance Date If Applicable: n/a

25 **PROSECUTOR DISTRIBUTION INFORMATION**

26 Superior Court	27 District & Municipal Court
28 <b>Original Charging Document--</b> 29 Original +2 copies to Clerk 30 1 copy to file 31 <b>Amended Charging Document(s)--</b> Original +2 copies to Clerk 1 copy to file	<b>Original Charging Document--</b> Original +1 copy to Clerk 1 copy to file <b>Amended Charging Document(s)--</b> Original +1 copy clipped inside file on top of left side 1 copy to file

Prosecutor's File Number--12-185188-10



# **APPENDIX J**

RECEIVED AND FILED  
IN OPEN COURT

JAN 16 2013

DAVID W. PETERSON  
KITSAP COUNTY CLERK

IN THE KITSAP COUNTY SUPERIOR COURT

JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

No. 12-8-00641-9

Juvis No. 835033 Ref. No. 12 R049532

v.

ORDER OF DISPOSITION/J.R.A.  
(NO RISK ASSESSMENT AND J.R. COMMIT)

Nestor Cardwell Gatchalian

Clerk's Action: Sections 1.1, 2.2, 2.4(b), 2.7, Bail  
Exonerated

DOB: 11 / 30 / 1995

DOL Revocation

Firearms Prohibition

Respondent.

Transfer of Jurisdiction/Supervision

I. HEARING

1.1 OFFENSES ADJUDICATED: On the 16<sup>th</sup> day of January, 2013,  
the Respondent was found guilty by  plea/alford plea  court verdict  stipulation by deferred disposition  
 stipulation pursuant to drug court contract, of the following offense(s) listed below:

#	OFFENSE(S)	DV* P&P	OFFENSE DATE(S)		RCW
			FROM	TO (X=same)	
I	<u>Child Molest 1<sup>o</sup></u>		<u>5/3/11</u>	<u>11/30/12</u>	<u>9A 44 083</u>
II					
III					

- The Information/Amended Information filed was amended on the record to reflect the above Count(s).
- Count(s) \_\_\_\_\_ of the Information/Amended Information was/were dismissed  with  without prejudice.
- The Respondent was found not guilty of count(s) \_\_\_\_\_ of the Information/Amended Information.

\*DV P&P: If marked, the state pled and proved that the offense was committed against a family or household member as defined in RCW 10.99.020.

*[Handwritten signature]*  
15

1.2 DISPOSITION HEARING: On the 16<sup>th</sup> day of January, 2013, a disposition hearing in this case was held at which the Respondent and the following were present:

Respondent's Lawyer:  M. Randolph  S. Tyner  J. Reese  S. Greer  \_\_\_\_\_  
Deputy Prosecutor:  Julie Gaffney  Todd Dowell  \_\_\_\_\_  
Probation:  Kay Morigan  Ronnie Mullins  Mullin's  
Others:  Parents and other members of the Respondent's family  Social worker/Counselor  
 Victim(s) \_\_\_\_\_  \_\_\_\_\_

1.3 EVIDENCE: The court heard all the evidence presented, including any pre-disposition reports to the court and recommendations by the juvenile probation counselor, prosecutor, and defense counsel.

**II. FINDINGS AND ORDER**

2.1 FINDINGS: The Court has jurisdiction over the parties and the subject matter of this action. The Respondent is guilty of the offenses listed in Paragraph 1.1 above.

- Under 12:** The Respondent was under 12 years of age on the date of the offense(s), but nonetheless had sufficient capacity to understand the act or neglect, and to know that it was wrong.
- Violation of Deferred/Drug Court:** The Respondent is in violation of the terms of an  Order of Deferred Disposition  A Drug Court Contract, entered herein in this cause, and that Order/Contract is hereby revoked.

2.2 RESTITUTION:  
 Restitution shall be by separate order.  Respondent agrees to restitution for uncharged victims.

- None:** No restitution appears to be due in this case, or no Victim Impact Statement was returned; however the State may request a hearing within the statutory time period.
- Crimes not charged:** In addition to the offenses listed above, the Respondent has agreed to, and shall pay, restitution to victims of offenses contained in the following police reports which the prosecutor agrees not to charge: \_\_\_\_\_
- As Previously Ordered** (Court adopts and incorporates any previous orders of restitution entered herein)
- Victims:** The Respondent shall make restitution payable by cash, money order or certified check through the Clerk of the Court at the Kitsap County Courthouse, 614 Division St., MS-34, Port Orchard, WA 98366-4676 as follows:

Victim: \_\_\_\_\_ Restitution Amount: \$ \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_  
Victim: \_\_\_\_\_ Restitution Amount: \$ \_\_\_\_\_  
Address: \_\_\_\_\_  
\_\_\_\_\_

Restitution shall be joint and several with adjudicated co-respondent(s). State may seek reimbursement for applicable court costs. Further, restitution shall be made at a rate and in a manner set by the Juvenile Rehabilitation Administration and/or the juvenile's supervising probation/parole counselor. Fifty percent of all earnings made by the juvenile while at JRA shall be applied toward the restitution ordered in this cause.

**2.3 AGGRAVATING AND/OR MITIGATING FACTORS:** The Court finds the following:

**Mitigating Factors:**

- The Respondent's conduct neither caused nor threatened serious bodily injury or the juvenile did not contemplate that his/her conduct would cause or threaten serious bodily injury.
- The Respondent acted under strong and immediate provocation.
- The Respondent was suffering from a mental or physical condition that significantly reduced his/her culpability for the offense though failing to establish a defense.
- Prior to his/her detection, the Respondent compensated, or made a good faith attempt to compensate, the victim for the injury or loss sustained.
- There has been at least one (1) year between the Respondent's current offense(s) and any prior criminal offense(s) [or has no prior history].
- \_\_\_\_\_

**Aggravating Factors:**

- In the commission of the offense, or in flight there from, the Respondent inflicted, or attempted to inflict, serious bodily injury to another.
- The offense was committed in an especially heinous, cruel, or depraved manner.
- The victim or victims were particularly vulnerable.
- The Respondent has recent criminal history or has failed to comply with conditions of a recent dispositional order or diversion agreement.
- The current offense included a finding of sexual motivation pursuant to RCW 13.40.135.
- The Respondent was the leader of a criminal enterprise involving several persons.
- There are other complaints which have resulted in diversion or a finding or plea of guilty but are not included as criminal history.
- The standard range disposition is clearly too lenient considering the seriousness of the Respondent's prior adjudications.
- \_\_\_\_\_

**2.4 SENTENCE FOR JRA OFFENSE(S):**

**Standard Range**    **Manifest Injustice**, sentence is hereby imposed with the following conditions:

**a.) Commitment:** The Respondent is, committed to the Department of Social and Health Services, Juvenile Rehabilitation Administration, for a period not to exceed 52 to 65 weeks broken down as follows: count I 52 to 65 weeks; count II \_\_\_\_\_ to \_\_\_\_\_ weeks; count III \_\_\_\_\_ to \_\_\_\_\_ weeks. The Department of Social and Health Services, Juvenile Rehabilitation Administration, is hereby granted the authority to consent to any necessary medical, dental, surgical or anesthesiology care while the Respondent is in their custody.

Credit against said commitment shall be given for 0 days previously spent in detention.

Respondent shall have no contact with the persons listed in paragraph 2.6(a) of this order, and shall submit to any applicable requirements under paragraph 2.6(b) and paragraph 2.7.

**A b.) Assessments:** The Respondent is ordered to pay the following financial assessments, which shall be paid by cash, money order or certified check through the Clerk of the Court at the Kitsap County Courthouse, 614 Division, MS-34, Port Orchard, and Washington 98366-4676.

**Crime Victim's Compensation:** Pursuant to RCW 7.68.035, a mandatory crime victim's assessment in the amount of  **one hundred dollars (\$100.00)**  **seventy-five dollars (\$75.00).**

**A DNA Collection:** Pursuant to RCW 43.43.754, a mandatory DNA assessment of one hundred dollars (\$100.00) for any crime that requires DNA collection (see paragraph 2.7).

**DUI, Physical Control, Vehicular Assault, or Vehicular Homicide Case:** Pursuant to RCW 46.61.5054, a mandatory vehicle crimes assessment of one hundred twenty five dollars (\$125.00) as Respondent is adjudicated of one or more of the following offenses: DUI; Physical Control; Vehicular Assault; or Vehicular Homicide.  **Suspended (if checked):** The court finds Respondent lacks ability to pay, therefore the fee herein is suspended.

**Indecent Exposure/Prostitution Case:** Pursuant to RCW 9A.88.120(2), a mandatory assessment imposed for the following crimes (*check applicable*):

**Indecent Exposure and/or Prostitution**, a fee of fifty dollars (\$50.00);

**Permitting Prostitution and/or Patronizing a Prostitute**, a fee of ( ) one thousand five hundred dollars (\$1,500.00)*[no priors for same]* ( ) two thousand five hundred dollars (\$2,500.00)*[one prior]* ( ) five thousand dollars (\$5,000.00)*[two or more priors]*;

**Promoting Prostitution** *[any degree]*, a fee of ( ) three thousand dollars (\$3,000.00)*[no priors for same]* ( ) six thousand dollars (\$6,000.00)*[one prior]* ( ) ten thousand dollars (\$10,000.00)*[two or more priors]*.

**Suspended [if checked]:** The court finds Respondent lacks ability to pay, therefore the fee(s) are reduced to a total of \$ \_\_\_\_\_ *[ Per RCW 9A.88.120 the fees may only be reduced up to two-thirds of the maximum].*

**Crime Lab Work Performed:** Pursuant to RCW 43.43.690, a mandatory crime lab assessment of one hundred dollars (\$100.00) for each offense adjudicated under paragraph 1.1 of this order, for a total of \$ \_\_\_\_\_, as a crime laboratory analysis was performed in this case.  **Suspended (if checked):** The court finds Respondent lacks ability to pay, therefore the fee herein is suspended.

**Domestic Violence Case (discretionary):** Pursuant to RCW 10.99.080, a discretionary domestic violence assessment of \$ \_\_\_\_\_, as Respondent was found guilty of a crime of domestic violence. Note: The fee assessed may not exceed one hundred dollars (\$100.00).

**Other:** An assessment of \$ \_\_\_\_\_ imposed on the basis of  a fine  \_\_\_\_\_.

## 2.5 SENTENCE FOR LOCAL SANCTION OFFENSE(S):

**Standard Range**  **Manifest Injustice**, sentence is hereby imposed with the following conditions:

**a.) Supervision:** Community Supervision shall be for a total period of \_\_\_\_\_ months, broken down as follows: Count I \_\_\_\_\_ months; Count II \_\_\_\_\_ months; Count III \_\_\_\_\_ months. The Respondent's participation in a risk assessment is waived in this matter. Periods of community supervision imposed among separate counts in this order shall run consecutive to each other subject to the limitations set forth in RCW 13.40.180. The total amount of supervision time imposed herein shall run concurrent to any community supervision time imposed on separate disposition orders, including supervision time under a deferred disposition or drug/treatment court contract. All other terms contained in separate disposition orders shall run consecutively.

Notwithstanding the above, supervision shall terminate upon the Respondent's eighteenth birthday.

- b.) Community Restitution Work:** The Respondent shall perform a total of \_\_\_\_\_ hours of community restitution work, broken down as follows: Count I \_\_\_\_\_ hours; Count II \_\_\_\_\_ hours; Count III \_\_\_\_\_ hours. Unless otherwise specified herein, community restitution shall be performed at a rate and in a manner as designated by the supervising probation counselor. Credit may be given against community restitution on a 1:1, hour for hour, basis for hours successfully spent in approved counseling or treatment sessions required by this order.
- Credit shall be given for \_\_\_\_\_ days spent in detention for a balance of \_\_\_\_\_ total hours of community restitution remaining.
- c.) Detention:** The Respondent shall serve a total of \_\_\_\_\_ days confinement in detention, broken down as follows: count I \_\_\_\_\_ days; count II \_\_\_\_\_ days; count III \_\_\_\_\_ days. Unless otherwise specified herein, the Respondent shall be screened to participate in the Juvenile Department's "Alternatives to Detention" program. The Respondent may serve the detention time imposed on the "Alternatives to Detention" program provided he or she meets the requirements of the program and the Juvenile Department approves of it.
- Respondent shall be given credit for \_\_\_\_\_ days already served in detention, for a total of \_\_\_\_\_ days remaining to be served.
- Of the detention days remaining, \_\_\_\_\_ of those days shall be served in custody (*choose one*)  
 at the Youth Service Center Detention Facility  at JRA along with his JRA commitment pursuant to RCW 13.40.185; not the Juvenile Department's "Alternatives to Detention" program.  
 \_\_\_\_\_
- Home Detention (RCW 13.40.308 – Motor Vehicle Crimes): In addition to the days of confinement in detention listed above, the juvenile shall serve \_\_\_\_\_ days confined to his or her home residence on non-school days only. Unless Electronic Home Monitoring ("EHM") is specifically required, the home detention shall be supervised and monitored by the juvenile's parent or guardian.  
 (If checked) Home detention shall be monitored by EHM instead of parent or guardian.
- \_\_\_\_\_
- d.) Curfew:** Unless otherwise specified herein, the Respondent shall abide by a 6 p.m. to 6 a.m. daily curfew unless the Respondent has otherwise been given permission by parent or guardian to attend an approved and supervised function or employment at a specified location. The probation counselor may modify said curfew later after consultation with parent and/or Respondent.
- Instead of 6 p.m. to 6 a.m., the curfew shall be  as set by parent/guardian  \_\_\_\_\_.
- e.) School Attendance:** The juvenile shall attend school or an approved educational program regularly, with no skips, unexcused absences, suspensions, or expulsions, and obey all rules of said program while on community supervision. Should the juvenile develop a pattern of not attending said program on a regular basis due to illness or medical condition, the supervising probation officer may require written excuse from a physician or health professional of any absence. If the juvenile is no longer legally required to attend an educational program, either because of completion or proper legal withdrawal, then the juvenile shall, if deemed appropriate by parent or probation officer, remain regularly employed or make a good-faith effort to seek regular employment.
- Juvenile shall attend Kitsap Alternative Transition School, to be held at the Kitsap County Juvenile Detention facility.

- f.) Counseling/Treatment:** If deemed necessary by risk assessment or evaluation, the Respondent shall attend and comply with any evaluation, counseling, and/or treatment program as directed by his or her parents or supervising probation counselor. Any evaluation shall be done within 30 days of determination of need.

Specifically ordered forms of counseling and/or treatment (if checked):

- Evaluation(s) and follow up -  alcohol/drug  mental health  \_\_\_\_\_;
  - Prevention clinics -  aggression replacement  fire  tobacco  shoplifting  \_\_\_\_\_;
  - Family related -  counseling  FFT  multi-systemic therapy  coordination of services;
  - Victim related -  victim-offender mediation  victim awareness  dui victim's panel;
  - Other: \_\_\_\_\_.
- g.) Urinalysis:** During community supervision, the Respondent shall be required to undergo random urinalysis as requested by the supervising probation counselor or treatment provider. Respondent shall provide an appropriate sample and shall not intentionally alter or attempt to alter a urine sample or the results of the urinalysis.
  - h.) Law/Rule Abiding Behavior:** 1) The Juvenile shall have no further law violations. 2) The juvenile shall live in the home of his/her parents, and/or court-approved placements, while on community supervision, and obey all rules of such residence. 3) If the juvenile is serving time in detention, he or she shall obey all rules of detention, including school program and orders from detention personnel. 4) Unless otherwise specified, the juvenile shall submit to supervision by the Kitsap County Juvenile Department, and report to the probation counselor once a week unless the probation officer modifies the frequency of contact. 5) Submit to any applicable requirements set forth in Paragraphs 2.4, 2.6 or 2.7.

**2.6 OTHER APPLICABLE CONDITIONS (JRA and NON-JRA):** In addition to the above sentence,

- a.) Contact Restrictions:** The Respondent shall have no contact with anyone prohibited by parent, guardian, or supervising probation counselor. The Respondent shall have no contact with or possession of firearms, weapons, alcohol, non-prescribed drugs or medications, or tobacco. The Respondent shall also have no contact or attempted contact with the following:
  - Victim(s): ACG 25-01, AG-5-3-03, including members of that victim's family or the victim's property.  \_\_\_\_\_.
  - Co-suspects/Others: \_\_\_\_\_  Unless supervised by an adult.
  - Matches, lighters, lighter fluid, or other incendiary devices.
  - Children 2 or more years younger;  unless supervised by an adult who is aware of the offense.
- b.) Other Conditions of Sentence:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2.7 **MANDATED STATUTORY CONDITIONS:** The Respondent is on notice of and is ordered to comply with, the following conditions mandated by statute:

**MARK DRIVER'S LICENSE/PERMIT AND NOTIFY DOL:** ONE OR MORE OF THE OFFENSES LISTED IN PARAGRAPH 1.1 REQUIRE DEPARTMENT OF LICENSING NOTIFICATION PURSUANT TO STATUTE -

- AGE 13 OR OLDER AND ONE OF THE FOLLOWING: ALCOHOL OFFENSE 66.44; VUCSA 69.50; LEGEND DRUG 69.41; IMITATION DRUGS 69.52; UPFA < 18 YRS 9.41; OR OFFENSE WHILE ARMED WITH A FA. [SEE, RCW 66.44.365, 69.50.420, 69.41.065, 69.52.070, and, 13.40.265].
- UPFA WHILE IN MOTOR VEHICLE; OR, RESPONDENT ARMED WITH F/A DURING AN OFFENSE WHERE A VEHICLE USED IN COMMISSION. [SEE, RCW 9.41.040(5)].
- DUI; PHYSICAL CONTROL; DWLS 1&2; VEHICULAR ASSAULT/HOMICIDE; HIT & RUN ATTENDED; RECKLESS DRIVING; ANY FELONY WHICH A VEHICLE USED IN COMMISSION (Except TMVOOP where passenger only) ; FALSE STATEMENTS UNDER RCW 46. [SEE, RCW 46.20.270].
- FELONY BLUDE; UNATTENDED CHILD IN RUNNING VEHICLE (2D OR SUBSEQUENT CONVICTION); RECKLESS ENDANGERMENT CONST. ZONE; AND, THEFT OF MOTOR VEHICLE FUEL. [SEE, RCW 46.20.270]. Note: Theft of MV fuel requires the court to order DOL to suspend the privilege for a determinate period set by the court not to exceed 6 months. Please notify the court and provide a separate order for the Clerk to forward to DOL.

THE COURT WILL NOTIFY THE DEPARTMENT OF LICENSING OF THESE OFFENSES. AS A RESULT OF THE NOTIFICATION, THE RESPONDENT'S PRIVILEGE TO DRIVE A MOTOR VEHICLE WITHIN THE STATE OF WASHINGTON WILL BE REVOKED OR SUSPENDED BY THE DEPARTMENT OF LICENSING PURSUANT TO LAW. [SEE, RCW 46.20.265, 46.20.285, 46.61.5055(9), 46.20.342(2), 46.61.524, 46.52.020(6), 46.61.500(2), 46.20.285(4), 46.20.285(6), 46.61.024(3), 46.61.685(2), 46.61.527(5), and, 46.61.740(2)].

PURSUANT TO RCW 46.20.270, THE RESPONDENT SHALL IMMEDIATELY PROVIDE HIS OR HER DRIVER'S LICENSE OR PERMIT TO THE CLERK OF THE COURT TO BE MARKED. IF THE LICENSE/PERMIT IS NOT IMMEDIATELY AVAILABLE, THE COURT WILL SET A HEARING AS SOON AS POSSIBLE FOR RESPONDENT TO PRODUCE SAID LICENSE/PERMIT FOR MARKING.

UPON MARKING, THE LICENSE/PERMIT WILL BE RETURNED TO THE RESPONDENT. PROVIDED IT IS OTHERWISE VALID AND REMAINS SO, THE LICENSE/PERMIT SHALL REMAIN IN EFFECT UNTIL THE DRIVING PRIVILEGE IS WITHHELD BY THE DEPARTMENT OF MOTOR VEHICLES.

**FIREARM PROHIBITION:** ONE OR MORE OF THE OFFENSES LISTED IN PARAGRAPH 1.1 CONSTITUTE A FELONY OFFENSE, OR, ANY OF THE FOLLOWING CRIMES WHEN COMMITTED BY ONE FAMILY OR HOUSEHOLD MEMBER AGAINST ANOTHER (DV): ASSAULT IN THE FOURTH DEGREE; COERCION; STALKING; RECKLESS ENDANGERMENT; CRIMINAL TRESPASS IN THE FIRST DEGREE, OR VIOLATION OF THE PROVISIONS OF A PROTECTION OR NO-CONTACT ORDER RESTRAINING OR EXCLUDING THE PERSON FROM A RESIDENCE. PURSUANT TO R.C.W. 9.41.040 AND 9.41.047 THE RESPONDENT SHALL NOT POSSESS A FIREARM UNLESS HIS OR HER RIGHT TO DO SO IS SUBSEQUENTLY RESTORED BY A COURT OF RECORD.

**DNA TESTING [Requires fee; see 2.4(b)]:** ONE OR MORE OF THE OFFENSES LISTED IN PARAGRAPH 1.1 CONSTITUTE A FELONY OFFENSE, AN OFFENSE REQUIRING SEX OR KIDNAPPING OFFENDER REGISTRATION, AND/OR ONE OF THE FOLLOWING OFFENSES: ASSAULT IN THE FOURTH DEGREE WITH SEXUAL MOTIVATION UNDER RCW 9A.36.041 & 13.40.135, STALKING UNDER RCW 9A.46.110, HARASSMENT UNDER RCW 9A.46.020, CUSTODIAL SEXUAL MISCONDUCT IN THE SECOND DEGREE UNDER RCW 9A.44.170, FAILURE TO REGISTER AS A SEX OR KIDNAPPING OFFENDER UNDER RCW 9A.44.132, PATRONIZING A PROSTITUTE UNDER RCW 9A.88.110, SEXUAL MISCONDUCT WITH A MINOR IN THE SECOND DEGREE UNDER RCW 9A.44.096, COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSE UNDER RCW 9.68A.090, OR VIOLATION OF A SEXUAL ASSAULT PROTECTION ORDER UNDER RCW 7.90. PURSUANT TO RCW 43.43.754 THE RESPONDENT SHALL UNDERGO DNA TESTING WITHIN 30 DAYS OF THIS ORDER. AN AUTHORIZED MEDICAL TECHNICIAN IN ACCORDANCE WITH THE REQUIREMENTS OF RCW 43.43 SHALL CONDUCT TESTING.

**HIV TESTING:** ONE OR MORE OF THE OFFENSES LISTED IN PARAGRAPH 1.1 CONSTITUTE A SEX OFFENSE UNDER RCW 9A.44, PROSTITUTION UNDER RCW 9A.88, OR, A DRUG OFFENSE INVOLVING NEEDLES UNDER RCW 69.50. PURSUANT TO RCW 70.24.340, THE RESPONDENT SHALL UNDERGO HIV TESTING AS SOON AS POSSIBLE AFTER SENTENCING, BUT NO LATER THAN 30 DAYS FROM THE DATE OF THIS ORDER. TESTING SHALL BE CONDUCTED BY THE BREMERTON-KITSAP COUNTY HEALTH DEPARTMENT IN ACCORDANCE WITH THE REQUIREMENTS DESIGNATED IN RCW 70.24.

**SEX OFFENDER/KIDNAPPING REGISTRATION:** ONE OR MORE OF THE OFFENSES LISTED IN PARAGRAPH 1.1 CONSTITUTE A SEX OR KIDNAPPING OFFENSE AS DEFINED IN 9A.44.128. PURSUANT TO RCW 9A.44.130, THE RESPONDENT SHALL REGISTER AS A SEX OFFENDER/KIDNAPPING OFFENDER IN ANY COUNTY WHICH HE OR SHE RESIDES.

**2.8 NOTICE TO JUVENILE OF HIS OR HER RIGHT TO SEAL RECORDS**

The official juvenile court file of any alleged or proven juvenile offender is open to public inspection unless sealed. Pursuant to RCW 13.50.050, the juvenile may petition to have the court vacate any orders and findings in this case, or any other case in which an information was filed, and to order the sealing of the official juvenile court file, the social file, and records of the court and of any other agency in the case (except any identifying information held by the Washington State Patrol). A juvenile petitioning to seal records shall give reasonable notice to the prosecutor and any agency whose records are sought to be sealed.

The court may seal juvenile records if it finds: (1) The juvenile is not required to register as a sex offender; (2) Full restitution has been paid; (3) There is no pending proceeding seeking conviction for a juvenile or criminal offense, (4) There is no pending proceeding seeking formation of a diversion agreement; and, (5) Based on the classification of offense, the following additional conditions are met-

- For class A felonies, (a) The juvenile has not been convicted of Rape in the First Degree, Rape in the Second Degree, or, Indecent Liberties with actual forcible compulsion; and, (b) Since the last date of release from confinement, including full-time residential treatment, if any, or entry of disposition, the juvenile spent five consecutive years in the community without committing any offense or crime that subsequently results in adjudication or conviction.
- For class B felonies, class C felonies, gross-misdemeanors, and misdemeanors, since the date of last release from confinement, including full-time residential treatment, if any, entry of disposition, or completion of a diversion agreement, the juvenile spent two consecutive years in the community without being convicted of any offense or crime.

If the court grants a petition to seal records, the official juvenile court file, the social file, and other records relating to the case shall be sealed, and the proceedings shall be treated as if they never occurred. The subject of the records may reply accordingly to any inquiry about the sealed records. However, any subsequent adjudication of a juvenile offense or a crime will nullify the sealing order. Also, subsequent charging of an adult felony will nullify the sealing order for the purposes of Chapter 9.94A RCW.

**2.9 FINALITY OF DISPOSITION AND BAIL EXONERATION**

**ANY PETITION OR MOTION FOR COLLATERAL ATTACK ON THIS JUDGMENT AND SENTENCE, INCLUDING BUT NOT LIMITED TO ANY PERSONAL RESTRAINT PETITION, STATE HABEAS CORPUS PETITION, MOTION TO VACATE JUDGMENT, MOTION TO WITHDRAW GUILTY PLEA, MOTION FOR NEW TRIAL OR MOTION TO ARREST JUDGMENT, MUST BE FILED WITHIN ONE YEAR OF THE FINAL JUDGMENT IN THIS MATTER, EXCEPT AS PROVIDED FOR IN RCW 10.73.100, RCW 10.73.090**

**ANY BAIL OR BOND POSTED UNDER THIS CAUSE NUMBER IS HEREBY EXONERATED, UNLESS IT WAS PREVIOUSLY FORFEITED BY SEPARATE ORDER.**

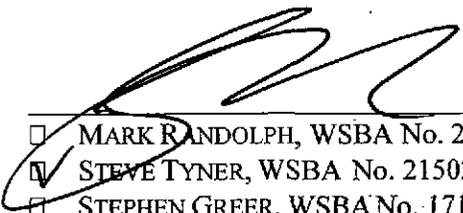
DATED AND SIGNED this 16<sup>th</sup> day of January, 2013

  
JUDGE-  JEANETTE DALTON  
 STEVE DIXON  
 Rexin D. Hall

PRESENTED BY-  
STATE OF WASHINGTON  
Deputy Prosecuting Attorney

APPROVED AS TO FORM-  
Attorney for Respondent

  
 JULIE GAFFNEY, WSBA No. 23155  
 TODD DOWELL, WSBA No. 18505  
 \_\_\_\_\_, WSBA No. \_\_\_\_\_

  
 MARK RANDOLPH, WSBA No. 26798  
 STEVE TYNER, WSBA No. 21503  
 STEPHEN GREER, WSBA No. 17166  
 JAMES REESE, WSBA No. 7806  
 \_\_\_\_\_, WSBA No. \_\_\_\_\_

PROBATION COUNSELOR-  
Kitsap Juvenile Department

RESPONDENT -

  
 KAY MORGAN  
 RONNIE MULLINS  
 \_\_\_\_\_

Nestor GATCALIAN  
Respondent's Address-  
\_\_\_\_\_  
\_\_\_\_\_  
( ) - \_\_\_\_\_

A copy of this Order of Disposition has been sent to \_\_\_\_\_ school at \_\_\_\_\_

**III. WARRANT OF COMMITMENT**

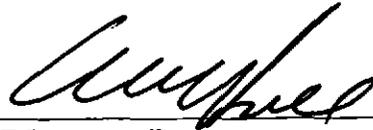
THE STATE OF WASHINGTON

TO: The Sheriff of Kitsap County, and to the proper officers of the Department of Social and Health Services.

- 3.1 The juvenile herein named has been convicted in the Superior Court of the State of Washington of the offenses listed in Section 1.1 of this order and the Court has ordered the juvenile be punished by serving not more than 52 to 65 weeks within the Division of Juvenile Rehabilitation.
- 3.2 YOU, THE SHERIFF, ARE COMMANDED to take and deliver the juvenile to the proper officers of the Department of Social and Health Services; and
- 3.3 YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF SOCIAL AND HEALTH, are commanded to receive the juvenile for classification, confinement and placement, as ordered in the Order of Disposition.

DATED AND SIGNED this 16<sup>th</sup> day of January, 2013

By the direction of the Honorable:

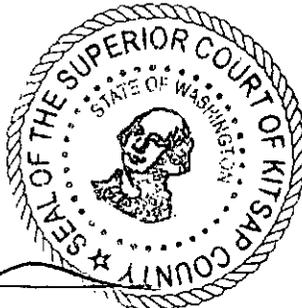


JUDGE-  JEANETTE DALTON

STEVE DIXON

Kevin D. Hall

DAVID W. PETERSON:  
County Clerk and ex-officio  
Clerk of the Superior Court



By:   
Deputy

RIGHT FOUR FINGERPRINTS TAKEN SIMULTANEOUSLY OF

OFFENDER Nester Gatchalian

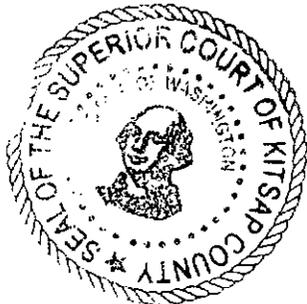
CASE NO. 12-8-00641-9



CERTIFICATE

I, DAVID W. PETERSON, County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of Kitsap, do hereby attest that the fingerprints above are the fingerprints of the offender's right hand, and were affixed by the said offender, Nester Gatchalian, on the 16<sup>th</sup> day of Jan. A.D. 2013, in my presence.

WITNESS MY HAND AND SEAL of said Superior Court this 16<sup>th</sup> day of January A.D. 2013.



DAVID W. PETERSON, County Clerk  
and Ex-Officio Clerk of the Superior Court

By: [Signature]  
Deputy

# **APPENDIX K**

I N C I D E N T D A T A	Agency Name <b>Bremerton Police Dept</b>		INCIDENT / INVESTIGATION REPORT				OCA: <b>B12-012268</b>		
	ORI <b>WA0180100</b>						<b>** Contains Restricted Names **</b>		
	#1	Crime Incident <b>RAPE OF CHILD 1</b>	CJA: <b>00816</b>	Local Statute: <b>9A.44.073</b>	<input type="checkbox"/> Att	<input checked="" type="checkbox"/> Com			
#2	Crime Incident	UCR:	Local Statute:	<input type="checkbox"/> Att	<input type="checkbox"/> Com	Occ To <b>11/29/2012</b>	:		
#3	Crime Incident	UCR:	Local Statute:	<input type="checkbox"/> Att	<input type="checkbox"/> Com	Dispatched <b>12/19/2012 15:45</b>			
						Arrived <b>15:45</b>			
						Cleared <b>15:45</b>			
Location of Incident <b>1025 Burwell St, Bremerton, WA</b>					Premise Type <b>Residence</b>		Offense Tract		
M O	How Attacked or Committed								
	Weapon / Tools <b>Hands, Fist, Feet, Etc</b>					Forcible Entry <input type="checkbox"/> Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> N/A			
V I C T I M	# Victims <b>2</b>	Type <b>Individual</b>	Injury <b>None</b>			Residency Status			
	Victim/Business Name (Last, First, Middle) <b>VII Gatchalian, Anamae JUVENILE SEXUAL ASSAULT VICTIM</b>				Victim of Crime # <b>1</b>	Age / DOB <b>09</b>	Race Sex <b>U F</b>		
					Relationship to Offenders <b>5/3/2003</b>	<b>U</b>	<b>F</b>		
	Home Address <b>1720 Olympic Ave, Bremerton, WA 98312</b>				Home Phone	Cell Phone			
	Employer Name/Address				Business Phone				
	VYR	Make	Model	Style	Color	Lic/Lis	VIN		
O F F E N D E R	Offender(s) Suspected of Using <input type="checkbox"/> Drugs <input checked="" type="checkbox"/> N/A <input type="checkbox"/> Alcohol <input type="checkbox"/> Computer		<b>Offender 1 OF1</b> Age: <b>46</b> Race: <b>B</b> Sex: <b>M</b>		<b>Offender 2</b> Age: Race: Sex:		<b>Offender 3</b> Age: Race: Sex:		
			<b>Offender 4</b> Age: Race: Sex:		<b>Offender 5</b> Age: Race: Sex:		<b>Offender 6</b> Age: Race: Sex:		
							Primary Offender Resident Status <input checked="" type="checkbox"/> Resident <input type="checkbox"/> Non-Resident <input type="checkbox"/> Unknown		
S U S P E C T	Name (Last, First, Middle) <b>OF Fowler, Vincent Lamont</b>				Home Address <b>Transient, WA</b>				
	Also Known As				Home Phone				
	Occupation <b>Janitor</b>			Business Address <b>Dentist Office</b>			Business Phone		
	DOB / Age	Race	Sex	Hgt	Wgt	Build	Hair Color <b>Black</b>	Eye Color <b>Brown</b>	
	<b>9/7/1966</b>	<b>46</b>	<b>B</b>	<b>M</b>	<b>5'07</b>	<b>160</b>			
	Hair Style							Hair Length	Glasses
	Scars, Marks, Tattoos, or other distinguishing features (i.e. limp, foreign accent, voice characteristics) <b>; Scars/Right Fore Abdom-; Scars/Right Arm-</b>								
	Hat		Shirt/Blouse		Coat/Suit		Socks		
	Jacket		Tie/Scarf		Pants/Dress/Skirt		Shoes		
	Was Suspect Armed?	Type of Weapon			Direction of Travel		Mode of Travel		
VYR	Make	Model	Style/Doors	Color	Lic/Lis	VIN			
Suspect Hate / Bias Motivated: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				Type:					
W I T N E S S	Name (Last, First, Middle)			D.O.B.	Age	Race	Sex		
	Home Address				Home Phone	Cell Phone			
	Employer				Business Phone				
Officer: <b>(423) DAVIS, KENNY</b>	SUPERVISOR:		INFO. ONLY:	F/UP: DET.	F/UP: LINE	PROSECUTOR:			

# Incident / Investigation Report

**Bremerton Police Dept**

OCA: **B12-012268**

O T H E R S  I N V O L V E D	CODES: DE-Deceased, DR-Driver, MN-Mentioned, MP-Missing Person, OT-Other, OW-Owner, PA-Passenger, PT-Parent/Guardian, RA-Runaway, RO-Registered Owner, RP-Reporting Party, VI-Victim					
	Code	Name (Last, First, Middle)	Type: <i>Individual</i>	Victim of Crime #	Age / DOB	Race   Sex
	<b>VI2</b>	<b>Gatchalian, Alena Cardwell JUVENILE SEXUAL ASSAULT...</b>		<b>1</b>	<b>11</b> 2/5/2001	<b>W</b>   <b>F</b>
	Home Address <b>1720 Olympic Ave, Bremerton, WA 98312</b>			Home Phone	Cell Phone	
Employer Name/Address			Business Phone			
N A R R A T I V E	Code	Name (Last, First, Middle)	Victim of Crime #	Age / DOB	Race   Sex	
	<b>PT1</b>	<b>Cardwell, Zeny M</b>		<b>35</b> 4/8/1977	<b>U</b>   <b>F</b>	
	Home Address <b>1720 Olympic, Bremerton, WA 98312</b>			Home Phone	Cell Phone <b>(360) 551-3283</b>	
	Employer Name/Address <b>None</b>			Business Phone		

On 11-29-12, while investigating a case regarding the sexual assaults of eleven year old Alena Gatchalian and her nine year old sister, Anamae Gatchalian, by their seventeen year old brother, Nestor Gatchalian (ref. B12-011408), I became aware of another individual, identified by Alena as Vincent Foster, who also sexually assaulted both her and Anamae. Foster is an associate of Zeny Cardwell, the girls' mother. The girls disclosed this during their respective child interviews conducted at the Kitsap Co. Prosecutor's Special Assault Unit (SAU).

This case has been assigned to me for follow up.

**I CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.**

\_\_\_\_\_  
 (Signature, Date)  
**(423) DAVIS, KENNY**

# Incident / Investigation Report

Bremerton Police Dept

OCA: **B12-012268**

## Additional Persons Involved

NameCode/#	Crime # Victim of	DOB	Age	Race	Sex	Phone(s)
<b>OT2 Gatchalian, Nestor Cardwell</b>		<b>11/30/1995</b>	<b>16</b>	<b>A</b>	<b>M</b>	H:
Address		<b>1907 9th St, Bremerton, WA 98337</b>				C:
Empl/Addr						B:

CODES: DE-Deceased, DR-Driver, MN-Mentioned, MP-Missing Person, OT-Other, OW-Owner, PA-Passenger,  
PT-Parent/Guardian, RA-Runaway, RO-Registered Owner, RP-Reporting Party, VI-Victim

# **APPENDIX L**

STATEMENT OF PROBABLE CAUSE

Clerk Code \_\_\_\_\_

CERTIFICATE OF PROBABLE CAUSE

SUSPECT NAME: Vincent L. Fowler (09-07-66)

COURT:  Superior  District  Juvenile  Bremerton Municipal

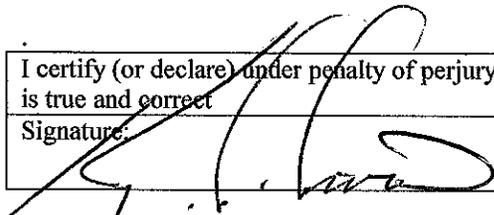
AGENCY CASE NUMBER: B12-012268

ARREST CRIME: RAPE OF A CHILD 1<sup>ST</sup> DEGREE  
CHILD MOLESTATION 1<sup>ST</sup> DEGREE

ARREST DATE & TIME:

ARREST LOCATION: WARRANT REQUESTED

- On 11-21-12, I received a CPS referral regarding the sexual assault of eleven year old ACG (02-05-01) and her younger sister, nine year old AG (05-02-03), by their seventeen year old brother, Nestor Gatchalian (ref. B12-011408). Nestor Gatchalian was charged and later pleaded guilty in that case.
- On 11-29-12, while being interviewed at the Kitsap Co. Prosecutor's Special Assault Unit (SAU) regarding their allegations against Nestor Gatchalian, the girls disclosed additional information that Vincent Fowler (09-07-66), a friend of their mother's, had also sexually assaulted them.
- On 12-04-12, the girls were brought back to SAU for an additional interview to gather further details regarding the sexual assaults by Vincent Fowler.
- Eleven year old ACG disclosed that she met Fowler through her friend, AAB (11-18-99) and AAB's mother, Stacey Bills. One night, when ACG was staying overnight at Fowler's house in Port Orchard a couple of years ago, she fell asleep on the couch in his living room. She awoke to Fowler touching her crotch on the outside of her pants with his hand. AGC said he stopped when she woke up and she went to the bathroom. When she got to the bathroom, she noticed her pants were unzipped. AGC said she told her friend AAB about what Fowler did. AGC said AAB told her that Fowler had done the same thing to her.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct		
Signature: 	Print Name: Detective Kenny D. Davis	Badge # 423

Date 03-29-13	Place: Bremerton, Wa.	Bremerton Police Department
	Case #: B12-012268	Page / of 3

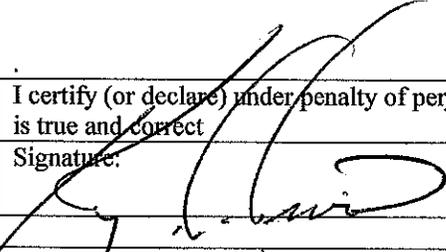
## STATEMENT OF PROBABLE CAUSE

- Nine year old AG disclosed in her interviews that when her mother and siblings were staying with her mother's friend, Virginia (Gina) Jordan at 2890 Clare Ave. in Bremerton, her mother's friend, Vincent (Vinnie) Fowler, stayed there too sometimes. AG said Fowler would touch her. AG described one incident when she was sleeping on the couch and everyone else was sleeping in another room. AG said Fowler pulled down her pants and underwear and put his finger inside of her private (her word for vagina) and it hurt.
- AG described another incident also at Gina's house in which she was sleeping on the bed and Fowler was touching her private. AG said Fowler's hand was really cold and he put it deep in her private, stretching it and it hurt. When asked by the child interviewer what Fowler said during this, AG said, "Nothing." AG said she pretended to be asleep and moved and Fowler stopped.
- ACG's friend, AAB, was later interviewed at SAU as well. Though she denied Fowler sexually assaulting her, she confirmed that ACG did tell her about waking up and finding her pants undone when ACG was staying the night with Fowler (ref B13-002396).
- I contacted ACG and AG's mother, Zeny Cardwell, and confirmed she stayed with Virginia Jordan from approximately July –November of 2011.

**ACG is eleven years old. Her sister, AG, is nine years old. Vincent (Vinnie) Fowler is forty six years old. The victims are under twelve years old and Fowler is at least thirty six months older than them. They are not married. During a period of time between approximately April-November of 2011, on one occasion, Fowler touched ACG on her vagina on the outside of her clothes, though she noticed her pants were unzipped as well. ACG was ten years old at this time.**

**AG disclosed that at least two occasions during July-November 2011, Vincent Fowler penetrated her vagina with his fingers when he thought she was asleep. She was seven or eight years old at the time.**

**Vincent Fowler is listed as transient and his current whereabouts are unknown.**

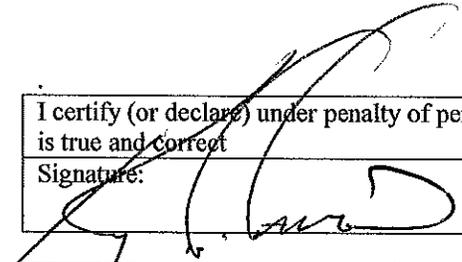
I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct		
Signature: 	Print Name: Detective Kenny D. Davis	Badge # 423
Date 03-29-13	Place: Bremerton, Wa.	Bremerton Police Department
	Case #: B12-012268	Page 2 of 3

STATEMENT OF PROBABLE CAUSE

Based on the clear and credible disclosures of both ACG and AG, I have probable cause to arrest Vincent L. Fowler for RAPE OF A CHILD 1ST DEGREE and CHILD MOLESTATION 1ST DEGREE.

I am requesting that a warrant be issued for his arrest for the above listed charges.

Report to prosecutor.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct		
Signature: 	Print Name: Detective Kenny D. Davis	Badge # 423
Date 03-29-13	Place: Bremerton, Wa.	Bremerton Police Department
	Case #: B12-012268	Page 3 of 3

# SUPPLEMENTAL REPORT

Bremerton Police Dept

OCA B12012268

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Investigator: (423) DAVIS, KENNY

Date / Time: 3/27/2013 13:51

Wednesday

Supplement Type: FOLLOW UP

Race: Sex: DOB: Age:

Employer:

Home Phone:

## FOLLOW UP INVESTIGATION

On 11-29-12, eleven year old Alena and nine year old Anamae Gatchalian were interviewed at the Kitsap County Prosecutor's Special Assault Unit regarding the sexual assaults of both of them by their brother Nestor Gatchalian (ref. B12-011408). It should be noted that Nestor Gatchalian pleaded guilty in that case.

During that interview Anamae also told the child interviewer about a man named Vinnie (identified as Vincent Lamont Fowler). Anamae said while she and her family were staying with her mother's friend, Gina (Virginia P. Jordan), Vinnie would touch her. Anamae described one incident when she was sleeping on the couch and everyone else was sleeping in another room. Anamae said Vinnie pulled down her pants and underwear and put his finger inside of her private and it hurt.

Anamae described another incident when she was in bed at Gina's house and Vinnie touched her bare vagina with his hand. Anamae said her private hurt from Vinnie touching it. Anamae said she is aware that Vinnie also touched her sister, Alena, because Alena told their mother, Zeny Cardwell. Anamae said her mother did not believe Alena, so Anamae decided not to tell her mother what Vinnie was doing to her.

Following the interview, Alena told the child interviewer that Vinnie's last name is Fowler. She described him as an African-American and he is 40 to 50 years old.

I later spoke with Sasha Mangahas, the child interviewer, who told me she was going to bring the girls back for a second interview to gather more information regarding Vincent Fowler.

On 12-04-12 Alena and Anamae returned to SAU for a second interview. During her interview, Alena disclosed information regarding Vincent Fowler touching her vagina.

Alena said a man named Vincent Fowler (Vinnie) touched her on her vagina when she stayed the night at his apartment. Alena said this incident happened about two years ago. Alena said she met Vinnie through her friend, Alicia Bills, and Alicia's mother, Stacey Bills. Alena said she stayed the night over at Vinnie's house one night because there was a woman there who had a dog she liked to play with. Alena said the woman left that evening and she was alone in the apartment with Vinnie. Alena said she slept on the living room couch and Vinnie slept on the floor. Alena said she woke to Vinnie touching her vagina on the outside of her clothes with his hand. When Alena woke, Vinnie stopped touching her and went back on the floor. Alena said she got up to use the bathroom and noticed her pants were unzipped. She stayed awake until she was certain Vinnie was asleep. The next day, Alicia Bills came over and Alena told her what Vinnie had done. Alicia told Alena that Vinnie had done the same thing to her. Alena and Alena tried to tell Alicia's mother what Vinnie had done to Alena, but Alicia's mom did not believe them.

Alicia Bills was later interviewed regarding her disclosure to Alena (ref. B13-002396). In that case, though Alicia did not disclose that Fowler touched her, Alicia did confirm that Alena told her about Fowler touching Alena.

## SUPPLEMENTAL REPORT

Bremerton Police Dept

OCA B12012268

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

Alena said when her mother started to hang around Vinnie several months later, she told her about Vinnie touching her. Alena said her mother did not believe her.

Anamae was then interviewed and relayed more information regarding being touched by Vincent Fowler.

Anamae described when she and her family were staying with her mom's friend Gina. She said it was dark and she was sleeping on the couch. She said Vinnie was there and pulled her pants down and began rubbing her private.

Anamae described another incident at Gina's house when she was sleeping on the bed with her little brother Felix. Anamae said Vinnie was touching her on her private. Anamae said his hand was really cold and he put it deep in her private stretching it and it hurt. The child interviewer asked Anamae what Vinnie said during this and Anamae said, "Nothing." Anamae said she pretended to be sleeping and moved and he stopped.

On 03-22-13, I phoned Zeny Cardwell. I asked her when she lived with her friend, Virginia Jordan. Zeny confirmed she did live with Gina for a short time and Vinnie stayed the night with her there off and on. Zeny said she and her children lived with Gina between July-November of 2011.

INTERVIEW: Virginia P. Jordan (DOB 11-13-53)  
2890 Clare Ave.  
Bremerton, Wa. 98310

On 03-28-13, I contacted Virginia (Gina) Jordan. She recalled Zeny staying at her house during the time Zeny spoke of. She did not remember Vinnie staying there.

Alena Cardwell Gatchalain is eleven years old. Her sister, Anamae Gatchalian, is nine years old. Vincent (Vinnie) Fowler is forty six years old. The victims are/were under twelve years old and Fowler is at least thirty six months older than them. They are not married. On or about April-November of 2011, Fowler touched Alena on her vagina on the outside of her clothes while he thought she was asleep, though she noticed her pants were unzipped. Alena would have been ten years old at this time. On two occasions during this time, Fowler digitally penetrated Anamae's vagina. At that time, Anamae would have been approximately seven years old.

Vincent Fowler's current whereabouts are unknown. He is listed as a transient in ILEADS.

Based on the clear and credible disclosures of both Alena and Anamae, I have probable cause to arrest Vincent L. Fowler for RAPE OF A CHILD 1ST DEGREE and CHILD MOLESTATION 1ST DEGREE.

I submit this case to the prosecutor with a request that warrants be issued for Fowler's arrest for the above mentioned charges.

Report to prosecutor.

Detective Kenny Davis

SUPPLEMENTAL REPORT

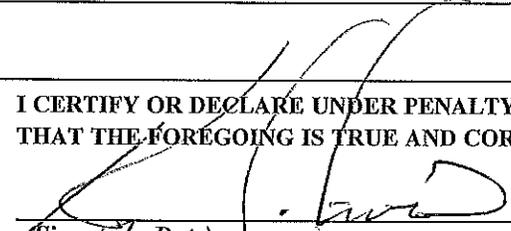
Bremerton Police Dept

OCA B12012268

THE INFORMATION BELOW IS CONFIDENTIAL - FOR USE BY AUTHORIZED PERSONNEL ONLY

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I CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.

 03-29-13  
\_\_\_\_\_  
(Signature, Date)  
(423) DAVIS, KENNY  
KITSAP COUNTY, WA

INCIDENT DATA

MO

VICTIM

OFFENDER

SUSPECT

WITNESSES

Agency Name <b>Bremerton Police Dept</b>		<b>INCIDENT / INVESTIGATION REPORT</b>				OCA: <b>B12-012268</b>	
ORI <b>WA0180100</b>		<b>** Contains Restricted Names **</b>				Date / Time Reported <b>WE Dec 19, 2012 15:44</b>	
#1	Crime Incident <b>RAPE OF CHILD 1</b>	CJA: <b>00816</b>	Local Statute: <b>9A.44.073</b>	<input type="checkbox"/> Att	<input checked="" type="checkbox"/> Com	Occ From <b>01/01/2010</b>	:
#2	Crime Incident	UCR:	Local Statute:	<input type="checkbox"/> Att	<input type="checkbox"/> Com	Occ To <b>11/29/2012</b>	:
#3	Crime Incident	UCR:	Local Statute:	<input type="checkbox"/> Att	<input type="checkbox"/> Com	Dispatched <b>12/19/2012 15:45</b>	
				<input type="checkbox"/> Att	<input type="checkbox"/> Com	Arrived <b>15:45</b>	
				<input type="checkbox"/> Att	<input type="checkbox"/> Com	Cleared <b>15:45</b>	
Location of Incident <b>1025 Burwell St, Bremerton, WA</b>					Premise Type <b>Residence</b>		Offense Tract
How Attacked or Committed							
Weapon / Tools							
Forcible Entry <input type="checkbox"/> Yes <input type="checkbox"/> No <input checked="" type="checkbox"/> N/A							
# Victims <b>2</b>	Type <b>Individual</b>	Injury <b>None</b>			Residency Status		
Victim/Business Name (Last, First, Middle) <b>VI Gatchalian, Anamae JUVENILE SEXUAL ASSAULT VICTIM</b>					Victim of Crime # <b>1</b>	Age / DOB <b>09</b>	Race <b>U</b>
					Relationship to Offenders	<b>5/3/2003</b>	Sex <b>F</b>
Home Address <b>1720 Olympic Ave, Bremerton, WA 98312</b>					Home Phone		Cell Phone
Employer Name/Address					Business Phone		
VYR	Make	Model	Style	Color	Lic/Lis	VIN	
Offender(s) Suspected of Using <input type="checkbox"/> Drugs <input checked="" type="checkbox"/> N/A <input type="checkbox"/> Alcohol <input type="checkbox"/> Computer		Offender 1 <b>OF1</b> Age: <b>46</b> Race: <b>B</b> Sex: <b>M</b>		Offender 2 Age: Race: Sex:		Offender 3 Age: Race: Sex:	
		Offender 4 Age: Race: Sex:		Offender 5 Age: Race: Sex:		Offender 6 Age: Race: Sex:	
Primary Offender Resident Status <input checked="" type="checkbox"/> Resident <input type="checkbox"/> Non-Resident <input type="checkbox"/> Unknown							
Name (Last, First, Middle) <b>OF Fowler, Vincent Lamont</b> Also Known As					Home Address <b>Transient, WA</b> Home Phone Cell Phone		
Occupation <b>Janitor</b>		Business Address <b>Dentist Office</b>					
Business Phone		DOB. / Age <b>9/7/1966 46</b>		Race <b>B</b>	Sex <b>M</b>	Hgt <b>5'07</b>	Wgt <b>160</b>
				Build	Hair Color <b>Black</b>	Eye Color <b>Brown</b>	
				Hair Style	Hair Length	Glasses	
Scars, Marks, Tatoos, or other distinguishing features (i.e. limp, foreign accent, voice characteristics) <b>; Scars/Right Fore Abdom-; Scars/Right Arm-</b>							
Hat		Shirt/Blouse		Coat/Suit		Socks	
Jacket		Tie/Scarf		Pants/Dress/Skirt		Shoes	
Was Suspect Armed?		Type of Weapon			Direction of Travel		Mode of Travel
VYR	Make	Model	Style/Doors	Color	Lic/Lis	VIN	
Suspect Hate / Bias Motivated: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No					Type:		
Name (Last, First, Middle)				D.O.B.	Age	Race	Sex
Home Address					Home Phone		Cell Phone
Employer					Business Phone		
Officer: <b>(423) DAVIS, KENNY</b>	SUPERVISOR: <b>416 (Rc)</b>		INFO: ONLY:	F/UP: DET. <b>423</b>	F/UP: LINE	PROSECUTOR: <b>SAU</b>	<b>CPS</b>

# Incident / Investigation Report

**Bremerton Police Dept**

OCA: **B12-012268**

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CODES: DE-Deceased, DR-Driver, MN-Mentioned, MP-Missing Person, OT-Other, OW-Owner, PA-Passenger, PT-Parent/Guardian, RA-Runaway, RO-Registered Owner, RP-Reporting Party, VI-Victim

Code	Name (Last, First, Middle)	Type: <i>Individual</i>	Victim of Crime #	Age / DOB	Race	Sex
VI2	<b>Gatchalian, Alena Cardwell JUVENILE SEXUAL ASSAULT...</b>		1	11 2/5/2001	W	F

Home Address <b>1720 Olympic Ave, Bremerton, WA 98312</b>	Home Phone	Cell Phone
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Employer Name/Address	Business Phone
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Code	Name (Last, First, Middle)	Type: <i>Individual</i>	Victim of Crime #	Age / DOB	Race	Sex
PT1	<b>Cardwell, Zeny M</b>			35 4/8/1977	U	F

Home Address <b>1720 Olympic, Bremerton, WA 98312</b>	Home Phone	Cell Phone <b>(360) 551-3283</b>
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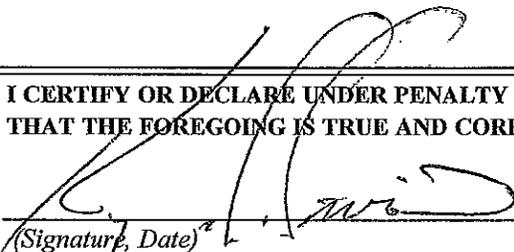
Employer Name/Address <b>None</b>	Business Phone
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On 11-29-12, while investigating a case regarding the sexual assaults of eleven year old Alena Gatchalian and her nine year old sister, Anamae Gatchalian, by their seventeen year old brother, Nestor Gatchalian (ref. B12-011408), I became aware of another individual, identified by Alena as Vincent Foster, who also sexually assaulted both her and Anamae. Foster is an associate of Zeny Cardwell, the girls' mother. The girls disclosed this during their respective child interviews conducted at the Kitsap Co. Prosecutor's Special Assault Unit (SAU).

This case has been assigned to me for follow up.

**I CERTIFY OR DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION AND BELIEF.**

*(Signature, Date)*  
  
**(423) DAVIS, KENNY**  
**KITSAP COUNTY, WA**

# Incident / Investigation Report

*Bremerton Police Dept*

OCA: **B12-012268**

## Additional Persons Involved

NameCode/#	Crime # Victim of	DOB	Age	Race	Sex	Phone(s)
<b>OT2</b>	<b>Gatchalian, Nestor Cardwell</b>	<b>11/30/1995</b>	<b>16</b>	<b>A</b>	<b>M</b>	H:
Address	<b>1907 9th St, Bremerton, WA 98337</b>					C:
Empl/Addr						B:

CODES: DE-Deceased, DR-Driver, MN-Mentioned, MP-Missing Person, OT-Other, OW-Owner, PA-Passenger,  
PT-Parent/Guardian, RA-Runaway, RO-Registered Owner, RP-Reporting Party, VI-Victim

# Kitsap County Prosecutor's Office Child Interview Report

Date Reported (Referred)–November 26, 2012

Agency–Bremerton Police Department - WA0180100 Report No. 2012BP011408

Date of Interview–11/29/12

	Victim	Suspect
Name	Anamae C. Gatchalian	Nestor Cardwell Gatchalian
Address	1720 Olympic Avenue	
City/State	Bremerton, Wa 98312	
Phone	360-551-3283	
Race	Asian/white	
DOB	05/03/2003, age 9	11/30/1995, age 17
Sex	Female	Male

	Non-Offending Parent	Collateral Contacts
Name	Zeny Cardwell	
Phone	360-551-3283	

Location of Incident–1720 Olympic Avenue, Bremerton, WA, [incident address zip]

Date(s) of Incident–November 20, 2012

### Interview Summary

Anamae came to the Special Assault Unit with her mother and her older sister. She was interviewed alone. Anamae appeared developmentally normal. She promised to tell me the truth. Anamae disclosed that her older brother, Nestor, sexually assaulted her on numerous occasions.

Anamae described an incident that occurred at her Aunt Michelle's house when she was 9. She stated that she was sleeping on the couch in the living room when Nestor pulled her pants and underwear down and rubbed the bare skin of her private with his hand.

She also told me about at time when she and her family were living at the Griffen Glen apartments. She stated that she and Nestor were alone in the living room when Nestor made her touch his private. She stated that Nestor put her hand on his private and made her rub it. She described his private as wet and dry. She stated that he had a blanket over his lap. She stated that he stopped when he heard someone coming.

Anamae stated that on numerous occasions at the Griffen Glen apartments, Nestor would take her into the bathroom and lock the door. She stated that this was usually after she had done something wrong and was

in trouble. Anamae stated that Nestor would pull her pants and underwear down, make her bend over and hold on the toilette and say she was sorry 100 times while he put his private in and out of her butt. She stated that her butt felt wet after Nestor would do this. She stated that when she pooped afterwards, it was hard to get the poop out and it stung when she peed. Anamae stated that she believes she was 8 years old when she was living at the Griffin Glen apartments.

Anamae stated that Nestor put his private in her butt once when she and her family were staying at Gina's house. She stated that the incident occurred in the living room when no one was there. She stated that she was lying on her stomach during this incident.

Anamae described an incident that occurred since she and her family have been living on Olympic Ave. She stated that when she got back from school, Nestor made her sit on his lap while he rubbed his private against her butt. She advised that this happened on one occasion.

Anamae also told me about a man named Vinnie. She stated that while she and her family were staying with Gina, Vinnie would touch her. She described one incident where she was sleeping on the couch and every one else was sleeping in another room. She advised that Vinnie pulled her pants and underwear down and put his finger inside of her private and it hurt. She described another incident where she was in bed at Gina's house and Vinnie touched her bare vagina with his hand. She stated that her private hurt from Vinnie touching it. Anamae stated that she is aware that Vinnie also touched her sister, Alena, because Alena told her mother. Anamae stated that her mother did not believe Alena so Anamae decided not to tell her mother about what Vinnie was doing.

Note—Following the interview, Alena told me that Vinnie's last name is Fowler. He is African American and is 45 to 50 years old. The mother, Zeny, told me that Nestor may be staying with her sister, Michelle Cardwell on 9<sup>th</sup> Street in Bremerton.

Child Interviewer: Sasha Mangahas

#### **Recording Status**

The interview was recorded on DVD, kept on file with the prosecutor's office

Our File No. 12-185188-10

# Kitsap County Prosecutor's Office Child Interview Report

Date Reported (Referred)–November 26, 2012

Agency–Bremerton Police Department - WA0180100 Report No. 2012BP011408

Date of Interview–12/4/12

	Victim	Suspect
Name	Anamae C. Gatchalian	Nestor Cardwell Gatchalian
Address	1720 Olympic Avenue	
City/State	Bremerton, Wa 98312	
Phone	360/551-3283	
Race	Asian	
DOB	05/03/2003, age 9	11/30/1995, age 17
Sex	Female	Male

	Non-Offending Parent	Collateral Contacts
Name	Zeny Cardwell	
Phone	Same as victim	

Location of Incident–1720 Olympic Avenue, Bremerton, WA,

Date(s) of Incident–November 20, 2012

### Interview Summary

Anamae came to the Special Assault Unit with her mother. She was interviewed alone. Anamae promised to tell me the truth.

Anamae told me about several more times that Nester made her touch his private. She stated that the incidents occurred when she and her family were living at Viewcrest Village and she was about 8. Anamae advised that on one or two occasions, Nester sat next to her on the couch, put a blanket over their legs and made her touch his private. She described him pulling his pants and underwear down and putting her hand on his private and making her hand rub up and down. She stated that there was wetness coming out of the end of his private and his private was a little bit hard.

Anamae also described the touching by Vincent Fowler in greater detail. She advised that during the incident which occurred in the bed at Gina's house, Vinnie hand felt cold and it felt like he was putting it deep into her private and stretching it. She described it hurting.

Child Interviewer: Sasha Mangahas

**Recording Status**

The interview was recorded on DVD, kept on file with the prosecutor's office

Our File No. 12-185188-10

# Kitsap County Prosecutor's Office Child Interview Report

Date Reported (Referred)—November 26, 2012

Agency—Bremerton Police Department - WA0180100 Report No. 2012BP011408

Date of Interview—11/29/12

	Victim	Suspect
Name	Alena Nmi Gatchalian	Nestor Cardwell Gatchalian
Address	1720 Olympic Avenue	
City/State	Bremerton, Wa 98312	
Phone	[pa phone1]	
Race	[race description]	
DOB	02/05/2001, age 11	11/30/1995, age 17
Sex	Female	Male

	Non-Offending Parent	Collateral Contacts
Name	Zeny Cardwell	
Phone	360-551-3283	

Location of Incident—1720 Olympic Avenue, Bremerton, WA,

Date(s) of Incident—November 20, 2012

### Interview Summary

Alena came to the Special Assault Unit with her mother and younger sister. She was interviewed alone.

Alena appeared developmentally normal. She promised to tell me the truth. Alena told me that her brother Nester has made her touch his thing on three occasions.

Alena advised that the last incident occurred during the first week of this November. She stated that Nester was sitting on her bed with her and grabbed her foot and put it on his private part. She stated that he had a blanket over his lap. Alena advised that Nester told her that he wanted to show her how to break a foot. She stated that she pulled her foot away and told him to stop. She stated that he got up, pulled up his pants and left. She advised that she did not see his private.

Alena described another incident that occurred at her mother's friend's house, (Gina). She stated that she was sleeping in the same bed with her siblings when Nester grabbed her hand and put in on the bare skin of his private. She stated that his private felt hairy and he made her move her hand on his private. She stated that she pulled her hand away. Alena stated that his incident occurred when she was 11. She stated that Gina lives in Bremerton near the Warren Ave. Bridge.

Alena stated that another incident occurred when she was 11 when she and her family were staying at a motel because they didn't have any money. She advised that they were in the bed and Nestor was at the bottom of the bed. Alena stated that Nestor grabbed her foot and put it on his private. She stated that she pulled her foot away. Alena advised that the motel is in Bremerton near the Walgreens and Rite Aide.

Alena told me that she remember when she and her family were living in some apartments that Nestor would take her sister, Anamae, into the bathroom and do stuff to her. She advised that she doesn't know exactly what Nestor was doing to Anamae.

Alena stated that she recently told her mother about what Nestor had done and her mother made Nestor leave. She believes Nestor is staying with her aunt, Michelle Cardwell.

Child Interviewer: Sasha Mangahas

**Recording Status**

The interview was recorded on DVD, kept on file with the prosecutor's office

Our File No. 12-185188-10

# Kitsap County Prosecutor's Office Child Interview Report

Date Reported (Referred)–November 26, 2012

Agency–Bremerton Police Department - WA0180100 Report No. 2012BP011408

Date of Interview–12/4/12

	Victim	Suspect
Name	Alena Nmi Gatchalian	Nestor Cardwell Gatchalian
Address	1720 Olympic Avenue	
City/State	Bremerton, Wa 98312	
Phone	360-551-3283	
Race	Asian	
DOB	02/05/2001, age 11	11/30/1995, age 17
Sex	Female	Male

	Non-Offending Parent	Collateral Contacts
Name	Zeny Cardwell	
Phone	Same as victim	

Location of Incident–1720 Olympic Avenue, Bremerton, WA, [

Date(s) of Incident–November 20, 2012

### Interview Summary

Alena was interviewed at the Special Assault Unit. She was interviewed alone. Alena appeared developmentally normal and she promised to tell me the truth.

Alena told me that a man named Vincent Fowler touched her on her vagina when she stayed the night at his apartment. She advised that the incident happened about two years ago. She met Vincent (Vinnie) through her friend Alicia Bills and Alicia's mother, Stacey Bills. She advised that she stayed the night at his house because there was a woman there who had a dog she liked to play with. She advised that the women left that evening and she was alone in the apartment with Vinnie. Alena stated that she slept on the living room couch and Vinnie slept on the floor. She awoke to Vinnie touching her vagina on the outside of her clothes with his hand. When she woke, Vinnie stopped touching her and went back on the floor. She advised that she got up to use the bathroom and noticed that her zipper was down. Alena stated that she stayed awake until she was sure Vinnie was asleep. The next morning, Alena asked Vinnie if Alicia Bills could come over. Alicia came over and Alena told Alicia what Vinnie had done to her. Alicia told Alena that Vinnie had done the same thing to her. Alicia and Alena tried to tell Alicia's mom what Vinnie had done to Alena but Alicia's mom would not believe them.

Alena advised that when her mother started to hang around Vinnie several months later, she told her about Vinnie touching her. Alena stated that her mother didn't believe her.

Child Interviewer: Sasha Mangahas

**Recording Status**

The interview was recorded on DVD, kept on file with the prosecutor's office

Our File No. 12-185188-10

# **APPENDIX M**

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
 ) No. 51029-4  
 Respondent, )  
 ) Declaration of Counsel, Craig G. Kibbe  
 v. )  
 )  
 VINCENT FOWLER, )  
 )  
 )  
 Appellant. )

Declaration of Counsel for Vincent Fowler:  
I, Craig Kibbe, being first duly sworn, states on oath:

I was court-appointed trial counsel for Vincent Fowler in the Kitsap County Superior Court case #13-1-00466-4. My understanding is that Fowler is seeking some relief from the Court of Appeals and has made certain statements regarding his legal representation. Among the matters discussed in his Supplemental Brief of Petitioner is that I failed to make contact with material witnesses. On pages 10 and 11 of the brief it cites a Lindsay Warner who claims that she never spoke with any member of the defense. However, defense investigator Sandy Francis did interview Ms. Warner by phone on 9/19/13. Ms. Francis wrote a report. Ms. Warner indicated that Fowler had never done anything to her children. Nothing appears in the report about a “three

DECLARATION OF COUNSEL, CRAIG G. KIBBE

1 foot rule.” Warner had never met nor seen Fowler with the victims in this case.

2 Another issue that is brought up in Fowler’s supplemental brief is that a potential witness,  
3 Monica Boyle, was not sought as a defense witness. In discussions I had with Fowler during  
4 2013 he indicated that she moved out of the apartment shortly after the incident in 2011 occurred  
5 involving ACG. He did not know of her whereabouts. Therefore, I was unable to reach her to  
6 interview her to determine if she would have been a defense witness in this case. It should be  
7 noted that her testimony according to the supplemental brief p. 16 was that ACG was never at her  
8 residence which is completely contradictory to Fowler’s testimony which is summarized on p.13  
9 on the supplemental brief.

10 A few of the others issues that Fowler brought up in his supplemental brief include trial  
11 preparation and his decision to testify. I met with Fowler regularly and often during the course of  
12 my representation of him. The defense of this case was ultimately one of general denial. We did  
13 not know whether Fowler would need to testify but did prepare for that eventuality. His  
14 testimony was well conceived and consistent with his theory of the case. Another issue that was  
15 raised was accusing the victims’s brother, Nestor, as an “other suspect.” This issue was discussed  
16 on the record in the trial during the Motions in Limine. I made a record at the time of why  
17 defense was not seeking to admit that evidence. I believe it is prohibited under the “rape shield  
18 law” and may be more harmful than helpful. That is mentioned in the supplemental brief on p.11.  
19 Another issue that has been brought up is why a defense expert on lying was not retained for the  
20 trial. I believe that a court would not allow such evidence since it would interfere with one of  
21 their primary tasks of a juror, to determine who is being truthful. Also, the circumstances of the  
22 disclosure of the victims provided none of the evidence consistent with motives to lie against  
23 Fowler.

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DECLARATION OF COUNSEL, CRAIG G. KIBBE

**KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION**

**June 12, 2018 - 2:18 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

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