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I. INTRODUCTION

With the benefit of an easily-gained conviction and sentence involving many years of incarceration behind it in the matter of Petitioner Jeffrey Taylor, the State now seeks to protect that conviction by flippantly dismissing the severe constitutional infirmities of the trial created by the complete failures of Taylor's attorney to do *anything* more than show up at trial in this case. For all the reasons discussed in Petitioner's opening brief and below, the Court should reject the State's dismissive and, at times constitutionally offensive arguments that there is, in fact, *no* level of lack of representation which is low enough to suffice to meet the prejudice prong of the Strickland test of ineffectiveness of counsel. Petitioner urges the Court to recognize – contrary to the State's assertions – that his attorney's performance, which included the complete failure to litigate any aspect of the case prior to trial, and the failure to retain *any* records or have much memory of anything now, cannot be justified in hindsight with the argument that he is not required to maintain and retain a file evidencing his work, or that he is not required to file and argue any pre-trial motions or investigate the possible necessity for expert witness investigation and testimony. Should the Court accept this circular reasoning, the logical result will be to turn Washington into a jurisdiction in which all criminal defense representation always meets constitutional

muster when the attorney himself makes an adequate review of his performance impossible by discarding all files immediately upon entry of a guilty verdict. Indeed, an adoption of the State's argument would likely allow even a defense attorney's complete failure to ever even open or maintain a file at all, since there is no rule requiring such.

II. ARGUMENT

A. TRIAL COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS.

In its response brief, the State argues that defense trial counsel Ron Sergei's performance was constitutionally sufficient under both prongs set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and further elaborated and clarified in, e.g. *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) and *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987).

Petitioner agrees that the State has adequately set forth the *standards and burdens* established by state and federal courts in those cases, *i.e.* that he must show both (a) deficient performance based on the entire record before the reviewing court; and (b) actual prejudice to him

caused by such deficient performance. Petitioner submits, however, that the State has misapplied those standards and burdens to the facts of *this case* in arguing its conclusion that Mr. Taylor was afforded Constitutionally sufficient effective assistance of counsel such that the guilty verdicts on three counts of Rape of a Child in the First Degree and the corresponding sentence of 195 months to life imprisonment should be upheld without further review and, at a minimum, a new trial.

Defense Trial Counsel's Performance Fell Below Constitutional Standards of Adequacy.

The issue of Mr. Sergei's performance, including a presentation of whatever facts are now still available to Petitioner, his counsel, and his investigator, has been fully briefed in Mr. Taylor's opening brief. The State, however, in its attempt to protect a Constitutionally infirm verdict and sentence, has fully ignored most of those facts, and the gravity of the errors.

The State, through its argument in response to Petitioner's opening brief, seeks to again benefit from Mr. Sergei's complete lack of preparation and effectiveness in his representation of Mr. Taylor. This time, however, rather than capitalizing on such ineffectiveness before a jury to gain its advantage and verdict, it is now defending Mr. Sergei's performance as perfectly adequate and always consisting of acceptable

and reasonable “strategy” decisions which should not be upset with the benefit of hindsight. Far from this benign characterization, however, it simply cannot be ignored – as the State would undoubtedly prefer – that Mr. Sergei did nothing to provide Mr. Taylor with the adequate representation the Constitution affords him.

As set forth in Petitioner’s opening brief, Mr. Sergei cannot be said to have adequately investigated and prepared this case, pre-trial. Cases involving allegations of sexual abuse of children, and especially young children as here, are particularly difficult cases and almost always present complicated issues involving the child’s alleged disclosures of the allegations. Not only are the fact of disclosure, and the circumstances surrounding such alleged disclosure themselves often an area of dispute and fruitful investigation, but the actions of, *e.g.* law enforcement, family, and treatment providers in the aftermath of the alleged disclosure become exceedingly important areas for investigation by the defendant’s attorney and investigator(s).

It is unfortunately not unheard of, or even overly uncommon, for alleged child victims of sexual misconduct to either falsely accuse or, after the initial accusation/disclosure, to falsely exaggerate the accusation to include significantly more acts, acts of a significantly greater degree of criminal conduct, or both. The latter (*i.e.* the post-initial disclosure

allegations) often come as a result of improper questioning of the child by law enforcement and/or mental health treatment providers.

Petitioner asserts that it is a primary duty of an effective defense attorney to explore and investigate these issues in order to adequately prepare for trial in these kinds of cases. The failure to do so puts defense counsel in the precarious position of (a) having developed no evidence of his own, with which to develop an effective pre-trial motions strategy and practice; and (b) to vigorously attack the allegations and charges against his client at trial. A defense attorney, who, like Mr. Sergei, fails to engage in such necessary pre-trial investigation and litigation, is ultimately left to try his client's case based *solely* on the information contained within the law enforcement reports provided him by the State in the regular course of discovery. The result, as was the case here, is invariably one in which defense counsel's cross-examinations of the State's most important witnesses are nothing more than lame attempts to pick at the edges of testimony given on direct and in police reports. This cannot be considered "effective" representation, particularly in cases of this subject matter, in which many jurors implicitly seem to require a showing of the falseness of the allegations or exaggerations thereof, or the impropriety of the child interviews by law enforcement itself. Mere inquiries along the lines of

“isn’t it possible” of the State’s witnesses on cross cannot provide such a showing.

The complicated nature of alleged child disclosure of improper sexual contact by an adult, as well as the proper – or improper – handling of such disclosure after it has allegedly occurred, usually requires not only adequate *investigation* by defense counsel, but also the employment of an expert witness specializing in precisely these issues. Petitioner acknowledges that Mr. Sergei served as appointed counsel in this case, and therefore the employment of any such expert witnesses would not have been a given, but would likewise have to have been appointed by the Court. While there is certainly no guarantee that the Court would have appointed such an expert, the pertinent fact for this PRP is that Mr. Sergei *never even requested one*. Based upon his failure to retain whatever “file” he may have had at the time of trial, and the same failure by his investigator, it is impossible to know whether or not Mr. Sergei even identified this as a possible area of inquiry requiring a motion for appointment of such an expert. The State’s response brief uses these failures to its advantage by arguing only that there is no requirement that Mr. Sergei have done any of the above in his representation of Mr. Taylor. Under the State’s theory, the fact that Mr. Sergei showed up and tried the case, however poorly, is sufficient to meet the requirements of

Constitutionally effective assistance of counsel. The Court should reject this argument.

In addition to the issues surrounding child disclosures of these allegations, the second glaring issue in this case which required an expert witness at trial is that of Mr. Taylor's alleged "confession." As discussed in Taylor's opening brief in this PRP, Dr. Richard Leo of the University of San Francisco School of Law reviewed the alleged "confession" at issue here and concluded that the statements are (a) ambiguous, and (b) cannot be interpreted as incriminating, due to the full facts and circumstances of the interrogation and the methods employed therein. Again, Mr. Sergei wholly failed to even *request* appointment of a confessions expert such as Dr. Leo in this case, and ultimately was left to make a feeble and unconvincing attempt at explaining the "confession" to the jury on his own.

The State's response to Mr. Sergei's failures here, too, is only that, in light of Sergei's mere reference to the "confession" in his simple cross-examination of Detective Gardner and in his closing argument, the issue amounted to nothing more than a "credibility determination," which is left to the sole province of the jury (*citing State v. Meyers*, 133 Wn.2d 26, 941 P.2d 1102 (1997)). Overall, according to the State's implicit argument that there is no such thing as ineffective assistance of counsel when an

attorney shows up for trial, this, too, is characterized as a product of Mr. Sergei's reasonable "tactical decisions," which should not be reviewed in hindsight. The cumulative effect of Sergei's failures to investigate centrally important issues, to litigate the case prior to trial, and to request appointment of important experts goes well beyond the scope of what this Court should consider to be reasonable "tactical decisions," however. Mr. Taylor's trial counsel's performance was Constitutionally deficient in this case.

B. MR. TAYLOR SUFFERED ACTUAL PREJUDICE CAUSED BY HIS COUNSEL'S DEFICIENT PERFORMANCE.

As with the entirety of the response to Petitioner's opening brief, the State impliedly argues that Mr. Taylor has not been prejudiced by Sergei's complete failure to adequately represent him because, in its estimation there can be no such thing as ineffective assistance of counsel. Mr. Sergei's lack of preparation, failure to vigorously litigate this case during the pre-trial stages, and failure to seek appointment of expert witnesses was at the time capitalized on by the State in a number of ways, *e.g.* increasing the number and severity of the charges from what was essentially one count of child molestation based upon the initial (and – even if accurate, which Petitioner denies – the only disclosure untainted by improper child interview protocol) to three counts of First Degree Rape of

a Child. Petitioner notes here that he was acquitted of the Child Molestation Charge, and received his 195-life sentence on the highly questionable charges that would have been more effectively combated by competent counsel. Now, after having obtained the convictions and sentence, the State argues that Sergei's representation was effective, that every failure was a legitimate "tactical decision," and that therefore, of course, Mr. Taylor cannot have been prejudiced.

The State does set forth the appropriate standard for showing prejudice, stating that Taylor must now "show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Citing McFarland*, 127 Wn.2d at 334-335 (add'l cites omitted). However, the conclusion that Taylor was *not* prejudiced because "the relative wisdom or lack thereof of [trial] counsel's decisions should not open for review after conviction" (*Citing State v. Adams*, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978)) requires one to look beyond each and every one of Mr. Sergei's failures to conclude that, even with different counsel, Mr. Taylor would have been convicted of at least the three ROC 1 charges for which he is currently imprisoned.

This is an untenable leap, considering that, by effectively investigating and employing an appropriate expert to discuss the subsequent "disclosures" of ever more severe conduct by Mr. Taylor by

the alleged victim, any reasonable juror could well have found that all allegations which arose subsequent to the disclosure of one instance of Child Molestation could not be proved beyond a reasonable doubt. The fact that Mr. Taylor was acquitted on the actual initially-disclosed Child Molestation allegation only strengthens the argument that failure to adequately attack the subsequent, and much more severe, allegations directly prejudiced Mr. Taylor by resulting in convictions that may well keep him imprisoned for the remainder of his lifetime.

Adding the failure to adequately address Mr. Taylor's alleged "confession" only further strengthens the prejudice he has suffered from Mr. Sergei's ineffectiveness in this case. The failure to request appointment of an expert to fully explain the serious problems with this "confession" cannot, as the State now desires, be explained away by pointing out that Mr. Sergei made mention of the "ambiguity" of the confession in his simple examinations and in closing argument. As Dr. Leo explained in his Declaration attached to Petitioner's opening brief, "[i]ncriminating statements, admissions, and/or confessions are universally treated as damning and compelling evidence of guilt, and if false can, and often do, lead to the wrongful conviction of the innocent." *See* Opening Brief of Petitioner at 22, *citing* the Declaration of Richard Leo at Paragraph 16, attached thereto as App. B). Such "universally"

“damning and compelling” statements cannot be effectively attacked at trial by an attorney alone, without providing the jury with the assistance of an expert such as Dr. Leo – and they certainly cannot be effectively attacked by an attorney who has done nothing in the way of vigorous pretrial investigation and litigation of the issue to determine the precise circumstances, tactics, and police recording techniques – or lack thereof – of the alleged “confession” itself.

Mr. Taylor received a sentence of 195 months at the lowest end to a possible life in prison on three charges of ROC 1. The alleged factual basis for those charges was not even contained in the alleged victim’s initial disclosure of the alleged wrongdoing. The Court should now reject the State’s hindsight defense of Taylor’s trial counsel’s deficient performance and find the obvious prejudice to his Constitutional rights to effective assistance of counsel.

III. CONCLUSION

This case involves highly questionable allegations of very serious magnitude – First Degree Rape of a Child and First Degree Molestation of a Child, including multiple, shifting, and ever-exaggerating child disclosures as to the frequency and severity of the alleged conduct. The result was that the jury, in absence of any effective cross-examination going beyond the mere police reports, or expert testimony regarding the

child disclosures or the alleged “confession,” found Mr. Taylor guilty of the three most serious – and later disclosed – charges, and Mr. Taylor was given a lengthy sentence which could well result in him spending the remainder of his life in prison on that basis.

The caselaw is clear that a petitioner can meet the two-pronged requirements for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 and its progeny by showing that his trial counsel failed to conduct adequate pretrial investigation of the case. *Jones v. Wood*, 114 F.3d 1002 (9th Cir. 1997).

However, the State now urges the Court to adopt as “effective,” trial counsel’s performance where, objectively, that evidence presented in Petitioner’s opening brief comprises all that can now be gathered by counsel on this PRP *due to trial counsel’s own failure to even have maintained a file*, and his similar inability to remember much about the case at all. Under this logic, the State would ask the Court to essentially mandate that any showing of ineffective assistance of counsel be made impossible unless Petitioners *do* find access to trial counsel’s entire file and the notes, research, etc. contained therein, to show where and how such investigation and litigation was insufficient. The absurd result becomes that, where this is possible, the overall likelihood that trial counsel was actually ineffective is substantially diminished, but where,

here, trial counsel completely discards whatever file and notes he had – if any, as even that cannot now be ascertained – the court will not be allowed to judge that attorney’s “tactical decisions” in hindsight.

Petitioner respectfully requests that this Court reject this illogical reasoning and grant Petitioner the relief he requests, *i.e.* order a new trial on this matter or, in the alternative, remand the petition for further hearings as requested in Petitioner’s opening brief at pg. 47.

Respectfully submitted this 1st day of June, 2007.

VAN SICLEN, STOCKS & FIRKINS

By: 
Michael J. Kelly, WSBA #31816
Attorney for Appellant

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CERTIFICATE OF SERVICE STATE OF WASHINGTON

BY 
DEPUTY

I certify that I caused one copy of the foregoing Reply Brief of
Petitioner to be served on the following parties of record and/or interested
parties by Federal Express overnight delivery of the same to the following:

Mason County Prosecuting Attorney's Office
521 N 4th St #B
Shelton WA 98584

DATED this 1st day of June 2007.

VAN SICLEN, STOCKS & FIRKINS



Nadia Feller,
Legal Assistant for Mike Kelly