

No. 42318-9-II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

In Re Personal Restraint Petition of
MARVIN SIDES FAIRCLOTH,
Petitioner

PETITIONER'S REPLY TO STATE'S RESPONSE TO
PERSONAL RESTRAINT PETITION

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A. AUTHORITY FOR PETITIONER'S RESTRAINT

Petitioner conceded that he is restrained pursuant to the Judgment and Sentence entered by the Mason County Superior Court under cause number 95-1-00051-7.

B. RESPONSE TO RESTATEMENT OF PETITIONER'S ISSUE PRESENTED FOR REVIEW TO THE COURT OF APPEALS

The Petitioner is seeking review of his case under RCW 10.73.100

(1). The relevant part of the statute provides that:

The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:

- (1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion.....

The Petitioner filed his motion on the issue of newly discovered evidence in the form of repressed memory, which was supported by an extensive declaration of Dr. Laura Brown. It is Petitioner's position that he did not know of the repression of his memory until psychological testing revealed the facts of his repression until 2011. The recovered memories include repression of memories to such an extent that those memories would have provided a valid defense against the charge of First Degree Murder.

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As such the Petitioner has acted with reasonable diligence in obtaining the psychological evaluation and in filing the Personal Restraint Petition that is now pending before this Court.

The relief sought by Petitioner is a new trial, which would include the expert testimony of the psychological factors influencing Petitioner's actions. Such testimony would likely result in a conviction on a lesser charge,¹ as Petitioner's actions were not premeditated because of the sexual and psychological abuse the Petitioner suffered at the hands of his parents, his foster parents, and specifically, the victim, Frank Faircloth. The jury that convicted Petitioner was not made aware of the Petitioner's sexual abuse by Frank Faircloth, and Petitioner at the time of trial has suppressed the nature and extent of the abuse suffered at the hands of the victim. Such information is directly relevant to the mental status of the Petitioner at the time of the crime and the Petitioner's inability to relate such information to the court and to the jury resulted in an unfair trial.

Therefore, the only remedy now available to the Petitioner is review by this Court and a request for a new trial.

¹ Petitioner is not claiming he bears legal culpability in the death of Frank Faircloth, although the extent of culpability would be an issue at a new trial.

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C. STATEMENT OF THE CASE

1) Response to the State's Summary of Facts

The Petitioner concedes that the State provided an accurate recitation of the facts from the verbatim proceedings in the "Ruling Affirming Judgment and Sentence" issued by Division II of the Court of Appeals on February 24, 1998². However, at the time of that PRP, there was no evidence before the trial court, or before the Court of Appeals regarding the fact that Frank Faircloth had been sexually and psychologically abusing Petitioner. There are two references in the record cited to by the state that allude to incidents not brought forth in testimony and thus appear out of context without background evidence now being brought before the court.

The first is the quoted portion of the text that indicates that Petitioner and co-defendant Keith Murphy, "asked Frank Faircloth to tell them he loved them. They called the victim a liar." (Page 3 of the February 24, 1998 Ruling Affirming Judgment and Sentence). There is no record that Petitioner could find in the trial transcript explaining why that comment was so significant. The testimony of expert Dr. Laura Brown would explain the significance of that statement with regard to the Petitioner's state of mind at the time of the crime.

² The State's Response lists the date as February 24, 2008, which is not correct, the Ruling Affirming Judgment and Sentence in Case No. 20549-1-II was provided in Appendix A of the State's Response to the Petitioner's Personal Restraint Petition dated December 5, 2011.

The second portion of that text found under footnote 2 states:
"Frank Faircloth had adopted Marvin Faircloth. For clarity, this court will refer to Frank Faircloth as the victim." (Page 3 of the February 24, 1998 Ruling Affirming Judgment and Sentence). The fact and circumstances surrounding the adoption of Petitioner are also absent in the trial record. At the time of trial, Petitioner was not asked to explain the significance of the adoption and had repressed the memories surrounding the adoption itself. Again, Dr. Brown's testimony would explain the dynamics of the relationship between the Petitioner and Frank Faircloth and how the adoption and the sexual encounters relating to that adoption contributed to the Petitioner's state of mind at the time the death of Frank Faircloth occurred.

2) Petitioner's Response to Procedural Facts and History

The Petitioner concedes that pages 4 and 5 of the State's Response to Personal Restraint Petition dated December 5, 2011 is accurate. However, the State did not provide all of the relevant citations to the record as presented in the 2005 Personal Restraint Petition, hereinafter 2005 PRP.

Because the State refers to this document in its brief, the Petitioner asks that the court review the 2005 PRP for the goutes from the trial court relating to his trial lawyer's lack of preparation and failure to preserve the defense of self-defense, which included battered child syndrome. (The Petitioner requests that the 2005 PRP in case number 41792-8-II be incorporated by reference into the current case).

The trial court ruled that trial counsel, Mr. Sam Davidson, had failed to preserve the battered child syndrome as a trial defense, and as such, the trial court ruled that no testimony reflecting the battered child syndrome come into testimony. The trial court clearly indicated its frustration with trial counsel about the fact that this defense had not been preserved or prepared for jury trial.

This ruling limited the testimony of Kathleen O'Shaunessy, Ph.D. and excluded the testimony of James Maxwell Ph.D. (Neuropsychologist) both of whom would have presented evidence on Petitioner's behalf, which in turn, would have provided an evidentiary basis for the battered child syndrome. That defense is even more compelling now, given the fact that Petitioner not only now realizes that he suppressed memories of abuse and that those memories would have provided a defense to the charge of premeditated first degree murder, but also has supporting expert testimony that would support his defense.

The 2005 PRP was never heard on its merits because it was dismissed on November 30, 2005 as time-barred.³ The new evidence was not available to Petitioner even at that date, so the relationship between the Petitioner's premeditation and the underlying facts of the repression of sexual and physical abuse of Petitioner by Frank Faircloth and others have not been heard or litigated. Additionally, the Petitioner did not have the psychological evidence of a competent expert to testify about the issues of memory suppression and filed this petition as soon as he could given his poverty and incarceration. It is Petitioner's contention that poverty and incarceration should be considered by this court in determining what was reasonable or diligent. A new trial is the only way Petitioner can correct the errors and have a trier of fact hear the complete evidence now available to the Petitioner through his experts.

The State cites to the 2005 PRP as if the Court had ruled on that petition on the merits, which did not occur. In addition, Dr.

³ Not only was the 2005 PRP not heard on its merits, the issue of newly discovered evidence based on repressed memories was not before the Court of Appeals to the best of Petitioner's knowledge. Additionally, the Petitioner maintains his allegation that he was deprived of his constitutional right to adequate counsel as briefed in his 2005 PRP.

Brown's Declaration supports Petitioner's contention that he was not aware of the nature and extent of the abuse suffered at the hands of Frank Faircloth at the time of trial. Brown Declaration, Page 3. The record does not support the State's assertion that in 2005, Petitioner knew "every other circumstance considered by Dr. Brown was known and available to the defense in 1995." In fact, the record makes it clear that trial counsel did not prepare the battered child syndrome defense and evidence of that defense was ruled inadmissible at the time of trial. Further, Dr. Brown's hearsay statement about what the Petitioner recalled in 2000, should not be considered as evidence in this court, because Dr. Brown was not present for any meetings with Petitioner in either 2000 or 2005. The abuse suffered by Petitioner at the hands of Frank Faircloth is materially different than his childhood abuse and is factually distinguishable from what was known in 1995.

The remainder of the State's procedural history is correct as written from the first paragraph on page 9 of the State's Response to Personal Restraint Petition to the end of section C, found on page 10 of the State's Response to Personal Restraint Petition.

D. STANDARD OF REVIEW FOR PERSONAL RESTRAINT PETITION

Petitioner concedes that this is a collateral attack on his conviction and is brought pursuant to RCW 10.73.100(1), based on the discovery of new evidence that has arisen from repressed memories and now available expert testimony, neither of which were available to Petitioner at time of trial.

A Petitioner may raise new issues by personal restraint petition, including both errors of constitutional magnitude that result in actual and substantial prejudice and non-constitutional errors that constitute a fundamental defect and inherently result in a complete miscarriage of justice. In re Pers. Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990); In re Pers. Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983). The Court of Appeals, under the authority of RAP 16.4 "will grant appropriate relief to a petitioner" if "[m]aterial facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding." RAP 16.4(a), (c)(3). The RAP 16.4(c)(3) standards for a new sentencing proceeding also apply to a motion for new trial based upon newly discovered evidence. In re Pers. Restraint of Brown, 143 Wn.2d 431, 453, 21 P.3d 687 (2001) (citing In re Pers. Restraint of Lord, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994)).

The petitioner must establish: "that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. The absence of any one of the five factors is grounds for the denial of a new" proceeding. See Brown, 143 Wn.2d at 453, 21 P.3d 687 (quoting State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)); see also CrR 7.5(a)(3).

E. RESPONSE TO STATE'S ARGUMENT

In this case, the Petitioner maintains he meets all of the requirements of Brown and Williams, supra. He also maintains that he meets the standards referred to in the State's brief in In Re Grasso, 151 Wn.2d 1, 10-11, 84 P.2d 859, 864 (2004) if this Court allows Petitioner's appeal to go forward under RCW 10.73.090 and RAP 16.4(d). The State appears to concede that Petitioner is able to proceed on the issues of constitutional error or manifest injustice. See, State's Response to Personal Restraint Petition, page 12. As such, Petitioner requests that the court review the 2005 PRP on its merit in addition to this Personal Restraint Petition requesting a new trial, because that 2005 PRP did argue both constitutional error by violation

of the Petitioner's 6th Amendment right to adequate counsel and improper preparation by his trial counsel resulting in a manifest injustice because his self defense claim was not preserved by trial counsel nor presented at trial.

The Petitioner did not argue the lack of adequate representation or the lack of the self defense claim at trial on direct review. Therefore, the Petitioner does not believe that he is barred from raising the issues on appeal before this Court. It is the Petitioner's belief that the direct appeal only involved limited issues and the argument regarding sufficiency of the expert testimony was only about whether the experts that were allowed to testify presented facts that supported a diminished capacity defense.

The Petitioner also maintains that there is nothing at the time of trial that was allowed regarding his sexual and emotional abuse as it related to self-defense. For the state to characterize sexual abuse by Frank Faircloth as just "more of the same"⁴ is callous and disrespectful. This is not a case where evidence would be cumulative because the evidence was never presented to the jury in the first place.

⁴ See State's Response to Personal Restraint Petition Case No. 42318-9-II at page 18.

In addition, Petitioner has filed a Motion for Appointment of Counsel and asks this Court to appoint counsel and to allow for further briefing and/or argument as Petitioner is currently proceeding without an attorney and needs representation. The new evidence does not controvert evidence submitted at trial because the judge did not allow the self-defense claim at trial due to the trial attorney's lack of due diligence in representing Petitioner. Therefore, the Grisby⁵ case cited by the State is not applicable here.

With regard to the Petitioner's due diligence, the Petitioner did not realize what the extent of the abuse was by Frank Faircloth. He was aware of some of his childhood abuse, but not all of it. The crux of the whole case that never came before the jury was that the victim of the crime had been repeatedly raping the Petitioner and in fact, adopted him and then told Petitioner that was the same as having married him. Petitioner maintains that he is doing the very best he can to address these issues and he is not denying that he was involved in the death of Frank Faircloth. What Petitioner is alleging is that a mitigating factor and a valid self defense claim were never presented to the jury. If a jury had heard the extent of the abuse of Petitioner

⁵ The State listed the case as Grimsby, but the Petitioner believes that the case is In Re Grisby, 121 Wn.2d 419, 853 P.2d 901 (1993).

by Frank Faircloth, they most certainly would have considered that factor and received a jury instruction on self-defense. That did not happen and Petitioner still doesn't understand why. He relied on his counsel to present his defenses at trial and did not know what to do or how to proceed when his counsel did not adequately represent him.

In addition to the constitutional error of trial attorney Davidson, the Petitioner believes he has acted with due diligence because the information now available to him was not available at the time of the direct appeal. In re Personal Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998). Petitioner believes that his recovered memories are, in fact, newly discovered evidence. When raised as a separate ground for relief, "newly discovered evidence" has the same meaning as a motion for a new trial. In re Personal Restraint of Lord, 123 Wn.2d at 319. Lord requires a defendant to show, among other things, that the evidence was discovered "since the trial" and could not have been discovered "before trial" in the exercise of due diligence. Lord, supra, at 319-20 (citing State v. Williams, 96 Wn.2d 215, 222-23, 634 P.2d 868 (1981)). In addition, the newly recovered evidence was not available to Petitioner before the time of his direct appeal. Id.

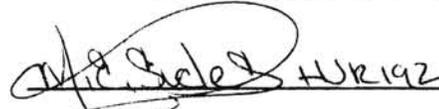
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Finally, Petitioner does not believe that the evidence that would be introduced went only to premeditation as the State seems to be saying. Instead, he believed that the evidence would be introduced to support his self-defense claim that was not presented due to counsel's failure to represent him and due to the lack of his repressed memories at the time of trial and direct appeal.

F. CONCLUSION AND REQUEST FOR RELIEF

It is difficult for Petitioner to understand how his trial counsel did not present self-defense at the time of trial, which led to a conviction of First Degree Murder instead of conviction of a lesser included offense. The Petitioner was 18 years old at the time of the incident and did not have any prior felonies and did not have legal experience to prevent what has happened in this case. Petitioner is asking this Court to remand this case to the trial court for a full and fair trial with the evidence properly presented by competent legal counsel. Petitioner asks that this court consider his indigency and lack of criminal record prior to this case and to appoint counsel.

DATED: 2.4.2012


MARVIN SIDES FAIRCLOTH
MARVIN SIDES FAIRCLOTH, Pro Se Petitioner

DECLARATION OF SERVICE BY MAIL
GR 3.1

12 FEB -7 PM 19:14
STATE OF WASHINGTON
BY

I, Marvin Sides-Faircloth, declare and say:

That on the 4th day of February, 2012, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 42318-9-II:

Petitioner's Reply To State's Response to PRP ;

addressed to the following:

Clerk, David Panzoha
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Tim Higgs
Mason County Pros. Office
P.O. Box 639
Spelton, WA 98584

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

DATED THIS 4th day of February, 2012, in the City of Aberdeen, County of Grays Harbor, State of Washington.



Marvin Sides-Faircloth

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