

NO. 42318-9-II

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

In re the Personal Restraint Petition of:

MARVIN SIDES FAIRCLOTH,

Petitioner.

SUPPLEMENTAL
BREIF OF PETITIONER

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A. ASSIGNMENTS OF ERROR

1. Petitioner is unlawfully restrained
2. Petitioner's PRP is not time barred.
3. Petitioner meets the criteria for substantive review based on newly discovered evidence of repressed memories of rape by the deceased, petitioner's foster father.
4. The PRP is not time barred.
5. The PRP is not a successive petition that has been reviewed on the merits.
6. The PR is not cumulative.
7. Trial counsel was ineffective for failing to preserve and raised Battered Child Syndrome.
8. Trial counsel was ineffective for failing to investigate DSHS records which informed that Frank Faircloth had psychiatric issues which seemed to include pedophilia and Frank Faircloth was not properly licensed to provide care for Marvin Faircloth.

Issues Presented on Appeal

1. Is Petitioner's PRP is time barred where he has demonstrated good cause for introducing newly discovered evidence that

could not have been discovered through due diligence?

2. Does Petitioner meet the criteria for substantive review based on newly discovered evidence of repressed memories of rape by the deceased, petitioner's foster father Frank Faircloth.?
3. Is the PRP a successive petition when substantive review on the issues herein have not previously been reviewed on the merits?
4. Is the PR cumulative where it introduces new evidence not previously reviewed?
5. Was trial counsel ineffective for failing to preserve and raise Battered Child Syndrome?
6. Was trial counsel ineffective for failing to investigate DSHS records which informed that Frank Faircloth had psychiatric issues which seemed to include pedophilia and Frank Faircloth was not properly licensed to provide care for Marvin Faircloth?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On February 13, 1996, the Marvin Faircloth¹ was convicted, after trial by jury of one count of Murder in the First Degree. Marvin timely filed a Notice of Appeal raising a sufficiency of evidence argument on premeditation and challenging the exceptional sentence. On August 3, 1998, the Court of Appeals issued a mandate affirming the conviction. In August, 2005, Marvin filed a personal restraint petition. That petition was not considered on its merits and was denied by the Court of Appeals on November 30, 2005. In that petition, Marvin alleged ineffective assistance of counsel and challenged the exceptional sentence imposed by the trial court. On January 12, 2011, the defendant filed, in the Mason County Superior his Court, a motion for relief from judgment. That motion was supported by the Declaration of Laura S. Brown, Ph.D, ABPP. The trial court transferred the motion to this Court which granted the PRP on April 5, 2012.

2. SUBSTANTIVE FACTS

All substantive facts have been filed with this court in the form of declarations and other documents that were either attached to the motion for a new trial, the state's response, or the reply to the state's response. The declarations are incorporated by reference herein.

¹ Hereinafter referred to as " Marvin" to avoid confusion with Frank Faircloth, referred to as "Faircloth".

C. ARGUMENT

MR. FAIRCLOTH IS SUFFERING
UNLAWFUL RESTRAINT.

a. Standard of Review.

A petitioner may file a PRP more than one year after the judgment becomes final if the PRP is based solely on grounds set forth in RCW 10.73.100, such as “[n]ewly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition.” RCW 10.73.100(1). *In re PRP of Stenson*, 276 P.3d 286, 292, (2012). Marvin’s PRP is based on the newly discovered evidence of the emergence of repressed memories of years of rape and sexual abuse by Frank Faircloth his foster father, the person slain in Marvin’s murder conviction.

A PRP may be based on 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 PRP of Spencer*, 152 Wn.App. 698,706, 218 P.3d 924 (2009). *In re PRP of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990). The petitioner must support the PRP with facts or evidence upon which the claims of unlawful restraint are based and may not rely solely

upon conclusory allegations. *Spencer*, 152 Wn.App. at 706; *Cook*, 114 Wn.2d at 813-14. The evidence presented cannot be based on “speculation, conjecture, or inadmissible hearsay.” *Spencer*, 152 Wn.App. at 707, quoting, *In re PRP of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

To obtain an evidentiary hearing, “the petitioner must demonstrate that there is competent, admissible evidence to establish” facts that would entitle the petitioner to relief. *Spencer*, 152 Wn.App. at 707, quoting, *Rice*, 118 Wn.2d at 886. When the evidence is based on other’s knowledge, the petitioner must present their affidavits. *Rice*, 118 Wn.2d at 886; *Spencer*, 152 Wn.App. at 707. The evidence in support of Marvin’s PRP, the declaration of Dr. Brown has been submitted to this Court in the initial PRP pleadings.

Under RAP 16.4, the reviewing Court “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); *In re PRP of Hacheney*, ___P.3d___, 2012 WL 2401667 (Div. 2). RAP 16.4(c)(3) applies to a motion for new trial based upon newly discovered evidence. *In re PRP of Brown*, 143 Wn.2d 431,

453, 21 P.3d 687 (2001), *In re PRP of Lord*, 123 Wn.2d 296, 319-20, 868 P.2d 835 (1994).

Faircloth must demonstrate that the new 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.” *Spencer*, 152 Wn.App. at 707; *In re PRP of Stenson*, 150 Wn.2d 207, 217, 76 P.3d 241 (2003); *In re PRP of Brown*, 143 Wn.2d at 453, quoting *State v. Williams*, 96 Wn.2d 215, 222–23, 634 P.2d 868 (1981). The absence of any one of these circumstances justifies the denial of a new proceeding *Stenson*, 150 Wn.2d at 217.

Here, the emergence of repressed memories meets the criteria for newly discovered evidence that is not time barred because it: “(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.” *Spencer*, 152 Wn.App. at 707.

- b. The Newly Discovered Evidence Will Probably Change the Result of the Trial, and Is Material, And Not Merely Cumulative.

For many years, Marvin was sexually abused by his foster father, a high ranking DSHS official. Marvin has Post Traumatic Stress Syndrome (“PTSD”) and his memory of the most horrific incidents of rape were repressed and did not emerge until after his conviction for killing Faircloth. The years of multiple incidents of sexual abuse, other than rape were however contemporaneously reported to social workers who did not take any action to protect Marvin from his abusive foster father.

Additionally, “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.” (Petitioner’s Reply to State’s Response to PRP).²

Before Marvin’s trial, there was evidence that DSHS actively took efforts to remove evidence of Frank Faircloth’s pedophilia, other psychiatric issue, and DSHS findings on lack of supervision, cover-up of issues in the Faircloth home, and lack compliance with DSHS foster care licensing for Frank Faircloth. (DSHS Findings January 18, 1996 –attached to the State’s Response to the PRP); (Declaration of Dr. Brown). It

² Trial transcripts were not provided as part of this PRP.

appears that Battered Child Syndrome was not raised during Mr. Faircloth's trial due to ineffective assistance of counsel in failing to preserve the issue for appeal.

Battered Child Syndrome is recognized and admissible under the *Frye*³ test. *State v. Janes*, 121 Wn.2d 220, 236, 850 P.2d 495 (1993).

When self-defense is relevant, evidence of the battered child syndrome is admissible to help prove self-defense. "The underlying principles of the battered child syndrome are generally accepted in the scientific community and satisfy the ER 702 requirements by helping the trier of fact to understand a little-known psychological problem." *Janes*, 121 Wn.2d at 236.

Originally developed as a physical diagnosis for describing child abuse, the "battered child syndrome" has come to describe both the physiological and psychological effects of a prolonged pattern of physical, emotional and sexual abuse. *See generally* Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 L. & Psychol.Rev. 103, 108-11 (1987). Such abuse typically lasts over a significant period of time and tends to operate in recurring patterns.

Janes, 121 Wn.2d at 233. "The resulting psychological response to abuse-induced PTSD is often referred to as the 'battered child syndrome'." *Id.*

³ *Frye v. United States*, 293 F. 1013, 34 A.L.R. 145 (D.C.Cir.1923), considered good law in the state of Washington, *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600-01, 260 P.3d 857 (2011).

In Washington, self-defense is defined by statute. Under RCW 9A.16.050 homicide is justifiable when committed:

In the lawful defense of the slayer ... when there is reasonable ground to apprehend a design on the part of the person slain ... to do some great personal injury to the slayer ... and there is imminent danger of such design being accomplished[.]

Janes, 121 Wn.2d at 237. Self-defense is available when the defendant reasonably believes that he is in danger of imminent harm from the person slain. *Janes*, 121 Wn.2d at 237-238.

The longstanding rule in this jurisdiction is that evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. *State v. Allery*, 101 Wash.2d 591, 594, 682 P.2d 312 (1984). As we stated in *State v. Wanrow*, 88 Wash.2d 221, 235-36, 559 P.2d 548 (1977):

Janes, 121 Wn.2d at 237-238.

Self-defense is defined as a lawful act, and the crime of first degree murder requires “intent”, which is defined as acting “with the objective or purpose to accomplish a result which constitutes a crime.” *State v. Box*, 109 Wn.2d 320, 328-329, 745 P.2d 23 (1987), quoting, RCW 9A.08.010(1)(a); *State v. Russell*, 47 Wn.App. 848, 851, 737 P.2d 698 (1987). The element of “intent” is thus inconsistent with a lawful act. *State*

v. Box, 109 Wn.2d at 328-329: *See Russell*, at 851; *State v. Peters*, 47 Wn.App. 854, 859, 737 P.2d 693 (1987).

State v. Janes, 121 Wn.2d at 235.

The defendant bears the burden of producing some evidence which tends to prove that the killing occurred in circumstances amounting to self-defense. *Janes*, 121 Wn.2d at 235. “Although it is essential that some evidence be admitted in the case as to self-defense, there is no need that the amount of evidence create a reasonable doubt in the minds of jurors on that issue.” *Janes*, 121 Wn.2d at 235, quoting, *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983) (plurality by Williams, J.). The quantum of evidence needed to raise self-defense is a question of law. *Janes*, 121 Wn.2d at 238. The evidence presented in Dr. Brown’s affidavit is extensive, detailed and comprehensive. Given the facts of this case, Battered Child Syndrome was relevant, material and would have been admissible in Marvin’s trial.

i. The Evidence Would Have Changed Result of Trial

Self-defense in the form of Battered Child syndrome would have negated the intent element of first degree murder thus changing the result of the trial. In *Janes*, the Supreme Court considered and determined that as

a matter of law, battered-child syndrome, self-defense was admissible in that case, a homicide because of the history of child abuse perpetrated by the victim on the defendant. *Janes*, 121 Wn.2d at 236, 238. The trial court in *Janes* rejected, but the Supreme Court determined that the expert testimony supported the instruction because it demonstrated that the day before the killing, the victim argued with the defendant which could have caused the defendant, with his heightened alertness to the victim's anger outbursts, to believe that he was in imminent danger of grievous bodily harm.

The trial court erroneously ruled that justifiable homicide instruction was unavailable because the events of the prior night and the morning of the killing were too far removed and lacked sufficient aggressiveness to constitute imminent danger. *Janes*, 121 Wn.2d at 236-237. The Supreme Court explained that an instruction on Battered Child Syndrome was necessary because an ordinary lay person not subjected to years of abuse would not understand the battered child's sense of "imminence" or the "heightened sense of awareness regarding the pattern of abuse" *Janes*, 121 Wn.2d at 240-241.

Imminence does not require an actual physical assault." *Janes*, 121 Wn.2d at 241, citing, *Walker*, 40 Wn.App. at 663, 700 P.2d 1168. Rather,

a threat, or its equivalent is sufficient, especially in abusive relationships, where patterns of behavior can signal the next abusive episode. *Janes*, 121 Wn.2d at 241 (citations omitted). “Imminent” means ready to take place: near at hand: ... hanging threateningly over one's head: menacingly near.” *Janes*, 121 Wn.2d at 241, quoting, *Webster's Third New International Dictionary* 1130, 1129 (1976).

Self-defense under RCW 9A.16.050 only requires that the harm faced by the defendant be imminent. *Id.* A seemingly innocuous comment days before the “triggering behavior and the abusive episode” does not negate the reasonableness of the defendant's perception of imminent harm, when the evidence shows that such a comment inevitably signaled the beginning of an abusive episode. *Janes*, 121 Wn.2d at 241.

In *Janes*, the Supreme Court reversed and remanded for the trial court to properly consider the defendant's sense of “imminent” danger as a Battered Child, a subjective assessment, in determining whether the defendant, reasonably believed that he was in imminent danger when the slain remained angry with him a day after a fight and where the defendant's mother warned the defendant that the slain was still angry with him. *Janes*, 121 Wn.2d at 242. The Court emphasized that the length of time between the threat and the homicide did not establish that the

threat was not imminent in the defendant's mind, and that the defendant need only show some evidence existed to justify the giving of the self-defense instruction. *Id.*

Janes is instructive and provides authority for this Court to reverse Mr. Faircloth's conviction and remand for a new trial with the provision of a Battered Child Expert and a self-defense instruction. Marvin like the defendant in *Janes* was subjected to years of abuse and an expert would have been able to explain Marvin's heightened awareness regarding the pattern of abuse and Marvin's sense of imminent danger. In the instant case, Dr. Brown's affidavit regarding Marvin's recovered memory of sexual abuse at the hands of Faircloth provides the necessary quantum of evidence to support the self-defense instruction that Marvin believed that he was in imminent danger of bodily harm at the time of the commission of the crime.

Had the jury been informed of Faircloth's repeated raping and abuse of Marvin and had the jury been properly instructed on Battered Child Syndrome, the self-defense would have negated the intent element of first degree murder, making conviction of that crime an impossibility. *Box*, 109 Wn.2d at 328-329.

The evidence in Dr. Brown's affidavit supports the admissibility of the Battered Child Syndrome and meets the criteria under RAP 16.4 for a new trial based on newly discovered evidence because the Battered Child Syndrome evidence "(1) will probably change the result of the trial because the self-defense negates the intent element of the first degree murder charge; 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." *Spencer*, 152 Wn.App. at 707.

(ii) Evidence Not Cumulative

The evidence is also "not merely cumulative or impeaching." *Spencer*, 152 Wn.App. at 707. Notwithstanding trial counsel's ineffective assistance in failing to preserve the defense of Battered Child Syndrome, and even though the lower levels of abuse were known to Marvin, the most horrific abuse was repressed and not available until 2011 thus it is newly discovered and it cumulative.

(iii) This PRP is Not Barred on the Merits.

The prohibition against successive petitions does not apply here because Marvin raises the newly discovered evidence issue for the first time in this PRP. RAP 16.4(d) "No more than one petition for similar

relief on behalf of the same petitioner will be entertained without good cause shown.” Id. *In re Martinez*, 171 Wn.2d 354, 362, 256 P.3d 277 (2011). “A successive petition seeks ‘similar relief’ if it raises matters which have been ‘previously heard and determined’ on the merits or ‘if there has been an abuse of the writ or motion remedy.’” *Martinez*, 171 Wn.2d at 362.4

In *Martinez*, the petitioner raised an instructional error issue and implicitly argued sufficiency of the evidence and relied on cases dealing with sufficiency of the evidence but did not expressly argue sufficiency. The Supreme Court permitted a successive PRP written by an attorney that expressly argued sufficiency of the evidence, reasoning that although implied, the sufficiency of the evidence was not properly presented in the first PRP. Id. The Court also indicated that had an attorney written the first PRP and simply failed to properly frame the salient issue, it would not permit the successive PRP. *Martinez*, 171 Wn.2d at 363.

Here, Marvin, like *Martinez* wrote his own PRP, was not represented by counsel, and did not raise the same issues, but rather raised the issue of ineffective assistance of counsel in a prior PRP which this

4 *In re PRP of Jeffries*, 114 Wash.2d 485, 488, 789 P.2d 731 (1990) (quoting *In re PRP of Haverty*, 101 Wash.2d 498, 503, 681 P.2d 835 (1984)).

Court did not review. This PRP meets the criteria for a new trial based on newly discovered evidence which Marvin raises for the first time based on the emergence of repressed memories of horrific years of sexual abuse at the hands of Faircloth. Marvin, like Martinez, does not seek “similar relief” within the meaning of RAP 16.4(d). Thus this Court should address the merits of Marvin’s PRP and the merits of the 2005 PRP that are referenced in the State’s Response to the PRP.⁵

- c. The personal restraint is based on newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under CrR 7.8;RAP 16.4(c); RCW 10.73.100.

⁵ See also Civil Statute RCW 7.68.060(3) which recognizes that repressed memories may take years to emerge. This statute provides:

Because victims of childhood criminal acts may repress conscious memory of such criminal acts far beyond the age of eighteen, the rights of adult victims of childhood criminal acts shall accrue at the time the victim discovers or reasonably should have discovered the elements of the crime. In making determinations as to reasonable time limits, the department shall give greatest weight to the needs of the victim

Department of Labor and Industries of State of WA. v. Denny, 93 Wn. App. 547, 551, 969 P.2d 525 (1999).

CrR 7.8 provides that “the court may relieve a party from final judgment” based on “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5.” CrR 7.8(b)(2). In general, where the motion is based on newly discovered evidence, the defendant must bring the motion within a reasonable time and within one year after the judgment, order, or proceedings. CrR 7.8. But, where the motion is a collateral attack, the one-year time limit does not bar the motion if the defendant acted with reasonable diligence in discovering the new evidence. *Scott*, 150 Wn. App. at, 291-293; RCW 10.73.090, .100.

No Washington case defines “reasonable diligence” in discovering new evidence or in filing a petition. This Court in *State v. Scott*, 150 Wn.App. 281, 207 P. 3d 495 (2009) however discussed the issue of the time bar to a personal restraint petition under the newly discovered evidence prong. In that case, five years after he pled guilty to a sex offense, Scott asked to withdraw his plea and submitted an affidavit from the victim recanting his statement against him. *Scott*, 150 Wn.App. at 286– 87.

In deciding whether Scott's motion was time-barred, this Court

noted that during the five years since his plea, Scott was indigent and incarcerated, a no-contact order prevented him from contacting the victim, and neither the State nor Scott had known of the victim's whereabouts for quite some time. *Scott*, 150 Wn.App. at 291. Considering these facts and that Scott only obtained the new evidence after he convinced a trial court to appoint a lawyer to investigate, the court held that Scott acted with reasonable diligence in discovering the new evidence. *Scott*, 150 Wn.App. at 286, 292–93.

Here, Marvin's memories were suppressed due to Marvin using drugs and alcohol in response to Faircloth's escalated sexual abuse and due to Marvin suffering PTSD. (Declaration of Dr. Brown, # 4). According to Dr. Brown, due to PTSD and drugs Marvin could not and did not access his repressed memories of the rapes until twelve years after his conviction, and no amount of "due diligence" could have recalled those memories sooner. *Id.* Marvin was aware of low levels of abuse in 1995, but was not aware of the rapes until 2011.

After his incarnation, Dr. Brown conducted an extensive forensic evaluation in 2011 when Marvin's memories of the rapes began emerging. Marvin like Scott did not have access to the newly discovered evidence. Until he had access to a professional. In *Scott*, counsel was needed; here a

trained psychologist. As soon as Marvin began remembering he filed this PRP. His 2005 PRP was never heard on the merits and did not include the repressed memories because they had not yet emerged, even though red flags existed since 1984 when Marvin was taken into CPS custody due to sexual abuse by his biologic father. When Marvin, like Scott obtained access to a profession, many years after his conviction the newly discovered evidence emerged. It was not discoverable earlier; it is relevant, material, and would likely change the outcome of the trial. For these reasons, this Court should address the merits of Marvin's PRP. *Scott*, 150 Wn.App. at 292-293.

2. INEFFECTIVE ASSISTANCE OF COUNSEL

Trial counsel's failure to preserve the issue of self-defense deprived Marvin of his constitutional right to effective assistance of counsel guaranteed by the federal and state constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's representation was deficient and that the defendant was prejudiced. *Id.* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address

the other prong. *State v. Garcia*, 57 Wn.App. 927, 932, 791 P.2d 244 (1990).

c. Failure to Preserve Self-Defense.

To determine if defense counsel's failure to preserve an issue or propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts review whether: (1) the defendant was entitled to the instruction; (2) the failure to request the instruction was tactical; and (3) the failure to offer the instruction prejudiced the defendant. *State v. Powell*, 150 Wn.App. 139, 154– 58, 206 P. 3d 703 (2009). Courts are required to begin their analysis with a strong presumption of competence. *Strickland*, 466 U.S. at 689–90. A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. *Strickland*, 466 U.S. at 90; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To show prejudice, the defendant must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Powell*, 150 Wn.App. at 153. “A reasonable probability ‘is a probability sufficient to undermine confidence in the outcome.’ “ *Powell*, 150 Wn.App. at 153, quoting, *In re Pers. Restraint of Hubert*, 138 Wn.App. 924, 930, 158 P.3d 1282 (2007).

“To be entitled to a jury instruction on self-defense, defense counsel must first preserve the issue and then the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *State v. Janes*, 121 Wn.2d at 238. To preserve a defense the defendant intends to raise at trial, the defense must declare the defense pretrial. *State v. Harris*, 122 Wn.App. 498, 506, 94 P.3d 379 (2004); CrR 4.7(b)(1); CrR 4.7(b)(2)(xiv). Here, trial counsel failed to preserve the self-defense defense.

Powell provides an analogous situation to Marvin’s. In *Powell*, the defendant was accused of second degree rape for engaging in sexual intercourse with a person who was incapable of consent by reason of being physically helpless or mentally incapacitated. *Powell*, 150 Wn.App. at 142. Powell asserted the statutory defense of “reasonable belief,” asserting that he reasonably believed the woman with whom he had intercourse was capable of consent. *Powell*, 150 Wn.App. at 152. His attorney did not propose a jury instruction on the reasonable belief defense. The Court concluded that the absence of an instruction on the reasonable belief defense deprived the jury of an opportunity to acquit Powell. *Powell*, 150

Wn.App. at 156.

The Court reasoned that if the jury had found that Powell had proved by a preponderance of the evidence that he reasonably believed the alleged victim was capable of consent and that the State had proved beyond a reasonable doubt that the alleged victim was, in fact, incapable of consent, the jury would not have had a means to acquit Powell based on his successful defense. *Powell*, 150 Wn.App. at 156– 57.

Here, trial counsel failed to preserve the Battered Child Syndrome defense and like *Powell* did not argue the main theory of his case. A Battered Child Syndrome, self-defense instruction would have been provided had trial counsel managed to preserve the issue. In this case, as in *Powell*, because Marvin did present some evidence of having been battered and sexually abused by Faircloth, he likely would have been entitled to the instruction had he requested it.

After considering all of the evidence in the record, the State would not have been able to meet its burden to show an absence of self-defense beyond a reasonable doubt. For these reasons, Marvin demonstrates with reasonable probability that the jury's verdict would have changed had the self-defense instruction been given which demonstrates prejudice. Trial counsel was ineffective to Marvin's prejudice for failing to preserve the

Battered Child Syndrome Defense. Following the reasoning in *Powell*, this Court should reverse and remand for a new trial.

b. Brady Violation

This case appears to involve a *Brady* due process violation compounded by ineffective assistance of counsel. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Trial counsel failed to investigate essential evidence that was partially provided that would have likely altered the outcome of the trial. The Declaration of Dr. Brown, and the internal DSHS investigation of this case reveal that DSHS staff were aware of psychiatric and other issues with Faircloth and Department Staff failed to disclose this to the larger DSHS teams and did not follow approved DSHS protocol in monitoring the appropriateness of Faircloth as a foster placement for Marvin. The State had access to the DSHS documents, and was aware of the cover-up but along with defense counsel failed to investigate.

The recent Supreme Court case *In re Stenson*, a PRP based on a *Brady* violation instructs that Marvin was entitled to all relevant, material evidence favorable to his defense. *Stenson*, 276 P.3d at 292-293. In

⁶ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (evidence favorable to the defense was wrongly withheld from the defense)

Stenson, the State Supreme Court reiterated the underlying principles behind the United States Supreme Court's decision in *Brady* that “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair.” *Stenson*, 276 P.3d at 292-293, quoting, *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. In *Brady*, the Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.*

The United States Supreme Court has since held that there is a duty to disclose such evidence even when there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). The scope of the duty to disclose evidence includes the individual prosecutor's “ ‘duty to learn of any favorable evidence known to the others acting on the government's behalf ... including the police.’ ” *Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), quoting, *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 113 L.Ed.3d 490 (1995).

Here, Marvin's trial attorney had access to the DSHS document,

which indicated a cover-up yet failed to argue a *Brady* violation based on the DSHS failure to further investigate Faircloth. *Stenson*, 276 P.3d at 292-293.

“There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Strickler*, 527 U.S. at 281–82. With respect to the third *Brady* factor, the terms “material” and “prejudicial” are used interchangeably. *See United States v. Price*, 566 F.3d 900, 911 n. 12 (9th Cir.2009).

Evidence is “material” under *Brady* if ‘there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’ ” *Kyles*, 514 U.S. at 433–3455 (quoting *Bagley*, 473 U.S. at 682, (opinion of Blackmun, J.); *id.* at 685, 105 S.Ct. 3375 (White, J., concurring in part, concurring in judgment)). A “‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’ ” *Kyles*, 514 U.S. at 434. (quoting

Bagley, 473 U.S. at 678). In *Stenson*, the State failed to disclose FBI photographic evidence that undermined the reliability of the forensic evidence and ultimately the confidence in the outcome of Stenson's trial. *Stenson*, 276 P.3d at 295.

Here, the prosecutor had a duty to investigate and disclose evidence of the DSHS cover-up and trial counsel's failure to raise a *Brady* issue was substandard attorney performance which, like the failure to propose an accurate jury instruction ultimately prevented Marvin from arguing his theory of the case which constitute ineffective assistance of counsel. *Stenson*, 276 P.3d at 295; *Powell*, 150 Wn.App. at 156.

D. CONCLUSION

Marvin Faircloth raises for the first time newly discovered evidence that; (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." *Spencer*, 152 Wn.App. at 707. And trial counsel rendered prejudicial ineffective assistance of counsel which prevented Marvin from arguing a defense that would have precluded a finding of guilt to first degree murder. Marvin is currently unlawfully restrained and this Court should review this PRP on its merit, reverse the first degree murder conviction and remand for a new trial with competent

counsel.

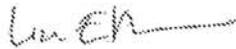
DATED this 15th day of July 2012

Respectfully submitted,



LISE ELLNER
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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Mason County Prosecutor's Office timw@co.mason.wa.us a true copy of the document to which this certificate is affixed, on July 15, 2012 Service was made by electronically to the prosecutor and to Marvin Faircloth DPC 747654 Stafford Creek Corr. Ctr. 191 Constantine Qay, Aberdeen, WA 98520, by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

ELLNER LAW OFFICE
July 15, 2012 - 1:40 PM

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