



**TABLE OF CONTENTS**

	<b><u>Page</u></b>
A. <u>ARGUMENT IN REPLY</u> .....	1
1. <i>The Failure to Interview and Subpoena to Trial a         Key Witness Was Prejudicial</i>	1
2. <i>Instruction No. 22 Was a Comment on the Evidence</i>	13
B. <u>CONCLUSION</u> .....	25

## TABLE OF CASES

	<b>Page</b>
<b><i>Washington Cases</i></b>	
<i>In re Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001) .....	23
<i>In re Coggin</i> , 182 Wn.2d 115, 340 P.3d 810 (2014) .....	19
<i>In re Crace</i> , 174 Wn.2d 835, 280 P.3d 1102 (2012) .....	11
<i>In re Dalluge</i> , 152 Wn.2d 772, 100 P.3d 279 (2004) .....	25
<i>In re Davis</i> , 152 Wn.2d 647,101 P.3d 1 (2004) .....	9
<i>In Re Detention of Gaff</i> , 90 Wn. App. 834, 954 P.2d 943 (1998) .....	21
<i>In re J.J.</i> , 96 Wn. App. 452, 980 P.2d 262 (1999) .....	14
<i>In re Maxfield</i> , 133 Wn.2d 332, 945 P.2d 196 (1997) .....	25
<i>In re Morris</i> , 176 Wn.2d 157, 288 P.3d 1140 (2012) .....	25
<i>In re Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004) .....	25
<i>In re Rosier</i> , 105 Wn.2d 606, 717 P.2d 1353 (1986) .....	23
<i>In re Stenson</i> , 174 Wn.2d 474, 276 P.3d 286 (2012) .....	12
<i>State v. Becker</i> , 132 Wn.2d 54, 935 P.2d 1321 (1997) .....	15,16
<i>State v. Boyer</i> , 91 Wn.2d 342, 588 P.2d 1151 (1979) .....	18,19
<i>State v. Brett</i> , 126 Wn.2d 136, 892 P.2d 29 (1995) .....	
<i>State v. Brune</i> , 45 Wn. App. 354, 725 P.2d 454 (1986) .....	23

*State v. Carr*, 13 Wn. App. 704, 537 P.2d 844 (1975) ..... 15

*State v. Carson*, 179 Wn. App. 961, 320 P.3d 185, (2014),  
*aff'd* 184 Wn.2d 207, 357 P.3d 1065 (2015) ..... 20,21

*State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988) ..... 16

*State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002) ..... 7

*State v. Davenport*, 33 Wn.App. 704, 657 P.2d 794 (1983),  
*rev'd*, 100 Wn.2d 757, 675 P.2d 1213 (1984) ..... 15

*State v. Deaver*, 6 Wn. App. 216, 491 P.2d 1363 (1971) ..... 3

*State v. Doogan*, 82 Wn. App. 185, 917 P.2d 155 (1996) ..... 24

*State v. Franklin*, 180 Wn.2d 371, 325 P.3d 159 (2014) ..... 7

*State v. Gay*, 82 Wash. 423, 144 P. 711 (1914) ..... 18

*State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995) ..... 19

*State v. Johnson*, 119 Wn.2d 167, 829 P.2d 1082 (1992) ..... 23

*State v. Johnson*, 69 Wn. App. 189, 847 P.2d 960 (1993) ..... 23

*State v. Kyлло*, 166 Wn.2d 856, 215 P.3d 177 (2009) ..... 24

*State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995) ..... 16

*State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996) ..... 7

*State v. McNeair*, 88 Wn. App. 331, 944 P.2d 1099 (1997) ..... 2

*State v. N.E.*, 70 Wn. App. 602, 854 P.2d 672 (1993) ..... 23

*State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995) ..... 21,22

<i>State v. Pam</i> , 101 Wn.2d 507, 680 P.2d 762 (1984) . . . . .	21,22
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984) . . . . .	18,20,21
<i>State v. Posey</i> , 174 Wn.2d 131, 272 P.3d 840 (2012) . . . . .	25
<i>State v. Reynoldson</i> , 168 Wn. App. 543, 277 P.3d 700 (2012) . . . . .	18
<i>State v. Rodriguez</i> , 121 Wn. App. 180, 87 P.3d 1201 (2004) . . . . .	24
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) . . . . .	24
<i>State v. Winings</i> , 126 Wn. App. 75, 107 P.3d 141 (2005) . . . . .	20

***Federal Cases***

<i>Boyde v. California</i> , 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) . . . . .	17
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963) . . . . .	11
<i>Crace v. Herzog</i> , 798 F.3d 840 (9 <sup>th</sup> Cir. 2015) . . . . .	11
<i>Estelle v. McGuire</i> , 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) . . . . .	17
<i>Harrington v. Richter</i> , 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) . . . . .	11
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) . . . . .	7
<i>Kyles v. Whitley</i> , 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995) . . . . .	12
<i>Lord v. Wood</i> , 184 F.3d 1083 (9 <sup>th</sup> Cir. 1999) . . . . .	9

<i>Miller-El v. Cockrell</i> , 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) .....	3
<i>Pierre v. Louisiana</i> , 306 U.S. 354, 83 L. Ed. 757, 59 S. Ct. 536 (1939) .....	3
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	11
<i>United States v. Perez</i> , 116 F.3d 840 (9th Cir. 1997) .....	22
<i>United States v. Real Property Known as 22249 Dolorosa Street</i> , 190 F.3d 977 (9th Cir. 1999) .....	14
<i>Yates v. Evatt</i> , 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991) .....	17

***Statutes, Constitutional Provisions, Rules and Other Authority***

ER 401-403 .....	1,7
RAP 10.3(5) .....	14
RAP 16.4 .....	11,25
U.S. Const. amend. VI .....	7,13,14,25
U.S. Const. amend. XIV .....	7,13,14,25
Wash. Const. art. I, § 3 .....	7,14,25
Wash. Const. art. I, § 21 .....	14,25
Wash. Const. art. I, § 22 .....	7,13,14,25
Wash. Const. art. IV, § 16 .....	25

WPIC 4.25 .....	19
WPIC 5.05 .....	15
WPIC 6.42 .....	15
28 U.S.C. § 2254 .....	11

**A. ARGUMENT IN REPLY<sup>1</sup>**

**1. *The Failure to Interview and Subpoena to Trial a Key Witness Was Prejudicial***

The State argues that it was not ineffective for Mr. Stark's trial attorney to fail to interview Jeffrey Stark ("Jeffrey") or to call him as witness at trial, concentrating on what it perceives to be the lack of evidentiary value of Jeffrey's testimony. Because of differences between Jeffrey's memory of his visit to the Stark family and CW's claims, the State concludes that Jeffrey was talking about a different incident and therefore his testimony would have been irrelevant and inadmissible under ER 401-403. *State's Response to Personal Restraint Petition* ("Response") at 17-26. The State's argument is without merit.<sup>2</sup>

At the outset, the State occasionally raises, in passing, questions about the authenticity of Jeffrey's statement, noting the lack of a legible signature,

---

<sup>1</sup> The State has conceded that Count I should be vacated based a statute of limitations argument, and that Mr. Stark will be re-sentenced and can raise then any challenges to the conditions of supervision. Given that concession, Mr. Stark will not address the sentencing issues further.

<sup>2</sup> The State repeatedly refers to Danelle Stark supposedly sending Jeffrey's statement to the superior court judge. *Response* at 17, 19, 22. This reference is puzzling. Danelle Stark sent Jeffrey's statement to Dan Satterberg, the King County Prosecuting Attorney, in February 2011. PRP, Ex. 14. The letter was "cc'd" to two deputy prosecutors (Terry Carlstrom and Charles Sergis), and to Mr. Meryhew – Mr. Stark's trial counsel. There is no indication that either Mr. Meryhew or the King County Prosecuting Attorney's Office forwarded Ms. Stark's letter and Jeffrey's statement to the trial judge.

*Response* at 20 n.6, and the fact that the statement is “handwritten, undated, unsworn, is not notarized, no envelope was provided along with the letter, and no person claims to have witnessed the letter being written or sent.” *Response* at 19. The State’s off-hand remarks, though, lack legal analysis and thus do not have to be addressed further. *See State v. McNeair*, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997) (failure to cite authority constitutes a concession that the argument lacks merit).

In any case, the State never disputes the facts offered by Mr. Stark that not only provide circumstantial evidence of the statement’s authenticity, but also that Jeffrey clearly intended the statement to be equivalent to a sworn declaration. These facts include declarations that show that Jeffrey spoke to Danelle Stark after the verdict and voiced his anger at CW’s claims, that Danelle Stark asked him to write something, that Danelle Stark then received the statement in an envelope with Jeffrey’s return address on it, that the letter was consistent with what Jeffrey had stated (Danelle had asked no one else to send her a statement), that the handwriting was similar to Jeffrey’s, and

that a few years later Jeffrey again repeated what he had said earlier. PRP, Ex. 14 & 15. The State offers nothing to contradict this evidence.<sup>3</sup>

Clearly, there is circumstantial evidence that the statement was Jeffrey's. *See State v. Deaver*, 6 Wn. App. 216, 218-19, 491 P.2d 1363 (1971) (authentication for phone call determined by circumstantial evidence). In any case, the State had possession of Jeffrey's statement since February 2011 and could have, if it wanted to, contacted Jeffrey to confirm his position. Having sat on the evidence for years, the State's complaints about the form of Jeffrey's statement should be discounted.

The State's main arguments center on the differences between Jeffrey's recollection of his visit to the Starks' home and CW's. These differences, the State argues, makes Jeffrey's statement less probative. Yet, the mere fact that Jeffrey's memory of his visit was quite different than CW's version is what actually would have made his testimony *more* relevant. While CW may have claimed to have gone bike riding in the middle of winter with Jeffrey when she was 10 years old (and Jeffrey would have been 13

---

<sup>3</sup> *See Miller-El v. Cockrell*, 537 U.S. 322, 345, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) ("Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it.") (quoting *Pierre v. Louisiana*, 306 U.S. 354, 362, 83 L. Ed. 757, 59 S. Ct. 536 (1939)).

years of age), and then went on to claim that Mr. Stark sent Jeffrey home and molested her inside a half-built house, one cannot judge the relevancy of Jeffrey's testimony by assuming that CW was telling the truth and then discounting Jeffrey's recollection as being about a "different incident."

The State argues that Jeffrey's testimony would have been inadmissible because his memory of a baseball mitt, playing with his cousins on the lawn, sleeping on the couch and watching television "do not match at all" with CW's description of events:

CW did not testify that a single one of these things occurred on the day she says she was sexually assaulted by Stark.

In short, there is nothing in Jeffrey's letter tying the event he describes in his letter to the event CW testified about.

*Response at 24.*

Yet, that is precisely the point. Jeffrey would have contradicted CW on critical points, and this is what makes his testimony relevant. Evidence is not irrelevant simply because it hurts the prosecution's belief that CW was telling the truth.

In the end, the fact that Jeffrey's memory contradicted CW on key events – that he did not go bike riding when he visited the Stark home and

was never sent home from a half-built house – is why it was so important that he should have testified before the jury.

In any case, the differences that the State points to are not very significant at all. Jeffrey recalled going to the Stark home for a visit when he was “approximately” 14 or 15 years of age. App. A. CW recalled Jeffrey coming over when he was “probably, like, 13.” RP (10/19/10) 242. Whether he was 13 or 14 is really irrelevant, particularly in a case where adult witnesses had difficulties even remembering whether things took place in 2007 or 2008. *See, e.g.*, RP (10/21/10) 531-32 (Lori Neilson testifies that she first became aware something was going on between CW and her step-father in December 2007, but then acknowledged in the past she said it was December 2008).

Jeffrey never attached any particular season to his memory of being at the Stark home. CW said it was “winter” when she claimed to have gone on the bike ride with Jeffrey. RP (10/19/10) 242. She never, however, claimed that it was the “dead of winter,” as the State describes it, *Response* at 24, nor did she ever testify, as the State claims, that it was “it was a January winter’s day.” *Response* at 23. The State’s record citation here (“RP 206-07, 241-42”) is misleading. While its citation to RP 241-42 accurately

relates that CW claimed it was “winter” and that the sun was going down and it was starting to get dark, nothing at pages 206-207 describe the incident as taking place in January.

Rather, CW testified only that she recalled moving to Maple Valley sometime after Christmas, early in 2004, in the winter. RP (10/19/11) 207. She later testified that the incident with Jeffrey took place “right after we had moved into the house in Maple Valley.” RP (10/19/10) 241. “Right after” to a ten year old child, remembered years later, could well be months after she moved into the house. Yet, even if CW’s memory that Jeffrey once visited in “winter” is accurate, “winter” stretches until March 20<sup>th</sup>. Certainly, if it was warm enough to go out for a pleasant bike ride through the neighborhood, there would be nothing to prevent someone on the same day from mowing a lawn, buying a baseball mitt or playing outside with cousins. The State’s quibbling over “winter” is simply absurd.

Again, the real issue is whether Jeffrey would have *contradicted* – not *agreed* with – CW. CW claimed that there was a witness (“Jeffrey”) present immediately before she claimed Mr. Stark molested her and even described what the witness was doing before that event supposedly took place. Yet, it turns out that this witness would have not supported hardly anything that CW

said – he would have contradicted CW on just about everything that she claimed to have taken place.

Of course, such a witness’s testimony would have been relevant. The State could have tried to impeach Jeffrey’s testimony and argue to the jury that there might be reasons why he did not remember riding his bike to a half-built house with his cousin and uncle, but that goes to weight, not admissibility. Had Jeffrey been presented as a witness, it would have been an error to exclude his testimony under ER 401-403. *See State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002) (“The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.”).

It also would have been constitutional error to have excluded such evidence. A person accused of a crime has the state and federal constitutional right, arising under the Due Process, Confrontation and Compulsory Process Clauses of the Sixth and Fourteenth Amendments and article I, sections 3 and 22, to present a complete defense including presentation of witnesses.<sup>4</sup> Excluding the one witness who could have contradicted CW on a critical

---

<sup>4</sup> *See Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014); *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

issue – that he was present shortly before she claimed to have been molested – would have violated these constitutional guarantees.

The State argues that there was no prejudice because that Jeffrey’s testimony would have been “clearly collateral” and that “Jeffery was never a witness who could testify that Stark did not sexually abuse CW. At the very most, Jeffery could have testified about an innocuous event.” *Response* at 25-26. But the State itself called witness after witness in this case who never testified that Mr. Stark did in fact sexually abuse CW, and who only testified about what other people told them or what they observed about CW or the Stark family. The State used this “collateral” testimony to buttress its weak case (a case where there was no direct corroboration of CW’s claims). Certainly, in light of the hours of testimony by such collateral witnesses, Jeffrey’s testimony, directly contradicting a key claim of CW – that he was present at a particular time and place, shortly before Mr. Stark supposedly molested her – would have been less “collateral” than most of the testimony presented by the State. This was not “collateral” testimony about an “innocuous” event – it would have been direct evidence that CW was lying about a key event.

The State argues: “The duty to investigate, however, ‘does not necessarily require that every conceivable witness be interviewed.’” *Response* at 22 (citing *In re Davis*, 152 Wn.2d 647,739,101 P.3d 1 (2004)). The State, however, mis-cites *Davis*.

In *Davis*, the issue was not whether a lawyer was ineffective for not interviewing or calling at trial a witness who had exculpatory information for the defense. Rather, the quote relates to a claim that counsel was ineffective for not interviewing key witnesses *before the State called them at trial*. *In re Davis*, 152 Wn.2d at 736 (“Petitioner claims ineffective assistance of counsel because before trial his attorneys neither investigated nor interviewed any State’s witnesses other than members of Petitioner’s family.”). Deciding not to interview a witness before he or she testifies is a different decision than not going out and locating a witness who the client and his wife ask the attorney to locate and interview because he can contradict the complainant’s story on a key factual issue.<sup>5</sup> The fact that the lawyer interviewed other witnesses who

---

<sup>5</sup> See also *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir. 1999) (“A lawyer who fails adequately to investigate, and to introduce into evidence, [information] that demonstrates his client’s factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance. Mindful of the deference we owe counsel’s trial strategy, we nevertheless conclude that counsel’s cursory investigation of the three possible alibi witnesses, and their subsequent failure to put them on the stand, constitute deficient performance that was prejudicial to Lord’s defense.”) (internal quotes and citations omitted).

testified and then impeached them with contradictions with their out-of-court statements does not cure this problem.

As to trial counsel's reasons for not interviewing Jeffrey, it is true that counsel now thinks that there was some "external barrier," but he admits this is just a "vague idea" about which he really did not know for sure, and that he has no record of why he did not contact Jeffrey. PRP Ex. 16. There is other evidence, though, that Jeffrey was available and Mr. Stark wanted his lawyer to interview him. PRP Exs. 13, 14, & 15. Moreover, Jeffrey was clearly available within weeks of the trial since (1) Danelle Stark says she spoke to him and (2) he then wrote out his statement that was mailed to the prosecutors in February 2011. Jeffrey clearly was not inaccessible in the weeks and months following the trial, so it is less likely that he was inaccessible in October 2010 during trial. Jeffrey does not say anything in his statement about being unavailable, and he told Danelle Stark that he was upset and angry about not being called to testify – not that he was upset because he was out of town during trial. PRP Ex. 13.

Under these circumstances, if the Court does not grant relief on this record, the Court should order a reference hearing to find the facts as to whether Jeffrey was truly available at the time of trial. On the other hand, if

there really was an “external barrier” to Mr. Meryhew contacting Jeffrey, then relief should be granted under RAP 16.4(c)(3), based upon newly discovered evidence (a basis for relief the State does not address).

The State cites to *Harrington v. Richter*, 562 U.S. 86, 111-12, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), to argue the lack of prejudice – “The likelihood of a different result must be substantial, not just conceivable.” *Response* at 26. *Richter*, though, is at its core a case about comity and federal deference to state court judgments in § 2254 cases. *See Richter*, 562 U.S. at 113 (“The California Supreme Court’s decision on the merits of Richter’s *Strickland*<sup>6</sup> claim required more deference than it received.”). These are not issues at stake in the current case.

Moreover, the State’s treatment of prejudice is seriously deficient because it ignores the prevailing tests under the Sixth and Fourteenth Amendments and *Strickland*. The State apparently does not dispute that the *Strickland* prejudice test is the same as that required under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *See In re Crace*, 174 Wn.2d 835, 842-46, 280 P.3d 1102 (2012), *habeas relief granted Crace v. Herzog*, 798 F.3d 840 (9<sup>th</sup> Cir. 2015). This test requires a

---

<sup>6</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

determination “that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995). The Supreme Court has held that this federal constitutional standard was met when there was a reasonable probability that one juror “might have had reasonable doubt” as to the guilt of the defendant. *In re Stenson*, 174 Wn.2d 474, 493, 276 P.3d 286 (2012).

The State does not address this federal constitutional standard at all. Yet, had Jeffrey testified consistently with his statement (which he clearly intended as having risen to the same level of solemnity as an affidavit), there is a reasonable probability that one juror might have had a reason to doubt that CW was truthful when she claimed she was molested after she went bike riding with Jeffrey. Had the jurors known that Jeffrey contradicted CW on just about everything she claimed to have occurred on that one day when Jeffrey visited her family,<sup>7</sup> it is reasonably probable that one juror might have had a reason to doubt CW’s claims of sexual assault.

---

<sup>7</sup> Or, to quote the State, “the events that CW described occurring on the day that she was sexually assaulted do not match at all with what is described in Jeffery’s letter.” *Response* at 24.

Accordingly, Mr. Stark can show prejudice. His trial counsel was ineffective and therefore Mr. Stark's right to counsel under the Sixth Amendment (as incorporated into the Fourteenth Amendment's Due Process Clause) and article I, section 22, was violated, or there is newly discovered evidence that justifies relief from restraint. The Court should vacate all three remaining convictions because if the jurors had known that CW lied about the bike riding and half-built house, there is a reasonable probability that one juror would also have had a reason to doubt CW's other claims involving Counts III and IV.

**2. *Instruction No. 22 Was a Comment on the Evidence***

A key factual dispute of the trial in this case was whether the State had proven beyond a reasonable doubt CW's claims that Mr. Stark committed child molestation in the first degree and incest in the first degree. Not only was there no corroboration for CW's allegations, but Mr. Stark took the witness stand and denied he sexually abused CW. Yet, the trial judge told the jurors:

Evidence has been produced suggesting that the defendant committed acts of Child Molestation in the First Degree and Incest in the First Degree on multiple occasions.

PRP Ex. 6, Instruction No. 22.

The State agrees that “a different choice of words could have been used in Instruction 22,” *Response* at 32, but argues that the instruction was not a comment on the evidence<sup>8</sup> or that the error was invited. The State’s arguments should be rejected.

The first line of Instruction No. 22 clearly and unambiguously is a judicial statement that Mr. Stark in fact was guilty. Whether trial counsel, the trial judge or appellate counsel on direct review missed this issue or not,<sup>9</sup> the fact remains is that the modified pattern instruction imparted a judicial opinion that the evidence suggested that Mr. Stark committed two of the charged offenses.

---

<sup>8</sup> The State fails to respond to Mr. Stark’s additional arguments that Inst. No. 22 weakened the State’s burden of proving the case beyond a reasonable doubt to a jury, in violation of the right to a jury trial and due process, protected by the Sixth and Fourteenth Amendments and article I, sections, 3, 21 & 22. *Opening Brief of Petitioner* at 20-21. The failure to present arguments with regard to these constitutional issues should be viewed as a concession of error. *See In re J.J.*, 96 Wn. App. 452, 454 n.1, 980 P.2d 262 (1999); *United States v. Real Property Known as 22249 Dolorosa Street*, 190 F.3d 977, 983 (9th Cir. 1999).

<sup>9</sup> The State speculates that Mr. Stark’s prior attorneys did not believe that Instruction No. 22 constituted a comment on the evidence. *Response* at 28 & n.11. There is no evidence to support the State’s assertion – simply failing to raise the issue on appeal or failing to except to an instruction does not mean that the attorneys did not “share” Mr. Stark’s current view of the instruction. The State’s factual assertions are without citation to the record, in violation of RAP 10.3(5) (“Reference to the record must be included for each factual statement.”). While “naked castings into the constitutional sea are not sufficient to command judicial consideration,” *Response* at 35-36 n. 15, so too are naked castings into the factual sea.

In this regard, Inst. No. 22 differs from WPIC 5.05 and WPIC 6.42. Those standard instructions tell the jurors how to weigh different types of evidence generally (prior convictions, co-defendant statements), but neither of those standard instructions explicitly tell the jurors that in fact the defendant had a prior conviction or that a co-defendant had made an out-of-court statement. More importantly, neither of the cited WPIC instructions offer a direct judicial opinion that the defendant is guilty.<sup>10</sup>

The State minimizes the harm of Inst. No. 22 by pointing to the standard instructions given in this case about disregarding judicial comments on the evidence, the presumption of innocence and other generalized instructions. *Response* at 30, citing Instructions No. 1, 2 & 5. Unfortunately, the State ignores the fact that the Supreme Court has already rejected the view that giving these standard instructions cures a comment on the evidence. In *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997) – a case the State

---

<sup>10</sup> Compare *State v. Davenport*, 33 Wn.App. 704, 707, 657 P.2d 794 (1983), *rev'd on other grounds*, 100 Wn.2d 757, 675 P.2d 1213 (1984) (instruction on prior convictions “is not an unconstitutional comment on the evidence because it conveys neither the court’s attitude regarding the merits of the case nor the court’s personal evaluation of witness credibility.”); *State v. Carr*, 13 Wn. App. 704, 710, 537 P.2d 844 (1975) (“Instruction No. 9 [regarding prior convictions] does not convey the court’s attitude toward the merits of the cause to the jury. Also, the instruction neither revealed the court’s evaluation of the victim as a witness nor indicated whether the judge personally believed any of the victim’s testimony. The charge merely instructed the jury on the law concerning the competency of witnesses.”).

neglects to mention in its *Response* -- the Supreme Court reversed based upon a comment on the evidence in a sentencing enhancement instruction (raised for the first time on appeal), despite the fact that all of the same standard instructions the State cites to here were given in that case. *See State v. Becker*, 132 Wn.2d at 78-79 (Talmadge, J., dissenting) (describing instructions). The State essentially wants the Court to follow the dissenting opinion in *Becker* rather than the majority.<sup>11</sup>

In the end, the State is correct on one point: “Jurors are presumed to follow instructions.” *Response* at 33 n. 14, citing *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). This is the precisely reason why Mr. Stark can show prejudice from the error in Inst. No. 22.

“When, for example, a trial court has instructed a jury to apply an unconstitutional presumption, a reviewing court can hardly infer that the jurors failed to consider it, a conclusion that would be factually untenable in

---

<sup>11</sup> Rather than discuss *Becker*, the State does cite to the earlier decision in *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). *Response* at 34. *Ciskie* involved a claim that the statutory definition of “threat” constituted a comment on the evidence. The Supreme Court rejected that argument, noting not only that the jury had been given the standard instructions about the judge not commenting on the evidence, but also that the instruction followed the RCW and “an instruction which does no more than accurately state the law pertaining to an issue in the case does not constitute an impermissible comment on the evidence by the trial judge under Const. art. 4, § 16.” *State v. Ciskie*, 110 Wn.2d at 282-83. Inst. No. 22, however, does not accurately state the law -- rather, it conveys the judge’s personal opinion that in fact Mr. Stark committed two of the charged offenses.

most cases, and would run counter to a sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given.” *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). The comparison to unconstitutional presumptions is apt where a comment on the evidence actually constitutes a conclusive presumption and a directed verdict. *See Opening Brief of Petitioner* at 20-21.

In this regard, the portion of *Yates v. Evatt*, *supra*, overruled by *Estelle v. McGuire*, *supra*, rebuts the State’s suggestion that to prove prejudice, Mr. Stark somehow would have to prove, through some sort of testimony, that the jurors were actually influenced by the trial judge’s comment on the evidence *Response* at 34. In *McGuire*, the Court adopted the standard of *Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) – “whether there is a reasonable likelihood that the jury has applied the challenged instruction” in an impermissible way. *Estelle v. McGuire*, 502 U.S. at 72 n.4. A “reasonable likelihood” standard does not

require putting jurors on the witness stand to see how they construed Inst. No. 22 – a procedure that is decidedly improper in any event.<sup>12</sup>

Here, there is a reasonable likelihood that jurors, reading Inst. No. 22, would conclude that the judge was telling them that Mr. Stark had committed multiple acts of Child Molestation in the First Degree and Incest in the First Degree. The first line of Inst. No. 22 is clear and unambiguous – it is a judicial statement, not that the State has alleged multiple incidents, but that the evidence suggests that Mr. Stark committed two crimes on multiple occasions. A commonsense reading of this instruction, by jurors who have no clue about the intricacies and evolution of “*Petrich*”<sup>13</sup> instructions, is that the judge was telling them that Mr. Stark was probably guilty and that they did not have to all decide that he committed all of the alleged acts, just some of them.

The State next argues that if there was an error in Inst. No. 22, it was “invited.” *Response* at 35. The “invited error” doctrine precludes review of instructions proposed by the appellant. “A party may not request an instruction and later complain on appeal that the requested instruction was

---

<sup>12</sup> See *State v. Gay*, 82 Wash. 423, 437-39, 144 P. 711 (1914); *State v. Reynoldson*, 168 Wn. App. 543, 549-50, 277 P.3d 700 (2012).

<sup>13</sup> *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

given.” *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). However, “[t]he failure to except to an erroneous instruction is different from actually proposing an erroneous instruction; the former is a failure to preserve error, the latter is error invited by the defense.” *State v. Gentry*, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995). “[F]ailing to except to an instruction does not constitute invited error.” *State v. Corn*, 95 Wn. App. 41, 56, 975 P.2d 520 (1999).

Similarly, “merely assenting” to an error does not mean a party “invited” the error. *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). In *Coggin*, defense counsel expressed a desire for individual juror questioning due to the publicity and sensitive nature of the case. Nevertheless, the Supreme Court concluded that Coggin’s actions did not rise to the level of invited error when he simply assented to the State’s juror questionnaire and the trial judge decided to question jurors in chambers. *Id.*

Here, the language of Inst. No. 22 that constitutes a comment on the evidence was clearly not proposed by the defense. The defense proposed instruction tracked WPIC 4.25’s language in the first sentence. PRP, Exhibit 5 (“The State alleges that the defendant committed acts of Child Molestation

in the First Degree and Incest in the First Degree on multiple occasions.”). When the State proposed its version, Mr. Stark’s lawyer failed to object.<sup>14</sup>

To be sure, at one point during the colloquy on instructions, the trial judge stated, “And Mr. Meryhew is indicating that he’s in agreement with the Court giving your proposed Petrich instruction,” to which Mr. Meryhew stated:

Yes, Your Honor. And with the interlineation of the occasions separate from Count II or III, as indicated in the “to convict” instructions, I certainly am able to argue that these have to be separate incidents. So that’s fine.

RP (10/26/10) 854.

This statement, however, is far different the cases cited by the State, such as *State v. Winings*, 126 Wn. App. 75, 107 P.3d 141 (2005) (*Response* at 35), where the defendant actually “proposed a nearly identical instruction defining assault” as the one complained of on appeal. 126 Wn. App. at 89. Here, Mr. Stark did not propose a “nearly identical instruction.”

*State v. Carson*, 179 Wn. App. 961, 320 P.3d 185, (2014), *aff’d* 184 Wn.2d 207, 357 P.3d 1065 (2015) – also cited by the State – is not pertinent

---

<sup>14</sup> “And I have no objection to the version that is offered here by Mr. Carlstrom.” RP (10/26/10) 851; “I have no objection to the State’s proposed change from that instruction, your Honor.” RP (10/26/10) 853; “And I have no exceptions to the instructions proposed by the State of Washington, other than those we’ve discussed already here in court.” RP (10/26/10) 869.

because there the defense counsel not only failed to propose a *Petrich* instruction, he “deliberately omitted a *Petrich* instruction from his proposed jury instructions and then repeatedly and strenuously opposed the trial court’s plan to give a *Petrich* instruction.” *State v. Carson*, 179 Wn. App. at 973-74. Nothing of the sort occurred here.

Similarly, in another case relied upon by the State, the civil case *In Re Detention of Gaff*, 90 Wn. App. 834, 954 P.2d 943 (1998), all that is known is that “[a]ll parties here agreed to use the feasibility wording that Gaff now challenges.” *Id.* at 845. *See also id.* at 839 (“Consequently, the parties agreed to submit an instruction that allowed the jury to consider the ‘feasibility’ of such alternatives.”). There is no further explanation as to how the parties “agreed.” But, in light of cases such as *Coggin*, relied upon by the State itself, that have held that “mere assent” is not invited error, the precedential value of *Gaff* is questionable because there is no indication as to how the parties in that case “agreed” to the challenged instruction.

The purpose of the “invited error” doctrine is to prevent intentional manipulation, by which an error is intentionally set up and specifically invited. For instance, in *State v. Pam*, 101 Wn.2d 507, 680 P.2d 762 (1984), *overruled on other grounds*, *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629

(1995), the State set up a test case by asking the trial court to sustain the defendant's objections in order for a particular issue related to attorney-client privilege to be resolved by a higher court. The Supreme Court held this was precisely the type of conduct the doctrine of invited error was meant to address. *Pam*, 101 Wn.2d at 511. *See also United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc) (invited error requires acting intentionally to relinquish a known right).

Nothing about the record here suggests that the failure to except to Inst. No. 22 was the result of gamesmanship or some other intent to gain some sort of tactical advantage for Mr. Stark. Such an argument is as offensive as it is without merit. The State simply has failed to supply any evidence on collateral review that shows that Mr. Stark's attorney intentionally failed to except to Inst. No. 22, so that, five years after Mr. Stark has been forcibly locked up behind concertina wire, he could then raise the issue in a PRP. The State too could submit affidavit evidence at this stage, and its failure to do so simply must reflect the absence of any evidence that the error was "invited."

The State finally, in a footnote, argues that the failure to except to Inst. No. 22 at trial or challenge it on direct appeal was not ineffective.

*Response* at 35-36 n. 15. Generally, arguments in footnotes need not be considered. See *State v. N.E.*, 70 Wn. App. 602, 606 n. 3, 854 P.2d 672 (1993); *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993). But, even if the Court considers the State's arguments, it is apparent that the arguments lack merit.

To begin with, the State cites cases that have absolutely no relevance, such as its citations to *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986), and *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). Such cases stand for the unremarkable proposition that courts require legal authority or facts before granting relief.

The State also is again sloppy with its citation to authority. The State cites to *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995) regarding the presumption that counsel was effective. However, in *Brett*, the Supreme Court held trial counsel's failure to request a proper instruction did not appear to be tactical, but that simply there was no prejudice. *Id.* at 200. Moreover, the State neglects to cite to *In re Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001), which vacated Mr. Brett's conviction based on ineffective assistance of counsel.

Where a lawyer fails to except to an erroneous instruction or proposes the wrong instructions, even on direct appeal, Washington courts have reversed based on ineffective assistance of counsel, without requiring any additional evidence.<sup>15</sup> As Division Three once noted:

If we can conceive of some reason why Mr. Rodriguez's lawyer would propose these instructions as a tactic or strategy to advance Mr. Rodriguez's position at trial, then we would conclude that the lawyer's performance was not deficient. . . . But we can conceive of none here. The net effect was to decrease the State's burden to disprove self-defense.

*State v. Rodriguez*, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004). Similarly there is no possible tactical reason why Mr. Stark's attorney would want an instruction that conveyed the trial judge's personal view that Mr. Stark was guilty of committing the offenses on multiple occasions.

As for not raising the issue on direct appeal, if the issue is meritorious and would lead to reversal if raised on direct appeal, Washington courts have granted collateral relief based on ineffective assistance of counsel on direct

---

<sup>15</sup> See *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009) (self-defense instructions); *State v. Thomas*, 109 Wn.2d 222, 225-29, 743 P.2d 816 (1987) (diminished capacity instructions); *State v. Doogan*, 82 Wn. App. 185, 188-90, 917 P.2d 155 (1996) (invited error doctrine does not bar relief based on ineffectiveness if counsel was ineffective for proposing the wrong instructions).

appeal.<sup>16</sup> The State's briefing is deficient because it fails to address this authority.

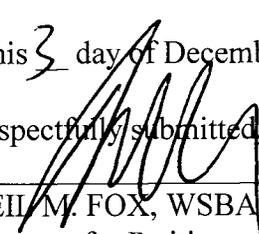
Ultimately, Inst. No. 22 constituted a comment on the evidence and weakened the State's burden of proof, essentially directing a verdict on Counts II and III. Mr. Stark's rights to due process of law and to a jury trial and to be free from comments on the evidence, protected by the Sixth and Fourteenth Amendments, and article I, sections 3, 21 & 22 and article IV, section 16, were violated. The Court should vacate the convictions in those two counts.

**B. CONCLUSION**

For the foregoing reasons, and the reasons set out previously, the Court should vacate the convictions in this case and release Mr. Stark from custody and restraint, pursuant to RAP 16.4(c)(1), (2), (3), (5), (6) and (7).

DATED this 3 day of December 2015.

Respectfully submitted,

  
\_\_\_\_\_  
NEIL M. FOX, WSBA NO. 15277  
Attorney for Petitioner

---

<sup>16</sup> See *In re Morris*, 176 Wn.2d 157, 166-68, 288 P.3d 1140 (2012); *In re Dalluge*, 152 Wn.2d 772, 787-88, 100 P.3d 279 (2004), *overruled on other grounds State v. Posey*, 174 Wn.2d 131, 272 P.3d 840 (2012); *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004); *In re Maxfield*, 133 Wn.2d 332, 343-44 945 P.2d 196 (1997).

## APPENDIX A

To whom it may concern,

Approximately when I was 14 or 15 I stayed the night with my uncle Brian and he bought me a baseball mit made by Nike at Target and that night we watched ~~TV~~ I slept on the couch and the next day I played with my little cousins outside, right out front, what I remember is Brian mowing the lawn and then I went home. The allegations that Caitlin made are false because we never went on a bike ride and Brian never told me to go home. There was no home unbuilt that we went to and that is the truth I will testify under oath that the allegations are false that I was <sup>not</sup> there and he <sup>never</sup> said that to me.

*J. Esler*

## APPENDIX B

No. 22

Evidence has been produced suggesting that the defendant committed acts of Child Molestation in the First Degree and Incest in the First Degree on multiple occasions. A separate crime is charged in each count. To convict the defendant on the count of Child Molestation in the First Degree, one particular act of molestation must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. To convict the defendant on the count of Incest in the First Degree, one particular act of sexual intercourse must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of child molestation or incest.

**STATUTORY APPENDIX**

## **Relevant Statutory Provisions and Rules**

ER 401 provides:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 402 provides:

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RAP 16.4 provides:

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement,

or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material 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 or civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, or .100. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. XIV, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (Amendment 10) provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Wash. Const. art. IV, § 16 provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

WPIC 4.25 (2008) provides:

The [State] [County] [City] alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant [on any count] of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime).

WPIC 5.05 (2008) provides:

You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose.

WPIC 6.42 (2008) provides:

You may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

IN RE THE PERSONAL RESTRAINT  
PETITION OF:

BRIAN T. STARK,  
Petitioner.

) CAUSE NO. 73580-2-I

) CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare that on the 3<sup>rd</sup> day of December 2015, I served the attached REPLY BRIEF OF PETITIONER by depositing a copy into the United States Mail with proper first class postage attached in an envelope addressed to:

Dennis McCurdy  
King County Prosecuting Attorney's Office  
W-554 King County Courthouse  
516 3<sup>rd</sup> Ave.  
Seattle WA 98104

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

DEC 3, 2015 - SEATTLE, WA  
DATE AND PLACE

Alex Fast  
ALEX FAST