

STATE OF WASHINGTON COURT OF APPEALS  
DIVISION II

07 APR -6 PM 1:51  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

JEFFREY K. DAY  
Petitioner

PERSONAL RESTRAINT  
PETITION

**36283-0**

A. STATUS OF PETITIONER

I, Jeffrey K. Day, c/o Prairie Coorectional Facility, Box 500, Unit FC 104, Appleton, MN, 56208, apply for relief from confinement. I am now in custody serving a sentence upon conviction of a crime. #875755

- The court in which I was sentenced is PIERCE COUNTY SUPERIOR COURT.
- I was convicted of the crime of Child Molestation 1st degree
- I was sentenced after trial in November 5, 2004. The judge who imposed sentence was Thomas Felnagle.
- My lawyer at trial court was Brett Purtzer 1008 S. Yakima Ave. Suite 203 Tacoma, WA 98405
- I did appeal from the decision of the trial court. I appealed to Division II, Court of Appeals. My lawyer on appeal was Brett Purtzer 1008 S. Yakima Ave. Suite 203 Tacoma, WA 98405

The decision of the appellate court was not published.  
The case number was 32594-2-II.

**CERTIFICATE OF SERVICE**  
I certify that I mailed  
1 copies of APP  
to Pro's  
& Station  
Date 5/31/06 Signed [Signature]

**ORIGINAL**

6. Since my conviction, I have not asked the court for some relief from my sentence other than I have written above.
7. Not applicable.
8. Additional information  
The only issue on which the trial court decision was appealed was sufficiency of the evidence. The conviction was affirmed by a court commissioner. Following a motion for reconsideration by a three judge panel, the commissioner's ruling was affirmed. This petition is now filed to raise issues which require information outside the trial court record.

B.   GROUNDS FOR RELIEF

I claim that I have 6 reasons for this court to grant me relief from the conviction and sentence described in Part A.

  FIRST GROUND

1. I should be given a new trial or released from confinement because:

The complaining witness held and played with a toy on the witness stand in front of the jury as he testified. There was no preliminary inquiry by the judge as to the necessity for this toy.

Washington courts have held that it is error for a witness to hold a toy on the stand without some significant preliminary showing as to the necessity for the toy. Given the lack of evidence in this case, this denied me a fair trial.

Courts are required to be alert to any factor that could undermine the fairness of the fact finding process. A trial judge is to be watchful to prevent prejudicial occurrences when they happen and to determine the effect of such occurrences. The judge in this case took no action.

Central to the right of a fair trial is the principle that one accused of a crime is entitled to have guilt or innocence determined solely on the basis of evidence adduced at trial and not on other circum-

## FIRST GROUND (cont.)

stances not adduced as proof at trial.

At the time of trial, D.J. was 12 years old and there was no reason he needed or should have had this toy on the stand when he testified.

2. The following facts are important when considering my case:

Other than the accusation made by the alleged victim, who had a motive to fabricate a story, there was nothing to support the charge. There was no physical or eye-witness evidence. There was no suggestion of the use of alcohol, drugs or pornography. There were no suggestions of other alleged victims despite my long involvement with youth. There were no statements attributed to Mr. Day of threats to the alleged victim.

The toy D.J. brought to the stand was an orange/yellow Koosh ball several inches in diameter. D.J. carried it into the courtroom and sat in front of the jury playing with it as he testified. The ball had nothing to do with the trial itself. At one point, D.J. stood near a diagram directly in front of the jury and played with the toy as he answered questions. The judge and jury could easily see D.J. display the toy.

Over the two days that D.J. testified, the Judge took no action to inquire as to the toy. There was no testimony that D.J. was reluctant to testify. There was no testimony he needed the toy for security. His demeanor and testimony did not suggest a need for the toy.

See affidavits of Lisa Jensen and Jo Rhodes, attached.

FIRST GROUND (cont.)

3. The following reported cases decisions in cases similar to mine show the error I believe happened in my case.

State v. Hakimi, 124 Wash. App. 15, 98 P.3d 809  
(Div. 1 2004)

State v. Harper, 35 Wash. App. 855, 670 P.2d 296  
(Div. 2 1983)

See Petitioner's brief for discussion of cases.

4. The following statutes and constitutional provisions should be considered by the court.

14th amendment to U.S. Constitution..right to fair trial

5. This petition is the best way I know to get the relief I want and no other way will work as well because:

This issue requires information outside the trial record.

Affidavits from persons who attended the entire trial are attached to attest to facts outlined on this issue.

SEE PETITIONER'S BRIEF for additional facts and argument.

## SECOND GROUND

1. I should be given a new trial or released from confinement because:

During my testimony, the mother of the alleged victim rose from her seat in the audience, cried out and stormed out of the courtroom. She continued her hysterics in the hallway loud enough for people in the courtroom to hear. The jury knew at the time that this was D.J.'s mother. The judge took no action to excuse the jury, to caution the jury or to admonish the mother. This display, without any corrective action from the court, deprived me of a fair trial.

Courts have held that emotional demonstrations are a sufficient reason to reverse a conviction where an outburst might reasonably have affected a jury verdict or where the incident may have prevented a defendant from having a fair and impartial trial. An ideal of the criminal justice system is that a defendant is entitled to a calm judicial atmosphere to minimize any possibility of a decision being rendered on speculation or emotion rather than on facts and logical reasoning.

Again, given the lack of evidence in this case to support the accusation and the inconsistent, contradictory testimony of the complaining witness (discussed later), it cannot be said the verdict would have been the same in absence of this outburst. The issues of a right to

SECOND GROUND (cont.)

a fair trial discussed previously apply here.

2. The following facts are important when considering my case:

At the time of the outburst, D.J.'s mother was sitting 8-10 feet from the jury. She had previously testified. During my testimony, she suddenly stood up, burst into a loud cry and stormed out of the courtroom. She made a loud exit through the courtroom doors. Her crying could be heard inside the courtroom even after the doors had closed and I continued to testify. See affidavit of Dan Platter, attached.

At least half the jury turned to watch D.J.'s mother make this scene and her dramatic exit. The judge took no action. He did not excuse the jury. He did not caution the jury to disregard the incident. He did not admonish the mother for her behavior. It appeared to persons observing the trial that, after the outburst, the jury was not paying attention to my testimony as the mother could still be heard in the hallway. See affidavits of Lisa Jensen and Jo Rhodes, attached.

3. The following reported court decision in cases similar to mine show the error that I believe happened in my case:

State v. Savage, 161 Conn. 445, 290 A. 2d 221 (1971)

SECOND GROUND (cont.)

Kreutz v. State, 293 S. 2d 451 (Miss. 1974)

State v. Sorrels, 33 N.C. App. 374, 235 S.E. 2d 70 (1997)

Richmond v. State, 302 Ark. 498, 791 S.W. 2d 691 (1990)

State v. Reuels, 569 S.E. 2d 15 (N.C. App. 2002)

Adkins v. State, 524 N.E. 2d 1274 (Ind. 1988)

All of the above cases involve disruptions at trial, and, in all a new trial was avoided only because a judge took immediate and decisive action to minimize the effect of the outburst. They are discussed in detail in petitioner's brief.

4. The following statutes and constitutional provisions should be considered by the court:

14th amendment to U.S. Constitution...right to fair trial

5. This petition is the best way to get the relief I want and no other way will work as well because:

This issue requires the eyewitness account of persons who were present when the outburst occurred, The affidavits of Dan Platter, Lisa Jensen and Jo Rhodes are attached and support the facts outlined.

SEE PETITIONER'S BRIEF for additional facts and argument.

THIRD GROUND

1. I should be given a new trial or released from confinement because:

The court erred and denied me a fair trial when it prevented me from discussing any facts related to my prior legal representation of D.J. No examination or cross examination was allowed into the subject.

It is fundamental that a criminal defendant should be given great latitude in cross examination of a prosecution witness to show motive or credibility. Our courts have said this is especially so in the prosecution of a sex offense where a defendant is often disproportionately at the mercy of a complaining witness's testimony. A criminal defendant's right to cross examine witnesses against him is a fundamental constitutional right. To allow a defendant no cross examination into an important area is an abuse of discretion.

2. The following facts are important when considering my case:

I represented D.J. in juvenile court in 2002 after he had been charged with arson. Eventually, I obtained dismissal of the charge. RP 360-61. For about 6 months following this representation I continued to have infrequent social contact with D.J. and his family.

THIRD GROUND (cont.)

D.J.'s alleged crime took place when he was 9. At the time I met him he was 10. I had never represented anyone this young previously.

There were 2 co-defendants in the case, both who agreed to deals where the charge would be reduced upon completion of certain requirements including payment of restitution estimated at \$60-70,000. D.J.'s mother did not want her son to plead guilty or accept this deal. My options were to try the case or get it dismissed.

It was essential that I gain D.J.'s trust so I could get him to tell me exactly what happened and so that I could determine how he would hold up at trial under questioning. After interviewing him in my office, I reviewed the police reports and interviewed witnesses. There were significant discrepancies between those reports and D.J.'s version. I decided to interview D.J. again but in a setting other than my office where he might be more relaxed, more open and where I could push him more on the contradictions in his story.

The first time we met I had heard him ask his mother to go to McDonalds. I chose that place to interview D.J. simply because he had mentioned it.

THIRD GROUND (cont.)

I thought it would be a place where he would feel relaxed enough for me to challenge him on his story. See affidavit of Jeffrey Day, attached.

Since the alleged crime was committed when he was 9, I also had to address issues related to capacity to commit a crime and possible competency issues. I was very aware of his birth date as a result since age was a significant aspect of the case.

In pretrial motions, the State asked the court to prohibit me from mentioning any details regarding the legal representation of D.J. I could not even mention that I had represented him in a criminal matter. RP 13-16. The court granted the State's motion.

In cross examining me, the prosecutor continually focused on the fact I took D.J. to McDonalds and that I knew his birth date. RP 448-50, 466-67, 469:22. In his closing argument, the prosecutor came back to these issues describing the first meeting at McDonalds as a first date. RP 525:19-21, RP 533-34.

Because I was prohibited from discussing D.J.'s legal case and my actions in it, I could not rebut those arguments. I could not ask anything in cross examination of D.J. or his mother that would have explained why going to McDonald's or gaining D.J.'s trust was important.

THIRD GROUND (cont.)

I could not rebut the suggestion that I built up a trust with D.J. for some ulterior purpose when the fact was I had to gain his trust to properly represent him in a serious criminal matter.

In effect, the court, at the prosecutor's urging, took away the ability for me to explain certain actions which had no sinister purpose and then the prosecutor had free reign to attribute an ulterior, sinister motive to these actions.

Particularly in this type of case with no other evidence other than the complaining witness's testimony, this was an abuse of discretion that denied me a fair trial.

3. The following reported court decisions in cases similar to mine show the error that I believe happened in my case:

State v. Peterson, 2 Wash. App. 464, 469 P.2d 980  
(Div. 2 1990)

State v. McSorley, 128 Wash. App. 598, 116 P.3d 431  
(Div. 2 2005)

These cases are discussed in Petitioner's brief.

4. The following statutes and constitutional provisions should be considered by the court.

14th amendment to U.S. Constitution....right to fair trial

5. This petition is the best way to get the relief I want and no other way will work as well because:

THIRD GROUND (cont.)

To understand the impact of the court's decision, this explanation required facts not contained in the trial record and which are contained in my attached affidavit.

SEE PETITIONER'S BRIEF for additional facts and argument.

FOURTH GROUND

1. I should be given a new trial or released from confinement because:

The prosecutor, in his direct examination of a forensic interviewer from his office, elicited testimony regarding the truthfulness of D.J., a type of testimony this court has previously ruled is error.

2. The following facts are important when considering my case:

On direct examination of Kimberly Brune, a forensic interviewer in the prosecutor's office, the following exchange took place:

Pros: When you interview a child, is there any concern you need to establish their understanding of telling the truth versus a lie?

Brune: We do ask questions about truth and lie. It depends on the age how we ask it. For children D.J.'s age usually the questions are if they know which is better to tell the truth? What's the reason it's better to tell the truth? What happens at yourself if you tell a lie. Things like that.

Pros: Did you establish these parameters with D.J. prior to interviewing him.

Brune: I believe I did.

RP 327:13-24. The prosecutor then went on to question Brune about what D.J. had said about allegedly being touched improperly. Eventually defense counsel objected to this hearsay. RP 331-32.

FOURTH GROUND (cont.)

3. The following reported case decisions in cases similar to mine show the error I believe happened in my case.

State v. Kirkman, 126 Wash. App. 97, 107 P.3d 133  
(Div. 2 2005)

In Kirkman, a prosecution for child rape, the prosecutor elicited testimony from a detective that he had given the alleged victim a type of "competency exam" to determine if A.D. understood what it was to tell the truth. The detective never affirmatively stated that he believed A.D.'s accusations himself. As in my case, there was no evidence but an accusation.

In answer to the prosecutor's questions, the detective said he was interested to be sure A.D. could distinguish between truth and a lie and the detective said that A.D. was able to distinguish between telling the truth and a lie. The detective said A.D. had promised to tell the truth. He then related what A.D. had told him.

The court found this type of testimony to be reversible error. Even though the detective had not offered his personal opinion on A.D.'s credibility he told the jury he tested A.D.'s competency and her truthfulness. In essence, he told the jury that A.D. told the truth when she related the alleged events to him.

The court held:

...that the detective's testimony detailing a competency exam he gave to the victim was an opinion on the victim's credibility. Admission of the opinion was constitutional error because the evidence violated the defendant's right to a jury trial and invaded the fact finding province of the jury. The errors can be raised for the first time on appeal and because there was no physical evidence or eyewitness testimony, the constitutional errors were not harmless.

Kirkman, 126 Wash. App. at 99.

The court found that by bolstering A.D.'s testimony through the detective, the jury was told it could believe A.D. Because her credibility was essential to convict Kirkman, the testimony related to her understanding on truth versus a lie was improper.

The type of testimony the prosecutor elicited from Ms. Brune in my case was similar. She told the jury she asked D.J. questions to determine if he understood the difference between telling a lie and the truth. She stated D.J. understood and then she began to relate his story to her.

The content and effect of her testimony as a forensic interviewer from the prosecutor's office created the same problem which required reversal in Kirkman. As in Kirkman, a competency exam of a sort had been given. The examiner said the person understood the difference between truth and a lie. As in

FOURTH GROUND (cont.)

Kirkman, the interviewer did not give a personal belief in the accusations. As in Kirkman, the credibility of the alleged victim was critical for a conviction. There was no eyewitness. There was no physical evidence. The accusation was consistently denied.

When Ms. Brune went on to relate what she had been told by D.J. she, in effect, bolstered his credibility. Just as that was improper in Kirkman, it was improper here. Ms. Brune's testimony amounted to an improper opinion on D.J.'s credibility. This was manifest error which denied me a fair trial.

4. The following statutes and constitutional provisions should be considered by the court.

14th Amendment to U.S. Constitution..right to fair trial

5. This petition is the best way to get the relief I want and no other way will work as well because:

At this stage of the proceedings, this route is the only one reasonably available and information outside the trial record as discussed in other portions of this petition was necessary to show the weakness in the case and why this error was not harmless, particularly in light of the lack of evidence.

\* This issue is not covered further in Petitioner's brief as it has been covered thoroughly in this petition.

FIFTH GROUND

1. I should be given a new trial or released from confinement because:

The prosecutor committed misconduct which denied me a fair trial when he (1) made a direct comment about his belief of the alleged victim's credibility and (2) appealed to the passion and prejudice of the jury by referring to facts not in evidence and to my work as a pro tem judge, an issue which had nothing to do with the charge.

Prosecutors may not make heated partisan comments which appeal to the passion of a jury in order to get a conviction. It is improper for a prosecutor to express his personal opinion about the credibility of a witness. The prosecutor violated both those directives in his closing argument.

2. The following facts are important when considering my case:

In closing argument, the prosecutor stated:

There's no reason to doubt Devin. He's credible. He's not mistaken about what occurred, wasn't making it up.

RP 547:20-22. At the point in the argument where this statement was made, the prosecutor was not arguing any inference from the testimony. He was giving his own opinion, an opinion which was wrong to give and which was wrong in accuracy as well.

FIFTH GROUND (cont.)

This case came down to the credibility of the complaining witness, yet his testimony was inconsistent and contradictory. D.J. continually mixed events which took place on February 6 and the night he stayed at my home, February 14. On the 6th we had stopped by a mall where he bought a bracelet, stopped by his girlfriend's house, went to a mall to eat and stopped by my house for 10 minutes where he borrowed a DVD. RP 421-23. On the 14th I simply picked him up, stopped by McDonalds to eat and we went home and watched DVDs until he fell asleep.

D.J. claimed all of this happened on the same day. RP 162, 213. But when challenged on this impossibility he changed his story not once (RP 232-33), or twice (RP 233:12-16), but three times. RP 243:17-20.

D.J. could not even recall events on the night of the alleged incident. He claimed he stayed over on a Friday night. RP 129:1-2. It was actually a Saturday night. He could not recall going to McDonalds. RP 165:5-7. He claimed we first rented a movie and then watched only two movies at home when in fact we first watched one movie, went out to rent a second, and then watched a third. RP 422-23, 234:19-20. When confronted with an earlier interview which contradicted his court testimony, he simply denied he

FIFTH GROUND (cont).

made the prior recorded statement. RP 234-36.

D.J. claimed he awoke a little after 6 a.m. and said he was being touched improperly. He claimed he asked to watch a movie and then, 5 minutes later, told me he had to be home by 10 a.m. at which time I supposedly showered 10-15 minutes and immediately took him home. RP 176-79, 137:3-16, 180:21-5.

In fact, as I testified, he awoke about 6:15, asked to watch a movie which I set up for him. I went back to bed until he awoke me at 7:30 and asked to use my computer. I got up and got it running and went back to bed. Then at 9 a.m. he woke me again telling me he had to be home by 10. Then I showered and took him home leaving my house at 9:30 and getting him home at 9:50. RP 433-39.

D.J. denied that he asked to use the computer. RP 178:16-22.

If one were to believe D.J.'s story we would have left my home about 6:40 and he would have been home by 7 a.m. Yet, even D.J.'s mother testified he came home between 9:30 and 10. RP 61. D.J.'s story made no sense.

There were numerous other inconsistencies. D.J. had stayed overnight one time about 15 months prior. At trial he claimed he stayed two nights in a row on that

FIFTH GROUND (cont.)

occasion, yet he never had stayed two nights. RP 152: 11-17, RP 509-10. When challenged on that statement he admitted he had never said that in any other interview. RP 238-9.

A key issue showing his inconsistency was his testimony about whether I had invited him into my room at any time. He was never invited in. I showed him and told him to use a spare bedroom and bathroom the first time he stayed over. On February 14, I told him to just sleep on the couch. RP 378:18-24, 379, 425:13-14. D.J. recalled I had told him to use the spare room but then added I said he could sleep in my room. RP 169. But on cross he examination he admitted that in a previous interview that I had only said he could use the spare room. He admitted I had never mentioned my room. RP 170-71. RP 188:1-3. But on redirect, he changed his story back saying I invited him to sleep in my room. RP 213:22-3. A few moments later he reversed himself again agreeing I never said he could sleep in my room. RP 222-26. Then, when the prosecutor examined him, he flopped back saying I must have invited him earlier in the day on the 14th. RP 241.

These inconsistencies, among many others, are relevant to the other issues in this case because they show a lack of credibility and consistency. There was

FIFTH GROUND (cont.)

not overwhelming evidence in this case. There was virtually no evidence. D.J. simply changed his story on a whim and when confronted by inconsistencies, he simply changed his story or denied making a prior statement. The prosecutor's opinion that D.J. was credible and not mistaken had to be a personal opinion because the testimony does not support such a wild claim.

In closing, the prosecutor also focused on D.J.'s financial status and my infrequent service as pro tem judge. At trial, D.J. wore a dark suit that was clearly several sizes too large making him look small and vulnerable. It did not appear to have been bought for him. See Affidavits of Lisa Jensen and Jo Rhodes.

The prosecutor specifically drew attention to the clothes by noting:

Most 12 year old children don't have a fine wardrobe full of fine suits that lawyers do, but D.J. came to court dressed like he would for a significant event. He wore the one suit he had. He was here for two days and he wore it twice, but that should tell you how he appreciates that this was serious.

RP 589-590. In fact there had been no testimony about how many suits anyone owned in this case. There had been no testimony about what D.J. thought was important. There was no evidence I had a "wardrobe full of suits."

FIFTH GROUND (cont).

These comments were directly intended to focus on the status of D.J. versus my status as a lawyer to appeal to the passion and sympathy of the jury. This was further aggravated by the prosecutor's continued references in his final closing argument:

He wants to intimidate you by the defendant's stature in the community, that he's a lawyer, that he's a part time judge.

RP 549:10-21.

He's a lawyer, he's a pro tem judge and he knew who his accuser was, an 11 year old boy at the time.

RP 590: 16-18

He was willing to stand up and say, no witnesses. It's going to come down to D.J. and to me. I'm the lawyer. I'm the part time judge. I'm the adult.

RP 590-91.

Our State Supreme Court has specifically condemned this kind of pandering to a jury's passion. My status as an attorney or judge had nothing to do with this case. The prosecutor simply wanted to prejudice the jury, to make it feel like an accusation alone should be enough to convict on when it involved a judge versus a child who could only afford one suit. The comments had no purpose but to appeal to the sympathy and passion of the jurors..

FIFTH GROUND (cont.)

Given the lack of evidence in this case, the inconsistent and contradictory testimony of D.J., these comments were improper and had a substantial likelihood to affect the verdict.

3. The following reported court decisions in cases similar to mine show the error I believe happened in my case: (They are discussed in Petitioner's brief)

State v. Rivers, 96 Wash. App. 672, 981 P.2d 16  
(Div.1 1999)

State v. Boehning, 127 Wash. App. 511, 111 P.3d 899 (Div. 2 2005)

State v. Sargent, 40 Wash. App. 340, 698 P.2d 598  
(Div. 1 1985)

State v. Belgarde, 110 Wash. 2d 507, 755 P.2d 174  
(1988)

State v. Reed, 102 Wash. 2d 140, 684 P.2d 699 (1984)

State v. Simmons, 59 Wash. 2d 381, 368 P.2d 378 (1962)

4. The following statutes and constitutional provisions should be considered by the court.

14th Amendment to U.S. Constitution..right to fair trial.

5. This petition is the best way I know to get the relief I want and no other way will work as well because:

Several of the issues discussed and which show prosecutorial misconduct require facts outside the trial record which have been provided on the attached affidavits. SEE PETITIONER'S BRIEF for additional facts and argument.

## SIXTH GROUND

1. I should be given a new trial or released from confinement because:

Defense counsel failed to provide effective assistance of counsel when he failed to put on an available character defense, failed to object to presence of the toy on the stand, failed to ask the court to instruct the jury following the emotional outburst, failed to object to the prosecutor's eliciting testimony on D.J.'s credibility and failed to object when the prosecutor gave his own opinion of D.J.'s credibility. These failures were not reasonable and, given the lack of evidence in this case and the inconsistent, contradictory testimony of D.J., there is a reasonable probability that, but for these errors, the verdict would have been different.

2. The following facts are important when considering my case:

In addition to facts outlined previously, the following facts are important.

I provided the names of several people who could have provided positive character evidence regarding my reputation for sexual morality. I had been a member of the Pierce County legal community for 12 years. I had also spent considerable time teaching a high school music program outside my law practice.

SIXTH GROUND (cont.)

I provided these names and background to my attorney but these witnesses were never interviewed nor called to testify. See affidavits of Jeffrey Day, James Johnson and Lisa Jensen.

Attached is the affidavit of Alvin D. Mayhew, an experienced trial attorney. Mr. Mayhew notes that often a character defense is one of the only defenses available to this type of charge and it is critical to assert such a defense. Mr. Mayhew was familiar with my case and the witnesses who could have been called. Mr. Mayhew states that this available defense should have been put forward and could easily have made a difference given the lack of evidence in this case. See affidavit of Alvin D. Mayhew, Jr.

Defense counsel failed to object to the presence of the toy on the witness stand or to request the court to caution the jury following the outburst of the alleged victim's mother. Counsel also failed to object when prosecution witness Kim Brune testified about the test she gave D.J. to determine if he was telling the truth and failed to object when the prosecutor gave his own opinion on D.J.'s credibility in closing argument. Counsel also failed to object to the repeated references by the prosecution to my status as a judge.

SIXTH GROUND (cont.)

3. The following reported case decisions in cases similar to mine show the error I believe happened in my case.

State v. Cienfuegos, 144 Wash. 2d 222, 25 P.3d 1011  
(2001)

State v. Sherwood, 71 Wash. App. 481, 860 P.2d 407  
(Div. 2 1993)

State v. Visitacion, 55 Wash. App. 166, 776 P.2d 986  
(Div. 1 1989)

State v. Griswold, 98 Wash. App 817, 991 P.2d 657  
(Div. 3 2000)

State v. Allen, 89 Wash. 2d 651, 574 P.2d 1182 (1978)

See Petitioner's brief for discussion of these cases.

4. The following statutes and constitutional provisions should be considered by the court.

Sixth Amendment to U.S. Constitution

Article 1, section 22 (amendment 10) of Washington  
State Constitution

Both guarantee the right to effective assistance of  
counsel.

5. The petition is the best way I know to get the  
relief and no other way will work as well because:

This issue requires facts not contained in the trial  
record and which have been provided in attached affida-  
vits.

SEE PETITIONER'S BRIEF for additional facts and  
argument.

C. STATEMENT OF FINANCES

1. I DO ask the court to file this without making me pay the \$250.00 filing fee because I am so poor I cannot pay the fee.
2. I have \$145 approx. in my institution account.
3. I do not ask the court to appoint a lawyer for me.
4. I am not employed other than the job I have at this facility which pays about \$40 a month.
5. During the past 12 months I DID NOT get any money from a business, profession or other form of self-employment.
6. During the past 12 months I  
DID NOT get any rent payments.  
DID NOT get any interest.  
DID NOT get any dividends.  
DID get other money. The total amount was approximately \$121.60 which is restricted for postage use only.
7. During the past 12 months I  
DID NOT have any cash except as said in answer 2.  
DID NOT have any savings or checking accounts.  
DID NOT own stocks, bonds or notes.
8. List all real estate and othr property or things of value which belong to you or in which you have an interest. Tell what each item is worth and how much you owe on it. Do not list household furniture, furnishings or clothing which you or your family need.  
  
NONE
9. I am NOT married.
10. All of the persons who need me to support them are listed here.  
  
NONE

C. STATEMENT OF FINANCES (cont.)

11. All of the bills I owe are listed here:

<u>Name of Creditor</u>	<u>Address</u>	<u>Amount</u>
Bank One	Louisville, KY	\$ 7,969
Wells Fargo	Los Angeles, CA	\$10,025
Citi Cards	The Lakes, Nevada	\$ 2,206
MBNA America	Wilmington, DE	\$18,947
Fleet Credit Cd.	Newark, NJ	\$ 1,366
IRS	Ogden, Utah	\$11,300

All the above amounts were as of two years ago and do not include interest and other accrued charges.

12. OTHER

I was determined by the court to be indigent at the time I filed my initial appeal. Nothing has changed since that time. My only income is from a prison job which pays about \$40 a month which I use to buy basic hygiene items. Any money sent in to me is subject to a 55% deduction for DOC purposes. I remain indigent.

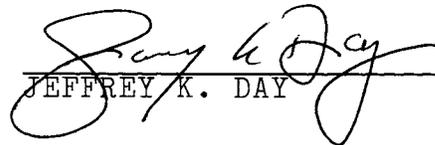
D. REQUEST FOR RELIEF

I want this court to vacate my conviction and give me a new trial.

E. OATH OF PETITIONER

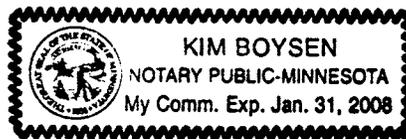
STATE OF MINNESTOA                    )  
  ) ss  
COUNTY OF SWIFT                    )

After being first duly sworn, on oath, I depose and say: that I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

  
JEFFREY K. DAY

SUBSCRIBED AND SWORN to me this 20<sup>th</sup> day of  
March, 2007.

  
NOTARY PUBLIC in  
and for the State  
of Minnesota. My  
Commission expires  
01/31/08.



PERSONAL RESTRAINT PETITION

ATTACHMENTS

Affidavit of Jeffrey K. Day	4 pages
Affidavit of Lisa Jensen	5 pages
Affidavit of Jo Rhodes	4 pages
Affidavit of Dan Platter	2 pages
Affidavit of James Johnson	3 pages
Affidavit of Alvin D. Mayhew, Jr.	3 pages

AFFIDAVIT OF JEFFREY K. DAY

STATE OF MINNESOTA            )  
  )  
County of Swift                 )

Jeffrey K. Day, after being duly sworn upon his oath, deposes and says as follows: I am submitting this affidavit in support of the personal restraint petition I have filed.

I began representing Devin Lytle a/k/a Jones in February 2002. He was charged in juvenile court with arson. He and two boys were accused of setting fire to a car in an apartment complex where Devin and his mother lived. The other boys plea bargained to a lesser charge contingent on payment of restitution estimated at \$60,000-\$70,000. Devin and his mother did not want to take the deal of plead guilty. They had no ability to pay the restituion. Following through on a plea deal would have been impossible, and Devin would have been left with a serious felony on his record. I agreed to represent Devin on a pay-as-able basis.

Devin was 10 years old when we met. The alleged crime was committed when he was 9. With no legitimate deal, this case had to go to trial or be dismissed. During the next six months I reviewed the police and fire investigation reports, interviewed witnesses and a co-defendant, attended a restitution hearing,

inspected physical evidence and met with Devin and his mother several times in my office and 5 times in court.

I had never represented anyone this young. I had little experience dealing with children his age because I am never around them. Because the crime took place when Devin was 9, I had to consider legal issues related to his capacity to commit a crime as well as his competency to get through trial. I had to determine how he might perform at trial. After interviewing him in my office, I discovered a number of inconsistencies between his story and the investigation reports. I wanted to interview him again in a place outside my office where he might feel more comfortable and where I could challenge him on the inconsistencies in his story. My office seemed to be too formal a setting to get him to open up.

The first time he came to my office I heard him ask his mother to go to McDonalds so I was aware he liked the place. I felt that taking him there might provide a good opportunity to get him to talk to me about his case and the concerns I had with his version of the facts. After his case ended, we generally stopped by at McDonalds if he needed to eat, but, initially, there was a very specific reason why I chose to take him there; to get him to talk about his case so I could properly represent him.

AFFIDAVIT OF JEFFREY K. DAY-2

At my trial, the issue of why we went to McDonalds was blown out of proportion and context. I never took him there because I knew his mother could not afford it. I took him because I felt it would be easier to talk to him, to confront him with the issues we had to deal with and to hear exactly how he would answer some tough questions that would be asked of him if we went to trial.

When the Court granted the State's motion to prohibit me from mentioning anything about my legal representation, I could not explain why it was so important for me to assess Devin's ability to go to trial. I could not explain he faced a serious criminal charge or that his mother would not allow him to take a deal or that there were legitimate legal issues that I had to explore regarding his legal capacity to even commit a crime. This was a criminal charge and, as his lawyer, I had to get him to trust me for that reason and no other. At trial, the prosecutor attributed an ulterior motive to my actions, when, in fact, there was a perfectly legitimate reason for my actions. I was prevented from explaining that to the jury.

There was a legitimate defense available to me that I feel my attorney should have put before the jury. This was a character defense.

In addition to my law practice, for the prior 12 years I had worked with the Cascade High School music

program as an instructor/arranger. This required constant involvement and supervision of 140-170 students each year. From July-November I would attend 2-4 rehearsals a week. I attended a week long band camp, travelled with the band on overnight competition trips and supervised on several 8-13 day trips the band took every two years. From January-June, we continued to rehearse once or twice a week. In short, over 12 years, I had significant contact with these students and their parents. My reputation within this band community was excellent. There was never a hint of impropriety in my relationships with these students.

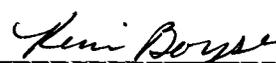
I provided the name of the band director and several parents to my attorney assuming he might contact them for use as character witnesses. I also provided the name of Lisa Jensen, a personal friend, whose 3 children went through the band program when I taught. These people and many others could have provided positive character evidence specifically in regard to sexual morality. See other Affidavits.

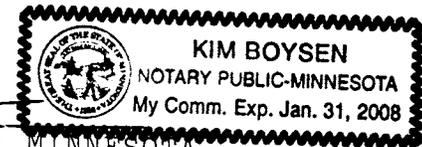
FURTHER your affiant sayeth naught.

DATED this 20<sup>th</sup> day of MARCH, 2007.

  
JEFFREY K. DAY

SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day  
of March, 2007.

  
NOTARY PUBLIC FOR MINNESOTA  
Commission expires: 01/31/08



AFFIDAVIT OF LISA JENSEN

STATE OF WASHINGTON            )  
  ) ss  
County of Snohomish            )

I, Lisa Jensen, after being duly sworn upon my oath deposes and says as follows: I was present throughout all of Jeff's trial and heard all the testimony. I had a good view of the jury, judge and witness stand. There were several incidents which occurred during the trial which I feel could only have denied Jeff a fair trial.

First, when Devin testified he held and played with an orange-yellow Koosh Ball. This toy is very popular for Devin's age group and is usually tossed back and forth between people. I saw that he had the ball when he walked into the courtroom. The color made it very obvious. Devin held and played with the ball in view of the jury while he testified. At one point he was directly in front of the jury referring to a diagram on a stand and was playing with the toy as he answered questions. There is no doubt that the Judge, jury, clerks and audience had a clear view of this toy. I was surprised Devin was allowed to have the toy while testifying. He did not appear

nervous or scared. Most of the time during his testimony he looked bored, yawned on the stand, and played with the toy. There was never any questioning about whether he needed a toy or why he had it.

Second, Devin was dressed in a dark suit that appeared to be two to four times too large. The jacket, in particular, made Devin look smaller than he was and made him look vulnerable which did not match his demeanor. What made this worse was the prosecutor making a reference in closing argument that Devin could not afford a lot of nice suits like an attorney and that Devin showed how important he felt the trial was since he wore the only suit he owned two days in a row. There had been no testimony about who owned how many suits or what Devin thought about the trial or that he wore a suit because he thought it was important. Given how poorly the suit fit, I think it doubtful that he even owned the suit. If Devin's family was so poor, as the prosecutor pointed out, why buy a suit that clearly did not fit? It felt, to me, that dressing Devin in a poorly fitting suit was all staged and that the prosecutor, without any proof, tried to make the jury feel sympathy for Devin based on his family's situation.

Third, and extremely disturbing, was the show Devin's mother put on in the middle of Jeff's testimony when she suddenly jumped up in the audience, cried out,

and ran out of the courtroom slamming the door as she went. Jeff was at a critical point in his testimony when she interrupted him. This was a small courtroom, and she was in plain view of the jury when she caused this disruption. We all knew she was Devin's mother since she had testified earlier. Once she got outside, she continued with her loud hysterics. We could hear her in the courtroom as Jeff was trying to continue with his testimony. I was shocked that the Judge took no action even though Amber continued to carry on in the hall. He did not take a recess or excuse the jurors. He did not advise the jury to disregard Amber's emotional antics. This seemed to be a problem because after Amber's outburst, it did not appear the jury was really paying attention to Jeff's testimony. Because the outburst and disruption were so disturbing to me, I can only believe the jury had to be affected as well and that the verdict was swayed, in part, by Amber's demonstration. She appeared good at staging times to act emotional.

Finally, I believe Jeff's attorney should have called many witnesses who were available to attest to his good character. I have known Jeff for 13 years. He has spent a lot of time with me and my children as they grew up. Three of my children were in the high school where Jeff helped to teach the band, and

all three went through the band program. Our band community was made up of 140-170 students each year plus their parents, alumni, staff and adults who continued to help the band even after their own kids had graduated. Next to the director, Jeff was the adult most involved with this program and spent several days a week teaching the students. Jeff's reputation for hard work and loyalty to the students was excellent. His reputation for sexual morality with these students was of the highest regard. There was never a hint of anything improper in how he conducted himself with students in all the time he worked with the program. Certainly, I and my children would have testified to his character if asked, but we were never contacted by his attorney. I know many others who knew and saw Jeff work with their children who would also have gladly testified if they had been asked. I think Jeff needed that sort of testimony at his trial to help counter this kind of accusation along with the prosecutor's improper comments, Amber's outburst, and the false image Devin presented dressed in an oversized suit playing with a toy in front of the jury during his testimony.

AFFIDAVIT OF LISA JENSEN-4

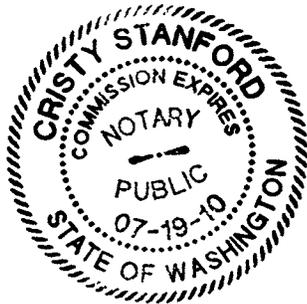
I heard all the testimony at the trial. This case came down to Jeff's word against Devin, and there were numerous inconsistencies in Devin's story which made no sense. I could not see how any jury could have come to the result this one did unless it was affected by these and other problems which occurred during the trial.

Further your affiant sayeth naught.

DATED this 13 day of October, 2006.

  
LISA JENSEN

SUBSCRIBED AND SWORN TO before me this 13<sup>th</sup>  
day of October, 2006.



  
Name: \_\_\_\_\_  
NOTARY PUBLIC for the State  
of Washington  
Residing at Everett WA  
Commission expires 07/19/10



after this disturbing outburst. He did not caution or advise the jury in any manner. He did not caution Amber when she returned to the courtroom. The Judge did not even take a break after the outburst. Even though Jeff's lawyer continued to question Jeff, it did not appear to me that, following the disruption, the jury was really paying attention to the testimony. We could all hear Amber in the hallway continuing to make a scene. It surprised me how long this went on while Jeff was testifying. I have no doubt the outcome the trial was tainted by this disturbing and disruptive display.

I was also concerned when Devin testified in front of the jury while holding and playing with a toy. This was an orange and yellow ball several inches in diameter, I saw Devin hold the ball on the witness stand, and the jury had a clear view of it as well. Devin played with the ball throughout the time he testified. At one point he was asked to step down from the stand to refer to a diagram placed on a stand in front of the jury. While answering questions about this diagram, he stood just a few feet from the jury. Devin continued to play with this toy while standing by the chart in full view of the jury. Everyone in the courtroom including

the Judge, clerk, audience and jury had a clear view of the toy and could see Devin playing with it.

I was surprised he was allowed to have this toy on the stand. There was no discussion with the Judge regarding the toy prior to or during Devin's testimony. Devin did not appear to need the toy for any reason. He did not appear nervous. Rather, he appeared bored most of the time.

The toy was certainly a distraction due to its color and the fact Devin displayed it and played with it while testifying.

Adding to the distraction of the toy was the fact that Devin was dressed in a suitcoat that was obviously several sizes too large for him. He wore the dark jacket and slacks and a white shirt, but the suit appeared to be made for someone much larger. The effect was to make Devin look smaller than he was, to make him look vulnerable. Compounding this appearance was the prosecutor's effort to specifically draw attention to it in closing argument. The prosecutor made a point of telling the jury that Devin's family was poor and that unlike lawyers, such as Jeff, Devin could only afford one suit and he had worn it to court both days.

There had been absolutely no testimony from anyone about how many suits anyone owned. It appeared that the prosecutor was purposely trying to focus the jury's attention on the clothes. It felt to me like the jacket issue was staged to make look Devin look more vulnerable and then direct the jury's attention to his class status. The jacket fit so poorly that there is no logical way that it could have been purchased specifically for him.

Given the nature of the testimony in that there was nothing to back up Devin's accusation, the only logical conclusion is that these events had an improper influence on the jury.

Further your afixant sayeth naught.

DATED this 7<sup>th</sup> day of October, 2006.

Jo Rhodes  
JO RHODES

SUBSCRIBED AND SWORN TO before me this 7<sup>th</sup> day of October, 2006.



Kevin E. Wirth  
Name: \_\_\_\_\_  
NOTARY PUBLIC for the State of  
Washington residing at Lyons Rd  
wa. My commission  
expires 8/9/2010.

AFFIDAVIT

I, DANNY E. PLATTER, after being sworn on oath deposes and says:

I am an attorney licenses to practice law in the State of Washington.

I have been acquainted with Mr. Day for several years, and at the time of his trial, he had been renting office space from me for a couple of years.

I was present during a part of his jury trial. Specifically, I was present during a part of his testimony during direct examination by his attorney.

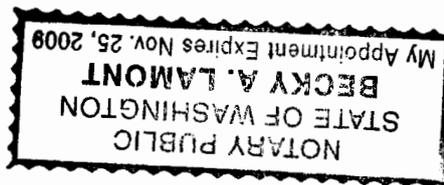
During Mr. Day's testimony, when he was denying the allegations against him, the alleged victim's mother, who was seated in the second row, in view of the jury, and approximately 8 to 10 feet from them, suddenly stood up, burst into a loud cry and stormed out of the courtroom. She made a loud exit through the courtroom doors and her crying could be heard inside the courtroom after the courtroom doors closed.

She came back in a few minutes later and reseated herself in the second row of the courtroom's seating area.

I heard the prosecutor tell her not to do that again; that it doesn't help.

*Danny E. Platter* 8/10/06  
Danny E. Platter

STATE OF WASHINGTON )  
) ss.  
COUNTY OF PIERCE )



I certify that I know or have satisfactory evidence that DANNY E. PLATTER is the person who appeared before me, and said person acknowledged that he signed the instrument to which this acknowledgement is attached and acknowledged it to be his free and voluntary act for the uses and purposes mentioned in the instrument.

Dated this 10<sup>th</sup> day of August, 2006.

Becky A Lamont

Notary Public in and for the State of Washington

Residing at 112 3rd St SW Puyallup, WA 98371

My appointment expires: 11/25/2006

Print name: Becky A. Lamont



AFFIDAVIT OF JAMES M. JOHNSON

STATE OF WASHINGTON        )  
                                  ) ss  
County of Snohomish        )

James M. Johnson, after being duly sworn upon his oath deposes and says as follows: I was the band director at Cascade High School in Everett Washington for 17 years. I have known Jeff Day since 1990 and worked with him for 12 years. I was also corps manager and head music instructor for the Seattle Cascades Drum and Bugle Corps from 1989-1995. Jeff worked for the corps as a percussion instructor from 1991 through 1995. The corps membership consisted of students from the age of 12-21.

Beginning in the fall of 1992 Jeff worked as an assistant percussion instructor with me at Cascade High. With the exception of the 1996-97 school year, Jeff worked with me until 2004. In Fall 1997 he assumed the position of head percussion instructor.

Our band consisted of 140-170 students each year. We also had a very active parent booster club and alumni group. In his position, Jeff was responsible for arranging all the percussion music for our competitive fall program. The percussion section typically consisted of 24-30 students. Jeff worked with and supervised these students throughout the year. He attended a two day drum camp with them each year. Beginning in July, he would rehearse them 2-3 days

a week. In August each year he taught at our week long band camp which involved 3 full days and nights away from the school. From September to mid-November each year, Jeff would spend 3-4 evenings per week with the percussison section and other sections of the band as we either practiced or performed throughout Washington, Oregon and Idaho. He also travelled with the band on trips we made to Florida, England and Aüstralia.

Given his significant involvement with the program, Jeff was well known by hundreds of students, parents, alumni, instructors and other staff members. This is a large and significant community of persons who have been involved with our program for many years. Jeff was always a valued instructor, liked by all, extremely hard working and very dedicated and loyal to the band program. Jeff worked with numerous adults during this time and was well liked by both adults and the students.

During the entire time Jeff worked with the drum corps and the high school, I never once had any mention that Jeff acted in any manner which was improper with either students or adults. He had an excellent reputation for hard work, His reputation for sexual morality among the students, parents and the many volunteers who worked with both the corps and band was excellent as well. Jeff always presented a positive role model for the students to follow in how he conducted himself.

I have never in these years of working with Jeff had any student or parent even mention or talk to me about any inappropriate action of any kind which involved a student. Jeff was the epitome of proper behavior and actions around band students and corps members, and he always maintained a well earned positive reputation for his actions.

I told Jeff to give my name to his attorney and that I would be happy to testify to these facts and to my knowledge of his positive reputation. I expected to be contacted by his attorney and to testify at trial but his attorney never contacted me.

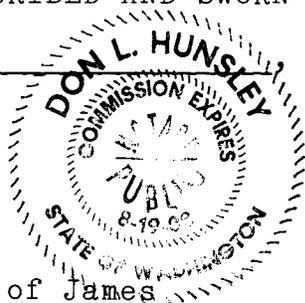
Given the fact that Jeff had worked with hundreds of students and their parents during his time in these programs without ever a hint of impropriety, I felt this information would have been valuable at his trial.

Further your affiant sayeth naught.

DATED this 13<sup>th</sup> day of June, 2006.

  
JAMES M. JOHNSON

SUBSCRIBED AND SWORN to before me this 13<sup>th</sup> day of June 2006.



  
Notary Public for the  
State of Washington  
Residing at 90420, WA  
My Commission expires  
8/19/08

AFFIDAVIT OF ALVIN D. MAYHEW, JR.

STATE OF WASHINGTON        )  
                                  ) s.s.  
County of Pierce            )

I, Alvin D. Mayhew, Jr. being duly sworn upon my path deposes  
and says as follows:

I have practiced law for more than thirty years. I have  
practiced criminal law for a significant portion of my career and  
I have defended many individuals charged with sex offenses.

I have known Jeff Day since 1992 when he was hired to work  
in my lawfirm. We have worked together on cases. We have served  
on the same Bar committees. We have both served as pro tem judges  
in the same courts. Jeff rented office space from me for several  
years after my law firm broke up. We continued to see each other  
on a regular basis through the time of his trial.

Jeff's reputation in the Pierce County legal community is  
excellent. He was highly regarded by his colleagues for his work  
and fairness. His reputation for sexual morality is also excellent.  
I never heard anyone speak negatively about Jeff in that regard.

I am also aware that Jeff spent a considerable amount of time  
teaching a band program outside of his law practice. He worked  
with hundreds of high school students and was highly regarded for  
his work there as well.

I am familiar with Jeff's case. I know the case came down

to Jeff's word against the word of the complaining witness. There was no corroborative evidence to support the accusation. Given the weakness of the case and the lack of evidence, I feel certain that had evidence been put forth regarding Jeff's good reputation for sexual morality, this would have made a difference in the verdict. I have practiced long enough and have handled enough of these cases to know that a defendant is at a disadvantage simply because of the nature of the charge. Essentially, the only defenses one has is an alibi defense that he was not present at the alleged scene of the crime or a character defense. The jury must hear from people who can testify that a defendant, based on his reputation, is not the type of person likely to commit this type of crime. Often, it is a defendant's only real defense against these emotionally charged accusations.

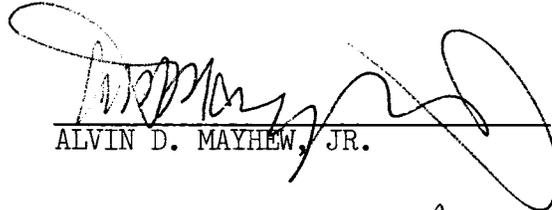
A character defense was available to Jeff and should have been put forward. I would certainly have testified, had I been asked, as to Jeff's reputation for sexual morality as part of the legal community. I have heard many attorneys and judges speak of Jeff and never have I heard any negative remarks about his reputation. Many others in this community would have gladly testified.

I know that many witnesses could have testified from the high school community where Jeff helped teach for 12 years, through the time of his trial. There were students and parents who had known

Jeff over time and would have testified. This kind of testimony from these people would have been very beneficial to Jeff, and, from my experience, could easily have made a difference at his trial.

Further your affiant sayeth naught.

DATED this 18 day of December, 2006.

  
ALVIN D. MAYHEW, JR.

SUBSCRIBED AND SWORN to before me this 18th day of Dec  
2006.



  
Name: MARY L. KARSTEDT  
NOTARY PUBLIC for the State of  
Washington residing at Puyallup  
My commission  
expires 09-20-08.