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COURT OF APPEALS
DIVISION II

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

JEFFREY K. DAY,

Petitioner.

NO. 36283-0-II

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Must the petition be dismissed for failure to (a) show actual and substantial prejudice arising from a Constitutional error; or (b) demonstrate non-Constitutional error that results in a complete miscarriage of justice?
2. Is petitioner entitled to relief where any possible claimed error was not Constitutional in nature, and did not result in a complete miscarriage of justice?
3. Is petitioner entitled to relief due to prosecutorial misconduct when the prosecutor's arguments were proper?
4. Should this Court consider petitioner's claim that his alleged errors are not harmless where (1) petitioner fails to demonstrate actual prejudice or a complete miscarriage of justice, and (2) petitioner relies on credibility of witnesses and sufficiency of the evidence, which was raised and rejected on appeal?

1 5. Has petitioner met his two-part burden in showing counsel ineffective
2 where petitioner cannot satisfy either prong of Strickland?

3
4 B. STATUS OF PETITIONER:

5 Petitioner, JEFFREY K. DAY, is restrained pursuant to a Judgment and
6 Sentence (Appendix A) entered in Pierce County Cause No. 04-1-01873-2. On
7 October 7, 2004, a Pierce County jury found petitioner guilty of first degree child
8 molestation. Appendix A. On November 5, 2004, the court imposed as a minimum
9 term 60 months to life in prison. Appendix A.

10 Petitioner filed a direct appeal claiming insufficiency of the evidence. On
11 March 13, 2006, this Court filed the Ruling Affirming Judgment. Petitioner moved
12 to modify the ruling. His motion was denied. The Supreme Court denied his
13 petition for discretionary review by Order dated March 7, 2007.

14 Petitioner's personal restraint petition was filed in this Court on April 6,
15 2007. The petition is not time-barred.

16
17 C. FACTS:

18 1. Procedure

19 On April 14, 2004, the State charged petitioner with one count of first degree child
20 molestation. CP 1. Trial began on September 29, 2004, in Pierce County Superior Court.
21 RP 1. The jury returned a verdict of guilty as charged. CP 35. Prior to sentencing,
22 petitioner moved the trial court for Arrest of Judgment. CP 44-45. The trial court found
23 that there was sufficient evidence to support the jury's finding of sexual gratification in (1)
24 the surrounding circumstances; and (2) the nature of the touching itself. RP-Motion 9.

1 The trial court sentenced petitioner to a minimum term of 60 months confinement to life in
2 the department of corrections. RP-Sentencing 27, CP 49-61.

3 2. Substantive facts

4 Sometime in the latter part of 2001, petitioner, then a licensed attorney, agreed to
5 represent D.J., born 03/16/92, on a juvenile court matter. RP 37-38, 41. Petitioner's legal
6 representation of D.J. ended around August of 2002. RP 44. Petitioner continued to see
7 D.J. after that. RP 45. Petitioner would pick D.J. up from his home and take him to a
8 football game, to the movies, to play putt-putt golf, shopping at Toys R Us, and many
9 times to McDonald's. RP 45. After several outings, petitioner invited D.J. to spend the
10 night at his house. RP 47. D.J. spent the night at petitioner's house three to four times.
11 RP 48. Petitioner bought gifts for D.J., including cards, gift cards, a Spiderman toy,
12 movies, etc. RP 49. These were things his mother could not afford to buy for him. Id.
13 D.J. thought of petitioner as an adult role model; a brother. RP 37-38, 117.

14 On February 14, 2004, D.J. spent the night with petitioner. RP 118. D.J. fell
15 asleep watching movies. RP 128-129. When he awoke, D.J. noticed his pants had been
16 removed and he was covered with a blanket. RP 129. Petitioner was sleeping in his room.
17 RP 130. D.J. was cold and did not like sleeping in the dark so he crawled into petitioner's
18 bed and went to sleep. RP 132. The next thing he remembers is waking up, feeling
19 petitioner touching him, "by his testicles". RP 132. D.J. was still wearing his boxer
20 shorts, but petitioner had put his hand inside the underwear on D.J.'s bare skin. RP 133.
21 Petitioner was still under the covers with D.J., moving his hand on D.J.'s genitals. RP 134.
22 At first, D.J. pretended to still be sleeping. RP 133. When D.J. moved his head and
23 opened his eyes, petitioner took his hand out of D.J.'s boxers. Id. D.J. got up claiming he
24 had to use the bathroom. RP 135. He did not return to the bed. Id. He then told petitioner
25 he had to go home. RP 136. He tried to call his mother while petitioner was in the shower,

1 but D.J. was panicking and could not get the call to go through. RP 137-138. When he got
2 home, D.J. immediately told his mother what petitioner did to him. RP 143.

3 Petitioner testified that he never touched D.J.'s genitals intentionally or
4 inadvertently. RP 435, 436. He admitted he removed D.J.'s jeans while he slept in the TV
5 room and that while doing so, D.J. made an attempt to pull his pants back up. RP 482.

6 Petitioner claimed that a few minutes after D.J. got into bed with him, he got up and went
7 to sleep on the couch. RP 426. He said he went back into the bedroom and sat on the bed
8 to watch D.J., because D.J.'s breathing was heavy, uneven, loud, and rapid. RP 429, 431.

9 Petitioner testified that he merely put his hand on D.J.'s chest to calm him as he slept. RP
10 431. At about that point, D.J. awoke and shortly thereafter got up to use the bathroom. RP
11 432-433.

12 Petitioner told the jury that D.J. had been afraid his mother would send him to a
13 "boot camp" if he messed up anymore. RP 419. On the day of the incident, D.J. had in his
14 possession wristbands and a CD player that his mother had confiscated. RP 165, 420. In
15 closing argument, petitioner urged the jury to consider "the motivations that young [D.J.]
16 had on that particular day." RP 556. He argued that D.J. was panicked on the morning of
17 the incident not because he had been molested, but because he had in his possession the
18 confiscated wrist bands and CD player, which would mean he was going to get sent to
19 "boot camp". RP 572. Petitioner argued that D.J. had an interest and bias in the case and
20 implied that he fabricated the molestation allegation to get out of going to "boot camp".
21 RP 573, 577.

1 D. ARGUMENT:

- 2 1. THE PETITION MUST BE DISMISSED BECAUSE
3 PETITIONER CANNOT SHOW (1) ACTUAL AND
4 SUBSTANTIAL PREJUDICE STEMMING FROM ERROR OF
5 CONSTITUTIONAL MAGNITUDE, OR (2) A FUNDAMENTAL
6 DEFECT, WHICH INHERENTLY RESULTS IN A COMPLETE
7 MISCARRIAGE OF JUSTICE.

8 Personal restraint procedure came from the State's habeas corpus remedy, which is
9 guaranteed by article 4, § 4 of the State constitution. In re Hagler, 97 Wn.2d 818, 823, 650
10 P.2d 1103 (1982). Fundamental to the nature of habeas corpus relief is the principle that
11 the writ will not serve as a substitute for appeal. A personal restraint petition, like a
12 petition for a writ of habeas corpus, is not a substitute for an appeal. Id. at 824.
13 “Collateral relief undermines the principles of finality of litigation, degrades the
14 prominence of the trial, and sometimes costs society the right to punish admitted
15 offenders.” Id. (*citing Engle v. Issac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed.2d 783
16 (1982)). These costs are significant and require that collateral relief be limited in state as
17 well as federal courts. Id.

18 In order to prevail in a personal restraint petition, a petitioner must meet an
19 especially high standard. A petitioner asserting a constitutional violation must show actual
20 and substantial prejudice. In re Haverty, 101 Wn.2d 498, 681 P.2d 835 (1984). Contrary
21 to petitioner’s brief, the rule that constitutional errors must be shown to be harmless
22 beyond a reasonable doubt has no application in the context of personal restraint petitions.
23 In re Mercer, 108 Wn.2d 714, 718-721, 741 P.2d 559 (1987); In re Hagler, 97 Wn.2d at
24 825. Mere assertions are insufficient in a collateral action to demonstrate actual prejudice.
25 Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and
not against it. In re Hagler, 97 Wn.2d at 825-26.

1 A petitioner relying on non-constitutional arguments must demonstrate a
2 fundamental defect which inherently results in a complete miscarriage of justice. In re
3 Cook, 114 Wn.2d 802, 810-11, 792 P.2d 506 (1990).

4 The present petition falls well short of these demanding standards. As
5 demonstrated below, petitioner asserts that errors occurred but fails to establish actual
6 prejudice arising from error of constitutional magnitude or a fundamental defect resulting
7 in a complete miscarriage of justice. As such, the petition must be dismissed.

- 8 a. That D.J. held a small ball in his hand during
9 testimony was not error, nor could such an innocuous
10 occurrence result in a complete miscarriage of
11 justice.

12 Petitioner argues that because D.J. held a ball in his hand while testifying the jury
13 was given the “impression that the [sic] was a small child who needed a security toy, an
14 image not supported by testimony or demeanor,” and that the effect “would create
15 sympathy.” Brief of Petitioner (BOP) at 16.

16 There is nothing in the record regarding D.J. having anything in his hand during
17 testimony. Both D.J. and his mother, Amber Lytle, testified to D.J.’s age of 12 at the time
18 of trial. RP 37, 106. Therefore, the jury could not have been given the impression that
19 D.J. was a “small child” as claimed by petitioner. To draw such a conclusion is mere
20 speculation and is also contrary to actual testimony of D.J.’s age. The claim that holding a
21 small ball would “create sympathy” is purely speculative.

22 A petitioner relying on non-constitutional arguments, such as this, must
23 demonstrate a fundamental defect which inherently results in a complete miscarriage of
24 justice. Cook, 114 Wn.2d at 810-11; In re Tran, 154 Wn.2d 323, 111 P.3d 1168,
25

1 (2005) (PRP granted where DOC error resulting in defendant's ineligibility for earned
2 early release credit, which could substantially lengthen prison sentence, constitutes
3 fundamental defect that inherently results in a miscarriage of justice); In re Goodman, 146
4 Wn.2d 861, 50 P.3d 618, (2002) (PRP granted where sentence based on miscalculated
5 offender score due to scoring of prior juvenile convictions that have washed out under
6 relevant statutes constitutes a fundamental defect inherently resulting in a complete
7 miscarriage of justice). Speculation will not sustain the onerous burden petitioner carries
8 here. Therefore, this contention is without merit.

9
10 b. Petitioner's claim that D.J.'s mother cried and left the
11 courtroom during petitioner's testimony does not
12 result in a complete miscarriage of justice.

13 Petitioner claims that while he was testifying, the victim's mother cried out and left
14 the courtroom. He does not allege that she made any statements, other than the fact that
15 she left the courtroom crying and could be heard in the hallway. PRP, Affidavit of Jo
16 Rhodes. In support of his claim, petitioner relies on four cases involving courtroom
17 outbursts. BOP 18-20. Each of these cases involved someone in the courtroom calling the
18 defendant a liar, or words to that effect. Id. None of these cases resulted in a reversal of
19 conviction.

20 Here, the allegation is merely that the spectator began crying, left the courtroom
21 rather noisily, and could be heard in the hallway crying. PRP, Affidavit of Rhodes. She
22 returned to her seat a few minutes later. PRP, Affidavit of Danny Platter. There is no
23 evidence that she called the defendant names, told him he was lying, or that she knew he
24 was guilty. Therefore, the cases cited by petitioner are inapposite.

1 This claim, even if true, is not an error of constitutional magnitude. As such
2 defendant must, but has failed to, show a complete miscarriage of justice. He is unable to
3 do so using an interruption that occurred one time during the course of a four day trial and
4 that was so minor that it did not even appear on the record. RP 356-509. This claim is
5 without merit.

6
7 c. Evidence of underlying facts of petitioner's
8 representation of victim was properly excluded.

9 During pre-trial motions, the court heard argument on the State's motion to
10 suppress any evidence related to the criminal charges on which petitioner represented D.J.,
11 the underlying facts of the charges, and/or that it was a criminal matter in Juvenile Court.¹
12 RP 12-16. The trial court granted the motion allowing only evidence that petitioner had
13 represented D.J. "in a juvenile matter." RP 15. Petitioner did not assign error to this ruling
14 on direct appeal.

15 In his PRP, petitioner asserts for the first time that evidence that D.J. had been
16 charged with arson, a felony, was necessary in order to show petitioner's actions with D.J.
17 were an effort to gain D.J.'s trust in order to effectively represent him, rather than to
18 pursue a sexual relationship, as argued by the State. BOP at 22.

19 This claim fails for two reasons. First, petitioner did not argue this theory of the
20 case below. The only basis offered for admission of the evidence was to explain "the
21 context as to how it was that [D.J.] and his mother came in contact with [petitioner], and
22 with respect to representation in a criminal matter at Remann Hall and the - - with respect
23

24
25 ¹ The record indicates that D.J. had been charged with arson, but that the charges were dismissed. RP 13-14.

1 to - - I think that at a minimum, we should be able to provide that information to the jury.”

2 RP 13-14.

3 Second, petitioner was still able to fully argue this theory of the case (that the
4 efforts to gain trust were to more effectively represent D.J.) without the jury being aware
5 of the charges against D.J. He could make all of his arguments using what the trial court
6 allowed – the fact that he was legal counsel for D.J.

7 Petitioner argues that a defendant should be given great latitude in cross
8 examination of a “prosecution witness to show *motive* or *credibility*.” BOP at 20 [italics
9 added]. However, the fact that D.J. had been once charged with arson, charges that did not
10 result in conviction, are not admissible to impeach credibility. ER 609. Additionally,
11 petitioner makes no effort to show how unsubstantiated arson charges would go to show
12 D.J.’s bias in any fashion. ER 404(b). Petitioner’s argument seems to be more of an effort
13 to admit highly prejudicial evidence against D.J. Such evidence had no probative value,
14 especially in light of the fact that the charges were unproven allegations that resulted in
15 dismissal. Further, petitioner’s proffered explanation of his actions is weak in light of the
16 fact that his relationship with D.J. continued for approximately a year and a half after their
17 attorney/client relationship ended. RP 44; 118. Clearly there was no reason to gain D.J.’s
18 trust and confidence *after* the charges had been dismissed. The trial court did not err in its
19 ruling in this regard.
20

21 Even had this ruling by the trial court been in error, and even had it been of
22 constitutional magnitude, the burden petitioner bears is showing actual and substantial
23 prejudice. In re Haverty, 101 Wn.2d 498, 681 P.2d 835 (1984). Contrary to petitioner’s
24 brief, the rule that constitutional errors must be shown to be harmless beyond a reasonable
25

1 doubt has no application in the context of personal restraint petitions. In re Mercer, 108
2 Wn.2d 714, 718-721, 741 P.2d 559 (1987); In re Hagler, 97 Wn.2d at 825. Mere assertions
3 are insufficient in a collateral action to demonstrate actual prejudice. Inferences, if any,
4 must be drawn in favor of the validity of the judgment and sentence and not against it. In
5 re Hagler, 97 Wn.2d at 825-26. Petitioner cannot show actual prejudice because he was
6 still fully able to argue this new theory of the case and rebut the prosecution's assertions
7 with the evidence that was admitted. This claim fails.

8
9
10 d. The prosecutor acted properly in closing argument.

11 A defendant claiming prosecutorial misconduct bears the burden of demonstrating
12 that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak,
13 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d
14 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128
15 Wn.2d 1015 (1996). Improper comments are not deemed prejudicial unless “there is a
16 *substantial likelihood* the misconduct affected the jury’s verdict.” State v. McKenzie, 157
17 Wn.2d 44, 52, 134 P.3d 221 (2006) (*quoting State v. Brown* 132 Wn.2d 529, 561, 940 P.2d
18 546 (1997)) [*italics in original*]. If a curative instruction could have cured the error and the
19 defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the
20 defendant did not object or request a curative instruction, the error is considered waived
21 unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an
22 enduring and resulting prejudice that could not have been neutralized by an admonition to
23 the jury.” Id.

1 To prove that a prosecutor's actions constitute misconduct, the defendant must
2 show that the prosecutor did not act in good faith and the prosecutor's actions were
3 improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* State v.
4 Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)).

5 In determining whether prosecutorial misconduct warrants the grant of a mistrial,
6 the court must ask whether the remarks, when viewed against the background of all the
7 evidence, so tainted the trial that there is a substantial likelihood the defendant did not
8 receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v.
9 Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983).

10 In addition to the burden set forth above, in a personal restraint petition, petitioner
11 must show that there was a complete miscarriage of justice. He is unable to do so.

12
13 Petitioner first claims the prosecutor committed misconduct in closing argument
14 when he told the jury that there was no reason to doubt D.J. BOP at 25. However, the
15 prosecutor was merely arguing credibility of the witnesses. He did not state a personal
16 opinion, nor did he vouch for the credibility of D.J. The statement did not prompt an
17 objection from the defense. RP 515-51. It is not misconduct for a prosecutor to make
18 arguments regarding a witnesses' veracity that are based on inferences from the evidence.
19 *See* State v. Rivers, 96 Wn. App. 672, 674-675, 981 P.2d 16 (1999). Further, a prosecutor
20 has wide latitude in closing argument to draw reasonable inferences from the evidence and
21 to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d
22 577 (1991). The prosecutor acted properly and there was no error.

23
24 Petitioner also claims the prosecutor committed misconduct by arguing that D.J.'s
25 appearance and demeanor showed he thought the proceedings were important. BOP 26.

1 Petitioner specifically argues that it was improper for the prosecutor to comment to the
2 jury that D.J. wore the same suit both days that he testified. Id. Petitioner’s affidavits
3 indicate that the suit was too big, making D.J. look small and vulnerable. This conclusion
4 is purely speculative because petitioner provides no evidence that the jury perceived D.J in
5 that fashion. The prosecutor did not comment on the size of the suit and the ownership and
6 source of the suit is unknown. However, at trial, “counsel are permitted latitude to argue
7 the facts in evidence and reasonable inferences” in their closing arguments. State v. Smith,
8 104 Wn.2d 497, 510, 707 P.2d 1306 (1985); *see also* State v. Harvey, 34 Wn. App. 737,
9 739, 664 P.2d 1281 (1983). Further, a prosecutor may make inferences in closing
10 argument, so long as they are supported by the evidence. State v. McKenzie, 157 Wn.2d at
11 57 (not misconduct in child rape case for prosecutor to call defendant a “rapist” where use
12 of the word was a reasonable inference from the evidence) (*citing* State v. Buttry, 199
13 Wash. 228, 250 90 P.2d 1026 (1939) (not prejudicial to designate defendant as a murderer
14 or killer where evidence indicates that he is)). The statements did not prompt counsel to
15 object.
16

17 Thirdly, petitioner contends that the prosecutor made an emotional appeal to the
18 passions and prejudices of the jury by mentioning the petitioner was a pro tem judge. BOP
19 at 27-28. Again, this argument prompted no objection from petitioner at trial.
20

21 Comments calculated to appeal to the jury’s passion and prejudice and encourage it
22 to render a verdict on facts not in evidence are improper. State v. Pastrana, 94 Wn. App.
23 463, 478, 972 P.2d 557 (1999) (*citing* State v. Stith, 71 Wn.App. 14, 18, 856 P.2d 415
24 (1993)). In Pastrana, the prosecutor told the jury, “You are going to tell this community
25 whether or not shooting a gun out a vehicle on the freeway at another moving vehicle and

1 killing somebody is first degree murder or if it is not.” Pastrana at 479. This Court held
2 that, viewed in the context of the whole argument, the prosecutor’s statement did not
3 amount to misconduct. Id.

4 Similarly, in State v. Greer, 62 Wn. App. 779, 815 P.2d 295 (1991), the prosecutor
5 stated, “I ask you to send a clear message out to the community that these two defendants
6 are accountable.” Greer at 786. Because the remarks must be read in context, the court
7 held that the argument did not amount to an appeal to the jury to decide the case on an
8 improper basis. Greer at 792-92.

9
10 Moreover, unlike the present one, the cases finding improper argument involve
11 egregious and inexcusable attempts to inflame the jury and obtain a verdict based on
12 prejudice. *See, e.g.,* State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988)
13 (prosecutor told jurors the defendant was involved in the American Indian Movement,
14 which he characterized as "a deadly group of madmen" and "butchers that kill
15 indiscriminately," and invited the jury to consider the events at Wounded Knee); State v.
16 Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (prosecutor repeatedly called the
17 defendant a liar, stated that defendant did not have a case, and argued that the defense
18 witnesses lacked credibility "because they were from out of town and drove fancy cars");
19 State v. Clafin, 38 Wn. App. 847, 849-51, 690 P.2d 1186 (1984) (prosecutor read poem
20 that used vivid and inflammatory imagery to describe the emotional effect of rape on its
21 victims).

22
23 Here, the prosecutor merely made arguments from the evidence, including drawing
24 an inference that petitioner thought he could get away with his crime due to his status in
25 the community relative to that of an indigent juvenile. RP 515-51. Petitioner does not cite

1 to any portion of the record where the prosecutor encouraged the jury to render a verdict
2 for an improper reason. Petitioner has failed to meet his burden in establishing the
3 impropriety of the remarks.

4 In spite of petitioner's claims of prosecutorial misconduct, he did not object at trial
5 to the prosecutor's conduct, he did not request a curative instruction, nor did he move for a
6 mistrial. On this issue, the Washington Supreme Court has stated:

7 We have consistently held that unless prosecutorial conduct is flagrant and
8 ill-intentioned, and the prejudice resulting there from so marked and
9 enduring that corrective instructions or admonitions could not neutralize its
10 effect, **any objection to such conduct is waived by failure to make an
11 adequate timely objection and request a curative instruction.** Thus, in
12 order for an appellate court to consider an alleged error in the State's closing
13 argument, the defendant must ordinarily move for a mistrial or request a
14 curative instruction. **The absence of a motion for mistrial at the time of
15 the argument strongly suggests to a court that the argument or event in
16 question did not appear critically prejudicial to an appellant in the
17 context of the trial.** Moreover, "[c]ounsel may not remain silent,
18 speculating upon a favorable verdict, and then, when it is adverse, use the
19 claimed misconduct as a life preserver on a motion for new trial or on
20 appeal."

21 State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)(*citing Jones v. Hogan*, 56 Wn.2d
22 23, 27, 351 P.2d 153 (1960); State v. Atkinson, 19 Wn. App. 107, 111, 575 P.2d 240,
23 *review denied*, 90 Wn.2d 1013 (1978)) [footnotes omitted] [emphasis added].

24 The failure to move for mistrial is also important because "the trial court is clearly
25 in a much better position than an appellate court operating from a cold record to evaluate
whether a remark can be cured by admonition or requires a mistrial based on the whole
flow of the trial and context of the remark." State v. Dickerson, 69 Wn. App. 744, 748,
850 P.2d 1366 (1993). Here, the prosecutor's remarks were proper and were not deemed
prejudicial by trial counsel as evidenced by his lack of objection.

1 In his claim of prosecutorial misconduct, petitioner has not met his burden of
2 showing a fundamental defect which results in a complete miscarriage of justice as
3 required by Cook, 114 Wn.2d at 810-11.

4 e. Because petitioner cannot show that error occurred
5 below, he cannot demonstrate actual prejudice or a
6 gross miscarriage of justice.

7 In his harmless error analysis, petitioner has revised the issue of sufficiency of the
8 evidence and credibility of the witnesses.² This issue was raised and rejected on direct
9 review. “This court from its early days has been committed to the rule that questions
10 determined on appeal or questions which might have been determined had they been
11 presented, will not again be considered on a subsequent appeal in the same case.” State v.
12 Bailey, 35 Wn. App. 592, 594, 668 P.2d 1285 (1983)(*quoting* Davis v. Davis, 16 Wn.2d
13 607, 609, 134 P.2d 467 (1943)). Because the personal restraint petition process is not a
14 substitute for appeal, petitioner cannot raise a valid issue on collateral attack by simply
15 revising an issue raised and rejected on direct appeal. On this issue, the Washington
16 Supreme Court stated:

17 Simply “revising” a previously rejected legal argument, however, neither
18 creates a “new” claim nor constitutes good cause to reconsider the original
19 claim. As the Supreme Court observed in Sanders, “identical grounds may
20 often be proved by different factual allegations. So also, identical grounds
21 may be supported by different legal arguments, . . . or be couched in
22 different language, . . . or vary in immaterial respects”. (Citations omitted.)
Sanders v. United States, *supra* at 16. Thus, for example, “a claim of
involuntary confession predicated on alleged psychological coercion does
not raise a different ‘ground’ than does one predicated on physical
coercion”. Sanders, at 16.

24
25 ² Again, petitioner does not use the applicable standard of review, incorrectly stating that the State must
prove any error harmless beyond a reasonable doubt. Mercer, 108 Wn.2d at 718-721; Hagler, 97 Wn.2d at
825.

1 In re PRP of Jeffries, 114 Wn.2d 485, 488, 789 P.2d 731 (1990). A claim rejected on its
2 merits on direct appeal will not be reconsidered in a subsequent personal restraint petition
3 unless the petitioner shows that the ends of justice would be served thereby. Jeffries, 114
4 Wn.2d at 487. In re PRP of Brown, 143 Wn.2d 431, 445, 21 P.3d 687 (2001), citing In re
5 PRP of Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994).

6 In the Ruling Affirming Judgment, this Court stated:

7 The jury believed D.J., and that credibility determination is not subject to
8 review. Camarillo, 115 Wn.2d at 71. The testimony of the victim of a sex
9 offense, is sufficient to support a conviction. It need not be corroborated.
RCW 9A.44.020(1).¹

10 ¹Day's argument that there must be corroboration is clearly contrary to the
11 statute. He asserts that State v. Boehning, 127 Wn. App. 511 (2005)
12 supports his position. That is not correct, the Boehning court rule that, as
13 here, the jury's verdict depended on whom they believed. It did not reverse
the verdict because the evidence was insufficient, but because it may have
been affected by prosecutorial misconduct.

14 Ruling Affirming Judgment, #32594-2-II.

15 Here, petitioner is merely reiterating his argument regarding credibility of the
16 witnesses, in an effort to show even the slightest error below *may* have affected the verdict.
17 However, as discussed above, petitioner must show a *complete miscarriage of justice*,
18 which he cannot do.

19 f. Petitioner has failed to meet his burden to show
20 ineffective trial counsel for counsel's failure to call
21 character witnesses and failure to object to properly
22 admitted evidence and argument.

23 The right to effective assistance of counsel is the right "to require the prosecution's
24 case to survive the crucible of meaningful adversarial testing." United States v. Cronin,
25 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial
proceeding has been conducted, even if defense counsel made demonstrable errors in

1 judgment or tactics, the testing envisioned by the Sixth Amendment, United States
2 Constitution has occurred. Id. "The essence of an ineffective-assistance claim is that
3 counsel's unprofessional errors so upset the adversarial balance between defense and
4 prosecution that the trial was rendered unfair and the verdict rendered suspect."
5 Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305
6 (1986).

7
8 To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-
9 prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80
10 L.Ed.2d 674 (1984); *see also*, State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).
11 First, a defendant must demonstrate that his attorney's representation fell below an
12 objective standard of reasonableness. Second, a defendant must show that he or she was
13 prejudiced by the deficient representation. Prejudice exists if "there is a reasonable
14 probability that, except for counsel's unprofessional errors, the result of the proceeding
15 would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251
16 (1995); *see also*, Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction,
17 the question is whether there is a reasonable probability that, absent the errors, the fact
18 finder would have had a reasonable doubt respecting guilt."). There is a strong
19 presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d
20 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d
21 858, (1996); Thomas, 109 Wn. 2d at 226. A defendant carries the burden of demonstrating
22 that there was no legitimate strategic or tactical rationale for the challenged attorney
23 conduct. McFarland, 127 Wn. 2d at 336.
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1 A presumption of counsel's competence can be overcome by showing counsel
2 failed to conduct appropriate investigations, adequately prepare for trial, or subpoena
3 necessary witnesses. State v. Maurice, 79 Wn. App. 541, 544, 903 P.2d 514 (1995). The
4 standard of review for effective assistance of counsel is whether, **after examining the**
5 **whole record**, the court can conclude that defendant received effective representation and
6 a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988) [emphasis added]. An
7 appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake.
8 State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

9
10 Judicial scrutiny of a defense attorney's performance must be "**highly deferential**
11 in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689
12 [emphasis added]. The reviewing court must judge the reasonableness of counsel's actions
13 "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690;
14 State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

15 In addition to proving his attorney's deficient performance, the defendant must
16 affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the
17 result would have been different." Strickland, 466 U.S. at 694.

18 The reviewing court will defer to counsel's strategic decision to present, or to
19 forego, a particular defense theory when the decision falls within the wide range of
20 professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton,
21 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); Campbell v.
22 Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When
23 the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or
24 objection, defendant must demonstrate not only that the legal grounds for such a motion or
25

1 objection were meritorious, but also that the verdict would have been different if the
2 motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v.
3 Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a
4 meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

5 A defendant must demonstrate both prongs of the Strickland test, but a reviewing
6 court is not required to address both prongs of the test if the defendant makes an
7 insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d
8 816 (1987).

9 Again, the standard of review for effective assistance of counsel is whether, **after**
10 **examining the whole record**, the court can conclude that defendant received effective
11 representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988)
12 [emphasis added].

13 As discussed above, a reviewing court will defer to trial counsel's tactical
14 decisions. *See* Strickland, 466 U.S. at 489. Here, trial counsel had a tactical reason to
15 forego a character defense. First, the only pertinent character trait admissible in a child
16 molestation case is a defendant's reputation regarding sexual morality. ER 404(a)(1); State
17 v. Griswold, 98 Wn. App. 817, 991 P.2d 657 (2000) (character evidence excluded because
18 witness addressed defendant's general moral character, rather than his *sexual* morality).
19 Affidavits provided by petitioner in this case either speak to petitioner's general character
20 or state sexual moral character in a summary fashion, with no foundation to support such a
21 conclusion. Second, the introduction of character evidence allows the State to present
22 evidence rebutting the same, allowing "the prosecutor to penetrate a previously proscribed
23 preserve," and cross-examine defendant's witnesses and probe the extent and source of
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1 their opinions. The scope of cross-examination of character witnesses is sufficiently broad
2 that for a criminal defendant to call such witnesses could be quite risky. *See State v.*
3 *Styles*, 93 Wn.2d 173, 606 P.2d 1233 (1980) (proper cross-examination to ask character
4 witness whether he or she “has heard” this or that about the defendant and may be asked
5 “do you know” this or that about defendant). *See also U.S. v. Logan*, 717 F.2d 84 (3rd Cir.
6 1983). It was a sound tactical decision to forego the risks associated with character
7 witnesses and adhere to attacking the credibility of D.J.

8
9 However, petitioner claims character evidence would have made a difference in the
10 trial because credibility was at issue. BOP at 44. However, petitioner’s reputation for
11 truthfulness would not be admissible because it is not pertinent to the charge of child
12 molestation. ER 404(a)(1); *see also State v. Harper*, 35 Wn. App. 855, 670 P.2d 296
13 (1983). Therefore, trial counsel was not deficient for failure to call character witnesses
14 because that evidence would have been limited to sexual morality and could not properly
15 be used to argue credibility as petitioner now urges. Given the risk involved, defendant
16 cannot show that the verdict would have been different had trial counsel taken this risk.

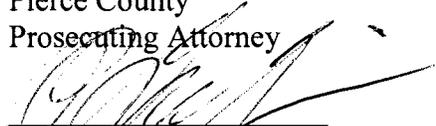
17 Similarly, petitioner has not shown (1) that an objection by trial counsel to certain
18 remarks of the prosecutor or (2) that requesting an instruction regarding an outburst would
19 have been successful or that the verdict would have been different. *Kimmelman*, 477 U.S.
20 at 375. Petitioner has failed to meet his burden under either prong of *Strickland*.
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2 E. CONCLUSION:

3 The petition must be dismissed because petitioner has not shown actual and
4 substantial prejudice stemming from error of constitutional magnitude nor has he shown a
5 fundamental defect, which inherently results in a complete miscarriage of justice.

6 DATED: August 2, 2007.

7 GERALD A. HORNE
8 Pierce County
9 Prosecuting Attorney

10 
11 P. GRACE KINGMAN
12 Deputy Prosecuting Attorney
13 WSB # 16717

13 Certificate of Service:

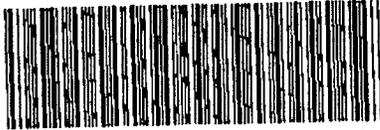
14 The undersigned certifies that on this day she delivered by U.S. mail or
15 ABC-LMI delivery to the petitioner true and correct copies of the document to
16 which this certificate is attached. This statement is certified to be true and
17 correct under penalty of perjury of the laws of the State of Washington. Signed
18 at Tacoma, Washington, on the date below.

19 8.3.07 Theresa Kar
20 Date Signature

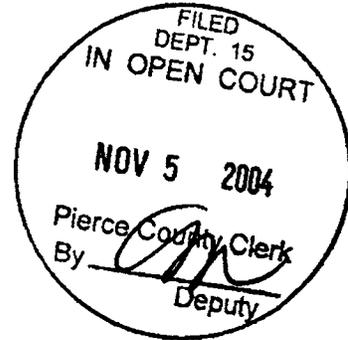
21 875755

APPENDIX “A”

Judgment and Sentence



04-1-01873-2 22068782 JDSWCD 11-08-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 04-1-01873-2

NOV - 8 2004

vs.

JEFFREY KEVIN DAY,

Defendant.

WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[x] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

04-1-01873-2

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 11/5/04

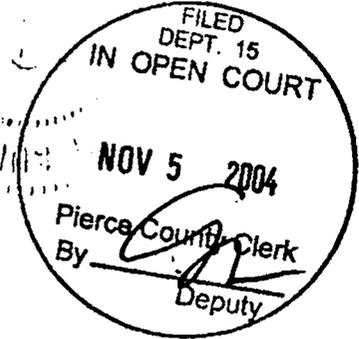
By direction of the Honorable

[Signature]
JUDGE
KEVIN STOCK THOMAS J. FELNAGLE

[Signature]
CLERK
By: DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

NOV - 8 2004 [Signature] Deputy



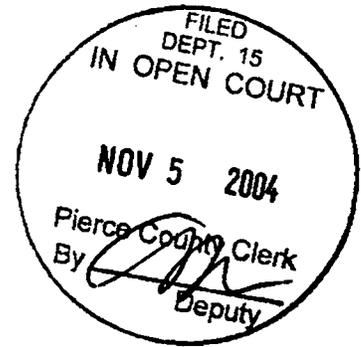
STATE OF WASHINGTON

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____.

KEVIN STOCK, Clerk
By: _____ Deputy

kam



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

NOV - 8 2004

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-01873-2

vs.

JUDGMENT AND SENTENCE (JS)

JEFFREY KEVIN DAY

Defendant.

- Prison
- Jail One Year or Less
- First-Time Offender
- SSOSA
- DOSA
- Breaking The Cycle (BTC)

SID: UNKNOWN
DOB: 03/10/56

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 10/07/04 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
1	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	N/A	02/15/04	04-001-228

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

as charged in the Original Information

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

JUDGMENT AND SENTENCE (JS)

(Felony) (6/19/2003) Page 1 of 10

04-9-13172-4

04-1-01873-2

2.2 CRIMINAL HISTORY (RCW 9.94A.525): NONE KNOWN OR CLAIMED

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	X	51-68 to life	N/A	51-68 to life	life

2.4 [] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence [] above [] below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney [] did [] did not recommend a similar sentence.

2.5 LEGAL FINANCIAL OBLIGATIONS. The judgment shall upon entry be collectable by civil means, subject to applicable exemptions set forth in Title 6, RCW. Chapter 379, Section 22, Laws of 2003. [] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

[] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [] attached [] as follows: *N/A state recommends high end of range.*

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [] The court DISMISSES Counts _____ [] The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

- RTN/R/N \$ L.O.C. Restitution to: _____
- \$ _____ Restitution to: _____
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).
- PCV \$ 500.00 Crime Victim assessment
- DNA \$ 100.00 DNA Database Fee
- PUB \$ _____ Court-Appointed Attorney Fees and Defense Costs
- FRC \$ 110⁰⁰ Criminal Filing Fee
- FCM \$ _____ Fine

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OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ 710⁰⁰ TOTAL

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ _____ per month commencing _____ RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

4.2 RESTITUTION

[X] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[X] shall be set by the prosecutor.

[] is scheduled for _____

[] defendant waives any right to be present at any restitution hearing (defendant's initials): _____

[] RESTITUTION. Order Attached

4.3 COSTS OF INCARCERATION

[] In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

4.4 COLLECTION COSTS

The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

4.5 INTEREST

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

4.6 COSTS ON APPEAL

An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.7 [] HIV TESTING

The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.8 [X] DNA TESTING

The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.9 NO CONTACT

The defendant shall not have contact with D.J. (3/16/92) (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for like years (not to exceed the maximum statutory sentence).

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Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence

4.10 OTHER:

See Appendix "H" and Appendix "F"

4.11 BOND IS HEREBY EXONERATED

4.12 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

 months on Count months on Count

CONFINEMENT. RCW 9.94A.712. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count I Minimum Term: 60 Months Maximum Term: LIFE

The Indeterminate Sentencing Review Board may increase the minimum term of confinement.

Actual number of months of total confinement ordered is: 60 month min - up to life

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers prior to the commission of the crime(s) being sentenced. _____

Confinement shall commence immediately unless otherwise set forth here: _____

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 29 days CFTS.

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4.13 [X] COMMUNITY CUSTODY is Ordered for counts sentenced under RCW 9.94A.712, from time of release from total confinement until the expiration of the maximum sentence:

Court I until _____ years from today's date [x] for the remainder of the Defendant's life.

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[] The defendant shall not consume any alcohol.

[x] Defendant shall have no contact with: minors; D.J.

[] Defendant shall remain [] within [] outside of a specified geographical boundary, to wit:

[] The defendant shall participate in the following crime-related treatment or counseling services: _____

[] The defendant shall undergo an evaluation for treatment for [] domestic violence [] substance abuse

[] mental health [] anger management and fully comply with all recommended treatment.

[x] The defendant shall comply with the following crime-related prohibitions: See Appendix "H" and Appendix "F"

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

4.14 [] WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.15 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

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CONFINEMENT. RCW 9.94A.712. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count I Minimum Term: 60 Months Maximum Term: Life

The Indeterminate Sentencing Review Board may increase the minimum term of confinement. []
COMMUNITY CUSTODY is Ordered for counts sentenced under RCW 9.94A.712, from time of release from total confinement until the expiration of the maximum sentence:

Count I until _____ years from today's date for the remainder of the Defendant's life.

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04-1-01873-2

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100, RCW 10.73.090.
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.
- 5.4 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.
- 5.5 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.
- 5.6 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.
- If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.
- If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving.

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to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 48 hours excluding weekends and holidays after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff's office may require you to list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

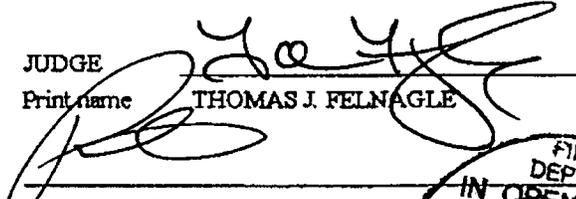
If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5.7 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 11-05-04

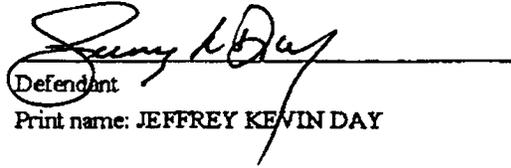


Deputy Prosecuting Attorney
Print name: KEVIN A. McCANN
WSB # 25182

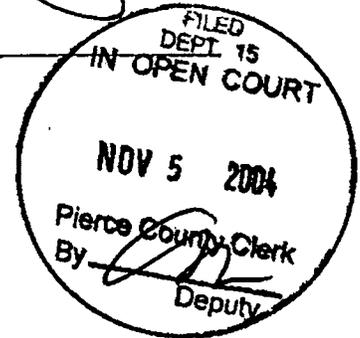


JUDGE
Print name THOMAS J. FELNAGLE

Attorney for Defendant
Print name: BRETT PURTZER
WSB # 17283



Defendant
Print name: JEFFREY KEVIN DAY



04-1-01873-2

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 04-1-01873-2

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____.

Clerk of said County and State, by: _____, Deputy Clerk

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04-1-01873-2

IDENTIFICATION OF DEFENDANT

SID No. UNKNOWN Date of Birth 03/10/56
 (If no SID take fingerprint card for State Patrol)

FBI No. UNKNOWN Local ID No. UNKNOWN

PCN No. UNKNOWN Other

Alias name, SSN, DOB: _____

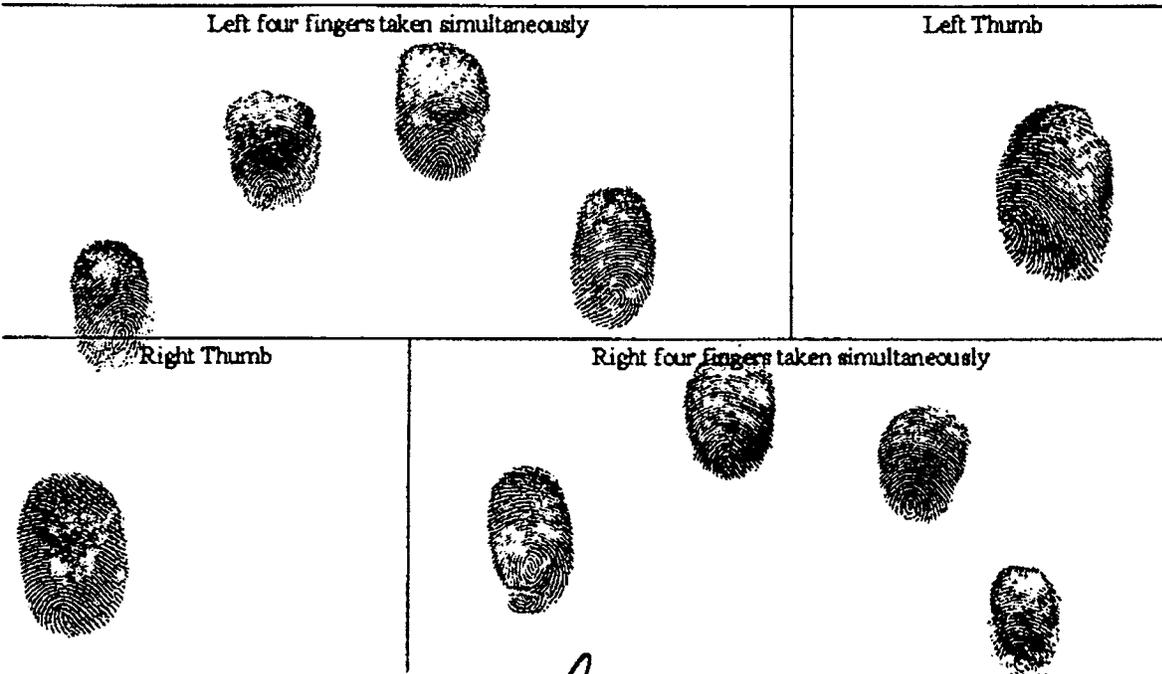


Race: Ethnicity: Sex:

[] Asian/Pacific Islander [] Black/African-American [X] Caucasian [] Hispanic [X] Male

[] Native American [] Other: [] Non-Hispanic [] Female

FINGERPRINTS



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk

[Signature] Date: 11/5/04

DEFENDANT'S SIGNATURE: *[Signature]*

DEFENDANT'S ADDRESS: 808 13th ST SE HN Puyallup 98371

04-1-01873-2

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year term of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed;

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC;

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: _____

per cco

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: minor children

(III) The offender shall participate in crime-related treatment or counseling services, per cco

(IV) The offender shall not consume alcohol; _____

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections, or

(VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: Register as a sex offender