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DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Patrick Hannon,**

Appellant.

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Lewis County Superior Court

Cause No. 05-1-00707-3

The Honorable Judge Richard L. Brosey

**Appellant's Opening Brief**

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**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iii**

**ASSIGNMENTS OF ERROR ..... 1**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1**

    1. Did the trial judge violate Mr. Hannon’s constitutional right to confront witnesses by prohibiting inquiry into the alleged victim’s admitted prior false accusation against her uncle? Assignments of Error Nos. 1, 2, 3. .... 1

    2. Was Mr. Hannon denied the effective assistance of counsel at sentencing where his attorney abandoned his role as an advocate and secured an amendment to the Judgment and Sentence adding legal financial obligations? Assignments of Error Nos. 4, 5..... 1

    3. Was Mr. Hannon denied his due process right to be present at sentencing when the trial judge entered an order, in Mr. Hannon’s absence, amending the Judgment and Sentence to add legal financial obligations? Assignments of Error Nos. 4, 5. .... 2

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 3**

**ARGUMENT..... 4**

**I. Mr. Hannon was denied his constitutional right to confront his accuser. .... 4**

**II. The trial court’s order adding legal financial obligations to Mr. Hannon’s Judgment and Sentence must be vacated. .... 8**

A. Mr. Hannon was deprived of the effective assistance of counsel when his attorney breached his duty of loyalty by facilitating imposition of additional punishment. .... 8

B. The court violated Mr. Hannon’s due process right to be present at a critical stage of the proceeding by amending the Judgment and Sentence in his absence. .... 10

**CONCLUSION ..... 11**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Davis v. Alaska</i> , 415 U.S. 308, 94 S.Ct. 1105, 39 L. Ed. 2d 347 (1974)....	5
<i>Fowler v. Sacramento County Sheriff's Dep't</i> , 421 F.3d 1027 (9th Cir. 2005).....	6
<i>Gardner v. Florida</i> , 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) .....	8, 10
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	8
<i>Kittelson v. Dretke</i> , 426 F.3d 306 (5th Cir. 2005) .....	6
<i>Michigan v. Lucas</i> , 500 U.S. 145, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991).....	7
<i>Redmond v. Kingston</i> , 240 F.3d 590 (7 <sup>th</sup> Cir. 2001) .....	6
<i>Rock v. Arkansas</i> , 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)..	7
<i>U.S. v. Salemo</i> , 61 F.3d 214 (3 <sup>rd</sup> Cir. 1995).....	8
<i>United States v. Cronic</i> , 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).....	8, 9
<i>United States v. Gagnon</i> , 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed.2d 486 (1985).....	10
<i>United States v. Velarde</i> , 485 F.3d 553 (10 <sup>th</sup> Cir. 2007).....	6
<i>White v. Coplan</i> , 399 F.3d 18 (1 <sup>st</sup> Cir., 2005).....	6, 7

### WASHINGTON CASES

<i>In re Pers. Restraint of Benn</i> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	9
<i>In re Pers. Restraint of Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	9

<i>State v. Angulo</i> , 77 Wn. App. 657, 893 P.2d 662 (1995).....	10
<i>State v. Barnes</i> , 54 Wn.App. 536, 774 P.2d 547 (1989).....	5
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	5
<i>State v. Foster</i> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	4
<i>State v. Hudlow</i> , 99 Wn.2d 1, 659 P.2d 514 (1983) .....	5
<i>State v. Reed</i> , 101 Wn.App. 704, 6 P.3d 43 (2000) .....	5
<i>State v. Webbe</i> , 122 Wn. App. 683, 94 P.3d 944 (2004) .....	9
<i>State v. Williams</i> , 65 Wn. App. 456, 828 P.2d 1158, 840 P.2d 902 (1992) .....	11
<i>State v. York</i> , 28 Wn.App. 33, 621 P.2d 784 (1980).....	5

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VI .....	4, 8
U.S. Const. Amend. XIV .....	4, 8
Wash. Const. Article I, Section 22.....	4, 8

**STATUTES**

RCW 10.01.160 .....	11
RCW 9.94A.634.....	11
RCW 9.94A.737.....	11
RCW 9.94A.740.....	11
RCW 9.94A.760.....	10
RCW 9A.44.020.....	6, 7

**OTHER AUTHORITIES**

*State v. Kornbrekke*, 943 A.2d 797 (N.H. 2008)..... 6

*State v. Miller*, 921 A.2d 942 (N.H. 2007) ..... 6

### **ASSIGNMENTS OF ERROR**

1. The trial court violated Mr. Hannon's constitutional right to confront his accuser.
2. The trial court erred by restricting Mr. Hannon's cross-examination of the alleged victim.
3. The trial court erred by refusing to allow Mr. Hannon to cross-examine the alleged victim about her admitted prior false accusation against her uncle.
4. Mr. Hannon was deprived of his due process right to be present at sentencing.
5. Mr. Hannon was denied the effective assistance of counsel at sentencing.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Patrick Hannon was accused of molesting his step-granddaughter. She had previously acknowledged the falsity of a similar accusation against her uncle. The trial judge refused to allow Mr. Hannon to cross-examine her about the admitted false prior accusation.

1. Did the trial judge violate Mr. Hannon's constitutional right to confront witnesses by prohibiting inquiry into the alleged victim's admitted prior false accusation against her uncle? Assignments of Error Nos. 1, 2, 3.

Appointed counsel prepared an order authorizing payment for his services and adding the attorney fees to Mr. Hannon's Judgment and Sentence as a legal financial obligation. The prosecutor signed the order, which was entered without a hearing.

2. Was Mr. Hannon denied the effective assistance of counsel at sentencing where his attorney abandoned his role as an advocate and secured an amendment to the Judgment and Sentence adding legal financial obligations? Assignments of Error Nos. 4, 5.

3. Was Mr. Hannon denied his due process right to be present at sentencing when the trial judge entered an order, in Mr. Hannon's absence, amending the Judgment and Sentence to add legal financial obligations? Assignments of Error Nos. 4, 5.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

In 2001, then 6 year old A.P. alleged that her uncle, Donald Grandchamp, had molested her. Mr. Grandchamp was charged in Juvenile Court with a sex offense, which was later dismissed when A.P. admitted that she had made up the allegation because she was angry. Supp. CP, Memorandum of Authorities. Her parents testified at the child hearsay hearing that she is prone to lies especially when angry, and that she had admitted to them the story was made up. Supp. CP.

In 2005, A.P. alleged that her step-grandfather, Patrick Hannon, had molested her. Supp. CP, Affidavit of Probable Cause. Mr. Hannon's attorney sought to admit evidence regarding her previous untrue allegation that she was molested by a relative. Supp. CP, Memorandum of Authorities; RP (8/29/07) 16-18; RP (8/30/07) 19-33. The defense argued that it was an appropriate challenge to the credibility of the witness, noting that when counsel deposed her, she had not alleged any sexual contact with Mr. Hannon. RP (8/30/07) 19-33; Supp. CP. The trial court denied the request, ruling that prior accusations would not be relevant, that there was no proof the prior allegation was false, and that any probity would be outweighed by prejudice. RP (8/30/07) 31-33.

The charge was heard by a jury, and Mr. Hannon was convicted of two counts of Child Molestation in the First Degree. CP 19-32.

Two days after the court entered the Judgment and Sentence, defense counsel moved the court for payment of attorneys fees. Supp. CP. Counsel presented his own draft of an order entitled “Order Directing Payment of Attorney Fees”, and “Order Amending Judgment and Sentence to Include Attorney Fees.” The orders, “approved” by the prosecutor, indicate that Mr. Hannon’s Judgment and Sentence is amended to include an order that he pay attorney’s fees. This order was entered ex parte. Supp. CP.

This timely appeal followed. CP 4-18.

## ARGUMENT

### **I. MR. HANNON WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSER.**

A criminal defendant has a constitutional right to confront witnesses against him. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most important aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308 at 315, 94 S.Ct. 1105

at 1110, 39 L. Ed. 2d 347 (1974). Our Supreme Court has stated that the purpose of cross-examination

...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded. *State v. Darden*, 145 Wn.2d 612 at 620, 41 P.3d 1189 (2002), *citations omitted*.

Where credibility is at issue, the defense must be given wide latitude to explore matters affecting credibility. *State v. York*, 28 Wn.App. 33, 621 P.2d 784 (1980). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence “must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial.” *Darden*, at 621.

The threshold to admit relevant evidence is very low, and even minimally relevant evidence is admissible unless the state can show a compelling interest to exclude prejudicial or inflammatory evidence. *Darden*, at 621. Where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *State v. Hudlow*, 99 Wn.2d 1 at 16, 659 P.2d 514 (1983); *State v. Reed*, 101 Wn.App. 704 at 709, 6 P.3d 43 (2000); *State v. Barnes*, 54 Wn.App. 536 at 538, 774 P.2d 547 (1989).

When the alleged victim of a sexual crime has made prior false complaints, the defense must be allowed to cross-examine regarding those false complaints. *White v. Coplan*, 399 F.3d 18 (1<sup>st</sup> Cir. 2005); *Fowler v. Sacramento County Sheriff's Dep't*, 421 F.3d 1027 (9th Cir. 2005); *Kittelson v. Dretke*, 426 F.3d 306 (5th Cir. 2005); *Redmond v. Kingston*, 240 F.3d 590 (7<sup>th</sup> Cir. 2001); *United States v. Velarde*, 485 F.3d 553 (10<sup>th</sup> Cir. 2007); *State v. Kornbrekke*, 943 A.2d 797 (N.H. 2008); *State v. Miller*, 921 A.2d 942 (N.H. 2007). As the First Circuit noted in *White v. Coplan, supra*,

If the witness were prepared to admit on the stand that a prior accusation of similar nature was false, it is hard to imagine good reason for excluding the evidence. Prior admitted lies of the same kind in similar circumstances could powerfully discredit the witness. No time-consuming excursion beyond the witness would be required. Further, the accusation being conceded to be untrue, inquiry would not require the witness to admit to prior sexual activity or assault.

*White v. Coplan, supra*, at 25.

No published opinion in Washington has ever upheld a trial court's decision to forbid cross-examination into an alleged victim's admittedly false prior accusation. Furthermore, prior accusations that are acknowledged to be false do not implicate the rape shield law, because they do not pertain to "past sexual behavior." *See* RCW 9A.44.020.<sup>1</sup>

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<sup>1</sup> Even if the rape shield law did apply, exclusion of the proffered evidence is disproportionate to the interests secured by RCW 9A.44.020, and thus violates the *Rock-*

In this case, A.P. made a prior accusation against her uncle, admitted that this prior accusation was false, and acknowledged that she'd fabricated the allegation because she was angry. Supp. CP. The state did not demonstrate that admission of this highly probative evidence would have disrupted the fairness of the trial. Furthermore, this admittedly false prior accusation did not implicate the rape shield law, since it did not relate to the child's past sexual behavior under RCW 9A.44.020.

Despite this, the trial judge refused to allow any cross-examination into the prior false complaint. This restriction violated Mr. Hannon's constitutional right to confront his accuser under both the state and federal constitutions. The conviction must be reversed and the case remanded for a new trial. *White v. Coplan, supra*.

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*Lucas* principal. See *Michigan v. Lucas*, 500 U.S. 145 at 151, 111 S. Ct. 1743, 114 L. Ed. 2d 205 (1991), quoting *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (state courts must determine, on a case-by-case basis, whether exclusion under a rape shield law is arbitrary or disproportionate to the state's legitimate interests).

**II. THE TRIAL COURT’S ORDER ADDING LEGAL FINANCIAL OBLIGATIONS TO MR. HANNON’S JUDGMENT AND SENTENCE MUST BE VACATED.**

- A. Mr. Hannon was deprived of the effective assistance of counsel when his attorney breached his duty of loyalty by facilitating imposition of additional punishment.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3<sup>rd</sup> Cir. 1995).

The right to effective assistance extends to the sentencing stage. *Gardner v. Florida*, 430 U.S. 349 at 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). The right ensures assistance when the defendant is “confronted with both the intricacies of the law and the advocacy of the public prosecutor.” *United States v. Cronin*, 466 U.S. 648 at 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The right to counsel requires counsel to act “in

the role of an advocate” and where “the process loses its character as a confrontation between adversaries,” the constitutional guarantee to assistance of counsel is violated. *Cronic at 656-57.*

Under certain circumstances, reversal is required without inquiry into counsel’s actual performance or its impact on the outcome. *Cronic at 650, 658; In re Pers. Restraint of Davis*, 152 Wn.2d 673, 101 P.3d 1 (2004). For example, prejudice is presumed when defense counsel breaches his duty of loyalty to his client, the “most basic of counsel’s duties.” *In re Pers. Restraint of Benn*, 134 Wn.2d 868 at 890, 952 P.2d 116 (1998), *citations omitted*. Under no circumstance may defense counsel abandon his “overarching duty to advocate the defendant’s cause” and join the state’s prosecution effort. *Benn*, at 890; *State v. Webbe*, 122 Wn. App. 683 at 695, 94 P.3d 944 (2004).

Mr. Hannon’s counsel breached the duty of loyalty by drafting and presenting an order to impose additional punishment in the form of higher legal financial obligations. Counsel ceased to act as an advocate and joined the state’s effort to punish Mr. Hannon.<sup>2</sup>

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<sup>2</sup> The issue here is not whether defense deserves compensation for his efforts as assigned counsel. Counsel’s preparation of an order amending the Judgment and Sentence was unnecessary; amendment of the Judgment and Sentence was not a prerequisite to compensation.

This breakdown in the adversarial process requires reversal of the Order Amending the Judgment and Sentence to impose additional legal financial obligations in the form of attorney fees.

B. The court violated Mr. Hannon's due process right to be present at a critical stage of the proceeding by amending the Judgment and Sentence in his absence.

The due process clause of the Fourteenth Amendment guarantees an accused the right to be present during all "critical stages" of the proceedings. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed.2d 486 (1985). Sentencing is a critical stage. *Gardner v. Florida*, 430 U.S. at 358. "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Gardner*, 430 U.S. at 358.

Mr. Hannon's due process right to be present was violated when the court amended his Judgment and Sentence in his absence. The additional legal financial obligations increased Mr. Hannon's punishment, and could result in further incarceration. *State v. Angulo*, 77 Wn. App. 657, 893 P.2d 662 (1995); see RCW 9.94A.760(10) ("The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence and the offender is

subject to the penalties for noncompliance as provided in RCW 9.94A.634, RCW 9.94A.737, RCW 9.94A.740.)

The court's imposition of additional punishment amounted to more than a ministerial act; the court had discretion to impose attorney fees, and was obligated (by statute) to inquire into Mr. Hannon's ability to pay. *State v. Williams*, 65 Wn. App. 456, 459, 828 P.2d 1158, 840 P.2d 902 (1992); RCW 10.01.160. Mr. Hannon's due process right to be present at a critical stage of the proceeding was violated; accordingly, the order imposing additional legal financial obligations must be vacated.

### **CONCLUSION**

By restricting Mr. Hannon's right to cross-examine A.P. regarding her admitted prior false accusation against her uncle, the court denied him important evidence relating to her credibility. This violated Mr. Hannon's right to confront his accuser. The conviction must be vacated and the case remanded to the trial court.

Furthermore, Mr. Hannon was denied his right to the effective assistance of counsel and his right to be present at sentencing when his attorney prepared an order increasing his legal financial obligations, and

the trial judge signed the order in Mr. Hannon's absence. The order adding attorney fees to the Judgment and Sentence must be vacated.

Respectfully submitted on May 14, 2008.

**BACKLUND AND MISTRY**

  
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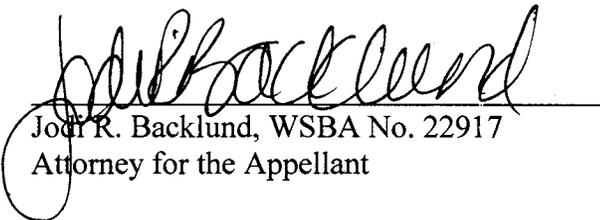
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 14, 2008.

  
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