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ARGUMENT

I. THE TRIAL COURT APPLIED THE WRONG LEGAL STANDARD IN DENYING THE MOTION FOR A MISTRIAL.

A mistrial must be granted when the accused person is prejudiced by a remark that cannot be cured except by a new trial. *State v. Hager*, ___ Wn. App. ___, 216 P.3d 438, 441 (2009). The court should consider the seriousness of the error, whether the statement was cumulative, and whether the problem can be cured by a jury instruction. *Id.*, at 441. Review is for abuse of discretion. *State v. Babcock*, 145 Wn.App. 157, 163, 185 P.3d 1213 (2008). A trial court abuses its discretion when it applies the wrong legal standard. *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009).

Here, the trial court applied the wrong legal standard. Instead of recognizing the serious prejudice caused by Tanori's remark, the absence of similar evidence, and the futility of a curative instruction, the trial judge denied the motion simply because Tanori hadn't intentionally violated the court's pretrial ruling. RP (6/24/09) 39-42. The motion should have been granted because the irregularity was serious—the first significant fact the jury learned about Mr. Nickols was that he had been to jail in 2007. RP (6/24/09) 37. Furthermore, Tanori's remark was not cumulative: Mr. Nickols's 2007 stint in jail was inadmissible. Finally, the error was not

cured by the court's instruction, which merely highlighted the problem.

See RP (6/24/09) 39.

Respondent's analysis parallels the trial court's flawed assessment: Respondent argues that the prosecutor was not at fault and that Tanori's remark was responsive. Brief of Respondent, pp. 3-5. Respondent dismisses the prejudicial effect of Tanori's statement as "minor," ignoring that the jury's first impression of Mr. Nickols was necessarily shaped by the fact that he'd been in jail before this incident occurred. Brief of Respondent, p. 5.

Respondent also ignores the second factor outlined in *Hager, supra*. No attempt is made to address the lack of cumulative evidence. Brief of Respondent, pp. 1-6.

Respondent claims that the error was cured by the court's instruction to disregard the evidence. Brief of Respondent, p. 5. However, "[a] bell once rung cannot be unring." *State v. Easter*, 130 Wn.2d 228, 230-239, 922 P.2d 1285 (1996) (internal citations omitted). It is unlikely that all twelve jurors held to the presumption of innocence once they learned that Mr. Nickols had been to jail.

There are undoubtedly some trial irregularities that are trivial, and do not warrant a new trial. However, introducing an accused person to the jury with irrelevant evidence of a prior stay in jail is not one of them. Mr.

Nickols's conviction must be reversed and his case remanded for a new trial. *Hudson, supra.*

II. THE TRIAL COURT ERRED BY IMPOSING AN UNREASONABLE ATTORNEY FEE ON MR. NICKOLS AS A CONDITION OF SENTENCE.

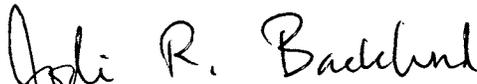
Mr. Nickols rests on the argument set forth in his Opening Brief.

CONCLUSION

Mr. Nickols's conviction must be reversed and the case remanded for a new trial. In the alternative, the \$1200 attorney fee recoupment must be vacated.

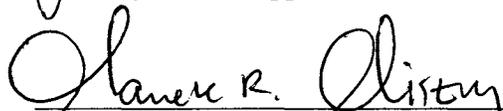
Respectfully submitted on January 11, 2010.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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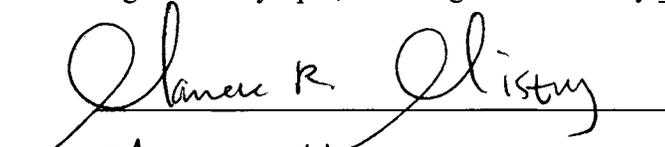
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 11, 2010.

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 January 11, 2010.



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