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ASSIGNMENTS OF ERROR

1. Mr. Coleman's convictions were entered in violation of his right to appear and defend in person under Wash. Const. Article I, Section 22.
2. Mr. Coleman's convictions were entered in violation of his Sixth and Fourteenth Amendment right to confrontation.
3. Mr. Coleman's convictions were entered in violation of his Fourteenth Amendment right to due process.
4. Mr. Coleman was denied his right to be present during his own trial.
5. Mr. Coleman was denied his right to assist in his own defense.
6. The trial court violated Mr. Coleman's First, Sixth, and Fourteenth Amendment right to an open and public trial.
7. The trial court violated Mr. Coleman's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22
8. The trial court violated Mr. Coleman's right to an open and public trial by conducting a closed hearing in chambers to select the appropriate jury instructions.
9. Mr. Coleman was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
10. Mr. Coleman was deprived of the effective assistance of counsel when his attorney failed to seek adequate accommodation for his disability, leaving him unable to hear much of the court proceedings.
11. Mr. Coleman was denied his right to the effective assistance of counsel by his attorney's failure to oppose the prosecutor's motion to exclude evidence of good character.
12. Mr. Coleman was deprived of the effective assistance of counsel by his attorney's failure to present available evidence of his good character.
13. Mr. Coleman's convictions infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of each offense.

14. The prosecution failed to prove beyond a reasonable doubt that any touching was done for purpose of sexual gratification.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has a constitutional right to be present, to assist in his own defense, and to confront adverse witnesses. In this case, Mr. Coleman's disability was not adequately accommodated, and he missed "quite a bit" of the proceedings. Were Mr. Coleman's convictions entered in violation of his rights under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?
2. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge consulted with counsel in chambers to select the jury instructions that guided the jury's deliberations. Did the trial judge violate the constitutional requirement that criminal trials be open and public by holding a hearing in chambers without first conducting any portion of a *Bone-Club* analysis?
3. A reasonably competent attorney will ensure that proceedings are conducted in a manner that protects the accused person's right to be present, to participate meaningfully, and to confront witnesses. Here, defense counsel unreasonably failed to ensure that his client could hear the testimony and other proceedings. Was Mr. Coleman deprived of the effective assistance of counsel?
4. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Defense counsel unreasonably failed to oppose the prosecutor's motion *in limine* to exclude evidence of Mr. Coleman's good character, and failed to offer available evidence establishing his reputation for good character. Was Mr. Coleman denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

5. To obtain a conviction for child molestation, the prosecution was required to show that any touching was done for purpose of sexual gratification. Here, evidence suggested that Mr. Coleman touched clothing that covered intimate areas rather than primary erogenous areas. Did Mr. Coleman's conviction infringe his Fourteenth Amendment right to due process because it was based on insufficient evidence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 2010, Leonard Coleman was 67 years old. He had no criminal involvement, much less any criminal record. CP 2. He had served in the Army, and then worked driving a truck over long hauls, until he retired in 2006. RP (1/26/11) 15, 139-140, 144. He raised a family and was a grandparent. Letters, Supp. CP. In fact, Mr. Coleman had countless friends and people who loved and trusted him, and was considered family by many non-relatives. Letters, Supp. CP. Over the years, Mr. Coleman had helped with the care of many, many children, all without incident or allegation, but with trust and honor. Letters, Supp. CP. Mr. Coleman had a home in Randle, and helped friends who were down on their luck. RP (1/26/11) 145-146; Letters, Supp. CP.

One such friend was Lonnie Faubion. She had met Mr. Coleman 20 years earlier. In the summer of 2009, when Faubion was having a hard time making it with her family in Arkansas, Mr. Coleman suggested she move to eastern Lewis County to reside with him so that he could help her. RP (1/26/11) 128-130, 145. She accepted his offer, and brought her daughter with her. After moving, she was able to find a job. RP (1/26/11) 130-132.

Because Mr. Coleman was retired, he often cared for Faubion's six-year-old daughter while Faubion worked. RP (1/26/11) 23-24, 146. Because he could not always watch Faubion's daughter, he and Faubion hired 13-year-old P.R. to babysit some days after school and on weekends. P.R. began babysitting around December of 2009. RP (1/25/11) 178-179; RP (1/26/11) 21, 131-133. Over the years, P.R.'s father, who lived nearby, had worked on trucks that Mr. Coleman drove (as well as Mr. Coleman's son's trucks). RP (1/25/11) 166-167, 173-174; RP (1/26/11) 4-6, 20.

P.R.'s parents had separated in 2004, and she had moved with her mother to California. RP (1/25/11) 148-149, 151, 177. P.R. wanted to move back to Glenoma to live with her father. She did so in February of 2008. RP (1/25/11) 152, 153; RP (1/26/11) 20. However, by late fall of 2009, she had stated several times that she wanted to move back to California. RP (1/25/11) 184; RP (1/26/11) 74-75, 151-152.

P.R. spoke with her mother (Diane Fryer) several times weekly. RP (1/25/11) 153, 154. During one conversation in March of 2010, P.R. asked Fryer for money. Fryer asked what had happened with P.R.'s babysitting job. At this point, P.R. made allegations to Fryer, accusing Mr. Coleman of having touched her inappropriately. RP (1/25/11) 156.

Some time later¹, Fryer called Toni Nelson, a social worker in the area where P.R. lived. RP (1/25/11) 125-127. According to Nelson, Fryer told her that P.R. had reported that she had been molested by Mr. Coleman. Though Nelson is a mandatory reporter, she took no action. Instead, she suggested that P.R. could phone Nelson if she wished. RP (1/25/11) 127-129, 140. Fryer called Nelson to discuss the issue at least four more times. RP (1/25/11) 145.

In June of 2010, P.R. called Nelson and they met soon after. RP (1/25/11) 129-130, 139-144. Nelson set up a meeting between P.R. and the police, who came to P.R.'s home on June 5 or 6, 2010. RP (1/25/11) 132-133.

Shortly thereafter, P.R. was allowed to move back to California to live with her mother. RP (1/25/11) 159; RP (1/26/11) 46.

The state charged Mr. Coleman with five counts of Child Molestation in the Second Degree. CP 1-7. The prosecution also filed a notice of three special allegations: (1) that multiple offenses and a high offender score would result in some current offenses going unpunished, (2) that the offenses were part of an ongoing pattern of sexual abuse of the same victim, and (3) that the defendant used his position of trust to

¹ The timing of P.R.'s "disclosure" and Fryer's subsequent call to Nelson was not clear at trial. See RP (1/25/11) 127, 154, 157, 163, 170; RP (1/26/11) 27, 41.

facilitate commission of the offenses. Notice of Aggravating Factors, Supp. CP.

Prior to trial, Mr. Coleman moved to suppress a statement he had made when contacted by the police. Supp. CP. At a CrR 3.5 hearing, the state introduced evidence that the lead officer on the case, Deputy Humphrey, had spoken with P.R. before approaching Mr. Coleman. P.R. had accused Mr. Coleman of molesting her. RP (1/7/11) 28. On June 6, 2010, Officers visited Mr. Coleman's son's home, and then went to Mr. Coleman's home on June 6, 2010. RP (1/7/11) 6, 26-27.

Mr. Coleman had been called by his son, who had warned him that police were coming to talk to him about touching P.R.'s breasts. RP (1/26/11) 148-150, 161-162. When the officers arrived, Mr. Coleman came out onto his porch and started talking with the officers before they got up to the porch. During the conversation, he came down onto the grass and spoke with both officers. RP (1/7/11) 7, 11, 27. Deputy Humphrey asked Mr. Coleman if he knew why they'd come. Having received a warning call from his son, Mr. Coleman responded by saying "I did it," instead of waiting for the officers to explain. RP (1/7/11) 12, 28. Humphrey asked what he had done, and Mr. Coleman told him that he had touched P.R.'s breast. RP (1/7/11) 28.

The three spoke about 10 minutes. The officers asked “incriminating” questions, which Mr. Coleman answered. RP (1/7/11) 8, 13, 29. Mr. Coleman agreed to give a taped statement. The prosecutor did not offer the recording at the suppression hearing. The officers testified that they read Mr. Coleman his rights (for the first time) at the beginning of the recording. RP (1/7/11) 9, 30, 41. Mr. Coleman’s taped statement lasted five to seven minutes. RP (1/7/11) 9, 13, 32. Following the initial recorded statement, the officers arrested Mr. Coleman. RP (1/7/11) 9, 32. They also spoke further, while Mr. Coleman was in handcuffs. RP (1/7/11) 14, 34. During this time, the officers discussed with Mr. Coleman perceived changes in his statements. According to the officers, Mr. Coleman did not provide a “straight answer.” RP (1/7/11) 15, 21-22, 35.

At the CrR 3.5 hearing, the court admitted a transcript into evidence, over defense objection. The exhibit, which purported to be a transcript of Mr. Coleman’s recorded statement, had not been reviewed for accuracy, and was not prepared by anyone who testified at the hearing. RP (1/7/11) 33-34; Exhibit 2 from Suppression Hearing, Supp. CP.

Judge Brosey asked the parties for briefing to address the officers’ failure to give Mr. Coleman his *Miranda* rights immediately after he said “I did it.” RP (1/7/11) 51-54; Memorandum by State, Supp. CP. The

court heard additional argument, and ruled that Mr. Coleman's initial statements (up until the point he said "I did it") were admissible. RP (1/21/11) 58. The court concluded by saying:

I can't find that the statements are admissible, because I don't know what the statements were, so the "I did it" statement comes in. That's all that comes in. Everything else doesn't.
RP (1/21/11) 59-60.

At the start of Mr. Coleman's jury trial, the parties discussed Judge Brosey's suppression ruling with the trial judge, Judge Lawler. No written findings had been entered. RP (1/25/11) 73-84. Judge Lawler indicated that he would follow Judge Brosey's ruling. RP (1/25/11) 77. Judge Lawler's understanding was that Judge Brosey had admitted the statement "I did it" and a subsequent statement (that he'd touched P.R.'s breast.) RP (1/25/11) 77-79. Mr. Coleman objected, and argued that Judge Lawler's understanding differed from Judge Brosey's ruling. Judge Lawler did not change his decision. RP (1/25/11) 79-84.

During opening statements, the prosecutor referred to "follow-up questions that were asked" after Mr. Coleman had told the officers he'd touched P.R.'s breast. RP (1/25/11) 100-101. Mr. Coleman objected and asked the court to declare a mistrial. RP (1/25/11) 101-103. The motion was denied. RP (1/25/11) 103.

After trial had concluded, the state proposed findings from the CrR 3.5 hearing. Supp. CP. At a hearing to address the proposed findings, Judge Brosey reviewed what had been introduced at trial, and indicated that he could not have ruled on the Mr. Coleman's alleged statement that he "touched her breast," since the prosecutor had not offered the statement at the suppression hearing. RP (2/7/11) 200-201. After making several changes to the proposed order, Judge Brosey signed Findings of Fact and Conclusions of Law from Suppression hearing, over objections from both the prosecution and Mr. Coleman. RP (2/25/11) 207-208; CP 8-10. Judge Lawler signed additional Findings of Fact and Conclusions of Law after Mr. Coleman had been sentenced. CP 44-45.

Prior to jury selection, the court addressed the prosecutor's motions *in limine*. Motion in Limine by State, Supp. CP. These included a motion for an order prohibiting testimony about the defendant's lack of criminal history to try to show good character. Defense counsel did not oppose this motion. RP (1/25/11) 65.

P.R. testified at trial that Mr. Coleman had touched her numerous times, and described four specific occasions. She claimed that he'd started touching her in February of 2010, and had subsequently touched her every time she babysat. RP (1/26/11) 28-40. She acknowledged that her testimony differed from prior statements. She admitted that she'd changed

her statement as it related to the number of times Mr. Coleman had touched her and the number of times she had babysat. For the first time at trial, she said that she'd hit Mr. Coleman in the face with a spatula (after he'd allegedly touched her), and she claimed that Mr. Coleman had allowed her to drive his truck, and that she'd she stopped the truck before driving up her driveway, so they could switch seats before he dropped her off at home. RP (1/26/11) 64-74.

Throughout the proceedings, Mr. Coleman (who has a significant hearing deficit) made use of a listening aid provided by the court. RP (1/25/11) 85. Mr. Coleman testified that he was "deaf in one ear and can't hear out of the other." RP (1/26/11) 138. He testified that the listening device provided by the court did not assist him in following the trial: "It picks up all noises and makes them kind of muffled, everything is kind of distorted." RP (1/26/11) 138. When asked if he'd had problems hearing during the trial, he replied "I missed quite a bit, but. . ." RP (1/26/11) 139.²

Mr. Coleman took the stand to refute the implications of his statement and to address the prosecutor's reference in opening statements to "follow-up questions." RP (1/26/11) 160-161. He explained that his

² His attorney completed the sentence by saying "But I'm here listening for you." RP (1/26/11) 139.

son had called him to warn him that police were coming, and had told him about the allegations. RP (1/26/11) 148-150, 161-162. Remembering a time he had hugged P.R. from behind and inadvertently touched her breast, he spoke up and said "I did it," when the police came to talk to him. RP (1/26/11) 149-150. He also said that the inadvertent touch was not for sexual gratification, and he denied the rest of P.R.'s allegations. RP (1/26/11) 157. Mr. Coleman testified that he had told the police he'd hugged P.R. a total of five to six times. RP (1/26/11) 165. The officers apparently thought he'd admitted to touching her breasts five to six times, but Mr. Coleman explained that was not what he'd meant. (1/26/11) 165.

Over defense objection, the prosecutor received permission to introduce Mr. Coleman's entire statement (which had been excluded under the court's pretrial ruling). RP (1/26/11) 158-163. Sgt. Stull testified that Mr. Coleman had said "it" happened more than three times, and that he had demonstrated how he'd hugged P.R. from behind. RP (1/26/11) 169-171. Deputy Humphrey characterized Mr. Coleman's statement as an admission of five to six touches of her breasts, but acknowledged that when he attempted to clarify, Mr. Coleman was clear there was only one touch and that it had been inadvertent. RP (1/26/11) 179-186.

At the close of the evidence, the trial court judge met with counsel in chambers to select the appropriate jury instructions. RP (1/26/11) 188;

RP (1/27/11) 3. The court did not explain why the instructions conference would take place behind closed doors. RP (1/26/11) 188; RP (1/27/11) 3.

The jury voted guilty on all five counts, marking “yes” on each special verdict form. RP (1/27/11) 72-79; Verdict Forms A-E2, Supp. CP.

At sentencing, Mr. Coleman’s attorney presented 33 letters from members of Mr. Coleman’s small community. All the letters attested to his truthfulness and his good work ethic. Many gave details of regarding his experience caring for children. Letters, Supp. CP. Even though the jury had made findings that could have supported an exceptional sentence upward, Judge Lawler issued a standard range sentence. Verdicts, Supp. CP; RP (3/9/11) 16; CP 11-25.

Mr. Coleman timely appealed. CP 26-41.

ARGUMENT

I. MR. COLEMAN’S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS RIGHT TO APPEAR AND DEFEND IN PERSON UNDER WASH. CONST. ARTICLE I, SECTION 22 AND HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO CONFRONTATION AND DUE PROCESS.

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010).

B. The proceedings were unfairly conducted in a manner that denied Mr. Coleman his right to be present and his right to confront witnesses.

In Washington, an accused person has a constitutional right to “appear and defend in person...” Wash. Const. Article I, Section 22. Under the federal constitution, an accused person has a right to be present at all critical stages, and a right to confront witnesses at trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *State v. Irby*, 170 Wash.2d 874, 880-881, 246 P.3d 796 (2011); see also *State v. Ramirez-Dominguez*, 140 Wash.App. 233, 243, 165 P.3d 391 (2007).

One component of these rights is “the right to have trial proceedings presented in a way that the accused can understand.” *Linton v. State*, 275 S.W.3d 493, 503 (Tex., 2009). The trial court “has a duty to devise a communication solution that provides the particular defendant with ‘that minimum level’ of understanding that is constitutionally required.” *Id*; see also *People v. James* 937 P.2d 781, 783 (Colo., 1996).

This standard requires accommodation that allows the accused to “sufficiently understand the proceedings against him such that he is able to assist in his own defense.” *Linton*, at 503-504; see also *U.S. v. McMillan* 600 F.3d 434, 453-454 (5th Cir. 2010); *State v. Barber*, 617 So.2d 974, 976 (La., 1993). The test is analogous to that used to determine competency to stand trial. *Linton*, at 503 n. 13 (collecting

cases). It requires accommodation to permit understanding at the time live testimony is given. *Id.*, at 504; *see also People v. Doe*, 602 N.Y.S.2d 507, 510 (1993) (“Even assuming that she was able to hear 92% of the trial, that percentage is not enough to satisfy due process. A defendant is entitled to hear 100% of the proceedings.”)

Once the trial court is alerted to a person’s disability, the court is responsible for taking whatever steps are necessary to ensure the minimum level of understanding required by the constitution. *Linton*, at 503-504. If the need for accommodation is acutely obvious, the accused person need not even make a request to the trial court. *Doe*, at 510.

Mr. Coleman suffers from a severe hearing impairment. He alerted the trial court to this fact and requested accommodation. Although the court provided some accommodation, it did not follow up to make certain that Mr. Coleman was able to hear and understand the testimony. RP (1/26/11) 138. In fact, his ability to hear and understand was severely limited.

Mr. Coleman testified that he was “deaf in one ear and can’t hear out of the other.” RP (1/26/11) 138. He testified that the listening device provided by the court functioned the same way as his hearing aids: “It picks up all noises and makes them kind of muffled, everything is kind of distorted.” RP (1/26/11) 138. When asked if he’d had problems hearing

during the trial, he replied “I missed quite a bit, but. . .” RP (1/26/11) 139.³

Despite this clear and unequivocal indication that the listening device was inadequate, the trial judge made no attempt to rectify the problem by improving on the initial accommodation.⁴ Having missed “quite a bit” of the proceedings before he testified, Mr. Coleman was forced—by the court’s inaction—to continue with the same ineffective listening apparatus through the remainder of the trial. This included rebuttal testimony, the reading of the instructions, closing arguments, and the delivery of the verdict. RP (1/26/11) 169-189; RP (1/27/11) 3-80. It also included argument over a set of proposed findings, and the sentencing hearing. RP (2/7/11); RP (2/25/11); RP (3/9/11).

Because Mr. Coleman was unable to hear “quite a bit” of his own trial, his convictions were entered in violation of his right to confrontation and his right to due process. *Linton, supra*. Accordingly, the convictions must be reversed and the case remanded to the superior court for a new trial. *Id.*

³ His attorney completed the sentence by saying “But I’m here listening for you.” RP (1/26/11) 139.

⁴ An obvious solution would have been to provide Mr. Coleman with an “interpreter” who would repeat the testimony and other proceedings, via the same equipment used for simultaneous foreign language translation—a microphone and headset.

II. THE TRIAL COURT VIOLATED BOTH MR. COLEMAN'S AND THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *Schaler*, at 282. Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, ___ Wash.App. ___, ___ P.3d ___ (2011).

B. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 723, ___ L.Ed.2d ___ (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club*, at

261-262, 257.⁵ In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct. at 724-725.

The public trial right ensures that an accused person “is fairly dealt with and not unjustly condemned.” *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, “the presence of interested spectators may keep [the accused person’s] triers keenly alive to a sense of the responsibility and to the importance of their functions.” *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007).

The public trial right “applies to all judicial proceedings.” *Momah*, at 148. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.”

⁵ See also *State v. Strode*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

*See, e.g., Strode, at 230.*⁶

- C. The trial court violated the public trial requirement by holding a hearing in chambers.

In this case, the trial judge conducted an *in camera* hearing to select the appropriate jury instructions. RP (1/26/11) 188; RP (1/27/11) 3. This *in camera* proceeding, conducted outside the public's eye without the required analysis and findings, violated Mr. Coleman's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra*. It also violated public's right to an open trial. *Id.* Accordingly, Mr. Coleman's conviction should have been reversed and the case remanded for a new trial. *Id.*

- D. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

The Court of Appeals has held that the right to a public trial only extends to hearings that require the resolution of disputed facts, and does not encompass hearings to resolve issues that are purely legal or ministerial. *See, e.g., State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view

⁶ ("This court, however, 'has never found a public trial right violation to be [trivial or] *de minimis*'") (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

of the public trial right is incorrect, and should be reconsidered.

The evils addressed by the requirement of open and public trials do not arise solely in the context of adversary proceedings to resolve disputed facts. Instead, a judge, an attorney, or another player in the judicial system can be guilty of impropriety at any stage, regardless of the substance of the hearing. Without public scrutiny, such impropriety remains hidden.

The problem is primarily one of appearance. For example, a murder victim's family, already upset that the murder weapon was suppressed prior to trial, might feel that the judge is colluding with the defense upon learning—after an acquittal is entered—that a jury question about the missing gun was met only with an instruction to continue deliberating. While such a response may well be appropriate, the fact that it was arrived at in secret could lead the victim's family to feelings of resentment, and speculation about judicial impropriety.

The difficulty with closed hearings extends beyond mere appearance issues. In another era, racist judges, prosecutors, and defense attorneys may have met secretly in chambers to ensure that a black defendant was convicted, or a white defendant acquitted. Milder forms of misconduct may have taken the form of grumblings about female or

minority jurors.⁷ Such blatant sexism and racial prejudice may be less common now than they were in years past; however, closed hearings allow such prejudices to be voiced with impunity, regardless of whether or not the hearing involves adversarial positions or disputed facts.

Even without actual malfeasance of the sort described, secret hearings degrade the public's perception of the judicial system. When hearings are conducted behind closed doors, members of the public are free to imagine the worst: the conspiracy-minded will see vast plots; the cynical will see corruption or incompetence. Only by opening all hearings—no matter how trivial—to the light of public scrutiny, can the judiciary be assured that it will be accorded the respect it deserves.

In *Sublett*, the Court of Appeals also implied that the need for an open and public hearing was obviated by the production of a written answer to the jury's question. *Sublett*, at 182. Under this reasoning, no proceeding need ever be open to the public, since courts excel at producing written records of their proceedings. The production of written jury instructions in this case does not eliminate the constitutional requirement that proceedings be open and public.

⁷ Similarly, in chambers, a judge may improperly silence a contract public defender's objections in a particular case by threatening to withhold assignment to future indigent cases. Such pressure could be applied during argument over purely legal issues, and would place counsel's ethical duties in conflict with her or his livelihood.

In this case, the *in camera* hearing violated Mr. Coleman's public trial right under the state and federal constitutions. It also violated the public's right to monitor proceedings. For these reasons, Mr. Coleman's conviction must be reversed, and the case remanded for a new trial. *Bone-Club, supra*.

III. MR. COLEMAN WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash.App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

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.” *United States v. Salerno*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption of adequate performance, which is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not

objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- C. Defense counsel should have sought further accommodation for Mr. Coleman’s disability, once it became clear he could not hear much of what transpired during trial.

Prior to trial, defense counsel was aware that Mr. Coleman was hard of hearing. RP (1/25/11) 85. By the time Mr. Coleman’s testified, defense counsel should have been aware that the listening device provided by the court was inadequate, and that Mr. Coleman missed quite a bit of the testimony. RP (1/26/11) 138, 139. Counsel’s position, apparently, was that his own ability to hear could substitute for his client’s understanding of the proceedings. RP (1/26/11) 139. Accordingly, counsel made no effort to alert the court to the ongoing problems with the court’s listening device, and the court was only made aware of the problem when Mr. Coleman revealed it during his testimony.

By failing to request additional accommodation, Mr. Coleman’s attorney deprived him of the effective assistance of counsel. A reasonably competent attorney would have sought to ensure Mr. Coleman’s rights by asking the court to provide additional assistance. Without an appropriate request from counsel, Mr. Coleman was left missing “quite a bit” of his own trial. RP (1/26/11) 138-139.

Furthermore, defense counsel's deficient performance prejudiced Mr. Coleman. Had counsel made a proper request, the problem could have been solved by providing a simultaneous relay of testimony and other proceedings through a microphone and headset. Such equipment is readily available, as it is used by interpreters who must provide simultaneous language translation without creating a distraction. A proper request would have allowed Mr. Coleman to be present and to participate meaningfully in his own trial.

Because Mr. Coleman was deprived of the effective assistance of counsel, his convictions must be reversed and the case remanded for a new trial. *Reichenbach, supra*.

D. Defense counsel should have opposed the prosecutor's motion to exclude evidence of Mr. Coleman's good character, and should have introduced character evidence supporting his client's defense.

Evidence of a pertinent trait of character may be offered by an accused person in a criminal trial.⁸ ER 404(a)(1). A pertinent trait of character is "one that tends to make the existence of any material fact more or less probable than it would be without evidence of that trait."

⁸ This stands as an exception to the general rule that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." ER 404(a).

State v. Eakins, 127 Wash.2d 490, 496, 902 P.2d 1236 (1995); *see also* *City of Kennewick v. Day*, 142 Wash.2d 1, 6, 11 P.3d 304 (2000).

Evidence of an accused person's general good character or reputation for law abiding behavior will almost always be admissible in a criminal trial:

[S]uch evidence may, in and of itself, create a reasonable doubt of the guilt of the accused... [Reasonable jurors] may, upon a consideration of all the evidence, reach the conclusion that even though the other evidence, if believed, would point to the guilt of the accused, it is doubtful that a person of the defendant's character would commit the crime charged. In such a case the jury cannot say, beyond a reasonable doubt, that he is guilty. In effect, the evidence of his good character weakens the credibility of the other evidence.

State v. Allen, 89 Wash.2d 651, 657, 574 P.2d 1182 (1978); *see also* *Territory v. Klehn*, 1 Wash. 584, 587, 21 P. 31 (1889) ("Evidence of the good character of the defendant is always admissible in a criminal case... 'Good character, like all other facts in the case, should be considered by the jury, and, if therefrom a reasonable doubt is generated in the mind of the jury as to the guilt of the accused, it is their duty to acquit'") (citations omitted).⁹ Furthermore, where conviction requires proof of a particular

⁹The Supreme Court has noted that character evidence "is different from most evidence." *State v. Thomas*, 110 Wash.2d 859, 865, 757 P.2d 512 (1988). Character evidence "does not prove or disprove an element of a charged crime nor prove or disprove a particular defense. Its relevance is to permit, but not require, the jury to infer from the particular character trait that it is unlikely or improbable that the defendant committed the charged act." *Id.*

mental state, “character evidence may be relevant and admissible to support an inference that the defendant lack[ed] the necessary mental state.” *Eakins*, at 495.

In this case, evidence of Mr. Coleman’s general good character was admissible to rebut the accusations against him. ER 404(a)(1); *Allen*, at 657. In addition, his reputation for being law-abiding¹⁰ and his reputation for appropriate behavior around children were both admissible to support his testimony that any improper touching was inadvertent.¹¹ RP (1/26/11) 150.

Despite this, defense counsel did not oppose the prosecutor’s motion to exclude evidence of good character. State’s Motions *in Limine*, Supp. CP; RP (1/25/11) 65. Nor did defense counsel make any effort to place evidence of Mr. Coleman’s good reputation before the jury, despite the ready availability of such evidence. *See* Letters, Supp. CP. In fact, Mr. Coleman’s attorney filed 33 letters prior to sentencing, all addressing Mr. Coleman’s good character. Letters, Supp. CP.

¹⁰ Mr. Coleman had no misdemeanor or felony convictions. CP 1-7.

¹¹ Mr. Coleman’s reputation for good “sexual morality” would also have been admissible, if witnesses were available to provide testimony on the subject. *See, e.g., State v. Griswold*, 98 Wash.App. 817, 829, 991 P.2d 657 (2000), *overruled on other grounds by State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003).

Counsel was not pursuing a strategy to keep negative information from the jury. This can be seen from Mr. Coleman's own testimony, which outlined his work history and placed his character at issue. RP (1/26/11) 139-144. *See State v. Fisher*, 130 Wash.App. 1, 17, 108 P.3d 1262 (2005) ("By relating a personal history supportive of good character, a defendant may be opening the door to rebuttal evidence along the same line.")

Character evidence would have provided the jury a powerful reason to acquit Mr. Coleman of charges that were—by all accounts—completely out of character. Had counsel offered the available character evidence, there is a reasonable possibility that the outcome of the proceeding would have differed. *Reichenbach*, at 130. Accordingly, defense counsel's deficient performance prejudiced Mr. Coleman. *Id.*

Mr. Coleman was deprived of the effective assistance of counsel. *Id.* His convictions must be reversed and the case remanded for a new trial. *Id.*

IV. MR. COLEMAN'S CONVICTIONS ON VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION ON EACH CHARGE.

E. Standard of Review

Constitutional questions are reviewed *de novo*. *Schaler*, at 282.

The interpretation of a statute is a question of law reviewed *de novo*. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009). The application of law to a particular set of facts is a mixed question of law and fact reviewed *de novo*. *In re Detention of Anderson*, 166 Wash.2d 543, 555, 211 P.3d 994 (2009). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Engel*, at 576.

F. Due process requires the prosecution to prove each element of an offense beyond a reasonable doubt.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

G. The prosecution was required to prove that Mr. Coleman touched P.R. for the purpose of gratifying sexual desire.

To obtain a conviction for child molestation, the prosecution was required to prove beyond a reasonable doubt that Mr. Coleman had sexual contact with P.R. RCW 9A.44.086; Instructions Nos. 9-13, Supp. CP. Sexual contact means touching of the sexual or intimate parts done for purpose of gratifying sexual desire. RCW 9A.44.010; Instruction No. 7, Supp. CP. Where the touching occurs through clothing, additional evidence of sexual gratification is required. *State v. Powell*, 62 Wash.App. 914, 917, 816 P.2d 86 (1991); *see also State v. Harstad*, 153 Wash.App. 10, 218 P.3d 624 (2009); *State v. Veliz*, 76 Wash.App. 775, 888 P.2d 189 (1995).

In this case, P.R. testified that Mr. Coleman touched her inappropriately, but always over her clothing. RP (1/25/11) 29. Because she testified that the touching occurred over her clothing, additional evidence of sexual gratification was required. *Powell*, at 917. However, the prosecution did not present any such evidence. Because of this, the evidence was insufficient to prove that the touching was for the purpose of sexual gratification. *Id.*

The evidence was insufficient for conviction; accordingly, the convictions must be reversed and the case dismissed. *Smalis, supra.*

CONCLUSION

For the foregoing reasons, Mr. Coleman's convictions must be reversed and the charges dismissed. In the alternative, the case must be remanded to the superior court for a new trial.

Respectfully submitted on July 27, 2011.

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BY _____
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CERTIFICATE OF MAILING

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

Leonard Coleman, DOC #346807
Monroe Correctional Complex
P.O. Box 777
Monroe, WA 98272

and to:

Lewis County Prosecutor
MS: pro01
360 NW North St.
Chehalis, WA 98532

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

All postage prepaid, on July 27, 2011.

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 July 27, 2011.



Jodi R. Backlund, WSBA No. 22917
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