

COA NO. 45907-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

AARON WILLIAMSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining To Assignments Of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
i. <i>Pretrial</i>	2
ii. <i>Trial Testimony</i>	4
iii. <i>Sentencing</i>	10
C. <u>ARGUMENT</u>	13
1. THE COURT ERRED IN GIVING A LIMITING INSTRUCTION THAT ALLOWED THE JURY TO CONSIDER EVIDENCE OF PRIOR BAD ACTS FOR A PROPENSITY PURPOSE.....	13
a. <u>The Limiting Instruction Failed To Inform The Jury That The Evidence Could Not Be Used For The Purpose Of Concluding That Williamson Had A Particular Character And Acted In Conformity With That Character</u>	13
b. <u>In The Alternative, Counsel Was Ineffective In Failing To Propose A Correct Limiting Instruction That Would Have Prevented The Jury From Using The ER 404(b) Evidence As Proof That Williamson Acted In Conformity With His Character</u>	18
2. PROSECUTORIAL MISCONDUCT VIOLATED WILLIAMSON'S DUE PROCESS RIGHT TO A FAIR TRIAL.....	21
a. <u>The Prosecutor Committed Misconduct On Cross Examination By Getting Williamson to Call L.'s Testimony Untruthful</u>	21

TABLE OF CONTENTS

	Page
b. <u>The Prosecutor Committed Misconduct In Closing Argument By Exceeding The Law Conveyed In The Jury Instructions, Misstating The Law And Arguing A Fact Not In Evidence.</u>	23
c. <u>The Prosecutor Committed Misconduct By Invoking His Personal Integrity And the Prestige Of His Office In An Effort To Sway the Jury</u>	29
d. <u>Reversal Of The Conviction Is Required Because The Misconduct Could Not Be Cured By Court Instruction And There Is A Substantial Likelihood That It Affected The Outcome</u>	36
e. <u>In The Alternative, Counsel Was Ineffective In Failing To Object To The Misconduct Or Request Curative Instruction.</u>	41
3. THE COURT IMPROPERLY RELIED ON THE POSSIBILITY OF GOOD TIME CREDIT WHEN IMPOSING AN EXCEPTIONAL SENTENCE.	43
a. <u>When The Court Consider The Availability Of Good Time In Setting The Length Of An Exceptional Sentence, The Sentence Rests On An Untenable Basis And Is Clearly Excessive</u>	44
b. <u>On Remand, A Different Judge Should Resentence Williamson To Ensure The Appearance Of Fairness</u>	48
D. <u>CONCLUSION</u>	50

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Cross,
__ Wn.2d __, 327 P.3d 660 (2014)..... 41

In re Pers. Restraint of Glasmann,
175 Wn.2d 696, 286 P.3d 673 (2012)..... 22, 32, 37-39

In re Pers. Restraint of Talley,
172 Wn.2d 642, 260 P.3d 868 (2011)..... 45

In re Pers. Restraint of Williams,
121 Wn.2d 655, 658, 853 P.2d 444 (1993)..... 45

Slattery v. City of Seattle,
169 Wn. 144, 13 P.2d 464 (1932)..... 38

State v. Aguilar-Rivera,
83 Wn. App. 199, 920 P.2d 623 (1996)..... 49

State v. Aumick,
126 Wn.2d 422, 894 P.2d 1325 (1995)..... 17

State v. Bacotgarcia,
59 Wn. App. 815, 801 P.2d 993 (1990)..... 18

State v. Bahl,
164 Wn.2d 739, 193 P.3d 678 (2008) 48

State v. Barrow,
60 Wn. App. 869, 809 P.2d 209,
review denied, 118 Wn.2d 1007, 822 P.2d 288 (1991) 22

State v. Boehning,
127 Wn. App. 511, 111 P.3d 899 (2005)..... 37, 40

State v. Bourgeois,
72 Wn. App. 650, 866 P.2d 43 (1994)..... 44, 47

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Bowen</u> , 48 Wn. App. 187, 738 P.2d 316 (1987).....	17
<u>State v. Buckner</u> , 74 Wn. App. 889, 876 P.2d 910 (1994), <u>rev'd on other grounds</u> , 125 Wn.2d 915, 890 P.2d 460 (1995).....	46
<u>State v. Case</u> , 49 Wn.2d 66, 298 P.2d 500 (1956).....	34, 38, 40
<u>State v. Casteneda-Perez</u> , 61 Wn. App. 354, 810 P.2d 74, <u>review denied</u> , 118 Wn.2d 1007, 822 P.2d 287 (1991)	23
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978).....	41
<u>State v. Cloud</u> , 95 Wn. App. 606, 976 P.2d 649 (1999).....	49
<u>State v. Crutchfield</u> , 53 Wn. App. 916, 771 P.2d 746 (1989).....	46
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	21, 35, 37, 38, 40
<u>State v. Duncan</u> , 90 Wn. App. 808, 960 P.2d 941 (1998).....	47, 48
<u>State v. Dykstra</u> , 127 Wn. App. 1, 110 P.3d 756 (2005), <u>review denied</u> , 156 Wn.2d 1004, 128 P.3d 1239 (2006)	35
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	37, 38

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Estill</u> , 80 Wn.2d 196, 492 P.2d 1037 (1972).....	26, 38
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	36, 37
<u>State v. Fisher</u> , 108 Wn.2d 419, 739 P.2d 683 (1987).....	46
<u>State v. Fleming</u> , 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), <u>review denied</u> , 131 Wn.2d 1018, 936 P.2d 417 (1997).	37, 41
<u>State v. Green</u> , 71 Wn.2d 372, 428 P.2d 540 (1967).....	22
<u>State v. Gresham</u> , 173 Wn.2d 405, 269 P.3d 207 (2012).....	14, 15, 19
<u>State v. Gutierrez</u> , 58 Wn. App. 70, 791 P.2d 275 (1990).....	46
<u>State v. Horton</u> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	42
<u>State v. Jerrels</u> , 83 Wn. App. 503, 925 P.2d 209 (1996).....	22
<u>State v. Jones</u> , 144 Wn. App. 284, 183 P.3d 307 (2008).....	28
<u>State v. Kylo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	19
<u>State v. Madry</u> , 8 Wn. App. 61, 504 P.2d 1156 (1972).....	48

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Neidigh</u> , 78 Wn. App. 71, 95 P.2d 423 (1995).....	42, 43
<u>State v. Oxborrow</u> , 106 Wn.2d 525, 723 P.2d 1123 (1986).....	44
<u>State v. Padilla</u> , 69 Wn. App. 295, 846 P.2d 564 (1993).....	22
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	38
<u>State v. Romano</u> , 34 Wn. App. 567, 662 P.2d 406 (1983).....	48
<u>State v. Rose</u> , 62 Wn.2d 309, 382 P.2d 513 (1963).....	28, 38
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	28
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 655 P.2d 697 (1982).....	18
<u>State v. S.H.</u> , 75 Wn. App. 1, 877 P.2d 205 (1994), <u>review denied</u> , 125 Wn.2d 1016, 890 P.2d 20 (1995).	47
<u>State v. Sledge</u> , 133 Wn.2d 828, 947 P.2d 1199 (1997).....	47-49
<u>State v. Smith</u> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	15
<u>State v. Suarez-Bravo</u> , 72 Wn. App. 359, 367, 864 P.2d 426 (1994).....	38

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Swanson,</u> __ Wn. App. __, 327 P.3d 67 (2014).....	27
<u>State v. Talley,</u> 83 Wn. App. 750, 923 P.2d 721 (1996), <u>aff'd</u> , 134 Wn.2d 176, 949 P.2d 358 (1998).....	49
<u>State v. Thomas,</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	19, 20
<u>State v. Wade,</u> 98 Wn. App. 328, 989 P.2d 576 (1999).....	17
<u>State v. Wakefield,</u> 130 Wn.2d 464, 925 P.2d 183 (1996).....	46
<u>State v. Walker,</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	38, 39
<u>State v. Warren,</u> 165 Wn.2d 17, 195 P.3d 940 (2008), <u>cert. denied</u> , 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).....	28, 38, 42
<u>State v. Weber,</u> 99 Wn.2d 158, 659 P.2d 1102 (1983)	37
<u>State v. Woods,</u> 138 Wn. App. 191, 156 P.3d 309 (2007).....	19
<u>State v. Wright,</u> 76 Wn. App. 811, 888 P.2d 1214 (1995).....	23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Berger v. United States,
295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)..... 32

Floyd v. Meachum,
907 F.2d 347 (2d Cir. 1990) 33, 35

Greer v. Miller,
483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987)..... 21

Smith v. Phillips,
455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). 37

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 19, 41

United States v. Gallardo-Trapero,
185 F.3d 307 (5th Cir. 1999) 33

United States v. Goff,
847 F.2d 149 (5th Cir. 1988) 33

United States v. Gracia,
522 F.3d 597 (5th Cir. 2008) 34

United States v. Herrera,
531 F.2d 788 (5th Cir. 1976) 34

United States v. Ramirez-Velasquez,
322 F.3d 868, (5th Cir. 2003). 35

RULES, STATUTES AND OTHER AUTHORITIES

ER 404(b)..... 1, 3, 13-15, 17, 18

Juvenile Justice Act 47

TABLE OF AUTHORITIES

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9.94A.507	10
RCW 9.94A.585(4).....	44
RCW 9.94A.728(1).....	45
RCW 9.94A.729.	45
RCW 9.94A.729(3)(c)	45
RCW 10.58.090	15
RCW 26.44.030(1).....	27
RCW 26.44.030(2).....	27
Sentencing Reform Act.....	45, 47
U.S. Const. amend. VI	19, 41
U.S. Const. amend. XIV	21, 48
Wash. Const. art. I, § 3	21, 48
Wash. Const. art. I, § 22	19, 41
WPIC 5.40.	15

A. ASSIGNMENTS OF ERROR

1. The court erred in failing to give a proper limiting instruction for evidence of prior bad acts admitted under ER 404(b).

2. Defense counsel provided ineffective assistance in agreeing to an improper limiting instruction.

3. Prosecutorial misconduct violated appellant's due process right to a fair trial.

4. Defense counsel provided ineffective assistance in failing to object and seek curative instruction for the prosecutorial misconduct.

5. The court erred in considering the availability of good time credit in setting the length of the exceptional sentence.

Issues Pertaining to Assignments of Error

1. Whether the court's limiting instruction for ER 404(b) evidence was improper because it did not limit the permissible use of that evidence and did not prevent the jury from considering prior sexual acts as evidence of appellant's propensity to commit the crime charged?

2. Whether counsel was ineffective in agreeing to the flawed limiting instruction because no legitimate strategy justified the agreement and there is a reasonable probability that counsel's deficient performance affected the outcome?

3. Whether the prosecutor committed prejudicial misconduct in getting appellant to say the complaining witness testified untruthfully, misstating the law, referring to a fact not in evidence, and placing the prestige of his office and personal integrity at issue to undermine the credibility of appellant and his defense theory?

4. Whether counsel was ineffective in failing to object to prosecutorial misconduct and seek curative instruction where no legitimate reason justified the failure and there is a reasonable probability that counsel's deficient performance affected the outcome?

5. Sentencing courts may not consider potential good time credit when deciding upon an appropriate sentence. Is a new sentencing hearing required because the court violated this prohibition?

B. STATEMENT OF THE CASE

i. *Pretrial*

The State charged Aaron Williamson with committing one count of indecent liberties by forcible compulsion against his stepdaughter L. CP 1. The State further alleged the aggravating circumstance that the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 manifested by multiple incidents over a prolonged period of time. CP 1-2.

Before trial, the State sought to admit evidence that Williamson committed prior acts of sexual misconduct against L. over a 14-year period starting in California when L. was four years old and continuing in Washington. RP¹ 21-25; CP 111. The State argued the purpose of admitting this evidence under ER 404(b) was to show Williamson's lustful disposition towards L. RP 22-25. According to the State, the evidence was relevant to prove the sexual gratification aspect of the sexual contact element and the forcible compulsion element of indecent liberties. RP 24-25. The State commented that the court could "give a limiting instruction to say that this evidence is only being introduced for the purposes of assisting the jury in determining whether or not the element of sexual contact and forcible compulsion was met." RP 25.

Defense counsel argued the lustful disposition purpose for admitting the evidence was inapplicable because Williamson admitted he inappropriately touched L. on the day of the charged event and on prior occasions. RP 26-27, 29-30; CP 15-16. Counsel requested exclusion of the California incidents because their prejudicial effect outweighed their probative value. RP 27-28; CP 14-15. Counsel raised no objection to the Washington incidents. RP 27-28.

¹ The verbatim report of proceedings is referenced as follows: RP - three consecutively paginated volumes consisting of 12/16/13, 12/17/13, 12/18/13, 1/17/14.

The court excluded the California evidence as too prejudicial, but admitted the Washington evidence for the purpose of showing lustful disposition. RP 34-38.

ii. *Trial Testimony*

L. started living with Williamson, her stepfather, when she was about four years old. RP 257. The family moved from California back to Washington around 2005. RP 257, 259. According to L., Williamson had often inappropriately touched her, or tried "to do more," at least a couple times a month in the years leading up to the charged offense. RP 260-61. He would touch her breasts, try to put his hand down her pants, or brush his hand against her butt. RP 261. Sometimes she told him to stop. RP 261-62. There were times that he did not stop and would "try to continue even more." RP 262. Sometimes she did not tell him to stop for fear that he would get mad or "maybe all of a sudden force himself even more on me." RP 262. She recalled a tickling incident where he tried to pull her pants down. RP 262-63. He also came into her room one night and caressed the side of her body. RP 263-64. She told him "no" on this occasion and he stopped before it progressed. RP 264. On other occasions, she eventually let him take topless photos of her because she was afraid he would get mad or persist until she gave in. RP 264-65.

L. described the event that formed the basis for the indecent liberties charge as follows. In 2011, a short time after Williamson's wife gave birth by caesarian section,² Williamson crawled into L.'s bed and said, "I don't want to hurt mom. Is it okay if we pull your pants down a little so I can get some physical relief? I don't want to go in you but I just want to get some physical relief." RP 266-69. L. said "no." RP 267. He said, "Oh, come on" and, reaching around her, tried to put his hands under her sweatpants. RP 267. He succeeded in putting his hand partway down, but then she put her hand on his to stop him from going further or pulling down her pants.³ RP 267. He applied a little more force and got down to her pubic hairline. RP 267. She tried to use both hands to get him to stop and kept telling him "no" and "stop." RP 267, 269-70. He used a good amount of force. RP 270. She turned away from him so he "wouldn't get down any further." RP 267. After resisting, he either pulled his hand out or she pulled his hand out. RP 357. She rolled around to prevent him from touching her further until he eventually left the room. RP 270-71. She was 17 years old at the time. RP 256, 266-67.

² RP 266.

³ At some point he told her to pull down her pajama bottoms. RP 268. She told him no. RP 268.

L. told her mother about this event about two years later, in March 2013.⁴ RP 272. Her mother decided that they should talk to the pastor. RP 285. L. talked to the pastor and told him what happened. RP 274-75, 278. She did not tell him anything about Williamson forcing her hand down her pants. RP 279. The pastor suggested L. and her mother go talk to the police and said he was going to confront Williamson. RP 285.

L. met with Detective Garrett a month after speaking with the pastor. RP 279, 286. She did not say anything to the detective about trying to pull Williamson's hand away, or that she resisted, or that any force was used. RP 282. She did say she stopped him from going further. RP 283. She told the detective that she did not want charges filed. RP 276. L. later changed her mind about filing charges when she realized that Williamson was still going to be around her little sister.⁵ RP 276, 289.

L. met with the prosecutor a couple of times. RP 275. On cross-examination, defense counsel elicited that the prosecutor told her about the different types of charges that could be filed, including the charge of indecent liberties by forcible compulsion. RP 276-77. The prosecutor also explained to her what "forcible compulsion" meant and that it was a

⁴ At trial, L. could not remember whether she said anything to her mother about Williamson trying to push his hand down her pants. RP 278.

⁵ L.'s sister, A., was two years old at the time of trial. RP 256.

necessary element of the crime. RP 277, 290-91. It was only at that point that L. mentioned about struggling with Williamson. RP 291.

On redirect, the prosecutor elicited that in talking with her, he never told or suggested to her what she needed to say. RP 288. They had a conversation about what charge fit the circumstances, and the prosecutor explained what charges could or could not be filed based on their conversation. RP 292-93.

Williamson testified in his own defense. He acknowledged to having sexual feelings towards L., describing an incident in 2007 where he moved his hand toward her vagina while wrestling and tickling her before stopping himself. RP 305, 308, 334. The same scenario played itself out a year later, except this time he groped her on the outside of her pants over her vaginal area. RP 309. She told him to stop and he did, apologizing. RP 309.⁶

As L.'s body developed, Williamson lusted after her. RP 333-34. There were times that he tried to watch her getting undressed by looking into her bedroom window. RP 311. His lust was escalating. RP 336. In her junior year of high school, Williamson gave L. a massage and touched the top of her breast. RP 312. He acknowledged that having L. pose for

⁶ He later realized, through therapy, that he had been grooming her for consensual sex. RP 310.

topless photographs in 2010 was part of the grooming process. RP 313-14, 316, 338. Williamson was filled with self-loathing. RP 339. His sexual frustration and lust were building up. RP 343.

In 2011, before his youngest daughter A. was born, there were three incidents where Williamson went into L.'s bedroom and initiated or attempted to initiate sexual contact. RP 317. On the first occasion, he proposed that she remove her panties for his gratification. RP 317-18, 341. She declined and nothing further happened. RP 318, 341.

The next day, he climbed under the sheets and asked to snuggle with her. RP 318-19. She said it was okay. RP 319, 341. As he pulled her towards him, his hand was on her stomach and then went underneath her pajama bottoms. RP 319, 342. When his hand reached her pubic line she pulled his hand out and said "no." RP 319, 325. He scooted away and acted like his feelings were hurt. RP 319. He did not force his hand down her pants. RP 325. He did not try to keep his hand in the area when she pulled on it. RP 325. He would have kept going if she had allowed it. RP 325. The intentional part, as he described it, "was when I realized that my hand went below into her, her pants or her pajama bottoms." RP 324. On cross-examination, he denied that L. resisted and turned away to prevent him from going further down her pubic line. RP 347. The prosecutor

asked, "She's not being truthful?" RP 347. Williamson answered "no."
RP 347.

The following day, Williamson again asked to snuggle with L. RP 320. She said "no" and he left her bedroom. RP 320. In the summer of 2011, Williamson asked L. to have sex with him. RP 320-21. She declined and he walked away. RP 321. At this point Williamson realized he needed serious help. RP 321.

After L. told her mother, Williamson was confronted on the issue by the pastor, Williamson's wife, his mother and his sister during a meeting. RP 326, 348. He admitted to molesting L. RP 327. L. did not want to prosecute. RP 327. The pastor told him to report the matter. RP 349. Williamson was told at the meeting to turn himself into the police. RP 327. He went to the sheriff's office and confessed.⁷ RP 328. He wanted to hold himself accountable.⁸ RP 329. On the stand, he again admitted to touching L. inappropriately, but denied using force. RP 348.

A jury convicted as charged. CP 42. Instead of proceeding to a bifurcated trial, Williamson stipulated to the charged aggravator. RP 439-

⁷ L. spoke with Detective Garrett after Williamson confessed to the authorities. RP 276.

⁸ The deputy testified that Williamson admitted to asking L. to pull down her panties while cuddling. RP 323-34, 240. Williamson felt guilt over his feelings towards her and explained that he wanted to take responsibility for what he had done. RP 240-41.

50. Among the underlying facts, Williamson stipulated to sexually abusing L. starting when she was four years old. RP 442, 444, 449.

iii. *Sentencing*

The offense of indecent liberties by forcible compulsion is subject to an indeterminate sentence, with a minimum and maximum term. CP 95; RCW 9.94A.507. Based on Williamson's offender score of zero, the standard range for the minimum term of the offense is 51-68 months. RP 448; CP 98. The maximum term is life. CP 98.

The State sought a minimum exceptional sentence of 18 years confinement. RP 466-67. The State explained that L. had a valid concern about needing to protect her younger sister until she was old enough to get out of the house. RP 466. The State continued: "we did the math, and I think we came up with something around eighteen years, and then with credit for time served, and Good Time, would require him to serve enough time in the Department of Corrections until the little sister is old enough to graduate high school and get out of the house and, you know, fend for . . . herself." RP 466.

A community corrections officer recommended an exceptional sentence of at least 13 years in confinement on the rationale that a sentence of that length would give the younger child a chance to mature to the point where she could speak up if anything inappropriate happened.

RP 469-70. The court commented "but if it was thirteen years then, with good time and all that . . . " RP 470. The corrections officer responded, "Correct. Now, sex offenders don't get the full amount of Good Time and Earned Time. I believe he'll get like ten percent. So he won't get as much as the offender. But still we want to take that into consideration. Thirteen is our minimum of what we're asking for." RP 470. The corrections officer was also fine with the State's recommendation of 18 years. RP 470.

L., speaking on her own behalf, wanted to have Williamson sentenced to 13 or 14 years so that her younger sister could grow up without being groomed and be old enough to complain if something happened. RP 471, 473.

Williamson requested a Special Sex Offender Sentencing Alternative (SSOSA) or, in the alternative, a standard range sentence. RP 475-76; CP 55-94. Williamson's evaluator, Dr. Jensen, supported a SSOSA. RP 485-87. Dr. Jensen told the court that there was no indication that Williamson had experienced any deviant urges or thoughts about his younger daughter. RP 488. This was fairly typical for incest offenders, as they often develop a fixation on one child in the family. RP 488. In addition, stepdaughters are sexually assaulted at a much higher rate than biological daughters. RP 488. The structure of the SSOSA, with

its attendant supervision requirements, would pose a minimal risk of offense to Williamson's biological daughter. RP 488.

The court returned to the prosecutor, asking "when you were doing the math and stuff, you took eighteen years and you came up with okay, when you take out Good Time and everything, it might be thirteen or fourteen years, I guess, or something?" RP 489. The prosecutor responded, "Well, I think Good Time is ten percent. You know, so . . . " RP 489. The court asked "Is ten percent the number we'd be working with, with this offense? Because you said it was different for a sex offense? Okay." RP 489. The prosecutor answered, "It's a serious violent sexual offense. And unlike some less serious offenses, it is a ten percent Good Time situation." RP 489.

The court then gave Williamson a chance to speak before imposing sentence. RP 489. Williamson apologized to L., said he was taking the steps needed to change, and would have no unsupervised contact with his younger daughter. RP 489-90. The court clarified that the younger daughter, A., was a little over two and half years old at present. RP 490.

The court imposed an exceptional sentence of 17 years minimum term of confinement, with a maximum term of life. RP 493; CP 98-99. The court explained, "The way I figure it, seventeen years, less Good Time, based on how old [A.] is at this point in time gets her roughly to

eighteen years of age, or so. And, um, that's one of the factors I'm taking into account." RP 493. This appeal follows. CP 109.

C. ARGUMENT

1. THE COURT ERRED IN GIVING A LIMITING INSTRUCTION THAT ALLOWED THE JURY TO CONSIDER EVIDENCE OF PRIOR BAD ACTS FOR A PROPENSITY PURPOSE.

The trial court gave an improper ER 404(b) limiting instruction that allowed the jury to consider Williamson's prior bad acts as proof of propensity to commit the charged crime. The court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction. This was a "he said she said" case that could have gone either way. The improper limiting instruction may have tipped the balance in the State's favor. Reversal of the conviction is therefore required. In the alternative, defense counsel was ineffective in agreeing to a defective instruction that Supreme Court precedent condemned.

a. The Limiting Instruction Failed To Inform The Jury That The Evidence Could Not Be Used For The Purpose Of Concluding That Williamson Had A Particular Character And Acted In Conformity With That Character.

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge,

identity, or absence of mistake or accident." "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Consistent with this categorical bar, the defendant is entitled, upon request, to a limiting instruction expressly prohibiting jurors from using prior bad acts for a propensity purpose. Gresham, 173 Wn.2d at 423. Moreover, "once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction." Id. at 424. "An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character." Id. at 423-424.

The State proposed the limiting instruction in this case and defense counsel affirmatively agreed with it. CP 130; RP 378. The instruction reads:

Evidence has been admitted in this case regarding the defendant's commission of previous sex offenses. The defendant is not on trial for any act, conduct, or offense not charged in this case.

Evidence of prior sex offenses on its own is not sufficient to prove the defendant guilty of the crime charged in this case. The State has the burden of proving beyond a reasonable doubt that the defendant committed each of the elements of the crime charged.

CP 38 (Instruction 15).

This instruction was used for prior sex offenses admitted under RCW 10.58.090. WPIC 5.40.⁹ Gresham held that statute was unconstitutional. Gresham, 173 Wn.2d at 424. The instruction in Williamson's case neither informed the jury of the purpose for which the ER 404(b) evidence was admitted, nor stated "the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character." Id. at 423-24. It was therefore erroneous.

The State might argue that defense counsel invited the error by agreeing to give the incorrect instruction and is thereby barred from challenging it on appeal. But as the court held in Gresham, the trial court has a duty to give a correct instruction once defense counsel requests a limiting instruction and its failure to do so is error. Id. at 424.

A new trial is required if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Id. at 425 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). A new trial is required here. This case came down to whether

⁹ WPIC 5.40 provides, "Certain evidence has been admitted in this case for only a limited purpose. This [*evidence consists of _____ and*] may be considered by you only for the purpose of _____. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation."

L. or Williamson was more credible on one crucial question: did he use force to touch her intimate area? There were no independent eyewitnesses to what happened. There was no physical corroboration. It was her word against his.

Faced with deciding who was more credible, jurors naturally would tend to view evidence of prior sex-related acts as proof that Williamson committed the act for which he was charged. L. testified that Williamson had forced himself on her in the past even when she protested. RP 262. The flawed limiting instruction allowed the jury to treat that behavior as proof that Williamson had a propensity to use force when encountering resistance and, acting in conformity with his character, must have committed the charged crime of indecent liberties by forcible compulsion.

Further, evidence showed both his prior bad acts and his sexual attraction to L. were escalating to the point where he had difficulty controlling himself. RP 336, 343. Without an adequate limiting instruction, the jury was free to conclude Williamson acted in conformity with his character to engage in escalating sexual conduct, culminating in the indecent liberties by forcible compulsion action for which he stood charged.

In closing argument, the prosecutor argued the evidence showed lustful disposition and that the evidence was not to be used to show he must have touched her inappropriately in 2011 because he touched her

inappropriately on earlier occasions. RP 395.¹⁰ The prosecutor's words do not render the instructional error harmless. The jury was instructed that the "the lawyers' statement are not evidence," and "the law is contained in my instructions to you." CP 24 (Instruction 1). The law contained in the court's instructions did not forbid the jury from using the ER 404(b) evidence for an improper propensity purpose. Further, "[a] jury should not have to obtain its instruction on the law from arguments of counsel." State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995).

Evidence of other misconduct is prejudicial because jurors may convict on the basis that the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987). Such evidence "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Bowen, 48 Wn. App. at 195. "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

¹⁰ The prosecutor's opening statement also addressed the issue. RP 215-16.

A juror's natural inclination is to reason that having previously committed an offense, the accused is likely to have reoffended by acting in conformity with that character. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). It is therefore crucial that jurors be correctly instructed on the proper use of ER 404(b) evidence, especially in sex cases where the danger of prejudice is at its highest. See State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982) (requiring limiting instruction and recognizing potential prejudice of prior bad acts is at its highest in sex cases). The flawed limiting instruction issued by the court allowed the jury to follow its natural inclination and infer Williamson acted in conformity with his character and therefore committed the criminal act charged by the State. A new trial is required because the instructional error was not harmless.

- b. In The Alternative, Counsel Was Ineffective In Failing To Propose A Correct Limiting Instruction That Would Have Prevented The Jury From Using The ER 404(b) Evidence As Proof That Williamson Acted In Conformity With His Character.

If the Court disagrees with Williamson's argument that invited error is inapplicable in this context, then it will be necessary to address whether counsel was ineffective in agreeing to the deficient instruction. The invited error doctrine does not preclude review where defense counsel was

ineffective in proposing a defective instruction. State v. Kylo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009).

Williamson is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. Kylo, 166 Wn.2d at 869. Counsel's agreement to a limiting instruction that allowed the jury to consider the ER 404(b) evidence for the purpose of showing action in conformity with character fell below an objective standard of reasonableness.

"Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel." State v. Woods, 138 Wn. App. 191, 197-98, 156 P.3d 309 (2007). Such is the case here. Counsel has a duty to know the relevant law. Kylo, 166 Wn.2d at 861 (counsel deficient in proposing pattern instruction because case law should have indicated to counsel that the pattern instruction was flawed). At the time of Williamson's trial, Gresham was the relevant law. There was no

reasonable trial strategy for agreeing to an instruction that did not prevent the jury from using evidence of Williamson's prior bad acts as evidence of his propensity to commit the charged crime. Counsel had a duty to guard his client against the most damaging inference that could be drawn from the evidence: that he did it before, so he must have done it again.

In closing argument, counsel referenced the instruction and told the jury it could not consider other acts of misconduct in determining whether Williamson committed the crime, but could consider those acts for his mindset. RP 409-10. The problem is that the instruction did not limit the jury's consideration of the evidence in this manner. Jurors were instructed to disregard argument not supported by the law as contained in the instructions. CP 24. The flawed instruction allowed jurors to not only consider the prior misconduct as evidence that Williamson committed the charged crime but also to consider that evidence as proof of Williamson's propensity to commit the charged crime.

Prejudice results from a reasonable probability that the result would have been different but for counsel's deficient performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. For the reasons set forth in section C.1.a., supra, there is a reasonable probability that the deficient instruction agreed to by defense counsel affected the outcome.

2. PROSECUTORIAL MISCONDUCT VIOLATED WILLIAMSON'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct violates the due process right to a fair trial when there is substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In this case, the prosecutor committed misconduct by (1) asking Williamson whether L. was being untruthful; (2) not confining his argument to the law as set forth in the jury instructions, misstating the law on mandatory reporting and arguing a fact not in evidence; and (3) putting his personal integrity and prestige of his office at issue during closing argument in an effort to sway the jury. Even in the absence of objection, reversal of the conviction is required because the misconduct was incurable through instruction and resulted in a substantial likelihood that the verdict was affected. In the alternative, counsel was ineffective in failing to object to the misconduct and seek curative instruction.

a. The Prosecutor Committed Misconduct On Cross Examination By Getting Williamson to Call L.'s Testimony Untruthful.

The presence of misconduct and its prejudicial effect are determined in the context of the record and the circumstances of the trial

as a whole. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 706, 286 P.3d 673 (2012). The first instance of misconduct occurred during the prosecutor's cross-examination of Williamson:

Q: Okay. And when she, she said that when your hand went down the pajama bottoms she testified that she resisted and resisted hard, and turned over and tried to get over onto her stomach to keep you from going any further than her pubic line?

A: Uh huh.

Q: You heard her testify to that?

Q: Correct.

Q: That's not the way you recall it?

A: No, no.

Q: That's not correct?

A: Correct.

Q: *She's not being truthful?*

A: No.

RP 347 (emphasis added).

"A prosecutor commits misconduct if his or her cross examination is designed to compel a witness to express an opinion as to whether other witnesses were lying." State v. Padilla, 69 Wn. App. 295, 299, 846 P.2d 564 (1993); accord State v. Jerrels, 83 Wn. App. 503, 507, 925 P.2d 209 (1996) (asking defendant's wife whether she believed child victims told the truth deprived defendant of his right to fair trial). Such cross examination is "argumentative, impertinent and uncalled for." State v. Barrow, 60 Wn. App. 869, 875, 809 P.2d 209, review denied, 118 Wn.2d 1007, 822 P.2d 288 (1991) (quoting State v. Green, 71 Wn.2d 372, 380-81,

428 P.2d 540 (1967)). It is "is contrary to the duty of prosecutors, which is to seek convictions based only on probative evidence and sound reason." State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74, review denied, 118 Wn.2d 1007, 822 P.2d 287 (1991).

"[R]equiring a defendant to say that other witnesses are lying is prejudicial because it puts the defendant in a bad light before the jury." State v. Wright, 76 Wn. App. 811, 822, 888 P.2d 1214 (1995). Such questions "are unfair to the witness because there may be other explanations for discrepancies in testimony." Wright, 76 Wn. App. at 822. Further, asking a witness to express an opinion as to whether another witness is lying invades the province of the jury and is misleading. Casteneda-Perez, 61 Wn. App. at 362.

The prosecutor's cross-examination of Williamson, in asking whether L. was not being truthful regarding the critical factual dispute in the case, is inexcusable. RP 347. It falls squarely within the realm of prohibited conduct, as shown by the precedent cited above.

- b. The Prosecutor Committed Misconduct In Closing Argument By Exceeding The Law Conveyed In The Jury Instructions, Misstating The Law And Arguing A Fact Not In Evidence.

In an effort to destroy Williamson's credibility, the prosecutor committed misconduct in not confining his argument to the law stated in

the jury instructions, in affirmatively misstating the law on mandatory reporting, and in arguing a fact not in evidence.

In closing argument, the prosecutor argued that this case boiled down to credibility. RP 398. In following up on that theme, the prosecutor addressed whether Williamson should be considered credible in light of the circumstances in which he went to the police and confessed:

And the defendant tells you, basically he tells you and he tells Deputy Avery just enough to go ahead and say, well, yeah I'm responsible. It's all on me. It's my fault. She didn't do anything wrong. Those were his words. She didn't do anything. It's not her fault.

She's not responsible for his, his urges or what he did. So he tells you basically just enough, and he tells Deputy Avery at the sheriff's department just enough to go ahead and say okay, I've come forward, I said this. Well, yeah, he came forward after it was, you know, he had to get out in front of this thing. Now, you know, it's out. *The minister is a mandatory reporter. You gotta go ahead and put a positive spin on this thing. You've got to get out and do it. You've got no choice. You've got to get out there in front of it.*

And, and, you know, so he does that. But then he denies the part that would get him convicted. Well, I did this. It was wrong. I had these urges I couldn't control them. But I didn't break the law. What I did was wrong. It was immoral. But, uh, I didn't break the law.

RP 399 (emphasis added).

In closing argument, defense counsel responded by telling the jury that Williamson had come to a point in his life "where he realizes that it's time to come clean. He knew that the day he walked into the sheriff's

office and confessed to a crime nobody had reported." RP 417. Counsel argued "none of us would be here" if Williamson had not done that: "It would have been dealt with in the family. It would have been dealt with in the church. He knew that and he walked in there." RP 417. Williamson's decision to come clean went to his credibility. RP 416-19.

In rebuttal, the prosecutor returned to the issue:

And Mr. Kelly put out, you know, dealings. Well, you know, they were going to deal with this, you know, within the church. *That's why the State of Washington and many other states in the United States have passed a law to make churches and school teachers, and we talked to a school teacher, to make it mandatory.* If some child comes to you and says something happened. Or *somebody comes to you and says something happened, you are mandated by law to report it to the authorities.*

So when he goes to the church and tells the law -- or, tells his pastor what happened, they can't sweep it under the rug or say, we've got a program, or, we've got therapy and we can go ahead and counsel you and we can cure you of this horrible thing. It's to prevent that kind of thing, so that it doesn't get swept under the rug, or handled within the church, or handled by the family.

He went to the sheriff's department and confessed, *I assume and you can infer, that his pastor said, you've told me and the law in the State of Washington says if you don't go tell them, I'm going to go tell them.* So, he's got to -- it's damage control at this point. Well, and he might have said, it's better if they hear it from you than they hear it from me. Well, you're right. I guess I'll go to the sheriff's department and tell them a little bit about what I did. So, it's damage control.

RP 429 (emphasis added).

Before long, the prosecutor again returned to the theme of Williamson's credibility:

I said I'm sorry. I just don't want to suffer the consequences. That's why he takes the stand. He confessed to a crime that nobody reported. And again, it goes back to well, nobody reported it? Well, no. *Your preacher was by law (inaudible) to report it and if you didn't do it he was going to do it.* Get out in front of this thing. Do the damage control. Put a positive spin on it. I'm really sorry. I need help. Deputy Avery told me I could get help. Oh my gosh, you know? He -- I didn't realize that.

It's manipulating the system. It's manipulating the church. It's manipulating the family. Anybody that you come into contact with. I got to put a positive spin on this thing. I'm not the -- I'm [sic] told you I'm a monster but I'm really not that bad of a guy. Because it was right for him to do. *He had to do this to go ahead and get out in front of it and get out of this jam.* I've got to do it.

RP 431 (emphasis added).

There are several things wrong with the prosecutor's argument. First, the jury was not instructed on what a mandatory reporter is. The prosecutor nonetheless took it upon himself to tell the jury that the pastor was required by law to report the abuse. That was misconduct all by itself. The prosecution's statements to the jury must be confined to the law stated in the court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972).

Second, a pastor or any other member of the clergy is in actuality *not* a mandatory reporter of child abuse. The mandatory reporting statute

spells out who qualifies as a mandatory reporter. RCW 26.44.030(1). A member of the clergy is not one of them. Further, the mandatory reporting requirement "does not apply to the discovery of abuse or neglect that occurred during childhood if it is discovered after the child has become an adult." RCW 26.44.030(2). The pastor was not told of the abuse until after L. turned 18 years old. RP 256, 272, 274-75, 326.¹¹ For both reasons, the prosecutor misstated the law in telling the jury that the pastor was a mandatory reporter. "The prosecutor may not misstate the law to the jury." State v. Swanson, __ Wn. App. __, 327 P.3d 67, 70 (2014).

Third, the prosecutor committed misconduct in arguing a fact not in evidence: "I assume and you can infer, that his pastor said, you've told me and the law in the State of Washington says if you don't go tell them, I'm going to go tell them." RP 429. The prosecutor has no business assuming anything not in evidence. The jury cannot infer that conversation took place. The jury heard no testimony that the pastor told Williamson "the law in the State of Washington says if you don't go tell them, I'm going to go tell them." See RP 326-28, 349. The misconduct is

¹¹ RCW 26.44.030(2) further provides "However, if there is reasonable cause to believe other children are or may be at risk of abuse or neglect by the accused, the reporting requirement of subsection (1) of this section does apply." There was no testimony about the pastor's awareness of Williamson's younger daughter let alone whether there was reasonable cause to believe she was at risk of abuse.

especially pernicious because the "inference" the prosecutor invited the jury to make was based on the inaccurate premise that the pastor was a mandatory reporter. The pastor was not a mandatory reporter, and so there is no basis for a reasonable inference that such a discussion took place. "Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record." State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008); accord State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). A prosecutor's reference to facts not in the record improperly allows the jury to speculate on facts not before it. State v. Warren, 165 Wn.2d 17, 44, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).

Defense counsel argued the fact that Williamson went to the police and confessed to impropriety after speaking to his pastor supported his credibility. RP 416-18. That argument was proper because it was based on facts in evidence and did not misstate the law. The prosecutor is entitled to make a fair response to the arguments of defense counsel. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor's rebuttal response was not a fair one because it was not confined to the law set forth in the jury instructions, actually misstated the law, and was based on a fact not in evidence. Indeed, the prosecutor actually committed

misconduct before defense counsel even started his closing argument. RP 399. The misconduct was repeated in rebuttal. RP 429, 431.

c. The Prosecutor Committed Misconduct By Invoking His Personal Integrity And the Prestige Of His Office In An Effort To Sway the Jury.

The next form of misconduct took place against the backdrop of what occurred during L.'s testimony. On cross-examination, defense counsel elicited from L. that the prosecutor told her about the different types of charges that could be filed, including the charge of indecent liberties by forcible compulsion. RP 276-77. The prosecutor also explained to her what "forcible compulsion" meant and that it was a necessary element of the crime. RP 277, 290-91. It was only at that point that L. mentioned about struggling with Williamson. RP 291. On redirect, the prosecutor elicited that in talking with her, he never told or suggested to her what she needed to say. RP 288. They had a conversation about what charge fit the circumstances, and the prosecutor explained what charges could be filed based on their conversation. RP 292-93.

In closing argument, defense counsel argued Williamson did not commit the crime charged because he did not use force. RP 407, 411-12. In this context counsel argued Williamson was overcharged. Id. L. waited two years to report and when she did, she said nothing about force being involved to her mother, to anyone at the meeting, or to the sheriff's

office. RP 413-15. It was only after the prosecutor told her about the crime of indecent liberties by forcible compulsion and what that involved did L. claim Williamson used force in touching her. RP 415-16. Counsel focused on the timing of that disclosure to cast doubt on the credibility of her use of force accusation, suggesting she "stretch[ed] things a little bit" upon being told about the proof necessary for the crime. RP 416.

In rebuttal, the prosecutor initially addressed the issue as follows:

Well, you know, they talk about the crime not charged, and I'm going to get help. You know, well, maybe you are. But you still have to be held accountable for this. Now I asked him about that, you know?¹² You want to be held accountable but you just don't want to be convicted? Well, not of this crime. Tell me which crime would you like to be convicted of?

RP 424.

That comment was not misconduct. But the prosecutor pressed the theme and in doing so crossed the line:

And then this discussion of overcharged. You know, she meets with the sheriff's department. She gives them a report. She gives a report to Detective Garrett. Detective Garrett takes the information and then this is how the system works. I guess it's another one of those civics lessons. Does the investigation and forwards it to my office because Detective Avery told me, he didn't arrest him right then and there at the time because he doesn't investigate sex crimes. That's for Detective Garrett to investigate. He's not going anywhere so I'll turn it over to Barb Garrett. She'll investigate it. She'll send it up to the

¹² See RP 349.

Prosecutor's Office, and they'll decide what charges, if any, have to be done. Get the report. Read the report. Need to bring the victim in -- the complaining witness in, I'm sorry. The complaining witness in to talk with them a little bit more. Find out a little bit more. I don't know an attorney an attorney worth their salt that would go to trial without talking to their witnesses. You got to talk to witnesses. Don't hold that against me because I have to talk to witnesses.

The purpose is to talk to the witness, the complaining witness, to say, I've read the statement. Is there anything more? Is this what you meant? Did the officer write it down correctly? You know, so that there are no misunderstandings later on, to make sure that the charge that's filed is, is the appropriate charge. The law requires it. *I've been doing this for over forty years as a police, a defense lawyer, a prosecutor. I've taken several oaths to uphold the law, to uphold the constitution. This is what I do. You know, so --, and it's not, wow, you know, this is what I would like charged and this is what I need you to say in order to go ahead and get that conviction. No.* You talk to the complaining witnesses, you talk to the victims. And sometimes you say, you know, it's just not here. I understand the fact that, you, what you think happened here was horrible. I agree. But there's not enough. So I have to make the charging decision. The law requires that.

RP 425-26.

The prosecutor continued to weave the same theme:

So now we have this big conspiracy theory that the State of Washington involves in, you know, that the State has now got this information and has inflated the charges. And the State has conspired now to go ahead and railroad poor Mr. Williamson. And, you and you heard from him, you know, everybody's against him, you know? It's me. It's not her fault. It's all on me. But everybody's against me and they've overcharged this thing, and this is not what I'm guilty of.

Well, I'll tell you what. You decide the case based upon the facts. But if you think that Scott Rosekrans, as your elected prosecuting attorney is railroading people, I am up for reelection next year and you can turn me out to pasture. I mean, if you think that I'm out to get people. That this case is going to put me in the Governor's chair. If you don't think I'm doing my job don't hold it against the law, hold it against me. Vote me out of office.

RP 430.

According to the prosecutor, Williamson was "accusing [L.], even the State of Washington, of stretching this to go ahead and get a conviction on somebody that didn't do anything wrong." RP 430.

It is well established that a prosecutor cannot use his or her position of power and prestige to sway the jury. Glasmann, 175 Wn.2d at 704. Such conduct invites the jury to assume that the State's witnesses bear a special seal of trustworthiness. The average jury has confidence that the prosecutor will faithfully observe her obligation to refrain from using methods calculated to produce a wrongful result while using every legitimate means to bring about a just one. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). "Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger, 295 U.S. at 88. A prosecutor cannot ask the jury to pass on his or her personal integrity and professional ethics

before deliberating on the evidence. Floyd v. Meachum, 907 F.2d 347, 354 (2d Cir. 1990). It is pernicious for a prosecutor to rely on the authority of the government to "impart an implicit stamp of believability to what the prosecutor says." United States v. Gallardo-Trapero, 185 F.3d 307, 320 (5th Cir. 1999) (quoting United States v. Goff, 847 F.2d 149, 163 (5th Cir. 1988)).

The prosecutor here improperly invoked his position of power and prestige as well as his personal integrity to sway the jury: "I've been doing this for over forty years as a police, a defense lawyer, a prosecutor. I've taken several oaths to uphold the law, to uphold the constitution. This is what I do. You know, so --, and it's not, wow, you know, this is what I would like charged and this is what I need you to say in order to go ahead and get that conviction." RP 426. And again: "Well, I'll tell you what. You decide the case based upon the facts. But if you think that Scott Rosekrans, as your elected prosecuting attorney is railroading people, I am up for reelection next year and you can turn me out to pasture. I mean, if you think that I'm out to get people. That this case is going to put me in the Governor's chair. If you don't think I'm doing my job don't hold it against the law, hold it against me. Vote me out of office." RP 430.

The prosecutor's comments put the jury in an awkward position. The message was that the jury needed to question the ethics of the

prosecutor if it believed the defense theory of the case. A juror could conclude that an acquittal would reflect adversely upon the honesty and good faith of the prosecutor. Jurors naturally respect prosecutors. State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956). The prosecutor, an experienced litigator, knows this full well, which is why he juxtaposed the defense theory with his own personal integrity and that of his office. He knew that the defense will always lose that contest.

The prosecutor's "conspiracy" comment likewise constituted misconduct: "So now we have this big conspiracy theory that the State of Washington involves in, you know, that the State has now got this information and has inflated the charges. And the State has conspired now to go ahead and railroad poor Mr. Williamson." RP 430. A prosecutor commits misconduct by making statements that "put the jury in the position that in order to find defendant not guilty it would be required to believe that the prosecutor had engaged in a necessarily illegal conspiracy with government witnesses." United States v. Herrera, 531 F.2d 788, 790 (5th Cir. 1976); accord United States v. Gracia, 522 F.3d 597, 601-02 (5th Cir. 2008). Such remarks improperly place the prosecutor's personal integrity at issue and amount to invoking the prestige and credibility of the prosecutor's office to sway a verdict in the State's favor. The prosecutor in effect told the jury that he knew something the jurors did not (i.e., that

there was no such conspiracy) and implied that the jury should trust the prosecutor's judgment.

Further, this entire line of argument occurred in the context of a debate about L.'s credibility. The prosecutor invited the jury to find L. credible by invoking his personal integrity and that of his office. The prosecutor's implied "voucher" for L.'s credibility "invited the jury to view its verdict as a vindication of the prosecutor's integrity rather than as an assessment of guilt or innocence based upon the evidence presented at trial." Floyd, 907 F.2d at 354.

While the prosecutor is entitled to make a fair response to defense counsel's argument, placing the prestige of his office and his personal integrity on the line does not qualify as one. A prosecutor's remarks made in direct response to defense argument may not go beyond what is necessary to respond to the defense. State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 756 (2005), review denied, 156 Wn.2d 1004, 128 P.3d 1239 (2006). The prosecutor must not exceed the range of response necessary to "right the scale." United States v. Ramirez-Velasquez, 322 F.3d 868, 874-75 (5th Cir. 2003); see Davenport, 100 Wn.2d at 760 (response was improper despite being invited by adversary in closing argument because it exceeded scope of provocation).

The prosecutor's comments were not in response to any *improper* conduct by defense counsel. Defense counsel properly challenged L.'s credibility based on the timing and circumstances of her claim of force being used. Counsel did not attack the prosecutor's credibility or integrity. Counsel acknowledged the prosecutor had "every right" to tell L. what the charge entailed. RP 415.

The prosecutor, in rebuttal, made it personal. The prosecutor made it about his personal integrity. It was not necessary or pertinent to respond to defense counsel's argument in that manner. A proper response to defense counsel's argument would have been to comment that there was no overcharging because the evidence supported the charge and the State had proved the crime beyond a reasonable doubt based on the evidence. As it was, the prosecutor's rebuttal did not right the scale. It went too far. It was disproportionate. It was unfair.

- d. Reversal Of The Conviction Is Required Because The Misconduct Could Not Be Cured By Court Instruction And There Is A Substantial Likelihood That It Affected The Outcome.

Defense counsel did not object to the misconduct. In the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

When applying this standard, reviewing courts should "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The touchstone of due process analysis is the fairness of the trial: regardless of whether the prosecutor deliberately committed misconduct, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? Davenport, 100 Wn.2d at 762 (citing Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)); accord State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). If prosecutorial "mistakes" deny a defendant fair trial, then the defendant should get a new one. Fisher, 165 Wn.2d at 740 n.1.

Disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997). A prosecutor's misconduct is similarly flagrant and ill-intentioned where case law and professional standards available to the prosecutor clearly warned against the conduct. Glasmann, 175 Wn.2d at 707.

Case law in existence well before Williamson's trial clearly warned against the prosecutor's improper conduct in this case. "Asking one witness whether another witness is lying is flagrant misconduct." State v.

Boehning, 127 Wn. App. 511, 525, 111 P.3d 899 (2005). The prosecutor did it just the same. RP 347. A prosecutor is not permitted to "throw the prestige of his public office" against the accused. Case, 49 Wn.2d at 71. The prosecutor did that. RP 425-26, 430. It was also already established that prosecutors must not go outside the jury instructions, misstate the law, and rely on facts not in evidence. Estill, 80 Wn.2d at 199; Davenport, 100 Wn.2d at 763; Rose, 62 Wn.2d at 312; Warren, 165 Wn.2d at 44.

The misconduct here was not the type to be remedied by a curative instruction. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)). Statements made during closing argument are intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. Case, 49 Wn.2d at 70-71. The cumulative effect of misconduct can overwhelm the power of instruction to cure. Glasmann, 286 P.3d at 679; State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Looking at each individual comment in isolation, a case could be made that instruction could have cured any prejudice. But that is not how

repetitive misconduct is reviewed on appeal. Repeated instances of misconduct and their cumulative effect must be considered as a whole: "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Glasmann, 175 Wn.2d at 707 (quoting Walker, 164 Wn. App. at 737).

The prosecutor's repeated misconduct combined to create a cumulative prejudicial force that deprived Williamson of his due process right to a fair trial. Taken together, the prosecutor's improper comments created a theme used to unfairly attack Williamson's credibility and the defense theory of the case. That theme involved repeatedly mischaracterizing the pastor as a mandatory reporter to discredit Williamson and repeatedly invoking the prestige and personal integrity of the prosecutor in an attempt to sway the jury. See Walker, 164 Wn. App. at 738 (improper comments used to develop theme in closing argument impervious to curative instruction). Under the circumstances of this case, a feeling of prejudice was engendered in the minds of the jury, which prevented Williamson from having a fair trial.

Reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict. Glasmann, 175 Wn.2d at 710. Rather, standard for showing prejudice is a substantial

likelihood that the misconduct affected the verdict. Id. at 711. To determine whether misconduct warrants reversal, courts consider its cumulative effect on the jury. Case, 49 Wn.2d at 73.

Here, the State and defense counsel agreed that the only element in dispute was whether Williamson used force in making sexual contact. RP 394, 407. Both agreed it was basically a "he said she said" type of case. RP 397, 412. The case boiled down to witness credibility. RP 398.

L.'s credibility was central to the State's case. Placing Williamson in a position where he had to challenge the truthfulness of the girl's testimony was highly prejudicial. See Boehning, 127 Wn. App. at 525 (addressing similar circumstance). Further, a prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763. The prosecutor misled the jury in arguing the pastor was a mandatory reporter, which unfairly undermined Williamson's credibility and the defense theory that Williamson had come clean on what he had done and not done. Throwing the personal prestige of the prosecutor's office into the mix in an effort to attack the defense theory and bolster L.'s credibility added to the prejudice.

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to

sway the jury in a close case.¹³ Fleming, 83 Wn. App. at 215. The evidence against Williamson was not overwhelming. It came down to the credibility of L. and Williamson. Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdict but for the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

e. In The Alternative, Counsel Was Ineffective In Failing To Object To The Misconduct Or Request Curative Instruction.

In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take such action. Strickland, 466 U.S. at 685-86; U.S. Const. amend. VI; Wash. Const., art. I, § 22. The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995).

"If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross,

¹³ The prosecutor told the jury he had "[b]een doing this for twenty years." RP 402.

Wn.2d, 327 P.3d 660, 693 (2014). If a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. See State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (defense counsel deficient in failing to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument).

Counsel's performance here fell below an objective standard of reasonableness. The prosecutor's tactics and comments were clearly improper. If an objection and instruction could have redirected the jury to the proper considerations and cured the prejudice resulting from the improper comments, then counsel had no legitimate tactical reason for not objecting. No legitimate reason supported the failure of counsel to properly object and request curative instruction given the prejudicial nature of the prosecutor's improper actions.

When a reviewing court decides misconduct occurred and instruction could have cured the prejudice resulting from that misconduct, it necessarily recognizes the presence of prejudice that was susceptible to cure. See Warren, 165 Wn.2d at 26-28 (prosecutor's misstatement of the burden of proof and presumption of innocence during closing argument did not require reversal only because the court gave a strongly worded curative instruction). No legitimate strategy justified allowing the prosecutor's

prejudicial tactics and comments to fester in juror's minds without court instruction that they should be disregarded. Defense attorneys must be ever vigilant in defending their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. Neidigh, 78 Wn. App. at 79. Such vigilance is necessary to allow the trial court to cure prejudice at the time of trial.

The less than overwhelming case presented by the State rendered Williamson's trial vulnerable to prejudicial misconduct unfairly tipping the jury in favor of the State. Reversal is required where, as here, defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome.

3. THE COURT IMPROPERLY RELIED ON THE POSSIBILITY OF GOOD TIME CREDIT WHEN IMPOSING AN EXCEPTIONAL SENTENCE.

The law is clear. The sentencing court may not take the possibility of earned early release or "good time" into consideration when calculating the length of an exceptional sentence. That is what happened here. The court's reason for the length of the sentence rests on an untenable basis and Williamson's sentence is clearly excessive as a result. The remedy is remand for resentencing.

- a. When The Court Consider The Availability Of Good Time In Setting The Length Of An Exceptional Sentence, The Sentence Rests On An Untenable Basis And Is Clearly Excessive.

"To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4).

The issue on appeal is whether Williamson's sentence was "clearly excessive." The standard of review is abuse of discretion. State v. Oxborrow, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986). A sentence is clearly excessive when the court exercises its discretion based on untenable grounds or for untenable reasons. Oxborrow, 106 Wn.2d at 531. "If sentence length is fixed based on improper consideration of potential early release, then it rests on an untenable basis." State v. Bourgeois, 72 Wn. App. 650, 661 n.7, 866 P.2d 43 (1994).

The court here fixed the length of Williamson's exceptional sentence based on the speculative assumption that he would earn good time while in prison. RP 489, 493. That is an untenable basis for the duration of the sentence.

Washington's penal law allows correctional facilities to reduce the sentences of offenders committed to their care by "earned early release time," otherwise known as "good time." In re Pers. Restraint of Williams, 121 Wn.2d 655, 658, 853 P.2d 444 (1993); In re Pers. Restraint of Talley, 172 Wn.2d 642, 647, 260 P.3d 868 (2011); RCW 9.94A.728(1), 729. A prisoner receives good time credit for good behavior or good performance while incarcerated. Talley, 172 Wn.2d at 647. Williamson, having been convicted of a class A felony sex offense, is eligible to earn good time at a rate of 10 percent of his sentence. RCW 9.94A.729(3)(c).

The court expressly took Williamson's ability to earn good time into account in determining the length of the exceptional sentence. RP 470, 489, 493. The court wanted Williamson to remain incarcerated until his youngest daughter was 18 years old. The court considered the availability of good time in imposing an exceptional 17-year minimum sentence. As explained by the trial court, that length of sentence would keep Williamson confined until his daughter reached the age of majority, based on the assumption that Williamson would earn good time. RP 493. Factoring in the possibility of good time is an untenable basis or reason for imposing his length of sentence.

"The framework of the [Sentencing Reform Act] indicates that earned early release time is to be considered only after the offender has

begun serving his sentence." State v. Fisher, 108 Wn.2d 419, 429 n. 6, 739 P.2d 683 (1987). "There is no guaranty credits will ever be earned, either because the prisoner fails to qualify or because the Legislature alters the rules." State v. Buckner, 74 Wn. App. 889, 899, 876 P.2d 910 (1994), rev'd on other grounds, 125 Wn.2d 915, 890 P.2d 460 (1995). The behavior of an offender while in confinement is an "entirely speculative prediction." Fisher, 108 Wn.2d at 429 n. 6. For these reasons, a sentencing court cannot consider the possibility of early release for good time credit when imposing an exceptional sentence. State v. Wakefield, 130 Wn.2d 464, 477-78, 925 P.2d 183 (1996); Fisher, 108 Wn.2d at 429 n. 6; State v. Gutierrez, 58 Wn. App. 70, 78, 791 P.2d 275 (1990); State v. Crutchfield, 53 Wn. App. 916, 930-31, 771 P.2d 746 (1989).

Specifically, it is error to consider the possibility of good time credit in setting the length of an exceptional sentence. Buckner, 74 Wn. App. at 899 (court erred in considering good time when it imposed exceptional sentence, as shown when court stated it was not "prudent nor will society be safe for you to be released before approximately your 75th year. And for the court, then, to reach that calculation, and realizing I do not have a perfect crystal ball, I note that with your age and with one-third off for good behavior, a sentence of 80 years in the Washington State Correction system will accomplish this end."); State v. Sledge, 133 Wn.2d

828, 844-46, 947 P.2d 1199 (1997) ("with no specific juvenile treatment program requiring a specific duration to complete, a trial judge may not take into consideration the possibility of early release in imposing an exceptional disposition, as the entitlement to such release is entirely too speculative."); State v. Duncan, 90 Wn. App. 808, 815-16, 960 P.2d 941 (1998) (absent facts documenting need to confine juvenile for set duration to attend specific treatment program, the assumption that he might be released before his 21st birthday due to earned good time was too speculative to support the length of the exceptional sentence); State v. S.H., 75 Wn. App. 1, 15-16, 877 P.2d 205 (1994) (error for juvenile court to consider possible early release in determining the length of a manifest injustice disposition), review denied, 125 Wn.2d 1016, 890 P.2d 20 (1995).¹⁴

To assume an offender will earn a discretionary early release invites too much speculation by the sentencing court. Sledge, 133 Wn.2d at 845. An exceptional sentence is therefore "clearly excessive" when the trial court considers the possibility of good time credit in setting the length of an exceptional sentence. Id. at 844-46. In setting the length of the

¹⁴ The reasoning behind the rule that a sentencing judge cannot consider the potential of earned early release time in fashioning exceptional sentences applies to both the sentencing of adults under the Sentencing Reform Act and the sentencing of juveniles under the Juvenile Justice Act. Bourgeois, 72 Wn. App. at 659-61.

exceptional sentence in Williamson's case, the court abused its discretion by considering the effect of good time.

Defense counsel did not object below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The remedy is remand for resentencing. Duncan, 90 Wn. App. at 816.

b. On Remand, A Different Judge Should Resentence Williamson To Ensure The Appearance Of Fairness.

On remand, a different trial judge should resentence Williamson to ensure the appearance of fairness. Due process requires not only that there be an absence of actual bias but that justice must satisfy the appearance of justice and impartiality. State v. Madry, 8 Wn. App. 61, 62, 504 P.2d 1156 (1972); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. "Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised." State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983).

The record here does not reflect a personal bias. But there are unusual circumstances warranting reassignment. Judge Harper could reasonably be expected to have substantial difficulty in overlooking his previously expressed view on the appropriate length of the exceptional

sentence and the reason for it. He explicitly set the length of Williamson's sentence based on a legally impermissible basis in order to make sure Williamson would not be released before his youngest daughter turned 18 years old. That concern would still be present in Judge Harper's mind if he were to do the resentencing. It would be unrealistic to think otherwise.

Judge Harper could not fairly be expected to conduct a resentencing hearing with an open mind, leaving Williamson in the difficult position of asking the judge to reconsider an already-imposed sentence. To comply with the appearance of fairness, a different judge should preside over the resentencing hearing.¹⁵

¹⁵ See State v. Aguilar-Rivera, 83 Wn. App. 199, 203, 920 P.2d 623 (1996) ("the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court has orally announced the sentence it intends to impose, the remedy is to send the defendant before a different judge for a new sentencing hearing."); Sledge, 133 Wn.2d at 846 (vacating trial court's disposition and remanding to trial court where Sledge may choose to withdraw his guilty plea or have new disposition hearing before another judge in light of previous judge's expressed view of disposition); State v. Talley, 83 Wn. App. 750, 763, 923 P.2d 721 (1996) ("On remand, we direct that Talley be sentenced by a different judge because the court's statement at the August 11 hearing that she had already decided to give him an exceptional sentence even though there had been no evidentiary hearing suggests she may have prejudged the matter."), aff'd, 134 Wn.2d 176, 949 P.2d 358 (1998); State v. Cloud, 95 Wn. App. 606, 615-16, 976 P.2d 649 (1999) (trial court's consideration of improper evidence at post-trial hearing required remand before new judge "because it would be extremely difficult, if not impossible, for the trial judge who worked so hard on this case to discount everything that transpired in the first hearing").

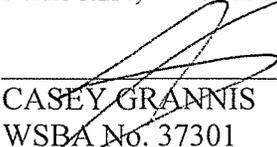
D. CONCLUSION

For the reasons set forth, Williamson requests reversal of the conviction, and if the Court declines to reverse, remand for resentencing before a different judge.

DATED this 14th day of August 2014

Respectfully Submitted,

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

STATE OF WASHINGTON

Respondent,

v.

AARON WILLIAMSON,

Appellant.

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COA NO. 45907-8-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF AUGUST 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AARON WILLIAMSON
DOC NO. 371165
CLALLAM COUNTY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM COUNTY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF AUGUST 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 11, 2014 - 4:34 PM

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