

492512

No. _____

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

In Re the Personal Restraint of
STEVEN L. HESSELGRAVE,
Petitioner.

PERSONAL RESTRAINT PETITION
AND BRIEF IN SUPPORT

CYNTHIA B. JONES
JONES LEGAL GROUP, LLC
1425 Broadway # 544
Seattle, WA 98122
Tel: (206) 972-4943

RITA J. GRIFFITH, WSBA
4616 25th Avenue N.E., # 453
Seattle, WA 98115
Tel: (206) 547-1742

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

Page

A. STATUS OF PETITIONER.....1

B. FACTS RELEVANT TO ALL GROUNDS FOR RELIEF.....2

 1. *Overview and Introduction of the Case Leading up to Trial.....2*

 2. *Facts of the Trial.....4*

C. GROUNDS FOR RELIEF.....7

FIRST GROUND: MR. HESSELGRAVE WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR USED HIGHLY INFLAMMATORY ILLUSTRATIONS AND INJECTED PERSONAL OPINIONS DURING CLOSING ARGUMENT.....7

SECOND GROUND: THE PROSECUTOR’S COMMENT ON MR. HESSELGRAVE’S EXERCISE OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND CONFRONTATION OF WITNESSES DENIED HIM THESE RIGHTS AND A FAIR TRIAL.....20

THIRD GROUND: THE OPINION TESTIMONY THAT THE COMPLAINING WITNESS HAD NOT BEEN COACHED UNCONSTITUTIONALLY COMMENTED ON THE CREDIBILITY OF A WITNESS AND MR. HESSELGRAVE’S GUILT.....26

FOURTH GROUND: THE TRIAL COURT’S COMMENT ON THE EVIDENCE DENIED MR. HESSELGRAVE HIS RIGHT TO A JURY TRIAL UNDER THE WASHINGTON CONSTITUTION.....35

TABLE OF CONTENTS (continued)

Page

**FIFTH GROUND: THE DIRECTIVE TO PAY LFO'S
WAS BASED ON AN UNSUPPORTED FINDING OF
ABILITY TO PAY; HENCE, THE MATTER SHOULD
BE REMANDED FOR THE SENTENCING COURT
TO MAKE AN INDIVIDUALIZED INQUIRY INTO
MR. HESSELGRAVE'S CURRENT AND FUTURE
ABILITY TO PAY BEFORE IMPOSING LFOS
INCLUDING COSTS OF INCARCERATION AND
MEDICAL CARE.....41**

**SIXTH GROUND: THE DOMESTIC VIOLENCE
FINDING SHOULD BE VACATED AND DISMISSED
BECAUSE MR. HESSELGRAVE WAS NOT A
STEPFATHER AT A TIME WHEN THE JURY
COULD HAVE FOUND THE CRIME OCCURRED.....46**

REQUEST FOR RELIEF.....49

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES:	
<u>In re Pers. Restraint of Brockie</u> , 178 Wn.2d 532, 309 P.3d 498 (2013).....	19, 24, 34, 39
<u>In re Pers. Restraint of Coats</u> , 173 Wn.2d 123, 267 P.3d 324 (2011).....	24, 34, 39
<u>In re Pers. Restraint of Elmore</u> , 162 Wash.2d 236, 172 P.3d 335 (2007).....	18, 44
<u>In re Pers. Restraint of Finstad</u> , 177 Wn.2d 501, 301 P.3d 450 (2013).....	18, 24, 34, 39, 44
<u>In re Personal Restraint of Glasmann</u> , 175 Wn.2d 696, 286 P.3d 673 (2012)..	10, 11, 12, 13, 14, 15, 16, 17, 18, 19
<u>In re Pers. Restraint of Lord</u> , 123 Wash.2d 296, 868 P.2d 835 (1994).....	19, 46
<u>In re Pers. Restraint of Morris</u> , 176 Wn.2d 157, 288 P.3d 1140 (2012).....	19, 20, 25, 35, 40, 46
<u>In re Netherton</u> , 177 Wn.2d 798, 306 P.3d 918 (2013).....	19, 46
<u>In re Pers. Restraint of Orange</u> , 152 Wn.2d 795, 804, 100 P.3d 291 (2004).....	20, 26, 35, 41, 46
<u>In re Pers. Restraint of Yates</u> , 177 Wn.2d 1, 296 P.3d 872 (2013).....	24, 34, 39
<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	49
<u>State v. Barklind</u> , 87 Wn.2d 814, 557 P.2d 314 (1976).....	43

TABLE OF AUTHORITIES (continued)

	Page
WASHINGTON CASES (continued)	
<u>State v. Becker</u> , 132 Wn.2d 54, 935 P.2d 1321 (1997).....	38
<u>State v. Bogner</u> , 62 Wn.2d 247, 382 P.2d 254 (1963).....	38
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	31, 32
<u>State v. Blazina</u> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	43, 44, 45, 46
<u>State v. Burke</u> , 163 Wn.2d 204, 181 P.3d 1 (2008).....	22, 23
<u>State v. Caldwell</u> , 94 Wn.2d 614, 618 P.2d 508 (1980).....	34
<u>State v. Carlton</u> , 80 Wn. App. 116, 906 P.2d 999 (1999).....	31
<u>State v. Carver</u> , 122 Wn.App 300, 93 P.3d 947 (2004).....	10
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978).....	23
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	22
<u>State v. Curry</u> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	42, 43
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	10

TABLE OF AUTHORITIES (continued)

	Page
WASHINGTON CASES (continued)	
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	31, 33
<u>State v. Dhaliwal</u> , 150 Wn.2d 559, 79 P.3d 432 (2003).....	10
<u>State v. Duncan</u> , ___ Wn.2d ___, ___ P.3d ___, 2016 WL 1696698 (April 28, 2016).....	42, 43
<u>State v. Easter</u> , 130 Wn.2d 228, 922 P.2d 1285 (1996).....	23
<u>State v. Eisner</u> , 95 Wn.2d 458, 626 P.2d 10 (1981).....	37
<u>State v. Eisenman</u> , 62 Wn.App. 640, 810 P.2d 55, 817 P.2d 867 (1991).....	43
<u>State v. Emery</u> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	24
<u>State v. Espey</u> , 184 Wn. App. 360, 336 P.3d 1178 (2010).....	22
<u>State v. Gauthier</u> , 174 Wn. App. 257, 298 P.2d 126 (2013).....	22
<u>State v. Hesselgrave</u> , No. 44177-2-II.....	1
<u>State v. Jacobsen</u> , 78 Wn.2d 491, 477 P.2d 1 (1970).....	37
<u>State v. Jones</u> , 117 Wn. App. 89, 68 P.3d 1153 (2003).....	31

TABLE OF AUTHORITIES (continued)

	Page
WASHINGTON CASES (continued)	
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993), <u>review denied</u> , 124 Wn.2d 1018 (1994).....	22
<u>State v. Kirkman</u> , 155 Wn.2d 918, 156 P.3d 125 (2007).....	33
<u>State v. Lampshire</u> , 74 Wn.2d 888, 447 P.2d 727 (1968).....	37, 38
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	38
<u>State v. Lewis</u> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	22
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	37, 38
<u>State v. Maule</u> , 35 Wn. App. 287, 667 P.2d 96 (1983).....	32
<u>State v. Moreno</u> , 132 Wn. App. 663, 132 P.3d 1137 (2006).....	22, 23
<u>State v. O’Neal</u> , 126 Wn. App. 395, 109 P.3d 429 (2005), <u>aff’d</u> , 159 Wn.2d 500 (2007).....	31
<u>State v. Painter</u> , 27 Wn. App. 708, 620 P.2d 1001 (1980), <u>review denied</u> , 95 Wn.2d 1008 (1981).....	37
<u>State v. Reed</u> , 25 Wn. App. 46, 604 P.2d 1330 (1979).....	22

TABLE OF AUTHORITIES (continued)

	Page
WASHINGTON CASES (continued)	
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	22
<u>State v. Sanders</u> , 66 Wn. App. 380, 832 P.2d 1326 (1992).....	31
<u>State v. Stewart</u> , 34 Wn. App. 221, 660 P.2d 278 (1983).....	32
<u>State v. Thach</u> , 126 Wn. App. 297, 106 P.3d 782 (2005).....	31
<u>State v. Theroff</u> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	37
<u>State v. Walker</u> , 182 Wn.2d 463, 341 P.3d 976 (2015).....	11, 13, 14, 15, 17
FEDERAL CASES:	
<u>Bearden v. Georgia</u> , 461 U.S. 660, 103 S.Ct. 2064, 2071, 79 L.Ed.2d 221 (1983).....	42
<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 74 L. Ed.2d 1314 (1935).....	29, 30
<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	34
<u>Doyle v. Ohio</u> , 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).....	22
<u>Estelle v. Williams</u> , 425 U.S. 501, 96 S.Ct 1691, 48 L. Ed. 2d 126 (1976).....	10

TABLE OF AUTHORITIES (continued)

Page

FEDERAL CASES (continued)

Fuller v. Oregon,
417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).....42, 43

Griffin v. California,
380 U.S. 609, 614, 85 S.Ct. 1229, 14 L. Ed. 2d 106 (1965).....22

United States v. Alcantara-Castillo,
788 F.3d 1186 (9th Cir. 2015).....30

United States v. Harrison,
585 F.3d 1155 (9th Cir. 2009).....30

United States v. Sanchez,
176 F.3d 1214 (9th Cir. 1999).....30

United States v. Young,
470 U.S. 1, 105 S.Ct. 1038, 84 L. Ed. 2d 1 (1985).....30

STATUTORY AUTHORITY

RCW 9.94A.760(2).....42

RCW 10.01.160(3).....42, 43, 44

RCW 26.16.205.....47

RCW 74.20A.920.....47

UNITED STATES CONSTITUTION:

Fourteenth Amendment.....10, 42

Sixth Amendment.....10, 42

TABLE OF AUTHORITIES (continued)

	Page
WASHINGTON STATE CONSTITUTION:	
Const. article 1, section 22.....	10, 21
Const. article IV, section 16.....	36, 37
COURT RULES:	
ER 608(a).....	31
GR 34.....	44
RAP 16.4(c) (2).....	18, 24, 34, 39, 44
OTHER AUTHORITY:	
ABA Standards for Criminal Justice, 3-5.8(b) (2 nd ed 1980).....	30
William J. Bowers, Benjamin D. Steiner & Marla Sandys, <u>Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition</u> , 3 U. Pa. J. Const. L. 171, 261 (2001).....	13
Lucille A. Jewel, <u>Through a Glass Darkly: Using Brain and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy</u> , 19 S. Cal. Interdisc. L.J. 237, 289 (2010).....	9, 12

Steven L. Hesselgrave, through his counsel Cynthia B. Jones and Rita J. Griffith, petitions for relief from personal restraint on the grounds described below.

A. STATUS OF PETITIONER

1. Petitioner Steven Hesselgrave is incarcerated at the Washington State Reformatory in Monroe, Washington.
2. Mr. Hesselgrave challenges his conviction of first degree rape of a child, SL, by jury verdict on September 21, 2012 , in Pierce County Superior Court Cause No. 11-1-02300-3. RP 991-95; CP 220.¹ Mr. Hesselgrave also challenges the special verdict finding that he and SL were “members of the same family or household.” RP 991-95; CP 221.

The Honorable Ronald E. Culpepper imposed Judgment and Sentence of 110 months to life imprisonment on November 9, 2012. CP 242-244.

3. Mr. Hesselgrave timely appealed his conviction to the Court of Appeals, Division II, No. 44177-2-I. This Court affirmed his conviction and sentence on October 29, 2014, in an unpublished opinion. His timely

¹ Mr. Hesselgrave is moving with this petition, for the court to transfer the record from his direct appeal for consideration with the petition. He will refer to the Clerk’s Papers as indexed on the direct appeal and refer to the verbatim report of proceedings as follows: The consecutively-numbered seven volumes of trial transcript are cited as RP; the four volumes of pretrial transcripts are cited by the date of the first hearing in the volume, e.g. RP (7-15-11); and the sentencing transcript is designated RP (sent).

Petition for Review was denied by the Washington Supreme Court on June 2, 2015. The Court of Appeals, Division II filed the Mandate for Mr. Hesselgrave's case on June 24, 2015. Appendix at 1.

4. No petitions, appeals or applications have been filed other than those listed above.

B. FACTS RELEVANT TO ALL GROUNDS FOR RELIEF²

1. Overview and Introduction of the Case Leading up to Trial

This case arose during a custody dispute between the defendant, Steven L. Hesselgrave, and his ex-wife, Leona Ling. RP 393. The two married on May 8, 2004. RP 373. At the time, Ms. Ling's daughter from a previous relationship, SL, was 18 months old and lived with the couple. RP 923. During the marriage, the couple had two children of their own, Jacob and Jack Hesselgrave. RP 371-372. In 2008, the marriage disintegrated when Ms. Ling began an affair with Christopher Ling while Mr. Hesselgrave served a tour of duty in Iraq with the armed forces. RP 371, 374, 388-389, 392. The couple divorced on March 5, 2010. RP 394.

After the divorce, Mr. Hesselgrave was granted full custody of Jacob and Jack, while Ms. Ling retained custody of SL. RP 378, 391, 393, 396-397. At one point, however, Ms. Ling asked Mr. Hesselgrave to let

² Facts specific to a specific grounds for relief will be included within the discussion and argument on that grounds.

SL live with him and the Hesselgrave boys for a while because Ms. Ling was unable to care for her properly. RP 389, 390, 923, 926. As part of the divorce agreement, Ms. Ling was not allowed to leave the state of Washington with the Hesselgrave boys without the permission of Mr. Hesselgrave. RP 392. And Ms. Ling was restricted from going to school and picking up Jacob. RP 428.

By October 2010, Ms. Ling resided in the Best Knights Inn hotel in Lakewood, Washington with SL. RP 377. One night Ms. Ling left SL in the care of a friend who also lived at the hotel. RP 382, 616. While in the friend's care, Kevin Palfrey, a registered sex-offender, molested and raped the eight-and-a half-year-old SL at the hotel while watching pornography on the hotel television. RP 322-323, 616, 624, 628, 629. Palfrey was arrested on October 10, 2010. RP (8/7/12) 94-96. Young SL received counseling to help her cope with the rape and untimely exposure to pornography. RP 616. The counseling for rape was terminated in mid-March, 2011. RP 625. During the counseling, SL never mentioned being abused by anyone other than Palfrey.

In May 2011, Ms. Ling desired to move SL and the two Hesselgrave boys to New York to be nearer Chris Ling, her boyfriend and husband by the time of trial, who lived in New York during the custody

dispute. RP 371, 392-393, 421, 444-445. Mr. Hesselgrave, who had full custody of the boys, refused to grant permission. Id., RP 886-887.

After Mr. Hesselgrave refused permission to take the boys to New York, Ms. Ling unenrolled SL from Larchmont Elementary School on May 27, 2011 and left for New York with SL. RP 761-762, 838, 886-887. SL's elementary teacher, Lucy McAlister, wrote on SL's report card, "Good luck in New York. We will miss [SL] a lot." RP 844.

A few weeks later, Ms. Ling returned to Lakewood, Washington and SL was re-enrolled in school. RP 839. RP 842. On the bus ride home from school after she re-enrolled, SL told two girls that her father had said his penis tasted like mint. RP 497, 842. The two girls reported SL's statement to their babysitter, who reported the statement to the school, and the school notified CPS and the police. RP 500-501, 525-526.

In the forensic interview that followed, SL asked the interviewer Cornelia Anderson Thomas, "If I'm telling the truth and the police go and arrest Steven, will I get my brothers back?" RP 689. SL later told Ms. Thomas that her mom said she better tell the truth because if she didn't "Leona and Chris will go to jail." Id.

2. *Facts of the Trial*

The trial boiled down to SL's word against Mr. Hesselgrave's.

She had been interviewed a number of times by the time of trial and gave a number of inconsistent statements, including about the time and circumstances of the incident.³ See, e.g. RP 324-327; 334-335; 340; 345-346; 349-350. Interestingly, when cross-examined, SL said she did not recall ever being interviewed by Mr. Hesselgrave's attorney yet she recalled in vivid detail her earlier conversations with the prosecution team, including Cornelia Thomas, the state's forensic interviewer. RP 312-321, 325, 678, 822-825.

Mr. Hesselgrave testified in his defense and he denied all the allegations of sexual abuse of SL. RP 892-894. During cross examination, Mr. Hesselgrave was questioned about his personal sexual habits. RP 905-907. Defense counsel objected under ER 404(b). But the trial court overruled the objection. RP 904-905. Mr. Hesselgrave answered candidly that he viewed pornography, that he never concealed this fact from detectives and that because of the small one-room apartment where he lived with his father, Jack Hesselgrave, and his two boys that when they were asleep at night, he viewed pornography and at times masturbated while watching pornography. RP 905-906. He also testified that this occurred at times when SL was sleeping over at the apartment. Id. When

³ The trial judge, in fact, noted at sentencing, "It's not crystal clear to me what happened in this case. However, the jury found Mr. Hesselgrave guilty as charged. . . ." RP (sent) 6-7.

questioned further, he said that yes, it was possible SL may have seen him if she awoke during the night but he said he did not think she ever saw him. Id.

When Ms. Ling testified, she said SL never told her that Mr. Hesselgrave sexually abused her, but she did tell her Palfrey raped her. RP 382-383. Ms. Ling also attempted to portray herself as having joint custody of the boys until it was revealed on cross-examination that she did not. RP 437-439. By the time of trial, in fact, Ms. Ling did not have custody of SL or of either of the Hesselgrave boys. RP 306-307. All the children, at the time of trial and during Mr. Hesselgrave's pre-trial confinement, were in the care of foster parents. Id. In his closing argument, the prosecuting attorney admitted to the jury, "Everyone in this room would wish that [SL's] mother was not the woman that she is. In fact, when her mother could not provide, it was the defendant that took over." RP 923; Appendix at 12.

During the testimony of the forensic interviewer, Cornelia Thomas, however, the prosecuting attorney elicited testimony from Ms. Thomas vouching for the credibility of SL, and then used this testimony during his closing argument. RP 677-678, 943-945.

Then the prosecuting attorney told the jury his personal opinion during closing argument that Mr. Hesselgrave was guilty and that SL was

telling the truth, and showed a PowerPoint slide to the jury that it was “IMPOSSIBLE” to reach any other verdict. RP 978, Appendix 8-9. Right before the jury was sent to deliberate, the prosecuting attorney presented another slide showing the jury the word **GUILTY** in all caps and large 20 point font. Appendix 13.⁴ The jury returned the verdict in favor of the state. RP 991.

C. GROUNDS FOR RELIEF

FIRST GROUND: MR. HESSELGRAVE WAS DEPRIVED OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL WHEN THE PROSECUTOR USED HIGHLY INFLAMMATORY ILLUSTRATIONS AND INJECTED PERSONAL OPINIONS DURING CLOSING ARGUMENT

Facts Relevant to the PowerPoint Presentation

During closing argument, the prosecutor presented a PowerPoint slide show to the jury. Those slides are attached and speak for themselves. *See* Appendix 3-13. The slides show the elements of the crime accompanied by a statement in bold face: “...**the defendant had sexual intercourse with S.L.**” Appendix at 4. One slide depicted paraphrased statements during SL’s testimony and the prosecutor used different sized fonts and all caps on some words but not others to visually conjure up a

⁴ The prosecuting attorney’s PowerPoint presentation to the jury is located in the trial court record as Exhibit 24.

sinister picture for the jury:; “Didn’t see the defendant come to wake her up...only HEARD HIS FOOTSTEPS.” Appendix at 4. Another slide paraphrased the prosecuting attorney’s perception of SL on the stand:

- S.L.
- Manner while testifying
- Scared
- Hid from the defendant; didn’t want to look over at him to say if his suit had stripes
- How should she behave.

Appendix at 8.

Four slides contained the words (three slides in all caps) SEXUAL INTERCOURSE with smaller font describing sexual organs and penetration and on one slide the words SEXUAL INTERCOURSE with the text MOUTH underlined in all caps depicting “any act of sexual contact between persons involving the sex organs of one person and the MOUTH or anus of another. This is: mouth on penis OR mouth on vagina (penetration irrelevant).” Appendix at 5. During the presentation of this slide, the prosecutor said:

I highlighted the word “mouth” because that’s the key to the third one. So mouth on penis or mouth on vagina, then that’s it. If you believe as a jury that any one of those things have happened then your verdict is guilty. You don’t have to agree that they all happened.

Defense counsel: Objection; misstates the state’s burden.

Court: Sustained. I think I agree with that.

RP 927-928.

In addition, six more slides used the words in all caps “IMPOSSIBLE to plan the chain” and then - near the end of the presentation - before the jury was to deliberate on the case, the prosecutor showed the jury a slide that said in large 20 point font, bold face and all caps: “**GUILTY**.” Appendix at 13. The next day, Mr. Hesselgrave’s counsel objected to the prosecuting attorney’s PowerPoint slides:

I would like the slide presentation filed and receive a copy of it. I think it was objectionable. It was burden shifting, misstated the standard, and there was a moment on the [sic] video where it said the witness was telling the truth. I think those are three objectionable bases. . . . [W]hen my client is here, I’ll move for a mistrial.

RP 985. The trial court ordered the prosecuting attorney to file a copy of the PowerPoint presentation. *Id.* The next day, Mr. Hesselgrave’s counsel again objected to the PowerPoint slides:

I think the State’s closing argument was improper. I think the slide show they used was burden shifting, used the wrong standard, and one of the slides said that [SL] was telling the truth, and that, I think, is very problematic. It vouches for a witness. And even though the State didn’t say it out loud, it was very clear on the screen.

RP 988. Defense counsel moved for a mistrial; the Court denied the motion but directed the prosecuting attorney to make a copy of the PowerPoint presentation and file it with the court. RP 989.

Legal Authority

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the Washington State Constitution. In re Personal Restraint of Glasmann, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012) (citing Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct 1691, 48 L. Ed. 2d 126 (1976)). Prosecutorial misconduct may deprive defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). “A ‘[f]air trial’ certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office...and the expression of his own belief of guilt into the scales against the accused.” In re Pers. Restraint of Glasmann, 175 Wn.2d at 704 (internal citations omitted).

A defendant establishes prosecutorial misconduct by proving that the prosecutor’s conduct was improper and that it prejudiced his right to a fair trial. State v. Carver, 122 Wn.App 300, 306, 93 P.3d 947 (2004) (citing State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)). A defendant establishes prejudice if there is a substantial likelihood that the misconduct affected the jury’s verdict. Carver, 122 Wn.App at 306 (quoting Dhaliwal, 150 Wn.2d at 578.) Courts review a prosecutor’s

comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Id.

In the context of prosecutors presenting PowerPoint slides to the jury during closing argument, two seminal cases from the Washington Supreme Court control the issue: In re Personal Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) and State v. Walker, 182 Wn.2d 463, 341 P.3d 976 (2015).

In both Glasman and Walker, the Court held the prosecutor engaged in misconduct by expressing his personal opinion of the defendant's guilt through the PowerPoint presentation during closing argument. In those cases, the Court set forth the following analytical framework: 1) The defendant must show the prosecuting attorney's conduct was improper and prejudicial in the context of the entire trial, and 2) If the defense fails to object below, the defense has the burden of showing the conduct was flagrant, ill-intentioned and that the conduct was so pervasive that it could not have been cured by a jury instruction.

In In re Glasmann, the Court found several slides objectionable and especially took issue with slides where the words "GUILTY GUILTY GUILTY" were on the face of the defendant's booking photograph. 175 Wn.2d at 706. The Court found the prosecutor "deliberately altered

[evidence] in order to influence the jury’s deliberations.” Id. The Court rejected the state’s argument that “it merely combined the booking photograph . . . with the court’s instructions and argument of the law and facts[.]” Id. Instead, the Court held the slide was the equivalent of unadmitted evidence. Id. In reversing Glasmann’s conviction, the Court reasoned that because existing case law and professional standards “were available for the prosecutor and clearly warned against the conduct here, we hold that the prosecutor’s misconduct, which permeated the state’s closing argument, was flagrant and ill intentioned.” Id. at 707.

And, most importantly, the Glasmann Court emphasized the danger of visual arguments that “manipulate audiences by harnessing rapid unconscious or emotional reasoning processes by exploiting the fact that we do not generally question the rapid conclusions we reach based on visually presented information.” Id. at 709 (quoting Lucille A. Jewel).⁵

With visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system – that reasoned deliberation is necessary for a fair justice system.

⁵ Lucille A. Jewel, Through a Glass Darkly: Using Brain and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy, 19 S. Cal. Interdisc, L.J. 237, 289 (2010).

Id. at 708 (citing William J. Bowers, et al)⁶

Likewise, in State v. Walker, the prosecutor utilized a PowerPoint presentation to the jury during closing argument. 182 Wn.2d 463, 471-472, 341 P.3d 976 (2015). Though, unlike here, the slides numbered over 200, the slides did use inflammatory language and bold face, all caps like the case at bar with headings such as, **DEFENDANT WALKER GUILTY OF PREMEDITATED MURDER** and **DEFENDANT WALKER GUILTY OF ASSAULT IN THE FIRST DEGREE.** Id. And like Glasmann, the prosecuting attorney in Walker altered admitted evidence and presented it to the jury in the form of photographs with superimposing words that read **DEFENDANT WALKER GUILTY BEYOND A REASONABLE DOUBT.**

The Court, relying on In re Glasmann, reversed all of Walker's convictions and lamented, "[I]t is regrettable that some prosecutors continue to defend these practices and the validity of convictions obtained by using them. We reject the State's arguments that Glasmann was materially distinguishable and should be disavowed in part and hold that,

⁶ William J. Bowers, Benjamin D. Steiner & Marla Sandys, Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition, 3 U. Pa. J. Const. L. 171, 261 (2001).

as in Glasmann the State's PowerPoint presentation requires reversal of Walker's convictions." Id. at 475.

The Walker Court went on to say "The prosecutor's duty is to seek justice, not merely convictions." Id. at 476. The court added that the number of slides "depicting statements of the prosecutor's belief as to the defendant's guilt, shown to the jury just before it was excused for deliberations, is presumptively prejudicial and may in fact be difficult to overcome, even with an instruction." Id. at 479.

Argument and Application of Legal Authority to Facts

Here, as in Glasmann and Walker, the prosecutor deliberately altered admitted evidence of SL's testimony – evidence the jury was to weigh - with slides depicting *paraphrased* statements of SL with a visual change of font on certain words and some words in all capital letters to emphasize to the jury a slanted version of the testimony of SL: "Didn't see the defendant come to wake her up...only HEARD HIS FOOTSTEPS." Appendix at 4. As in Glasmann and Walker, this is the equivalent of presenting the jury with unadmitted evidence and is grounds for reversal.

In yet another slide, the prosecutor outright created a visual perception in the jury's minds by speculating what SL was thinking while on the stand thereby invading the juror's domain.

S.L.

- Manner while testifying
- Scared
- Hid from the defendant; didn't want to look over at him to say if his suit had stripes
- How should she behave.

Appendix at 8.

In the same way the Glasmann Court took issue with the fact that the prosecutor "deliberately altered [evidence] in order to influence the jury's deliberations," this court should correct the misconduct of the prosecutor in this case. It was improper for the prosecutor to put into the jurors' minds the prosecutor's speculation of what SL thought while on the stand and this invasion into the territory of the jury's sworn duties is grounds for reversal.

Additionally, as in Walker and Glasmann, the prosecutor improperly and clearly expressed a personal opinion on the guilt of Mr. Hesselgrave by presenting slides to the jury with blown up words in large font and bold face **GUILTY**. What's more, the prosecutor showed the jury visual elements of the crime with the prosecutor's proclamation, in bold face to the jurors before they deliberated that: "...**the defendant had sexual intercourse with S.L.**" Appendix at 4. Also, the PowerPoint slides were accompanied by the prosecutor's verbally directing the jury to "Find him guilty" which only enhanced the prejudice of the slides. RP

979. This is another improper expression of opinion on the guilt of Mr. Hesselgrave and is grounds for reversal.

The prosecutor's misconduct was improper and prejudicial in the context of the entire trial, and as proclaimed by the Court In re Glasmann, it is well established that a prosecutor cannot use his or her position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case. 175 Wn.2d at 706.

This court should follow the reasoning of Glasmann, where they reversed Glasmann's conviction after considering, among other things, that:

[w]ith visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system – that reasoned deliberation is necessary for a fair justice system.

Id. at 708 (See footnote 5, infra).

Here, like in Glasmann, four slides the prosecutor presented to the jury contained the words (three slides in all caps) SEXUAL INTERCOURSE with smaller font describing sexual organs and penetration and on one slide the words in all caps SEXUAL INTERCOURSE with the text MOUTH underlined in all caps depicting

“any act of sexual contact between persons involving the sex organs of one person and the MOUTH or anus of another. This is: mouth on penis OR mouth on vagina (penetration irrelevant).” Appendix at 5.

This visual emphasis on SEXUAL INTERCOURSE with the word “MOUTH” presented visual information to the jury that interfered and interrupted their reasoned deliberation, the “bedrock principle of our legal system.” Id.

Further, in this case, even though the defense timely objected, and the defense does not have to show the conduct was flagrant, ill-intentioned or so pervasive that it could not have been cured by a jury instruction, the conduct by the prosecutor easily meets the burden because here, as in In re Glasmann, the prosecuting attorney was clearly warned by existing case law and professional standards that this kind of presentation was well over the line of accepted conduct and prohibited. As stated in Glasmann, “[h]ighly prejudicial images may sway a jury in ways that words cannot...such imagery, then, may be very difficult to overcome with an instruction...the prosecutor essentially produced a media event with the deliberate goal of influencing the jury to return guilty verdicts[.]” Id. at 707-708.

Also, as in both State v. Walker and Glassman, here in Mr. Hesselgrave’s case, “during the critical moments of trial, one of the last

things the jury saw before it began its deliberations was the representative of the State of Washington impermissibly flashing the word ‘GUILTY’” predisposing the jury to return a harsh verdict. See In re Glasmann, 175 Wn.2d at 710.

In sum, in this case, read in context and considering the visual display accompanying the prosecutor’s words, the argument was both inflammatory and unfair. Not only are the PowerPoint slides unfair, the prosecutor repeatedly expressed his personal opinion about the credibility of witnesses – a decision that must be left in the exclusive hands and minds of the jurors. Mr. Hesselgrave’s conviction must be reversed.

PRP Standards Satisfied

These issues are constitutional and properly raised in this petition. RAP 16.4(c) (2) (conviction obtained in violation of U.S. and Washington State Constitutions is proper grounds for personal restraint petition). Mr. Hesselgrave can show he was actually and substantially prejudiced by constitutional error and that his trial suffered from a fundamental defect that inherently resulted in a complete miscarriage of justice. See In re Pers Restraint of Finstad, 177 Wn.2d 501, 506, 301 P.3d 450 (2013); In re Pers Restraint of Elmore, 162 Wash.2d 236, 251, 172 P.3d 335 (2007). This is because the prosecutor’s PowerPoint presentation to the jury, more likely than not, resulted in actual and substantial prejudice to Mr. Hesselgrave.

The constitutional standard here is satisfied considering the totality of circumstances in the case. In re Pers. Restraint of Brockie, 178 Wn.2d 532, 539, 309 P.3d 498 (2013).

Argument as to Ineffective Assistance of Counsel on Direct Appeal

If this Court should hold that Mr. Hesselgrave failed to meet the collateral attack standard, then he was denied the effective assistance of counsel because his appellate counsel failed to raise the PowerPoint issue on appeal, failed to cite to controlling authority and failed to file a reply brief in response to the State's answering brief losing several opportunities to cite to the controlling authority on this constitutional issue.

To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must establish that 1) counsel's performance was deficient and 2) the deficient performance actually prejudiced the defendant. In re Netherton, 177 Wn.2d 798, 801, 306 P.3d 918 (2013) (citing In re Pers. Restraint of Lord, 123 Wash.2d 296, 314, 868 P.2d 835 (1994); In re Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012)).

Specifically, Mr. Hesselgrave's counsel failed to cite to or even mention the controlling authority of In re Glasmann a case decided nearly a year before Mr. Hesselgrave's opening brief was filed. Also, Mr. Hesselgrave's appellate counsel failed to file a reply brief, and by doing so Mr. Hesselgrave was denied a vital opportunity not only to rebut the

state's arguments on direct appeal, but to cite to controlling authority that would have changed the outcome of his appeal if the PowerPoint issue had been raised.

Failure of Mr. Hesselgrave's appellate counsel to raise the PowerPoint issue, failure to file a reply brief and failure to cite and bring to the attention of the court the controlling authority was deficient performance and that deficient performance actually prejudiced Mr. Hesselgrave. See In re Pers. Restraint of Morris, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012); In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 814, 100 P.3d 291 (2004).

SECOND GROUND: THE PROSECUTOR'S COMMENT ON MR. HESSELGRAVE'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS TO COUNSEL AND CONFRONTATION OF WITNESSES DENIED HIM THESE RIGHTS AND A FAIR TRIAL

Facts Relating to Comments by Prosecutor

In closing argument the prosecutor asked the jurors to consider SL's demeanor in court in light of the fact that there were "two lawyers asking a ten-year-old every question that they can think of." RP 931. Defense counsel's objection that this violated a motion in limine excluding

argument about the attorneys doing their job was overruled.⁷ RP 931-932. When the prosecutor continued by arguing that two attorneys questioned SL for “hours on end,” defense counsel’s objection was sustained. RP 932. The prosecutor then argued that SL was in court for one to two hours. RP 932.

The prosecutor next described SL as nervous and scared when she testified, “with her little cush ball,” reference to which had been excluded.⁸ RP 936. The prosecutor described SL as hiding behind the counter when he asked her to describe what Mr. Hesselgrave was wearing in court that day. He detailed how he asked her if she wanted to look at Mr. Hesselgrave and she said “no.”

In these arguments that prosecutor violated the court’s rulings and improperly commented on Mr. Hesselgrave’s exercise of his constitutional rights under the Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution to the assistance of counsel and confrontation of witnesses.

⁷ The court granted a defense motion in limine to exclude testimony that Mr. Hesselgrave requested an attorney; in other words, exercised his right to counsel. RP 284.

⁸ Prior to her testifying the prosecutor told the court that SL wanted to bring a small cush ball with her to hold while testifying. RP 301. Defense counsel questioned whether it was necessary. RP 301-304. The court allowed her to bring the toy but ruled that no one should call attention to it or mention it. RP 304. The court indicated that it would not be prejudicial as long as no one mentioned or said anything about it. RP 304.

Legal Authority

The state may not introduce evidence at trial that the defendant exercised a constitutional right. Doyle v. Ohio, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). Nor may the state ask the jury to draw adverse inferences from a defendant's exercise of a constitutional right. State v. Moreno, 132 Wn. App. 663, 672-673, 132 P.3d 1137 (2000) (right to self-representation); State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984) (right to own guns); State v. Lewis, 130 Wn.2d 700, 705-706, 927 P.2d 235 (1996) (right to remain silent); State v. Reed, 25 Wn. App. 46, 48, 604 P.2d 1330 (1979) (same); State v. Espey, 184 Wn. App. 360, 266, 336 P.3d 1178 (2010) (right to counsel); State v. Jones, 71 Wn. App. 798, 811-812, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994) (right to confront witnesses); State v. Gauthier, 174 Wn. App. 257, 298 P.2d 126 (2013) (right to refuse consent to a warrantless search). To hold otherwise would penalize the defendant for lawfully exercising a constitutional right. Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

A comment is impermissible where "manifestly intended" to be a comment on a constitutional right. State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). The error can be raised for the first time on appeal

and is subject to a constitutional harmless error test on appeal. Moreno, 132 Wn. App. 672. “A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” Burke, 163 Wn.2d at 222, 242 (citing State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996)).

Argument and Application of Authority to Facts

Here, defense counsel objected to the prosecutor’s comment on his questioning of SL; since the objection was overruled, the trial court did not take advantage of the opportunity to correct the error. And while counsel did not object to the comment on Mr. Hesselgrave’s right to confrontation, the comment was obviously meant to tell the jurors they should find SL credible and Mr. Hesselgrave guilty because he exercised his right to confront SL, the primary witness against him. Comment on the exercise of a constitutional right constitutes flagrant and ill-intentioned misconduct which can be raised even in the absence of an objection. State v. Charlton, 90 Wn.2d 657, 663-664, 585 P.2d 142 (1978) (where prosecutor must have been aware of the marital privilege, comment on the privilege was necessarily “mindful, flagrant and ill-intentioned”). And once the prosecutor painted the picture of 10-year-old SL in court afraid to

look at Mr. Hesselgrave, nothing could have erased the prejudice. State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (the court 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”).

PRP Standard Satisfied

The issues are constitutional and properly raised in this petition. RAP 16.4(c) (2). And the prosecutor’s commenting on Mr. Hesselgrave’s exercise of his rights to counsel and confrontation, more likely than not, resulted in actual and substantial prejudice to Mr. Hesselgrave. In re Pers. Restraint of Finstad, 177 Wn.2d 501, 506, 301 P.3d 450 (2013); In re Pers. Restraint of Coats, 173 Wn.2d 123, 132-33, 267 P.3d 324 (2011); In re Pers. Restraint of Yates, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). This standard is met considering the totality of circumstances in the case. In re Pers. Restraint of Brockie, 178 Wn.2d 532, 539, 309 P.3d 498 (2013).

The prosecutor’s argument was meant to, and did, portray SL as a young child, holding her little cushion ball for comfort, being grilled for hours by experienced counsel, and unfairly having to face her abuser in court.⁹ Given that her credibility was central at trial and that the in-court

⁹ The unwillingness to look squarely at the defendant does not necessarily mean that the witness is afraid of the defendant. It may mean that the witness is not being truthful and is uncomfortable looking at the defendant for that reason.

testimony was the only opportunity for the jury to judge her demeanor first hand, the prosecutor's evoking sympathy for her by asking the jury to convict based on Mr. Hesselgrave's exercise of his constitutional rights surely resulted in substantial and actual prejudice to him. His conviction should be reversed and his case remanded for retrial without such comments. The prosecutor ran roughshod over the court's rulings and clear case authority, and Mr. Hesselgrave should not have been convicted because of such conduct.

Argument as to Ineffective Assistance of Counsel on Direct Appeal

Because the prosecutor intended his argument to comment on Mr. Hesselgrave's exercise of his right to counsel and to confrontation, because SL's credibility was the primary issue at trial and because the trial judge who saw all of the testimony expressed concern about what actually happened (RP (sent) 6-7), the state would not have been able to prove harmlessness beyond a reasonable doubt if the issue had been raised on appeal. These circumstances should also establish that Mr. Hesselgrave was actually and substantially prejudiced by the prosecutor's comments. But if this Court should hold that he failed to meet the collateral attack standard, then he was denied the effective assistance of counsel for not raising the issue on appeal. See In re Pers. Restraint of Morris, 176 Wn.2d

157, 166, 288 P.3d 1140 (2012); In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 814, 100 P.3d 291 (2004).

**THIRD GROUND: THE OPINION TESTIMONY THAT THE
COMPLAINING WITNESS HAD NOT BEEN
COACHED UNCONSTITUTIONALLY
COMMENTED ON THE CREDIBILITY OF A
WITNESS AND MR. HESSELGRAVE’S
GUILT**

Facts Relevant to Coaching

The court granted Mr. Hesselgrave’s motion in limine to exclude witnesses from testifying that they believed the victim. RP 280-281. The prosecutor agreed, at that time, that the state had no “objection to not allowing witnesses to take the stand and comment on the credibility of one witness or another. . . .” RP 280. Nevertheless, over defense objection, the court allowed the prosecutor to introduce such testimony during trial.

The prosecutor asked a series of questions to elicit from state’s witness Cornelia Thomas that she was an accredited forensic interviewer and that she was “trained to be alert for coaching.” RP 673. Thomas described a coached child as making “kind of robotic statements.” RP 674. She described evidence that the witness had not been coached, as “spontaneity” or “comments or statements within their interview where a child is disclosing, they’re giving information, and then they’ll add something about that disclosure.” RP 674. Thomas provided “[a]n

example of that is if a child said – maybe made a disclosure of oral sex and then the child said, ‘Oooh, and then I had to drink it.’” – which happened to be a disclosure made by SL during the interview that was shown to the jury during Thomas’s testimony. RP 674, 680. And then, after playing a DVD of the interview, the prosecutor expressly asked Thomas whether she personally saw any evidence of coaching:

Q. So now that you reviewed the tape with us in court and you were present during the interview, did you see any evidence or indicators of coaching?

A. No.

RP 673-675. Defense counsel’s objection “it calls for credibility” was overruled by the trial court, “Well, overruled. You can inquire on cross, of course.”¹⁰ RP 681.

Because the objection was overruled, during closing argument the prosecutor was able to argue that “Cornelia Thomas, she has done 1,500 plus child sex interviews, 1,500, and she said she saw no evidence of coaching.” RP 943. Ms. Thomas’s testimony that she saw no evidence of coaching was also featured on one of the many PowerPoint slides during closing argument. Appendix at 8-10.

¹⁰ A short time before this objection, defense counsel had objected to another of the prosecutor’s more fully, “Objection. It calls for an opinion about the credibility of the witness.” RP 676. The “it calls for credibility” echoed that fuller statement of the objection.

Ms. Thomas's expert opinion, in effect, that SL was credible could not have been more unfairly prejudicial to Mr. Hesselgrave. The case hinged entirely on the jury's determination of SL's credibility; that was the central issue at trial. The defense theory of the case was that SL's interviews showed the evolution, inconsistencies and improbabilities of the descriptions in her accusations and that her one truly spontaneous statement in the original forensic interview was her asking whether she would get to live with her stepbrothers if Mr. Hesselgrave were arrested. RP 952-953. This question linked to another important component of the defense theory -- that SL's mother had a motive to lie -- to have Mr. Hesselgrave arrested, to gain custody of their sons and to reduce her child support payments -- which she conveyed to SL. RP 960.

Thomas's testimony that SL was not coached was particularly prejudicial because the defense witness, Dr. Mark Reinitz, who was an expert in memory and perception and who actually relied on methods accepted in the scientific community in reaching his opinions, was not allowed to testify specifically about SL's memory. RP (8-22-12) 26, 107. It was his pretrial testimony that in his professional opinion SL did not have an accurate memory: SL was a young child and children have less detailed memories, which fade more rapidly than adult memories, and because her mental functioning would have declined in a time of high

stress. RP (8-22-12) 9, 23-24. SL would not be expected to remember details after almost three years and her explanations in the interview changed when she realized they were not plausible; she had been exposed to pornography and information that she may have incorporated into her memory. RP (8-22-12) 21-27. The jury heard only Thomas's testimony on SL's credibility.

The trial court erred in overruling the defense objection to Thomas's opinion testimony: the testimony was an improper vouching for and comment on SL's credibility. This violated Mr. Hesselgrave's state and federal constitutional rights to a jury trial and due process of law. Further, the testimony was not shown to be based on any scientifically reliable theory; Thomas's testimony was simply her personal opinion.¹¹

Legal Authority

In Berger v. United States, 295 U.S. 78, 86, 55 S. Ct. 629, 79 L. Ed.2d 1314 (1935), the United States Supreme Court held that prosecutors must "refrain from improper methods calculated to produce a wrongful conviction," noting that "while he may strike hard blows, he is not at

¹¹ While ER 704 provides that an expert opinion, otherwise admissible, is not necessarily excludable "because it embraces an ultimate issue to be decided by the trier of fact," as set out below, Thomas's opinion here was not an "expert opinion" because it was not based on any reliable scientific theory.

liberty to strike foul ones.” In holding that the prosecutor’s expressing his personal opinion of the defendant’s guilt was an example of such a “foul blow” contemplated in Berger, the Supreme Court in United States v. Young, 470 U.S. 1, 105 S. Ct. 1038, 1042, 84 L. Ed. 2d 1 (1985), cited the ABA Standards for Criminal Justice 3-5.8(b) (2nd ed 1980):

It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant.¹²

It is now black-letter law that the prosecutor must not ask a state’s witness or the defendant on cross-examination to comment on the credibility of another witness. United States v. Alcantara-Castillo, 788 F.3d 1186, 1197 (9th Cir. 2015); United States v. Harrison, 585 F.3d 1155, 1158 (9th Cir. 2009). Such testimony invades the province of the jury and denies the accused due process of law. Id. (citing United States v. Sanchez, 176 F.3d 1214, 1219 (9th Cir. 1999)). It is for the jury alone to determine the credibility of a witness’s testimony. United States v. Weatherspoon, 410 F.3d 1142, 1147 (9th Cir. 2005).

Washington authority is the same: a witness may not express an opinion on another witness’s credibility nor be asked to render an opinion

¹² In Young, the prosecutor’s misconduct was held to not be plain error because the prosecutor was countering the defense counsel’s repeated attacks on the prosecutor’s integrity. Young, 105 S. Ct. 1147.

as to the guilt or innocence of the accused. ER 608(a); State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Demery, 144 Wn.2d 755, 759, 30 P.3d 1278 (2001); State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003), State v. O’Neal, 126 Wn. App. 395, 409, 109 P.3d 429 (2005), aff’d, 159 Wn.2d 500 (2007). Such testimony invades the province of the jury and denies the accused his or her right to a jury trial. State v. Thach, 126 Wn. App. at 312; Demery, 144 Wn.2d at 617. Witnesses cannot be asked to address, directly or indirectly, whether another witness is telling the truth. State v. Demery, 144 Wn.2d at 763 (credibility of witnesses is a jury question), State v. Carlton, 80 Wn. App. 116, 129, 906 P.2d 999 (1999) (“no witness may give an opinion on another witness’s credibility”).

An improper comment can constitute a manifest constitutional error which can be raised for the first time on appeal even if not, as here, objected to at trial. State v. Thach, 126 Wn. App. 297, 312, 106 P.3d 782 (2005). Here defense counsel objected that “it calls for credibility,” which gave the trial judge the opportunity to correct the error on the grounds argued here – that the testimony was improper comment by one witness on the credibility of another. The judge, however, overruled the objection, conveying to the jurors that the question was proper and allowing the

prosecutor to rely on the testimony in closing argument and his PowerPoint slide presentation. RP 681.

Most importantly, Thomas's testimony that a forensic interviewer can tell that a child who makes what the interviewer considers a spontaneous statement has not been coached or that a child who has been coached makes robotic statements was not shown to be based on any reasonable scientific principles. It was akin to the testimony in State v. Black, *supra*, and cases cited in Black, which were held to be reversible error. In Black, the error was in admitting testimony about "rape trauma syndrome." In State v. Maule, 35 Wn. App. 287, 295-96, 667 P.2d 96 (1983), the error was in admitting testimony about the characteristics of sexually abused children; and in State v. Stewart, 34 Wn. App. 221, 222-224, 660 P.2d 278 (1983), the error was in admitting testimony about the propensity of babysitting boyfriends to inflict child abuse.

Argument and Application of Legal Authority

In this case, Thomas's testimony that a child who makes a statement like the statement that SL made in the interview has not been coached and that a coached child makes robotic statements, not only allowed the jurors to believe that Thomas, as an expert forensic interviewer, had determined that SL showed no signs of being coached, but also that Thomas's testimony rested on independent and objective

principles. For this reason, her testimony was overwhelmingly and unfairly prejudicial; it conveyed to the jury – in effect -- that she was able as an expert to determine that SL’s accusations were credible.

In considering whether opinion testimony is unfairly prejudicial, appellate courts consider “(1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) other evidence before the trier of fact.” State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing Demery at 759). Here, consideration of these factors establishes that the testimony was impermissible.

Thomas testified as an expert in forensic interviewing, a witness whose testimony was likely to impress the jury, and her testimony related directly to SL’s disclosures of the incident for which Mr. Hesselgrave was on trial. The charge was rape of a child in the first degree, the type of charge which engenders great sympathy towards the accusing child. The defense was that the SL made the accusations as a result of her desire to live with her stepbrothers and coaching by her mother who sought to be relieved of her support obligations and other provisions of the divorce decree and parenting plan. SL was essentially the only state’s witness with actual knowledge of what, if anything, occurred between her and Mr. Hesselgrave. The unfair prejudice of Thomas’s testimony that SL was not

coached was overwhelming. It was cloaked in the aura of reliability, as if there was a scientific basis for concluding that SL's accusations were true and Mr. Hesselgrave guilty as charge. The defense objected, but the trial court overruled the objection and the prosecutor relied on it significantly in closing argument to the jury. The testimony was impermissible opinion testimony and overwhelmingly prejudicial.

PRP Standard Satisfied

The error denied Mr. Hesselgrave a fair trial. His conviction was imposed in violation of the Washington State Constitution and properly raised in a personal restraint petition. RAP 16.4(c) (2), And the prosecutor's eliciting Thomas's testimony that SL had not been coached, more likely than not resulted in actual and substantial prejudice to Mr. Hesselgrave. In re Pers. Restraint of Finstad, 177 Wn.2d 501, 506, 301 P.3d 450 (2013); In re Pers. Restraint of Coats, 173 Wn.2d 123, 132-33, 267 P.3d 324 (2011); In re Pers. Restraint of Yates, 177 Wn.2d 1, 17, 296 P.3d 872.¹³ This standard is met considering the totality of circumstances. In re Pers. Restraint of Brockie, 178 Wn.2d 532, 539, 309 P.3d 498 (2013). SL's credibility was the primary the issue for the jury, and the

¹³ As constitutional error, on direct appeal the error in admitting the testimony would not be harmless unless shown by the state to be harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); and State v. Caldwell, 94 Wn.2d 614, 618, 618 P.2d 508 (1980).

prosecutor spent a substantial portion of closing argument on the issue of whether she was coached. He expressly told the jurors that Thomas – who had conducted over 1,500 interviews -- determined that she had not been. He asked the jury to look at the DVD again and remember Thomas's testimony. The jury surely did consider it in finding Mr. Hesselgrave guilty and it surely influenced their decision.

The state should not be permitted to take the issue from the jury by evidence that an expert had determined the alleged victim to be credible.

Argument as to Ineffective Assistance of Counsel on Direct Appeal

If this Court should hold that Thomas's testimony that SL had not been coached failed to meet the collateral attack standard, then he was denied the effective assistance of counsel for not raising the issue on direct appeal. See In re Pers. Restraint of Morris, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012); In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 814, 100 P.3d 291 (2004).

FOURTH GROUND: THE TRIAL COURT'S COMMENT ON THE EVIDENCE DENIED MR. HESSELGRAVE HIS RIGHT TO A JURY TRIAL UNDER THE WASHINGTON CONSTITUTION

Facts Relevant to Judicial Comment on the Evidence

At the beginning of general voir dire, the trial court asked jurors about their prior jury experiences. The court asked a juror who had sat on

arson case, “Was there direct evidence? Did anybody see the fire being set?” RP 107. When the prospective juror responded, “no,” the court asked a series of questions -- if this absence of eyewitnesses created any problems in deliberations, whether the jury was instructed on circumstantial evidence and whether there “were jurors who said that they really needed to see someone who was there and saw it?” RP 108. The court then followed up his questions by commenting:

That’s actually often a problem in cases. There often aren’t eyewitnesses. [There] aren’t videotapes of a lot of things. In fact, as you might imagine, in child abuse cases, frequently there isn’t a lot of eyewitness testimony.

RP 108.

Through this questioning, the trial court conveyed to the entire jury panel the court’s opinion that the absence of eyewitness testimony should not be a “problem” to obtaining a conviction in child abuse cases – that the “problem” would be if any members of the jury were unwilling to convict on circumstantial evidence and without eyewitness testimony. In asking the questions, the court assumed the role of the prosecutor in the voir dire process. In going further and commenting, the court conveyed his personal attitude on the merits of the case. This was an unconstitutional comment on the evidence prohibited by Article IV, section 16 of the Washington State Constitution.

Legal Authority

Article VI, section 16 of the Washington constitution, provides that “judges shall not charge juries with respect to matter of fact, nor comment thereon, but shall declare the law.” The purpose of this constitutional provision is “to prevent the jury from being unduly influenced by the court’s opinion regarding the credibility, weight or sufficiency of the evidence.” State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981) (quoting State v. Jacobsen, 79 Wn.2d 491-495, 477 P.2d 1 (1970). “A trial judge should not enter the ‘fray of combat’ nor assume the role of counsel.” Eisner at 462-463 (holding that a judge who extensively intervened in questioning the child witness commented on the evidence).

A judge comments on the evidence “if [he or she] conveys or indicates to the jury a personal opinion or view . . . regarding the credibility, weight, or sufficiency of some evidence introduced at trial.” State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Theroff, 95 Wn.2d 385, 388-389, 622 P.2d 1240 (1980), State v. Painter, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981). It is sufficient to constitute a comment on the evidence if the judge’s personal opinion is implied; it need not be stated expressly. Levy, at 56 Wn.2d at 721; State v. Jacobsen, 78 Wn. App. 491, 495, 477 P.2d 1 (1970); State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Moreover, it is irrelevant whether the

court intended the statement to be a comment. Lampshire, 74 Wn.2d at 893. Any comment that has the potential effect of saying that the jury need not consider an element of the offense qualifies as a comment. Levy, at 721.

Here the judge entered the fray and assumed the role of the prosecutor in voir dire and conveyed his opinion that the jurors should not consider the absence of an eyewitness as a “problem” in assessing the sufficiency, credibility or weight of the evidence.

Because a comment on the evidence is manifest constitutional error, it can be raised for the first time on appeal. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Failure to object does not foreclose raising the issue on appeal. Lampshire, at 893. Moreover, a comment on the evidence is presumed to be prejudicial on appeal. Levy, 156 Wn.2d at 723 (1968). The state bears the burden of demonstrating that the defendant was not prejudiced. Id. at 723; State v. Lane, 125 Wn.2d 825m 838-8m 889 P.2d 929 (1995). The state bears the burden of showing the judge’s comment did not influence the jury even if the evidence is undisputed or overwhelming. State v. Bogner, 62 Wn.2d 247, 251, 382 P.2d 254 (1963).

Mr. Hesselgrave’s conviction should be reversed and remanded for trial before an untainted jury even though the issue was not raised on appeal.

PRP Standard Satisfied

His conviction was imposed in violation of the Washington State Constitution, and is therefore properly raised in a personal restraint petition. RAP 16.4(c) (2). And the trial judge's comment on the evidence meets the collateral relief standard that it more likely than not resulted in actual and substantial prejudice to Mr. Hesselgrave. In re Pers. Restraint of Finstad, 177 Wn.2d 501, 506, 301 P.3d 450 (2013); In re Pers. Restraint of Coats, 173 Wn.2d 123, 132-33, 267 P.3d 324 (2011); In re Pers. Restraint of Yates, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). This standard is met considering the totality of circumstances. In re Pers. Restraint of Brockie, 178 Wn.2d 532, 539, 309 P.3d 498 (2013).

Argument and Application of Legal Authority and Standards to the Facts

Here, the issue for the jury at trial was the credibility of SL's allegations in light of, among other things, their inconsistency and change over time, the absence of any medical or physical evidence, the delay in disclosure given Kevin Palfrey's abuse of her and her therapy after the Palfrey abuse came to light, and her motivation to see Mr. Hesselgrave in jail so that she could be with her brothers. The trial judge, in fact, indicated at sentencing, after having seen the evidence, his concern about the sufficiency and credibility of the state's evidence:

Her statements to me weren't completely clear and consistent, part of that is because she was maybe six or six-and-a-half when this occurred. So her memory – and she had been in counseling and also had been the victim by another person, for whatever that tells us about her living situation. It is certainly less than the best. There was Mr. . . . Paulfree [sic]. It's not crystal clear to me what happened in this case. However, the jury found Mr. Hesselgrave guilty as charged. . . .

RP (sent) 6-7. In light of this, it is more likely that the court's initial statement to the jurors that it would be a problem if they did not convict because of the lack of eyewitness testimony influenced them in convicting Mr. Hesselgrave. It likely caused them to give less serious scrutiny to SL's testimony and out-of-court statements because the judge indicated that they shouldn't require direct proof of the truth of the allegations.

Argument as to Ineffective Assistance of Counsel on Direct Appeal

Second, had appellate counsel raised this issue on direct appeal, the comment on the evidence would have been presumptively prejudicial and certainly not harmless beyond a reasonable doubt. Had appellate counsel raised this issue, Mr. Hesselgrave's conviction would properly have been reversed. Under these circumstances, his appellate counsel was ineffective for failing to raise the issue. Like the failure to raise a meritorious closed courtroom issue on appeal, failure to raise a meritorious comment on the evidence issue should result in reversal in a collateral proceeding. In re Pers. Restraint of Morris, 176 Wn.2d 157,

166, 288 P.3d 1140 (2012); In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 814, 100 P.3d 291 (2004).

FIFTH GROUND: THE DIRECTIVE TO PAY LFO'S WAS BASED ON AN UNSUPPORTED FINDING OF ABILITY TO PAY; HENCE, THE MATTER SHOULD BE REMANDED FOR THE SENTENCING COURT TO MAKE INDIVIDUALIZED INQUIRY INTO MR. HESSELGRAVE'S CURRENT AND FUTURE ABILITY TO PAY BEFORE IMPOSING LFOS INCLUDING COSTS OF INCARCERATION AND MEDICAL CARE

There is insufficient evidence to support the trial court's finding that Mr. Hesselgrave has the present and future ability to pay legal financial obligations (LFOs). Before trial, Mr. Hesselgrave was assigned to the Department of Assigned Counsel because he was indigent. Appendix at 17. During Mr. Hesselgrave's sentencing hearing, however, the trial court failed to make an individualized inquiry into Mr. Hesselgrave's ability to pay before it imposed \$2,300 in legal financial obligations. RP (sent.) 7-8.

After imposing LFOs, the court asked defense counsel, "You were appointed?" and Mr. Hesselgrave's attorney answered, "Yes, Your Honor." RP (sent.) 7. On January 20, 2013, an order of indigency was entered for Mr. Hesselgrave and he received appointed counsel for his direct appeal. Appendix at 17.

On January 15, 2016, the court entered an order denying Mr. Hesselgrave's motion for the court to consider his ability to pay appellate costs. Appendix at 16. On that same day, the court entered an order adding \$12,454.92 in LFOs to Mr. Hesselgrave's Judgement and Sentence. Appendix at 14.

Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant can pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment. Fuller v. Oregon, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. Bearden v. Georgia, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

The Washington Supreme Court recently held that LFOs may be challenged for the first time on appeal and that the imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations. State v. Duncan, ___ Wn.2d ___, ___ P.3d ___,

2016 WL 1696698 (April 28, 2016) (quoting State v. Barklind, 87.Wn.2d 814, 817, 87 Wash.2d 814, 557 P.2d 314 (1976) citing Fuller v. Oregon, 417 U.S. 40, 44–47, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974)).

The Duncan Court went on to say a constitutionally permissible system that requires defendants to pay court-ordered LFOs must meet seven requirements:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Duncan citing State v. Curry, 118 Wash.2d 911, 915–16, 829 P.2d 166 (1992) (quoting State v. Eisenman, 62 Wn.App. 640, 644 n. 10, 810 P.2d 55, 817 P.2d 867 (1991); See also RCW 10.01.160(3).

Similarly, in State v. Blazina, the Court held a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before imposing LFOs. 182 Wn.2d 827, 830 344 P.3d 680 (2015). If the trial judge fails to make this inquiry, it must be remanded to the trial court for a new sentence hearing. Id.

The Court, in guidance to lower courts, offered the following:

Practically speaking, this imperative under RCW 10.01.160(3) means that *the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry*. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay... Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status...the ways to establish indigent status remain nonexhaustive, see *id.*, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

State v. Blazina, 182 Wn.2d at 838-839 [emphasis added].

Here, Mr. Hesselgrave challenges the imposition of LFOs for the first time. These issues are constitutional and properly raised in this petition. RAP 16.4(c) (2). Mr. Hesselgrave can show he was actually and substantially prejudiced by constitutional error. See In re Pers Restraint of Finstad, 177 Wn.2d 501, 506, 301 P.3d 450 (2013); In re Pers. Restraint of Elmore, 162 Wash.2d 236, 251, 172 P.3d 335 (2007). This is because the trial court failed in the statutory obligation to make an individualized inquiry into Mr. Hesselgrave's current and future ability to pay before it imposed the \$2,300 in LFOs. See Blazina at 830.

The trial court did nothing more than “sign a judgment and sentence with boiler plate language stating that it engaged in the required inquiry”; that is error and the remedy is to remand to the trial court for a new sentencing hearing. Appendix at 16; See Blazina at 838.

Further, the court’s failure to consider Mr. Hesselgrave’s indigent status and make an individualized inquiry into Mr. Hesselgrave’s ability to pay the more than \$12,000 in appellate costs is error and should be remedied. Appendix at 14-18. The order entered by the court denying Mr. Hesselgrave’s motion to consider his ability to pay was nothing more than a pro forma sheet of paper with an old case number crossed out and Mr. Hesselgrave’s penned over the top and the signature of the judge with the impermissible “boiler plate language.” See Appendix at 16.

The sloppiness with which the court entered the appellate costs against Mr. Hesselgrave speaks for itself that no inquiry, much less an individualized one, was made into Mr. Hesselgrave’s ability to pay. The remedy is for this court to remand to the trial court for a new sentencing hearing on both the trial and appellate costs and show in the record an inquiry, an individualized inquiry, on Mr. Hesselgrave’s ability to pay the approximately \$15,000 in LFOs – LFOs that will continue to accrue interest at 12 percent per annum until the LFOs are paid in full. See

Blazina at 836 (LFOs accrue at 12 percent and if not paid on time accrue additional fees).

Argument as to Ineffective Assistance of Counsel on Direct Appeal

If this Court should hold that Mr. Hesselgrave failed to meet the collateral attack standard, then he was denied the effective assistance of counsel because his appellate counsel failed to raise the LFO issue on appeal. See In re Netherton, 177 Wn.2d 798, 801, 306 P.3d 918 (2013) (citing In re Pers. Restraint of Lord, 123 Wash.2d 296, 314, 868 P.2d 835 (1994); In re Morris, 176 Wn.2d 157, 288 P.3d 1140 (2012)).

Failure of Mr. Hesselgrave's appellate counsel to raise the LFO issue was deficient performance and that deficient performance actually prejudiced Mr. Hesselgrave. See In re Pers. Restraint of Morris, 176 Wn.2d 157, 166, 288 P.3d 1140 (2012); In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 814, 100 P.3d 291 (2004).

SIXTH GROUND: THE DOMESTIC VIOLENCE FINDING SHOULD BE VACATED AND DISMISSED BECAUSE MR. HESSELGRAVE WAS NOT A STEPFATHER AT A TIME WHEN THE JURY COULD HAVE FOUND THE CRIME OCCURRED

As the jury was properly instructed, for purposes of the domestic violence allegation, a "family or household member" means a person with

a biological or legal parent-child relationship, including stepparent and stepchild. Court's instruction 12-13. Although "stepparent" is not defined in the criminal code and was not defined for the jury, for family and support matters, it includes only present stepparents whose legal support obligations terminate on dissolution of the marriage between the natural parent and stepparent. RCW 74.20A.920; 26.16.205. Under the court's instruction and consistent with family law definitions, Mr. Hesselgrave was not SL's stepfather after the dissolution of his marriage to her mother and could not be found guilty of the domestic violence allegation if the crime took place when he was no longer her stepfather. He was not a family or household member at that time.

SL alleged that the acts she accused Mr. Hesselgrave of occurred on only one occasion. She first said it happened when she was living with him and her two brothers after he separated from her mother; later she said it happened when she spent the night at his apartment while her mother was at a bachelorette party. RP 251, 652-653. Mr. Hesselgrave was married to SL's mother from May 8, 2004 through February 16, 2010 -- when SL was living with Mr. Hesselgrave, but not at the time of the bachelorette party. RP 373, 375-377, 867. Therefore, Mr. Hesselgrave was SL's stepfather on the earlier date, but not the second. RP 867.

The jury was not asked to specify which occasion they agreed on for conviction. The “to-convict” instruction included a period of July 11, 2008 through December 31, 2010, to cover both possible times. Court’s Instruction 6. Since the verdict did not reflect which incident the jury relied on for conviction, it is possible that the jury found the incident occurred the night of the bachelorette party. It is, in fact, quite likely they did. On cross-examination at trial, SL was clear that she was claiming it happened at the time of the bachelorette party:

Q And was that [Steve did these things to you] while you were living with him? Or was it another time?

A It was the time that I visited him because my mom was at a bachelorette party.

RP 325.

The trial court noted the potential problem at the close of the trial – that the stepparent relationship did not exist if anything occurred after the dissolution, and that it would not be inconsistent for the jury to find Mr. Hesselgrave guilty, but say no to the domestic violence allegation. RP 867. The prosecutor agreed, “I suppose you are right, Your Honor.” RP 867. But the court did nothing to advise the jury that Mr. Hesselgrave’s legal relationship to SL ended on divorce and that he would no longer be SL’s stepfather. And while this is inferable from the definitional instruction (number 12), nothing in the instructions made this clear. As a

result, it cannot be determined whether the jury found Mr. Hesselgrave guilty of an act that occurred when he was no longer a stepfather.

Where it is possible that the jury found the domestic violence allegation proven when the evidence could not sustain such a finding, the domestic violence allegation should be reversed and dismissed. State v. Aho, 137 Wn.2d 736, 744, 975 P.2d 512 (1999) (“Because the jury did not identify when the acts that it found constituted the offenses occurred, it is possible that Aho has been illegally convicted based upon an act or acts occurring before the effective date of the child molestation statute. Accordingly, Aho’s convictions for child molestation violate due process”).

Although the trial court did not impose an exceptional sentence based on the domestic violence allegation, the finding may have other negative consequences. It should be reversed and dismissed.

REQUEST FOR RELIEF

For the reasons set forth above, Petitioner asks the Court to:

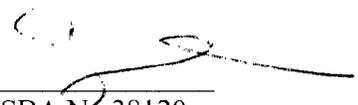
- a. Grant his petition, reverse his conviction and remand his case for retrial.
- b. Grant his petition and vacate and dismiss the domestic violence finding.

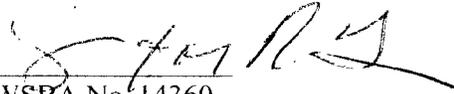
c. Grant his petition and remand his case for a determination of his ability to pay the legal financial obligations imposed after trial and direct appeal.

d. Grant Petitioner such other relief as is just and necessary to a full and fair adjudication of Petitioner's claims and this Petition.

DATED this 16th day of June, 2016.

Respectfully submitted,


_____/s/_____
Cynthia B. Jones, WSBA No. 38120


_____/s/_____
Rita J. Griffith, WSBA No. 14360

Attorneys for Petitioner

E. VERIFICATION

I, Steven L. Hesselgrave, hereby verify under penalty of perjury pursuant to the laws of the State of Washington that I have read the foregoing petition and exhibits, know the contents thereof, and believe the same to be true.

DONE THIS 7 day of June, 2016.



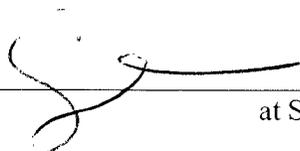
STEVEN L. HESSELGRAVE, at Monroe, WA

CERTIFICATE OF SERVICE

I certify that on the date listed below, I served by e-mail a copy of this pleading on the following:

Counsel for Respondent
Kathleen Proctor
Pierce County Prosecutor's Office
930 Tacoma Avenue S., Rm 946
Tacoma, WA 98402-2171
kproctor@co.pierce.wa.us

And by U.S. Mail to
Steven Hesselgrave
DOC 361157
Washington State Reformatory
P.O. Box 777
Monroe, WA 98272



at Seattle, WA

DATE 6/16/14

GRIFFITH LAW OFFICE

June 16, 2016 - 11:31 AM

Transmittal Letter

Document Uploaded: 0-prp-Personal Restraint Petition-20160616.pdf

Case Name: In re the Personal Restraint of Steven L. Hesselgrave

Court of Appeals Case Number:

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: _____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

The personal restraint petition includes the opening brief. A declaration and Appendix as well as a Motion to Transfer are being filed at the same time as the PRP.

Sender Name: Rita J Griffith - Email: griff1984@comcast.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us

cjones@joneslegalgroup.net