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51942-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,  
DIVISION TWO

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IN RE DARREL HARRIS,

Petitioner

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

The Honorable Vicki Hogan, Judge

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PERSONAL RESTRAINT PETITION REPLY BRIEF

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JAMES R. DIXON  
Attorney for Petitioner

Dixon & Cannon, Ltd.  
601 Union Street, Suite 3230  
Seattle, WA 98101  
(206) 957-2247

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## I. ARGUMENT IN REPLY

### 1. **The State ignores control caselaw in arguing that the ineffective assistance of counsel claims are procedurally barred.**

In his direct appeal, Harris brought an ineffective assistance claim based on the lack of an objection during the prosecutor's closing argument. This Court agreed that the prosecutor committed misconduct but concluded the failure to object was likely strategic in that defense counsel addressed a similar issue in his own closing argument. *State v. Harris*, Slip Op. 47477-8-II, at \*19 (2017). In this Personal Restraint Petition, Harris raises an ineffective assistance claim based on different grounds. Here, Harris identifies the available evidence any reasonably effective attorney would have introduced to bolster his client's testimony and attack the credibility of the complaining witness. Harris argues that the failure to introduce this evidence denies Harris a fair trial.

In response, the State argues that Harris is procedurally barred from bringing any ineffective assistance of counsel claim because he raised ineffective assistance of counsel in his direct appeal. *Brief of Respondent ("BOR")* at 5-6. The State does not allege that the ineffective assistance claim is based on the same grounds. Rather, the State asserts that ineffective assistance cannot be raised in both a direct appeal and a collateral attack. *Id.* The State fails to mention controlling caselaw to the contrary. *See In re*

*Khan*, 184 Wn.2d 679, 688-89, 363 P.3d 577 (2015) (ineffective assistance properly raised in collateral attack, where the basis for ineffective assistance was different than that raised in the direct appeal).

In *Khan*, the State presented the same argument as that presented here. The Supreme Court flatly rejected that argument:

The State argues that Khan is procedurally barred from raising this argument because he raised ineffective assistance of counsel on direct review. But Khan did not argue on direct review that counsel was ineffective for failing to obtain an interpreter; he argued that his counsel was ineffective for failing to object to testimony that his stepdaughter would suffer adverse social consequences for coming forward with her allegations and for failing to object to alleged prosecutorial misconduct. [citation omitted]. *We may consider a new ground for an ineffective assistance of counsel claim for the first time on collateral review.*

*Id.* at 688-89 (emphasis added).

The failure to mention *Khan* is troubling. Even a rudimentary caselaw search on this issue produces the *Khan* decision. Moreover, this Court specifically brought *Khan* to the attention of the Pierce County Prosecutor's Office less than five months ago. *See In re Peebles*, 50172-4-II, at \*2 (May 15, 2018) (unpublished, not cited as binding authority). In *Peebles*, the Pierce County Prosecutor made the same procedural argument they made here. In rejecting that argument, this Court explained,

But the premise that a petitioner who raised any ineffective assistance of counsel claim on direct appeal is barred from raising another ineffective assistance of counsel claim based on different grounds in a PRP has been expressly rejected by our Supreme Court in *In re Personal Restraint of Khan*, 184 Wn.2d 679, 689, 363 P.3d 577 (2015).”

*Peebles* at 4. Raising this argument again without trying to distinguish *Khan* is frivolous. Harris’ claims are properly before this Court in this collateral attack.

As set forth below, the State’s substantive arguments do not fare much better. Following this same pattern, the State relies upon inapplicable authority and in some instances, simply misstates the law without citation to any authority.

**2. The State is incorrect in asserting that a petitioner alleging ineffective assistance of counsel must include a declaration from his former trial attorney.**

The State argues that “Petitioner bears the burden of proving counsel was deficient, which cannot be achieved by presenting a record without proof of *why* counsel proceeded as he did.” *BOR* 8 (emphasis in original). Even assuming this to be correct, Harris did provide counsel’s reason for proceeding as he did. In each instance, when Harris brought up the potential evidence, his attorney told him that the evidence was not admissible. As set forth below, this is not a strategic or tactical decision, it was simply a mistake of law.

The State also argues that a declaration from the attorney himself was required to explain his reasons for not introducing evidence. *BOR* 8, 11. Similar to the State's earlier procedural argument, the State again fails to cite to any authority for those propositions. This is hardly surprising given that no such authority exists.

The State does correctly note that there are cases holding that a petitioner's self-serving affidavits may be insufficient to establish a claim. *BOR* 6-7. But read in context, the cases cited by the State do not support its argument. For instance, in *In re Connick*, 144 Wn.2d 442, 451, 28 P.3d 729 (2001), the defendant alleged that his attorney was negligent for not taking more time to determine whether his out of state convictions constituted same criminal conduct. The Court rejected that argument noting that, other than petitioner's claim the offender score was incorrect, there was insufficient evidence in the record that an incorrect offender score was used. *Id.* at 4651-62. Petitioner was required to present more evidence than just his bald claim that the offender score was indeed wrong. *Id.* 461-63.

The State's reliance upon *In re Williams*, 111 Wn.2d 353, 759 P.2d 436 (1988) is equally puzzling. The defendant in *Williams* challenged his offender score on various due process grounds. The Court found that the general statement as to why his sentencing violated the Constitution was

insufficient; that a more particularized statement citing to specific evidence must be produced. *Id.* at 364-66.

Unlike the petitioners in *Connick* and *Williams*, Harris did present specific facts in support of his Sixth Amendment challenge. He not only presented declarations as to what the evidence would be, he also revealed his conversations with defense counsel as to why the evidence was not introduced. There is nothing in *Connick* or *Williams* which require a declaration from the former trial counsel.

The State suggests that as long as there was a strategic reason for defense counsel taking the actions he did, then the Court must give deference to that strategic decision. *BOR 11-12*. The State is mistaken for “not all defense counsel’s strategies or tactics are immune from attack.” *In re Caldellis*, 187 Wn.2d 127, 141, 385 P.3d 135 (2016). “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)).

For example, in *In re Khan*, the petitioner argued that he was denied his right to counsel when his attorney decided not to use an interpreter for his client when his client testified. The State argued that this was a legitimate trial strategy, as it reinforced that the victim was rebelling against the strict cultural norms of her father and made the defendant more

sympathetic through his use of broken English. *Khan*, 184 Wn.2d at 690. The Chief Judge at the Court of Appeals accepted this argument and dismissed the petition. The Supreme Court accepted reviewed and reversed, finding that “this is not a meaningful strategy worthy of deference.” *Id.* Because there was a factual dispute as to the defendant’s ability to understand English, the case was remanded to superior court for a reference hearing.

The State suggests that defense counsel made a tactical decision not to introduce the evidence identified in the personal restraint petition. *See BOR* 7-8. That is not correct. Defense counsel simply did not believe that the evidence would be admissible. *Harris Dec. at 2-3*. As set forth below, this was a mistake of law. Thus, contrary to the State’s arguments, this is not a situation where defense counsel considered the witnesses’ demeanor and made a judgment call on how they would be perceived by the jury. *See BOR* at 7-8. Rather, this was a mistake of law. “Reasonable conduct for an attorney includes the duty to research relevant law.” *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009) (reversing conviction where defense counsel proposed an erroneous instruction).

**3. Defense counsel was ineffective in failing to introduce evidence of Harris’ reputation for truthfulness following the State’s cross examination.**

Both Harris' employer (Tom Collins) and a fellow resident at the mobile park where Harris used to live (Robert Hall) were prepared to testify regarding Harris' reputation. Defense counsel did not call either of them to the stand. The State makes a number of arguments to justify this deficiency, but none of them are persuasive.

- a. ER 608 evidence was admissible after the State's cross examination.

The State argues that the evidence was inadmissible because the prosecutor did not attack Harris' truthfulness. *BOR 16*. The State argues that "contradiction of a petitioner's testimony" does not open the door to good-reputation rebuttal. *Id.*, citing *State v. Deach*, 40 Wn. App. 614, 618, 699 P.2d 811, (1985).

The *Deach* decision relied upon *Tegland* in defining the scope of permissible evidence under ER 608(a), *See Deach* at 619, *quoting 5K Tegland*, Wash.Prac. § 233, at 494–95 (1982). *Tegland* explains that the question of whether rebuttal evidence under ER 608 is allowed will often turn upon what the State was attempting to imply through the cross examination: "Impeachment by prior inconsistent statement likewise may or may not justify the introduction of good reputation, depending upon whether the impeachment constitutes a general attack on the witness's character *or whether it merely implied a lack of memory or mistake.*"

*Tegland*, 5A Wash. Prac., Evidence Law and Practice § 608.17 (6<sup>th</sup> ed, 2018) (emphasis added).

In the present case, the State did not suggest mistake or lack of memory. The State repeatedly suggested that Harris staged evidence, withheld photographs from the jury, and lied about his physical affections towards KM. *See e.g.*, RP 698-699; CRP 11; RP 704; CRP 65-66.

- b. Mr. Collins' and Mr. Hall's testimony regarding Mr. Harris' reputation for veracity was admissible after the State's cross examination.

In his declaration, Collins stated “within the work place community, as well as the local real estate industry as a whole, Darrel was well known and respected. *He had a reputation* of being honest and a hard worker.” *Collins Dec. at 2* (emphasis added). In its response brief, however, the State asserts that although Collins has multiple agents working for him, “nowhere does he aver they share his opinion of his friend.” *BOR 15*. This makes no sense. By asserting that Darrel Harris has a reputation within the work community for honesty, Collins is stating that this is a belief shared within that community. While the State may have preferred that Collins stated that everyone “shared” his opinions, the evidence rules require a witness to talk about someone’s “reputation” instead. *See ER 608(a)(2)*. In addition to Mr. Collins’ testimony, Mr. Hall was available to discuss Harris’ reputation within the mobile park community where he used to live. *Hall Dec. at 2*.

The State argues that a jury was unlikely to give much credence to these witnesses because they were good friends with Harris. *BOR 15*. The State has it backwards. Both witnesses, but particularly Mr. Collins, were in positions of responsibility. They were both the natural choice to testify regarding someone's reputation within the community. To the extent that a juror would draw any inference from the fact that they were friends with Harris, it would be a positive one. Harris' friendship with successful, responsible people would only enhance the jurors' opinion of Harris.<sup>1</sup>

c. The State's belief that character evidence is of limited probative value is not shared by the courts.

The State suggests that character evidence is relatively meaningless, as it is akin to oath takers willing to swear that someone else is honest "despite their ignorance of relevant events." *BOR 13*. This is not a view shared by the courts. The United States Supreme Court has noted that character evidence alone, in some circumstances, may be sufficient to raise a reasonable doubt as to guilt. *Michelson v. United States*, 335 U.S. 469, 476, 69 S.Ct. 213, 93 L.Ed. 168 (1948); *See also U.S v. John*, 309 F.3d 298, 303 (5th Cir. 2002) ("Standing alone, however, character evidence may create a reasonable doubt regarding guilt."). While the State is certainly

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<sup>1</sup> The State chides petitioner for not mentioning that these character witnesses were his good friends. Presumably the State would be moving to exclude reference to this fact if they testified, but if not, then petitioner would be happy to capitalize on the State's miscue.

entitled to its own views on the usefulness of reputation evidence under ER 608 and ER 404, the Washington Supreme Court, which adopts these rules, has the final say. And those rules, and the caselaw interpreting them, make it clear that this type of evidence can play an important role in providing a fair trial to the defendant.

The State argues that it was a reasonable defense strategy to focus on the absence of evidence rather than trying to build up the defendant's character. *BOR* 11. The State does not explain why these are mutually exclusive goals. Given that Harris was testifying, it was incumbent upon defense counsel to take all reasonable steps necessary to bolster his credibility. The State offers no reasonable explanation for not introducing this evidence.

**4. Defense counsel was ineffective in failing to introduce evidence of Harris' reputation for sexual morality and sexual decency around children.**

As respondent notes, there were two witnesses prepared to testify regarding Harris' reputation for sexual morality around children. *BOR* 18-19. Mr. Powers was the mobile park residential manager and Mr. Hall was a parent who lived there at the park. Given the nature of mobile home living, a manager at such a facility is much more likely to hear about someone's bad reputation than on a typical street where everyone is more spread out and insulated in their own castles. Similarly, a man with a young daughter

will likely pay more attention to someone's reputation for sexual decency than someone without children.

In arguing that this evidence would have not been admissible, the State repeatedly cites to Division One's decision in *State v. Jackson*, 46 Wn. App. 360, 730 P.2d 1361 (1986). What the State fails to mention is that this Court and Division Three have disagreed with Division One on this issue. *See State v. Harper*, 35 Wn. App. 855, 859-60, 670 P.2d 296 (1983) (in charges stemming from sexual contact with an 11-year-old girl, Division Two held the "specific trait pertinent to the charge is sexual morality and decency.") In fact, just this year, the Supreme Court noted that Divisions Two and Three recognize sexual propriety as a pertinent character trait under ER 404(a)(1), while Division One does not. *State v. Lopez*, 190 Wn.2d 104, 114, 410 P.3d 1117 (2018). *See also, Idaho v. Rothwell*, 154 Idaho 125, 294 P.3d 1137 (2013) (adopting "majority rule" that a trait relating to a defendant's sexual morality with children is an admissible pertinent trait under ER 404(a)).

The State responds that it is "illogical" to believe that jurors would credit this type of character evidence if they had accepted as true the testimony of KM and JJ. *BOR at 18*. This argument is itself a logical fallacy, as it presupposes all of the jurors would still have believed KM and JJ if

they had more support for Darrel Harris' denials and evidence challenging KM's credibility.

As if to prove its point, the State notes that John Wayne Gacy was respected in his community and entrusted to entertain children "before the corpses of 33 boys turned up in his basement." *BOR* at 22. Stripped away of its hyperbole, the State's argument comes down to the same tired refrain: character evidence serves no legitimate purpose in trial. In making this argument, the State implicitly asks this Court to ignore cases from Washington and other jurisdictions.

The Washington Supreme Court itself has approved the use of sexual decency evidence under ER 404(b). *See State v. Thomas*, 110 Wn.2d 859, 757 P.2d 512 (1988). *Thomas* was a statutory rape case in which the trial court allowed three witnesses to testify that the defendant had a good reputation for sexually morality and sexual decency. The Supreme Court noted that this "character trait evidence was admitted in careful compliance with ER 404(a)(1)." *Id.* at 864.

Other jurisdictions are in agreement. In *State v. Enakiev*, 175 Or. App. 589, 29 P.3d 1160 (2001), the defendant was alleged to have touched the sexual, intimate parts of another. At trial, the defense sought to introduce evidence of the defendant's reputation for sexual propriety as a character trait pertinent to the charged offense. *Id.* at 593. The trial court excluded the

evidence. The appellate court disagreed, finding that the sexual propriety character evidence was admissible under ER 404(2)(a). Looking at the absence of physical evidence, the court determined that the exclusion of that character evidence deprived the defendant of a fair trial. *Id.* at 595-597. The court reversed the conviction and ordered a new trial.

An Arizona appellate court reached a similar conclusion in *State v. Rhodes*, 219 Ariz. 476, 200 P.3d 973 (2008). In that case, the defendant was charged with engaging in oral sex with a child under 16. The defendant moved to admit evidence of his sexual morality from people who knew of his appropriate interactions and reputation around children. The trial court initially excluded the evidence, but then granted a motion for a new trial based on this erroneous earlier ruling. The Arizona Court of Appeals recognizing the potential significance of this type of character evidence, upheld the granting of a new trial. *Id.* at 479-481.

It is common knowledge that jurors often fear they are not receiving all of the necessary information and will speculate as to character of the defendant standing before them. In some instances, where the character evidence is pertinent to the charged offense, the jury can properly consider evidence on that issue. There can be little question that testimony establishing the defendant has a reputation for sexual morality, particularly around children, is the type of character evidence likely to have an impact

on jurors. There is more than a reasonable probability that at least one juror would have had a reasonable doubt upon hearing this evidence. See *State v. Lopez*, 190 Wn.2d at 125 (“a ‘reasonable probability’ is lower than a preponderance standard.”) There is no justified defense strategy for not introducing this evidence.

**5. Defense counsel was ineffective in failing to introduce evidence of KM’s extensive use of illicit drugs and the impact it had on her memory and ability to perceive.**

As set forth in the initial Personal Restraint Petition, there is indisputable evidence that KM was a drug addict who was constantly using drugs during her stay at Harris’ house. Her drug use at the house was a continuation of the addictive behavior she demonstrated even before she moved into Harris’ house. A police officer who spoke with her a year earlier had commented that she was under the influence of drugs, while a prior roommate had kicked her out for stealing medication. See *Dixon Dec. Exhibit 1*. The manager of a mobile home park observed that “just about every time I saw her”, she appeared to be on drugs. *Powers Dec. at 2*. This continued while she was at Harris’ house, as evidenced by a neighbor who saw her on multiple occasions smoking marijuana outside the house. *Satre Dec. at 1-2*. KM regularly used “marijuana, pain pills and muscle relaxants, and possibly other drugs.” *Harris Dec. at 2*. As a result, “she was usually still groggy in the morning from the drugs.” *Id.*

The State acknowledges that drug usage is admissible to impeach a witness if the witness was under the influence at the time of the occurrence which is the subject of the testimony. *BOR* at 22, quoting *State v. Thomas*, 150 Wn.2d 821, 864, 83 P.3d 970 (2004). That applies here. KM testified at trial as to her observations and interactions while she was staying at Harris' house. She also claims that she was assaulted by Harris in the early morning, a time in which she would still have been groggy from the use of drugs. RP 257.<sup>2</sup> The evidence of drug usage was clearly admissible. Further, her addictive behavior, as demonstrated in the year before she moved in, corroborates Harris' testimony regarding her drug usage at the house.

Understandably, the State did not want the jury to hear this information and moved to exclude the evidence. Defense counsel did not object to the State's motion to exclude this evidence. This was not a trial tactic. To the contrary, defense counsel made it clear that while he wanted to use this drug evidence, he did not believe the law permitted him to do so. 2RP 201-02. His failure to oppose the motion was based on a misunderstanding of the law. Such decisions constitute a deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

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<sup>2</sup> KM told the officer that Harris had touched her over her pajamas (RP 257) but later told the jury that he stuck his hand inside her pajamas (RP 411).

The State's response is to misstate and oversimplify the petitioner's argument. The State in its response brief refers to the new defense theory, followed by a block quote setting forth that theory. *BOR* at 22. But contrary to the misleading formatting, this is not a quote; it is simply the State's own mischaracterization of the defense argument, made to appear as a quote. *Id.*

The State argues that the new defense theory is that JJ was just confused about who molested her. It is true that KM's mom, who is JJ's grandmother, believes it possible that JJ may have been molested by one of KM's friends when JJ was left alone at KM's all-night parties. *Midgette Dec. at 2*. However, the defense still believes that the most likely scenario is that KM coached and manipulated JJ into making these allegations.<sup>3</sup> What Darrel Harris does know is that he did not commit these offenses, and whether it is KM purposefully making all of this up or whether KM has become confused as to part of it, the defense was entitled to present this evidence to the jury.

**6. Defense counsel was ineffective in failing to introduce multiple acts of dishonest conduct which would have undercut KM's credibility.**

The State once again argues that the decision not to impeach KM with prior acts of dishonesty was a strategic decision. *BOR* at 24. This is

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<sup>3</sup> Given the relationship that JJ has had to endure with KM, who has since lost custody of JJ (*Midgette Dec. at 2*), it is easy to see how JJ could be easily manipulated by a mother she so wishes to please.

plain foolishness. The defense theory was that KM fabricated these allegations. There is no legitimate strategy in not introducing evidence that would advance that theory.

The State's argument is similar to the State's unsuccessful argument in *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009). In *Powell*, defense counsel did not propose a reasonable belief instruction in a second degree rape trial. The defense argued ineffective assistance of counsel on appeal. The State responded that the decision not to present this defense was a strategic decision. This Court soundly rejected that argument, noting that "we are aware of no objectively reasonable tactical basis" for failing to request an instruction that was supported by the evidence and was consistent with the defense theory of the case. *Id.* at 155. This Court reversed the conviction in that case.

The same reasoning applies here. The defense approach was to attack KM's credibility. Introducing this evidence would promote that goal. There is no objectively reasonable tactical basis for not cross-examining KM about her dishonest behavior.

Defense counsel failed to do the necessary research and investigation that would allow him to authoritatively cross examine KM as to her multiple acts of dishonesty under ER 608. She shoplifted from stores, she stole from roommates, and she made false accusations against family

members to avoid trouble. *See Petition at 22-25*. The State argues that the cross examination would not have been authoritative as extrinsic evidence is not permitted under ER 608. While it is certainly possible that KM would lie about her past activities, her knowledge that there was documentation to the contrary would likely have prevented her from doing so.

The ability to effectively cross examine a key witness is a crucial component of the Sixth Amendment. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct 1038, 35 L.Ed.2d 297 (1973). The more important the witness is to the State's case, the more imperative the right to cross examination. Where a witness is central to the State's case, the exclusion of ER 608 evidence can require a new trial. *State v. York*, 28 Wn. App. 33, 36-38, 621 P.2d 784 (1980) (exclusion of ER 608 evidence relating to the "buy officer" deprived defendant of a fair trial).

KM's credibility was crucial to the State's case. Not just as it related to the indecent liberties charge, but because of her influence over JJ as well. While Harris was able to deny the charges, the jury never heard independent evidence that would have undercut her credibility. The claim that this evidence would not have impacted at least one juror is itself is not credible.

## **II. CONCLUSION**

The State's response to this personal restraint petition has been to use inflammatory language and mischaracterize the defense argument.

What the State has not done is present persuasive authority to support its position. One of the main questions in this case is not what JJ said, but why she said it. Simply quoting JJ's testimony, which the State does throughout the brief, does not put this Court any closer to resolving the issues presented. Indeed, the defense can just as easily point to times such as when JJ testified that she forgot anything that Harris did to her. RP 340.

Despite JJ's claim that Harris had abused her "33 times", there was not a shred of physical evidence in this case. RP 547, 305-06. In fact, the physical examination of JJ was entirely normal for a child who has not been sexually abused. As anyone who has ever spent time with a young child knows, they are very susceptible to influence from their parents. The case turned in large part upon the credibility of Harris and KM. By not introducing evidence that would have supported Harris' credibility or evidence that would have undercut KM's credibility, defense counsel deprived his client of a fair trial. Darrel Harris' convictions should be reversed.

Dated this 20<sup>th</sup> day of November, 2018

s/ James R. Dixon  
State Bar Number 18014  
601 Union Street, Suite 3230  
Seattle, WA 98104  
Telephone: (206) 957-2247  
E-mail: james@dixoncannon.com

**DIXON CANNON, LTD**

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