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STATE OF WASHINGTON

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BY E O., D.R. CARPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY SCOTT FISHER,

Petitioner.

FILED  
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STATE OF WASHINGTON

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

The Honorable Vic L. VanderSchoor, Judge

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SUPPLEMENTAL BRIEF OF \_ E ~~4~~

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ORIGINAL

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## **A. ISSUES ON REVIEW**

1. Is a defendant denied his state and federal constitutional rights to proof beyond a reasonable doubt of every element of the crime charged and to jury unanimity where the single "to convict" instruction given for all four counts charged required the jury to agree only that sexual contact occurred on four separate days during the charging period, and the "multiple counts" instruction permitted the jury "to convict" if they agreed that at least one particular act--rather than four particular acts--had been proven?

2. Does a trial court abuse its discretion in admitting so much ER 404(b) evidence at trial that it constitutes a majority of the evidence and it goes far beyond its stated non-character purpose?

3. Must the proponent of ER 404(b) prior bad acts evidence seek admission of it outside the presence of the jury?

4. Does a prosecutor's misconduct by arguing successfully that the ER 404(b) evidence was admissible to explain a delay in reporting, and then using the evidence to argue propensity; by impugning the integrity of defense counsel and eliciting work product; by eliciting sentencing consequences of conviction; by making faces and gestures while the defendant is testifying and during the argument of defense counsel; and by making other improper arguments to the jury in closing, deny a defendant his state and federal constitutional rights to a fair trial?

5. Does a trial court deny a defendant his state and federal constitutional rights to confrontation of witnesses and to appear and defend at trial by denying him the right to cross-examine witnesses to establish their motive and bias and his right to present witnesses to support his theory of defense?

## **B. STATEMENT OF THE CASE**

The four counts of second degree child molestation charged against Timothy Fisher arose from allegations by 18-year-old Melanie Lincoln, in 2003, that Mr. Fisher had touched her inappropriately seven years earlier. CP 126-28, 139-40.

1. Trial evidence

Mr. Fisher married Ms. Lincoln's mother, Judy Ward, when Ms. Lincoln was in the fifth grade. RP 38. According to Ms. Lincoln, when

she was in the seventh grade, Mr. Fisher started taking her upstairs, almost daily, to the room she shared with her younger sister Brittany and having her take off her pants and lift her shirt while lying on the bed. RP 61-62, 65, 68-69. While she lay quietly, Mr. Fisher would open and close the outer portion of her vagina and sometimes pluck her pubic hair or twist her breasts. RP 61-62, 65, 68-69. She said that Mr. Fisher did not remove his clothing or fondle himself during these times. RP 150. Ms. Lincoln testified that she did not tell anyone about what happened because Mr. Fisher threatened to harm her if she did. RP 54.

Ms. Lincoln's brother Brett, who was 17 at the time of trial, testified that he once heard a scream from the room. RP 627-29. At a pretrial hearing, he had adamantly insisted he heard screaming and spanking every day from his parents' room -- "like someone down the street was chasing someone and they were screaming for their life." RP(1/8/04) 156, 165-67; RP 627-29. When questioned about the inconsistency at trial, Brett denied that he ever made the pretrial statements and insisted that the statements made by him in the pretrial hearing were untrue. RP 627-29.

Brittany and Mr. Fisher's two children from an earlier marriage, who visited every other weekend, all testified that they never saw Mr. Fisher and Ms. Lincoln go upstairs together. RP 44, 238, 275-402. The children's summer babysitter recalled that the children never acted afraid of Mr. Fisher and that their demeanor did not change when he arrived home. RP 362-64.

2. **ER 404(b) evidence**

The majority of the testimony and argument at trial went beyond the facts relevant to the allegations of sexual abuse of Ms. Lincoln; most of the testimony was devoted to evidence about Mr. Fisher's alleged acts of physical abuse against Ms. Lincoln, Brett, Brittany, and Mr. Fisher's two children. The trial court accepted the prosecutor's argument that the prior bad acts of physical abuse against Ms. Lincoln and her siblings explained Ms. Lincoln's delay in reporting the allegations. RP 2-3. The state, however, was also permitted to introduce evidence that the stepmother of Mr. Fisher's two step-children had filed a complaint alleging that one of them had been physically abused; alleged prior bad acts unrelated to Ms. Lincoln. RP 617-22. Considerable testimony was introduced about an incident in which Mr. Fisher was accused of slapping his son.. RP 374, 446-54.

The prior bad acts evidence included a police officer's visit to the home in 1999, four years prior to the allegations of sexual abuse, when Mr. Fisher was no longer living with the family. RP 71-72. Ms. Lincoln talked to the officer about physical abuse, but did not report any sexual abuse. RP 71-72.

In closing, the prosecutor used the prior bad acts evidence, not to argue that it explained the delay in reporting, but to argue that Mr. Fisher was guilty because of his "distinctive pattern" of abuse, and that to acquit him the jurors would have to disbelieve all of the testimony of the witnesses who described the physical abuse. RP 661, 709. The prosecutor listed thirteen instances of alleged physical abuse on a board for the jurors and

argued that this conduct "spilled over" into sexual abuse. RP 711-12. This lead to further argument that Mr. Fisher abused his children, and the prosecutor asked the jurors, "What's that consistent with?" RP 661. The prosecutor told the jurors that they had to "balance" the testimony of Ms. Lincoln against the defendant's and that the balance tipped towards her truthfulness. RP 655. The prosecutor argued that it came down to whether the jurors believed Melanie's testimony or Mr. Fisher's. RP 718.

### **3. Exclusion of defense evidence**

The court excluded evidence, during opening statement and trial, that issues arising in Ms. Ward's divorce from Mr. Fisher may have given her a motive and bias in prosecuting and testifying against Mr. Fisher. RP 23-26. The defense made an offer of proof that the divorce was bitter and drawn out; Ms. Ward had told a friend and colleague that she would "get" Mr. Fisher. RP 23-24. Mr. Fisher had won a judgment requiring that the house be sold and the equity divided. RP 297. Ms. Ward had refused to sell the house and, after delays and contempt proceedings, was permitted to pay a monetary judgment. RP 297. It took three years, however, for Mr. Fisher to collect the judgment and, during that time, Ms. Ward had tried to file bankruptcy to avoid payment. RP 297-98.

Defense counsel was permitted only to ask Ms. Ward on cross-examination if she had told a police officer in 1999 that she was in the middle of a long, bitter divorce. RP 313. The prosecutor was permitted, however, to ask Ms. Lincoln to confirm that Mr. Fisher did not owe her money or property, that she had never owed him anything, and that she had not filed a civil lawsuit against him. RP 98. Ms. Ward was permitted to

testify that neither Brett nor Brittany had anything to gain from their testimony. RP 99.

#### **4. Impugning the defense and work product**

The prosecutor was permitted to call the defense investigator as a witness and question her about how the defense investigation was conducted and how many hours she spent on the case. RP 180. The prosecutor asked who had been interviewed, who conducted the interviews, whether defense counsel asked Ms. Lincoln about sexual abuse, and whether such questions should have been asked. RP 206-07. The prosecutor was permitted to question Mr. Fisher about whether his attorney and the defense investigator told him how to testify and accused him, in front of the jury, of having rehearsed his testimony. RP 584-85. When defense counsel objected, the prosecutor responded that Mr. Fisher was giving pat answers and "we need to get to the bottom of why." RP 587. Even though the court sustained an objection to the question, the prosecutor continued, "You've been well coached." RP 588.

The prosecutor asked Mr. Fisher what was the common denominator in all of the accusations, and defense counsel objected under ER 404(b). After a sidebar, the court said this could be argued in closing and allowed the prosecutor to ask Mr. Fisher if he was the person accused in each instance. RP 609. The prosecutor was also permitted to ask Mr. Fisher if he was aware of having to register as a sex offender if convicted and that he would not be able to have contact with children. RP 611.

**5. The prosecutor's eye rolling and gestures**

In its motion for new trial, the defense noted the prosecutor's gestures and expressions in front of the jury. RP (12/21/04) 2-6; CP 56-72, CP 82-103. The defense submitted affidavits attesting to the prosecutor's having winced, rolled his eyes, and shaken his head in a negative manner while Mr. Fisher was testifying and during closing argument. CP 77-81. The defense investigator personally observed expressions and gestures when Ms. Lincoln was testifying and during defense counsel's argument. RP(12/21/04) 2-6. The court acknowledged that there were words and gestures by the prosecutor which "were not entirely appropriate" and "some gestures and so on," "but not," according to the trial court, anything "that would undermine the jury's impartiality." RP (12/21/04) 57-58.

**C. ARGUMENT**

**1. THE COURT'S JURY INSTRUCTIONS DENIED MR. FISHER HIS RIGHT TO JURY UNANIMITY AND PROOF BEYOND A REASONABLE DOUBT.**

The trial court gave one "to convict" instruction for all four counts charged. The court's instruction allowed the jurors to convict Mr. Fisher of the four counts if they agreed that Mr. Fisher had sexual contact on "four separate days" during the charging period. CP 118. The single "to convict" instruction did not require the jurors to unanimously agree that the act charged as to a particular count occurred on any specific day or unanimously agree that acts occurred on the same four days. The jury was never instructed in the "to-convict" or elsewhere in the instructions that a separate crime was charged in each count and that their verdict on one count should not control their verdict on other counts. Thus, it denied Mr.

Fisher his state and federal constitutional right to have the jury determine unanimously that he committed the criminal act with which he was charged. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), modified State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); Const. art. 1, § 22; U.S. Const. amend. 6. Further, the instruction was insufficient to require the state to bear the burden of proof on every element as required by In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1999), and State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980). If the court's instructions to the jury do not require the jury to find that a particular act of sexual conduct has been committed for each count, the state is not required to meet its burden of proving the *actus reus* of each crime.

Because the "to-convict" instruction was inadequate to require the jury to unanimously agree on an act which constituted the *actus reus* of each count, Mr. Fisher's conviction should be reversed. The "to-convict" instruction must be the yardstick by which the jury determines guilt or innocence and must itself contain a complete statement of every fact the state must prove for conviction. State v. Mills, 154 Wn.2d 1, 7-9, 109 P.3d 415 (2005). Even though instructions must be read as a whole, the court "may not rely on other instructions to supply an element missing from the 'to-convict' instruction." Mills, 154 Wn.2d at 7; State v. Smith, 131

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<sup>1</sup> This Court recognizes an exception where a base crime is elevated with additional penalties of additional facts are found by special verdict. Mills, supra; State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002).

Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). If the "to-convict" instruction is inadequate to require the jury to find all of the necessary facts beyond a reasonable doubt, it is constitutionally deficient.

In addition, where multiple counts are charged and the state does not elect which act it is relying on for each count, "[t]he trial court must instruct the jury that they must be unanimous as to which act constitutes the count charged and that they are to find 'separate and distinct acts for each count where the counts are identically charged.'" State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) (citing State v. Noltie, 116 Wn. App. 831, 842-43, 809 P.2d 190 (1991)).

Here, the "unanimity" instruction did not supplement the "to-convict" instruction or meet the dictates of Hayes and Noltie; it made matters worse. The instruction simply told the jurors, in its plain terms, that they need only agree that one act had been proven beyond a reasonable doubt:

There are allegations that the defendant committed acts of child molestation on multiple occasions. To convict the defendant, one or more particular acts must be proven beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proven beyond a reasonable doubt. You need not unanimously agree that all the acts have been proven beyond a reasonable doubt.

CP 116.

What was missing from the court's instructions was any requirement, in any of the instructions, that the jury unanimously agree that a particular act has been proven as to each count.

The jury was obviously confused. During deliberations, the jurors sent out a note asking "Why are there 4 counts? Why not 3 or 6? What was the basis for 4 counts?" CP 108. The court responded, "You must rely on the instructions already given to you by this Court." CP 108.

The "to-convict" instruction did not accurately reflect the state's burden of proof as to each count nor did the instruction require the jury to unanimously agree that a particular act which constituted the crime had been committed. No other instruction could cure the problem. In this case, the instructions as a whole made matters worse. The absence of an instruction explaining that each count must be decided separately and the inclusion of the unanimity instruction, which told the jurors that they could convict if they found one act proven, was prejudicial and Mr. Fisher's convictions should be reversed and his case remanded for retrial.

**2. THE ADMISSION OF ER 404(B) EVIDENCE DENIED MR. FISHER A FAIR TRIAL.**

The majority of the testimony and argument at trial was devoted to evidence about Mr. Fisher's alleged acts of physical abuse of Ms. Lincoln and her siblings Brett and Brittany. The stated basis for admitting the evidence was to explain the delay in reporting by Ms. Lincoln. The prosecution, however, was not limited to introducing alleged acts which Ms. Lincoln purportedly was aware of; rather the prosecution was permitted to introduce evidence that the stepmother of Mr. Fisher's two step-children had filed a complaint alleging that one of them had been physically abused. RP 617-22. Moreover, Ms. Lincoln talked to the police about physical abuse well before she alleged any sexual abuse --

undercutting the claim that her fear of Mr. Fisher caused her not to report being abused by him. RP 71-72. As the prosecutor's closing argument demonstrated, the evidence of alleged physical abuse was introduced for the improper purpose of showing that Mr. Fisher was the type of person to have committed the charged crimes. RP 661, 708. The prosecutor argued throughout that committing sexual abuse was "consistent" with committing his listed 13 instances of physical abuse.

Under ER 404(b), evidence of prior bad acts is never admissible to show that a defendant is acting in conformity with his character in committing the charged crime or that he had a propensity to commit the crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995); ER 404(b). "Once a thief, always a thief, is not a valid basis to admit evidence." State v. Holmes, 43 Wn. App. 397, 400, 171 P.2d 766 (1986). Even though evidence of prior bad acts may be admissible under ER 404(b) for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," it is presumptively inadmissible. Evidence of prior bad acts is inadmissible and any doubts about admissibility must be resolved in favor of exclusion. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

To overcome the presumption of inadmissibility, the proponent of the evidence must establish that it is necessary to prove an essential fact of the crime. State v. Barragan, 102 Wn. App. 754, 758, 9 P.3d 942 (2002); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

As set out in State v. Salterelli, 98 Wn.2d 358, 361-62, 655 P.2d 697 (1982), before 404(b) evidence may be admitted, the court must identify the purpose for the evidence; the court must find that the purpose is relevant to prove an essential element and of consequence to the particular action; and the court must find that the probative value of the evidence outweighs its prejudicial impact.

In this case, the court admitted the ER 404(b) evidence of alleged acts of physical abuse against Ms. Lincoln and others as relevant to explain Ms. Lincoln's delay in reporting the alleged sexual abuse. Ms. Lincoln, however, testified that she delayed reporting because she was afraid of Mr. Fisher, an explanation which did not need further elaboration. Moreover, it was never clear why physical abuse to her siblings made Ms. Lincoln less willing to disclose Mr. Fisher's sexual abuse. Further, Ms. Lincoln did report physical abuse years before she alleged sexual abuse, establishing that she was not afraid to report allegations of abuse against Mr. Fisher. Given the lack of relevance, the enormous prejudice of admitting the evidence of physical abuse clearly outweighed any probative value.

As it was, the prior bad acts evidence overwhelmed the relevant evidence at trial. The trial court did not even limit the prior bad acts to acts Ms. Lincoln might have had some reason to know of. The Court of Appeals excused this by trial counsel's failure to object. Slip Op. at 6. Salterelli, however, requires the proponent of the evidence to establish its admissibility outside the presence of the jury and for the court to balance the relevance of the evidence prior to admission. The prior bad acts

evidence overwhelmed the relevant evidence at trial and denied Mr. Fisher his fundamental right to a fair trial.

3. **THE PROSECUTOR'S MISCONDUCT DENIED MR. FISHER A FAIR TRIAL.**

The prosecutor committed widespread misconduct, from making gestures and faces while the defendant was testifying and his attorney was arguing, to asking Mr. Fisher if he would have to register as a sex offender if he were convicted, a sentencing consequence which is inadmissible at trial. This misconduct not only denied Mr. Fisher a fair trial, it demeaned the decorum of the courtroom and both the trial court and the Court of Appeals erred in excusing the behavior--and in placing the sole responsibility on trial counsel for policing the conduct of the prosecutor. In fact, some of the misconduct took place behind the back of defense counsel, but in the direct view of the jury.

The prosecutor's conduct in arguing propensity and that Mr. Fisher was guilty of sexual misconduct because it was consistent with his character of physically abusing children was flagrant and ill-intentioned. As held in State v. Gregory, 158 Wn.2d 759, 147 P.3d 1202 (2006), "the fact that the state made the motion in limine and then blatantly violated the resulting order strongly suggests that the argument was flagrant and ill-intentioned. " Gregory, 158 Wn.2d at 866. By the same logic, the prosecutor's blatant violations of the limited scope for which the ER 404(b) evidence was admitted "strongly suggests that the argument was flagrant and ill-intentioned. " The prosecutor was well-aware that the 404(b) evidence was admitted, per his own request for limited liability, only to explain why Ms.

Lincoln delayed reporting. In failing to honor that limitation, the prosecutor committed flagrant and ill-intentioned misconduct. The prosecutor's further misconduct in eliciting additional 404(b) evidence without seeking permission outside the presence of the jury was also flagrant and ill-intentioned; the court had already conducted a pretrial hearing to determine the admissibility of the 404(b) evidence. Nothing short of a new trial can cure the prejudice of the prosecutor's misconduct in using the ER 404(b) evidence to argue that Mr. Fisher was guilty of the charged offenses.

Where misconduct is flagrant and ill-intentioned, it can be challenged for the first time on appeal; and, where there is a substantial likelihood that the misconduct affected the jury, the defendant is deprived of the fair trial guaranteed by the Fourteenth Amendment. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). As held in Lough, supra, the prejudice in admitting ER 404(b) is always that the jury will misuse the evidence and convict because they believe the defendant is the type of person who should be convicted; "once a thief, always a thief." Lough, 125 Wn.2d at 863. When, as here, the prosecutor -- the same prosecutor who mimed his disapproval and personal opinion about the defendant and defense counsel -- invited the jury to misuse the evidence, a new trial should be granted.

In addition to arguing propensity and eliciting additional 404(b) evidence, the prosecutor committed further well-established acts of misconduct: misstating the burden of proof in argument, impugning the integrity of defense counsel, eliciting information about the sentencing

consequences of conviction through questions which provided those consequences, and questioning the defense investigator about work product decisions. RP 174, 178, 180, 182-85, 196, 206-07, 209-11, 611, 661, 709, 711-12.

The prosecutor impugned the integrity of defense counsel and was improperly permitted to elicit work product by calling the defense investigator and asking her about how the defense investigation was conducted and asking her whether defense counsel should have questioned Ms. Lincoln about the sexual abuse while interviewing her. RP 180, 206-07. The prosecutor, during the cross-examination of Mr. Fisher, accused defense counsel of telling him how to testify and commented to the jury that Mr. Fisher was giving "pat answers" and that "we need to get to the bottom of why." RP 587. He expressed his personal opinion of Mr. Fisher and the arguments of defense counsel by rolling his eyes and gesturing to the jury. Such unfounded attempts to undermine the defense case by denigrating counsel compromises the state and federal constitutional right to the effective assistance of counsel. See Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983); United States v. Frederick, 78 F.3d 1370 (9th Cir. 1996); State v. Jury, 19 Wn. App. 256, 263-66, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978); State v. Swan, 114 Wn.2d 613, 769 P.2d 610 (1990) (improper for prosecutor to express personal opinions about credibility of witnesses or defense case).

The prosecutor's questioning of Mr. Fisher about whether he would have to register as a sex offender if convicted, violated the Court Instruction No. 1 (instructing the jury that it had "nothing whatsoever to do

with" sentencing consequences), and the well-established rule that the "sentence imposed by the court is never a proper issue for the jury's deliberations, except in capital cases." RP 611. State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1969); Shannon v. United States, 512 U.S. 573, 579, 129 L. Ed. 2d 459, 114 S. Ct. 2419 (1994).

The prosecutor's argument that the jurors have to "balance" the testimony of Ms. Lincoln against that of the defendant's and that the balance tipped towards her truthfulness is virtually identical to the argument found to be flagrant and ill-intentioned in State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996) (misconduct to argue to the jury that in order to convict the defendant, the jury would have to find that the state's witnesses were untruthful; such misconduct so well-established that flagrant and ill-intentioned to make the argument).

The misconduct was wide-spread and infected the entire trial. The prosecutor injected himself and his personal opinion on credibility into the trial through his facial expressions and gestures. He blatantly argued that the 404(b) evidence established Mr. Fisher's propensity to commit sexual abuse. He denigrated defense counsel and acted as if it would be improper for counsel to discuss Mr. Fisher's testimony with him or to interview Ms. Lincoln as he did. Because of the misconduct, Mr. Fisher should be given a new trial.

4. **MR. FISHER WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM.**

Mr. Fisher's defense at trial was that Ms. Ward had animosity and a bias against him because of their long and extremely bitter divorce, and

that the children were influenced by her. RP 23-24, 297-98. He was prepared to cross-examine Ms. Ward to establish her motive and bias and to present the testimony that she threatened to "get" Mr. Fisher. RP 23-24. The trial court excluded this evidence. RP 23-26.

The Court of Appeals excused the trial court's failure to allow Mr. Fisher to put on his defense by simply discounting it -- because the record did not show any on-going divorce proceedings. Slip op. at 31. The trial court erred in excluding the evidence and the Court of Appeals erred in affirming the exclusion.

Mr. Fisher had the right under the Sixth Amendment and Const. art. 1 § 22, to present his defense of choice by calling witnesses in his own behalf and by confronting and cross-examining the state's witnesses. State v. Hudlow, 99 Wn. 2d 1, 14-15, 659 P.2d 514 (1983). These rights cannot be restricted absent a compelling state interest more important than the truth-finding process. Hudlow, 99 Wn.2d at 16; State v. Boast, 87 Wn.2d 447, 453, 553 P.2d 1322 (1976).

In denying Mr. Fisher the right to cross-examine witnesses to establish their bias and motive or hostility, the trial court and the Court of Appeals denied Mr. Fisher his rights under the Sixth Amendment. State v. Buss, 76 Wn. App. 780, 787, 887 P.2d 920 (1995). The right to confrontation under the Sixth Amendment and the Washington constitution includes the right to place specific facts before the jury. State v. Brooks, 25 Wn. App. 550, 552, 611 P.2d 1274 (1980); State v. Pickens, 27 Wn. App. 97, 100, 615 P.2d 537 (1980); Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 Sc. Ct. 1105 (1974).

In any case involving allegations of misconduct, the question arises as to why a young woman would make accusations if they were not true. The defense is entitled to provide those reasons by showing specific grounds for bias, hostility and motive.

Not only was Mr. Fisher precluded from putting forth evidence of motive and bias, the prosecutor took advantage of the exclusion of evidence and curtailment of cross-examination by eliciting from Ms. Lincoln that neither she nor her siblings had any lawsuits or reason to accuse Mr. Fisher. At the least, Mr. Fisher had the right to present evidence after this door was opened.

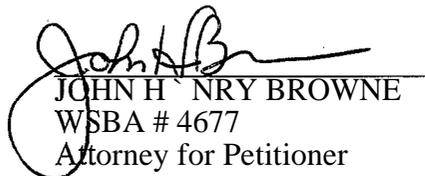
The denial of confrontation should require reversal of Mr. Fisher's convictions and a remand for retrial.

**D. CONCLUSION**

Petitioner respectfully submits that his convictions be reversed and remanded for retrial.

DATED this 11 day of December, 2007.

Respectfully submitted,

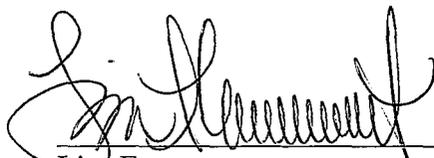
  
JOHN HENRY BROWNE  
WSBA # 4677  
Attorney for Petitioner



and to: Timothy Scott Fisher, DOC 873122  
Airway Heights Corrections Center, C-5  
PO Box 2079  
Airway Heights, WA 99001-2079

Said envelope contained the document to which this affidavit is attached, more particularly described as: Supplemental Brief of Appellant.

Dated this 28th day of December, 2007.



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Lisa Earnest

SUBSCRIBED AND SWORN TO before me this 28th day of December, 2007.

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NOTARY PUBLIC in and for the State of  
Washington, residing at Se ttle My  
commission expires: /0 Q