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STATE OF WASHINGTON

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No. 44177-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN HESSELGRAVE,

Appellant.

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

The Honorable Ronald Culpepper, Judge

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. Appellant Steven Hesselgrave was deprived of his state and federal due process rights to present a defense.

2. Hesselgrave's state and federal rights to meaningful confrontation were violated.

3. Hesselgrave was deprived of his Sixth Amendment and Article I, § 22 rights to effective assistance of appointed counsel.

4. Reversal and dismissal is required because the trial court abused its discretion in admitting child hearsay when there was insufficient showing that the child was competent and there was no corroborating evidence to support the conviction.

   Hesselgrave assigns error to the trial court's "Order Finding Child Victim Hearsay Admissible at Trial" in its entirety. He also assigns error to the specific findings that "S.L. had no apparent motive to lie," that the statements were "generally consistent" even though made at different times and places with different degrees of detail, and that there was "nothing about the timing of S.L's statements or her relationship to persons she spoke to that suggest an improper motive" and no "reason to believe S.L. misrepresented the defendant's involvement." CP 248-51.

5. The prosecutor committed serious, prejudicial misconduct and there is more than a reasonable probability that misconduct had an impact on the verdict.

6. The sentencing court exceeded its statutory authority and violated Hesselgrave's rights in imposing improper conditions of community placement. Hesselgrave assigns error to the following conditions contained in the judgment and sentence, Appendix H:

   13. You shall not possess or consume any controlled substances without a valid prescription from a licensed physician.

   . . . .

   16. . . . Do not have any contact with physically or mentally vulnerable individuals.

. . .

25. Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex. Also, do not possess or use any cell phone that may provide access to the Internet as well.

CP 238-41 (emphasis added).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion and were Hesselgrave's rights to confront and cross-examine witnesses and to present a defense violated when the trial court excluded evidence which would have impeached the victim whose word was the sole evidence against appellant?

   Further, is reversal required because the prosecution cannot meet the heavy burden of proving that the constitutional errors were harmless beyond a reasonable doubt as those errors had a direct impact on the only issue in the case - the credibility of the victim's claims?

2. In the alternative, was trial counsel prejudicially ineffective in failing to properly impeach the victim, thus depriving Hesselgrave of his rights to confront and cross-examine witnesses and to present a defense?

3. Were Hesselgrave's rights to meaningful confrontation and to present a defense further violated when the trial court prevented questioning and evidence directly relevant to whether the witness and the victim had a motive to lie?

4. Did the trial court abuse its discretion in finding a child competent and admitting hearsay statements from the child where the child's competence was not properly determined and there was insufficient corroborating evidence to support admission of the hearsay?

5. Did the prosecutor commit serious, prejudicial misconduct in repeatedly arguing that the jury only had three choices - that the child victim was lying on her own, was being coached to lie or was telling the truth? Further, is there more than a reasonable probability that the misconduct affected the verdict where the only evidence against the

defendant was the word of the child?

6. The Legislature authorized a sentencing court to impose a condition of community custody prohibiting consuming or possessing controlled substances without a valid prescription, but did not limit the medical personnel from whom such a prescription must be issued.

   Did the sentencing court err and was the condition limiting Hesselgrave to prescriptions from "a licensed physician" unauthorized where it is lawful in this state for many other types of medical personnel to issue prescriptions and the Legislature has not chosen to impose such a limitation?

7. Was the condition prohibiting contact with "physically or mentally vulnerable individuals" improper as not crime-related?

8. Did a condition fail to satisfy due process requirements by ordering Hesselgrave not to patronize "establishments that promote the commercialization of sex" but failing to give any notice of which establishments might meet that definition and failing to define the term so as to allow for arbitrary enforcement?

9. Where there is no evidence that the defendant ever accessed the internet by cellular phone during the incident, is a condition prohibiting use or possession of any phone capable of such access a crime-related prohibition?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Steven Hesselgrave was charged by amended information with first-degree rape of a child, alleged to be a "domestic violence" incident. CP 46; RCW 9A.44.073; RCW 10.99.020. Pretrial, child hearsay and competency and trial proceedings were held before the Honorably Judge Ronald Culpepper on July 15, September 30, October 21, December 15-16, 20, and 23, 2011, April 20, June 4, 15, 25, August 9, 13, 21-23, and September, 10-13 and 17-21, 2012. On September 21, a jury found Hesselgrave guilty as charged. CP 220-24.

Judge Culpepper imposed a standard-range indeterminate sentence on November 9, 2012. CP 225-41. Hesselgrave appealed and this pleading follows. See CP 264-85.

2. Testimony at trial

In the autumn of 2010, when S.L. was about eight and a half years old, she and her mom, Leona Ling, were living at a motel where a man named Kelvin Palfrey also lived. 4RP 322, 616. According to S.L., Palfrey would take care of her when S.L.'s mom "couldn't make if back from school." 4RP 322. A counselor who later treated S.L. said that S.L.'s mom had left S.L. with a babysitter and Palfrey was the sitter's boyfriend. 4RP 616.

Palfrey, who was a registered sex offender, was arrested alone in the motel room with S.L. in October of 2010. S.L. said she was scared when police showed up because she thought that meant that she was in trouble and they were there to arrest her. 4RP 624.

By the time of trial in this case, S.L. was saying that Palfrey had touched her on her "vagina and butt" and that he also made her watch other people having sex on TV in the hotel room. 4RP 323, 342. The 10-year old described it as watching a man"put his penis in the woman's vagina." 4RP 342. S.L. said she saw a "few more" movies of people having sex, but could not remember what the other ones were about. 4RP 343.

S.L. did not remember ever saying that, although Palfrey was naked and wanted her to touch him, she had not actually done so. 4RP 343. When asked if he actually tried to put his penis into her vagina, she

said, "I do not know," and she did not remember ever telling anyone he had. 4RP 343. She also did not remember telling anyone that Palfrey had laid on top of her and tried to put his penis in. 4RP 344. She did recall saying that Palfrey had pulled down his pants, pulled down her pants and "rubbed himself" against her. 4RP 344. She also remembered telling people he had said, "I will show you my penis if you show me your vagina." 4RP 344.

Among the other things she could not remember, S.L. did not remember telling her mom that Palfrey "was doing that stuff for three days" before his arrest. 4RP 344.

During the investigation of the Palfrey incident, S.L. went through interviews, forensic and otherwise, and began counseling with Anna Watson, a mental health therapist. 4RP 323, 605-609, 615-18. Watson, who started seeing Ling in November of 2010 and and S.L. starting in December of 2010, described S.L.'s disclosures of Palfrey as starting with a "pretty minimal disclosure" which, over time, ended up with "quite a bit more." 4RP 615, 624.

Initially, Watson said, S.L. told the therapist that Palfrey had showed her pornography. 4RP 629. Ultimately, S.L. also said Palfrey had engaged in full sexual intercourse with her. 4RP 631.

Watson testified that, while the focus was "on the specific trauma," Watson also did a "little safety check" at the beginning of treatment to try to determine who are the people that are "safe" or "not safe" in the child's life. 4RP 619, 630. She did that "safety check," Watson said, "in case there is another person in their life that's abusing them." 4RP 619.

When Watson did the "safety check" with S.L., S.L. never said anything about anyone else abusing her at all. 4RP 619-30. During therapy, when asked about the individual family members, friends, teachers and others in her life and whether they gave her "touches that are safe or not safe," S.L. identified only Palfrey as having touched her improperly. 4RP 620.

Watson described the "trauma narrative" she used for the counseling, which included having S.L. "write the story of what happened." 4RP 644. Watson then would talk to her about what she shared and "validate[] her feelings." 4RP 645. Watson admitted that she was not concerned with whether a child was telling the truth or not. 4RP 626. Instead, Watson said, her role was "just to respond to what the individual patient says" and support the patient's feelings. 4RP 626, 628-45. Watson also gave kids positive reinforcement when they gave more detail. 4RP 640.

Watson's last session with S.L. was on March 25, 2011. 4RP 615. By the end of the 11 counseling sessions, Watson said, S.L. was "sufficiently healthy to terminate counseling." 4RP 633. Indeed, Watson noted, S.L. was no longer having trouble sleeping, was not having nightmares and was not suffering from high anxiety anymore. 4RP 633. S.L.'s school behavioral problems had also improved. 4RP 635.

At the end of her treatment of a child, Watson said, she did a section called "enhancing future safety" in which they talked about who a kid should talk to if there were future issues, if they had learned that they would be believed and helped if they "told," and helping to make sure the

child would feel "good" about telling in the future. 4RP 623. She said that the protocol she used included an element that would "affect a child's willingness" to disclose abuse in the future if they were ever "in an uncomfortable situation." 4RP 623.

Not once during any of the interviews or counseling sessions for Palfrey's sexual abuse of her did S.L. mention anything about her stepdad, Steven Hesselgrave, having done anything improper to her, too. 4RP 323, 633. Several months later, however, on the bus on the way to the Boys and Girls Club after school, however, S.L. said either that her stepdad had said "to try his penis because it tasted like mint" or "to taste her dad's private because it tastes like mint, or something." 4RP 496-97, 507. One of the kids on the bus, who was 11 years old by the time of trial, said that, when S.L. was getting off the bus, she also said to someone, "he also said it tasted like chocolate chip cookies." 4RP 498.

One of the kids on the bus repeated this claim to someone at the Boys and Girls Club who then contacted a school counselor. 4RP 455, 483, 486, 500. Another kid, who was 8 at the time of trial, told her "kind of stepmom" about it and "accidentally" told the principal of the school they all attended, too. 4RP 509-10. The "kind of stepmom" said that the 8 year-old had made it sound like S.L. had not said that her stepdad had said his penis tasted like mint but instead that S.L. had herself said it had that taste. 4RP 526-27.

The school counselor called state Child Protective Services (CPS) and reported the allegation. 4RP 455, 483. S.L. was questioned in mid-May of 2011 by Christine Murillo, a CPS social worker. 4RP 452-53.

Murillo did a "safety interview" of S.L., asking questions to determine if S.L. was still having contact with the alleged abuser and decide if a forensic interview was "warranted or not." 4RP 455-57. In that interview, Murillo said, S.L. disclosed sexual abuse. 4RP 457.

Murillo also said that S.L.'s "emotional state" when reporting the abuse was that she was "at ease," and "talkative." 4RP 452.

Murillo spoke with the detective assigned to the case, Jennifer Quilio, and a forensic interview was scheduled by Cornelia Thomas on May 25, 2011. 4RP 464, 466, 547, 552.

Thomas testified about doing that interview and having the goal as investigating, not obtaining a disclosure. 4RP 662-63, 666. She said S.L. was able to tell the difference between a truth and a lie and her demeanor during the interview was "fine" and "lively." 4RP 678.

When asked if she knew why she was there, S.L. said it was because she was raped by Palfrey. 4RP 678. At that point, Thomas said she was not there to talk about that but wanted to know about anyone else it had happened with, and S.L. identified Hesselgrave and made disclosures. 4RP 678-80. They included watching a video involving a naked girl and an elephant online. See Ex 1. With Thomas, S.L. denied saying anything about abuse to anyone else, like her friends at school. Ex 1.

In the interview, S.L. indicated that Hesselgrave's penis was about the length of her forearm, nearly a foot long. 4RP 72.

S.L., who was ten years old at the time of trial, testified that, when she was six years old and living in the same house as him, her then-

stepfather, Steven Hesselgrave, made her have sex with him once. 4RP 308-308, 312. S.L. said it occurred when she was sleeping on a bed which was behind the bedroom door in Hesselgrave's room. 4RP 311-12, 321. The bed was where Hesselgrave's dad usually slept but S.L. said she also usually slept there, while her two younger brothers slept on the floor in the living room. 4RP 311-12.

Initially, S.L. testified that Hesselgrave's dad would sleep in the same bed as her "[m]ost of the time." 4RP 312. Later in trial, however, she said that she did not sleep in the same bed as "Big Jack," because he was often gone at night. 4RP 350. She was then asked, "did you ever sleep with him in the same bed," and S.L.'s answer at that point had become, "[n]o." 4RP 350.

S.L. said that, when he came to wake her up, Hesselgrave was not wearing any clothes but just his underwear. 4RP 314. Once they got into the bedroom, he then took off her clothes and his underwear. 4RP 314. According to S.L., he got onto the bed, picked her up and put her on his stomach and then, "put his penis in my vagina." 4RP 314-15. He did not move but just "left it there." 4RP 315.

At some point, S.L. said she was going to the bathroom. 4RP 315. He came in after she was done, she said, and put his penis into her butt while she was next to the sink, standing up. 4RP 315-16. S.L. said she had her feet on the floor and he was standing upright behind the then 6-year old girl. 4RP 329-30. When he put his penis into her bottom he did not grab or touch anything first and did not spit or anything like that. 4RP 330. She said it went right in halfway at first and then all the way in. 4RP

330.

S.L. admitted she was shorter then and that Hesselgrave is an adult. 4RP 329. Although she said it really hurt, she said, she never cried or made a noise, although she said she felt like it. 4RP 331. Afterwards, there was nothing wet on her body or coming out of her body. 4RP 332.

At trial, S.L. testified he stopped and then took her back to the bed, having vaginal sex with her again with him on his back and her on his stomach. 4RP 317. This time, she said, he was going up and down. 4RP 317. She told him she was going to go get a drink and he said "no," after which S.L. said he "peed" in her mouth. 4RP 318. She was going to spit it out but he told her to drink it. 4RP 319. She said it tasted like a bar of soap but she was sure it was pee. 4RP 333.

After that, S.L. said, he took her back to the bed and "licked my vagina." 4RP 320. He then showed her some magazines of naked women and a video of a woman having sex with an elephant on the computer. 4RP 320.

At trial, S.L. said that, after showing her the porn, Hesselgrave woke up S.L.'s younger brother, J1, told him to come into the bedroom and then told the three- or four-year old boy "to do the same thing that Steve did to me." 4RP 320. S.L. said he had J1 pull down his pants and underwear and put his penis in S.L.'s mouth. 4RP 321. S.L. also said that Hesselgrave told her to "bite on" J1's penis, and to do so "hard," so she did. 4RP 321. S.L. said that J1 did not say anything or cry or anything and, after that, Hesselgrave told J1 to get dressed and go back to bed, and S.L. and Hesselgrave did the same. 4RP 321.

J1, who was 7 at trial, testified that, when S.L. visited or was there at the home, he never saw her naked on Hesselgrave's bed. 4RP 730-35. He was never told by his dad to "get naked" with S.L., was never naked with her on her dad's bed and was never naked with her while his dad was also naked. 4RP 730-35.

CPS worker Thomas, who conducted the initial "safety" interview of S.L., admitted that she specifically asked S.L. at the end of the session if there was anything else important that had happened, other than what S.L. had just disclosed, but S.L. said nothing about anything occurring with J1. 4RP 687. Thomas and S.L. had, in fact, talked about J1 at some points during the interview. 4RP 687. The disclosure of J1 being involved had occurred after the trial proceedings began. See 2RP 131.

In addition to what she said occurred, S.L.'s memory of when it occurred changed, too. First, she told police and forensic investigators that it happened when she was living with Hesselgrave at his home. 4RP 335. At trial, however, S.L. maintained that the incident had not occurred when she lived with him but instead after that, one night when she visited him because her mom was at a bachelorette party. 4RP 325. Indeed, she was "sure" that it was the night of the party. 4RP 326, 329, 335.

S.L. did not know why she told the forensic interviewer that it was while she and the boys, J1 and J2, lived with Hesselgrave but thought it might be that she "made a mistake." 4RP 335. She explained, "I was only six at that interview, I think." 4RP 335. Then she said, "[i]t might have been six or it might have been eight." 4RP 335.

According to S.L.'s mother, Leona Ling, S.L. lived with

Hesselgrave for about 9 months, from about the end of December 2008 or in January 2009 to about August or September of that same year. 4RP 374-75. At the time, Ling was living at a motel, and she asked Hesselgrave to take all of the kids because she had financial problems and could not really take care of them. 4RP 376, 390. Ling and Hesselgrave were not yet divorced but Ling was already seeing Chris Ling, the man she would later marry after the divorce from Hesselgrave was final. 4RP 398.

When S.L. returned to living with Ling and Chris[1] in about September of 2009, they lived in various places including transitional housing and ultimately ended up at the Best Knights Inn motel in 2010, which is where events unfolded with Palfrey. 4RP 377.

Ling said in October of 2010, S.L. stayed with Hesselgrave for one night while Ling was at a bachelorette party. 4RP 382. S.L. had asked to spend the night at Hesselgrave's while her mom was out. 4RP 382, 415. When she picked S.L. up the next morning, Ling admitted, S.L.'s demeanor was "fine." 4RP 415-16. S.L. seemed happy and healthy and had no complaints. 4RP 415-16. Indeed, Ling admitted, S.L. told her mom that "she had a blast" at her stepdad's house. 4RP 416.

S.L. did not complain of any aches or pains within the next week or two of that night. 4RP 416. Ling said her daughter acted, moved and played "fine" and said nothing about physical pain when walking, sitting or anything similar. 4RP 419.

Ling conceded that this was true not only after the bachelorette

[1]Because they share a last name, for clarity Leona Ling will be referred to as "Ling" and Chris Ling will be referred to as "Chris," with no disrespect intended.

party but also when S.L. lived with Hesselgrave. 4RP 410. During the eight months she was living with Hesselgrave, Ling conceded, S.L. never went to the hospital. 4RP 417. S.L. never complained about anything relating to Hesselgrave during that time. 4RP 417. Instead, S.L. seemed happy and did not ever seem mad, angry or fearful. 4RP 417.

S.L. admitted at trial that she missed living with her younger brothers, J1 and J2. 4RP 336. She told her mom she missed them, because they were living with Hesselgrave and she was living with Ling. 4RP 337-38.

S.L. also admitted she really does not like Hesselgrave and she knew that, if he went "away to jail or something like that," it would be easier for her to get to live with her brothers. 4RP 337. S.L. knew that it would be easier if he was gone before she made her disclosure to the first interviewer. 4RP 337.

At the forensic interview, when she was asked about the difference between the truth and a lie, S.L. had asked, "if I tell the truth that they were going to - - if they were going to go to Steve's house and arrest him . . . do I get my brothers?" 4RP 337.

Ling admitted that she had wanted to move to New York with S.L. and the boys, because Chris had family there. 4RP 392. Ling was not going to be allowed to do what she wanted, however, because Hesselgrave would not agree to let her take the boys so far away. 4RP 393. He only agreed that, if she moved to New York, the boys could stay with her during the summer if they flew back and forth with her. 4RP 393.

At some point, one of the boys told Hesselgrave that Ling had been

saying that, when she got to New York, she was going to "fight for the boys." 4RP 444. As a result, Ling was only allowed to take one boy at a time for visitation. 4RP 444.

Ling admitted that she had talked with S.L. about moving out to New York with Chris and the boys to "start a new life." 4RP 420-21. She also told S.L. that Hesselgrave was not going to allow it, so S.L. knew she was only going to be able to see her brothers during the summer unless something changed. 4RP 420-21.

Ling tried to downplay it, however, first implying that the idea of moving had been a passing thought and then claiming that she had not even gone to New York at any point. 4RP 521-22. The school counselor at S.L.'s school, however, said S.L. and her mom had gone to New York, and were talking about moving there if they were able to find work. 4RP 491. In fact, the counselor had said that Ling had unenrolled S.L. but S.L. ended up back in school at few weeks later. 4RP 521-22. The counselor knew that the family had "definitely' gone to New York "with the plans to stay if they found jobs," and remembered, "[t]hey were excited about that." 4RP 523. The school attendance professional testified that S.L. was "transferred out" of the district but ended up back in about 10 days later. 4RP 760, 765.

Ling initially claimed she had joint custody with Hesselgrave of both of their boys, J1 and J2. 4RP 378, 388. When confronted with the Parenting Plan and other documents, however, Ling admitted that Hesselgrave actually had sole custody. 4RP 396. In fact, Ling had to pay him child support, something which she was behind in doing, although she

claimed not to know the outstanding balance. 4RP 378-79, 396.

Ling also initially said she had no restrictions on seeing the boys. 4RP 396-97. A moment later, however, again when confronted with documents, Ling admitted that, in fact, she was required to make arrangements for visitation - supervised - a week prior to any such visitation. 4RP 397. Ling maintained that she and Hesselgrave "never followed" those restrictions. 4RP 397-401.

Ling was not herself allowed to go pick up the boys from school. 4RP 423. When asked if she was "restricted" from going to the school, she answered, "[y]es and no." 4RP423. She said she was restricted from picking the boys up at the office but the teacher would let her do it. 4RP 424.

Ling denied telling the school she and Hesselgrave had joint custody and she had paperwork to prove it. 4RP 429. But in her defense interview before trial, she had said, to the contrary, that she had taken her custody papers to the school and that they "specifically said" she had joint custody. 4RP 433, 438.

The day Hesselgrave was arrested for the allegation, Ling had called police and "reported kidnapping." 4RP 386. Hesselgrave had been talked to by police and he was mad at her for not telling him the investigation had been going on. 4RP 384-85. He was also angry, Ling admitted, because he thought Ling had pushed S.L. into making the claims. 4RP 385.

According to Ling, she called to talk him about being allowed to pick up the kids early but he said she was never going to see him or the

kids again and that he was "leaving for good." 4RP 385-86. She then called police and, she admitted, told them that she and Hesselgrave had joint custody and she thought he was going to take the kids. 4RP 431.

At trial, she maintained that it was true "[i]n my eyes" that she had joint custody, but she conceded that the parenting plan giving Hesselgrave full custody was then about a year old. 4RP 431.

After her conversation with the 9-1-1 operator that day, Ling also spoke to Detective Quilio, who went to the elementary school and decided to take the boys into "protective custody." 4RP 567-69. They encountered Hesselgrave and his dad at the school and the men were detained. 4RP 569-70.

After the arrest, Murillo interviewed Hesselgrave and asked him whether S.L. might have seen his penis "outside a stepfather/stepdaughter relationship" and he responded, "yes, she may have." 4RP 562. They talked about it maybe happening if he got out of the shower or something like that. 4RP 562. Murillo also claimed that Hesselgrave said that he watched pornography at night when the kids were asleep and it was possible that S.L. might have woken up and inadvertently seen him masturbating "while watching porn in the same room." 4RP 562. He also said that he had watched "animal pornography" but when asked about an elephant video was unfamiliar with that one. 4RP 564.

When Murillo asked if Hesselgrave had ever "performed sexual acts on" S.L., he said he had not. 4RP 564. He repeated it unequivocally at trial. 4RP 886. Regarding the claims involving J1, Hesselgrave noted that, at age 3 or 4, J1 had not been able to dress or undress himself without

help. 4RP 891.

Julie Armijo, a defense investigator, testified that, when asked what happened with Hesselgrave, at the defense interview S.L. said she had forgotten because it had been "like a long time since that happened." 4RP 742. When asked if she remembered what happened, she said, "I do not know." 4RP 746. She was unable to remember certain details and said it had been too long since things happened. 4RP 744.

Armijo testified that S.L. had said she did not remember telling anyone what happened with Hesselgrave. 4RP 747-48. S.L. told the defense that she had not talked with school friends or other friends about it. 4RP 748. Also in that interview, she denied saying that her dad's penis tasted like mint. 4RP 748.

D. ARGUMENT

1. HESSELGRAVE WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE, TO CONFRONT AND CROSS-EXAMINE WITNESSES AND, IN THE ALTERNATIVE, COUNSEL WAS INEFFECTIVE

Under the state and federal due process clauses, a defendant in a criminal case has a fundamental right to present a defense. See State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983), limited on other grounds by State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); Rock v. Arkansas, 483 U.S. 44, 53-55, 107 S. Ct. 2704, 97 L. 2d 37 (1987); Sixth Amend.; Fourteenth Amend.; Art. 1, § 22.. Further, both constitutions guarantee the accused the rights to confrontation and cross-examination of witnesses. See Hudlow, 99 Wn.2d at 14-51; Davis v. Alaska, 415 U.S. 308, 315-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Sixth Amend.;

Fourteenth Amend.; Art. 1, §22.

In this case, this Court should reverse, because Mr. Hesselgrave's rights to present a defense and to meaningful confrontation and cross-examination were violated. In the alternative, counsel's unprofessional failures on this issue violated Hesselgrave's Sixth Amendment and Article 1, § 22, rights to effective assistance of appointed counsel.

a. Preventing full impeachment of S.L.

i. Relevant facts

At trial, in cross-examination, counsel tried to ask S.L. about the pretrial defense interview, eliciting that she did not remember that interview at all. 4RP 325. A few minutes later, after S.L. talked about the sexual acts she said Mr. Hesselgrave had committed, counsel again asked if S.L. remembered the defense interview "at all," and S.L. answered, "[n]o." 4RP 333.

Counsel went on to ask S.L. a series of questions, framing them as asking is she had "ever told anyone" certain things. He tried to ask her about the change in her claims, because at trial she said Hesselgrave had vaginal sex with her in the bedroom, anal sex in the bathroom, vaginal sex again in the bedroom and then, after that, oral sex but previously she had a completely different chronology, with the oral sex as the first part of the incident. 4RP 332. She denied having ever given a different chronology. 4RP 334.

S.L. also denied a number of other things, such as whether she had ever said that Palfrey had shown her a "lot of people" having sex in videos. 4RP 434. She did not recall originally saying only that Palfrey

had been naked and wanted her to touch him but she had not. 4RP 343. She also did not think she had ever said that Palfrey had tried to put his penis in her vagina, and did not recall ever saying he had laid on top of her and done that. 4RP 343-44.

When counsel tried to ask if S.L. had ever said that Palfrey got on top of her and started shaking the bed "and it was hard to breathe," the prosecutor objected that it was irrelevant, cumulative and "403." 4RP 344. Counsel explained it was impeachment but the court sustained the objection. 4RP 345. Counsel then asked S.L. if she had said that Palfrey kissed her cheek and touched her "butt and vagina" and the prosecutor said, "[s]ame objection." 4RP 435.

With the jury excused, counsel then told the court that S.L.'s statements had changed fundamentally from that Palfrey was "only naked and watching" to that he was rubbing up against her and then that he was getting on top of her. 4RP 346. Counsel argued that it showed that S.L. would "make one allegation" and then later give "a whole different explanation of what happened." 4RP 346. He said that was "exactly what she is doing in this case." 4RP 347. The prosecutor argued these were "completely collateral issues." 4RP 347. The court agreed with the prosecutor and excluded the evidence. 4RP 347.

A few minutes later, counsel tried to ask S.L. about what she had said in the defense interview, such as that she had forgotten what had happened with Palfrey, that she did not remember anything about watching naked people on TV, that she did not remember if Hesselgrave had even touched her and that she remembered nothing about the incident. 4RP

349. S.L. said she did not remember ever telling counsel any of those things. 4RP 349.

Later in trial, counsel tried to ask Detective Quilio about what S.L. had said in her interview with Thomas. 4RP 575. Ultimately, the court sustained the objection. 4RP 576. After Quilio's testimony, again with the jury out, the parties argued about the issue, with counsel noting that prior inconsistent statements can be used as impeachment and the prosecutor arguing, "[o]nly if it is sworn testimony at another proceeding." 4RP 581.

Then, during Armijo's testimony, when counsel asked about what S.L. had said in her interview with the defense, the prosecution objected and the court excused the jury. 4RP 749. The prosecutor then argued that the interview was "not inconsistent with her trial testimony," a claim counsel disputed, noting that, at the time of the interview, S.L. no longer had any memory of the much of the incident but now, later, at trial, she did. 4RP 751. The court then asked if S.L. was ever shown the transcript of the defense interview and counsel thought it had happened but also argued, "she doesn't have to be shown the transcript prior to the impeachment," and "[s]he just needs an opportunity to explain it," which the state could by recalling S.L. to the stand. 4RP 751.

The court agreed with the defense that the defense interview and testimony was mostly inconsistent. 4RP 753. The judge nevertheless sustained the prosecutor's objection, stating that, under ER 613(b), "[e]xtrinsic evidence of a prior inconsistent statement by a witness" was not admissible "unless the witness is afforded an opportunity to explain or

deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon." 4RP 753. The court said, "[t]hat hasn't happened here." 4RP 753.

Counsel objected that the opportunity to explain did not have to be made "prior" to the impeachment and the court agreed that the prosecution could call S.L. back as a witness. 4RP 754. The court nevertheless sustained the objection, stating, "[s]he could have been asked about this at the time and wasn't." 4RP 754.

A little later, counsel raised the issue again, arguing that extrinsic evidence could be introduced without first cross-examining the witness about the specific statement in question. 4RP 767. The court again stated its belief that S.L. had to be confronted with the document and refused to change its ruling. 4RP 769.

At that point, counsel said he wanted to recall S.L. to testify. 4RP 769. The prosecutor objected, "they had their opportunity to cross-examine her." 4RP 770, 777. Counsel responded that he had sufficiently cross-examined S.L. to be able to bring in the prior inconsistent statements through Armijo. 4RP 779. He explained that he had chosen the method he was using because he did not want to go through a long cross-examination with the child, thinking it would be "hard on her." 4RP 779.

The court recalled that the defense had asked very few questions about the defense interview during cross-examination, but counsel reminded the court that he had asked several questions about remembering the interview at all and S.L. had denied any memory of it, contrary to her very specific memory of what she said had happened at trial. 4RP 780.

Counsel argued it was "only fair" that he be allowed to impeach each statement of S.L. about the abuse, as the prosecution got to present those statements to the jury. 4RP 780.

The following exchange then occurred:

> THE COURT: She was here before. Wouldn't that have been the time to cross-examine her?
>
> [DEFENSE COUNSEL]: It certainly normally is, but we have a nine-year-old, almost ten.
>
> THE COURT: She's ten now.
>
> [DEFENSE COUNSEL]: She's ten. I'm going to hand her the transcript and say: Okay; you don't remember your answer; read what my questions was; read your answer.
>
> That seems very cumbersome and difficult for a ten-year-old especially in front of a jury, so I thought, well, she has denied - - or she has made an inconsistent statement. She has addressed the circumstances around the interview. She doesn't really remember what happened so, okay, that's enough. I don't want to go in there and look like a mean old criminal defense attorney who is beating up on a ten-year-old, so I did it as gently as I could and thought that I would go through the rest of the impeachment after the foundation was laid with Julie[.]

4RP 781. The court then said:

> Again, there are these rules that I'm supposed to follow, and one of them is 613(b), a person is supposed to have an opportunity to explain or deny, and that wasn't done on her cross-examination.

4RP 782. The court said it would allow a few questions but "I don't think we need to have 20 questions and have her say "I don't remember." 4RP 782. Counsel strongly objected to the court's "limiting cross-examination of the only witness in this case to the incident" and said "the impeachment is not done." 4RP 782. Counsel urged the court to hold that counsel's desire to try to be "easy" on S.L. was not a great reason to limit "my ability

to cross." 4RP 783.

Counsel later recalled Armijo to the stand but did not ask many questions because of "the Court's earlier ruling." 4RP 846-48. With the jury out, counsel objected that he had wanted to recall S.L. but was not allowed to do so, and had wanted to ask the questions of Armijo, but the court had refused that, too. 4RP 851-65. Counsel then detailed all of the questioning he would have done of S.L. or Armijo, including that S.L. kept saying she did not remember what had happened, did not really know what it was, did not want to talk about it, did not know if it happened by herself or not, did not want to live with Hesselgrave because he yells at her, did not remember telling anyone at school anything, did not talk to the woman at school about Hesselgrave, does not remember ever seeing a movie with naked people, could not remember what happened with Palfrey, did not know if she talked to her mom about it, never told anyone her daddy's penis tasted like mint, had never talked to anyone about being touched inn improper way, denied ever saying anything about animals or an elephant and never talked to her mom about what would happen if she lied. 4RP 852-65.

Counsel also read into the record the portion of the interview where the child admitted she really wanted to live with her brothers and Chris and Ling, that it would be easier to do that if Hesselgrave was not around, that if he went to prison that was what would happen and that she was afraid that if she said something "different" than her claims of abuse to the interviewers that she could not live with Chris and Ling. 4RP 864. Counsel argued that all of the impeachment was essential as S.L. was the

only fact witness in the case. 4RP 864-65. The court did not reconsider its ruling.

ii. Hesselgrave's rights to present a defense and to meaningful confrontation of S.L. were violated

The state and federal due process clauses require that a defendant in a criminal trial is given "the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). As a result, as part of the right to present a defense, the defendant is entitled to present evidence of his version of events. See Darden, 145 Wn.2d at 662. In addition, a defendant's right to impeach a witness with evidence of a prior inconsistent statement is guaranteed by the confrontation clauses of both federal and state constitutions. See State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1988); Davis v. Alaska, 415 U.S. at 316-18.

In this case, both Hesselgrave's rights to present a defense and to meaningful confrontation of the only real witness against him were violated by the court's rulings below. As a threshold matter, although this Court ordinarily reviews issues of exclusion of evidence for abuse of discretion, where there is an issue of a potential violation of the right to present a defense or the right to meaningful confrontation, review is de novo. See State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

On such review, this Court should reverse. In precluding counsel from the crucial impeachment of S.L., the court was concerned with ER 613, which provides:

Extrinsic evidence of a prior inconsistent statement by a witness is

> not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness.

The court below apparently believed that the evidence was inadmissible because counsel had not specifically gone through every question with S.L. when she was on the stand.

In this, however, the court was wrong. The credibility of a witness may be attacked by any party, including the one calling the witness. See State v. Lavaris, 106 Wn.2d 340, 344, 721 P.2d 515 (1986). Further, a witness' prior statement is admissible for impeachment purposes if it is inconsistent with the witness' trial testimony. See State v. Newbern, 95 Wn. App. 277, 292, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999). The reason for allowing such evidence is that a prior inconsistent statement "tends to cast doubt on the credibility of whomever made the other statement." See State v. Allen S., 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999), review denied sub nom State v. Swagerty, 140 Wn.2d 1022 (2000).

Here, the trial court agreed that S.L.'s pretrial statements and testimony were inconsistent. The court's concern, however, was that the proper foundation of ER 613 had not been made because S.L. was not specifically shown all of the statements and asked about each. But the court was incorrect, because "it is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination or *after the introduction of extrinsic evidence*." Johnson, 90 Wn. App. at 70 (emphasis added).

Indeed, the Johnson Court specifically held that there was a

"relaxed" foundational standard under ER 613, which had required, prior to admission of a prior inconsistent statement, that the examiner "direct the declarant's attention to the exact content of the allegedly contradictory statement as well as to the time and place where" it was made. Johnson, 90 Wn. App. at 70. The current rule, however, "does not specify any particular time at which the witness must be given the opportunity to explain or deny." Id, quoting, Park et al., Evidence Law 436-37 (West Group Hornbook Series, 1998).

As the trial court itself here noted, there was a full opportunity for S.L. to explain or deny her statements on recall, after the impeachment had occurred. This is sufficient. See Johnson, 90 Wn. App. at 70.

In any event, the trial court was actually not correct that counsel had failed to follow the requirements for impeachment under ER 613 in his cross-examination of S.L. Two cases are instructive. In Johnson, supra, counsel asked about when the detectives talked to her, whether she remembered the conversation, if she remembered what police asked her, if she understood that there were be no monetary award without someone being blamed for the crime, and, after a denial, asked, "[d]idn't you tell [your girlfriend] that very same thing?" 90 Wn. App. at 68 (emphasis omitted; alteration in original). The Johnson Court held this was sufficient to establish a foundation for impeaching based on the prior inconsistent statements to police, even though the witness had denied having any memory of what she said in the police interview or otherwise. Id.

In contrast, in State v. Horton, 116 Wn. App. 909, 916-17, 68 P.3d 1145 (2003), counsel was deemed not to have followed the requirements

for impeachment with a prior inconsistent statement when counsel asked if the victim had previously had sex with anyone other than the defendant prior to a physical exam and whether the victim had told the prosecutor that morning on direct examination that she had not had sex with anyone else. Id. Defense counsel then tried to admit evidence of the victim's prior statements to two other people in which she stated she had been sexually active with prior boyfriends. Id. On review, this Court held that counsel had failed to lay the appropriate foundation because he never asked her to explain or deny her pretrial statements at all. Horton, 116 Wn. App. at 913.[2]

Here, as in Johnson, counsel specifically asked about the pretrial interview. Over and over, counsel tried to inquire of S.L. about what she said during that interview which was inconsistent with her testimony at trial. And for most of the questions, S.L. simply denied remembering the interview at all. Unlike in Horton, S.L. was directly asked about her pretrial statements and given the opportunity to explain them. Further, S.L. remained available for recall and the opportunity to explain could have been given after the admission of the extrinsic evidence. See, e.g., Johnson, 90 Wn. App. at 70.

Thus, the proper foundation was made under ER 613 and the trial court erred in holding to the contrary. But even if the proper foundation had not been laid, that did not end the inquiry. Regardless whether evidence would be excluded under an evidentiary rule, when the

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[2]The Horton Court found counsel ineffective for this failure. 116 Wn. App. at 916-17. Counsel's ineffectiveness in this case is discussed in the alternative, *infra*.

defendant's constitutional rights are implicated by that exclusion, the evidentiary ruling alone does not dispose of the issue. See State v. Baird, 83 Wn. App. 447, 482, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997). Instead, the reviewing court must examine the reasons underlying the evidentiary rule in order to determine if the rule is properly limited and has not operated to deprive the defendant of his constitutional rights under the facts of the case. 83 Wn. App. at 482.

Here, the exclusion of the crucial impeachment evidence violated not only Hesselgrave's rights to present a defense but also his rights to meaningful confrontation. Taking the former first, the right to present evidence is "not absolute, of course," and evidence that the defendant seeks to introduce "must be of at least minimal relevance." Jones, 168 Wn.2d at 720, quoting, Darden, 145 Wn.2d at 622; see also, State v. Gregory, 158 Wn.2d 759, 786 n. 6, 147 P.3d 1201 (2006). If evidence meets that minimal standard, the burden then shifts to the prosecution "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Jones, 168 Wn.2d at 720, quoting, Darden, 145 Wn.2d at 622. Only if the prosecution can meet that burden can even minimally relevant evidence be excluded without violating the defendant's constitutional rights to present a defense and to a fair trial. Jones, 168 Wn.2d at 720.

Where evidence is of *more* than minimal relevance, however, the burden of the prosecution is far greater. Darden, 145 Wn.2d at 622. And in all cases, even if the evidence is only of minimal relevance, our Supreme Court has cautioned courts to balance the interests by tipping the

balance heavily against the State and against exclusion of the evidence:

> The State's interest in excluding [even] prejudicial evidence must also 'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.' **We must remember that 'the integrity of the truthfinding process and [a] defendant's right to a fair trial' are important considerations.**

Jones, 168 Wn.2d at 720 (citations omitted; emphasis added).

As a result, when evidence is of high probative value, the Supreme court has flatly stated that there is **no** state interest that can justify its exclusion and excluding such evidence is a violation of the Sixth Amendment and Article I, § 22. Id.; see also, Hudlow, 99 Wn.2d at 16.

In this case, the evidence was of such high probative value. The threshold for "relevance" is, in fact, "low," and evidence is relevant if it has "**any** tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401 (emphasis added); Darden, 145 Wn.2d at 621.

Here, the fact that S.L. had previously made such inconsistent statements about what had happened and what she remembered was not just relevant, it was essential to the defense. Prior inconsistent statements are extremely relevant to credibility, and the need to introduce evidence of such statements is high. Newbern, 95 Wn. App. at 293. As the Newbern Court explained:

> even if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling.

Newbern, 95 Wn. App. at 293.

Further, meaningful impeachment is an essential part of the right to confrontation. Thus, in State v. Dickenson, 48 Wn. App. 457, 740 P.2d 312 (1997), review denied, 109 Wn.2d 1001 (1998), the appellate court found a violation of the defendant's rights to confrontation based upon the trial court's exclusion of impeachment evidence of a prior inconsistent statement. In that case, the defendant's former girlfriend testified that she had seen the defendant point what looked like a gun during an argument and had heard the "gun go off." 48 Wn. App. at 460-61.

During her interview with police, however, the ex-girlfriend had repeatedly said it was police who killed "her friend," and at trial she described the decedent as her *only* friend. 48 Wn. App. at 464. The trial court precluded the defense from presenting testimony from the police officer who took the statement and another man present for the statement about what the witness had said. On review, the appellate court held that the refusal of the trial court to allow the testimony was a violation of the defendant's confrontation clause rights, because the evidence was very relevant to the crucial issue of credibility. 48 Wn. App. at 470. Because of the overwhelming evidence against the defendant in that case, however, the Dickenson Court found that the prosecution had met its burden of proving the constitutional error harmless, beyond a reasonable doubt. 48 Wn. App. at 470-71.

Here, there is no such "overwhelming evidence." There is no physical evidence. There is no medical evidence. There were no independent witnesses. There was no corroboration, other than statements

which came from S.L. herself, that S.L. was abused. The exclusion of the crucial evidence of impeachment that S.L.'s allegations had changed, that she had said she did not remember anything several months before trial, and that her versions of events were suspect was a violation of Hesselgrave's rights to present a defense and to meaningful confrontation. This Court should so hold.

iii. In the alternative, counsel was ineffective

In the unlikely event that the Court finds that the proper foundation was not laid for the impeachment, reversal should be ordered based on counsel's ineffectiveness. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Horton, supra, is directly on point. In that case, this Court found that defense counsel's failure to comply with the rules of evidence regarding the victim's prior inconsistent statement was ineffective

assistance. 116 Wn. App. at 912. The defendant was convicted of rape of a child and child molestation. There was medical evidence of penetration and the victim had told the investigators that she had not been sexually active with anyone else. 116 Wn. App. at 911. Before trial, defense counsel had interviewed witnesses who had said that the victim had confessed to them about having been sexually active. Id.

At trial, however, counsel only asked on cross-examination if the victim had been sexually active in the past and had given testimony that she was not sexually active with anyone other than the defendant. 116 Wn. App. at 913. Counsel never asked about the victim's pretrial statements to the other witnesses about her sexual activity, nor did counsel ask for the victim to remain available for recall as a witness. 116 Wn. App. at 913. Counsel was later precluded from calling those witnesses to testify about the victim's admission of other sexual activity, because the trial court found counsel had failed to present sufficient foundation under ER 613(b). Horton, 116 Wn. App. at 914.

On appeal, this Court found that counsel's failures were ineffective assistance. 116 Wn. App. at 916-17. There was no evidence of any strategic reason to fail to impeach the crucial witness, this Court said. Further, the failure to comply with the requirements of the rule in order to be allowed to impeach the state's witness "was entirely to Horton's detriment," while compliance would have been only to his benefit. Id. This Court concluded that "an objectively reasonable attorney would have complied with ER 613(b) under the circumstances." Horton, 116 Wn. App. at 914. Further, this Court was convinced that there was a reasonable

probability that counsel's ineffectiveness had an effect on the outcome of the case. The testimony of the victim clearly implicated the defendant and counsel "could have defused the implication, at least in part," by presenting evidence that she had previously made inconsistent claims to others. Id.

In reaching its conclusion, this Court noted similar cases in which defense counsel "actually possessed evidence" which would have impeached the victim's credibility but had "blundered" in getting it into evidence. 116 Wn. App. at 923. Where "the victim's credibility was the major factor in the case, it was crucial for the defense to admit any evidence that would have questioned her credibility." Id., quoting, Wright v. State, 581 N.E. 2d 978, 980 (1991), cert. denied, 506 U.S. 1001 (1992).

Here, counsel possessed crucial evidence of impeachment. If this Court finds that counsel failed to present sufficient foundation to introduce that evidence, that failure should be deemed prejudicially ineffective and reversal and remand for a new trial with new counsel should be required.

b. Exclusion of other relevant impeachment

i. Relevant facts

Before trial, the prosecutor moved to exclude evidence of Ling's "poor character" and being a "poor mother." 2RP 90. Counsel agreed that character evidence is usually not admissible but pointed out that, under ER 404(b), such evidence is admissible to prove motive. 2RP 91. Later, he argued that he should be allowed to admit the parenting plan, order of child support, findings and conclusions and other documents regarding the divorce. 4RP 361-62. Those documents included language explaining

that, with Ling, there were concerns about "a long-term emotional impairment which interferes with the performance of parenting functions and long-term substance abuse that interferes with the performance of parenting." 4RP 361-62. There was also evidence in those documents that she Ling had withheld the boys from Hesselgrave for a protracted period of time, without good cause. 4RP 361-62.

Counsel argued that the evidence was relevant to show the contentious relationship, the extent of the custody dispute and the motive Ling had to lie about Hesselgrave in order to get custody of the boys. 4RP 366-67. The court ruled that most of the evidence was inadmissible under ER 404(b), except for the duty to pay child support and information about Ling being behind in paying. 4RP 367-69. The court later renewed its ruling after Ling tried to claim she had joint custody, allowing only the evidence of the custody arrangement but not anything else from the paperwork. 4RP 387.

ii. <u>The exclusion of the evidence was a further violation of Hesselgrave's rights to present a defense and to meaningful confrontation</u>

By excluding this evidence, the trial court again violated Hesselgrave's rights to confrontation and to present a defense. There can be no question that Ling's relationship with Hesselgrave was one of the fundamental issues at trial. The defense theory was that S.L. was either making up the allegations or had been put up to it whether consciously or not by the child custody situation and S.L.'s desire to live with her brothers, Chris and Ling. It was clear from the testimony that S.L. was aware of Hesselgrave as the stumbling block to the realization of that

desire. Evidence from a witness regarding the motives of an accuser for making allegations is not hearsay but rather proper impeachment for motive or bias. See State v. Spencer, 111 Wn. App. 401, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003).

Here, the evidence of that motivation - and the potential motives of Ling - was not properly, fully put before the jury because of the exclusion of the evidence of the contentiousness of the relationship. Further, the exclusion of the evidence gave a false impression of the true facts of the case. Jurors might reasonably question why anyone would go to such extremes as to claim abuse in order to get custody - thus questioning the defense. The excluded evidence, however, would have explained the need for such extremes, because it would have shown why Ling could not have likely gotten custody away from Hesselgrave without such an extreme complaint. This Court should also find a violation of Hesselgrave's rights to meaningful confrontation of the only fact witness against him and of his rights to present a defense.

Reversal and remand is required. Where, as here, the exclusion of evidence is in violation of the defendant's rights to present a defense and to meaningful confrontation of the state's case, the error is presumed prejudicial and the prosecution bears the burden of showing it harmless beyond a reasonable doubt. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). To meet that burden, the prosecution must show that the constitutional error could not have had *any* effect on the fact-finder's decision to convict. See, State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Further, this standard

is far different than the question asked when the challenge is one of sufficiency of evidence, where the question is whether any rational trier of fact could have convicted. See e.g., State v. Romero, 113 Wn. App. 779, 783-85, 65 P.3d 1255 (2005). For constitutional harmless error, the issue is whether *every* rational trier of fact would *necessarily* have reached the same result absent the error. Id.

The prosecution cannot meet that burden here. The only evidence against Hesselgrave was S.L.'s testimony and her hearsay statements to others. There can be no question that the excluded evidence could have had an effect on a rational fact-finder's evaluation of the credibility of S.L.'s claims, especially given the inconsistencies, changes in and problems with those claims. Reversal and remand for a new trial is required.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING S.L. COMPETENT AND IN ADMITTING HER CLAIMS WHERE THERE WAS INSUFFICIENT EVIDENCE TO CORROBORATE THEM

Before the state may introduce either a child's testimony or the testimony of others about what the child told them about abuse, the trial court must find that the statements are reliable and either the child must testify or must be found "unavailable." RCW 9A.44.120; see State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). A child who is not competent to testify is considered an "unavailable" witness. See id. If a child is incompetent, in the past our courts have held that her statements may not be used at trial unless there is not only sufficient corroborative evidence of the abuse but also a finding by the trial court that the

statements were reliable. Dependency of A.E.P., 135 Wn.2d 208, 227, 956 P.2d 297 (1998).

In this case, this Court should reverse, because S.L. was not competent to testify as that term is legally defined and there was insufficient corroborating evidence to support the conviction. Further, there is a serious question whether the statements were, in fact, reliable.

a. Relevant facts

At the competency hearing, S.L. testified about now living with her brothers and having her own room in foster care. 3RP 140. She knew the date of her birthday and some things like teacher's names. 3RP 140-50. She did not, however, know what a mistake was. 3RP 150. She admitted it was sometimes hard to remember things and her memories sometimes got all confused. 3RP 151. She agreed when counsel said, "[l]ike you remember one thing, but really you got it a little wrong." 3RP 151. She said that happened, in fact, "a lot." 3RP 151.

When she was describing Hesselgrave, she used the term "step-dad." 3RP 151. She admitted she did not know what it meant but repeated it because she heard other people say it so she thought it was "true." 3RP 152. She agreed it would be easier for her to be with J1 and J2 if Hesselgrave was in jail. 3RP 154. In fact, she said, she would like to see Hesselgrave in jail so she could be with her brothers. 3RP 154.

At the hearing, she testified that the incident happened the one night of the bachelorette party. 3RP 155. She thought she also told Thomas the same. 3RP 155. In fact, she clearly remembered telling Thomas that it was that night. 3RP 155. S.L. also said she had

remembered J1's abuse during a counseling session. 3RP 164-65.

S.L. was asked what she could remember from that night and responded that she could not remember anything except Hesselgrave "pulling out some magazines and taking me to his computer." 3RP 156. A moment later, when asked, "[d]o you remember anything with J[1]," she said "yes" and could not explain how she suddenly could remember. 3RP 156. The following exchange occurred:

Q: It's hard to remember things sometimes, isn't it?

A: Yes.

Q: And especially here, kind of tough?

A: Yes.

Q: All these adults around. Is that true?

A: Yes.

Q: And sometimes when you're asked questions, do you just feel that you need to give an answer?

A: Yes.

Q: And sometimes you give an answer even though it might not be exactly what you're thinking?

A: Yes.

Q: It's just easier to give the answer you think the adult wants to hear?

A: Yes.

Q: And there has been a lot of adults talk to you, right?

A: Yes.

Q: And you basically tell them what you think they want to hear?

A: Yes.

Q: Sometimes when you do that, it's not actually what really happened; is that true?

A: What was your question?

Q: Sometimes you'll tell adults something because you think that's what they want to hear even though it didn't actually happen. Does that happen sometimes?

A: Yes.

3RP 156-57.

In arguing that S.L. was not competent, counsel noted that S.L. could "barely remember things" and, more important, that she had testified "that she will give answers that she thinks adults want to hear." 3RP 169. Counsel noted that S.L. used the phrase "inappropriate touching" and other sophisticated language she obviously got from adults. 3RP 170. He pointed out that she had told everyone it had happened when she lived with Hesselgrave, but now was saying it was during the bachelorette party. 3RP 170. Counsel argued that it was all evidence that she did not have a "clear, accurate memory" of those incidents. 3RP 171.

Regarding the disclosures, counsel noted how unlikely it was that a three-year old could undress themselves as S.L. claimed. 3RP 173. He also talked about how unlikely it was that the three year old understood "put your penis into S[]'s vagina" and did it without assistance or complaint. 3RP 174. Counsel also noted that S.L. supposedly was ordered to - and did - bite J1's penis "hard," but the younger child apparently did or said nothing, according to S.L. 3RP 174.

In finding S.L. competent, the court first said that it was "unfair and certainly not the law that we require perfect witnesses." 3RP 188.

The court also stated that a six year old would have some difficulty remembering accurately, but that was not "real unusual" for that age. 3RP 188-89. The court then said it appeared S.L. understood "the obligation to tell the truth." 3RP 189.

Regarding "capacity at the time" to "receive accurate impressions of what was happening," the court declared "I don't see any reason to doubt that." 3RP 189. The court focused on her being a six-year old at the time and the court's belief that six-year-olds can understand what is happening to them. 3RP 189. The court later entered an order finding S.L. competent. See CP 253-54.

b. The court abused its discretion in finding S.L. competent and admitting S.L.'s statements to others with insufficient corroboration and reliability

Even given the "great deference" appellate courts give to the trial court's determination of a child's competency, the court's decision here does not withstand review. By statute, persons "who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly," are not competent to testify. RCW 5.60.050(2). To determine if a child is competent, a court must look at whether the child had several things:

> (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967).

In this case, the trial court's findings did not address the Allen

factors by name. See CP 249-64. One of the most crucial of these factors, however, was not met or not properly considered. The question of S.L.'s mental capacity at the time of the occurrence was glossed over, with the court declaring there was not "any reason to doubt that" S.L. had such capacity. 3RP 189.

But the determination of mental capacity requires the court to look at the child's abilities *at the time the crime occurred.* A.E.P, 135 Wn.2d at 223-24. Further, a court cannot possibly rule on the child's mental capacity at the time of the incident and the child's ability to receive an accurate impression of what happened if there is no evidence establishing exactly when the incident occurred. Id. Thus, in A.E.P., where the evidence indicated that the crime could have occurred either recently or two years prior, without information to "narrow the time window," the trial court could not "begin to determine whether the child had the mental ability at the time to receive an accurate impression" of the incidents. Id.

Here, there were two contradictory claims from S.L. - that it had happened when she lived with Hesselgrave (early 2009 to about August when she was about six) and that it had happened when she lived with her mom but was at a bachelorette party (more than a year later, in October of 2010). But the court did not look at the separate time periods and the year or so difference in the child's age for each - it just lumped them together and said it had no reason to "doubt" S.L. was so able. Because the first Allen factor was not met, the court abused its discretion in finding S.L. competent. See A.E.P., 135 Wn.2d at 225-26.

In addition, there is a serious question about the potential impact of

the therapy and interrogation S.L. underwent as a result of the abuse by Palfrey. In A.E.P., the Court held that it was not required that there be a separate "taint" hearing to explore such issues because a defendant can argue "memory taint" at the time of the child's competency hearing under the third Allen factor of "a memory sufficient to retain an independent recollection of the occurrence." A.E.P., 135 Wn.2d at 230. The Court also found that such issues could be raised when looking at statements made by a child deemed "competent" are also "reliable," a prerequisite for their entry under the Ryan factors, which are:

> (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness[.]

See Ryan, 103 Wn.2d at 175-76.

Here, the therapy S.L. went through with Watson as a result of the claims again Palfrey was "specific, kind of directive counseling called 'trauma-focused cognitive behavioral therapy." 4RP 604-609. The goal is to reduce symptoms of trauma by focusing on the abuse and "whatever kind of distress that memory is causing for the child." 4RP 605-610. Watson described the counseling she does as

> kind of like if you skin your knee and get dirt and gravel on it, you have to clean that out so the wound can heal, and trauma-focused counseling is the process of cleaning out the wound of whatever it is to allow that child to recover.

4RP 611. She then detailed facts she said made it more difficult for a child to do the healing on their own, such as if it was a trusted person, how long the abuse went on, how severe it was and how "good the support

system they have[.]" 4RP 611. The "support system" was defined as whether the child, "when they reported the abuse, were they believed, were they protected, were they dealt with [in] an appropriate way or were they told you're a liar; you're making this up; we don't believe you." 4RP 612.

Further, Watson specifically admitted giving positive reinforcement when S.L. made disclosures. 4RP 640. And Watson admitted that she did not question the truth of what a child said but instead saw her role as "validating" whatever that was and making the child feel better. 4RP 645.

Notably, Watson also talked about making sure that S.L. would feel "good" if she made any disclosures in the future. 4RP 623.

The possibility of "taint" of a child's memory is one the Supreme Court said "should definitely be considered by a trial court deciding both competency of the child and reliability of the statements. A.E.P., 135 Wn.2d at 231. But as the Court noted in A.E.P., the appellate court does not have to rule on the reliability of a child's hearsay statements if the child is not deemed competent unless there is sufficient corroboration of those statements. 135 Wn.2d at 233.

To be sufficient, "corroborating evidence" must not simply be evidence that suggests a possibility the acts occurred, but must in fact be evidence "which would support a logical and reasonable inference that the act of abuse described in the hearsay statement occured." See State v. C.J., 148 Wn.2d 672, 687, 63 P.3d 765 (2004). Here, there was not such evidence. There were no contemporaneous disclosures. The precocious

knowledge S.L. had could clearly be attributed to the prior abuse by Palfrey. There were no complaints of pain or injury or anything of the kind at the times when the incident might have occurred. There was no physical evidence.

In short, the only evidence against Hesselgrave was S.L.'s hearsay statements. Because she was incompetent, and there was insufficient corroboration to support entry of her hearsay statements, reversal is required.

3. THE PROSECUTOR COMMITTED SERIOUS, PREJUDICIAL MISCONDUCT TO WHICH COUNSEL REPEATEDLY OBJECTED AND WHICH COMPELS REVERSAL

Reversal is also required because of prosecutorial misconduct. Prosecutors are "quasi-judicial" officers, with a duty to act in the interests of justice rather than as "heated partisans" at trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct which is likely "to produce a wrongful conviction." State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985).

Further, because the words of a prosecutor carry great weight with the jury, those words may ultimately deprive the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974);

Suarez-Bravo, 72 Wn. App. at 367. In this case, reversal is required, because the prosecutor repeatedly committed serious, prejudicial misconduct and the result was that Hesselgrave was deprived of a fair trial.

a. Relevant facts

In closing argument, the prosecutor told the jurors there were only three possibilities in the case:

> So here's what it really comes down to in this case. There's three possibilities for what happened: Someone coached S[.]; S[.] made it up on her own, or she is telling the truth. That's it.
>
> [DEFENSE COUNSEL]: Objection. That's improper argument.
>
> THE COURT: Overruled.

RP 938. At the same time, the prosecutor projected a "Power Point" slide which said:

> THREE POSSIBILITIES
>
> 1. Someone coached S.L.
> 2. S.L. made it up on her own
> 3. S.L. is telling the truth

Exhibit 25 at 4.

The prosecutor then went on to "talk about this one by one," starting with the "coaching/frame job" theory, moving on after a short time to the theory that "S[.] made it up on her own" and projecting a slide referring to "The Impossible to Plan Chain." RP 944-45. The prosecutor declared there was no "motive" which would "make sense to an 8-year-old girl, then then went on:

> No motive for an eight-year old girl. I mean, why do people lie? It's to get themselves out of trouble, like "I didn't break that lamp,"

or to make themselves look good. So, here, all the attention in this is negative.

[DEFENSE COUNSEL]: Objection; there's no evidence of this in dispute or in evidence.

THE COURT: Well, it's closing argument. I'll overrule the objection.

RP 945. At the same time, the prosecutor apparently projected a slide which provided:

(2) S.L. made it up on her own

Why do people lie?

-to get THEMSELVES out of trouble, (I.e. I didn't break the lamp) or to make themselves look good

-Allegations of abuse do neither
-Attention is negative
-Criminal justice process uncomfortable at best

Exhibit 25 at 7-8. The prosecutor also said "[j]ust like there's no evidence to support Leona coached her, there's no evidence to support Sabrina made it up." 4RP 946. The slide projected said:

No Evidence to Support

S.L. Made it up

on Her Own

Exhibit 25 at 8. The next slide projected said:

One Conclusion

(3) S.L. is telling the truth

Exhibit 25 at 8-9.

In rebuttal closing argument, the prosecutor again returned to the "chain of disclosure" argument, saying that it "can't be explained through

coaching or planning," and argument counsel objected to as "burden shifting." 4RP 975. The court overruled the objection. 4RP 975. The prosecutor asked the jury to "say . . . that [S.L.] got it right when she said. . . the penis was in her anus" and her vagina. 4RP 977. He also asked jurors if S.L. was "a criminal mastermind," an "elaborate actor, a perfect liar," saying that Hesselgrave wanted the jurors to believe it both ways. 4RP 978. The prosecutor then said if jurors "believe" that Hesselgrave had his penis in her vagina at some point, he was guilty. 4RP 978. Counsel's objection that the argument "misstates the standard" was overruled. 4RP 978.

The prosecutor gave a final parting shot, telling jurors, "ask yourself, is that ten-year-old girl pulling the wool over my eyes or is that a ten-year-old girl describing something no ten-year-old girl should ever have to? Find him guilty." 4RP 978-79.

b. <u>The arguments were serious, prejudicial misconduct</u>

These arguments were all serious, prejudicial misconduct. This type of argument is called a "false choice argument," roundly condemned as a misstatement of the law, the state's burden of proof and the jurors' role. <u>See</u> <u>State v. Barrow</u>, 60 Wn. App. 869, 876, 809 P.2d 209, <u>review denied</u>, 118 Wn.2d 1007 (1991). It is well-settled that it is "misleading and unfair to make it appear that an acquittal requires the conclusion" that the prosecution's witnesses are lying. <u>State v. Casteneda-Perez</u>, 61 Wn. App. 354, 362-63, 810 P.2d 74, <u>review</u> <u>denied</u>, 118 Wn.2d 1007 (1991). The argument misstates the jury's role because the jury is *not* required to determine who is telling the truth and who is lying in order to perform its

duty. Id. Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn. 2d 1010 (1995).

Further, the choice presented by the argument is "false" because it improperly tells jurors that either the state's witnesses or defense witnesses are lying and there are no other options. Barrow, 60 Wn. App. at 876. But this is not true even if the various versions of events are inconsistent. Id. Instead:

> [t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth.

Casteneda-Perez, 61 Wn. App. at 362-63; Wright, 76 Wn. App. at 824-26

Thus, in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997), the prosecutor's "false choice" argument was misconduct even though the victim and defendants had fundamentally opposed versions of the case. 83 Wn. App. at 213. The defendants were accused of raping the victim in her home and the sole issue was whether the sexual contact was consensual. 83 Wn. App. at 213. The prosecutor told the jury it would have to find that the victim lied, was confused, or just fantasized what had happened in order to find the defendants not guilty. 83 Wn. App. at 213.

In finding the argument to be serious misconduct, the Fleming Court declared, "[t]he jury would not have had to find that [the victim] was mistaken or lying in order to acquit; instead, it was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony." 83 Wn.

App. at 213 (emphasis in original). In fact, the Court noted, the jury could be unsure she was telling the truth, or question her ability to recall, or have some other question about the state's case and thus have to acquit - none of which would require a finding she was lying. Id.

Thus, this type of argument misstates the jury's role and their duty in deciding the case. And it does so in another way, too, by converting the case into a decision about which side to choose or what is the "truth" of the case, rather than holding the prosecutor to his constitutionally mandated burden of proof. Essentially, the jury is given the impression that it should "pick a side." And that argument tasks them with choosing "which version of events is more likely true, the government's or the defendant's." See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events they think is more likely to be true and then rely on that "preponderance" standard in rendering their verdict. Id.

The kind of "false choice" arguments in this case mislead the jury about their duty, function and role and improperly relieve the prosecution of the full weight of its constitutional burden. And such misconduct has supported reversal even if the defendant did not object below. Thus, in State v. Miles, 139 Wn. App. 879, 162 P.3d 1169 (2007), this Court found misconduct when the prosecutor told the jury that they had to decide which of the mutually exclusive versions of events was more credible in deciding the case. The argument was misconduct, the Court held, because the jurors do not have to believe the defendant's version of events to

acquit - they only have to "entertain a reasonable doubt as to the State's case." 139 Wn. App. at 889. The argument also misstated the jury's role because "the jury was entitled" to conclude that it did not necessarily believe the defendant but was not be satisfied beyond a reasonable doubt of his guilt. Id. The question is not which "version" of events is more credible - the question is whether the prosecution has proven guilt beyond a reasonable doubt.

Here, the prosecutor's entire theme in closing argument was focused on an improper "false choice" of only "three possibilities" - that someone coached S.L., she made it up on her own, or she was telling the truth. RP 938, Exhibit 25 at 4. Indeed, the prosecutor said, those three choices were "what it really comes down to in the case," and they were the *only* possibilities. RP 938. The prosecutor also told the jurors there was "no evidence" to support that S.L. was lying, because she had no motive, and "no evidence" to prove that S.L. had made it all up on her own. RP 945-46. The prosecutor told jurors there was only "one conclusion" - that S.L. was "telling the truth." Exhibit 25. And the prosecutor exhorted the jurors to "**say**. . .. that [S.L.] **got it right** when she said. . . the penis was in her anus" and her vagina. 4RP 977 (emphasis added). Either S.L. was "a criminal mastermind," an "elaborate actor, a perfect liar," or she was telling the truth. 4RP 978.

Finally, the prosecutor told jurors to ask themselves "is that ten-year-old girl pulling the wool over my eyes or is that a ten-year-old girl describing something no ten-year-old girl should ever have to? Find him

guilty." 4RP 978-79.

Thus, the prosecutor made his "false choice" argument clear. The *only* options for the jury, according to the state, were that S.L. was lying on her own or with coaching or she was telling the truth. The fourth option that S.L. might have been mistaken or the fifth option, that jurors did not necessarily believe Hesselgrave but were not satisfied beyond a reasonable doubt of his guilt, were foreclosed.

But that is not a correct statement of the law. The jurors could have disbelieved Hesselgrave but still acquitted if they found that the prosecution failed to present sufficient evidence to prove its case beyond a reasonable doubt. The jury also did not have to find that S.L. was a "criminal mastermind" in order to acquit - it simply had to have a reasonable doubt about Hesselgrave's guilt. Rather than having to "say" that S.L. was lying or "say" that "she got it right," jurors simply had to find that the inconsistent, completely uncorroborated claim of a girl with no other evidence of abuse whatsoever was insufficient to prove Hesselgrave's guilt beyond a reasonable doubt. The prosecutor's arguments were serious, flagrant misconduct and this Court should so hold.

Reversal is required. Where, as here, counsel objects below, such an objection is clear evidence that the arguments appeared critically prejudicial at the time they were made. See e.g., State v. McKenzie, 157 Wn.2d 44, 53 n. 2, 134 P.3d 221 (2006). Further, when counsel objects below, reversal is required if there is a reasonable probability that the misconduct affected the verdict. Id. There is more than such a reasonable

probability here. The jury's verdict in this case was based entirely upon the credibility of the complaining witness and the defendant. There were no witnesses or physical evidence to corroborate the claims of abuse, and the other witnesses had no independent knowledge but simply parroted what S.L. had said.

Further, there were serious questions about S.L.'s claim. The location changed. The date changed. The claims became more serious, then were forgotten at the time of the defense interview, then were remembered - with additions - for trial. And the claims included unlikely facts such as a three-year old undressing himself, engaging in sex and having his penis bitten "hard" without complaint, argument or upset. Under such circumstances, it is impossible to say that a rational jury "probably would have returned the same verdict without the prosecutor's improper remarks. See, e.g., State v. Boehning, 127 Wn. App. 511, 532, 111 P.3d 899 (2005). Because the credibility of S.L. was the only issue in the case, and because there is more than a reasonable possibility that the misconduct affected the outcome of this case, reversal is required.

4. THE SENTENCING COURT ERRED IN ORDERING CONDITIONS OF COMMUNITY CUSTODY WHICH VIOLATED DUE PROCESS OR WERE NOT STATUTORILY AUTHORIZED

In addition to the other serious errors below, the sentencing court further erred in imposing several of the conditions of community placement/custody, because those conditions either were in violation of Hesselgrave's constitutional rights or were not statutorily authorized.

a. Relevant facts

At sentencing on November 9, 2012, the parties discussed what the court described as a condition regarding "viewing pornography," with the court saying that S.L. had indicated that some pornography was shown at some point during the incident. SRP 6-7. The court stated that S.L.'s statements at trial "weren't completely clear and consistent" and that it was not "crystal clear to me what happened in this case," given the incident with Palfrey. SRP 6-7. The court imposed a sentence of 110 months to life, then discussed a condition, condition 24 of Appendix H, which said that Hesselgrave could have "[n]o access to the Internet at any location." SRP 8. Counsel suggested, "[p]erhaps a restriction on sexually explicit material," and the court noted that condition "25 has that," striking condition 24. SRP 8.

The court then imposed, *inter alia*, the following conditions of community custody in a separate Appendix H:

> 13. You shall not possess or consume any controlled substances without a valid prescription from a licensed physician.
>
> . . . .
>
> 16. . . . Do not have any contact with physically or mentally vulnerable individuals.
>
> . . .
>
> 25. Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex. Also, do not possess or use any cell phone that may provide access to the Internet as well.

CP 238-41.

b. The conditions were not authorized or were unconstitutional

This Court should strike conditions 13, 16 and 25, because those conditions were not statutorily authorized or were unconstitutional. A sentencing court does not have unfettered discretion to order conditions of community custody. See, e.g., State v. Kolsenik, 146 Wn. App. 790, 806-807, 192 P.3d 937 (2008), review denied, 165 Wn.2d 1050 (2009). Instead, the court is limited to ordering only those sentencing conditions authorized by law. See In re Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980).

As a threshold matter, these issues are properly before the Court. Where the lower court imposes an illegal or erroneous condition, that issue may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008). Further, a challenge to such a condition may be made "preenforcement" if the challenge raises primarily a legal question and no further factual development is required. Id. All of the conditions in that case meet those standards because all of them are illegal or erroneous and all of the raise primarily legal questions ready for this Court's review.

In general, sentencing conditions are reviewed for abuse of discretion i.e., to determine whether the lower court's decision was manifestly unreasonable or the judge's decision was based on untenable grounds or made for untenable reasons. See, State v. C.D.C., 145 Wn. App. 621, 625, 186 P.3d 1166 (2008). However, by definition, a court abuses its discretion when it exceeds its sentencing authority. Id. As a

result, a court will find abuse of discretion where the sentencing court has imposed a condition unauthorized by the sentencing statutes. See State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). The question of whether the court had statutory authority to impose a particular condition is reviewed de novo. See State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The relevant statute, RCW 9.94A.703 provides three types of conditions: mandatory, which the court must impose; "waivable," which are imposed by default unless waived by the court; and "discretionary," which the court may order, if it so chooses. RCW 9.94A.703(1), (2) and (3). None of the challenged conditions in this case were authorized under any of those sections of the statute.

Taking condition 13 first, that condition prohibited Hesselgrave from possessing or consuming controlled substances without a valid prescription from a "licensed physician." RCW 9.94A.703(2) provides a "waiveable" condition of community custody that the offender to refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions. Thus, it is clear that the sentencing court had the statutory authority under RCW 9.94A.703(2)(c) to order Hesselgrave not to consume or possess controlled substances without a lawful prescription.

But nothing in the statute authorized the court to limit the relevant medical personnel from whom he was allowed to actually get such a prescription. Physicians are, in fact, only one of the types of professionals with legal authority to write prescriptions in this state. See RCW

69.41.030(1). The Legislature has also chosen to give such authority to osteopaths, optometrists, dentists, podiatrists and certain physician assistants and nurse practitioners. See RCW 69.41.030(1). And the Legislature was clearly aware of its own statutory scheme regarding who could issue a "lawful prescription" when it wrote the condition in RCW 9.94A.703(2) to require such a prescription before an offender can consume or possess a controlled substance. See, e.g., Wynn v. Earin, 163 Wn.2d 361, 372, 181 P.3d 806 (2008). Nevertheless, the Legislature chose not to limit "lawful prescriptions" to those written only by a physician, instead just requiring that the prescription must be "lawful." RCW 9.94A.703(2). The trial court did not have the authority to override that Legislative decision by limiting the professionals from whom Hesselgrave could get a "lawful prescription."

Condition 16 was also not statutorily authorized. RCW 9.94A.703(2)(b) permits the sentencing court to impose, as a "discretionary" condition, that the defendant "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." Thus, it is entirely proper to enter a "no contact" order for S.L. See, e.g., In re Rainey, 168 Wn.2d 367, 229 P.3d 686 (2010).

It was not proper, however, to order Hesselgrave to have no contact with "physically or mentally vulnerable individuals" as well. This case was about alleged sexual abuse of a child related by marriage. There is no evidence that the case involved "physically or mentally vulnerable individuals" and thus that condition was improper. See, e.g., State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), overruled in part and on

other grounds by, State v. Valencia, 169 Wn.2d 782, 239 (2010).

Finally, condition 25 not only exceeds statutory authority but also violates Hesselgrave's due process right. That condition provides:

> Do not possess or peruse any sexually explicit materials in any medium. Your sexual deviancy treatment provider will define sexually explicit material. Do not patronize prostitutes or establishments that promote the commercialization of sex. Also, do not possess or use any cell phone that may provide access to the Internet as well.

CP 239. There is nothing in the record indicating that this case involved, in any way, prostitution, adult "toy" shops, or any of the frankly thousands of places which might fall under the rubric of this condition. The case involved an incident which occurred inside a private apartment, not in a sex shop, not with a prostitute, nor anything similar.

Further, that the prohibition is unconstitutionally vague, as it fails to provide ascertainable standards for enforcement and fails to provide sufficient notice of what is prohibited. Bahl, supra, is instructive. In that case, the Court addressed, *inter alia*, a condition prohibiting the defendant from frequenting "establishments whose primary business pertains to sexually explicit or erotic material." 164 Wn.2d at 752. The condition was not unconstitutionally vague, the Court held, because definitions of what was sexually explicit or erotic were relatively clear and thus identified the prohibition sufficiently. Id.

In contrast, here, there is no definition of what places exactly, promote the "commercialization of sex" and thus are prohibited for Hesselgrave to go. And definitions vary. For example, some define the "commercialization of sex" as "offering or receiving any form of sexual

conduct in exchange for money" - thus prohibiting Hesselgrave from going to any place where there is prostitution. See, e.g., Christopher R. Murray, "Grappling with 'Solicitation": The Need for Statutory Reform in North Carolina after Lawrence v. Texas," 14 DUKE J. GENDER L. & POLICY 681, 682 (2007). Another may define "[t]he commercialization of sex" as including "all forms of media, including movies, television shows, songs, advertising, and magazines," used "to sell products and attract consumer interest" - thus potentially prohibiting Hesselgrave from a much wider range of places. See Takiyah Rayshawn McClain, "An Ounce of Prevention: Improving the Preventative Measures of the Trafficking Victims Protection Act, 40 VAND. J. TRANSN'L L. 597, 603 (2007).

In addition, the First Amendment protects much which is sexually explicit, as well as covering communications, speech, etc. and even the forum aspect of the Internet. See, e.g., Bahl, 164 Wn.2d at 757; see also, Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed 2d 874 (1997). Where a condition of community custody affects materials or conduct protected by the First Amendment, a "stricter standard" applies, requiring the government to show that the restriction in question is "reasonably necessary to accomplish the essential needs of the state and public order." Bahl, 164 Wn.2d at 757. That standard was not met by condition 25.

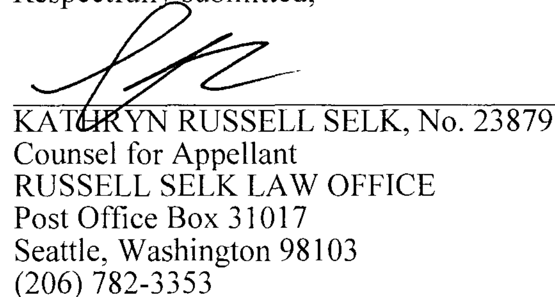
Finally, the Court should strike the condition prohibiting use of cell phones which might have Internet access. Again, because the use of a phone for communication purposes implicates the First Amendment, so that the restriction on such use must meet the stricter standard set forth in Bahl. Here, the issue was using the Internet to view pornography at

home, not on a phone. Further, it is likely that every cell phone "may" provide Internet access, so that the court's order effectively prevents Hesselgrave from ever owning a cellular phone. The cell phone portion of the condition does not meet the standards of Bahl and should be stricken.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the conviction or reverse and remand for a new, fair trial. In the alternative, the Court should strike the improper conditions of community custody.

DATED this 29th day of August, 2013.



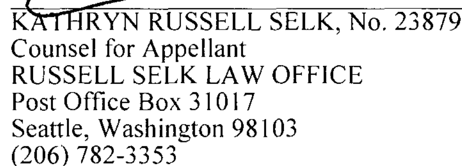
Respectfully submitted,

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel by efiling this date to this Court's upload portal and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Mr. Steven Hesselgrave, DOC 361157, MCC, P.O. Box 777, Monroe, WA. 98272.

DATED this 29th day of August, 2013.



Respectfully submitted,

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
Post Office Box 31017
Seattle, Washington 98103
(206) 782-3353

Appendix A

The verbatim report of proceeding consists of 12 volumes, unfortunately with conflicting page numbers. The volumes will be referred to as follows:

> July 14 , September 30, October 21, December 15-16, 20, 23, 2011, and April 20, June 4, 15 and 25, 2012, as "1RP;"
>
> Aug 9 and 13, 2012, as "2RP;"
>
> the two chronologically paginated volumes containing the proceedings of Aug 21-23, 2012, as "3RP;"
>
> the seven chronologically paginated volumes containing the proceedings of September, 10-13 and 17-21, 2012, as "4RP;"
>
> the sentencing of November 9, 2012, as "SRP."