SUPREME COURT NO. 91520-2
NO. 70702-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MALCOLM FRASER,

Petitioner.

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

The Honorable Jay White, Judge
The Honorable Beth Andrus, Judge
The Honorable Lori Smith, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Malcolm Fraser asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished opinion in State v. Malcolm Fraser, case no. 70702-7-I, which was filed February 17, 2015. The opinion is attached as an Appendix ("Opinion").

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals ignore precedent from this Court when it denied petitioner's claim that the defense should have been permitted to conduct in camera review of the complainant's counseling records?

2. Was the petitioner's right to effective cross-examination violated when a judicial finding that the lead detective had committed misconduct in his investigation was excluded from trial?

3. Was the petitioner's right to effective cross-examination violated when he was not permitted to cross-examine a key prosecution witness regarding her failure to appear for two defense interviews?

4. Did the court err in excluding relevant evidence as to the appellant's reputation for sexual morality in the community, and should this Court accept review where there is a split of authority on the matter?

D. STATEMENT OF THE CASE[1]

The State charged Fraser with two counts of first degree child molestation and two counts of first degree child rape as to complainant M.C. The acts were alleged to have occurred between January 1, 2005 and May 31, 2006, when M.C. was 10 or 11 years old. CP 1-6, 187-89. M.C. was 17 when she first made the allegations and 18 at the time of trial. 7RP 955; 11RP 94.

Jessica G. is the mother of complainant M.C. 9RP 44. Jessica and husband Greg joined the Sound Doctrine Church (Sound) in 2000. 9RP 46, 56. Jessica's family began renting a home on Franklin Street in Enumclaw to be closer to the church community. 9RP 50. The family hosted a number of church-affiliated short-term and long-term guests, including Fraser, an assistant pastor, and his wife. 9RP 75, 96.

At trial, Jessica estimated the Frasers stayed in her family's guestroom for six months. 9RP 79, 146. In a previous statement, Jessica said the Frasers stayed in the home more than eight months, from September 2005 to May of 2006. 9RP 151-52. In yet another interview, she said the Frasers were in the home about a year. 9RP 185-87.

[1] This petition refers to the verbatim reports as follows: 1RP – 8/24/12, 12/7/12 and 1/11/13; 2RP – 1/18/13 and 4/3/13; 3RP – 4/9/13 and 4/17/13; 4RP – 4/18/13; 5RP – 4/22/13; 6RP – 4/23/13; 7RP – 4/24/13; 8RP – 4/25/13 and 7/23/13 (motion to arrest judgment); 9RP – 5/6/13; 10RP – 5/7/13; 11RP – 5/8/13; 12RP – 5/9/13; 13RP – 5/14/13; 14RP – 5/15/13; 15RP – 5/16/13; 16RP – 5/20/13; 17RP – 5/21/13; 18RP – 5/22/13; 19RP – 5/23/13, 5/28/13 and 5/29/13; and 20RP – 7/26/13 (sentencing).

In May of 2006, Jessica and her family moved to another home in Enumclaw. 9RP 80-81. The Frasers remained in the Franklin Street home, and another church member and her two children moved in. 12RP 148; 13RP 18-19.

Jessica and Greg left the church in August of 2006 after Jessica learned church leadership had criticized her parenting of M.C. 10RP 53. Years later, Jessica still had negative feelings toward Sound. 9RP 206-08. Five years after the family left Sound, Jessica began associating with a disgruntled former congregant, Athena Dean. 9RP 215. Jessica's sister was married to Athena's son, himself a lapsed Sound member. 10RP 113. Athena, the former owner of Sound's publishing business, was angry with Sound leadership including Fraser in part because she believed she was wronged in the sale of the business to the church. 15RP 75-77, 95-96, 106-08; 17RP 131-33; 18RP 33. Athena "blogged" frequently about this. 15RP 75-76. Athena presided over two gatherings of disgruntled former Sound members in November of 2011. 10RP 27-28.

Jessica denied Athena was present during M.C.'s two March 2012 interviews at the Enumclaw police department after M.C.'s allegations came to light. 10RP 32-33, 65. M.C., on the other hand, admitted Athena was at the police station both times. 13RP 79-81, 114.

Like her mother, M.C. recalled the Frasers were in her home six or seven months starting in October 2005 and ending in April 2006. 11RP 124; 13RP 43-45. M.C. and her sisters slept in an open attic room when M.C. was younger, but that changed at some point before the Frasers moved in. 11RP 136, 138-39. Stepfather Greg "finished" an area at the rear of the attic for M.C. and installed a door with a lock. 11RP 136-37. The room was so small that an average-sized adult could barely fit under the apex of the sharply sloped ceiling. 11RP 137; 12RP 102-03; 16RP 37-38. M.C.'s sisters still slept in the open area at the top of the attic stairs. 11RP 139-40; 12RP 107.

M.C. testified Fraser started abusing her in October of 2005. 12RP 71-74; 13RP 50. One night, Fraser woke M.C. He put his hand over her mouth and rubbed under her shirt. He also rubbed her crotch. 11RP 150. M.C. kicked Fraser but she was unable to scream because he covered her mouth. 11RP 152. Fraser told M.C. to be quiet and threatened to hurt her if she told anyone. 11RP 151. He also warned M.C. that she would be thrown out of the church and go to hell if she told. 11RP 154-56. Fraser returned a few days later and engaged in similar activity. M.C. kicked, screamed, and tried to escape, but Fraser held her down and repeated the warnings. 11RP 159-61. After that, Fraser returned to M.C.'s room a few times a week for several months. 12RP 75-76. At some point, Fraser

started forcing M.C. to vigorously masturbate his penis. 11RP 162-63; 12RP 4-5, 121-22. Fraser also attempted to force his penis into M.C.'s mouth. 12RP 15, 18, 139. M.C. testified Fraser's penis was "normal" and circumcised. 13RP 118-19. M.C. recalled vigorously kicking and flailing during the incidents. 12RP 114, 115, 120, 131. She also attempted to punch Fraser in the penis. 12RP 123.

M.C. testified one incident occurred after she and other home-schooled children from the church went on a field trip to a bookstore in Portland, Oregon. 12RP 89-91. According to other church members, however, the single Portland trip occurred in 2004 or 2005, before the Frasers lived with M.C. 16RP 140-41; 18RP 118. The abuse stopped a few weeks before M.C.'s family moved out. 12RP 74. M.C. did not tell anyone even after her family left the church. 12RP 21-22.

M.C. denied harboring animosity toward church members and did not recall family animosity toward Sound after leaving the church. 12RP 26-27; 13RP 22-24, 60. M.C. knew of brewing animosity toward Sound among former members, but she denied participating. 13RP 68-69.

At some point, M.C. told her younger half-sister K.C., who lived in Tacoma, that she had been abused. 12RP 43-45. The conversation may have occurred a few years after the family left Sound, or about a year

before M.C. made the allegations to police. 12RP 43-44; 13RP 39-40. M.C. also told her stepsister in early 2012. 12RP 46; 13RP 32.

In March of 2012, M.C. revealed to counselor Kathleen Moore that she had been abused. Moore claimed privilege as to the details of M.C.'s disclosures. 14RP 14. Shortly thereafter, M.C. told her mother Jessica. 12RP 51; 13RP 25. Jessica took M.C. to the Enumclaw police department, where M.C. met with Detective Grant McCall. M.C. declined to give a detailed statement at the first meeting but returned a few days later. 12RP 51, 53. According to M.C., her first detailed account of abuse was provided to McCall. 13RP 122-23.

M.C.'s sister K.C., a year and a half younger than M.C., provided testimony regarding M.C.'s disclosures that was inconsistent with, and more detailed, than M.C.'s version. 13RP 137-38, 141, 143-45, 156-57. K.C. acknowledged she had not come forward with the information until two months before trial. 13RP 157-58. Defense counsel attempted to question K.C. about her failure to appear for two scheduled interviews in 2012. 13RP 158. On the State's objection, the court precluded the inquiry. 13RP 158-161.

Detective McCall received a CPS report on March 14, 2012 and contacted Jessica. 9RP 953-54. He met with M.C. and Jessica the following day. 9RP 957-58. M.C. eventually gave a lengthy statement

implicating Fraser. 9RP 963-66. McCall acknowledged he had little training on how to interview witnesses. 7RP 962-63, 1000-01. He was unfamiliar with recommended practices. 7RP 1045-60; 9RP 23.

After M.C.'s disclosure, Athena Dean began corresponding with McCall. 7RP 976, 1022. McCall also received an email from Fraser's mother, Thelma, and began corresponding with her. 7RP 976. Thelma's emails were critical of Sound's religious teachings. McCall responded in kind. He wrote, for example, that Sound "was completely without the Gospel of our Lord and Savior Jesus," and he referred to the "fruit" of the church as "evil and twisted." 7RP 1008-09, 1011. McCall testified he was simply attempting to "build rapport" with Thelma, although he acknowledged the emails were consistent with his religious beliefs. 9RP 977, 1005-06, 1010, 1012-13. In his emails, McCall quoted the Bible; he also referred to Sound as a "cult" in an email to Athena Dean. 7RP 1022-24.

On the other hand, McCall strenuously denied bias: He told a defense investigator he "never thought of [Sound] in a negative light." 7RP 1007-08. He said he did not provide the emails to the prosecution or the defense because he did not consider them to be "of evidentiary value." 7RP 1019, 1027-30, 1038, 1073-77. The defense was precluded from introducing a finding by Judge Beth Andrus that McCall committed

misconduct in his handling of evidence based on his religious bias. CP 166-72. Over defense objection, however, the State was permitted to present evidence rebutting assertions McCall was biased against Sound and Fraser. 8RP 1088-89, 1104-06; 9RP 28-42.

Contrary to the timeline set forth by the State's witnesses, defense witnesses testified the Frasers did not live with the G. family for the period that the State's witnesses claimed. 15RP 29-32, 84; 16RP 116-18; 17RP 59, 67-68, 180-86; 18RP 100-04, 141. Fraser's wife confirmed they did not move into the house until March 31, 2006 and therefore lived with the G. family less than two months. 16RP 27, 59-61, 63; 17RP 143-44.

Dr. John Yuille, a forensic psychologist and an expert on memory and interviewing techniques, testified. 14RP 38. McCall's interview of M.C. was problematic. 14RP 45, 75, 87, 117-43. McCall's questions "suggested" a number of sexual activities occurred, and he never provided M.C. the opportunity to provide a narrative of events. 14RP 85-86, 160. Moreover, McCall appeared to treat the interview merely as an opportunity to confirm his beliefs. 14RP 86.

Philip Welch, a medical doctor, testified Fraser, who is uncircumcised, suffers from a medical condition called "phimosis" that prevents his foreskin from retracting. 15RP 159-60, 162-63. Sufferers often experience pain if the foreskin is stretched beyond its limit. 5RP

163-64. Based on a physical examination of Fraser, Dr. Welch opined forceful retraction of Fraser's foreskin would cause significant pain. 15RP 174-75. As such, vigorous sexual activity, including the behaviors M.C. described, would have caused pain. 15RP 189-90, 193-94, 213.

Thirteen-year-old Anna Dean testified she lived with the Frasers for two or three years after M.C.'s family left the Franklin Street home. Fraser was a kind man and she considered him an uncle. 18RP 52-53, 69. Her brother, 15-year-old Ezekiel, had similar memories. 18RP 78. The children's mother, Abigail Davidson, confirmed Fraser was a loving and stable presence in her family's life. 18RP 95-96, 104, 117-18. The Dean children were present when Athena, their step-grandmother, met with former Sound members in late 2011. 18RP 64-65, 86-87. The former members harassed Ezekiel and Anna based on church membership. 18RP 89-90.

A jury convicted Fraser as charged. He was sentenced to concurrent low-end minimum sentences on each count. CP 260-63, 294-304; RCW 9.94A.507(3) (providing for maximum and minimum terms).

Fraser appealed and raised the issues identified above. In an unpublished decision, the Court of Appeals rejected each claim. Opinion at 3-16.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. BECAUSE THE DECISION DENYING IN CAMERA REVIEW OF COUNSELING RECORDS CONFLICTS WITH A DECISION OF THIS COURT, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1).

Eight months before trial, Fraser moved for in camera review of M.C.'s counseling records from counselor Moore. 1RP 3-34. Fraser argued that the records likely contained evidence of M.C.'s bias toward Sound. M.C. reportedly told her counselor Sound was "like a cult." CP 306-12. Fraser also argued that, given the problematic nature of McCall's interview, the records were reasonably likely to reflect a more accurate account of the abuse. CP 306-22. The above information was likely to be material, Fraser argued, given the case was likely to be a credibility contest. CP 311-12.

The court denied Fraser's motion, stating in part that:

> The general assertions that the records might reveal . . . inconsistent statements [and] bias toward Sound . . . are not sufficiently specific to show that it is likely or plausible that in camera review would reveal "discoverable information" that is favorable, material or exculpatory to the defense. . . .

CP 323-26; see also 1RP 34-36 (court's oral ruling). This ruling violated Fraser's due process and conflicts with this Court's decision in State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006), overruled

on other grounds, State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014)

"[T]he inability of a defendant to adequately prepare his case skews the fairness of the entire system." Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Due process is violated where the State fails to disclose evidence in its possession that is both favorable to the accused and material to guilt or punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Evidence is material if there is a reasonable probability that the evidence, had it been disclosed, could have altered the result of the proceeding. State v. Knutson, 121 Wn.2d 766, 854 P.2d 617 (1993). An accused is entitled to evidence that bears on the credibility of a significant witness. United States v. Strifler, 851 F.2d 1197, 1201-02 (9th Cir. 1988).

When the prosecution claims records are privileged or confidential, an accused is entitled to an in camera review to determine whether the records contain exculpatory or impeaching information. Ritchie, 480 U.S. at 57-58; State v. Mines, 35 Wn. App. 932, 938-39, 671 P.2d 273 (1983); see CrR 4.7(e)(1) (disclosure permitted "[u]pon a showing of materiality to the preparation of the defense"); CrR 4.7(h)(6) (providing for in camera review where appropriate).

In camera review is necessary when the defense establishes a non-speculative basis to believe the records may have evidence relevant to the defendant's innocence. State v. Cleppe, 96 Wn.2d 373, 382, 635 P.2d 435 (1981). A criminal defendant is entitled to in camera review of privileged or confidential records upon a "'plausible showing' that the information would be both material and favorable to the defense." Gregory, 158 Wn.2d 759 at 791 (citing Ritchie, 480 U.S. at 58 n.15).

Although mere speculation is insufficient, an accused need only establish a basis to claim that the record sought contains material evidence. Gregory, 158 Wn.2d at 792. Gregory is instructive. Gregory was convicted of three counts of first degree rape. Id. at 778. His theory at trial was that he had consensual, paid intercourse with the complainant. Id. at 779-80. Before trial, he sought in camera review of the dependency files of the victim's child, which the court denied. Id. The Court held Gregory was entitled to in camera review because, although privileged, the files could have shown whether the victim had been engaged in prostitution at the time of the crime, corroborating the defense theory. Id. at 795. It was impossible to say whether the files actually contained information supporting the defense theory, and the files might instead have contained damaging evidence that the victim was not involved in prostitution at the time. Id.

Nonetheless, the Court held it was enough to show that *if* the victim was involved in prostitution, that information would likely be in the files. Id.

As in Gregory, Fraser established a basis for the claim that the counseling records contained material exculpatory information. First, M.C. told her counselor that Sound was "like a cult," and such information was significant enough for the counselor to relay it to CPS. CP 307, 311. This indicated M.C. harbored animosity toward the church, despite her protestations to the contrary at trial. 12RP 26-27; 13RP 60. Fraser did not need to show that the counseling records or safety plan would confirm this theory, only that the information either confirming or refuting it would likely be in the records. Gregory, 158 Wn.2d at 794-95. Second, Fraser argued that the records were likely to contain impeachment information, given that M.C. spoke to Moore before McCall's problematic interview. Although Fraser elaborated on this theory at trial via Yuille, his initial motion alerted the court that the interview had a number of problems. CP 311.

Either of these two rationales is sufficient to require in camera review under Gregory. The court violated Fraser's constitutional rights when it denied even a minimally intrusive in camera review, and this Court should accept review.

2. BECAUSE EXCLUSION OF A MISCONDUCT FINDING UNDERMINED FRASER'S ABILITY TO CONFRONT THE DETECTIVE REGARDING BIAS, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(3).

Before trial, Fraser moved to dismiss under CrR 8.3(b), arguing in part that McCall committed misconduct by deleting and/or failing to disclose emails including those discussed above in the Statement of the Case. These included emails to and from Thelma Fraser, Jessica, and Athena Dean. CP 19-37. A hearing occurred at 1RP 45-149.

Judge Andrus, who did not ultimately preside at trial, denied the motion to dismiss, reasoning the misconduct could be remedied by other means. 1RP 140-44; CP 166-72. As to the nature of the misconduct, the court found McCall's religious bias may have affected his judgment in the investigation. Emails to and from Athena, Jessica, and Greg demonstrated animosity toward Sound and potential influence on M.C.'s allegations. 1RP 140-44; CP 166-72. But the trial judge later ruled the defense could not tell the jury about the misconduct finding. 3RP 411-23.

The Sixth Amendment guarantees an accused the opportunity to confront the witnesses against him through cross-examination, although the trial court retains the authority to set boundaries. Delaware v. Van Arsdall, 475 U.S. 673, 679, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The right to present evidence is subject only to the following limitations:

(1) the evidence sought to be admitted must be relevant; and (2) the right to introduce relevant evidence must be balanced against the State's interest in excluding evidence that would disrupt the fairness of the fact-finding process. Washington v. Texas, 338 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

An accused has a right to confront witnesses with bias evidence so long as the evidence is at least minimally relevant. Hudlow, 99 Wn.2d at 16. "Bias" describes "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." United States v. Abel, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). Bias may be the product of like, dislike, fear, or self-interest, and it is almost always relevant. Id. An accused enjoys more latitude to expose the bias of a key witness. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

Here, the court excluded the pretrial judicial finding that McCall had engaged in misconduct by deleting and otherwise failing to produce potentially exculpatory material, as well as resisting defense discovery requests. CP 166-72. As the Court of Appeals notes, the defense was permitted to expose McCall's acts. Opinion at 8, 10. But as the Court of Appeals fails to note, McCall denied bias, and then the State was

permitted to introduce evidence to refute the suggestion that he was biased.

The court's rationale for excluding the evidence appears to have been that such a ruling was a comment on the evidence. 3RP 411-23. Article IV, section 16 of the state constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." But Judge Andrus's prior finding of misconduct was not a comment on the evidence; rather, it *was* evidence of McCall's bias toward Sound and its leadership. See State v. Gentry, 125 Wn.2d 570, 639, 888 P.2d 1105 (1995) (judgment bearing trial judge's name was not comment on the evidence, but rather evidence). But even if the finding could be characterized as a comment on the evidence under the state constitution, Fraser's federal due process rights control. Const. art I, §2 (recognizing supremacy of federal constitution).

The Sixth Amendment confrontation right is violated when the court precludes a "meaningful degree of cross-examination." Jordan v. United States, 18 A.3d 703, 710 (D.C.2011) (internal quotations omitted). "Meaningful" cross-examination includes the rights of an accused to effectively expose a witness's various biases to the jury. Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). It is not

enough that the possibility of bias be mentioned; counsel must be permitted to present the nature and extent of the bias. Id..

Although there is no Washington case directly on point, the general rule across jurisdictions appears to be that misconduct by a police officer is relevant to bias, provided the connection between the misconduct and the testimony is not too speculative or remote in time. See, e.g., Commonwealth v. Bozyk, 987 A.2d 753, 757 (Pa. 2009) (a police witness may be cross-examined about misconduct "as long as the wrongdoing is in some way related to the defendant's underlying criminal charges and establishes a motive to fabricate"); Jones v. United States, 853 A.2d 146, 153 (D.C.2004) (preclusion of cross-examination as police officer's lack of compliance with internal regulations and failure to include exculpatory information in warrant affidavit violated Sixth Amendment despite admission of other evidence); State v. Beaumier, 480 A.2d 1367, 1372 (R.I.1984) (defendant should have been allowed to present evidence that police officer was under investigation for misconduct at the time he testified against the defendant). The misconduct finding here was not remote or speculative. It was therefore admissible.

This Court should accept review to clarify that a finding of police misconduct is not a comment on the evidence. But even if it is, Fraser's

federal due process right to fully cross examine the detective as to his bias controls and requires reversal.

3. BECAUSE EXCLUSION OF EVIDENCE SHOWING K.C.'S BIAS DENIED FRASER A FAIR TRIAL, THIS COURT SHOULD GRANT REVIEW UNDER RAP 13.4(b)(3).

The court excluded the evidence about sister K.C.'s failure to appear for two scheduled interviews on the ground that 16-year-old K.C. was "under 18." 13RP 161. This was error. The court did not articulate how K.C.'s age prevented her from being biased. Regardless of age, every person is presumed competent to testify. See, e.g., RCW 5.60.020 ("Every person of sound mind and discretion . . . may be a witness in any action, or proceeding"). This rendered K.C., a key corroborative witness, subject to the same rules as any other witness. Moreover, despite the State's argument, the court never found she was, due to her age, unable to secure transportation to attend the interviews. Cf. Opinion at 7 (remarking that K.C. could not secure her own transportation).

A witness's cooperation, or lack thereof, with an opposing party is relevant to the issue of that witness's bias. See Jackson v. Commonwealth, 266 Va. 423, 438, 587 S.E.2d 532 (2003) (upholding trial court ruling permitting inquiry by government as to defense expert's refusal to meet with government's experts). Again, proof of bias is almost always

relevant. Abel, 469 U.S. at 52. This Court should accept review and reverse on this ground.

4. BECAUSE THERE IS A CONFLICT BETWEEN THE DIVISIONS REGARDING THE ADMISSIBILITY OF EVIDENCE OF REPUTATION FOR SEXUAL MORALITY, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(2) AND (4).

The defense sought to introduce evidence that Fraser had a reputation in the community for sexual morality. The court's refusal to permit this testimony prejudiced Fraser's defense. The Court of Appeals recognized a split of authority on the issue. Opinion at 11-16; see State v. Woods, 117 Wn. App. 278, 280, 70 P.3d 976 (2003), review denied, 151 Wn.2d 1012 (2004) (Division Three case holding sexual morality is considered a pertinent character trait in sexual offense cases); State v. Griswold, 98 Wn. App. 817, 829, 991 P.2d 657 (2000) (Division Three case holding sexual morality was a pertinent character trait in child molestation case), abrogated on other grounds by State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003); State v. Harper, 35 Wn. App. 855, 860, 670 P.2d 296 (1983) (Division Two case stating that evidence of sexual morality and decency is pertinent reputation evidence); but see State v. Jackson, 46 Wn. App. 360, 365, 730 P.2d 1361 (1986) (Division One case rejecting Harper). This Court should accept review and resolve the issue in Fraser's favor.

Evidentiary error is grounds for reversal if the error is prejudicial. State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009). This was a close case, made closer by the errors described above. The crimes could not have occurred how and when M.C. described. Fraser presented evidence that, for example, based on his medical condition and M.C.'s close proximity to her sisters, the crimes could not have occurred *how* M.C. described them. Fraser also presented evidence establishing he did not live with M.C.'s family *when* she said he did, and therefore could not have abused her during the period she alleged. The jury heard testimony that various individuals held Fraser in high regard. But the defense should have been permitted to present evidence of his reputation.

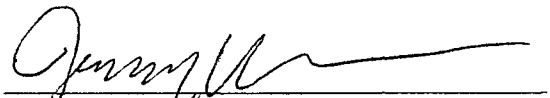
F. CONCLUSION

For the foregoing reasons, this Court should accept review.

DATED this 19TH day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorneys for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 70702-7-I
Respondent,	)	DIVISION ONE
v.	)	
MALCOLM JOHN FRASER,	)	UNPUBLISHED
Appellant.	)	FILED: February 17, 2015

Cox, J. — Malcolm Fraser appeals his judgment and sentence for his convictions of child molestation and rape of a child. The trial court did not abuse its discretion in declining to review in camera privileged counseling records. Likewise, it did not deprive him of due process or the right to confront witnesses by limiting the cross-examination of two witnesses. And the court did not abuse its discretion in excluding evidence of his good character. We affirm.

The victim, M.C., and her family were former members of a church for which Fraser served as an assistant pastor. Fraser lived with M.C.'s family for a period of time. M.C. testified that while Fraser lived with her family, he entered her bedroom and had sexual contact with her.

M.C. received counseling, and her counselor reported the abuse to Child Protective Services. After an investigation, the State charged Malcolm Fraser

with two counts of first degree child molestation and two counts of first degree rape of a child.

Before trial, Fraser moved for an in camera review of M.C.'s counseling records to determine if they contained discoverable information. Fraser argued that the counseling records would provide evidence that M.C. was biased. He also claimed that they contained inconsistent statements, as M.C. disclosed the abuse to her counselor before being interviewed by a police detective. The court denied the motion.

Fraser also moved to dismiss the case, arguing that the lead detective was biased and had violated Brady v. Maryland[1] by failing to preserve exculpatory evidence. During his investigation, the detective had exchanged e-mails with several witnesses. Some of these e-mails indicated that some witnesses might be biased. The detective subsequently deleted these e-mails.

The court denied the motion to dismiss. The court found that the detective should have preserved the e-mails but that his failure to do so was not malicious. The court also held that Fraser had not proven incurable prejudice. Instead of dismissing the case, the court ordered the State to attempt to recover the e-mails from their recipients or from the detective's computer or e-mail service. The court also found that the detective's religious beliefs "may have affected his judgment" during the investigation.

[1] 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Before trial, the State moved to exclude evidence of Fraser's good character. The court ruled that the evidence of Fraser's reputation for sexual morality was irrelevant and granted the motion.

At trial, the court limited Fraser's cross-examination of M.C.'s sister. While cross-examining M.C.'s sister, K.C., Fraser asked about her failure to attend two scheduled defense interviews. The State objected on relevancy, and the court sustained the objection. The jury convicted Fraser of all counts.

Fraser appeals.

COUNSELING RECORDS

Fraser argues that the court violated his right to due process when it failed to review M.C.'s counseling records in camera. Specifically, Fraser argues that reviewing the records would have revealed evidence of M.C.'s bias against Fraser's church. We hold that the court did not abuse its discretion in denying this motion.

Counseling records are generally privileged.[2] "[F]or due process to justify in camera review of a record that is otherwise deemed privileged or confidential by statute, the defendant must establish 'a basis for his claim that it contains material evidence.'"[3] The defendant "must make a particularized factual

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[2] RCW 5.60.060(9).

[3] State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006) (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 58 n.15, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)), overruled on other grounds by, State v. W.R., Jr., 181 Wn.2d. 757, 336 P.3d 1134 (2014).

showing"—mere speculation is not enough.[4] "Evidence is material only if there is a reasonable probability that it would impact the outcome of the trial."[5] "A reasonable probability is probability sufficient to undermine confidence in the outcome."[6]

This court reviews a trial court's decision whether to view privileged documents for abuse of discretion.[7]

Here, the court ruled that Fraser did not establish that the records contained material information. This failure substantiates the court's ruling denying in camera review.

Fraser does not dispute that the counseling records were privileged. Instead, he argues that he showed that the records were likely to contain impeachment evidence and evidence that M.C. was biased against Fraser's church.

Here, Fraser fails to establish either a due process right or an evidentiary right for the court to review the records in camera. Fraser failed to establish that the evidence allegedly showing bias was material. The only specific information Fraser alleged was evidence that M.C. had described the church as a "cult" to her counselor. This fails to show that the counseling records contained material

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[4] State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993).

[5] Gregory, 158 Wn.2d. at 791.

[6] Id.

[7] Id.

evidence. Thus, he failed to show a reasonable probability that evidence in the counseling records "would impact the outcome of the trial."[8]

Additionally, we note that Fraser introduced other evidence showing M.C.'s alleged bias and extensively argued this point during closing argument. Thus, it is unclear to us that the denial of in camera review of the privileged counseling records had any effect on the outcome of this trial.

Fraser also failed to show that the records would contain inconsistent statements. Fraser alleged that the records would contain inconsistent statements because M.C. described the abuse to her counselor before speaking to the detective. The mere fact that M.C. made prior statements is insufficient to show that she made inconsistent statements. Thus, Fraser's argument was purely speculative—not a particularized showing.

In sum, the trial court did not violate Fraser's due process rights and did not abuse its discretion by declining to review in camera M.C.'s counseling records.

SCOPE OF CROSS-EXAMINATION

Fraser argues that the trial court deprived him of his right to confront witnesses and his right to a fair trial by limiting the scope of cross-examination. Specifically, he argues that the court should have permitted him to cross-examine M.C.'s sister about her failure to appear at defense interviews. He also argues that the court should have allowed him to use the court's pretrial findings to cross-examine the lead detective. We disagree with both contentions.

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[8] Id.

A trial court violates a defendant's right to confront witnesses if it impermissibly limits the scope of cross-examination.[9] But "[t]he right to confrontation, and the associated right to cross-examine adverse witnesses, is limited by general considerations of relevance."[10]

Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable."[11]

This court reviews a trial court's rulings on relevancy for abuse of discretion.[12] This court also reviews rulings on "[t]he scope of cross-examination" for abuse of discretion.[13]

Cross-Examination of M.C.'s Sister

First, Fraser argues that the court abused its discretion by ruling that the fact that M.C.'s sister, K.C., missed two defense interviews was not relevant and prohibiting Fraser from cross-examining her on that fact. We disagree.

Here, the court did not abuse its discretion in determining that this line of questioning was not relevant. The court asked Fraser to make an offer of proof on what he hoped to elicit. Fraser stated that K.C. failed to attend two defense

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[9] State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

[10] State v. O'Connor, 155 Wn.2d 335, 348-49, 119 P.3d 806 (2005) (emphasis omitted).

[11] ER 401.

[12] State v. Foxhoven, 161 Wn.2d. 168, 176, 163 P.3d 786 (2007).

[13] Garcia, 179 Wn.2d at 844.

interviews scheduled at the prosecutor's office, although she later spoke to the defense over the phone. Fraser argued that missing the two interviews showed that K.C. was uncooperative, and therefore not credible.

In response, the State argued that K.C. relied on her father for transportation and that she missed the interviews because her father was "recalcitrant" and did not take her to it. The court found that there was no basis to find that K.C. had voluntarily missed the interviews and sustained the State's objection to this evidence.

Because K.C. could not control her own transportation, her failure to appear at the interviews was not relevant, either to her credibility or to any other issue. Further, Fraser's offer of proof noted that K.C. had participated in a telephonic interview. Thus, K.C. had participated when transportation was not an issue. The court did not violate Fraser's right to confront witnesses when it excluded this line of questioning on cross-examination.

Fraser argues that the court abused its discretion because its ruling was based on the fact that the witness was under the age of 18. The court did note that K.C. was under 18. But the court noted that because she was under 18, the evidence was not relevant for the purpose for which Fraser sought to introduce it. Fraser does not deny that K.C. relied on her parents for transportation. Accordingly, this argument is unpersuasive.

Cross-Examination of Lead Detective

Second, Fraser argues that the court impermissibly limited the scope of cross-examination by prohibiting Fraser from using the court's pretrial findings to cross-examine the lead detective in the case. We disagree.

Fraser sought to introduce some of the court's pretrial findings during his cross-examination of the detective. Specifically, Fraser wanted to use the finding that the detective's religious beliefs "may have affected his judgment" during the investigation. Fraser also wanted to use the court's ruling that deleting the e-mails was a Brady violation.

The trial court did not allow Fraser to introduce these findings or cross-examine the detective about them. But it allowed Fraser to cross-examine the detective on the underlying facts—the e-mail messages' religious content and their subsequent deletion.

Limiting the scope of cross-examination in this way was not an abuse of discretion because the court's findings were not relevant. The underlying facts about the detective's conduct were relevant. The jury could have used these facts to find that the detective was biased and thus less credible. And Fraser was able to use these underlying facts in his cross-examination.

But the court's findings and conclusions themselves were not relevant. The findings addressed whether the detective had violated Brady. This determination was not relevant to the jury's determination about whether the detective was credible.

We also believe that if the court had allowed Fraser to use the findings, it could have been an impermissible comment on the evidence by the court. Article IV, section 16 of the Washington constitution prohibits judges from commenting on the evidence. "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury."[14]

Introducing the findings, particularly the finding that the detective's religious beliefs "may have affected his judgment" could inform the jury about the court's opinion about the detective's credibility. This would be an impermissible comment on the evidence.

Fraser argues that the trial court prevented him from introducing evidence about the detective's misconduct. But the court allowed Fraser to cross-examine the detective on the alleged misconduct. It merely prevented Fraser from using the court's conclusion that the detective's behavior was a Brady violation.

At oral argument of this case on appeal, Fraser argued that he was entitled to use the pre-trial rulings in his cross-examination under Davis v. Alaska.[15] But Davis is distinguishable.

In Davis, a "crucial witness for the prosecution" was on juvenile probation.[16] Joshaway Davis sought to cross-examine the witness with the

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[14] State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

[15] 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

[16] Id. at 310-11.

witness's juvenile record, to show that he had a motive to shift suspicion onto other suspects and that he may have been under "undue pressure from the police."[17]

The trial court excluded evidence of the witness's juvenile record, and the United States Supreme Court held that this was error. The Supreme Court held that Davis had been deprived of his right to cross-examine the witness because he could not raise the inference that the witness was biased or under undue influence without using the juvenile record.[18]

Thus, in Davis, it was because of the witness's juvenile record that he was allegedly biased. And without cross-examining the witness on his record, the defense's attempt to show he had a motive to direct suspicion onto someone else seemed entirely speculative.

In contrast, the trial court's pretrial findings in this case were not necessary to demonstrate the detective's alleged bias. The detective's e-mails and the fact that he deleted them showed his alleged bias. Thus, cross-examining the detective on the e-mails sufficiently raised the issue of his bias. Additionally, using the court's pre-trial findings would have introduced the court's opinion on those facts and constituted a judicial comment on the evidence. Davis does not command this result.

In sum, the trial court neither abused its discretion not violated Fraser's right to confront witnesses by excluding this evidence.

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[17] Id. at 311.

[18] Id. at 317-18.

CHARACTER EVIDENCE

Fraser also argues that the trial court abused its discretion by excluding character evidence about him. Specifically, he argues that evidence about his reputation for "sexual morality" was relevant. Because the decision to exclude this evidence was within the range of reasonable choices by the trial court, we disagree.

Under ER 404(a), a party generally cannot introduce character evidence to show that a person acted in conformity with that character. But a defendant may introduce evidence of a pertinent character trait.[19] Under ER 404(a), a character trait is "pertinent" if it is relevant.[20]

Unless certain exceptions apply, a defendant may prove his or her character traits only with evidence about the defendant's reputation for that character.[21]

We review de novo the correct interpretation of an evidentiary rule.[22] "Once the rule is correctly interpreted, the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion."[23]

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[19] ER 404(a)(1).

[20] State v. Perez-Valdez, 172 Wn.2d 808, 819-20, 265 P.3d 853 (2011).

[21] ER 405.

[22] State v. Gunderson, ___ Wn.2d. ___, 337 P.3d 1090, 1093 (2014).

[23] State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

A trial court abuses its discretion if its "decision is 'manifestly unreasonable or based on untenable grounds or untenable reasons.'"[24] "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard."[25]

The question before us is whether evidence of a reputation for "sexual morality" is pertinent under ER 404(a) when the defendant is charged with child molestation or rape of a child.

At the outset, we note that we are unaware of any bright line rule that commands either the admission or exclusion of evidence in any particular case. Once the trial court properly interprets the court rule, the decision in any particular case to admit or exclude evidence remains a discretionary decision by the trial court, in the first instance.

In State v. Jackson, this court affirmed a trial court's ruling that the defendant's reputation for sexual morality was not pertinent to whether he had committed a sex offense with a child.[26] This court stated:

> The crimes of indecent liberties and incest concern sexual activity, which is normally an intimate, private affair not known to the community. One's reputation for sexual activity, or lack thereof, may have no correlation to one's actual sexual conduct. Simply put, one's reputation for moral decency is not pertinent to whether one has committed indecent liberties or incest.[27]

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[24] State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)).

[25] Littlefield, 133 Wn.2d at 47.

[26] 46 Wn. App. 360, 364-65, 730 P.2d 1361 (1986).

[27] Id. at 365.

Essentially, the Jackson court held that while a defendant's ***character trait*** for sexual morality may be pertinent, a defendant's ***reputation*** for that trait is unlikely to correlate to the defendant's behavior. Thus the reputation evidence was not relevant for purposes of that case.

Division Three of this court subsequently declined to follow Jackson.[28] In State v. Griswold, Division Three declined to follow Jackson on two bases—dicta in a Division Two case and dicta in a supreme court opinion.[29] In Griswold, the defendant was charged with child molestation.[30] The trial court did not allow the defendant to present evidence of his reputation for good moral character, following Jackson.[31] Division Three held that this was error and that sexual morality was a pertinent trait in child molestation cases.[32]

The supreme court case on which Division Three relied was State v. Thomas.[33] In Thomas, the supreme court stated that "[t]he sole issue raised by the petition for review is whether the trial court must instruct on character evidence when the defendant has introduced relevant character testimony."[34]

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[28] State v. Griswold, 98 Wn. App. 817, 829, 991 P.2d 657 (2000), abrogated on other grounds by, State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

[29] 98 Wn. App. 817, 828-29, 991 P.2d 657 (2000).

[30] Id. at 819.

[31] Id. at 828.

[32] Id. at 828-29.

[33] 110 Wn.2d 859, 757 P.2d 512 (1988).

[34] Id. at 860.

The State charged the defendant in Thomas with rape of a 14 year old victim.[35] At trial, the court permitted witnesses to testify that the defendant had a reputation for being sexually moral.[36] But the court later refused to give an instruction that the character evidence was sufficient to create a reasonable doubt.[37]

The supreme court held that it was error for the court to refuse to give any instruction on the character evidence.[38] The court then instructed trial courts to use the following instruction in cases involving character evidence:

> Any evidence which bears upon good character and good reputation of the defendant should be considered by you, along with all other evidence, in determining whether or not the defendant is guilty. However, even if you find that the defendant is a person of good character or reputation, you should not acquit if you are convinced beyond a reasonable doubt of the defendant's guilt.[39]

But the supreme court neither cited nor discussed this court's prior decision in Jackson. Moreover, the supreme court did not directly address the issue of whether sexual morality was a "pertinent" character trait in the case. The only statement in Thomas that supports the proposition that the evidence was pertinent is the statement that the character evidence was "properly

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[35] Id. at 860-61.

[36] Id. at 863.

[37] Id. at 860-61.

[38] Id. at 867.

[39] Id.

introduced" under ER 404 and 405.[40] We do not view that statement as a holding that such evidence is, in all cases, admissible.

There is a split of authority on this question in other jurisdictions.[41] And one jurisdiction has explicitly adopted Jackson's reasoning.[42]

Here, the trial court was made aware of this court's decision in Jackson and that it conflicts with Griswold from Division Three. We conclude the decision to follow Jackson from Division One was not an abuse of discretion.

Whether the supreme court will, at some point, resolve the conflict on this question between Division One and Division Three is simply not before us. Thus, we need not address that question.

Finally, in this case, Fraser was an assistant pastor for the church where M.C. and her family were members. Fraser sought to introduce the reputation evidence from members of his church. We assume that assistant pastors generally have a good reputation for sexual morality within their church. So, we question whether testimony of Fraser's good reputation from members of his church would have added anything to what the jury already knew about him in

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[40] Id. at 865.

[41] State v. Rothwell, 154 Idaho 125, 131, 294 P.3d 1137 (Ct. App. 2013) (listing cases from jurisdictions that allow reputation evidence on sexual morality and cases from jurisdictions that do not), review denied, (Feb. 28, 2013); Hendricks v. State, 34 So. 3d 819, 823-26 (Fla. Dist. Ct. App. 2010) (citing and discussing Jackson), review granted, 49 So. 3d 746 (Fla. 2010), review dismissed as improvidently granted, 108 So. 3d 608 (Fla. 2013).

[42] Hendricks, 34 So. 3d at 824-26.

this case. In sum, we question whether there was any prejudice to Fraser from the exclusion of this evidence.

CUMULATIVE ERROR

Fraser also argues that cumulative error denied him a fair trial. We disagree.

Where several errors do not individually warrant reversal, the cumulative error doctrine requires reversal when the errors' combined effects denied the defendant a fair trial.[43]

Here, we conclude that the trial court did not err in any respect. Thus, the cumulative error doctrine does not apply.

STATEMENT OF ADDITIONAL GROUNDS

Fraser raises seven issues in his statement of additional grounds for review.[44] He frames his arguments based on "common sense, fairness, and justice" rather than the law.[45] None of his arguments is persuasive.

In his first three issues, Fraser essentially challenges the sufficiency of the evidence. Fraser argues that M.C.'s testimony was the only evidence against him and that the jury should not have believed her testimony.

But the jury, not this court, determines the credibility of witnesses.[46] And M.C.'s testimony was sufficient to establish all the elements of both crimes.

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[43] State v. Davis, 175 Wn.2d 287, 345, 290 P.3d 43 (2012).

[44] Statement of Additional Grounds for Review at 1-10.

[45] Id. at 9.

[46] State v. Witherspoon, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

In issues 4, 6, and 7, Fraser alleges that the prosecutor committed misconduct. Fraser claims he was prosecuted because of his religious beliefs and that "[t]he State effectively put [Fraser's church] on trial alongside" Fraser.[47] The record does not support these claims. Fraser also alleges that the State placed a certain witness, Athena Dean, on its witness list with no intention of calling her. But the defense also placed this witness on its list. Thus, assuming Fraser is correct, he does not appear to have suffered prejudice.

Fraser also argues that his counsel should have confronted M.C. with certain inconsistencies in her testimony. Analyzing this issue as a claim of ineffective assistance of counsel, Fraser's counsel was not deficient.

To establish deficient representation, the defendant must show that counsel's representation "f[ell] 'below an objective standard of reasonableness'"[48] Courts presume that counsel provided effective representation and require the defendant to prove that no legitimate strategic or tactical reasons exist.[49]

During closing argument, Fraser's counsel used the inconsistencies in M.C.'s testimony to argue that the jury should not believe her. But counsel did not confront M.C. with all of the inconsistencies during cross-examination.

This was a legitimate strategic decision, as it did not allow M.C. to explain the inconsistencies. Thus, Fraser's counsel was not deficient.

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[47] Statement of Additional Grounds for Review at 7.

[48] State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[49] Id.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	SUPREME COURT NO. _____
v.	)	COA NO. 70702-7-I
	)	
MALCOLM FRASER,	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

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

THAT ON THE 18TH DAY OF MARCH 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MALCOLM FRASER
DOC NO. 366545
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF MARCH 2015.

X Patrick Mayovsky