Court of Appeals
Division II
of the State of Washington

State of Washington
Respondant,

v

Robert Bruce McKay-Erskine
Appellant.

No: 45587-1-II

Statement of Additional
Grounds for Review

I, Robert Bruce McKay-Erskine, have received the opening brief prepared by my attorney Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of additional Grounds for Review when my appeal is considered on the merits.

I-Summary of Additional Grounds

A- I would like to start by first expressing my appreciation for your time in accepting and evaluating my Statement of Additional Grounds for Review (SAG).

I am unsure if I have obeyed all the rules and regulations but I have done my utmost to ensure that all of the points referred to herein are factual and concise, and that all supporting arguments are relevant and devoid of

emotional content, as well as properly referenced to the record by date, page, and line. I have also made every effort to reference all arguments to their appropriate points of record, for example; arguments regarding hearsay are referenced first to the hearsay portion of the proceedings, then references to later proceedings to demonstrate the effect of the alleged error. I would also point out that I make two arguments that are similar to those put forth by my appellate counsel, Mrs. Cyr.

B - In my SAG I am going to argue that trial court abused its discretion by allowing the State to:

A-Improper Application of Evidentiary Rule 404

B-Improper Application of the Ryan Factors, Culminating With a Violation of the Defendant's Sixth Amendment Right to Confront

C-Erroneous Submission of Hearsay Evidence by State Actors

D-Erroneous Submission of Written Testimony as Hearsay

E-Erroneous Submission of Recorded Testimony as Hearsay

F-Prosecutorial Misconduct

G-Improper Application of RCW 9.94A.589 During Sentencing

H-Cumulative Error Doctrine.

II-Additional Grounds

A-Improper application of Evidentiary Rule 404

1-Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

a- (a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

b - The following definitions come from: Black's Law Dictionary (9th ed. 2009)

1-"Crime. An act that the law makes punishable; the breach of a legal duty treated as the subject matter of a criminal proceeding.",

2-"Wrong. Breach of one's legal duty; violation of another's legal right".

3-"Act. Something done or performed, esp. voluntarily; a deed".

c-The following definition comes from: The American Century Dictionary circa 1994

1-"Thought. (1) process or power of thinking; faculty of reason (2) way of thinking associated with a particular time, group, etc. (3) attention, reflection, or consideration (4)idea, conception, or piece of reasoning (5) (usu. pl.) what one is thinking; one's opinion".

2-Supporting Arguments

a-The State clearly explains what and how they wish to submit the evidence for (092613RP23(2-5), (12-6)). As the rule clearly states: "...(b) Other Crimes, Wrongs, or Acts..." "...the thought of..." that this was a thought, allegedly proffered by the defendant. A thought, this does not meet the definition of crime, wrong, or act. At best, this would be admitable as ER 404(a)1), "...Character of Accused..." which the State is only allowed as a rebuttal to defense's initial offering. The record clearly states that this is the first reference to the defendant's character, and it is clearly being made by the State. As stated in City of Kennewick v Day (2000), 142 Wash.2d 1, 11 P.3d 304; "The prosecution is foreclosed from presenting evidence in the first instance regarding the defendants character."

b-092613RP23(19-22) " [Mrs.] Lavergne... contacted police back in October or November of 2012 and at the time believed she herself was a suspect in something."

This circumstance alone should automatically raise doubts as to the credibility and veracity of the alleged statement.

c-Alleged statement was made eight years prior to these proceedings (092613RP29(1-2)), and in no way indicates that the defendant continues to think or feel the same today, which is supported by State v Lane (1995), 125 Wash. 2d 825, 889 P.2d 929; "Under 404(b), evidence is admissible to complete story of the crime on trial by proving its immediate context of happenings near in time and place."

3-In conclusion, State v Yarbrough (2009), 151 Wash. App 66, 210 P.3d 1029, supported by State v Russell (2010), 154 Wash. App. 775, 225 P.3d 478, review granted 169 Wash. 2d 1006, 234 P.3d 1172, reversed 171 Wash. 2d 118, 249 P3d 604; and State v Mee (2012), 168 Wash. App 144, 275 P.3d 1192, review denied 175 Wash.2d 1011, 287 P.3d 594; which states; " Rule, providing that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith, is not designed to deprive the State of relevent evidence necessary to establish an essential element of its case, but, rather, to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." To put it another way, State v Foxhoven (2007), 161 Wash.2d 168, 163 P.3d 786, which states; "The statutory prohibition against admission of evidence of other crimes, wrongs, or acts encompasses not only prior bad acts and unpopular behavior but any evidence offered to show character of a person to prove the person acted in conformity with that character

at the time of a crime." State v Wade (1999), 98 Wash.App. 328, 989 P.2d 576, supported by State v McCreren (2012), 170 Wash.App 444, 284 P.3d 793, review denied 176 Wash.2d 1015, 297 P.3d 708 and State v Wilson (2008), 144 Wash.App. 166, 181 P3d 887, as amended; puts it thus; " Regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith." As the seven prior cases suggest, ER404 is very specific in regard to what evidence can be submitted and on how that evidence can be used.

Failure of trial court to exercise its discretion properly can become an error of constitutional magnitude, especially when allowing such flagrantly inflammatory and severely prejudicial evidence as this to be admitted and as such, requires reversal as supported by State v Pogue (2001), 104 Wash.App 981, 17 P.3d 1272; " Erroneous admission of evidence of prior bad acts requires reversal if there is a reasonable probability that the error materially affected the outcome." as supported further by, State v Gresham (2012), 173 Wash. 2d 405, 269 P.3d 207 and State v Fuller (2012), 169 Wash.App. 797, 282 P3d 126, review denied 176 Wash.2d 1006, 297 P.3d 68

B-Improper Application of the Ryan Factors

1-State v Ryan (1984), 103 Wash.2d 165, 691 P.2d 197, states; " Recently this court adopted a set of factors applicable to determining the reliability of out-of-court declarations. State v Parris, 98 Wash.2d 140, 654 P.2d 77 (1982). Those factors 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.

(5) the timing of the declaration and the relationship between the declarant and the witness.'

Parris, at 146, 654 P.2d 77. We added that these factors were not exclusive and should be considered with the additional factors in Dutton v Evans, 400 U.S. 74, 88-89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1978): (1) the statement contains no express assertion about past fact, (2) cross-examination could not show the declarant's lack of knowledge, (3) the possibility of the declarant's faulty recollection is remote, and (4) the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvements."

2-Supporting Arguments

a-(1) motive to lie and (2) character of declarant

I-A.B. is young, bright, eager and charming young lady (101013RP432(5-19)), who unfortunately is also; being neglected by her mother, having to deal with her step-dad, four step-sisters, and two step-brothers moving out (100913RP333(18)) after a nasty argument involving allegations of physical abuse that culminated in, the police arriving Mrs. Erskine-McKay checking into a mental hospital (100913RP354(23)- 355(12)) and her whole world being changed, again.

Mrs. Erskine-McKay, who already felt like she had been misrepresented (100913RP353(22-23), 357(21) - 358(1)), was upset with the defendant, and has a history of making threats (101413RP31(6-11), as well as rejected testimony from Ms. Edwards (101413RP44(23-25)), was alone with A.B. for several months before Mr.Rosso and his wife, Mrs. Hasenbuhler moved in (101013RP406(23)). Either before or after Mr.

Rosso and Mrs. Hasenbuhler moved in A.B.has firmly learned her mother's side of the events of May 17, 2012 and this was the the very first thing she reported to Mrs. Scott, the CPS investigator (100313RP125(6-15)). As the record goes on to demonstrate at numerous points there are no real consistencies except A.B. not wanting anyone to get in trouble for her (100313RP125(17-19), 142(5-13)), which is also a reasonable excuse for her demeanor, which, as the Court is aware, is not always indicative of veracity.

II-Further, there were numerous concerns of coaching from the beginning, starting with Mrs. Nyland, the school counselor (100313RP113(14-22), 100913RP367(9)-368(12), 378(8) - 379(10), 381(3-8), 101013RP 424(5) - 425(9), 439(23) - 440(1)), who shared her concerns with CPS, then during A.B.'s forensic interview (exhibit 9 for child hearsay, exhibit 20 for trial, I apologize for not providing time stamps), at the very end Mrs, Thomas asks A.B. ; " Is everything you're telling me the truth?' A.B. responds; "It's supposed to be.", and during her forensic medical evaluation with Mrs. Hanna-Truscott she has to pause and check that she said everything (100713RP205(3-9)), and finally it would explain perhaps the only real spontaneous declaration that A.B. made to Mrs. Nyland; "You know, [the defendant] is a really nice guy." (100913RP372(24)-373(1), 376(5-16), which A.B. made away from Mrs. Hasenbuhler.

b-(3) whether more than one person heard the statements; No two people were told consistent details with any real specificity as demonstrated by the record: 100313RP116(10)-117(12), 125(6)-127(14), 140(4-9), 141(20-21), 157(14-159(10), 162(25)-164(12), 166(5-7), 178(2-10), 199(18) - 205(22), A.B. did not testify during Child

Hearsay hearing about abuse, in trial, 100913RP281(5) - 300(16), which the State had to poke, prod, cajole, and ultimately had to lead A.B. who was constantly saying, I don't know, I don't remember, probably, maybe, etc. A.B. didn't really provide the, when, where, how often, how frequent, or even say what, that the State didn't already provide through the leading questions.

c-whether the statements were made spontaneously; Black's Law Dictionary (9th Ed. 2009) defines spontaneous declaration as; " Evidence. A statement that is made without time to reflect or fabricate and is related to the circumstances of the perceived occurrence."

Each and every utterance, especially the first,was the result of either a direct question (100313RP155(13-22), 176(21) - 177(3), being told what to say to Mrs. Nyland (100313RP113(14-22)), or as the result of an interrogatory; CPS (100313RP125(6-9), Mrs. Hanna-Truscott (100713RP193(6-8)), and Mrs. Thomas (100713RP223(13) - 224(21), exhibit 9 (same as exhibit 20)) which were all testimonial. In re Dependency of S.S. (1991), 61 Wash.App. 488, 814 P.2d 204 it states; " For purposes of determining reliability of a statement made by a child victim of sexual abuse under ten years of age, any statements made that are not the result of leading or suggestive questions are 'spontaneous'." None of these qualify The only real spontaneous statement made by A.B. was to Mrs. Nyland after A.B. was forced to talk to her, and that was 100913RP372(24) - 373(1), 376(5-16); You know, [the defendant] is a really nice guy."

d-(5) Timing of the declaration and relationship between the declarant and witness; A.B. made her first disclosure to Mr. Ross, in-responce to direct questions his

wife told him to ask (100313RP154(24) - 155(3), 155(13-22), 101013RP415(22) - 416(2), 452(16-23), 472(2-9)), at least six months after the defendant moved out. It was only after Mr. Rosso and Mrs. Hasenbuhler moved in, and specifically after Mrs. Hasenbuhler, with her extensive history of mental health issues, including a multiple personality disorder, with at least four distinct personalities (100313RP161(3-6), 165(25) 166(4), 168(22-169(5),, 101013RP401(21)-403(7), 418(1-23, 438(12-13), 441(9-15)), on top of her own sexual abuse (101013RP434(2-8)), which was very similar to what A.B. reported (101013RP415(10-13)), and then having numerous detailed, private (100313RP156(4-13)), talks about sex and reproduction with A B. (100313RP150(10)-151(11)), and finally, someone who likes to play pranks (100313RP89(16-21)) and has a mischievous personality (100313RP170(5-13)).

e-(6) no express assertions about past facts; It's child hearsay , of course it expressly asserts past facts.

f-(7) cross-exam could not show lack of knowledge; Defence wasn't allowed to ask questions about A.B.'s knowledge (100313RP(25)-88(18), 100713RP225(7) - 237(22)), which is a direct violation of defendant's Sixth Amendment right to confront adverse witnesses, as supported by State v Kinzle (2014), 326 P3d 870 which states; "In Rohrich, the State called the alleged victim of rape and child molestation to testify and asked her only innocuous background questions about her school, her birthday, and her cat's name. Rohrich. 132 Wash. 2d at 474, 939 P2d 697.
The defendant's conviction was reversed " The States failure to adequately draw out testimony from the child witness *before* admitting the child's hearsay puts the defendant

in a constitutionally impermissible Catch-22' of calling the child for direct or waiving his confrontation rights." Rohrich, 132 Wash.2d at 478, 939 P.2d 697, quoting Lowery v Collins, 996 F.2d 770, 771-72 (5th Cir. 1993). " As the record shows, even though State did not ask those questions, defense did attempt to ask and was over-ruled by the State during the child hearsay hearing (100313RP87(25)-88(18), 100713RP225(7) - 237(22)). As pointed out in State v Ryan (1984), 103 Wash.2d 165, 691 P.2d 197 ; "Where cross-examination would serve to expose untrustworthiness or inaccuracy, denial of confrontation would be a constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." as further supported by; State v Kilgore (2001), 107 Wash.App. 160, 26 P.3d 308, review granted 145 Wash.2d 1032, 41 P.3d 485, affirmed 147 Wash.2d 288, 53 P.3d 974; State v Smith (2001) 108 Wash App 581, 31 P.3d 1222, review granted 145 Wash.2d 1033, 43 P.3d 20 reversed 148 Wash.2d 122, 59 P.3d 74 reconsideration denied; State v Spicer, 1998 WL 12660 (Wash. Ct. App. Div. 3 1998), review denied, 136 Wash.2d 1010, 966 P2d 904 (1998).

g-(8) faulty recollection is remote & (a) declarant misrepresents defendant; There is such a distinct lack of continuity in the events testified to from witness to witness, let alone the notably bizarre way, and carefully managed how (100313RP167(13-15)), that the first allegations came to notice that there should be little doubt that the recollection and misrepresentation of events and participants is highly likely, as demonstrated in trial.

3-In conclusion, trial court severely abused its discretion regarding the Ryan factors, culminating in outright denying the defendant's Sixth Amendment right to confront

his accuser. This alone is a constitutional violation requiring reversal, let alone the cumulative effect of the other Ryan violations stated herein.

C-Erroneous Submission of Hearsay Evidence by State Actors

1-The State entered interrogatorial evidence as hearsay which was the incorrect method for submission. Doing so not only laid an incorrect foundation, but unduly prejudiced the defendant by denying him the appropriate method to challenge the evidence.

2-Arguments in Support

a-Admission of evidence as hearsay from Mrs. Nyland, Mrs. Scott, Mrs. Hanna-Truscott, and Mrs. Thomas, all being state actors, should have been denied due to the circumstances of their involvement. State v Beadle (2011), 173 Wash.2d 97, 265 P.3d 863 states; " Victim's hearsay statements to investigators for Child Protective Services (CPS) and detective were testimonial, for purposes of Confrontation Clause, such that their admission at trial for child molestation was error; immediate danger to victim had passed at the time of disclosures, interview had degree of formality, and primary purpose of interview was to establish or prove past events potentially relevant to later criminal prosecution, rather than to respond to ongoing emergency." and further, from paragraphs twenty-one through twenty-eight, and thirty-one through thirty-three, the Court defines the underlying factors to establish whether evidence is testimonial or non-testimonial in nature. Like Beadle, the defendant did not have the opportunity to cross-examine the alleged victim properly (100313RP87(25=88(18), 100713RP225(7) - 237(22).

From the first involvement of Mrs. Nyland (100313RP 113(15-16)) who was mandatorily bound to contact CPS, with Mrs. Scott responding and then interviewing A.B. (100313RP 125(6-9)), who then refers A B. to Mrs. Hanna-Truscott (100713RP 223(13) - 224(21) not primarily for treatment, but for confirmation of child abuse as a step in law enforcement proceedings. State v Hopkins (2007) 137 Wash.App 441, 154 P.3d 250, states; " Child's hearsay statements that she made to social worker were testimonial, and therefore, their admission violated defendant's right to confront witnesses against him in prosecution for rape of a child and child molestation; during second interview, at which there was no ongoing emergency, social worker was acting in a government capacity and, in that capacity, she obtained statements from a child that State used to prosecute the defendant." Which is exactly what the State did in this case.

b-Further, regarding States submission of Mrs. Hanna-Truscott's testimony under the provision of ER803(a)(4); first, there was no indication of a treatment plan as a result of exam; second, per Mrs. Hanna-Truscott, of Mary Bridge Child Advocacy Center, this was a forensic evaluation performed as a direct referral from CPS (100713RP 192(10-13) and at the request of the Prosecutor's Office (100313RP 127(15-25)); third, there is no evidence in the record that alleged victim was suffering from any physical trauma or condition at the time of the interview or understood the role of the nurse so as to trigger the motivation to provide truthful information that was needed for exception to apply, as supported by State v Lopez (1999), 95 Wash. App 842, 980 P.2d 224. In State V Wade (1993 N.H), 136 N.H. 750, 622 A.2d 832, the Court held; "Medical treatment hearsay exception applied whether declarant is child or adult, and foundation for admissibility must include showing that child possessed the requisite state of mind.";" For statement to be admissible under medical treatment hearsay exception, declarant must have

intended to make the statement in order to obtain a medical diagnosis or treatment; while diagnosis need not inevitably result in treatment for statements to qualify under this rule, the diagnosis must have been sought with the purpose of treatment, if necessary. ";" If declarant is unaware that the statement will enable physician to make a diagnosis and administer treatment, statement is not sufficiently trustworthy to qualify under medical treatment hearsay exception. "," State failed to establish that five-year-old alleged victim of sexual assault by her father understood the medical purpose of examinations or the need to answer questions truthfully; thus, child's statements during interviews with doctors were not admissible under medical treatment hearsay exception. ";" In prosecution for aggravated felonious sexual assault, error from admission under medical treatment hearsay exception of five-year-old alleged victim's statements during doctor's interviews was harmful; other than examining physicians equivocal findings, those statements were all that directly established essential element of penetration. "; further substantiated from U.S. v Tome (1995), 61 F. 3d 1446, 42 Fed. R. Evid. Serv. 699; "Although caseworker was highly trained and experienced in interviewing children who were allegedly victims of abuse, interview consisted of open-ended non-leading questions, and child used childish language to describe sexual abuse with specificity and in graphic detail, sexual abuse victim's detailed account of abuse, made during interview with caseworker that was solely for purpose of determining whether protective order was appropriate, was not admissible under residual exception to hearsay rules; statement was not spontaneous, interview occurred more than one year after events described, and interview took place when child arguably had motive to fabricate story. "and; " Erroneous admission of hearsay statements against defendant accused of sexual abuse of a child was not harmless; erroneously admitted statements described particular instance of abuse with great specificity and in graphic terms, while victim's own testimony at trial was not nearly as articulate or comprehensive. "and supplemented further by

38 ALR. 5th 433, Admissibility of Statements Made for Purposes of Medical Diagnosis or Treatment as Hearsay Exception Under Rule 803(4) of the Uniform Rules of Evidence, section II-Admissibility Under Particular Circumstances, A - Cases Involving Child Abuse, 1- Statements Describing Abuse, In General, Section 3(b) To physician -- Held not admissible under 803(4) and Section 6(b) To nurse -- Held not admissible under 803(4): "Hoff v Com., (Ky. 2011) 394 S.W. 3d 368, People v Hackrey (1990) 183 Mich. App. 516, 455 NW 2d 358, Colvard v Com. (Ky. 2010) 309 S.W. 3d 239, State v Coates, 950 A.2d 114 (Md. 2008),

State v Merritt, 875 So.2d 80 (La. Ct. App. 3d Cir 2004), Commonwealth v Smith (1996, Pa) 681 A2d 1288, State v Lawrence, 752 So. 2d 934 (La. Ct. App.4th Cir 1999) writ denied, 764 So. 2d 962 (La. 2000), State v Whipple (Mont. 2001) 2001 MT 16, 19 P.3d 228, Van Patten v State (Ind. 2013) 986 N.E.2d 255, Coates v State, 930 A.2d 1140 (Md. Ct. Spec. App. 2007), State v Mendez 2009-NMCA-060, 211 P.3d 206 (N.M. Ct. App 2009) cert granted, (June 23, 2009), State v Ortega, 2008- NMCA-001, 175 P.3d 929 (N.M. Ct App 2007), State v Watts, 539 S.E.2d 37 (N.C. Ct App. 2000),"

3-In conclusion, even if the evidence would have been allowed had it been submitted under the correct means, it does not change the fact that it was submitted erroneously and must therefore be ruled invalid for the purposes stated in this trial, for this instance. The State should not be allowed to submit repetitious hearsay merely to justify the existence of repetitious hearsay, one person saying almost the same thing four times does not lend weight to credibility, it must still undergo the crucible of adversarial testing, which is denied by the erroneous submission of evidence.

D-Erroneous Submission of Written Testimony as Hearsay

1-Written testimony was erroneously admitted as hearsay evidence, exhibits; 8, 11, 13, 15, 16, 17, 21, 22, 24

2-Argument in Support

a-Written statements submitted as hearsay evidence should not have been allowed as they were testimonial in nature. The statements resulted from interrogatories with state actors (100713RP 208 (4-15), 222 (14) - 223(10), 101013RP 485 (18) - 487 (7), 101413RP 56 (17) - 59 (9)) at Mary Bridge Child Advocacy Center from a referral by CPS (100713 RP 192 (10-13) and at the request of the Prosecutor's Office (100313RP 127(15-25)). State v Hopkins (2007), 137 Wash. App 441, 154 P.3d 250, in part; "Child's hearsay statements that she made to social worker were testimonial, and therefore, their admission violated defendant's right to confront witness against him..."with Swan v Peterson, C.A. 9 (Wash.) 1993, 6 F.3d 1373, in part; "Other corroborating evidence may not be considered by court in assessing reliability of child's hearsay statements..."

3-In conclusion, again, the State is entering evidence under the incorrect rule, by-passing the just and proper procedure of adversarial testing. The State can not just pick and choose which laws, rules, and statutes it will abide by, it is equally liable to all, and must be held accountable when errors are made, the same as every man, woman, and child.

E-Erroneous Submission of Recorded Testimony as Hearsay.

1-DVD recording of alleged victims interrogatory with Mrs. Thomas of Mary Bridge Child Advocacy Center, exhibit 9 and 20, was erroneously admitted as hearsey.

2-Argument in Support

a-Mrs. Thomas is a forensic interviewer (100713RP216(6-9)) conducting a scheduled interview with A.B. at the request of the Prosecuter's Office (100313RP 127(15-25)) with a referral from CPS (100713RP 192(10-13)). An item of particular note; at the very end of this interview Mrs. Thomsas asks A.B. if she is telling the truth, A.B.'s response was; "It's supposed to be." a rather unusual answer that speaks to the veracity of the statements. Referring again to the U.S. v Tome (1995) 61 F.3d 1446, 42 Fed. R. Evid. Serv. 699, in part "Although caseworker was highly trained and experienced in interviewing children...made during interview with caseworker solely for the purpose of determining...was no admissible under residual exception to hearsay..."; and "Erroneous admission of hearsay statements...was not harmless; erroneously admitted statements described particular instance of abuse with great specificity and in graphic terms, while victim's own testimony at trial was not nearly as articulate or comprehensive. "This was a forensic interview used exclusively as a step in law enforcement proceedings. This is addressed in State v Hopkins (2007), 137 Wash. App 441, 154 .P.3d 250, in part; "Child's hearsay statements that she made to social worker were testimonial, and therefore, their admission violated defendant's right to confront the witness against him..." with Swan v Peterson, C.A. 9 (Wash.) 1993, 6 F.3d 1373, in part; "Other corroborating evidence may not be considered by court in assessing reliability of child's hearsay." and quoting from 71 A.L.R. 5th 637 (Originally published in 1999), Section III Construction and Application § 7(b) Reliability of victim - Hearsay statements not reliable; "Hearsay evidence, in form of statements by three-year-old victim to mother and grandfather and to police detective and Child Protective Services worker who conducted videotaped interview, was insufficiently reliable to be admissible under "protected persons" statute in child molesting prosecution; there was no indication that statements were made close in time to alleged

molestation, statements were not sufficiently close in time to each other to prevent implantation or cleansing, and victim was unable to distinguish truth from falsehood. West's A.IC. 35-37-4-6, 35-42-4-3(a); Rules of Evid Rule 801(c). Carpenter v State, 786 N.E.2d 696 (Ind. 2003)."; § 9(b) Videotaped testimony of victim - Videotape inadmissible;"In Cogburn v State, 292 Ark. 564, 732 S.W.2d 807 (1987), the court held that the seven-year-old child victim's videotaped testimony was inadmissible because it was admitted at trial under the wrong statute."

3-In closing, once again the State is attempting to admit evidence under the wrong statute, once again entering highly inflammatory and prejudicial evidence without allowing the defendant a proper and correct way to confront the evidence using the crucible of adversarial testing.

F-Prosecutorial Misconduct

1-The State made several references during their closing arguments that were express personal opinions, references to facts not substantiated by the record, denigrating comments, and emotional appeals to the jury.

2-Supporting Argument

a-At several points in the State's closing argument, they resort to using; denigrating remarks (101513RP 728(19-21), 732(21) - 733(1), 752(3-6), 754(2-7), at one point classifying the group as a; "cult of dysfunction and neglect" (101513RP725(8)); appeals to passion or prejudice (101513RP 708(23-25), 714(23) - 715(6), 729(12-14), 731(19-24), 734(4-6), 753(12-17), 755(4-7), and at another point;

"...go ahead and urinate on yourself" (101513RP 754(8-9)); references to facts unsupported by the record (101513RP 714(23) - 715(6), refuted by the record at 100913RP 372(7-22), 373(21-25) and 376(11-13); 101513RP 731(22-24), 754 (8-9)); and finally, references to improper evidence, purely for the inflammatory and prejudicial effect (101513RP 732(14) - 733(7)).

3-In closing, allow me to state; "The prosecutor does not represent the victim, but has the responsibility to be a minister of justice, which requires them to see that the defendant is accorded procedural justice and that guilt is decided upon a basis of sufficient evidence. "I'm paraphrasing the Rules of Professional Conduct, 3.8. There are quite a number of cases that support this concept, starting with; State v Jones (1993), 71 Wash.App 798, 863 P.2d 85; "Appeals to prejudice and passion of jury and references to matters outside evidence are improper." supported further by; In re Cross (2014), 2014 WL 2892418;State v Berube (2012) 286 P.3d 402; State v Davis (2012), 175 Wash.2d 287; State v Fuller (2012), 282 P.3d 126; State v Pierce (2012), 280 P.3d 1158; State v Rafay (2012), 168 Wash.App 734; State v Turner (2014), 275 P.3d 356. To quote again from State v Jones (1993), 71 Wash.App 798, 863 P.2d 85; "Although prosecutor has wide latitude in closing argument to draw and express reasonable inferences from evidence, prosecutor may not make statements that are unsupported by record and prejudice defendant." supported by; In re Glassmann (2012), 286 P.3d 673; State v Turner (2012), 275 P.3d 356; State v Pierce (2012), 280 P.3d 1158; In re Yutes (2013), 296 P.3d 872; State v Ramos (2011) 2011 WL 4912836; State v Rafay (2012), 168 Wash.App 734. One final quote from State v Jones (1993), 71 Wash.App 798, 863 P.2d 85; "Testimony suggesting that the accused is a member of a group that has a

statistically higher incidence of child abuse is likewise impermissible because of it's prejudicial effect. State v Petrich, 101 Wash.2d 566, 576, 683 P.2d 173 (1984); State v Braham, 67 Wash.App 930, 841 P.2d 785; State v Maule, 35 Wash.App 287, 293, 667, P.2d 96 (1983); State v Steward, 34 Wash.App 221, 224, 660, P.2d 278 (1983)."

G-Improper Application of RCW 9.94A.589 During Sentencing

1-Trial court erred in failing to count all five offenses as one crime for calculating the offender score and sentencing, per RCW 9.94A.589.

2-Supporting Argument

a-"Finding that child molestation and child rape did not constitute same criminal conduct for purposes of determining defendant's offender score and criminal sentence was unsupported by record as State failed to prove that the defendant committed crimes in separate incidents, both crimes, committed through continuous sexual behavior over short period of time, involved same objective criminal intent, which was the defendant's sexual gratification, and child molestation furthered child rape, as inappropriate rubbing and touching of child led to penetration of child's vagina." State v Dolen (1996), 83 Wash.App 361, 921 P.2d 590 review denied 131 Wash.2d 1006, 932 P.2d 644,, supported by; State v Kloepper (2014), 317 P.3d 1088; State v Salinas (2012), 169 Wash.App 210, 279 P.3d 917 review denied 176 Wash.2d 1002, 297 P.3d 67; State v Porter (1997), 133 Wash.2d 177, 942 P.2d 974; State v Bickle (2009), 153 Wash.App 222, 222, P.3d 113, State v McGrew (2010), 156 Wash.App 546, 234 P.3d 268, review denied 170 Wash.2d 1003, 245 P.3d 226; State v Mehrabian (2013), 175 Wash.App 578,

308 P.3d 660, review denied 178 Wash.2d 1022, 312 P.3d 650; State v Young (1999), 97 Wash App 235, 984 P.2d 1050; State v Palmer (1999) , 95 Wash.App 187, 975 P.2d 1038; State v Collins (1987), 48 Wash.App 95, 737 P.2d 1050, review granted, reversed on other grounds 110 Wash.2d 253, 751 P.2d 837, and finally; State v Walden (1993), 69 Wash.App 183, 847 P.2d 956.

H-Cumulative Error Doctrine

1-Trial court made numerous errors, some of which may not be sufficient to justify reversal on their own, but, when taken together, their combined weight has denied defendant a fair trial and under the cumulative error doctrine requires reversal.

2-Supporting Arguments

a-State v Toloff (1923), 211 P.745 states; "Where a great many errors were committed in the trial of a charge of attempt to commit rape, none of which, standing alone, might be sufficient to require reversal, but the cumulative effect of which was very prejudicial, the conviction will be reversed, especially where the evidence of guilt was so feeble as to leave reasonable doubt, unless the jury was influenced by matters not appearing in evidence."

b-State v Coe (2006), 684 P.2d 668 states; "Accumulated evidentiary errors committed by trial court and violations of discovery rules by prosecutor necessitated new trial of prosecution for first-degree rape."

c-State v Weber (2006), 149 P.3d 646 states; "Cumulative error may warrant reversal, even if each error standing alone would be otherwise be considered harmless." Supported by the following; State v Russell (1994), 882 P.2d 747; State v Perrett (1997), 936 P.2d 426; State v Saunders (2004), 86 P.3d 232; State v Yarbrough (2009), 210 P.3d 1029; State v Isreal (2002), 54 P.3d 1218; State v Venegas (2010), 228 P.3d 813; State v Korum (2006), 141 P.3d 13, In re Yates (2013), 296 P.3d 872; State v Bluehorse (2011), 2011 WL 174859; State v Lewis (2010), 233 P.3d 891; State v Garcia (2013), 2013 WL 6008613; State v Brewczynski (2013), 294 P.3d 825 and finally; State v Newbern (1999), 975 P.2d 1041.

III-Conclusion

In the previous sections I have demonstrated all eight of the following points:

A-Improper Application of Evidentiary Rule 404

B-Improper Application of the Ryan Factors, culminating with a violation of the Defendant's Sixth Amendment Right to Confront

C-Erroneous Submission of Hearsay Evidence by State Actors

D-Erroneous Submission of Written Testimony as Hearsay

E-Erroneous Submission of Recorded Testimony as Hearsay

F-Prosecutorial Misconduct

G-Improper Application of RCW 9 94A.589 During Sentencing

H-Cumulative Error Doctrine.

B-Many of the errors cited herein unfairly prejudiced the defendant. Introducing evidence improperly takes that evidence outside of the defense's ability to properly challenge through the crucible of adversarial testing, and it did not just happened once, it happened seven distinct times. Once is understandable, but seven is outrageous. The cumulative effect created an environment so biased and prejudicial that it turned this noble proceeding into a mockery of the very thing it is supposed to represent, justice. This was not a fair trial, it was an embarrassment to the very ideal it was meant to represent. I might be a tad biased now, but when I started these proceedings, I had faith in what is supposed to be the best judicial system in the world. A view that is shared by many, and not just Americans. Like the jury, I had complete faith I was going to get a fair trial, instead the State abused that trust and faith by allowing the prosecution to time and again violate the very rules they are sworn to uphold by siding with the prosecution whenever the defense dared to object. This was no trial, it was a travesty.

C-In conclusion, this document shows first that the State allowed highly inflammatory and extremely prejudicial evidence to be incorrectly submitted seven different times. Second that the State built their case around erroneous evidence. Third that the State violated the defendant's Constitutional Rights, the right to confront, on seven different occasions; the right to a fair trial; the right to equal protection under the law, and; the right to not be persecuted unjustly. The only choice to be made is clear; to overturn and release the defendant, or, to reverse defendant's conviction and remand for a new, fair, trial.

Thank you for your time on this matter today.

Signature: 

Date: 9/11/14