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STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

COURT OF APPEALS  
STATE OF WASHINGTON  
2011 JUN 13 10:40  
*[Handwritten signature]*

STATE OF WASHINGTON,  
Respondent,  
v.  
John E. Erickson  
Appellant.

No. 65935-9  
STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

I, John E. Erickson, have received and reviewed 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.

Additional Grounds

See Attached:

Additional Ground 1 (Brady Violation).....	4 Pages
Additional Ground 2 (Ineffective Assistance of Counsel).....	6 Pages
Additional Ground 3 (Prosecutorial Misconduct).....	2 Pages
Additional Ground 4 (Illegal Search) .....	1 Page
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Exhibit 1 (Excerpt from W.W.C.C. Psych200 Textbook) .....	4 Pages

Date: 6/8/11 Signature: *John E. Erickson*

## Additional Ground 1 (Brady Violation)

Did the City of Renton Police Department and/or the prosecuting attorney commit a Brady Violation when it did not collect, nor document, nor photograph, nor report to the child interviewer the pornographic DVD's that J.S. had been watching? In other words, did this inaction violate the due process clause of the Fourteenth Amendment? It is possible that to fully determine this that an evidentiary hearing may be required, but I believe that there is sufficient evidence in the record to prove this claim. If there is not sufficient evidence, then I would request an evidentiary hearing.

### Supporting Case Law:

- Brady v. Maryland 373 U.S. 83, 10 L Ed 2d 215, 83 S Ct 1194
- Kyles v. Whitley 514 US 519 – “a prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor’s attention.”
- State v. Siclovan 2007 Wash. App. LEXIS 1745 No. 33697-9-11 – Just like in this case, the pornographic DVD’s “support my case theory”, was suppressed by the state, and the suppression was prejudicial.
- State v. Wittenbarger 124 Wn.2d 467, 880 P.2d 517 (1994) – “Dismissal of criminal charges is the only remedy for the State’s destruction of evidence only if the State fails to preserve material exculpatory evidence or, in the exercise of bad faith, it fails to preserve potentially useful evidence.”
- State v. Ramirez 2002 Wash App. LEXIS 546 no. 26687-3-11 – “Furthermore, Breland’s report, which the court admitted, indicates that D.L. was exposed to pornography.” This aided in the determination that DL’s memory of the incident was “tainted” and required the state to dismiss the case.

To support the fact that J.S. had been watching pornography refer to:

- RP 430:24 where Shaun Erickson says “I observed my daughter sitting on my bed watching an adult movie.”
- RP 541:15 where J.S. says the pornographic DVD’s were in the drawer below the TV.
- RP 542:7 where J.S. says “There were 4 movies.”
- RP 545:4 where J.S. admits to watching all 4 pornographic DVD’s from “beginning to end.”

The only trace of the pornographic DVD’s that remains is a photo that my wife took of J.S. and Shaun Erickson’s bedroom immediately after the police arrested me and searched the house. This photograph is discussed:

- RP 118:13 where Ms. Rogers-Kemp mentions the picture of the pornography J.S. was exposed to.
- RP 119:1 where Ms. Rogers-Kemp discusses the “picture of all the videos.”

To support the claim of a Brady Violation, the 3 pronged test is listed below:

1. The evidence at issue must be favorable to the accused either because it is exculpatory or because it is impeaching. I believe it to be exculpatory because it proves why I am innocent. It explains that J.S. was telling a story of what she had seen on one of these DVD’s, not something that actually happened to her. I believe it

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to be impeaching because it proves that Shaun Erickson was lying when he said he kept the pornographic DVD's up high in a box in his closet.

- A. Just like in *State v. Ramirez* the missing DVD evidence would have been exculpatory in this case because it would have proven the alleged victim's memory was "tainted".
  - B. RP 433:5 where Shaun Erickson says he kept the pornography in the closet on the top shelf versus RP 541:15 where J.S. says the pornographic DVD's were in the drawer below the TV. Only one of these statements can be true. Proper handling of this evidence by the police department would have proved who was telling the truth. The evidence would have been impeaching for one of them.
  - C. Exhibit 1 is an excerpt from the textbook in the Psychology 200 class offered by Walla Walla Community College. It tells us that preschool children have difficulties differentiating between things they have done and things they have been told or shown. This would indicate that J.S. viewing pornographic DVD's could have been the actual place where she witnessed the activity she describes. This proves that the evidence would have been exculpatory.
  - D. RP 501:10 where Shaun Erickson admits that some of the porn showed men ejaculating.
  - E. RP 432:11 where Shaun Erickson says "When I walked in, there was a girl masturbating a guy on the video."
  - F. RP 545:4 where J.S. admits to watching all 4 pornographic DVD's from "Beginning to end."
  - G. RP 761:23 where Ms. Rogers-Kemp says "It appears to be approximately 10 minutes long that in the defense's opinion is an exact act that is described by the little girl in the child interview." When she refers to a scene on the suspected pornographic DVD.
2. That evidence must have been suppressed by the State either willfully or inadvertently. In this case, the state did not provide the defense with any pornographic DVD's, nor any photo's of the pornographic DVD's, nor any documentation of what pornographic DVD was found where before laying them out on Shaun Erickson's bed after their search and seizure. In addition, the State did not even inform the child interviewer that the child had been watching pornography.
- A. RP 14:7 where the Judge indicates that he read about the pornography in the cert.
  - B. RP 15:13 for a discussion of the search warrant and collecting several disks. The disks that they collected were disks from my office. They were family photo and home movie disks, not pornography. The police did not collect any of the pornographic disks. They simply left them laying on Shaun Erickson's bed when they left.
  - C. RP 16:15 where the Judge says in disbelief "And I don't know why we would need a copy because the original should be in custody of law enforcement." In reference to Ms. Rogers-Kemp telling him that the defense had to procure a copy of the DVD.
  - D. RP 17:12 where Ms. Woo says "I think she is referring to photographs that were taken by law enforcement on the seizure and search warrant." Does that mean we could have used a similar photo that law enforcement took instead of the one my wife took? If that's the case then the prosecution did not notify the defense that

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- such a photo existed. I suspect that it's more likely that the prosecution expected there to be a photo like that, but it wasn't there.
- E. RP 416:6 where Shaun Erickson indicates exhibit 7, 8 & 9 are photographs of his room. Apparently law enforcement took photos of J.S. and Shaun Erickson's bedroom before they searched it and found the pornography.
  - F. RP 420:3 where Shaun Erickson indicates that exhibit 8 shows two beds in his room. There is a transcription error here where they call the bed that belonged to J.S. a "door" bed. What actually was said was that it was a "Dora" bed (As in Dora the Explorer). Since there were two beds in this room and one was a Dora bed, it should have been obvious to investigating officers that a child slept in this room. One would reason that if pornography was found within reach of a child in this room it would be important to this case.
  - G. Shaun Erickson informed police about walking in on J.S. watching pornography in his initial report to them. See the reference to it in the statement of probable cause. However, even if the investigating officers were not informed, it would seem logical that the investigating officers would at a minimum document any pornography that they found accessible to the alleged victim.
    - i. Court Record "Statement of probable cause" states "Shaun Erickson ... found J.S. in his bedroom watching one of his pornographic films."
    - ii. Court Record "Certificate for the determination of probable cause" dated 2/25/2009 states "Shaun Erickson ... found J.S. in his bedroom watching one of his pornographic films."
  - H. Shaun Erickson informed everyone he talked to that J.S. was watching his pornography when he came into the room.
    - i. RP 650:4 Katherine VanGog says "He said that he found Judy viewing pornography."
    - ii. RP 625:5 Collette Dahl (the hospital nurse who examined J.S.) stating that Lindsey Smith told her that "Shaun had found Judith watching naughty videos."
    - iii. RP 904:11 where when asked whether Shaun Erickson had told her about J.S. watching porn, Shannon Casey says "Yes, he did tell me about it."
3. And prejudice must have ensued. In this case I believe the missing evidence proves why I am innocent and if properly handled would have prevented this case from going to the arrest and trial phase, but at a minimum it provides a reasonable doubt to my guilt and would have had an effect on the outcome of my trial.
- A. Just like in State v. Ramirez if the missing evidence would have been around, this trial would have been dismissed. This was far from a harmless error.
  - B. RP 820:19 where Carolyn Webster (the child interviewer) says "If a child is exposed to pornography, I might want to know what they saw and have them describe that." Carolyn never asked about pornography in the child interview.
  - C. RP 824:4 where Carolyn Webster (the child interviewer) says "I would ask ... about the pornography that they viewed and I would typically ask them to describe it." She never asked about it.
  - D. RP 712:18 Detective Barfield indicates that not all of the cases he investigates end in criminal charges being filed. I contend that if he had informed Carolyn Webster that J.S. had been watching pornography, Carolyn Webster would have been able

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to get to the truth of the issue and this false accusation would never have resulted in criminal charges being filed, let alone a trial.

- E. As a condition of my release on bail, the Judge ordered that I could not possess nor watch pornography of any kind. This placed me in a position where I had to dispose of the DVD's in question. At that time I had no idea of their importance to my case. I had not seen any documentation telling me that J.S. had been watching pornography. This makes the damage irreversible. There is no way to now identify which DVD was in the player when Shaun and J.S. stopped living with us. If law enforcement would have at a minimum cataloged what DVD was in the player, we would know for sure which one J.S. was watching. Instead they removed the DVD in the player, and placed it and the DVD's from the top drawer (under the TV) onto Shaun's bed. Why didn't law enforcement take these DVD's into custody, or take a picture of them, or at least catalog which DVD was found where? Simply moving them irreversibly destroyed our ability to determine which DVD was where.
  - i. Court Record "Condition for Release for Defendant" dated 3/30/2009 states a condition of release of "abide by no contact order; nor possess or view any sexually explicit material."
- F. The outcome of the trial would have been different if the defense could have shown the DVD that J.S. was watching. The DVD's were so hard core that they brought Ms. Rogers-Kemp to tears when we viewed them in the courtroom trying to find the spot containing the exact act she describes. We were unable to show the DVD in court because my wife took the photo instead of me. My lawyers decided not to call my wife to the stand to vouch for the photo's authenticity in fear of the prosecution causing my wife to slip up somehow. If we would have had the original DVD or a law enforcement photo, or a catalog we could have played the DVD and it would have had a dramatic impact on the jury.

## Additional Ground 2 (Ineffective Assistance of Counsel)

Did my counsel violate my sixth amendment rights by not providing effective assistance of counsel? (See Strickland, 466 U.S. at 690) It is possible that to fully determine this, an evidentiary hearing may be required, but I believe there is sufficient evidence in the record to prove this claim. If there is not sufficient evidence, then I would request an evidentiary hearing.

1. Defense did not consult nor call a Psychological or Medical expert witness of its own.
  - A. RP 625:23 where Collette Dahl (who has a master's degree in nursing and specializes in sexual assault) says "I am not an expert in that area" when asked if a child watching pornography can damage that child mentally? The defense was on the right track in asking this question, but it should have asked it pretrial and/or in trial to a child psychologist expert of its own, instead of this state expert who is not an expert in this area.
  - B. Barkell v. Crouse U.S. 468 F.3d 684; 2006 U.S. App. LEXIS 27526 No. 05-8045 – "Because the failure to consult an expert may have added to any prejudice resulting from counsel's failure to investigate ... petitioner could include it in the evidentiary hearing."
  - C. State v. Ramirez 2002 Wash. App. LEXIS 546; No. 26687-3-11 – In this case calling a Psychological expert resulted in the child being found incompetent to testify and the trial was dismissed before going before a jury. This proves that involving a child psychologist would have resulted in a different outcome in this case too since the circumstances were so similar. Just like this case, State v. Ramirez involved the child watching pornography. The child psychologist was able to explain how this tainted the alleged victim's memory.
  - D. State v. Carol M.D., 89 Wn. App. 77; 948 P.2d 837; 1997 Wash. App. LEXIS 2021; No. 15014-3-111 – "The trial court abused its discretion when it denied Mr. and Mrs. D. the funds to secure expert testimony on false memory syndrome."
  - E. Singleton v. Davis 2006 U.S. Dist. LEXIS 95018 – "Even in the absence of psychological expert testimony from the prosecution, the general principal remains: "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Since the defense counsel, in my case, held the viewing of pornography by the alleged victim and the damage that caused so high in its defense strategy how can they possibly claim contacting a psychological expert was unnecessary?"
  - F. Byrd v. Trombley U.S. 580 F. Supp. 2d 542 – "Counsel could not have made a reasonable strategic decision not to call experts because he never even explored that option."... "The failure to even consult an expert violated counsel's duty to conduct a reasonable diligent investigation of the case."
  - G. Gersten v. Senkowski 426 F.3d 588 – "In sexual abuse cases, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel."
  - H. Burch v. Millas U.S. 663 F. Supp. 2d 151 – "The second Circuit suggested in Lindstadt v. Keane (U.S. 239 F.3d 191) that it is "difficult to imagine a child abuse case ... where the defense would not be aided by the assistance of an expert." (Quoting Beth A. Townsend, Defending the "Indefensible"; A Primer to Defending Allegations of Child Abuse, 45 A.F.L. Rev 261, 270 (1998)).

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- I. Pavel v. Hollins U.S. 261 F.3d 210 – “We believe that [counsel’s] performance was deficient to the extent that he did not call a medical expert to testify as to the significance of the physical evidence presented by the prosecution.”
- J. Usher v. Ercole 06-cv-1126 – “The prosecution’s case rested centrally on the alleged victim’s testimony and is corroborated by the indirect physical evidence as interpreted by the medical expert. The medical expert testimony was central not only because it constituted the most extensive corroboration that any crime occurred, but because to undermine it would undermine the alleged victim’s credibility and thus the entire prosecution case as to all charges ... In this case, the state could not have reasonably concluded that defense counsel’s failure to consult an expert did not constitute deficient performance under Strickland.”
- K. Spencer v. Donnelly U.S. 193 F. Supp. 2d 718 – “At a minimum, the use of a child psychologist or similar expert would have been most helpful to trial counsel in preparing for the cross-examination of the state’s expert.” Just like in this case, my trial counsel could have used a child psychologist to help prepare for both of the state’s expert witnesses... Collette Dahl and Carolyn Webster.
- L. Exhibit 1 is an excerpt from the textbook in the Psychology 200 class offered by Walla Walla Community College. The book is called “Human Development: A Life-Span View”. It was written by Robert Kail and John Cavanaugh. It was last copyrighted in 2007. This 2<sup>nd</sup> year Psychology textbook tells us that:
  - i. Preschoolers are particularly prone to confusion and often confuse “what actually happened, what they think might have happened, and what others have suggested may have happened.” Their actual memory for the event may be more fragile than older children’s and adults’ memories. Also, preschoolers are “less able to distinguish the source of memories and thoughts.”
    1. RP 761:23 where Ms. Rogers-Kemp says “It appears to be approximately 10 minutes long that in the defense’s opinion is an exact act that is described by the little girl in the child interview.” She is referring to a pornographic DVD that we suspect J.S. had been watching.
  - ii. Interviewers must warn children that they may sometimes try to trick them or suggest things that didn’t happen.
    1. This did not happen in court.
    2. In the child interview it happened at the very beginning of the interview, but was never repeated, even after a long break. An hour later I’m sure J.S. had forgotten that she may be tricked.
  - iii. Interviewers should use questions that evaluate alternative hypothesis instead of questions that imply a single correct answer.
    1. This did not happen in court. All questions expected a single choice.
    2. In the child interview J.S. was rarely given a choice of alternate hypothesis. The questions were primarily expecting a single correct answer.
  - iv. Interviewers should avoid questioning repeatedly on a single issue.
    1. RP 521 – 528 where J.S. is asked 22 times what happened before she finally answers something other than “I don’t remember” or “I don’t want to talk about it.” If this were the defense asking these questions, the defense would have been accused of badgering the witness.

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2. An example of repeatedly asking the same question over and over until the prosecution go the right answer can be found in RP 521:24 where Ms. Woo asks “What is the pee pee thing?” and J.S. responds “I don’t remember.” Then at RP 522:5 Ms. Woo asks “Can you tell us what the pee pee thing is?” and J.S. responds “I don’t remember.” Then at RP 522:20 Ms. Woo asks “Do you remember telling someone about the pee pee thing?” and finally J.S. responds differently and says “Yes.”, but now the entire context that follows is different in this child’s mind. From this point on she is talking about something she told someone else and not necessarily what actually happened. Ms. Woo has changed her context.
2. Defense did not contact, interview, nor call to the stand any of the 12 witnesses I gave them a list of (twice) who could have testified to J.S.’s habitual lying.
  - A. This may be outside the scope of this direct appeal, but I could provide affidavits from the 12 witnesses that I requested they contact.
3. Defense did not follow through with funding for psychological testing.
  - A. RP 1145:3 where Ms. Rogers-Kemp stats “This court ordered an evaluation to be done.”
  - B. Court Record “Notice of change of Sentencing Date” dated 6/22/2010 states “Reason for change” is “Presentence Evaluation.”
  - C. RP 1145:9 where Ms. Rogers-Kemp says “It is inexplicable to me that the office of public defense would deny funding for a sexual deviancy evaluation regardless of whether it is post trial or not.”
  - D. RP 1144:2 where Ms. Woo argues that “It is completely out of the ordinary for the court to impose SSOSA when there is no evaluation for the Court to consider at the time of sentencing.” This proves that the denial of funds for the evaluation had an adverse result in sentencing.
  - E. State v. Young 125 Wn.2d 688 – “The court concluded that the legislature intended to confer upon the trial court not only the discretion to order the evaluation under Wash. Rev. Code 9.94A.120(7) regarding the trial court’s authority to order the expenditure of public funds for the initial SSOSA evaluation because it recognized that Wash. Super Ct. Crim. R.3.1(f) already provided that authority.”
  - F. State v. Hermanson 65 Wn. App. 450 – “Under the circumstances the trial court abused its discretion in denying defendant one’s request for appointment of an expert to perform the sexual deviancy evaluation.”
4. Defense did not get the picture of the pornographic DVD’s into court.
  - A. See Ground 1 (Brady Violation) for additional information about the picture of pornographic DVD’s.
  - B. RP 17:12 where Ms. Woo says “I think she is referring to photographs that were taken by law enforcement during the seizure and search warrant.”
  - C. RP 118:3 where Ms. Rogers-Kemp mentions the picture of the porn J.S. was exposed to.
  - D. RP 119:1 where Ms. Rogers-Kemp discusses the “Picture of all the videos.”
5. Defense did not get the pornographic DVD’s into court.
  - A. RP 430:23 where Shaun Erickson says “I observed my daughter sitting on my bed watching an adult movie.”

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- B. RP 500:19 where Shaun Erickson admits the pornography was his and it was x-rated.
  - C. RP 541:15 where J.S. says the pornographic DVD's were in the drawer below the TV.
  - D. RP 542:7 where J.S. says "There were 4 movies."
  - E. RP 545:4 where J.S. admits to watching all 4 pornographic DVD's from beginning to end.
  - F. RP 14:17 where the Judge is indicating that he read about the pornography in the cert.
6. Defense did not get any testimony regarding Del Shawn into trial.
- A. RP 181:21 where Ms. Rogers-Kemp says "The actual information came when this counsel asked the little girl "Have you ever accused anyone else of doing this to you?" and J.S. said "Yes." And then when asked "Who?", she said "Del Shawn.""
  - B. RP 144:10 for the start of the discussion of allowing testimony regarding Del Shawn.
  - C. RP 150:17 where the Judge rules to exclude testimony regarding Del Shawn.
  - D. RP 560 – 574 for the continuation of the discussion of allowing testimony regarding Del Shawn.
7. Defense was not able to impeach the testimony of J.S.
- A. RP 118:23 where Ms. Roger-Kemp talks about seeds being brown and cold.
  - B. RP 820:5 where Carolyn Webster says "She did state that, yes." When asked if J.S. said the seeds were brown.
  - C. RP 529:9 where J.S. states that "white stuff" came out of Papa John's private.
  - D. RP 551 – 552 where Ms Rogers-Kemp speaks to the Judge about not being able to impeach J.S. in the normal fashion. She says that she is too young to read into the record the transcript from her previous interview.
  - E. None of these discrepancies were mentioned in defenses closing statements.
8. Defense did not properly impeach Katherine VanGog and Lindsey Smith. Their testimony differed on several key issues that the defense did not bring to light.
- A. RP 653:16 where Katherine VanGog says she told Lindsey Smith about prior to November 15<sup>th</sup> issues.
  - B. RP 640:12 where Katherine VanGog says "A lot yes." When asked if J.S.'s behavior had changed prior to November 15<sup>th</sup>.
  - C. RP 640:15 where Katherine VanGog says "She started wetting the bed every night." When she is discussing the changes that Judy exhibited prior to November 15<sup>th</sup>.
  - D. RP 653:18 where Katherine VanGog says "Thought that was her mom's responsibility so I called her mom with all the incidences." When asked why she hadn't called the police prior to November 15<sup>th</sup>.
  - E. RP 681:19 where Lindsey Smith says "No" to the question "Prior to November 15<sup>th</sup> had you previously had any concerns about the defendant being around your daughter?"
  - F. RP 618:22 where Collette Dahl says that Lindsey Smith told her that she "Has not noticed any temperaments or behavioral changes or emotional changes."

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- G. RP 619:17 where Collette Dahl says that Lindsey Smith told her that J.S. “currently has some bedwetting. That this occurs approximately once a week, but this has been her normal pattern.”
- H. None of these discrepancies were mentioned in defenses closing statements.
- 9. Defense did not properly impeach Shaun Erickson.
  - A. RP 503:11 Shaun states “Towards the end there he [referring to the defendant] was unemployed so he had lots of time on his hands.”, but in my testimony we introduced an exhibit of several paychecks which covered the period of time from January 1 through December 15<sup>th</sup> of that year.
  - B. RP 511:17 where Shaun Erickson states that on November 15<sup>th</sup> Judy wasn’t in school yet.
  - C. RP 658:15 Katherine VanGog says “Yes” when asked “Isn’t it true that around September J.S. began Kindergarten?”
  - D. None of these discrepancies were mentioned in defenses closing statements.
- 10. Defense did not properly investigate the case.
  - A. RP 475:17 where Ms. Rogers-Kemp states “Our investigator left us abruptly in the middle of our case. We have no investigator any longer.”
  - B. See Number 1 and the discussion of defense counsel consulting a psychological expert.
- 11. Failure to disallow testimony of Karen Skaggs.
  - A. Karen Skaggs is unable to practice law in Canada because of her mental disability. She suffered a breakdown and underwent electroshock therapy. Because of her excessive treatment she now had memory problems. You can see her memory problems in her testimony in court. She is confusing her life with me and many of the child sexual abuse cases that she prosecuted during her career. She should not have been allowed to testify for the same reasons she is not allowed to practice law.
  - B. Karen is also a jealous ex-girlfriend who is out for revenge.
  - C. State v. Robinson 1999 Wash. App. LEXIS 1719, No. 17806-4-111 – “Conduct is sufficiently similar when the similarity indicates design, not merely coincidence.”
  - D. State v. Dewey 93 Wn. App. 50; 966 P.2d 414; 1998 Wash. App. LEXIS 1562; No. 21604-3-11 – “Dewey holds that common features must be unique or uncommon to the crime in order to establish common scheme or plan.” Most of Karen’s testimony was admitted because of the common plan or scheme argument and her hearsay of my daughter and comments that she claims I made about some bathing incident. You cannot get less unique or more common than giving a child a bath. How can bathing a child be upheld as a common plan or scheme? Especially since it was never stated by any of the witnesses that bathing had anything to do with the crime I was charged with. This was merely an elaborate fabrication made up by the prosecutor and not based in any witness testimony.
- 12. Failure to disallow testimony of Shannon Casey.
  - A. Shannon Casey is on Social Security disability for her mental condition. Her condition affects her ability to accurately remember events. She should not have been allowed to testify because of her condition.
  - B. Shannon is a longtime girlfriend of Shaun Erickson and would say anything that Shaun Erickson asked her to say.

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- C. Just like Karen Skaggs, most of Shannon Casey's testimony revolves around her witnessing me giving children baths. At no time during her testimony did she indicate that anything nefarious was going on. Her testimony was extremely prejudicial, but yielded no information about the crime in question.
13. Defense did not get any of the articles that they showed me about improper handling of walking in on your child while they are masturbating admitted into trial.
- A. RP 431:13 where Shaun Erickson says "She was sitting on the bed. It looked like she was perspiring a little bit. It almost looked like she was enjoying the movie [referring to the adult movie she was watching]."
- B. There are many articles available that say it is developmentally normal and even common for young children as young as 3 to engage in self-stimulation or masturbation, which could have resulted in the same physical condition observed.
- i. John E.B. Myers, Evidence in Child Abuse and Neglect Cases 5.31, at 517(3d ed. 1997) (citing Martin A. Finkel & Allan R. Dejong, Medical Findings in Child Sexual Abuse, in Child Abuse: Medical Diagnosis and Management 185-247, at 186 (Robert M. Reece ed., 1994) One study of children in day care found 30 percent were occasionally observed to engage in masturbation during nap time.
- ii. Myers, supra, 5.31, at 520 (citing Phipps-Yonas et al., Sexuality in Early Childhood, 23 CURA REPORTER 1-5 (May 1993) (Published by the University of Minnesota, Center for Urban and Regional Affairs)). Moreover, at least some children who masturbate do so to the point of self-injury. MYERS, supra, at 521 n.588.
14. Defense did not get J.S. ruled incompetent to testify (See Other Errors – Competency of J.S.)
15. Defense did not get a "Bill of Particulars".
- A. RP 167:14 Judge says "The defense motion for a bill of particulars is therefore denied."
- B. A proper bill or particulars would have contained the specific act(s) that I was being charged for and specific date(s) those acts occurred. Since these were not clearly spelled out it violated my ability to defend myself. How could I claim that I was not there at a specific time if a specific time is not given? Also by not spelling out the specific act(s) I was being charged with, it allowed those acts to change based on the whim of whatever the child testified to on this date. It was clearly different act(s) then when the child interview occurred. Since the specific act(s) constantly changed, how could my counsel properly prepare a defense?
16. Defense did not object to the Brady Violation (see Additional Ground 1 (Brady Violation)).

### Additional Ground 3 (Prosecutorial Misconduct)

Did the prosecutor commit prosecutorial misconduct?

1. Did Ms. Risa Woo commit prosecutorial misconduct during her closing arguments?
  - A. *State v. Smith*, 14 Ohio St.3d, 14 Ohio B. 317, 470 N.E.2d 883, 885 (Ohio 1984) – “It is improper for an attorney to express his personal belief or opinion as to the credibility of a witness or as to the guilt of the accused.”
  - B. *Hodge v. Hurley*, 426 F.3d 368; 2005 U.S. App. LEXIS 22016; 2005 FED App. 0431 P (6<sup>th</sup> Cir) No. 03-3166 – “This misconduct is especially prejudicial in this case given the extent to which the jury’s determination to Hodge’s guilt or innocence hinged almost entirely on the credibility of Hodge and Fenn.”
  - C. *State v. Grove*, 2005 Wash. App. LEXIS 2177, 54973-1-1 – “We hold that there is a substantial likelihood that the prosecutor’s improper emotional appeal to the jury’s passion or prejudice affected the verdict.”
  - D. RP 1074:11 where Ms. Woo says in her closing argument “It is because she (J.S.) told you the truth.”
  - E. RP 1114:28 where Ms. Woo says in her closing argument “The defendant is guilty.”
  - F. Throughout Ms. Woo’s closing arguments she referred to J.S. as a five or six year old. This is not true. During the time period covered in the jury instructions, J.S. was between four and five years old. See RP 1077:2 for an example of Ms. Woo misstating J.S.’s age. She does this on purpose to enhance her claim that J.S. is too old to be bathed and to sell her conjecture that something nefarious occurred in the tub. She did this on purpose to tie in her comments at RP 1078:21 where she claims the “common plan or scheme.” Nothing on the record indicates that the bathing incidences for both children were anything other than an adult bathing a child or indicates that the bathing happened as part of the charge act. How can it be a “common plan or scheme” if it’s not part of the charged act?
  - G. *State v. Robinson* 1999 Wash. App. LEXIS 1719 No. 17806-4-111 – “Conduct is sufficiently similar when the similarity indicates design not merely coincidence.”
  - H. *State v. Dewey* 93 Wn. App. 50; 966 P.2d 414; 1998 Wash. App. LEXIS 1562; No. 21604-3-11 – “Dewey holds that common features must be unique or uncommon to the crime in order to establish a common plan or scheme.” You cannot get less unique or more common than giving a child a bath. How can that be established as a common plan or scheme?
2. The prosecutor alluded to hearsay from B.E. that the Judge had ruled against allowing into the trial.
  - A. RP 71:1 where the discussion of admissibility starts.
  - B. RP 78:18 where the Judge rules that “I am not going to allow any statements that Brittaney allegedly made to Ms. Skaggs to be admitted.”
  - C. RP 836:1 where Ms. Woo asks “After you confront him with what Brittaney told you, what was his reaction?”
  - D. RP 836:3 Where Karen Skaggs responds “He told her (as in Brittaney) that she wasn’t telling the truth.”
  - E. Did the court rule correctly when Ms. Rogers-Kemp called for a mistrial at RP 836:12? It seems to me that Ms. Woo is bringing up the hearsay of Brittaney in her question. The hearsay is implied and probably even more prejudicial because the hearsay was disallowed. The way it’s introduced here lets the jury use their imagination as to what Brittaney might have said that Karen said I told Brittaney she was lying about.

### Additional Ground 3 (Prosecutorial Misconduct)

- F. State v. Fisher 165 Wn.2d 727; 202 P.3d 937; 2009 Wash. LEXIS 230; No. 79801-0 –  
“The prosecuting attorney thus contravened the trial court’s pretrial ruling by impermissibly using the physical evidence to demonstrate Fisher’s propensity to commit crimes.”
3. RP 635:22 where Katherine VanGog says “I have to say it the right way. That kids should learn about sex early on and the younger they are the better.” Who told her what the “Right way” of saying it is? It seems to be a common theme throughout all the prosecution’s witnesses. Were they coached to say it a specific way? Since I have never said anything even remotely like this to anyone, it makes me wonder why so many people said something like this in the trial. It’s either that the prosecutor instructed them or that Karen Skaggs did. Karen has a prosecutorial background and knows what it takes to get a conviction of this type to go through. So it’s possible that she is the source of these statements.
  4. Allowing the prosecution witnesses to discuss the case.
    - A. RP 499:9 where Shaun Erickson says “I’m sure I did.” Referring to discussing the incident with J.S. before seeing the police.
    - B. RP 499 – 500 where Shaun Erickson admits to talkig to Lindsey Smith, Katherine VanGog, Shannon Casey, and Karen Skaggs after reporting the incident to the police.
  5. Someone instructed J.S.
    - A. In what to write for the sentencing hearing. The wording is way to advanced for a first grader. Is this the same person who instructed her in what to say at the child interview and in court?
    - B. In the child interview J.S. actually said “I forgot what I was suppose to say.”
    - C. There was plenty of time for J.S. to be instructed.
      - i. Two weeks between the medical exam and the formal report to Renton Police.
      - ii. Three months before the child interview.
      - iii. Over a year before trial.
  6. Judge allowed J.S. to hold a doll while testifying which makes her look like a victim.
    - A. RP 188:3 Ms. Rogers-Kemp starts the doll discussion.
    - B. RP 192:6 Ms. Rogers-Kemp requests that J.S. not be allowed to bring the doll with her into the court room because it may make her appear to be a victim.
    - C. RP 193:2 The Judge says he will allow the doll.
  7. The prosecutor permitted the Brady violation to happen (See Additional Ground 1)

## Additional Ground 4 (Illegal Search)

Did the City of Renton violate my Fourth Amendment rights and perform an illegal search of my house? The address on the search warrant was 15820 SE 137<sup>th</sup> St., Renton, WA 98059. My legal address at the time of the search and the address of the house that they actually searched was 6720 SE 3<sup>rd</sup> Ave., Renton, WA 98059.

### Similar Cases:

- U.S. v. Williamson 1 F.3d 1134 – “We conclude that the warrant at issue did not describe the premises to be searched with sufficient particularity” and “We also reject the government’s contention that the executing officer’s knowledge cured this manifestly defective warrant.” And “The Supreme Court had made clear that “a warrant may be so facially deficient – i.e. in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid.”
  - U.S. v. Constantino 201 F. Supp. 160; 1962 U.S. Dist. LEXIS 3956 Crim. A. No. 61-221 – “The conclusion simply is that the premises to be searched were not identified in the affidavit for, nor in the search warrant.”
1. Court Record “Certification for the determination of probable cause” states “Officers executed a search warrant at Erickson’s residence at 15820 SE 137<sup>th</sup> St., Renton, WA 98059.
  2. RP 705:22 Detective Barfield states that the address is “15820 SE 137<sup>th</sup> St.”
  3. The legal address of the house that was searched was 6720 SE 3<sup>rd</sup> Ave., Renton, WA 98059.

## Additional Ground 5 (Other Errors)

- I. Did the court error in finding that J.S. was competent to testify? See where the Judge rules her competent to testify between RP 95:1 and RP 110:22. According to RCW 5.60.050(2) the test for determining a child's competency has five elements:
  1. An understanding of the obligation to speak the truth on the witness stand.
    - A. The Judge appears to have covered this well.
  2. The mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it.
    - A. RP 98:3 J.S. says "No" when asked if she remembers her last birthday. How can she remember events that occurred as much as one or two years before her last birthday if she can't recall her last birthday? On her last birthday she was six. Her age at the time of the allegations she had just turned four through when she was five and a half. There is a huge difference in mental capacity between those ages. It is incorrect for the Judge to base his decision on the fact that she remembers her first grade teachers name now. The Judge is supposed to determine if her mental capacity was sufficient at the time of the allegations, not at the present time.
    - B. RP 98:14 J.S. describes a fishing game she got on her sixth birthday. The Judge never ascertains if the gift she describes was actually received on that birthday. The gift she describes may have been a Christmas present or a gift from some other occasion or she may have never received a gift like that.
    - C. RP 99:5 J.S. says "Yes" when asked if that's the only present she remembers. After further prompting she finally admits to remembering having a party and getting one gift. Surely she received more than one gift.
    - D. *Petcu v. DSHS* 135 Wn.2d 208; 956 P.2d 297; 1998 Wash. LEXIS 384 65205-8 – "If the trial court has no idea when the alleged event occurred, the trial court cannot begin to determine whether the child had the mental ability at the time of the alleged event to receive an accurate impression of it." While there is a specific time period outlined in this trial, the fact that it covers a period of when J.S. had just turned four up until she was five and a half makes it almost as impossible.
    - E. RP 494:12 Shaun Erickson says "What I said was I don't officially recollect what happened. It was two years ago." If someone Shaun's age cannot remember what occurred how is someone J.S.'s age suppose to?
    - F. Jury instruction number 8 states that the crime may have occurred as early as June 1, 2007 (The date of J.S.'s 4<sup>th</sup> birthday). This means the Judge must determine if she can remember things that occurred on her 4<sup>th</sup> birthday, not on her 6<sup>th</sup> birthday as he did in court.
  3. A memory sufficient to retain an independent recollection of the occurrence.
    - A. RP 499-500 Shaun Erickson says "I'm sure I did referring to discussing the incident with J.S. before seeing the police. This would indicate that her recollection has been tainted by Shaun Erickson.
    - B. *State v. Ramirez* 2002 Wash. App. LEXIS 546 where the mother tainted the independent memory of the child. "The trial court found that the combination of W.L.'s vigilance in repeatedly asking D.L. about possible sexual abuse, the exposure to pornography, and the suggestion that the alleged sexual abuse occurred during a bath incident compromised D.L.'s ability to independently

## Additional Ground 5 (Other Errors)

- recollect the occurrence.” D.L. was almost the exact same age as J.S. and these cases are very similar. Why was State v. Ramirez dropped because of the tainting and an incompetent adolescent and this case proceeded to trial?
- C. The fact that J.S. had been exposed to pornography eliminates her ability to have an “independent recollection” of the occurrence. According to the textbook in exhibit 1, children of her age (at the time of the alleged incident) are unable to distinguish between what they have experienced and what they have been told or seen. In State v. Ramirez, Dr. Whitehill says similar things to this book when he says “Young children from three to five years old are the most vulnerable to suggestion and interviewer bias.”
  - D. RP 710:13 Detective Barfield indicates that he attempted to contact Shaun Erickson and Lindsey Smith several times during November, December, and January to schedule the child interview. So there were more than three months of discussion going on that J.S. was exposed to before the child interview occurred.
- 4. The capacity to express in words his memory of the occurrence.
    - A. J.S. could not express what occurred the same way twice. During the trial her description of what happened was radically different to what it was a year earlier in the child interview.
  - 5. The capacity to understand simple questions about it.
    - A. During both the child interview and her testimony in court, J.S. had to be asked numerous times and in several different ways before she said anything besides “I don’t remember” or “I don’t want to talk about it” (see RP 521-528 during the trial). Also see the transcript of the child interview. In both instances she had to be led down a specific path and repeatedly asked the same question to say what she did.
    - B. According to exhibit 1, repeatedly asking the same question over and over and expecting different results is not an effective interview technique. This occurred both in the child interview and during the trial. How can it be said that J.S. understands simple questions about it if it requires repeated questioning to get an answer?
- II. The Department of Corrections impeded my ability to defend myself.
- 1. By limiting the number of pages I can print per day to 20 pages.
  - 2. By not providing me with permanent storage for my documents thus requiring that I retype the entire document for simple changes.
  - 3. By delaying mail and law library access. When I requested and was granted a 45 day extension, I was only provided 7 useable days of law library access.
    - A. Letter from court of appeals to me indicating the extension was approved was mailed on 5/5/2011 and I received it on 5/9/2011.
    - B. I requested Law Library access on 5/10/2001 and was granted access on 5/23/2011 through 6/13/2011.
    - C. Law library closed for the week of 5/29/2011 through 6/5/2011.
    - D. In order to allow enough time for mailing my response I have to mail it by 6/8/2011.
    - E. This results in useable days of 5/23, 5/24, 5/25, 5/26, 5/27, 6/6, & 6/7.

## Additional Ground 6 (Cumulative Errors)

Did my trial have so many errors that I was denied my constitutional right to a fair trial?

### Supporting Case Law:

- State v. Perrett – 86 Wn. App. 312; 936 P.2d 426; 1997 Wash. App. LEXIS 734; No. 19727-8-11
- State v. Jones – 144 Wn. App. 284; 183 P.3d 307; 2008 Wash App. LEXIS 1064; No. 34471-8-11
- State v. Torres – 16 Wn. App. 254; 554 P.2d 1069; 1976 Wash App. LEXIS 1696; No. 3134-1

See the errors listed in the previous grounds:

- Brady Violation
- Ineffective Assistance of Counsel
  1. Defense's lack of its own Psychological or Medical expert.
  2. Defense did not contact witnesses.
  3. Defense did not follow through with funding for Psychological testing.
  4. Defense did not get the picture of pornographic DVD's into court.
  5. Defense did not get the pornographic DVD's into court.
  6. Defense did not get testimony regarding Del Shawn into court.
  7. Defense was not able to impeach the testimony of J.S.
  8. Defense did not properly impeach Katherine VanGog and Lindsey Smith.
  9. Defense did not properly impeach Shaun Erickson.
  10. Defense did not properly investigate the case.
  11. Failure to disallow testimony of Karen Skaggs.
  12. Failure to disallow testimony of Shannon Casey.
  13. Defense did not get any of the masturbation articles admitted into trial.
  14. Defense did not get J.S. ruled incompetent to testify.
  15. Defense did not get a "Bill of Particulars".
  16. Defense did not object to the Brady Violation.
- Prosecutorial Misconduct
  1. Misconduct during prosecutor's closing statements.
  2. Prosecutor alluded to hearsay from B.E. that the Judge ruled against allowing into trial.
  3. Prosecutor allowed witness tampering to occur.
  4. Prosecutor allowed witnesses to discuss the case.
  5. Someone instructed J.S.
  6. Judge allowed J.S. to hold a doll while testifying.
  7. Prosecutor permitted the Brady violation to occur.
- Illegal Search
- Other Errors
  1. Competency of J.S. to testify in court.
  2. Department of Corrections impeded my ability to defend myself.

# HUMAN DEVELOPMENT

*A Life-Span View*

FOURTH EDITION

**ROBERT V. KAIL**

*Purdue University*

**JOHN C. CAVANAUGH**

*University of West Florida*

**THOMSON**  
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## Exhibit 1 - Page 3

during the preschool years are language skills and a child's sense of self. Language allows children to become conversational partners. After infants begin to talk, parents often converse with them about past and future events, particularly about personal experiences in the child's past and future. Parents may talk about what the child did today at day care or remind the child about what the child will be doing this weekend. In conversations like these, parents teach their children the important features of events and how events are organized. Children's autobiographical memories are richer when parents talk about past events in detail and encourage their children to participate in these conversations. In contrast, when parents' talk is limited to direct questions that can be answered "yes" or "no," children's autobiographical memories are less extensive.

How does an emergent sense of self contribute to autobiographical memory? One- and 2-year-olds rapidly acquire a sense that they exist independently in space and time. An emerging sense of self thus provides coherence and continuity to children's experience. Children realize that the self who went to the park a few days ago is the same self who is now at a birthday party and is the same self who will read a book with dad before bedtime. The self provides a personal timeline and anchors a child's recall of the past (and anticipation of the future). Thus, a sense of self, language skills that enable children to converse with parents about past and future, and basic memory skills all contribute to the emergence of autobiographical memory in preschool children.

Research on children's autobiographical memory has played a central role in cases of suspected child abuse. When abuse is suspected, the victim is usually the sole witness. To prosecute the alleged abuser, the child's testimony is needed. But can preschoolers accurately recall these events? We'll try to answer this question in the Current Controversies feature.

## CURRENT CONTROVERSIES

### PRESCHOOLERS ON THE WITNESS STAND

Remember Cheryl, the 4-year-old who claimed that a neighbor had touched her "private parts"? Regrettably, episodes like this one are all too common in America today. When abuse is suspected, the victim is usually the sole eyewitness. Can preschool children like Cheryl provide reliable testimony?

Answering this question is not as easy as it might seem. One obstacle to accurate testimony is that young children are often interviewed repeatedly during legal proceedings, which can cause them to confuse what actually happened with what others suggest may have happened. When the questioner is an adult in a position of authority, children often believe that what is suggested by the adult actually happened (Ceci & Bruck, 1995, 1998; Lamminen & Smith, 1995). They will tell a convincing tale about "what really happened" simply because adults have led them to believe things must have happened that way. Young children's storytelling can be so convincing that even though enforcement officials and child protection workers believe they can

usually tell if children are telling the truth, professionals often cannot distinguish true and false reports (Gordon, Baker-Ward, & Ornstein, 2001). Perhaps you doubt that interviewers routinely ask the leading or suggestive questions that are the seeds of false memories. But analyses of videotapes of actual interviews reveal that trained investigators often ask children leading questions and make suggestive comments (Lamb, Steinberg, & Esplin, 2000).

Adults aren't the only ones who taint children's memories; peers can too! When, for example, some children in a class experience an event (e.g., a class field trip, a special class visitor), they often talk about the event with classmates who weren't there; later,



When questioned by a person in a position of authority, young children often go along with an adult's description of events.

these absent classmates readily describe what happened and often insist they were actually there (Principe & Ceci, 2002).

Preschool children are particularly suggestible. Why? One idea is that preschool children are more suggestible due to limited source-monitoring skills (Poole & Lindsay, 1995). Older children, adolescents, and adults often know the

source of information that they remember. For example, a father recalling his daughter's piano recitals will know the source of many of his memories: Some are from personal experience (he attended the recital), some he saw on videotape, and some are based on his daughter's descriptions. Preschool children are not particularly skilled at such source monitoring. When recalling past events, preschoolers are often confused about who did or said what, and when confused in this manner, they frequently assume that they must have experienced something personally. Consequently, when preschool children are asked leading questions (e.g., "When

the man touched you, did it hurt?"), this information is also stored in memory, but without the source. Because preschool children are not skilled at monitoring sources, they have trouble distinguishing what they actually experienced from what interviewers imply that they experienced.

Although preschoolers are easily misled, they can provide reliable testimony. Here are guidelines for improving the reliability of child witnesses (Ceci & Bruck, 1995, 1998; Gordon et al., 2001):

- Warn children that interviewers may sometimes try to trick them or suggest things that didn't happen.

- Interviewers' questions should evaluate alternative explanations of what happened and who was involved.
- Children should not be questioned repeatedly on a single issue.

Following these guidelines can foster the conditions under which preschoolers (and older children too) are more likely to provide accurate testimony. More important, with greater understanding of the circumstances that give rise to abuse—a topic of Chapter 7—we should be able to prevent its occurrence altogether.

## LEARNING NUMBER SKILLS

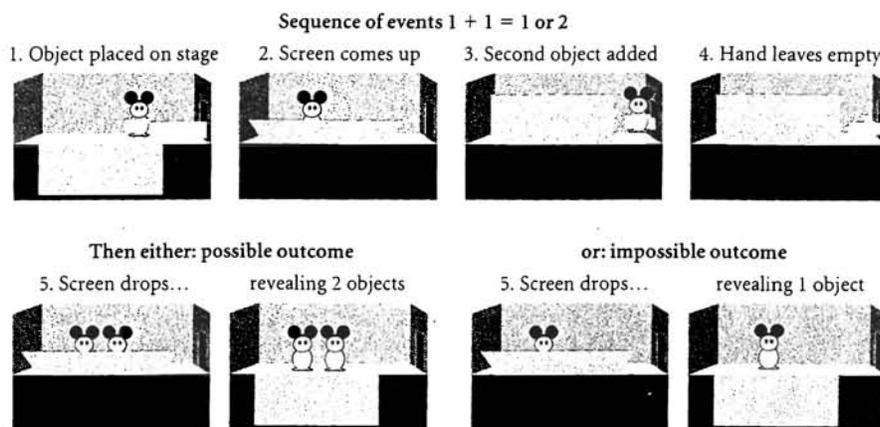
Powerful learning and memory skills allow infants and preschoolers to learn much about their worlds. This rapid growth is well illustrated by research on children's understanding of number. Basic number skills originate in infancy, long before babies learn names of numbers. Many babies experience daily variation in quantity. They play with two blocks and see that another baby has three; they watch as a father sorts laundry and finds two black socks but only one blue sock, and they eat one hot dog for lunch while an older brother eats three.

From these experiences, babies apparently come to appreciate that quantity or amount is one of the ways in which objects in the world can differ. That is, research suggests that 5-month-olds can distinguish two objects from three and, less often, three objects from four (Canfield & Smith, 1996; Wynn, 1996). Apparently, infants' perceptual processes enable them to distinguish differences in quantity. That is, just as colors (reds, blues) and shapes (triangles, squares) are basic perceptual properties, small quantities ("twoness" and "threeness") are too.

What's more, young babies can do very simple addition and subtraction. In experiments using the method shown in Figure 4.6, infants view a stage with one mouse. A

**Figure 4.6**

Infants are surprised when they see objects added or removed but the original number of objects are still present when the screen is removed; this pattern suggests some basic understanding of addition and subtraction.



THE STATE OF WASHINGTON

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State of Washington  
Petitioner

Case No. 65935-9

v.  
John E. Erickson  
Defendant

DECLARATION OF MAILING

I, John E. Erickson, declare that, on 6/8/2001, I deposited the foregoing documents:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Connell, WA on this 8th day of June, 2011.

  
\_\_\_\_\_  
John E. Erickson