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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

NO. 36283-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF
JEFFREY K. DAY

PETITIONER'S REPLY BRIEF

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CERTIFICATE OF SERVICE
I certify that I mailed
1 copies of reply to PRP
to K. Prator
& _____
8/17/07
Date Signed

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None

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

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STATEMENT OF THE CASE

See Brief of Petitioner, pages 4-10 plus additional facts in Section IV, Brief of Petitioner, pages 28-40.

ARGUMENT

I. THE PETITIONER MUST ESTABLISH ACTUAL
AND SUBSTANTIAL PREJUDICE BUT ONLY
BY A PREPONDERANCE OF THE EVIDENCE

The State correctly notes that, in a PRP, the petitioner has the burden to establish that errors were not harmless or, in other words, to establish that an error was prejudicial. In re Personal Restraint of Hagler, 97 Wash. 2d 818, 650 P.2d 1103 (1982). However, the State conveniently fails to mention that such prejudice need only be shown by a preponderance of the evidence. State v. Brett, 142 Wash. 2d 868, 16 P.3d 601 (2001).

The State also incorrectly states that Hagler requires any inferences to be drawn in favor of the validity of the judgment and sentence and not against it.

Hagler says nothing of this nature.

Further, prejudice is not a fixed standard. It varies from cases to case. As Justice Utter stated:

Sometimes only a small showing of prejudice or none is demanded because that interest (in a perfect trial) is reinforced by the necessity that the administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach.

Hagler, 97 Wash. 2d at 830.

Thus, where a case is weak, where evidence of guilt is not substantial, far less is required to prove prejudice by a preponderance of the evidence.

Given the meager evidence of guilt in this case, Mr. Day has established that the trial errors, individually and cumulatively were prejudicial and he was denied a fair trial.

2. THE COURT ERRED BY ALLOWING THE
COMPLAINING WITNESS TO TESTIFY BEFORE
THE JURY WHILE HOLDING A TOY.

Mr. Day was denied a fair trial when the court allowed D.J. to testify holding a toy, in this case, a Koosh-ball. The court made no inquiry into the need for D.J. to have this toy. In Washington, this is error. State v. Hakimi, 125 Wash. App. 15, 98 P.3d 809 (Div. 1 2004). The State simply makes a conclusory statement that holding a toy at trial was not error of constitutional magnitude, yet

The State offers no argument to support that erroneous assertion. The State fails to address Hakimi. Yet, other courts have also found a defendant's holding a toy during testimony to be error of constitutional magnitude as it impacts the right to a fair trial.

In State v. Cliff, 116 Idaho, 921, 782 P.2d 44 (Idaho App. 1989), the defendant was accused of abusing his stepdaughter who was 8 at time of trial. When she entered the courtroom to take the stand, she carried a doll. The judge immediately recessed the jury to conduct a hearing. Id., 782 P.2d at 47. A guardian ad litem testified that the child started to have dry heaves during a preliminary hearing and that the child tended to wring her hands and chew her nails. It was the GAL's opinion that allowing the child to hold a doll would give her something to occupy her hands. Id., at 46.

The appellate court noted this procedure implicated the right to a fair trial and added that the trial court judge as well as the prosecutor had a duty to protect the defendant's right. The appellate court upheld the trial court's decision, but it was critical that the trial court judge had immediately excused the jury and held a hearing. Only after specific testimony that the doll could have a calming affect was it allowed.

In State v. Marquez, 124 N.M. 409, 951 P.2d 1070, (N.M. App. 1997), a defendant was charged with sexual abuse of a minor. At trial, the 12 year old alleged victim testified holding a teddy bear. Immediately after opening stements, the jury was recessed. The court and defense counsel questioned the alleged victim about the need for the toy. The court took a major role asking the alleged victim her name, birthday, age, about school and about telling the truth. Id., 951 P.2d at 1074. The trial court then allowed her to testify holding the bear.

The appellate court upheld the decision only because the trial court made a specific inquiry prior to testimony. The trial court "properly balanced" the prejudicial effect of the teddy bear against the necessity for the teddy bear's calming effect.

In State v. Palabay, 9 Haw. App. 414, 844 P.2d 1 (1992), the Hawaii appeals court found it was error for a 12 year old witness to testify while holding a teddy bear absent a finding of compelling necessity. Palabay was charged with 7 counts of sexual assault.

The appeallate court noted that it was fundamental to the American system of justice that a person accused

of a crime has a right to a fair and impartial trial. The court said a trial court must determine the compelling necessity to allow special procedures for children's testimony.

The Palabay court reviewed State v. Cliff, supra, noting in that case the court had made findings of necessity prior to allowing testimony. In Palabay, there was no evidence in the record to indicate a compelling necessity for the complainant to hold a teddy bear. The appellate court found there was error.

State v. Hakimi, supra, also requires a showing of compelling necessity before allowing a child to testify holding a toy. The trial court heard evidence that both girls were reluctant to testify. A child expert testified that girls in the 9 year old range may find security holding a toy while testifying. In Hakimi, the judge weighed the interests of the victim against the potential prejudice to the defendant.

In Mr. Day's case, the court did nothing. The toy was obvious to everyone in the courtroom. See Affidavits of Jo Rhodes and Lisa Jensen. The trial court did not inquire into the necessity for D.J. to hold a toy. There was no finding of compelling necessity for him to have the toy.

Where special procedures are used in this State to benefit child witnesses, they have only been applied to children under the age of 10. For example, RCW 9A.44.150 allows a child under the age of 10 to testify via closed circuit TV but only if the court finds substantial evidence that requiring the child to testify before the defendant or jury will cause the child to suffer serious emotional distress. A court must make particularized findings.

Similarly, the child hearsay statute only applies to children under the age of 10. RCW 9A.44.120

Thus, our law presumes a child over the age of 10 can testify in court without special measures that infringe on a defendant's right to a fair trial.

Allowing D.J., who was 12 at time of trial, to testify while holding a toy was error.

3. MR. DAY WAS DENIED A FAIR TRIAL WHEN THE COURT TOOK NO ACTION FOLLOWING AN OUTBURST BY THE ALLEGED VICTIM'S MOTHER DURING MR. DAY'S TESTIMONY.

Failure of the trial judge to take immediate action when D.J.'s mother interrupted Mr. Day's testimony and stormed out of the courtroom denied Mr. Day a fair trial.

The State, again, simply contends this was not error of constitutional magnitude but offers no case law.

The State simply counters that in the cases cited by Petitioner, the disruptions involved words so they are irrelevant. The State is wrong. Words and actions can both impact a jury and fairness of a trial.

In People v. Holmes, 19 Ill. App. 3d 814, 313 N.E. 2d 297 (1974), a murder trial, the wife of the deceased began crying audibly in court during testimony of an expert witness. The judge excluded the wife from the courtroom during further testimony and cautioned jurors to disregard the incident in the courtroom. Again, just as in cases cited in petitioner's opening brief, it was only because the judge took immediate and affirmative action to insure that defendant had not been prejudiced that a new trial was avoided.

In Mr. Day's case, when D.J.'s mother rose in the middle of Mr. Day's testimony, cried out and stormed out of the room, the judge took no action. The entire jury was exposed to the incident. This was not a "minor" incident as claimed by the State. The disruption by D.J.'s mother came at a critical point in testimony. She cried out, slammed the door on her way out of court, and her hallway hysterics could be heard in the courtroom. See Affidavits of Lisa Jensen and Jo Rhodes.

In Holmes, the disruption was, arguably, less dramatic yet the judge there both excluded the person causing the disruption and cautioned jurors to disregard the incident.

Outbursts during trial implicate the constitutional right to a fair trial. State v. Halvorson, 560 N.W. 2d 331 (Minn. App. 1993). Where outbursts have taken place, new trials were avoided only because a trial judge took immediate action to negate any possible prejudicial impact. Failure to act in Mr. Day's case was error impacting his right to a fair trial.

4. MR. DAY WAS DENIED A FAIR TRIAL
WHEN THE COURT LIMITED HIS ABILITY
TO TESTIFY REGARDING HIS REPRESENTATION
OF THE ALLEGED VICTIM.

The Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. Crane v. Kentucky, 476 U.S. 683, 106 S. Ct. 2142, 90 L.Ed. 2d 676 (1986). The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. Chia v. Cambra, 360 F.3d 999 (9th Cir. 2004).

The effect of the court's ruling denied Mr. Day

a fair opportunity to defend himself while allowing the prosecutor unfettered leeway to make negative inferences that Mr. Day's actions as D.J.'s lawyer had a sinister purpose. The inability to present a complete defense by this restriction implicates a constitutional right and can be raised in this petition.

The nature of Mr. Day's representation was critical for the jury to have a complete understanding of his actions with D.J. The prosecutor repeatedly suggested that taking D.J. to McDonalds had an ulterior purpose when it was simply done to allow Mr. Day to question a young client in a non-threatening atmosphere. The fact that Mr. Day remembered D.J.'s birth date relates specifically to the fact that D.J. was charged with a crime and his age presented legal issues to consider.

Because this was a criminal charge and D.J. would be the primary defense witness if there was a trial, it was essential for Mr. Day to develop a trust and rapport with D.J. The jury was prevented from understanding the need for Mr. Day's actions by the court's limitation of his testimony.

Already at the mercy of a complaining witness

who told an inconsistent, contradictory story, Mr. Day was handicapped when prevented from bringing out information and being able to present a complete defense to rebut the State's insinuations and accusations. This denied him a fair trial.

5. THE PROSECUTOR'S VOUCHING FOR THE CREDIBILITY OF ITS KEY WITNESS AND MAKING REPEATED APPEALS TO THE PASSION AND SYMPATHY OF THE JURY DENIED MR. DAY A FAIR TRIAL.

A prosecutor's job isn't just to win, but to win fairly, staying well within the rules. U.S. v. Blueford, 312 F.3d 963 (9th Cir. 2002), citing U.S. v. Kojayan, 8 F.3d 1315 (9th Cir. 1993). In this case, the prosecutor ignored the rules.

A. Comments on Credibility

A prosecutor's vouching for the credibility of a witness is especially problematic where the case against a defendant is close. U.S. v. Garcia-Guizar, 160 F.3d 511 (9th Cir. 1998). In a sexual abuse case where the alleged victim's testimony was, at times, unclear and inconsistent, the court reversed a conviction finding a prosecutor's impermissible remarks could have helped establish the victim's credibility in the minds of the jury thus affecting the verdict. U.S. v. Frederick,

78 F.3d 1370 (9th Cir. 1996).

Convictions have been reversed for the exact type of vouching that took place in Mr. Day's case. In U.S. v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005), the prosecutor told the jury in closing, "The point is he told the truth in the handwritten statement that he gave on that morning. He told the truth when he came into the grand jury under oath and he was in front of you today and told the truth to you." The court said that vouching of this kind is dangerous precisely because a jury may be inclined to give weight to the prosecutor's opinion instead of making an independent judgment.

In Weatherspoon, the court noted that the case was close and boiled down to a battle over credibility. In that context, prosecutorial statements that vouched for the credibility of witnesses posed a real danger to a defendant's right to a fair trial. Id. at 1152. The court reversed the conviction.

Failure to object does not excuse a prosecutor's improper vouching for witness credibility. In Hodge v. Hurley, 426 F.3d 368 (6th Cir. 2005), the defendant was charged with rape of a child. The complaining witness, Consuela Fenn, was the child's mother who

claimed to have witnessed the crime. In closing, the prosecutor said, "Consuela Fenn is absolutely believable. Her family is absolutely believable." The court found this statement particularly egregious as it was a comment on the veracity of a key witness.

Defense counsel failed to object, a failure the court said was unreasonable. The court found the misconduct especially prejudicial given the extent to which the jury's determination hinged almost entirely on the credibility of the complaining witness. Id. at 379. The court concluded the result would have been different without this and other remarks.

This was precisely the situation in Mr. Day's case when, in closing argument, the prosecutor said of D.J.:

There's no reason to doubt D.J. He's credible. He was not mistaken about what occurred, wasn't making it up.

RP 547: 20-22.

The State gives the typical response that the prosecutor was simply arguing inferences from the evidence but, again, simply makes a conclusory statement without any argument to support it. In fact, the prosecutor was not arguing inferences. The prosecutor had just finished telling the jury his concept of reasonable

doubt. He was not discussing the evidence or testimony. In the context at the time the statement was made, the prosecutor's comments were a blatant statement of his personal belief in D.J.'s credibility and were just as improper and prejudicial as the statements in Weatherspoon.

The statement, similar in nature to that in Hodge, was just as egregious given the lack of evidence in Mr. Day's case. It, too, was a comment on the veracity of a key witness and was just as "patently improper."

B. Comments Pertaining to Passion and Prejudice

The prosecutor's repeated comments in closing focusing on Mr. Day's infrequent status as a judge and to the difference in financial status of Mr. Day and D.J. were error.

A prosecutor's appeals to the passions and prejudices of the jury are misconduct because they invite the jury to decide the case based on something other than reason and evidence. State v. Johnson, 132 Wash. App. 454, 132 P.3d 767 (Div. 1 2006).

The prosecutor's repeated reference to Mr. Day's role as a judge had nothing to do with the case. Two of three references were made in the prosecutor's final

closing argument thus offering no chance for rebuttal. RP 590-91. These repeated statements were nothing more than an ill-intentioned effort to suggest that Mr. Day, as a judge, should be held to a higher standard than other defendants.

Appeals to class prejudice are also highly improper and cannot be condoned. The trial court should be ever alert to prevent them. Prosecutorial appeals to wealth and class bias can create prejudicial error violating a defendant's right to due process of law. U.S. v. Jackson-Rudolph, 282 F.3d 369 (6th Cir. 2002), citing U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 2d 1129 (1940.) See also State v. Neidigh, 78 Wash. App. 71, 895 P.2d 423 (Div. 1 1995).

This type of appeal is exactly what the prosecutor did by arguing, without facts, to the jury that D.J. wore the one suit he had to court and did not have a "wardrobe of fine suits that lawyers do." RP 589-90. The intent was to have the jury compare Mr. Day's status as a lawyer/judge to D.J. to invoke sympathy for D.J. The prosecutor further drew out the distinction by saying

He's a lawyer, he's a part time judge
and he knew who his accuser was... an
11 year old boy with the mother with
no money.

RP 590: 16-20. See also RP 525: 1-12.

Improprieties in closing arguments can, themselves, violate due process. Brown v. Borg, 951 F.2d 1011 (9th Cir. 1991). The comments in Mr. Day's case were not isolated. They were repeated, thus flagrant and improper.

C. Failure to object to the Prosecutor's comments did not waive any objection because the comments were flagrant and ill-intentioned.

Failure to object to an improper remark will not waive a right to object or request a new trial if the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Russell, 125 Wash. 2d 24, 882 P.2d 747 (1994).

In other words, according to the Supreme Court, a conviction must be reversed if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict. Id. Where a court cannot say from the record whether a defendant would or would not have been convicted but for the comment, the court cannot deem the comment harmless. State v. Charlton, 102 Wash. 2d 140, 684 P.2d 699 (1984).

The State's typical response that an objection and curative instruction could have negated any prejudice is simply speculation. Courts have been cautious to

accept this stock reply to justify misconduct.

In State v. Case, 49 Wash. 2d 66, 298 P.2d 500 (1956), a statutory rape case, the court rejected the State's claim that an improper remark could simply be cured by an instruction. In closing, the prosecutor gave his opinion on the guilt of the defendant. There was no objection. The court found the prosecutor's comment, taken in context, could only be an attempt to impress upon the jury the prosecutor's personal belief in the defendant's guilt. The court found this both unethical and extremely prejudicial.

In Case, the court rejected the "pat answer" of the State that, had the defendant objected, a curative instruction could have negated any prejudice. The court said there comes a time when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction...."can erase it and cure the error." Id., 298 P.2d at 504. The only remedy is a new trial. See also State v. Reeder, 46 Wash. 2d 888, 285 P.2d 884 (1955) (Counsel's failure to object does not excuse the misconduct of the prosecutor who, himself, owes a duty to the accused.) State v. Powell, 62 Wash. App. 914, 816 P.2d 86 (Div. 3 1991) (Improper comments made at

the end of final closing were improper. That a carefully worded curative instruction could have remedied the prejudice was simply speculation.)

The remedy in Mr. Day's case must be a new trial. The comment vouching for D.J.'s credibility, like the statement in Case, was nothing more than a blatant personal opinion on credibility and Mr. Day's guilt by implication. The prosecutor reminded the jury not once or twice, but three times that Mr. Day was a judge even though that infrequent status had nothing to do with the case. Similarly, the prosecutor referred repeatedly to the poor financial status of D.J. and his family and compared that status to Mr. Day as a lawyer. RP 589-90. These improper comments came near the end of the prosecutor's final closing argument.

The prosecutor's comments were improper. They were flagrant and ill-intentioned. Given the weakness of the case, there is a substantial likelihood these comments affected the verdict. It is not necessary, contrary to the State's assertion that a petitioner must prove a complete miscarriage of justice as well. The errors are constitutional in nature. The comments were error and were prejudicial. The conviction should be reversed on this ground.

6. THE EXTREME WEAKNESS OF THE STATE'S CASE DEMONSTRATES THAT THESE ERRORS WERE PREJUDICIAL.

The State argues that a petitioner must prove a complete miscarriage of justice by labelling the errors as non-constitutional in nature despite lack of any case law to suggest they are non-constitutional. This is because the State cannot make a logical argument, given the weakness of the case, that the errors were not prejudicial.

In a PRP, for constitutional error, a court should reverse a conviction if it has grave doubt as to the harmlessness of the error. In re the Personal Restraint of Sims, 118 Wash. App. 471, 73 P.3d 398 (Div. 1 2003). It is not necessary to prove that a defendant would have been acquitted but for the error. It is enough if there is a reasonable probability that the error affected the trial's outcome and the error undermines the court's confidence in the trial's fairness.

The State's contention that petitioner is simply rearguing a sufficiency of the evidence argument misses the entire point of Section IV in petitioner's opening brief. This is not simply a revision of the argument made on direct appeal.

Review of a PRP requires an evaluation of the totality of the circumstances including weight of evidence

of guilt, which necessarily involves review of the whole record. In re the Personal Restraint of Mercer, 108 Wash. 2d 714, 719-720, 741 P.2d 559 (1987).

Thus, contrary to the State's position, review of the PRP requires a court to review the sufficiency of the evidence in light of the claimed errors.

Section IV of the Brief of Petitioner lays out a detailed analysis of why these errors were prejudicial given the meager evidence in this case. See Brief of Petitioner, pages 28-40.

In summary, this case was completely a credibility contest with no eyewitness or physical evidence. There was no allegation of alcohol and drug use or the presence of pornography as is often the case in such allegations. There were no other alleged victims. There was no accusation that Mr. Day had threatened D.J. in any way. D.J.'s own testimony was that Mr. Day acted normal after D.J. awoke and throughout the morning after the alleged event.

Thus, this case rests on the strength of D.J.'s testimony--testimony filled with inconsistencies and contradictions. He repeatedly mixed up events from various occasions. He could not even remember the correct day that he stayed at Mr. Day's house.

His testimony omits nearly 3 hours of time on the morning after the alleged incident. Mr. Day's version of events corroborated by others directly contradicts D.J.'s testimony. Numerous other inconsistencies are outlined in the Brief of Petitioner.

Further, D.J. had a strong motive to lie given that his mother had threatened to send him to boot camp for his continued misconduct and this threat took place the same day he stayed with Mr. Day. In fact, he had stolen items from his house he was not supposed to have. He knew he was in trouble when he stayed with Mr. Day. He knew he would be in trouble as soon as he got home. These circumstances alone raise credibility issues.

Mr. Day consistently denied the accusation while D.J. continually changed his story combining unrelated events or simply denying he had made previous statements.

It is particularly this type of case that requires close scrutiny by a court. In Martin v. Parker, 11 F.3d 613 (6th Cir. 1993), the court found the cumulative effect of errors in a sexual abuse trial so prejudicial as to strike at the fundamental fairness of the trial.

Cases involving sexual abuse exert an almost irresistible pressure on the emotions of the bench and bar alike.

Because such cases typically turn on the relative credibilities of the defendant and the prosecuting witness, however, strict adherence to the rules of evidence and appropriate prosecutorial conduct is required to ensure a fair trial.

Id. at 616-17.

In cases where the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors. Alcala v. Woodford, 334 F. 3d 862 (9th Cir. 2003).

Mr. Day's case was a credibility contest. Nothing corroborated the bare accusation. This is the type of accusation the Parker court said demands strict adherence to rules and appropriate prosecutorial conduct to avoid a decision based on passion and prejudice rather than the facts.

Each error on its own, given the weakness in this case, justifies reversal. Cumulatively, the effect of these errors tipped the scale so heavily against Mr. Day that any semblance of a fair trial was lost. State v. Simmons, 59 Wash. 2d 281, 368 P.2d 378 (1962).

Without the errors, a court should have grave doubt about the verdict in this case. Adding the errors, petitioner has demonstrated by more than a preponderance that he was prejudiced by the errors. The conviction should be reversed.

7. FAILURE TO OBJECT TO THE PRESENCE OF THE TOY, THE OUTBURST AND THE PROSECUTOR'S IMPROPER REMARKS AND THE FAILURE TO PUT ON AN AVAILABLE CHARACTER DEFENSE WAS UNREASONABLE AND PREJUDICED MR.DAY'S DEFENSE.

As with other errors, the cumulative effect of counsel errors can deprive a defendant of the Sixth Amendment right to effective counsel. Where evidence against a defendant is weak, confidence in the judgment of conviction may be undermined by a relatively smaller quantity of prejudice than might ordinarily suffice. Pavel v. Hollins, 261 F.3d 210 (2d Cir. 2001).

When a prosecutor acts unfairly, there is little a defendant can do other than rely on his attorney to lodge an appropriate and timely objection. Failure to make such an objection can have devastating consequences for a defendant. Thus, courts have held that failure to object to prosecutorial misconduct can amount to ineffective assistance of counsel. Hodge v. Hurley, 426 F.3d 368 (6th Cir. 2005).

In Hodge, defense counsel failed to object to the prosecutor's closing remarks in which he vouched for the credibility of a complaining witness in a child rape case. The court found failure to object unreasonable. Prejudice occurred because it was a close case and relied

entirely on a jury determination of credibility between the defendant and the complaining witness. Failure to object, said the court, given that scenario, is particularly likely to affect the jury's decision. Id. at 387.

It was unreasonable to fail to object to the prosecutor's remarks vouching for D.J.'s credibility or repeatedly comparing financial status or repeatedly referring to Mr. Day as a judge when that fact had nothing to do with the case. These comments appealed to the passion and prejudice of the jury.

Failure to object to D.J.'s holding and playing with a toy during testimony was unreasonable. There was no reason not to object. Similarly, it was unreasonable not to request some type of judicial intervention following the disruption by D.J.'s mother.

The failure to put on an available character defense was unreasonable. Mr. Day does not argue, as the state suggests, that character witnesses should have been called as to his reputation for truthfulness. The argument is the people who would have testified, as shown by their affidavits, would have testified to Mr. Day's good reputation for sexual morality.

The affidavits of James Johnson, Lisa Jensen and Alvin Mayhew outline the specific foundation to testify to Mr. Day's reputation for sexual morality. All have known him for years and have witnessed his work in the business and legal community or with a high school music program involving hundreds of students. All would have testified to his excellent reputation for sexual morality.

The State offers nothing specific to suggest putting on such a defense would have been a poor tactic. The State simply suggests, in general, that it could be "risky" for a defendant to call character witnesses.

Credibility was an issue. Mr. Day's good reputation for sexual morality could have been used to bolster his credibility because it is consistent with his defense that he did not commit the alleged act. Character evidence as to sexual morality could easily have created a doubt in and of itself.

Given the weakness in this case, there is more than a reasonable probability that the verdict, without counsel's errors would have been different.

CONCLUSION

A defendant does not have to prove he would have been acquitted but for errors. The defendant is pre-

judiced if there is a reasonable probability that the error affected the trial's outcome and the error undermines the court's confidence in the trial's fairness.

Sims, supra.

Prejudice need only be proved by a preponderance of the evidence and where the case is weak, much less is required to achieve that goal.

Any reasonable person should have grave doubt about this verdict and the effect of the errors on that verdict given the weakness in the case.

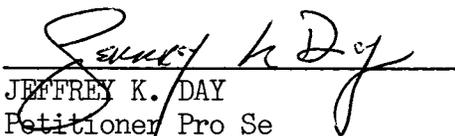
As Justice Utter noted in discussing the court's responsibility when reviewing a personal restraint petition:

Fundamental fairness is the key concern. Where a constitutional error goes to the truth finding function of the jury, we must provide collateral relief where the error might have affected the result of a criminal prosecution. Our concerns for finality of judgments simply have no force when a person who might be innocent is the subject of such finality. Time does not lend credibility to a judgment that is unfair.

Hagler, 97 Wash. 2d at 830.

The judgment in Mr. Day's case was the result of an unfair trial. The conviction should be reversed.

DATED this 14th day of August, 2007.


JEFFREY K. DAY
Petitioner Pro Se