

NO. 94418-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

OSCAR RAUL LOPEZ,

Petitioner.

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. Did the Court of Appeals correctly hold that Lopez failed to show deficient performance when trial counsel did not offer evidence of Lopez's reputation for sexual morality where such evidence was not admissible and where counsel mounted an otherwise sound defense?

2. Did the Court of Appeals correctly hold that Lopez failed to show prejudice from a lack of testimony about his sexual morality when multiple witnesses testified that Lopez was trusted by his fellow school employees and by his family and where multiple witnesses testified that they were shocked to hear the victim's accusations?

3. Did the Court of Appeals properly hold that the Due Process Clause does not demand a lawyer free from mental illness?

B. FACTS

The trial in this case lasted from February 11, 2015 until March 12, 2015. Eleven witnesses were called by the State and eight witnesses testified for the defense. The transcript fills ten volumes and is more than twelve hundred pages long. Because ineffective assistance of counsel claims are necessarily fact-dependent, the State devoted 37 pages of its opening brief in the Court of Appeals to a full summary of the crime-related facts and a detailed summary illustrating how defense counsel

investigated and tried the case. Brief of Appellant, at 3-40. That summary cannot be duplicated within the page limits of this brief, so the State respectfully asks this Court to review the factual summary provided in its opening brief below.<sup>1</sup> Specific highlights of that summary will be described herein with citations to the record and the State's brief below.

L.M. was a six year old student at the small religious school where Lopez the bus driver primarily responsible for transporting L.M. to and from school. She reported to her mother one day that Lopez had come to her as she sat alone in the back of the bus, put his hand under her skirt and up her shorts, and rubbed or tickled his hand over her vaginal area. 5RP 425-38 (forensic interviewer); Ex. 18, pp. 10-14 (transcript of interview); 7RP 662-72 (mother's testimony). See Brief of Appellant, at 5-11.

Lopez was charged with a single count of child molestation. CP 77. Beginning on July 11, 2014, he was represented by Mr. Steven Witchley. CP 6-7. Witchley has been a criminal defense lawyer in Washington since 1990. He was a public defender with The Defender Association (TDA) and then he operated his own practice. He has handled many serious felonies and at least three death penalty cases. CP 286.

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<sup>1</sup> Lopez devoted only four and one-half pages to the facts in his Court of Appeals brief and only six pages in his petition for review. Both documents discuss post-trial proceedings but say almost nothing about the conduct of the trial.

Shortly after appearing, Witchley moved to release Lopez and arranged for 25 witnesses to appear on Lopez's behalf. CP 237. He and his investigator thereafter conducted a thorough investigation including no fewer than 12 interviews where Witchley personally appeared. CP 89-95, 165-221, 223-35. About 24 pretrial motions (discovery, impeachment, character evidence, victim's nightmares, bus logs, penalty evidence) were litigated on the first day of trial. 1RP 6-41.

Counsel zealously and intelligently defended his client's interests on each topic raised. Counsel indicated that he did not intend to introduce character evidence under ER 404(a). 1RP 17-18; CP 40-41. Counsel also persuaded the court to grant a second interview with the victim based on new video evidence. 1RP 35-38. A complicated child hearsay issue was litigated over the course of several days and Witchley adeptly presented cogent arguments that led to rulings in his favor. 3RP 61-95; Brief of Appellant, at 22-23. He effectively argued a "hue and cry" issue during trial. 6RP 527-36; Brief of Appellant, at 32. In the middle of trial, he persuaded the court to order a second interview of the child victim. 6RP 588-95; Brief of Appellant, at 33-34.

Voir dire occurred over five days, fifty-six jurors were examined individually, and many were excused for cause, at least five at the express urging of defense counsel. CP 43-51. Witchley presented a solid opening

statement and outlined the key aspects of his defense. 3RP 109-13; Brief of Appellant, at 24.

Witchley wove several themes into the fabric of his defense. To undermine the jury's confidence that the event occurred when L.M. claimed, and to undermine its confidence in her credibility, generally, counsel pored over detailed bus scheduling records to show that L.M. was not alone with Lopez when she said the abuse occurred. See, e.g., 3RP 194-209 (Sandosky); 3RP 409-13 (Salavea); 6RP 575-77 (VanArsdell). He elicited testimony to portray her as emotional, sensitive, and prone to exaggeration. 8RP 921 (Jimenez) and 9RP 997-98 (Jimenez Matus). He tried to show that Lopez had insufficient English-language skills to have communicated with L.M. as she reported. 3RP 207-09 (Sandosky); 5RP 416-17 (Salavea); 6RP 580-83 (VanArsdell). He attacked at length the worthiness of a video exhibit that was important to the State's case. 3RP 283-304 9 (Acosta); 5RP 409-10 (Salavea); 6RP 572-73 (VanArsdell). And, finally, he took advantage of every opportunity to illustrate that Lopez was a family man surrounded by children and other adults, and that nobody believed he would molest a child.

For example, the State's first witness was a school employee who first took the report of abuse. Witchley skillfully cross-examined this witness to show Lopez was trusted. He asked her, "If you had ever

observed any inappropriate conduct taking place between an adult and any of the kids at the daycare, what would you have done?" Ili replied, "Report it." Witchley then asked, "Did you ever have those concerns with Mr. Lopez?" Ili answered: "No." 3RP 134. The State's second witness was also a school employee. This witness was key to Witchley's theory that the abuse reported by the victim was improbable as to timing and circumstance and Witchley developed that theme through cross-examination, as well as showing that Lopez had limited English-language skills and had six children in a "close-knit" family. 3RP 194-217; Brief of Appellant, at 26.

Witchley also made excellent use of the State's third witness, Ms. Acosta, who was a school employee and friend of Lopez. Witchley convinced the trial court to allow him considerable latitude on cross-examination to ask Acosta why she supported Lopez. Acosta painted a picture of a loving family man and daycare employee who would never molest children. 4RP 292-93. Witchley commented later that this testimony was essentially equivalent to character evidence. CP 228-29. Witchley was similarly effective in cross-examining other witnesses. See e.g. 5RP 448-50 (child interview specialist); Brief of Appellant, at 32.

The victim, L.M., testified on March 4 and 5, 2015. 7RP 733-76; 8RP 790-816. She was reluctant to testify about certain topics on direct

examination and answered those questions vaguely, or by saying she could not remember. Witchley's cross-examination displayed tact, sensitivity, and skill to elicit more information from this child witness.

He started by obtaining permission of the court to wheel his chair around counsel table so that he could sit while questioning, so as not to threaten or appear to threaten the witness. 8RP 789. He asked her whether she recalled coming to an earlier hearing and upon seeing Lopez, "giving him a big smile and waving to him?" 8RP 800. He was able to convince her to talk about the video where she had earlier declined. 8RP 801. He stayed back from her in court to encourage her to keep her voice up. 8RP 802. He got L.M. to agree that instead of Lopez touching her head in the video, maybe they were just playing a game. 8RP 802. He got her to agree that Lopez played games, goofed around with all the kids, not just her. 8RP 803. She agreed that he would tickle kids when they did not fasten their seatbelts. 8RP 804.

As for the actual abuse, he confirmed with her that there was frost on the windows, and then juxtaposed that with her testimony that she was wearing shorts. 8RP 804. When it appeared she was getting reluctant to answer questions, he changed the topic and asked her about the stuffed animal she was holding. 8RP 807. And, he had L.M. describe the event in

a way that invited the jury to question whether Lopez could have reached under her shorts while she was in a sitting position. 8RP 809-10.

Witchley called eight witnesses (including Lopez) in the defense case. In addition to basic facts that would support Lopez's theories of the case, he skillfully elicited testimony from these witnesses to show how the defendant was surrounded by close friends and children, how they were shocked at the charges, and how they remained loyal to him even in the face of molestation charges. 8RP 864-952 (wife); 8RP 953-67, 968-79 (18 year-old twin daughters); 9RP 987-88 (24 year-old stepson who was a teacher); 9RP 1018 (22 year-old son); 9RP 1043-51, 1051-64 (16 year-old son and sixth grader son).

Counsel called Lopez as a witness and led him through a lengthy, detailed and thorough direct examination covering Lopez's personal history, his family history, his reasons for moving to Washington, his desire to start a church of his own, his military service in Guatemala, his work history, his limited ability to speak English, his commercial driver's license, the routines of work at Bethel, the bus routes and the timing of those routes, and other topics. RP 1067-1170. Counsel defended his client during cross-examination by objecting no fewer than nine times. RP 1014, 1034, 1059, 1116 (twice), 1122, 1126, 1128, 1160.

Finally, Witchley delivered an intelligent, articulate, cogent and methodical closing argument showing a sensitivity to language, legal concepts, and both the subtleties and generalities of the evidence. He fully explored the nuances of the bus routes and schedules, he illustrated conflicts in the evidence, he exploited any weaknesses in the State's evidence, he talked about general themes in child molestation prosecutions, and he cautioned the jury not to convict based on innuendo and insinuation. 10RP 1185-1203.

The trial court complimented Witchley's trial practice three times. See 3RP 238 (You're obviously a very able trial attorney, but this [tardiness] continues to be an issue."); 11RP 1283 (Even though I have to say, quite candidly, I thought Mr. Witchley, despite his tardiness, for the most part did a good job."); 11RP 1317 ("Mr. Witchley, even despite his shortcomings, was a competent trial attorney for the most part, except for the evidentiary issues.").

Nonetheless, the jury was persuaded by the State's evidence and Lopez was convicted as charged. CP 81; 10RP 1212-14.

Lopez fired Witchley after trial and hired Mr. Trejo on April 15, 2015. In June, Trejo filed a motion for new trial claiming ineffective assistance of counsel, a series of five hearings were held, and the court ruled on October 30, 2015. The initial motion alleged a failure to

investigate and call six witnesses who could testify as to the defendant's good character; reputation evidence was not mentioned. CP 113-40. With the court's permission, Witchley was interviewed by the prosecutor and a transcript of that interview, adopted by Witchley as true, was provided to the court. CP 141-45 (order), 222 (Decl. of Witchley), 223-64 (transcript). The prosecutor filed a brief opposing the motion, CP 149-221, and noted that Witchley had attended key witness interviews. CP 147.

The day before an evidentiary hearing scheduled for October 8, 2015, Lopez filed a new motion supported by different declarations and alleging this time that Witchley should have called "reputation" witnesses. CP 265-97. The new motion was supported by a declaration of Witchley's former investigator. The deputy prosecutor had received these materials only the day before, was going on maternity leave the next day, and was unable to adequately address the new materials. 11RP 1233-34. The court continued with an evidentiary hearing, nonetheless.

As the hearing came to a close, the court noted that it felt the need to unseal a declaration Witchley had filed after he was sanctioned. 11RP 1280. The court said, "I've now come to the conclusion that the contents of the declaration are relevant to this proceeding." 11RP 1280. The court said the declaration was relevant to "the failure of Mr. Witchley to consider calling some of the witnesses for the purposes of giving

*reputation* testimony as to Mr. Lopez's sexual morality." 11RP 1282-83 (italics added). The court also said, "And I think that Mr. Witchley's mental state during trial is a relevant consideration for the court because I can tell you, in general terms, that I believe there's a connection between his ability to perform and his mental state. Even though I have to say, quite candidly, though Mr. Witchley, despite his tardiness, for the most part did a good job. But I am concerned about this one area." Id.

Mr. Trejo was then allowed to call Witchley's former investigator, Ms. Sanderson as a witness over the State's objection. 11RP 1284-85. Sanderson testified that Witchley was suffering from severe depression during trial. She was quite explicit that she and Witchley discussed presenting reputation evidence, not general character evidence. 11RP 1286, 1290, 1293, 1297. The trial court was also presented with an affidavit from Witchley's doctor, which said in part that "Steve is able to work very productively in focused areas, though has difficulty with managing the various demands of a full-time legal practice." 11RP 1315.

On October 30, 2015, the trial court announced its decision in an oral ruling. 11RP 1303-19. The court discussed four appellate decisions and faulted Witchley for not presenting reputation evidence as to "sexual morality and decency," even though the case law was "somewhat muddy." 11RP 1306-08. The court asserted that the decision to forego reputation

evidence was not tactical, citing an unsworn electronic mail message where Witchley said he never considered the issue. CP 347; 11RP 1308-09.<sup>2</sup> The court then ruled that it would have allowed reputation evidence at trial, and that Witchley therefore had made a “serious mistake,” and concluded that he had been constitutionally deficient. 11RP 1309.

On the issue of prejudice, the court ruled “reputation evidence can be particularly impactful ... because it allows jurors to view the defendant in a broader context ... [and] can potentially have a significant impact on the outcome, particularly in close cases. And this was a close case.” 11RP 1311.<sup>3</sup>

The trial court also ruled that “as a matter of due process a defendant is entitled to be represented by somebody who is not suffering from mental illness. And so this is ... an independent basis for finding that Mr. Lopez should be given a new trial.” 11RP 1317.

The State appealed and the Court of Appeals reversed. State v. Lopez, No. 74333-3-I, slip op. (Court of Appeals, Div. I, filed 3/20/17). The court held that trial counsel had not been deficient because binding

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<sup>2</sup> It does not appear that the parties had seen this email before the October 30<sup>th</sup> hearing. The trial court did not address how that single unsworn sentence in an email could be squared with Ms. Sanderson’s repeated statements under oath that they deliberately tried to develop “reputation evidence of character.” 11RP 1285-86, 1293, 1297.

<sup>3</sup> This court rejected all other claims of ineffective assistance of counsel and made no findings that counsel’s performance was deficient in any other respect. 11RP 1317-19.

authority prevented admission of reputation evidence in a child molestation case and counsel was not obligated to seek a change in that law. Slip op. at 7-8. It also held that counsel was to be judged by his overall performance rather than by a single act or omission, and that his performance had been objectively reasonable. Id. at 8-9. Moreover, the court held that prejudice was not demonstrated because “the missing sexual morality testimony would not have greatly augmented the evidence actually provided to the jury.” Id. at 10.

C. ARGUMENT

The only finding of deficient performance made by the trial court was counsel’s failure to offer evidence of Lopez’s reputation in the community for sexual morality. This finding does not, as a matter of law, constitute deficient performance because binding precedent made it clear that such evidence is not admissible under the reputation exception to the bar on character evidence. People do not generally have a reputation in the community for sexual morality vis-à-vis a child. Counsel had no obligation to seek a change in this law. Even if reputation evidence were admissible, counsel’s single lapse on an evidentiary matter does not constitute deficient performance.

Nor can Lopez prove prejudice. Reputation evidence has very limited probative value and, in any event, trial counsel skillfully elicited testimony equivalent to reputation evidence through a number of witnesses. He also ably litigated motions, crossed the State's witnesses, presented eight witnesses on Lopez's behalf, and delivered an excellent summation. The result of the trial would not have changed with reputation evidence.

The trial court's ruling based on the Due Process Clause is wholly unsupported, the Court of Appeals properly rejected it, and Lopez has provided no authority to support that theory.

Finally, Lopez's arguments in his petition for review that counsel failed to investigate and failed to communicate with him should not be entertained. The trial court explicitly rejected those claims, and Lopez never pursued a cross-appeal. Those assertions were never established as fact and are not part of the ruling under review.

1. THE ABSENCE OF CHARACTER EVIDENCE BY TESTIMONY AS TO REPUTATION FOR SEXUAL DECENCY IS NOT DEFICIENT PERFORMANCE IN A CHILD MOLESTATION CASE.

Lopez argued and the trial found that trial counsel's failure to present reputation evidence for sexual morality was deficient performance.

The Court of Appeals properly rejected this ruling based on State v. Jackson, 46 Wn. App. 360, 730 P.2d 1361 (1986), which was binding authority at the time of trial. Slip op. at 7-8. To the extent there is tension between Jackson and other appellate court decisions, this Court should hold that Jackson states the proper rule, and that failure to present reputation evidence in a child sexual abuse case is not deficient performance.

Thirty years ago the Court of Appeals held that evidence of sexual decency is not relevant in prosecutions for sexual abuse of a child. State v. Jackson, 46 Wn. App. 360, 730 P.2d 1361 (1986). Jackson was charged with first degree statutory rape for sexual intercourse with a very young girl and he offered two character witnesses “concerning his reputation for sexual morality and decency.” Jackson, 46 Wn. App. at 364. The Court of Appeals affirmed refusal of that evidence.

The crimes of indecent liberties and incest concern sexual activity, which is normally an intimate, private affair not known to the community. One’s reputation for sexual activity, or lack thereof, may have no correlation to one’s actual sexual conduct. Simply put, one’s reputation for moral decency is not pertinent to whether one has committed indecent liberties or incest. The trial court properly refused to permit Jackson’s witnesses to testify concerning his reputation for sexual morality and decency.

Jackson, at 365. This holding was binding precedent on the trial court in this case. Witchley was not ineffective in failing to offer inadmissible reputation evidence.

Instead of relying on this binding precedent, however, the trial court relied upon decisions from Divisions II and III of the Court of Appeals which the trial court said “permitted reputation evidence of sexual morality.” 11RP 1308 (citing State v. Griswold, 98 Wn. App. 817, 991 P.2d 657 (2000) and State v. Harper, 35 Wn. App. 855, 859-60, 670 P.2d 296 (1983). This Court should reject that reasoning.

First, the language in Harper was dicta. No testimony was offered in Harper that the defendant had a reputation for sexual morality or decency. The sole issue was whether reputation for the defendant’s *truthfulness* was admissible in a prosecution for indecent liberties. Harper, 35 Wn. App. at 859-60.

State v. Thomas, 110 Wn.2d 859, 757 P.2d 512 (1988), did not overrule Jackson. Thomas was convicted of rape in the third degree for sexual intercourse with a 14-year old girl. Thomas, 110 Wn.2d at 861. Three of his closest friends testified to his reputation for sexual morality. Thomas, at 863-64. The prosecution appears not to have objected to this testimony, or to closing argument drawing attention to the testimony. Id. The trial court refused, however, to instruct the jury on how to evaluate

character evidence. On appeal, “[t]he sole issue raised [wa]s whether the trial court must instruct on character evidence when the defendant has introduced relevant character testimony.” Id. at 860. The supreme court held that an instruction was not required. Admissibility of the evidence itself was never challenged, so the Court did not address the reasoning of Jackson. Thus, Thomas does not hold that reputation evidence of sexual morality is admissible under ER 404(a)(1).

State v. Griswold transformed the dicta in Harper and the inapposite holding in Thomas into a rule of law that conflicts with the holding in Jackson. Griswold was a martial arts instructor convicted of child molestation in the third degree for sexual contact with a 14-year old student. The trial court, relying on Jackson, rejected Griswold’s effort to present testimony from several witnesses as to his reputation for good sexual character. Division III held that the trial court had erred, because, it believed, Thomas and Harper permit such testimony. Griswold, 98 Wn. App. at 828-29. Although the court recognized that the language in Harper was dicta, it failed to recognize that such evidence was never challenged in Thomas. Thus, the holding in Griswold is flawed, and is no more authority for the admissibility of such evidence than is either Thomas or Harper standing alone.

The reasoning in Jackson is sound and this Court should adopt it. Reputations for character traits like truthfulness or peacefulness are reliable evidence because public conduct reveals those traits, so a person can develop a reputation as to the trait. And truthfulness and peacefulness are truly elements of a person's character. Reputations concerning sexual conduct, however, are more likely to be based on speculation than on observed conduct. It is highly unlikely that a person will display or discuss his or her immoral or indecent sexual conduct. Many offenders deliberately hide such behavior and simultaneously cultivate a false reputation for sexual decency. Thus, a person's reputation for sexual conduct is unlikely to reflect his immoral or indecent conduct. For this reason, it is not a character trait "pertinent" to a criminal prosecution, if it is a "character" trait, at all. A reputation for sexual morality is meaningless as to a crime that occurs in private.

As prosecutions of sex offenders have increased over the last two decades, as victims have become more open to discussing the crimes committed against them, including crimes committed by supposedly reputable people, it has become even more apparent that many admired people commit sexual crimes against children. Politicians, priests, coaches, and teachers have all been shown to be abusers of children. See, e.g., <http://www.cnn.com/2016/04/27/politics/dennis-hastert-sentencing>

(last accessed 10/4/17). Any one of these trusted public figures could muster dozens of witnesses to testify (truthfully) that he or she had a reputation for sexual morality. But such reputation was ultimately immaterial to the question whether they molested a child. There is no psychological test or profile to determine whether a person is a child molester. See John E.B. Myers, *Myers on Evidence in Child, Domestic, and Elder Abuse Cases*, § 6.27 and 6.28 (4<sup>th</sup> ex. 2011).

A lawyer is strongly presumed to be competent and will be found ineffective only if the defendant overcomes that presumption and proves that counsel's failures caused prejudice. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Jackson was binding authority that prohibited evidence of reputation for sexual morality. Witchley was not ineffective for failing to offer such evidence.

Even if this Court were to decide that such evidence *can* be admitted, Witchley was not constitutionally ineffective for failing to offer it. A lawyer is not ineffective if he follows existing precedent. In re Det. of Coe, 175 Wn.2d 482, 491, 286 P.3d 29 (2012) ("It is difficult to imagine exactly how Coe's counsel was deficient when then-controlling authority stated an instruction was not necessary"). Nor does counsel's

failure to anticipate changes in the law amount to deficient representation. State v. Brown, 159 Wn. App. 366, 372, 245 P.3d 776 (2011); State v. Slighte, 157 Wn. App. 618, 238 P.3d 83 (2010) (concluding that trial counsel is not deficient for failing to anticipate changes in relevant case law and adjusting legal trial strategy accordingly); United States v. Fields, 565 F.3d 290, 296 (5th Cir.), cert. denied, 558 U.S. 914 (2009) (noting that a majority of federal appellate circuits hold that counsel need not anticipate changes in the law). Nor does counsel have a duty to seek a change in the law. Maryland v. Kulbicki, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2, 4, 193 L. Ed. 2d 1 (2015).

Jackson had been the law in Division One of the Court of Appeals for decades. A lawyer who follows the law is not deficient. The trial court erred when it ruled that Witchley had to be “right” about the ultimate admissibility of reputation evidence. 11RP 1307.

Moreover, counsel is deficient only if his performance “fell below an objective standard of reasonableness based on consideration of all the circumstances.” Strickland, 466 U.S. at 687-88. Overall, as the trial court said three separate times, Witchley presented an sound defense for Lopez. He aggressively sought Lopez’s release pretrial, he professionally litigated pretrial motions, he skillfully cross-examined the State’s witnesses to extract information helpful to Lopez, he attacked the State’s video

evidence, he presented seven witnesses whose testimony was plainly designed to persuade the jury that Lopez could be trusted around children, and he made a compelling closing argument. A single shortcoming on a debatable evidentiary question is not deficient performance under the Sixth Amendment.

2. LOPEZ HAS NOT PROVED PREJUDICE.

Lopez must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland, at 693-94; McFarland, 127 Wn.2d at 335. The likelihood must be substantial, not just conceivable. Harrington v. Richter, 562 U.S. 86, 131 S. Ct. 770, 762, 787 (2011). Strickland requires a particularized finding of a deficiency that caused prejudice, not simply a generalized feeling that counsel could have done better. In re Pers. Restraint of Davis, 152 Wn.2d 647, 674, 101 P.3d 1 (2004).

In Davis, the defendant claimed that his lawyers' alleged failures in a capital murder case were necessarily prejudicial. This Court rejected that argument, holding that counsel had mounted a significant defense, which precluded a finding that there had been "a complete denial of counsel or a break down in the adversarial process." Davis, 152 Wn.2d at

674 (quoting United States v. Cronin, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

The first part of the trial court's prejudice ruling here is tied solely to the reputation evidence. The court essentially said that reputation evidence is important, this was a close case, and so the absence of such evidence might have changed the result of the trial. The court's reasoning was flawed in several ways.

First, the court was mistaken that reputation evidence is powerful. As discussed above, there is a very strong argument that reputation for sexual morality is simply not relevant at all in child sex cases. If such evidence is irrelevant or barely relevant, it cannot be "powerful" for purposes of finding prejudice. Moreover, the reason that reputation evidence has "power" is similar to the reason propensity evidence can be persuasive. It invites a jury to decide a case based on the past, rather than to assess the case based on evidence relevant to the current crime. It is even worse than propensity evidence, however, because it turns not on what the defendant has actually *done*, but on testimony about his reputation for *not* doing something—a reputation that nobody can possibly know. Thus, such evidence is of exceedingly low probative value. Its value lies in its tendency to encourage decisions on an improper basis. Prejudice should not be measured by the extent to which it encourages a

lawless verdict. Strickland, 466 U.S. 668 (“A defendant has no entitlement to the luck of a lawless decisionmaker “).

Second, the trial court did not consider counsel’s overall performance. In fact, the trial court failed to recall the extent to which Witchley had already elicited equivalent evidence. During the post-trial evidentiary hearing, about seven months after the trial, the trial court had to ask the prosecutor to remind it who witness Acosta was. 11RP 1291. Acosta was a State’s witness but was a friend of Lopez’s who was allowed to testify on cross-examination to (essentially) her opinion that Lopez did not molest this child. 4RP 292-93. Witchley later commented that this testimony was essentially equivalent to character evidence. CP 228-29.

Witchley also developed a body of evidence showing that Lopez’s other co-workers, his family, and his fellow parishioners believed he was trustworthy with children. They were all shocked by the allegations, and were still clearly allied with Lopez. Most rational jurors would assume Lopez would be driving a school bus at a daycare only if he had a good reputation for sexual morality. Express testimony on that point would have been only a marginal improvement over what had already been presented, and would not have changed the result in this case. In fact, express rather than indirect testimony to sexual morality might have

opened the witnesses to cross-examination on the topic, and thereby undermined the effect of their testimony.

Nor is there any per se rule of prejudice in the Sixth Amendment analysis. “The question of whether counsel’s performance was ineffective is generally not amenable to per se rules, but requires a case by case basis analysis.” State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). This Court has repeatedly rejected arguments that deficiencies should be deemed per se prejudicial. Davis, at 674 n.34 (shackling a defendant in front of the jury was per se prejudicial); Cienfuegos, 144 Wn.2d at 228 (failure to offer diminished capacity instruction is not per se prejudicial); State v. Robinson, 138 Wn.2d 753, 982 P.2d 590 (1999) (deprivation by counsel of right to testify is not per se prejudicial); State v. Holm, 91 Wn. App. 429, 436, 957 P.2d 1278 (1998) (defense attorney to fail to pursue plea bargaining). In Bell v. Cone, 535 U.S. 685, 697, 122 S. Ct. 1843, 1851-52, 152 L. Ed. 2d 914 (2002), the Supreme Court made it clear that prejudice can be presumed based on an attorney’s failure to test the prosecutor’s case only if the failure is complete, i.e., if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing and the failure to adduce mitigating evidence in a capital case and the waiver of closing argument did not meet that standard. Lopez cannot meet the standard here.

Moreover, numerous courts have refused to adopt rules of per se ineffectiveness based on disabilities suffered by counsel. Dows v. Wood, 211 F.3d 480, 485 (9th Cir. 2000) (“The mere fact that counsel may have suffered from a mental illness at the time of trial ... has never been recognized by the Supreme Court as grounds to automatically presume prejudice”); Smith v. Ylst, 826 F.2d 872, 876 (9th Cir. 1987) (“mental illness is too varied in its symptoms and effects to justify a per se reversal rule without evidence that the attorney’s performance fell below the constitutional norm”). Johnson v. Norris, 207 F.3d 515, 518 (8th Cir. 2000) (“[o]ur Court has previously declined to adopt a rule requiring a per se presumption of prejudice with regard to mental illness....Bipolar disorder, like most mental illnesses, can have varying effects on an individual’s ability to function, and ... [a]ny errors ... should be apparent from the face of the trial record, or otherwise susceptible of proof, and thus readily reviewable.” See also Bellamy v. Cogdell, 974 F.2d 302, 308 (2d Cir. 1992).

Finally, Lopez argued in his petition for review that the combination of several alleged deficiencies combined to cause prejudice. This argument should be rejected. Lopez’s list of “deficiencies” relate to trial counsel’s depression, not to allegations that the depression caused a particular *legal* deficiency. Thus, his argument begs the relevant question.

A lawyer may face any number of obstacles, but ineffective assistance of counsel exists only if counsel was legally deficient and that legal deficiency was prejudicial. The only legal deficiency found by the trial court related to reputation evidence. There was no finding as to any other deficiency. In fact, Lopez's other arguments were expressly rejected and he never cross-appealed those rulings.

3. THE SIXTH AMENDMENT, NOT THE DUE PROCESS CLAUSE, IS USED TO MEASURE WHETHER COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

The trial court originally ruled that the Due Process Clause was an independent basis upon which to grant a new trial, because that clause guarantees a right to counsel free from mental illness. 11RP 1316-17. Lopez has yet to offer a single citation to authority to support the trial court's ruling. It should be rejected for this reason alone.

The argument should also be rejected because it would unfairly penalize excellent lawyers with mental illnesses who ably represent their clients. As amici WACDL recognizes, "many wonderful lawyers ... suffer from diagnosed mental illnesses and are able to provide competent and even extraordinary representation to criminal defendants." Brief of WACDL as Amicus Curiae, at 5. A constitutional rule requiring a lawyer

free from mental illness would exacerbate the stigmas associated with mental illness and would promote bias against such persons.

D. CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Court of Appeals rejecting the trial court's ruling on ineffective assistance of counsel and the matter should be remanded for imposition of judgment on the jury's verdict of guilty.

DATED this 5<sup>th</sup> day of October, 2017.

Respectfully submitted,

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