

66147-1

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON, )  
Respondent, )  
)  
)  
)  
V. )  
)  
JEFFREY W. KINER, )  
Appellant, )  
\_\_\_\_\_ )

No: 66147-7-1

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

2011 JUN 16 AM 10:24

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STATE OF WASHINGTON~~

The Appellant, Jeffrey W. Kiner, acknowledges having received and reviewed the opening brief prepared and filed by his attorney Mr. Christopher H. Gibson. The Appellant respectfully submits his "Statement of Additional Grounds for Review" for consideration before the Honorable Judges of the Division One Court of Appeals.

It appears that there is an error stemming from the Sept. 14, 2010 "Order Denying Defense Motion" entered by King County superior court judge Leroy McCullough. This error pertains to the actual number of motions denied by this ruling and is furthered by the Jan. 27, 2011 ruling by the Court of Appeals to appoint counsel.

This issue has not been addressed by Appellants' counsel and the Appellant seeks to establish on record that the Sept. 14, 2010 Superior Court Order referenced denies a total of three motions. Two of the motions denied are CrR 7.8 motions - they are separate motions that raise different issues- One of the motions denied is a

MOTION TO RECUSE judge McCullough from hearing any future matters pertaining to State v. Jeffrey W. Kiner.

First the Appellant points to the Sept. 14, 2010 superior court order.

PG 1 Ln 7- "By Motion documents dated Dec. 8, 2009 and April 9, 2010 defendant requested that the 2006 Judgment and Sentence be modified. There was no significant change to the pleadings, which challenged the jury's findings on specific counts, and which challenged the applicability of RCW 10.73.090 to his case." Then, on the bottom of the page it states- "It is ordered that both motions be denied." This ruling denies both the motion dated Dec. 8, 2009 and the motion dated April 9, 2010. The problem began when judge McCullough mistakenly refers to these motions as they are the same motion repetitively filed. This is simply not the case and in doing this the superior court has unnecessarily confused the issue and are attempting to ignore a CrR 7.8 motion that is properly before it.

Kiners' CrR 7.8 motion dated Dec. 8, 2009 is a challenge to the sufficiency of evidence presented in support of two of the charges he was convicted of. Not only is it obvious that this motion was filed well ahead of the one-year time bar found in RCW 10.73.090 but the motion itself is exempt from time bar because of the specific language of RCW 10.73.100 (4). (Appendix pg 1)

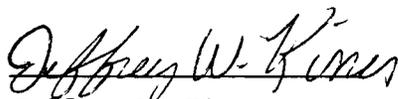
The CrR 7.8 motion dated April 9, 2010 raises several issues. These include violation of pre-trial motion in limine to exclude evidence of drug use by the defendant, violation of rules of evidence regarding hearsay and photographic evidence presented, and prosecutorial misconduct based on statements made by King County prosecuting atty. Amy Montgomery. Again it is obvious that this motion was submitted

within the limits set forth in RCW 10.73.090. (Appendix pg 1)

On June 22, 2010 Kiner contacted King County superior court and asked for information regarding two "separate and distinct CrR 7.8 motions". On June 28, 2010 customer service specialist S. Johnson responded and informed Kiner that each of the motions had been forwarded to judge McCullough upon receipt. (Appendix pgs 2-3) Kiner submit a copy of his April 9 , 2010 CrR 7.8 motion to illustrate the fact that it is a separate motion and is easily distinguishable from the Dec. 8, 2009 motion.(Appendix pgs 4-14)

The superior court order denied motions dated Dec. 8, 2009 and April 9, 2010. Then in January 2011 the superior court properly conceded that neither of these motions are time barred and that denial on those grounds was improper. Kiner now respectfully asks this Court to reverse the Sept. 14, 2010 "Order to Deny Defense Motions" and to remand both CrR 7.8 motions for proper consideration.

Respectfully submitted this 10th day of June, 2011.

  
Jeffrey W. Kiner  
Appellant/Pro-se

APPENDIX

RCW 10.73.090 ;

"(1) No petition or motion for collateral attack on a judgment in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its' face and was rendered by a court of competent jurisdiction.

(3) For the purposes of this section a judgment becomes final on the last of the following dates:

(b) The date an appellate court issues its' Mandate disposing of a timely filed direct appeal from conviction."

RCW 10.73.100 ;

" the time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based on one or more of the following grounds.

(4) The defendant plead not guilty and the evidence introduced at trial is insufficient to support the conviction.

June 21st, 2010

King County Superior Court Clerk  
516 Third Avenue  
Seattle, Wa. 98104

re: Status of CrR 7.8 Motions filed on ~~cause~~ #05-1-09246-3-KNT

Dear Clerk,

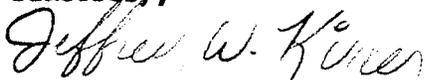
I am contacting you today to ~~request~~ information about two separate and distinct CrR 7.8 motions filed by me on the above cause ~~3~~.

- 1) The first motion was filed on or about Dec. 16th, 2009. The Supreme Court granted ~~a~~ writ of mandamus regarding this motion on ~~July~~<sup>June</sup> 1st, 2010. In doing so they ordered the Superior Court to act on the motion. I would like to know when this motion is scheduled to be heard.
- 2) On April 9th, 2010 I filed another CrR 7.8 motion with the Superior Court. As I would like to avoid the same delays and mishandling of this motion as occurred with the previous ones, I am contacting you to find out when this motion is scheduled to be heard. The 90 days for this motion to be decided is soon to expire and I have heard nothing from the Court. **Please**

**please** contact me as soon as possible with the requested information.

Thank you for your time and assistance in this matter.

Sincerely,



Jeffrey W. Kiner #932875  
A.H.C.C. N unit B03L  
P.O. Box 2049  
Airway Heights, Wa. 99001-2049

*Mailed June 22, 2010*



## King County

Department of Judicial Administration  
Barbara Miner  
Director and Superior Court Clerk  
(206) 296-9300 (206) 296-0100 TTY/TDD

June 28, 2010

Mr. Jeffery Kiner  
932875 – N Unit B03L  
Airway Heights Correction Center  
P.O. Box 2049  
Airway Heights, WA

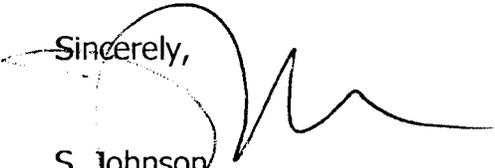
Dear Mr. Kiner:

In response to your recent correspondence the Clerk's Office forwarded each of your motions to Judge McCullough upon receipt. Please contact the Judge's bailiff directly for any further information regarding these motions at 206-296-9245 or by mail at the following address:

Judge Leroy McCullough  
Juvenile Division  
1211 East Alder, Suite  
Seattle, WA 98122

For your information I have enclosed a copy of your case contents.

Sincerely,



S. Johnson  
Customer Service Specialist  
Department of Judicial Administration

*Seattle:*  
516 Third Avenue Room E609  
Seattle, WA 98104-2386

*Regional Justice Center:*  
401 Fourth Avenue North Room 2C  
Kent, WA 98032-4429

*Juvenile Division:*  
1211 East Alder Room 307  
Seattle, WA 98122-5598

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,  
respondent,

v.

JEFFREY W. KINER,  
defendant,

---

No: 05-1-09246-3-KNT

MOTION TO VACATE AND MODIFY  
JUDGEMENT AND SENTENCE

I IDENTITY OF MOVING PARTY

COMES NOW, Jeffrey W. Kiner, defendant in the above case, appearing Pro-Se. Pursuant to CrR 7.8, not barred by R.C.W. 10.73.090, making a substantial showing that relief is entitled and that a factual hearing is necessary moves this Court for the relief sought below.

II RELIEF SOUGHT

On August 9, 2006 Kiner was convicted of three counts of first degree child molestation. He now seeks reversal of these convictions and an order granting a new trial. Kiners' rights at trial were severely prejudiced by the egregious errors that occurred during his trial. The issues presented clearly show that Kiners' Constitutional Rights were violated.

### III. ARGUMENT IN SUPPORT OF MOTION

Kiner had intended that this motion be filed after what he hopes will be a favorable decision of a separate motion challenging the sufficiency of evidence for two of these counts. As a decision is not forthcoming Kiner now submits this motion for a decision on the merits.

Originally the alleged victim had reported that she had masturbated the defendant to ejaculation on at least 15 different occasions but then was unable to recall any such incidents other than what we find here.

On **July 8th, 2005** the State charged Kiner with two counts of first degree child molestation and offered that if the defendant would plead guilty to one count they in turn would drop the second. Kiner refused and informed the prosecution that he intended to proceed to trial in an attempt to prove his innocence. A year later on the first day of trial (**July 27th, 2006**) Kiner again refused the States' offer and it was then that the Prosecutor amended the charges and added a third count. This retaliatory act was purely vindictive and amounts to irregular and malicious prosecution. In doing this the State cast an air of culpability on the defendant and prevented him any chance of receiving a fair trial. No longer was this an isolated incident that he must defend himself against but seemingly a "pattern of abuse" involving multiple acts. The prejudicial effect was huge. This was further reinforced by amending the charging documents to

give a three year time frame (Feb.11th,1998-Feb.10th,2001) of when the alleged acts took place. Even though according to the mother they only lived with the defendant for about 6 months and he was at sea fishing for a good portion of that time.(4Rp-Pg96).It was in this prejudicial environment that trial was held.

1) VIOLATION OF COURT ORDER

Prior to trial a motion to exclude any evidence of prior drug use by the defendant was filed and granted for the simple fact that this information held no probative value and was viewed as "highly prejudicial". Then, under direct examination, States' witness Cathy Phillips makes a clear and direct violation of this Courts' order by stating that "he had gone into treatment..."(4Rp-Pg76).

This causes problems no matter how it is understood by the jury. On the one hand, they may have assumed this to mean drug treatment. If so, then it would seem that if the defendant was violating the laws of this State by using drugs then it is much more probable that he committed the alleged crimes. Obviously this is extremely prejudicial and damaging to the defense.

On the other hand, since there was no other mention of drugs in the trial, the type of "treatment" is left undefined and the effects of the error are magnified as the jury is then left to connect the only two things they can be certain of. That this is a case alleging child molestation and that the defendant was in need of treatment of some kind.

The only logical inference would be that the "treatment" was somehow associated with the alleged crimes. Thereby tainting all the evidence as well as the jurys' deliberations.

Not only did this violate this Courts' order to exclude this info. but it also violates ER 103 (C) which forbids "inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury"

also, it is well established that central to right of a fair trial, as Guaranteed by the Sixth and Fourteenth U.S. Constitutional amendments is the principle that one accused of a crime is entitled to have his or her guilt or innocence determined solely on the basis of the relevant and admissible evidence produced at trial.

Furthermore, the erroneous admission of evidence under ER 404(B) warrants reversal of the conviction if the outcome of the trial might have been different had the error not occurred.

In cases of this nature the prejudicial effects of prior bad acts is staggering. This case consisted of confused allegations in that the number of incidents alleged kept declining (5Rp-Pg22) and the dates could not be recalled. The alleged victim could not approximate the time of year or even be sure of the year itself. Which you think possible if she had masturbated the defendant to ejaculation " on at least 15 different dates and times" as the certificate of probable cause states. With this in mind, the weight of this error is enormous and more than likely affected the outcome.

2) IMPROPERLY ADMITTED HEARSAY

The next issue that denied the defendant a fair trial is the testimonies of States' witnesses Jessica Jerochim and Michelle Guy. Both testified that Megan had told them she had been abused in some way by her mother's ex-boyfriend. But they differ in the type of abuse described and clearly open the door for reasonable doubt. Especially after Jessica testified that Megan told her that her abuser had molested her by touching her chest area (5Rp-Pg93) and Megan testified that "I did not tell anyone that he touched me because he didn't" (5Rp-Pg56) and that she "must have exaggerated" when initially talking with police. (5Rp-Pg48). So we have that, but the defendant also questions whether these testimonies should even be allowed. Clearly they consist solely of hearsay, they are not excited utterances or even spontaneous statements as both came years after the alleged abuse. These testimonies are irrelevant and are only offered to bolster the alleged victims' credibility and to serve as proof of the alleged crimes. They should not have been allowed.

ER 802 states that hearsay is not admissible unless an exception can be found in other court rules. The defendant finds no such exception. Instead, he finds that before a witness's testimony is actually attacked as a recent fabrication, a prior consistent statement is not allowable under ER 801(d)(i) to forestall such an attack. Also, ER 402 is clear; "evidence which is not relevant is not admissible."

The defendant looks to State v. Harper, 35 WnApp 855, 857, 670 P2d 296 (1983) Division II, reversed :

In Harper the Court of Appeals finds:

" The first and universally necessary criterion is relevancy SEE ER 401. The general rule is that a witnesses' testimony cannot be corroborated or bolstered by presenting to the fact finder evidence that the witness made the same or similar statements out of court- for the simple reason that repetition is not generally a valid test for veracity. Thomas v. French, 99 Wn2d,95,659 P.2d 1097(1983)."

[1]..." The fact that such prior consistent statements do not constitute hearsay under ER 801(d)(i) does not necessarily render them admissible."

In State v. Harper a D.S.H.S. worker testified that the alleged victim (11 years-old) had made consistent previous statements more than two months after the event occurred was irrelevant irrelevant and states:

..." Accordingly, it was completely irrelevant and should not have been admitted. ER 402. Because such testimony was highly prejudicial, perhaps devastating to the defense of the heinous crime, we must reverse and remand for a new trial."  
Court of Appeals: "Holding that testimony of the stepdaughters repeated recitations of the event was irrelevant and prejudicial the Court reverses the judgement."

Here the point is well taken. These irrelevant hearsay testimonies should not have been allowed. They are prejudicial and damaging enough to warrant reversal and a new trial free of the error. The defendant also looks to :

State v. Alexander, 64 WnApp 147,151,152,822 P.2d 1250, (1992)

Division I, reversed;

"[2] In criminal trials involving sex offenses, the prosecution may present evidence that the victim complained to someone after the assault. State v. Ferguson, 100 Wn2d 131,135, 667 P.2d 68, (1983); State v. Murphy, 35 Wn2d 233, 237,212 P.2d 801 (1949) However, this narrow exception allows only evidence establishing that a complaint was timely made..."

..." Unless the defense directly attacks the victims credibility by, for example, suggesting that she recently fabricated her allegations, evidence that she repeatedly told the same story out of court is not admissible to corroborate or bolster her testimony. Thomas v. French, 99 Wn2d 95, 659 P.2d 1097 (1983); State v. Bray, 23 WnApp 117,125,594 P.2d 1363 (1979); State v. Harper, 35 WnApp 855, 857,670 P.2d 296 (1983). "

It is evident that neither of these statements were timely made, nor had the defense directly attacked Megans' credibility. As such, these testimonies were irrelevant and as in Harper, Id. "highly prejudicial, perhaps devastating to the defense of the heinous crime." Therefore should not have been admitted and reversal is warranted.

3) INADMISSIBLE PHOTOGRAPHS

States' exhibits #1&2 found at 4Rp-Pg43 were photographs of the alleged victim from around the time of alleged abuse. Since the jury was well aware that the charged crime was first degree child molestation, and to be so the alleged acts had to have occurred when she was less than twelve years-old, there could be no need for them except to evoke an emotional response from the jury. In this instance the error is similar yet more prejudicial than found in State v. Powell, 62 WnApp 914, 915, 920, 816 P.2d 86 (1991) Division III, reversed wherein:

[4]" Sexual offenses-evidence-illustrative sketch-nude child  
A sketch or diagram of a nude child, while not prejudicial in itself, has the potential to elicit a prejudicial emotional response from the trier of fact. Its admission to illustrate a fact already known to the trier of fact is error.[dictum]"

"The Court of Appeals held that the jury has an awareness of the frontal view of the body of a nude child."

If one tries to argue that the photographs were admissible for illustrative purposes you cannot form a solid basis to support this contention. Nor can you excuse the fact that two photographs were presented to the jury. If needed, one would be a sufficient representation of the alleged victim. Any more can only be seen as an attempt to manipulate the jury's emotions and extremely unfair to the defendant.

4) IMPROPER CLOSING ARGUMENT BY PROSECUTOR

Lastly the defendant points to improper remarks, opinions, and vouching statements given by the prosecutor, Amy Montgomery.

In general, a prosecutor errs by expressing a personal opinion about the credibility of a witness, about the evidence, or about the guilt or innocence of the accused. First we go to 6Rp-Pg3:

Ln.13..."And this defendant is greedy."

Ln.17..."And this defendant is selfish."

These traits are not inherent to the crime charged nor was any testimony given that would characterize the defendant in this way. She is offering improper opinion as evidence to the jury.

Then on 6Rp-Pg15:

" So, a year plus later, after she's had time to process what happened, realize that it's something that shouldn't have happened gets settled in a new place, find a best friend, in a child's life, that's a time period that it would take for you to figure out and feel comfortable talking about something that had happened to you as a child, especially if you are not a child who is going to tell your mom..."

Here she is trying to offer to the jury her explanation of why there was such a delay in complaining. Except she crosses over that broad latitude of inference from the evidence into an area where she seems to be testifying as an expert in the field of child psychology.

Next, on 6Rp-Pg20 she tells the jury that:

" To convict the defendant of child molestation the State has to prove the following things and most of these are agreed upon. **Agreeing that between the time between Feb.11th,1998 and Feb10th, 2001, the defendant had sexual contact with Megan.**"

To any body that's listening, she just told the jury that the defendant agrees to (admits) to being guilty of the crimes the State has charged him with.

Then on 6Rp-Pg20 she sums it up like this:

" The term verdict in Latin is the word for Truth. Because in this courtroom, truth matters and justice matters and the defendant should be held responsible for his actions. So I would ask you to return three verdicts of guilty to each count of child molestation in the first degree..."

Here again she testifies to the defendants guilt. She doesn't say - that if you believe the defendant is guilty then he should be held responsible for his actions. Thereby leaving it for the jury to decide. Instead she talks of how truth and justice matter and "the defendant should be held responsible for his actions." After intentionally mis-leading the jury by telling them that the defendant agreed that he had sexual conduct with the alleged victim she lends the weight of improper personal opinion to the evidence and asserts a fore-knowledge of the defendants guilt.

What she has done is systematically told the jury that- The defendant says he's guilty, I say he's guilty, and you the jury should say he's guilty also.

After these eggregious errors, what choice did the jury have but to find the defendant guilty as charged?

#### IV. CONCLUSION

Among the factors relevant to harmless error analysis are the victims' degree of certainty and the existence of conflicting evidence regarding the incidents. In this case the number of alleged incidents started at "at least 15" then was changed to three that she could remember and possibly three or four more times that couldn't be recalled. (5Rp-Pg48-49)

When asked if she thought it happened more than 3 times her response was "It could have, not too many more, but possibly..." (5Rp-Pg22)

Megans' testimony that "I did not tell anyone that he touched me because he didn't" (5Rp-Pg56) is directly contradicted by Jerochims' "I think she said like her chest area and stuff like that" (5Rp-Pg92-93)

Her degree of certainty is so vague that one cannot even ascertain what year the alleged incidents were to have taken place. Added to that are the irrelevant hearsay testimonies to bolster the credibility of the alleged victim and we have a situation similar to that found in **State v. Alexander** Id. where Division I of the Court of Appeals states:

..."Initially, we observe that the victim need not 'pinpoint the exact dates of the oft-repeated incidents of sexual contact.' Ferguson.100 Wn2d at 139. In this case, however, the inconsistencies in Ms' testimony regarding when the abuse occurred, and whether the bathtub or babyoil incidents occurred at all, were extreme. We cannot conclude that a rational jury would have returned the same verdict had Bennetts' and Ss' bolstering testimony been properly excluded. Accordingly, we hold that without this inadmissible testimony, the evidence was too confused to allow it to find Alexander guilty beyond a reasonable doubt.

In summary, the vouching and hearsay testimony of Bennett and S, when combined with the prosecutors improper questions and closing remarks prevented Alexander from obtaining a fair trial."

..."A conviction must be reversed when the reviewing Court concludes that a cummulation of errors has deprived the defendant of the right to a fair trial."

It is obvious that the defendants' trial was unfair and that not only did each of these separate issues prejudice him but the cummulation of these errors deprived him of his Constitutional rights.

After considering the prejudicial effect of the un-supported charges, the confused and conflicting testimonies, the inadmissable evidence, and lastly the misleading and improper statements by the prosecutor, it is impossible to say that justice has been served or that the defendant received a fair trial. In fact, the nature of these errors guarantee against it and clearly violated Kiners' fundamental rights as provided by both the Washington State and United States Constitutions.

For the reasons stated herein the defendant asks this Court to reverse the remaining conviction and either dismiss this charge or an order granting the defendant a new trial.

Respectfully submitted this 9<sup>th</sup> day of April 2010.

*Jeffrey W. Kiner*  
JEFFREY W. KINER, PRO-SE

The Defendant certifies that all references to the "verbatim report of proceedings"(RP) of his trial contained in this Motion are true and accurate to the best of his ability.

\*\*\*\*\*

SUBSCRIBED AND SWORN TO BEFORE ME THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2010

MY COMMISSION EXPIRES: \_\_\_\_\_

\_\_\_\_\_  
notary public in and for the State of Washington residing at

FILED  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON  
2011 JUN 16 AM 10:27

DECLARATION OF SERVICE BY MAIL

I Jeffrey W. Kiner, declare that, on June 10, 2011, I deposited the foregoing documents, or a copy thereof, in the internal legal mail system of Airway Heights Corrections Center and made arrangements for proper postage, to all parties listed below.

I further declare under penalty of perjury under the laws of the state of Washington the foregoing is true and correct.

*No. 66147-7-I.  
ST. V. KINER*

Documents

Statement of Additional Grounds for Review w/ appendix  
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\_\_\_\_\_  
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Parties Served By First Class Mail

King County Prosecuting Atty  
W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104

Mr. Christopher H. Gibson Atty  
1908 E. Madison  
Seattle, WA 98122

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Printed Name and Address:

Jeffrey W. Kiner #932875  
A.H.C.C. N unit B41L  
P.O. Box 2049  
Airway Heights, WA 99001

Dated this 10th day of June, 2011.

*Jeffrey W. Kiner*  
Signature

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