

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JONATHAN P. DUENAS — PETITIONER
(Your Name)

vs.

COURT OF APPEALS OF WASHINGTON — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEALS OF WASHINGTON, DIVISION TWO
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JONATHAN P. DUENAS 384687
(Your Name)

STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
(Address)

ABERDEEN, WA. 98520
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

1. WAS THE MOTHER'S TESTIMONY THAT HER DAUGHTERS WOULD NOT LIE ABOUT BEING ABUSED AN IMPERMISSABLE OPINION TESTIMONY VIOLATING PETITIONER'S RIGHT TO A FAIR TRIAL AND TO HAVE FACTUAL QUESTIONS DECIDED BY THE JURY, IN VIOLATION OF THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 21 AND 22 OF THE WASHINGTON CONSTITUTION?
2. WHETHER THE PROSECUTOR COMMITTED MISCONDUCT IN A VARIETY OF WAYS, REQUIRING REVERSAL OF THE CONVICTIONS DUE TO THE INCURABLE NATURE OF THE MISCONDUCT?
3. WHETHER DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO (a) OBJECT TO THE IMPROPER OPINION TESTIMONY; (b) RENEW OBJECTION TO THE ADMISSION OF CHILD HEARSAY STATEMENTS; AND (c) OBJECT TO THE PROSECUTOR'S MISCONDUCT?
4. WHETHER CUMULATIVE ERROR VIOLATED PETITIONER'S DUE PROCESS RIGHTS TO A FAIR TRIAL?
5. WHETHER THE COMMUNITY CUSTODY CONDITION PROHIBITING ENTRY INTO A RELATIONSHIP WITH ANYONE WHO HAS MINOR CHILDREN IS VAGUE, IN VIOLATION OF DUE PROCESS?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix 2 to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was JUNE 13, 2017.
A copy of that decision appears at Appendix 2.

☒ A timely petition for rehearing was thereafter denied on the following date: JANUARY 3, 2018, and a copy of the order denying rehearing appears at Appendix 4.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

DECLARES THAT "IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE.

2. THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

DECLARES THAT "ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

IN 2013, PETITIONER (JONATHAN DUENAS) WAS ENGAGED TO HEATHER LINDEN. DUENAS AND LINDEN LIVED TOGETHER IN VANCOUVER, WASHINGTON AND WITH LINDEN'S TWO DAUGHTERS, H.A AND K.L. DURING THAT YEAR, K.L TOLD HER MOTHER, LINDEN, THAT DUENAS HAD BEEN TOUCHING BOTH HER AND HER SISTER, H.A. SHORTLY AFTER THE DISCLOSURE, LINDEN CONTACTED THE POLICE, AND THE STATE CHARGED DUENAS WITH FIRST DEGREE CHILD RAPE AND TWO COUNTS OF FIRST DEGREE CHILD MOLESTATION OF H.A, AND ONE COUNT OF THIRD DEGREE CHILD MOLESTATION OF K.L.

AT A PRETRIAL HEARING REGARDING H.A'S HEARSAY STATEMENTS, LINDEN TESTIFIED THAT H.A WAS RELUCTANT TO DISCLOSE ANY INFORMATION OF THE ALLEGED SEXUAL ASSAULT AND THAT LINDEN HAD ASKED H.A OPEN-ENDED QUESTIONS TO LEARN WHAT HAD OCCURRED. LINDEN ALSO INFORMED THE COURT THAT THE RELATIONSHIP BETWEEN DUENAS AND H.A. WERE OVERALL GOOD. H.A. DENIED BEING UNHAPPY OR MAD AT DUENAS. BASED ON THE TESTIMONY FROM PRETRIAL HEARING, THE TRIAL COURT ADMITTED H.A'S HEARSAY STATEMENTS UNDER THE RYAN FACTORS, AND PROVIDED SUFFICIENT INDICIA OF RELIABILITY.

AT TRIAL, LINDEN TESTIFIED, DESCRIBING THE DAY SHE FIRST ASKED H.A ABOUT THE SEXUAL ASSAULT ALLEGATIONS STATED THAT SHE "JUST SAID, YOU KNOW, IS THERE ANYTHING YOU WOULD LIKE TO TELL ME?... YOUR SISTER HAS ALREADY TOLD ME SOME THINGS, AND I JUST WANT TO MAKE SURE THEY'RE TRUE." RP 128. HEATHER CONTINUED, "SO I SAID, LET ME MAKE THIS EASY ON YOU. I WAS, LIKE, [K.L] TOLD ME THAT [DUENAS] HAD BEEN TOUCHING YOU. AND I WAS, LIKE, IS THAT TRUE? AND SHE SAID- I SAID, IS THERE ANYTHING YOU WANT TO TELL ME? AND SHE SAID, NO. AND THEN SHE IS, LIKE, YEAH." RP 128.

STATEMENT OF THE CASE

DUEÑAS DID NOT OBJECT. LINDEN ALSO TESTIFIED THAT H.A. HAD A BAD ATTITUDE, WAS "VERY HATEFUL" IN THE MONTHS LEADING UP TO THE ALLEGATIONS AND THAT SHE DID NOT GET ALONG WITH DUEÑAS.

ON CROSS-EXAMINATION, DEFENSE COUNSEL ELICITED TESTIMONY FROM LINDEN THAT HER CHILDREN LIED ONCE IN AWHILE. RP 158. ON REDIRECT, THE PROSECUTOR NOTED DEFENSE COUNSEL HAD ASKED IF HER KIDS WERE OCCASIONALLY NOT COMPLETELY HONEST AND HAD TOLD A FIB OR TWO IN THEIR DAY. RP 159. THE PROSECUTOR THEN ASKED LINDEN, "OKAY, NOW IF THEY WOULD NOT BE FORTHCOMING WITH YOU, WOULD IT BE ABOUT SMALLER STUFF OR WOULD IT BE ABOUT A MASSIVE ISSUE LIKE THIS?" RP 159. LINDEN RESPONDED, "I THINK IT WOULD BE SMALLER - I - SOMETHING LIKE THIS IS NOT SOMETHING THAT'S JUST MADE UP OR SOMETHING THAT THEY'RE GOING TO LIE ABOUT. IT'S -- I MEAN, I CAN TELL, ESPECIALLY WHEN MY KIDS ARE, LIKE, WELL WE WEREN'T GOING TO TELL YOU, BUT YOU KNOW WHAT I MEAN? LIKE, IT'S NOT SOMETHING THAT'S JUST -- YEAH." RP 159-60. THE PROSECUTOR ELICITED HER AGREEMENT THAT, AS A PARENT, SHE HAS A HISTORY OF FERRETING OUT WHEN THEY'RE BEING FORTHCOMING AND WHEN THEY'RE NOT. RP 166. DUEÑAS DID NOT OBJECT.

DUEÑAS TESTIFIED IN HIS OWN DEFENSE AND DENIED ALL ALLEGATIONS AGAINST HIM. RP 328-29.

AT THE CLOSE OF TRIAL, THE TRIAL COURT INSTRUCTED THE JURY THAT "YOU ARE THE SOLE JUDGES OF THE CREDIBILITY OF EACH WITNESS. YOU ARE ALSO THE SOLE JUDGES OF THE VALUE OR WEIGHT TO BE GIVEN TO THE TESTIMONY OF EACH WITNESS."

STATEMENT OF THE CASE

" DURING CLOSING ARGUMENTS, THE STATE ARGUED, THE DEFENDANT RAPED AND MOLESTED HIS SOON-TO-BE STEPCHILDREN... A LOT OF US GO THROUGH OUR DAILY ROUTINES AND OUR DAILY LIVES AND WE DON'T DEAL WITH CHILD SEX ABUSE OR DON'T FACE IT. AND THAT'S A VERY GOOD THING. IT WOULD NOT BE A GOOD SOCIETY, IF WE WERE ALL DEALING WITH THAT ON A DAILY BASIS. AND IT'S HARD WHEN YOU'RE FACED WITH IT. AND IT'S HARD WHEN YOU'RE FACED WITH IT NOT IN THE ABSTRACT. IT'S EASY TO SIT THERE AND SAY, I RECOGNIZE THAT THIS HAPPENS. IT'S EASY TO SAY THAT IN THE ABSTRACT. BUT WHEN IT'S RIGHT THERE IN FRONT OF YOU AND YOU'VE GOTTEN TO KNOW A CHILD BECAUSE THEY'VE TESTIFIED IN FRONT OF YOU, IT'S NOT EASY TO SIT THERE AND FULLY COMPREHEND THAT THAT CHILD HAS HAD THAT HAPPEN TO THEM. AND THAT'S ACTUALLY ONE OF THE CHALLENGES IN PROSECUTING THESE CASES... WE HAVE THE OBVIOUS HURDLE, THAT WE NEED TO PROVE OUR CASE BEYOND A REASONABLE DOUBT. BUT WE ALSO NEED 12 PEOPLE TO ACCEPT THAT THIS REALLY DID HAPPEN. AND THAT'S A HARD THING TO DO. BUT THE UNFORTUNATE REALITY IS THAT THIS HAPPENS. IT HAPPENS TO KIDS EVERY DAY AND IT HAPPENED TO [K.L.] AND IT HAPPENED TO [H.A.] AND IT HAPPENED TO THEM AT THE HANDS OF THE DEFENDANT." RP 386-87. DUENAS DID NOT OBJECT.

NEXT, WHILE ADDRESSING THE THIRD DEGREE CHILD MOLESTATION OF K.L, THE PROSECUTOR STATED, " SO THEN SHE DESCRIBES THE DEFENDANT RUBBING HER CALF. IT'S LASTING ABOUT A MINUTIE. SO WHAT'S GOING ON AT THIS POINT? WELL, WE CAN'T GET INSIDE THE DEFENDANT'S HEAD, BUT FROM THE EVIDENCE, I WOULD ARGUE THAT WHAT'S GOING ON IS A COUPLE POSSIBILITIES. ONE HE'S TESTING THE WATERS, HE'S RUBBING HER CALF AND SEEING, OKAY, A. IS SHE AWAKE? AND B. AM I GOING TO GET SOME REACTION? BECAUSE IT'S KIND OF AN INNOCENT PART OF THE BODY. IT'S NOT OBVIOUSLY.

STATEMENT OF THE CASE.

PROBLEMATIC. SO HE'S RUBBING HER CALF, AND HE'S NOT REALLY GETTING A RESPONSE. HE'S NOT GETTING HER PUSHING AWAY. SO HE CONTINUES... THEN, HE WORKS HIS WAY TO HER VAGINA. AND SHE TALKED ABOUT THIS IN A VERY UNIQUE, SPECIFIC WAY... THAT'S DETAIL THAT I WOULD ARGUE DOESN'T COME OUT IF SOMEBODY ISN'T BEING ABOUT WHAT HAPPENED. PEOPLE - IF SOMEBODY WERE FABRICATING SOMETHING, THEY'RE NOT COMING UP WITH DETAILS LIKE [K.L.] IS COMING UP WITH. THAT'S A DETAIL THAT SHOULD SEND SOME SHIVERS DOWN SOME OF YOU. BECAUSE THAT REALLY PAINTS A TROUBLING PICTURE. RP 398. DUEÑAS DID NOT OBJECT.

IN CONCLUDING HIS CLOSING ARGUMENT, THE PROSECUTOR ARGUED, "AND I WOULD ARGUE THAT TO DISMISS THIS CASE AS SIMPLY, A THEY SAID HAPPENED CASE, WOULDN'T DO JUSTICE TO THE EVIDENCE THAT'S PRESENTED. IT WOULD MISCHARACTERIZE IT. BECAUSE WE HAVE MORE THAN THAT. WE HAVE CORROBORATION, WE HAVE PEOPLE BEING CONSISTENT, WE HAVE A LACK OF MOTIVATION TO LIE. BUT MORE IMPORTANTLY, WE ALSO HAVE THE IMPACT OF EVIDENCE... THE IMPACT THAT THIS HAD ON EVERYBODY IS VERY REAL. WHAT THE DEFENDANT DID TO THESE CHILDREN IS VERY REAL AND IT HAS BEEN PROVEN TO YOU. I'D ASK YOU COME BACK GUILTY. RP 411-13. DUEÑAS DID NOT OBJECT.

DURING HIS CLOSING ARGUMENT, DEFENSE COUNSEL ATTACKED HA'S AND K.L.'S CREDIBILITY AND ARGUED THAT THEY FABRICATED THE ALLEGATIONS. DEFENSE COUNSEL ALSO STATED, "NOW, HOW DO WE PROVE IT DIDN'T HAPPEN? WELL, THERE'S NO PHYSICAL EVIDENCE. WE RELY UPON THE TESTIMONY. AND WE LOOK AT THE TESTIMONY." RP 416-17.

STATEMENT OF THE CASE

ON REBUTTAL, THE STATE NOTED THAT DEFENSE COUNSEL WAS "ACCUSING [H.A AND K.L], KNOWING FULL WELL THAT THEIR MOTHER GOT TO LEAVE THE STRESSES OF HER JOB, GOT TO COME HOME AND SPEND TIME WITH THEM, THAT SHE WAS IN LOVE WITH THE DEFENDANT, THAT THEY WERE HAPPY AND SET TO BE MARRIED. AND WHAT HE IS ACCUSING THEM OF DOING IS FABRICATING SEXUAL ASSAULT ALLEGATIONS AND CARRYING IT THROUGH." RP 423. THE STATE ALSO NOTED THAT "WHAT [DEFENSE COUNSEL] IS ACCUSING THEM OF DOING IS ABSOLUTELY EGREGIOUS... [N]OBODY HERE - AND WE DON'T HAVE EVIDENCE SO - WHAT WAS ACTUALLY GOING ON?" RP 424. DUEÑAS DID NOT OBJECT.

THE STATE CONTINUED, "NOW DEFENSE COUNSEL, YOU KNOW, BRINGS UP THESE POINTS THAT WE DON'T HAVE PHYSICAL AND THAT'S KIND OF DOVETAILING, BECAUSE THERE WAS SOME PEOPLE DURING JURY SELECTION THAT SAID I WANT PHYSICAL EVIDENCE... HE RAISES THE BAR FOR THE STATE TO A POINT WHERE NO PROSECUTOR COULD EVER CLEAR THE BAR. AND HAMMERS ON, WELL, IT'S NOT PROOF BEYOND A REASONABLE DOUBT. AND THAT'S DOING EXACTLY WHAT WE TALKED ABOUT, IS IT'S TAKING PRECONCEIVED NOTIONS AND THAT'S NOT WHAT WE'RE SUPPOSED TO DO. IT'S SAYING THAT YOU NEED PHYSICAL - OR NEED DNA. " ... BEYOND A REASONABLE DOUBT IS DESCRIBED AND NOW YOU HAVE A DEFINITION. IT'S WHEN YOU HAVE AN ABIDING BELIEF IN THE CHARGES, THAT'S IT... SO WHEN YOU ARE ANALYZING ARGUMENTS THE DEFENSE MADE, YOU GOT TO ASK YOURSELF, DOES IT AFFECT MY ABIDING BELIEF THAT THIS HAPPENED? AND THE DEFENSE ARGUMENT CAN BE EFFECTIVE, BUT IT'S MISLEADING BECAUSE I DON'T HAVE TO PUT ON A PERFECT CASE. THE LAW DOESN'T REQUIRE ME TO PUT ON A PERFECT CASE THAT'S WHY I DON'T HAVE TO PROVE MY CASE BEYOND ALL

STATEMENT OF THE CASE

POSSIBLE DOUBT WHATSOEVER." RP 428-30. DUENAS DID NOT OBJECT.

THE JURY FOUND DUENAS GUILTY OF ALL CHARGES. THE COURT SENTENCED DUENAS TO A TOTAL OF 175 MONTHS IN CONFINEMENT. DUENAS'S SENTENCE INCLUDED 54 MONTHS OF INCARCERATION AND 36 MONTHS OF COMMUNITY CUSTODY FOR THE THIRD DEGREE^{MR} CHILD MOLESTATION. THE SENTENCING COURT ALSO ORDERED THAT DUENAS "SUBMIT TO PLETHYSMOGRAPH EXAMS, AT [HIS] OWN EXPENSE, AT THE DIRECTION OF THE COMMUNITY CORRECTION OFFICER" AND THAT HE NOT ENTER A RELATIONSHIP WITH ANYONE WHO HAS MINOR AGED CHILDREN RESIDING IN OR VISITING THEIR HOME WITHOUT THE APPROVAL OF THE THERAPIST AND THE [CCO] "AS COMMUNITY CUSTODY CONDITIONS. (JUDGEMENT AND SUMMARY).

DUENAS APPEALED HIS CONVICTIONS AND SENTENCING IN THE COURT OF APPEALS OF WASHINGTON, DIVISION TWO. IN HIS DIRECT APPEAL, HE ARGUED:

1. THE MOTHER'S TESTIMONY THAT HER DAUGHTERS WOULD NOT LIE ABOUT BEING SEXUALLY ABUSED CONSTITUTED AN IMPERMISSABLE OPINION ON CREDIBILITY AND GUILT.

THE PRIME EVIDENCE AGAINST DUENAS WAS THE TESTIMONY OF THE CHILDREN, WHICH THE STATE ATTEMPTED TO BOLSTER WITH THE MOTHER'S TESTIMONY ABOUT HER DAUGHTERS' VERACITY IN MAKING THE ACCUSATIONS. THAT TESTIMONY CONSTITUTED AN IMPERMISSABLE OPINION ON GUILT AND CREDIBILITY OF THE WITNESSES. RP 159-160. THE COMMON LAW ATTEMPTED TO PROTECT THE ROLE AND THE PROVINCE OF THE JURY BY PROHIBITING OPINION TESTIMONY OF ULTIMATE ISSUES OF THE

STATEMENT OF THE CASE.

CASE. UNITED STATES V. SPAULDING, 293 U.S. 498, 507, 55 S.Ct. 273 (1935). NO WITNESS, LAY OR EXPERT, MAY OPINE AS TO THE DEFENDANT'S GUILT. STATE V. BLACK, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

"OPINIONS ON GUILT ARE IMPROPER WHETHER MADE DIRECTLY OR BY INFERENCE," STATE V. QUAALE, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

"THE RIGHT TO HAVE FACTUAL QUESTIONS DECIDED BY THE JURY IS CRUCIAL TO THE RIGHT TO TRIAL BY JURY." STATE V. MONTGOMERY, 103 Wn.2d 577, 590, 183 P.3d 267 (2007) (CITING U.S. CONST. AMEND. VI; WASH. CONST. ART. I § 21, 22). IMPERMISSABLE OPINION TESTIMONY ON GUILT

"VIOLATES THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A JURY, WHICH INCLUDES THE INDEPENDENT DETERMINATION OF THE FACTS BY THE JURY." QUAALE, 182

Wn.2d AT 199. SIMILARLY, EXPRESSIONS OF PERSONAL BELIEF AS TO CREDIBILITY OF A WITNESS ARE "CLEARLY INAPPROPRIATE," MONTGOMERY,

103 Wn.2d AT 591, "A WITNESS IS NOT PERMITTED TO GIVE A DIRECT OPINION ABOUT THE DEFENDANT'S GUILT OR INNOCENCE." UNITED STATES V.

LOCKETT, 919 F.2d 585, 590 (9TH CIR. 1990). "AS A MATTER OF LAW,

THE CREDIBILITY OF WITNESSES IS EXCLUSIVELY FOR THE DETERMINATION BY THE JURY, AND WITNESSES MAY NOT OPINE AS TO THE CREDIBILITY OF THE TESTIMONY OF OTHER WITNESSES AT TRIAL." CAMERON V. CITY OF NEW YORK, 589 F.3d 50, 61 (2ND CIR. 2009).

THE COURT OF APPEALS HELD THE CHALLENGED OPINION WAS NOT A DIRECT OPINION ON THE VERACITY AND CREDIBILITY OF H.A. AND K.L.

"MOREOVER, HEATHER'S TESTIMONY DID NOT INFER DUENAS'S GUILT AND WAS NOT AN OPINION ON THE ACCURACY OF H.A'S AND K.L'S

DISCLOSURES," (SEE ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION). THEREFORE, RULING THE CHALLENGED OPINION

TESTIMONY COULD NOT BE RAISED FOR THE FIRST TIME ON APPEAL

ACCORDING TO RAP 2.5(a)(3). "THE [WASHINGTON] APPELLATE COURT

STATEMENT OF THE CASE

MAY REFUSE TO REVIEW ANY CLAIM OF ERROR WHICH WAS NOT RAISED IN THE TRIAL COURT. HOWEVER A PARTY MAY RAISE THE FOLLOWING CLAIMED ERRORS FOR THE FIRST TIME IN THE APPELLATE COURT: (3) MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT." RAP 2.5(a)(3).

HOWEVER, "MANIFEST ERROR REQUIRES A NEARLY EXPLICIT STATEMENT BY THE WITNESS THAT THE WITNESS BELIEVED THE ACCUSING VICTIM." STATE V. KIRKMAN, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). TO DETERMINE WHETHER AN OPINION GUILT HAS BEEN EXPRESSED, THE TESTIMONY MUST BE VIEWED IN CONTEXT. STATE V. RAFAY, 168 Wn. App. 734, 808, 285 P.3d 83 (2012), REVIEW DENIED, 176 Wn.2d 1023, 299 P.3d 1171 (2013); VIEWED IN CONTEXT, THE OPINION IS EXPLICIT. THE PROSECUTOR ASKED IF LINDEN'S DAUGHTERS WOULD LIE ABOUT "SMALLER STUFF OR WOULD IT BE ABOUT A MASSIVE ISSUE LIKE THIS?" RP 159. "THE QUESTION IS CLEARLY GEARED TOWARD SEEKING AN OPINION ABOUT WHETHER LINDEN'S DAUGHTERS WOULD LIE ABOUT THE SEXUAL ABUSE ALLEGATIONS THEY MADE AGAINST DUENAS. THERE IS NO OTHER "MASSIVE ISSUE LIKE THIS" INVOLVED. LINDEN RESPONDED, "I THINK IT WOULD BE SMALLER - I - SOMETHING LIKE THIS IS NOT SOMETHING THAT'S JUST MADE UP OR SOMETHING THAT THEY'RE GOING TO LIE ABOUT." RP 159-60. BASED ON HER ANSWER, IT WAS PERFECTLY CLEAR TO LINDEN WHAT THE PROSECUTOR WAS TALKING ABOUT. THE ISSUE AT TRIAL WAS WHETHER THE CHILDREN'S ACCUSATIONS WERE BELIEVABLE, SUCH THAT THE STATE PROVED IT'S CASE BEYOND A REASONABLE DOUBT. THAT WAS THE "SOMETHING LIKE THIS" REFERRED TO IN BOTH THE QUESTION AND ANSWER. LINDEN'S OPINION THAT SHE BELIEVED HER DAUGHTERS IS UNMISTAKABLE. SHE AFFIRMS THIS WHEN SHE SAID, "I'M GOING TO LOVE MY CHILDREN

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BEFORE BELIEVING SOMEBODY ELSE." RP 105.

IN VOUCHING FOR HER DAUGHTERS' TESTIMONIES, LINDEN EFFECTIVELY OPINED THAT DUENAS WAS GUILTY OF THE CRIMES THEY ACCUSED HIM OF DOING. STATE V. ALEXANDER, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). A MOTHER'S OPINION TESTIMONY ABOUT HER CHILD'S CREDIBILITY IN A RAPE/MOLESTATION CASE IS INADMISSABLE. STATE V. JERRELS, 83 Wn. App. 503, 508, 925 P.2d 209 (1996), REVIEW DENIED, 136 Wn.2d 1011, 966 P.2d 903 (1998); STATE V. SUTHERBY, 138 Wn. App. 609, 158 P.3d 91 (2007), AFF'D, 105 Wn.2d 870, 204 P.3d 916 (2009). IN SUTHERBY, THE COURT REVERSED THE CONVICTIONS BECAUSE THE COMPLAINING WITNESS'S MOTHER GAVE AN IMPERMISSABLE OPINION THAT HER DAUGHTER WAS TELLING THE TRUTH. THE MOTHER'S OPINION TESTIMONY IN SUTHERBY IS COMPARABLE TO LINDEN'S TESTIMONY HERE. LINDEN'S EXPRESSED OPINION THAT HER CHILDREN WOULD NOT LIE ABOUT THE ACCUSATIONS IS AT LEAST AS DIRECT. DUENAS DENIED THE ACCUSATIONS AGAINST HIM. THERE WAS NO PHYSICAL EVIDENCE SHOWING WHETHER SEXUAL ABUSE OF THE CHILDREN OCCURRED. THIS CASE RELIED SOLELY ON TESTIMONY. AS IN SUTHERBY, CREDIBILITY OF THE COMPLAINING WITNESS WAS THE CRUCIAL ISSUE IN THE CASE. THE TRIAL COURT MAY HAVE INSTRUCTED THE JURY THAT IT WAS SOLE JUDGE OF A WITNESS'S CREDIBILITY. HOWEVER, IN JERRELS, THE WASHINGTON COURT DETERMINED THAT A "MOTHER'S OPINION AS TO HER CHILDREN'S VERACITY COULD NOT EASILY BE DISREGARDED EVEN IF THE JURY HAD BEEN INSTRUCTED TO DO SO." THEREFORE, REVIEW FOR DUENAS'S CHALLENGED OPINION TESTIMONY SHOULD HAVE BEEN WARRANTED UNDER RAP 2.5(a)(3).

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2. WHETHER THE PROSECUTOR'S MISCONDUCT DEPRIVED DUENAS OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL?

PROSECUTORIAL MISCONDUCT CAN VIOLATE THE DUE PROCESS RIGHT TO A FAIR TRIAL. GREER V. MILLER, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed. 2d 618 (1987); STATE V. DAVENPORT, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. CONST. AMEND. XIV; WASH. CONST. ART. 1 § 3. IN THIS CASE AT HAND, THE STATE PROSECUTOR COMMITTED MULTIPLE INSTANCES OF MISCONDUCT THROUGHOUT CLOSING ARGUMENTS AND IN ELICITING LINDEN'S IMPROPER OPINION TESTIMONY.

THE PROSECUTOR'S DELIBERATE ELICITATION OF LINDEN'S OPINION THAT HER CHILDREN WERE NOT LYING CONSTITUTES MISCONDUCT. JERRELS, 83 Wn.App. At 504, 507-08.

THERE IS MORE MISCONDUCT. IN REBUTTAL, THE PROSECUTOR SUMMARIZED DEFENSE COUNSEL'S ARGUMENT AS ACCUSING THE CHILDREN OF FABRICATING THEIR ALLEGATIONS AND COLLUDING TO PERPETRATE A LIE, PROCLAIMING "WHAT HE IS ACCUSING THEM OF DOING IS ABSOLUTELY EGREGIOUS." RP 423-24. THE PROSECUTOR ALSO TOLD THE JURY THAT DEFENSE COUNSEL'S ARGUMENT WAS MISLEADING. RP 430. PROSECUTORIAL STATEMENTS THAT MALIGN DEFENSE COUNSEL ARE IMPERMISSABLE BECAUSE THEY CAN DAMAGE A DEFENDANT'S OPPORTUNITY TO PRESENT HIS CASE. STATE V. LINDSAY, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). "NO PROSECUTOR MAY EMPLOY LANGUAGE THAT LIMITS THE FUNDAMENTAL RIGHT OF AN ACCUSED TO PRESENT A VIGOROUS DEFENSE." SIZEMORE V. FLETCHER, 921 F.2d 667, 671 (6TH CIR. 1990). IT IS THEREFORE MISCONDUCT FOR A PROSECUTOR DISPARAGE DEFENSE COUNSEL'S INTEGRITY. BRUNO V. RUSHEN, 721 F.2d 1193, 1195 (9TH CIR. 1983). THE PROSECUTOR'S ARGUMENT

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IS PERNICIOUS BECAUSE IT SEEKS TO ALIGN THE JURY AGAINST DUENAS THROUGH HIS ATTORNEY. ON THE RIGHT SIDE ARE THOSE WHO BELIEVE CHILD ACCUSERS, ON THE WRONG SIDE ARE THOSE, LIKE DEFENSE COUNSEL, WHO ACCUSED THEM OF LYING. THE PROSECUTOR'S COMMENT DAMAGED DUENAS'S OPPORTUNITY TO PUT ON A DEFENSE BY CASTING THE DEFENSE ITSELF AS MORALLY CORRUPT. FURTHER, THE PROSECUTOR'S COMMENT ABOUT DEFENSE COUNSEL PRESENTING A "MISLEADING" ARGUMENT WAS MISCONDUCT. THE IMPLICATION OF DECEPTION AND DISHONESTY ON THE PART OF DEFENSE COUNSEL IS IMPROPER. LINDSAY, 180 Wn.2d AT 433 (CALLING COUNSEL'S ARGUMENT A "CROCK"); STATE V. THORGERSON, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011) (REFERRING TO DEFENSE COUNSEL'S PRESENTATION AS INVOLVING "SLEIGHT OF HAND").

THERE IS MORE MISCONDUCT. THE PROSECUTOR BEGAN HIS CLOSING ARGUMENT AS FOLLOWS: "THE DEFENDANT RAPED AND MOLESTED HIS SOON-TO-BE STEPCHILDREN." RP 386. PROSECUTOR'S MAY NOT MAKE PREJUDICIAL STATEMENTS UNSUPPORTED BY EVIDENCE IN THE RECORD. STATE V. ROSE, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). THERE IS NO EVIDENCE K.L. WAS RAPED. WHEN A PROSECUTOR ARGUES FACTS NOT IN EVIDENCE, HE BECOMES AN UNSWORN WITNESS AGAINST THE DEFENDANT. STATE V. BELGARDE, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). THE PROSECUTOR'S STATEMENT IMPLIES HE KNEW SOMETHING MORE THAN WHAT WAS PRESENTED AT TRIAL CONCERNING K.L.

THE PROSECUTOR CONTINUED THAT "IT WOULD NOT BE A GOOD SOCIETY" IF WE DEALT WITH CHILD SEX ABUSE ON A DAILY BASIS, THE JURY NEEDED TO ACCEPT THAT ABUSE REALLY HAPPENS EVERY DAY, AND THAT IT HAPPENED TO H.A. AND K.L. RP 386-87. A PROSECUTOR CANNOT "CALL TO THE ATTENTION OF THE JURORS MATTERS WHICH THEY WOULD NOT BE JUSTIFIED IN CONSIDERING IN DETERMINING

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THEIR VERDICT." STATE V. BUTTRY, 199 Wn. 228, 251, P.2d 1026 (1939). WHETHER SEXUAL ABUSE IS COMMITTED AGAINST OTHER CHILDREN EVERY DAY IS IRRELEVANT TO WHAT THE JURY IN DUENAS'S CASE NEEDED TO DECIDE. BUT THE PROSECUTOR'S INVITATION TO LOOK AT THE CASE THROUGH THAT PRISM UNFAIRLY AIDED THE PROSECUTION EFFORT. THE PROSECUTOR RESORTED TO COMMUNITY VALUES AND THE NEED TO BELIEVE THE CHILDREN AND CONVICT DUENAS ON EVIDENCE OUTSIDE THE RECORD. SEE STATE V. THIERRY, 190 Wn.App. 680, 691, 360 P.3d 940 (2015), REVIEW DENIED, 185 Wn.2d 1015, 368 P.3d 171 (2016).

THE PROSECUTOR THEORIZED ABOUT WHAT WAS GOING ON IN DUENAS'S HEAD WHEN HE ADDRESSED K.L.'S TESTIMONY, THAT DUENAS WAS TESTING FOR A REACTION BEFORE GOING FURTHER. RP 397-98. A PROSECUTOR CANNOT SPECULATE ABOUT A DEFENDANT'S THOUGHT PROCESS DURING THE COMMISSION OF A CRIME. STATE V. PIERCE, 169 Wn.App. 533, 554, 280 P.3d 1158, REVIEW DENIED, 175 Wn.2d 1025, 291 P.3d 253 (2012). NO EVIDENCE WAS PRESENTED OF DUENAS'S MINDSET DURING THE ALLEGED INCIDENT.

THE PROSECUTOR CONTINUED HIS ARGUMENT THAT DUENAS DUENAS TRACED [K.L.]'S VAGINA WITH ONE FINGER: "THAT'S DETAIL THAT I WOULD ARGUE DOESN'T COME OUT IF SOMEBODY ISN'T BEING TRUTHFUL ABOUT WHAT HAPPENED. PEOPLE - IF SOMEBODY WERE FABRICATING SOMETHING, THEY'RE NOT COMING UP WITH DETAILS LIKE [K.L.] IS COMING UP WITH. THAT'S A DETAIL THAT SHOULD SEND SOME SHIVERS DOWN SOME OF YOU. BECAUSE THAT REALLY PAINTS A TROUBLING PICTURE." RP 398. ALTHOUGH A PROSECUTOR HAS WIDE LATITUDE TO ARGUE REASONABLE INFERENCES FROM THE EVIDENCE, HE OR SHE MUST SEEK CONVICTIONS BASED ONLY ON PROBATIVE EVIDENCE AND SOUND REASON.

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IN RE PERS. RESTRAINT OF GLASMANN, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). "A PROSECUTOR MAY NOT PROPERLY INVITE THE JURY TO DECIDE ANY CASE BASED ON EMOTIONAL APPEALS," STATE V. GAFF, 90 Wn. App. 834, 841, 954 P.2d 943 (1998). TO "SHIVER" IS TO "UNDERGO TREMBLING (AS FROM COLD, FEAR OR THE APPLICATION OF A PHYSICAL FORCE)." WEBSTER'S THIRD NEW INT'L DICTIONARY 2098 (1993). THE PROSECUTOR IN EFFECT TOLD THE JURY THAT THE DETAIL IN K.L.'S TESTIMONY SHOULD ELICIT AN EMOTIONAL RESPONSE - A RESPONSE OF FEAR - AND SHOULD BE BELIEVED FOR THIS REASON.

THE PROSECUTOR'S COMMENT THAT "THAT'S DETAIL I WOULD ARGUE DOESN'T COME OUT IF SOMEBODY ISN'T BEING TRUTHFUL ABOUT WHAT HAPPENED" IS ALSO IMPROPER. RP 398. PROSECUTORS ARE FORBIDDEN FROM STATING A PERSONAL BELIEF AS TO THE CREDIBILITY OF WITNESSES. STATE V. MONDAY, 171 Wn.2d 667, 677, 257 P.3d 551 (2011). THIS COMMENT WAS NOT AN ISOLATED AFFAIR. IN ADDRESSING THE DEFENSE ARGUMENT THAT K.L. WAS MOTIVATED TO FABRICATE THE ALLEGATION, THE PROSECUTOR TOLD THE JURY "IT'S HARD FOR ME TO COMPREHEND WHERE IN EVIDENCE THERE'S SUPPORT THAT SHE HAD MOTIVATIONS," RP 427. THE PROSECUTOR MADE IT PERSONAL. THE PROSECUTOR ALSO INVITED THE JURY TO CONSIDER THE EMOTIONAL IMPACT OF THE CRIMES ON THE CHILDREN AND THEIR MOTHER. RP 412-13. THIS, TOO, WAS AN INVITATION TO DECIDE THE CASE BASED ON EMOTION.

THE COURT OF APPEALS HELD SOME OF THESE INSTANCES DID NOT QUALIFY AS MISCONDUCT AND THOSE THAT DID WERE WAIVED AS ERRORS FOR APPEAL BECAUSE THEY WERE NOT SO FLAGRANT THAT THEY WERE INCURABLE BY INSTRUCTION. SLIP OP AT 11-20. IN ASSESSING PREJUDICE, HOWEVER, THE CUMULATIVE EFFECT OF MISCONDUCT MUST BE TAKEN INTO ACCOUNT. STATE V. CASE, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

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REPEATED INSTANCES OF MISCONDUCT MUST BE CONSIDERED AS A WHOLE BECAUSE "THE CUMULATIVE EFFECT OF REPETITIVE PREJUDICIAL PROSECUTORIAL MISCONDUCT MAY BE SO FLAGRANT THAT NO INSTRUCTION OR SERIES OF INSTRUCTIONS CAN ERASE THEIR COMBINED PREJUDICIAL EFFECT." GLASMAN, 175 Wn.2d AT 707 (QUOTING STATE V. WALKER, 164 Wn.App. 724, 737, 265 P.3d 191 (2011)). "THE FAILURE TO OBJECT WILL NOT PREVENT A REVIEWING COURT FROM PROTECTING A DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL." STATE V. WALKER, 182 Wn.2d 463, 477, 341 P.3d 976, CERT. DENIED, 135 S.Ct. 2844, 192 L.ED. 2d 876 (2015). THE MISCONDUCT WAS PREJUDICIAL BECAUSE THIS WAS A "HE SAID, SHE SAID" TYPE OF CASE, WITH THE MISCONDUCT BEARED TOWARD CONVINCING THE JURY THAT IT SHOULD BELIEVE THE CHILDREN RATHER DUEÑAS'S DENIAL.

3. WHETHER DUEÑAS WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN SEVERAL WAYS?

PETITIONER IS GUARANTEED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. STRICKLAND V. WASHINGTON, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.ED 2d 674 (1984); U.S. CONST. AMEND. VI; WASH. CONST. ART. I § 22.

a. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE MOTHER'S IMPROPER OPINION TESTIMONY AND MISCONDUCT IN ELICITING THE TESTIMONY. EVEN IF THE MOTHER'S CHALLENGED OPINION TESTIMONY IS NOT A MANIFEST CONSTITUTIONAL ERROR THAT CAN BE RAISED FOR THE FIRST TIME ON APPEAL, REVERSAL IS STILL REQUIRED BECAUSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IT. DEFENSE COUNSEL IS INEFFECTIVE WHERE (1) THE ATTORNEY'S PERFORMANCE IS DEFICIENT AND (2) THERE

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A REASONABLE PROBABILITY THAT THE DEFICIENCY PREJUDICED THE DEFENDANT. STRICKLAND, 466 U.S. AT 687, 694. "OPINIONS ON GUILT ARE IMPROPER WHETHER MADE DIRECTLY OR BY INFERENCE." QUAALE, 182 Wn.2d AT 199. THERE IS A REASONABLE PROBABILITY THAT DEFENSE COUNSEL'S OBJECTION WOULD HAVE BEEN SUSTAINED HAD IT BEEN LODGED BECAUSE INDIRECT OPINIONS ON GUILT ARE AS OBJECTIONABLE AS EXPLICIT ONES. LINDEN'S OPINION THAT HER CHILDREN WERE TELLING THE TRUTH HAD NO LEGAL RELEVANCE, BUT IT WAS EXTREMELY PREJUDICIAL BECAUSE OF THE WEIGHT A JURY COULD BE EXPECTED TO PUT ON A MOTHER'S OPINION IN A CASE INVOLVING THE ALLEGED SEXUAL ABUSE OF HER CHILDREN. SUTHERBY, 138 Wn.2d AT 617-18; JERRELS, 83 Wn.App. AT 507-08. GIVEN THE DAMAGING NATURE OF THE MOTHER'S OPINION TESTIMONY, THERE WAS NO SOUND REASON NOT TO OBJECT TO IT. THIS CASE BOILED DOWN TO A CREDIBILITY CONTEST. STRICKLAND REQUIRES REVERSAL WHEN COUNSEL'S DEFICIENT PERFORMANCE RESULTS IN "A REASONABLE PROBABILITY THAT, ABSENT THE ERRORS, THE FACTFINDER WOULD HAVE HAD A REASONABLE DOUBT RESPECTING GUILT." STRICKLAND, 466 U.S. AT 695.

(b). DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO PROSECUTORIAL MISCONDUCT OR REQUEST CURATIVE INSTRUCTION.

"IF A PROSECUTOR'S REMARK IS IMPROPER AND PREJUDICIAL, FAILURE TO OBJECT MAY BE DEFICIENT PERFORMANCE." IN RE PERS. RESTRAINT/OF CROSS, 180 Wn.2d 664, 722, 327 P.3d 660 (2014). ONLY LEGITIMATE TRIAL STRATEGY OR TACTICS CONSTITUTE REASONABLE PERFORMANCE. STATE V. KYLLO, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). DEFENSE ATTORNEYS MUST BE EVER VIGILANT IN DEFENDING THEIR CLIENTS' RIGHTS TO FAIR

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TRIAL, INCLUDING BEING AWARE OF THE LAW AND MAKING TIMELY OBJECTIONS IN RESPONSE TO MISCONDUCT. STATE V. NEIDIGH, 78 Wn. App. 71, 79, 95 P.2d 423 (1995). IF PROPER OBJECTION OR REQUEST FOR A CURATIVE INSTRUCTION COULD HAVE CURED THE PREJUDICE FROM PROSECUTORIAL MISCONDUCT, THEN DUENAS'S ATTORNEY WAS DEFICIENT IN FAILING TO TAKE SUCH ACTION. SEE STATE V. HORTON, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (COUNSEL DEFICIENT IN FAILING TO OBJECT TO PROSECUTOR'S PERSONAL OPINION ABOUT DEFENDANT'S CREDIBILITY DURING CLOSING ARGUMENT); BURNS V. GAMMON, 260 F.3d 892, 895-96 (8TH CIR. 2001) (PREJUDICE WOULD HAVE BEEN AVOIDED HAD COUNSEL OBJECTED AND PROMPTED A CURATIVE INSTRUCTION IN RESPONSE TO THE PROSECUTOR'S IMPROPER COMMENT).

THE DEFICIENCY PREJUDICED DUENAS. "THE BENCHMARK FOR JUDGING ANY CLAIM OF INEFFECTIVENESS MUST BE WHETHER COUNSEL'S CONDUCT SO UNDERMINED THE PROPER FUNCTIONING OF THE ADVERSARIAL PROCESS THAT THE TRIAL CANNOT BE RELIED ON AS HAVING PRODUCED A JUST RESULT." STRICKLAND, 466 U.S. AT 686. THE LESS THAN OVERWHELMING CASE PRESENTED BY THE STATE RENDERED DUENAS'S TRIAL VULNERABLE TO IMPROPER EVIDENCE AND PREJUDICIAL COMMENTS UNFAIRLY TIPPING THE JURY IN FAVOR OF THE STATE.

(C). DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO RENEW HIS CHILD HEARSAY OBJECTION FOLLOWING TRIAL TESTIMONY THAT WAS INCONSISTENT WITH TESTIMONY FROM THE PRE-TRIAL HEARING.

A CHILD'S HEARSAY ACCUSATIONS ARE ADMISSABLE IF THE COURT FINDS "THE TIME, CONTENT, AND CIRCUMSTANCES OF THE STATEMENT PROVIDE SUFFICIENT INDICIA OF RELIABILITY." RCW, 9A.44.120(1).

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AMONG OTHER FACTORS, THE COURT CONSIDERS WHETHER THERE IS AN APPARENT MOTIVE TO LIE AND WHETHER THE STATEMENTS WERE MADE SPONTANEOUSLY. STATE V. RYAN, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). AT A PRETRIAL HEARING REGARDING THE ADMISSIBILITY OF H.A.'S HEARSAY STATEMENTS, LINDEN SAID THAT H.A. WAS RELUCTANT TO TELL HER ABOUT THE SEXUAL ASSAULT AND THAT SHE ASKED HER OPEN-ENDED QUESTIONS TO LEARN WHAT HAD OCCURRED. RP 35-36. LINDEN ALSO DESCRIBED THE RELATIONSHIP BETWEEN H.A. AND DUENAS IN UNIFORMLY POSITIVE TERMS. RP 33-34. H.A. DENIED BEING UNHAPPY OR MAD AT DUENAS. RP 19. BASED ON THE TESTIMONY FROM THE PRETRIAL HEARING, THE TRIAL COURT ADMITTED H.A.'S HEARSAY STATEMENTS. RP 54-57. AT THE TRIAL, HOWEVER, LINDEN TESTIFIED THAT SHE ASKED H.A. LEADING QUESTIONS WHEN SHE FIRST CONFRONTED H.A. ABOUT THE ALLEGATIONS. RP 128-30. LINDEN ALSO TESTIFIED THAT H.A. HAD A BAD ATTITUDE, WAS "VERY HATEFUL" IN THE MONTHS LEADING UP TO THE ALLEGATIONS, AND SHE DID NOT GET ALONG WITH DUENAS, RP 138-39.

DEFENSE COUNSEL WAS INEFFECTIVE IN NOT RENEWING A CHALLENGE TO THE ADMISSION OF H.A.'S HEARSAY STATEMENTS AFTER LINDEN TESTIFIED AT TRIAL DIFFERENTLY THAN SHE DID IN THE PRETRIAL HEARING. IN ITS PRETRIAL RULING, THE COURT ATTACHED IMPORTANCE TO THE MOTHER'S TESTIMONY SHOWING SHE DID NOT SUGGEST AN ANSWER AND THERE WAS NO APPARENT MOTIVE TO LIE. RP 54-56. GIVEN THE WEIGHT ATTACHED BY THE TRIAL COURT TO THOSE FACTORS AT THE PRETRIAL HEARING, IT IS REASONABLY PROBABLE THE COURT WOULD HAVE DECIDED TO EXCLUDE H.A.'S STATEMENTS HAD THE REQUEST TO DO SO BEEN MADE AT TRIAL. DUENAS WAS PREJUDICED BECAUSE THE HEARSAY STATEMENTS BOLSTERED H.A.'S CREDIBILITY IN A CASE THAT CAME

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DOWN TO WITNESS CREDIBILITY. A JURY IS MORE LIKELY TO CONVICT WHEN THEY HEAR EVIDENCE OF DAMNING STATEMENTS MADE BEFORE TRIAL, RATHER THAN HEARING ABOUT ABUSE ALLEGATIONS MADE FOR THE FIRST TIME AT TRIAL, BECAUSE THE OUT-OF-COURT STATEMENTS SERVE TO CORROBORATE AND REINFORCE THE IN-COURT TESTIMONY.

4. CUMULATIVE ERROR DEPRIVED DUENAS OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

EVERY DEFENDANT HAS THE DUE PROCESS RIGHT TO A FAIR TRIAL. DAVENPORT, 100 Wn.2d AT 762; U.S. CONST. AMEND. XIV; WASH. CONST. ART. 1 § 3. UNDER THE CUMULATIVE ERROR DOCTRINE, A DEFENDANT IS ENTITLED TO A NEW TRIAL WHEN IT IS REASONABLY PROBABLE THAT ERRORS, EVEN THOUGH INDIVIDUALLY NOT REVERSIBLE ERROR, CUMULATIVELY PRODUCE AN UNFAIR TRIAL BY AFFECTING THE OUTCOME. CHAMBERS V. MISSISSIPPI, 410 U.S. 284, 93 S.Ct. 1038; DOONELLY V. CHRISTOFORD, 416 U.S. 637, 94 S.Ct. 1868; TAYLOR V. KENTUCKY, 436 U.S. 478, 98 S.Ct. 1930 (1978); PARUE V. RUNNELS, 505 F.3d 922, 927. (9TH CIR. 2067); STATE V. COE, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984). THE COMBINED PREJUDICIAL EFFECT OF (1) IMPROPER OPINION TESTIMONY; (2) PROSECUTORIAL MISCONDUCT; (3) INEFFECTIVE ASSISTANCE OF COUNSEL PRODUCED AN UNFAIR TRIAL.

5. THE COMMUNITY CUSTODY CONDITION PROHIBITING DUENAS FROM ENTERING A RELATIONSHIP WITH ANYONE WHO HAS MINOR AGED CHILDREN IS VAGUE.

A PROHIBITION IS VOID FOR VAGUENESS UNDER THE DUE

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PROCESS CLAUSE IF IT DOES NOT (1) DEFINE THE OFFENSE WITH SUFFICIENT DEFINITENESS SUCH THAT ORDINARY PEOPLE CAN UNDERSTAND WHAT CONDUCT IS PROHIBITED; OR (2) PROVIDE ASCERTAINABLE STANDARDS OF GUILT TO PROTECT AGAINST ARBITRARY ENFORCEMENT. STATE V. BAHL, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008); U.S. CONST. AMEND. XIV; WASH. CONST. ART. I § 3. AS A CONDITION OF COMMUNITY CUSTODY, THE COURT ORDERED "DO NOT ENTER INTO A RELATIONSHIP WITH ANYONE WHO HAS MINOR AGED CHILDREN RESIDING IN OR VISITING THEIR HOME WITHOUT THE APPROVAL OF THE THERAPIST AND THE CCO." (JUDGEMENT AND SUMMARY). THE CONDITION VIOLATES DUE PROCESS BECAUSE IT IS TOO INDEFINITE AND INVITES ARBITRARY ENFORCEMENT.

THE CONDITION DOES NOT PROVIDE DUENAS WITH ADEQUATE NOTICE AS TO WHAT HE IS PROHIBITED FROM DOING. WHAT CONSTITUTES A "RELATIONSHIP," AND WHAT CONSTITUTES "ENTRY" INTO ONE? COMMONLY UNDERSTOOD, A "RELATIONSHIP" IS "A STATE OF AFFAIRS EXISTING BETWEEN THOSE HAVING RELATIONS OR DEALING." WEBSTER THIRD NEW INT'L DICTIONARY 1916 (1993). THAT CONCEIVABLY COVERS AN INCREDIBLE RANGE OF HUMAN INTERACTION. AT WHAT POINT DOES AN INTERACTION BETWEEN TWO PEOPLE TURN INTO A RELATIONSHIP? WHERE IS THE DIVIDING LINE BETWEEN PASSING ACQUAINTANCE AND "ENTRY" INTO A RELATIONSHIP? THE CONDITION, AS WRITTEN, DOES NOT GIVE AN ANSWER.

FURTHER, WHAT KIND OF RELATIONSHIP IS COVERED? IS THE RESTRICTION LIMITED TO ROMANTIC RELATIONSHIPS? THE CONDITION DOESN'T SAY SO. DOES IT COVER MERE FRIENDSHIPS WITH THOSE WHO HAVE MINOR CHILDREN? WHAT ABOUT PROFESSIONAL OR THERAPEUTIC RELATIONSHIPS? THE CONDITION REQUIRES PREAPPROVAL BY A CCO WITHOUT STANDARDS, PERMITTING A CCO TO BAR DUENAS FROM ESTABLISHING ALL

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SORTS OF RELATIONSHIPS OF VARYING DEPTH SO LONG AS THE OTHER PERSON HAS A MINOR CHILD. THE CONDITION DOES NOT PROVIDE DUEAS WITH ADEQUATE NOTICE AS TO WHAT RELATIONSHIPS HE IS PROHIBITED FROM FORMING AND AT WHAT POINT AN INTERACTION BECOMES A RELATIONSHIP. A REASONABLE PERSON CANNOT DESCRIBE A STANDARD NECESSARY TO AVOID ARBITRARY ENFORCEMENT. A CONDITION THAT LEAVES SO MUCH TO THE IMAGINATION IS UNCONSTITUTIONALLY VAGUE BECAUSE IT GIVES TOO MUCH DISCRETION TO THE CCO TO DETERMINE WHEN A VIOLATION HAS OCCURRED.

UNITED STATES V. REEVES, 591 F.3d 77, 79, 81 (2ND CIR. 2016) HELD A CONDITION OF SUPERVISION REQUIRING THE DEFENDANT TO NOTIFY THE PROBATION DEPARTMENT UPON ENTRY INTO A "SIGNIFICANT ROMANTIC RELATIONSHIP" IS VAGUE IN VIOLATION OF DUE PROCESS. ACCORD UNITED STATES V. ROCK, 863 F.3d 827, 833 (D.C. CIR. 2017). IN STATE V. DICKERSON, NOTED AT 194 Wn. App. 1014, 2016 WL 3126480 (2016), THE COURT OF APPEALS HELD A CONDITION PROHIBITING A DEFENDANT FROM "ENTERING A ROMANTIC RELATIONSHIP WITHOUT THE PRIOR APPROVAL OF THE COMMUNITY CORRECTIONS OFFICER AND THERAPIST" WAS VAGUE IN VIOLATION OF DUE PROCESS. DICKERSON, 2016 WL 3126480 AT *1, 5. THE COURT OF APPEALS IN DUEAS'S CASE IGNORED REEVES AND DICKERSON, INSTEAD RELYING ON STATE V. KINZLE, 181 Wn. App. 774, 326 P.3d 870 (2014), REVIEW DENIED, 181 Wn.2d 1019, 337 P.3d 325 (2014). KINZLE IS INAPPOSITE BECAUSE IT DID NOT DECIDE THE DUE PROCESS ISSUE RAISED IN DUEAS'S APPEAL. Id AT 785.

THE CONDITION IN DUEAS'S CASE IS EVEN LESS CLEAR THAN THE CONDITIONS STRUCK DOWN IN DICKERSON AND REEVES. THE CONDITION IN THOSE TWO CASES AT LEAST NARROWED THE TYPE OF RELATIONSHIP AT ISSUE TO "ROMANTIC" ONES. THE PROHIBITION RESTRICTS DUEAS'S

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ABILITY TO "ENTER" ANY TYPE OF "RELATIONSHIP." THE CONDITION IS MORE EXPANSIVE AND INVITES EVEN MORE ARBITRARY ENFORCEMENT IN REGARD TO WHAT QUALIFIES AS A "RELATIONSHIP." DUENAS'S FREEDOM DURING SUPERVISED RELEASE SHOULD NOT HINGE ON THE ACCURACY OF HIS PREDICTION OF WHETHER A GIVEN CCO, PROSECUTOR, OR JUDGE WOULD CONCLUDE THAT A PRESCRIBED RELATIONSHIP HAD BEEN ENTERED INTO. THE CONDITION DOES NOT MEET THE REQUIREMENTS OF DUE PROCESS AND SHOULD BE STRICKEN.

REASON FOR GRANTING WRIT OF CERTIORARI

PER RULE 10(b)(c) OF THE UNITED STATES SUPREME COURT, CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI INCLUDE:

(b). A STATE COURT OF LAST RESORT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT OR OF A UNITED STATES COURT OF APPEALS; AND (c) A STATE COURT OR A UNITED STATES COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT, OR HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

FOR THESE REASONS SET FORTH, I PLEAD, BY GOD'S MERCY AND GRACE AND BY THE MERCY OF THIS COURT, TO GRANT REVIEW ON THIS PETITION FOR A WRIT OF CERTIORARI.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jathan Duong PRO SE Doc# 384687

Date: APRIL 1ST, 2018