71418-0

71418-0

No. 71418-0-I

COURT OF APPEALS
Division I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

V.

JOHN E. BETTYS,

Appellant,

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
IN AND FOR SKAGIT COUNTY

Hon. David R. Needy, Judge

OPENING BRIEF OF APPELLANT

By: JOHN E. BETTYS, Appellant, Pro Se
711306 - HA-01
Coyote Ridge Correction Center
P.O. Box 769
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T A B L E O F C O N T E N T

T A B L E O F A U T H O R I T Y

WASHINGTON STATE APPELLANT AUTHORITY

WASHINGTON STATE SUPREME AUTHORITY

WASHINGTON STATE SUPREME AUTHORITY (Cont.)

UNITED STATES SUPREME AUTHORITY

UNITED STATES SUPREME COURT (Cont.)

OTHER CITED AUTHORITY

VEBATIM REPORT OF PROCEEDINGS

A. **IDENTITY OF APPELLANT**

I, John Bettys, appellant, pro se, asks the court accepts the review under RAP 2.2 of the trial court errors listed below.

B. **ASSIGNMENT OF ERRORS**

1. The trial court erred by modifying the correctly entered final judgment by order December 17, 2013, where court's authority to sentence does not extend to discretion for modifying the sentence without legal error.

2. The trial court erred allowing 'Indeterminate Sentencing Review' of the RCW 9.94A.535 sentence, where statutory law required 'Determinate Sentence Review' only.

3. The trial court erred if finding 'factual basis' for the essential element of 'sexual contact' to sustain charge and conviction of child molestation, where child's live testimony and evidence established only the non-sexual purpose for the alleged fleeting touch over clothing, by a related adult overnight caretaker of the child.

4. The trial court erred including a washed-out coviction in the offender score, where exclusion had vested prior.

ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

Error# 1: The trial court lacked jurisdiction to modify a final judgment & sentnece entered November 26, 2013, where no legal error was claimed by the moving party, and no statute authorized actions of the trial court at the time.

The trial court abused discretion entering the order December 17, 2013, where the court applied the wrong legal standards in the laws, or took a view no reasonable person would take on a care function.

The power to sentence does not carry with it the power for a trial court to modify the sentence at a later time merely because it appears in retrospect a different ruling might be more preferred by one party to the action.

The importance of finality in a rendered judgment precludes a modification, where modification would interfere with a party's protected constitutional right to appeal. CP187-208;

The constitutional rights to protection from 'double jeopardy' extend to ensure that a sentence is not later increased by a State's attorney, therefore the trial court improperly entered such an order December 17, 2013, increasing the set January 1, 2014 release date of the appellant for the Department of Corrections, without finding actual legal error in the final judgment on official record.

Error# 2: The trial court ignored legislative command stated clearly in RCW 9.94A.535 that the sentence be 'Determinate Only' as trial court allowed appellant held for 'Indeterminate Sentencing Review' of appellant's sentence by the Department of Correction's 'Indeterminate Sentence Review Board'(ISRB). CP 402-446

The trial court abused discretion modifying a correct sentence December 17, 2013, where State's attorney advised that Department of Corrections could not complete a review before January 1, 2014 release date established in the exceptional sentence RCW 9.94A.535 imposed. CP 164-176;

RCW 9.94A.535 was modified by the legislature in 2005 for the exclusion of 'Indeterminate Sentence Review' of all the exceptional sentences imposed by the trial court, therefore trial court applied

the wrong legal standards, in violation of legislative command in the wording of RCW 9.94A.535, which no reasonable person would take under the known circumstances presented in this case.

There is substantial public interest in having the statutes of Washington applied properly by the criminal trial courts, where the Indeterminate Sentence Review Board does not have authority under law to increase those RCW 9.94A.535 sentences post Blakley V. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004).

The Blakley decision is the reason the legislature modified the RCW 9.94A.535 statute in the 'Laws of Washington 2005, Chapter 68, Section 3' to avoid the error presented in this case, however this trial court ignored the wording of the statute. CP 402-446;

Error# 3: The trial court erred finding any 'factual basis' for the essential required element of 'sexual contact' to sustain charge or conviction under child molestation, where 'sexual contact' would require 'intent or purpose' of 'sexual gratification' and evidence does not support the required element.

The trial court must establish an independent 'factual basis' for guilt in an 'alfords plea' as the defendant claimed innocents of all actions, and the alleged child victim stated on record that the sole intent or purpose in the charged fleeting touch outside of his clothing, by the related adult caretaker, was to check a pull-up diaper that the child was wearing under his clothing, per evidence.

The State's witnesses testified to the child being in appellant's care or custody overnight, and daily being driven to school by this appellant, who had parental consent required under WAC 388-15-009(3)

to provide their child hygiene, medical care, or child care, and therefore the appellant's alleged touch to the outside of child's clothing for checking the pull-up diaper could not constitute the basis for an sexual crime in Washington State.

The trial court abused discretion by ignoring Washington State's laws, where the trial court applied the wrong legal standards to a ruling, and took a view no reasonable person would take.

The records established the appellant as the child's caretaker, where appellant bathed the child, fed the child, disciplined this child, baby-sat the child overnight, and drove the child to school on a daily basis, all with parental consent.

The child was proven to wear pull-up diapers, which his mother's testimony claimed she helped him with changing, therefore, reasonable people would find a caretaker would do the same while baby-sitting a child overnight. CP 23-25; CP 54-57; CP 211-213; CP 409-416; CP 419; CP 422; CP 424-426; CP 42-48;

Error# 4: The trial court erred including a washed-out conviction in the current offender scoring, which increased the sentence that is imposed, raising the offender score three (3) points.

The wash-out vested under the Sk Cause 93-1-00180-0, where the prior law operated prior to the change excluding wash-out of prior juvenile crimes, and therefore the trial court erred including the washed-out juvenile convictions in the present case.

The triggering event vested under the prior laws, and therefore the appellant is entitled to enjoy exclusion of the history, where due process is implicated, once the right vested in prior law.

C. STATEMENT OF THE FACTS

The appellant is a registered sex offender, having plead guilty to two (2) counts of first degree child rape in 1993. CP 102-113;

The complaining parties were his two (2) nephews, who chose to have contact with appellant restored by the superior court in 2004/ 2005, and normal family relations resumed. CP 42-48;

The Court of Appeals reversed the 1993 conviction's sentence in 2002, finding the 1988 and 1989 juvenile history washed at the age of fifteen (15), on September 12, 1989, and excluded such from the 1993 case sentence. The appellant was resentenced on Dec. 19, 2002 without inclusion of the two (2) juvenile crimes.

The superior court issued a certificate of finality in the 1993 case on June 15, 2005, which restored all rights except the right to bear arms, therefore appellant's rights to child care was restored, and appellant was in care or custody of his son. CP 280-281;

The appellant married Marissa Bettys August 18, 2007, and their son was born May 8, 2008, while registered as a sex offender under the 1993 conviction. CP 238; 1RP at 88;

Mr. & Mrs. King, appellant's nephew and his wife allowed their son MIF to be baby-sat by appellant overnight, and drove to school daily by appellant for several months, knowing appellant's rights had previously been restored, and appellant had his own young son in his care or custody since his birth in 2008. CP 213; CP 413-414; CP 422; CP 424-426; CP 429-430; CP 437-441; 1RP at 46-54; 1RP at 55-61; 1RP at 82-86; 1RP at 92-94; 1RP at 111- 115;

Mr. & Mrs. King's son MIF disclosed appellant touched outside of his clothing over his penise area sometime in the past, while he was being baby-sat overnight at appellant's home. This was to have been reported to law enforcement July 12, 2009, after MIF's disclosure to his maternal grandmother, without clarification for the purpose of the touch alleged. CP 26-27; CP 213;

The trial court excluded appellant's past sexual offense on December 22, 2010 under ER 404(b), finding the only purpose would be to show the appellant acted in conformity with the past, and is therefore to prejudicial to the present case. Therefore, the trial court could not use the 1993 offense in the alford plea, nor should it be weighed into evidence by the Court of Appeals herein.

The Detective Mike Hansen investigated the July 12, 2009 case complaint, finding that appellant drove the child to school daily, was on the school's records as authorized to have custody of this child with parental approval, appellant was found to bathed MIF, feed MIF, discipline MIF, and baby-sit the child at appellant's own home overnight, therefore the record showed appellant was caretaker of the young child regularly, with parents approval. CP 171-179; CP 417; CP 419; CP 422; CP 424-426; CP 66; 1RP at 46-54; 1RP at 55-62; 1RP at 62-72; 1RP at 72-76; 1RP at 76-80; 1RP at 80-86; 1RP at 91-96; 1RP at 105-118;

The appellant became aware of WAC 388-15-009(3) after alford's plea was accepted, which allows touching of the sexual or intimate parts of a child if done by a parentally approved caretaker, and appellant is proven by court record to be the child's parentally approved caretaker, therefore the sexual offense should be dismissed.

This case alleged a fleeting touch outside clothing, as parties agreed December 22, 2010 hearings, and apparently was for the purpose of checking the child's pull-up diaper, the same as appellant would check his own son's disposible diapers, and MIF testified to pull-up being checked by the fleeting touch charged. 1RP at 27 Line 22-25; 1RP at 28 Line 9-22; 1RP at 32 Line 20-25; 1RP at 37 Line 1-10; 1RP at 38 Line 6-7; 1RP at39 Line 7-21; 1RP at 42 Line 3-25; 1RP at 94 Line 18-25; 1RP at 95 Line 1-19;

The child's mother testified that she still helped MIF with the pull-ups at the time relevant to the charged touch, therefore would it not be reasonable appellant might help during overnight stays at appellant's home. 1RP at 122 Line 2-18;

The child wore pull-ups from after dinner through the night, per appellant's wife's testimony. 1RP at 99 Line 16-25;

The prosecution convicted child's parents for leaving child with appellant, therefore state cannot argue appellant did not have "care or custody" of MIF, with parental approval, and appellant's rights to child "care or custody" were restored by "Certificate" June 15, 2005 by Superior Court order. CP 279-282; 1RP at 87-88; 1RP at 80-86;

The appellant was convicted of child molestation first degree on May 11, 2011, which was reversed under COA# 67111-1-I March 11, 2013, and the alford plea was entered September 26, 2013 to child molestation third degree. CP 116-125; 2RP at 10 Line 4-13;

The final judgment was entered November 26, 2013 "Exceptional Sentence" with a January 1, 2014 release date, then modified under order December 17, 2013 to extend confinement. 2RP at 10-56; CP 180;

There simply was no possible way for trial court to find basis

finding 'sexual contact' elements of child molestation, thereby the reviewing court should provide relief. CP 23-25; CP 54-57; CP 211-213;

D. **ARGUMENTS PRESENTED FOR REVIEW**

1. THE TRIAL COURT ERRED BY MODIFYING THE CORRECTLY ENTERED FINAL JUDGMENT BY ORDER DECEMBER 17, 2013, WHERE COURT'S AUTHORITY TO SENTENCE DOES NOT EXTEND TO DISCRETION FOR MODIFYING THE SENTENCE WITHOUT LEGAL ERRORS.

"The sentencing reform act permits modification of sentence only in specific, carefully delineated circumstances, and only if it meets the requirements of the sentence reform act provisions relating directly to the modification." State V. Wandell, 175 Wn. App. 447, 311 P.3d 28 (2013); State V. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989).

The trial court erred in the December 17, 2013 order, where the State's attorney presented no 'legal error' or statute that required the sentence modified, therefore the trial court abuse discretionary authority modifying the correct final judgment, by application of the wrong legal standards.

"Claim that power to set sentence carries with it power later to modify sentence imposed ignores importance of finality in these rendered judgments." State V. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989).

The trial court entered the final judgment on November 26, 2013, and returned appellant to the Washington State correctional facility for processing December 3, 2013, with an established release date of January 1, 2014 imposed under RCW 9.94A.535 'exceptional sentencing guidelines' standards. CP 164-165;

The assistant attorney general filed for a modification of the final judgment in December of 2013, merely claiming the Department of Corrections was unable to process an 'indeterminate review' for release by January 1, 2014, therefore the department needed this sentence extended by the court. CP 187-208; 2RP at 33-56;

This simply is not a 'legal error' or 'clerical mistatke' that could permit the trial court's exercise of discretionary authority under the sentencing reform act, and the trial court's power must be limited in modifying the final judgment to protect finality in those judgments once rendered, therefore without some 'legal error' there is an abuse of discretion in trial court's conduct modifying this final judgment December 17, 2013, as CrR 7.8 does not apply under the circumstances presented herein. CP 187;

> "Modification of a judgment is not appropriate under the SRA merely because it appears, wholly in retrospect, that some different decision might have been more preferable." State V. Shove, 113 Wn.2d at 88, 776 P.2d 132 (1989).

Therefore the trial court abused discretion applying the wrong legal standards, without sufficient authority in law December 17, 2013 in this case, prejudicing appellant. CP 177-179; CP 180; 2RP at 35;

The Department of Corrections has ignored the final judgment of record, where the order modifying December 17, 2013 is not "amended Judgment or Modified Judgment" documents, therefore the entire case sentence is no longer stated upon the judgment as required.

The actual final judgment in file still continues to list the January 1, 2014 release date. CP 164-176;

"The department of corrections is not authorized to either correct or ignore a final judgment." Dress V. Department of Corrections, 168 Wn. App. 319, 279 P.3d 375 (2013).

Since the only judgment still officially on record required the appellant released January 1, 2014 under RCW 9.94A.535 'exceptional sentence' standards, it is clearly established the State's actions are an illegal detaining of appellant, where final judgment simply has been ignore for the December 17, 2013 order. CP 164-176;

"Double jeopardy still continues to prohibit increasing any correct sentence." State V. Hardesty, 129 Wn.2d 315, 915 P.2d 1080 (1996); United States V. DiFranscesco, 449 U.S. 117, 136-37; 101 S.Ct. 426 (1980); United States V. Lange, 85 U.S. 163, 18 Wall 163 (1873); State Ex Rel Sharf V. Municipal Court, 56 Wn.2d 589, 345 P.2d 692 (1960).

"A double Jeopardy claim is of constitutional magnitude, and may be raised for the first time on appeal." State V. Land, 172 Wn. App. 593, 295 P.3d 782 (2013).

The state's only argument presented for modification was for a state's agencies benefit, providing the Department of Corrections a longer period for their illegal 'indeterminate sentence review' of appellant's sentnece, therefore the order entered December 17, 2013 is invalid, where trial court applied the wrong legal standards to impose the order, and the order modified final judgment, extending a correct sentence in violation of 'double jeopardy' protections.

"Trial court abuses discretion when the trial court rules on unsupported facts, takes a view no reasonable person would

take, applies the wrong legal standards, or bases its ruling on an erroneous view of the laws." State V. Lord, 161 Wn.2d 276, 156 P.3d 1261 (2007).

There is proof the Department of Correction has detained this appellant past January 1, 2014, based solely upon the December 17, 2013 order, thereby the appellant is entitled to relief.

RCW 9.94A.585(7) does not apply to this case, where it is seen that no 'legal error' required the original judgment modified, and therefore the trial court should have denied the State's motion on grounds the trial court had no authority to modify judgments.

"The trial court abused discretion because it did not use one of the legal standards applicable under CrR 7.8." State V. Lamb, 175 Wn.2d 121, 285 P.3d 27 (2012).

The same is true in this present case, where the trial court is not even presented legal argument under CrR 7.8 to correct an error in the original sentence imposed, and nothing allowed the sentence rendered modified to benefit the state agency after November 26, 2013.

The 'double jeopardy' provisions of the United States constitut--ion are clearly violated by the trial court's December 17, 2013 order extending the January 1, 2014 release date, without legal error on the face of the original judgment. CP 164-176; CP 187-208; CP 218;

"Double jeopardy still continues to prohibit increasing the correct sentence." State V. Hardesty, 129 Wn.2d 315, 915 P.2d 1080 (1996).

Based upon the trial court applying the wrong legal standards in ruling on December 17, 2913, the order must be reversed, and appellant

immediately released from confinement, where the January 1, 2014 release date established in the November 26, 2013 original final judgment still on official record has past long ago. CP 164-176;

2. THE TRIAL COURT ALLOWING ILLEGAL 'INDETERMINATE SENTENCE REVIEW' OF THE RCW 9.94A.535 'DETERMINATE SENTENCE' ERRED, WHERE STATUTORY LAW REQUIRES "DETERMINATE SENTENCE REVIEW.

"The meaning of a statute is a question of law reviewed de novo." State V. Williams, 147 Wn.2d 476, 55 P.3d 597 (2002); State V. Gonzales, 168 Wn.2d 265, 226 P.3d 131 (2010).

Therefore the issue is before this court anew and ripe for the review solely on the merits of the wording in the statute, and this court should ignore past judicial rulings, favorable or not favorable.

"When interpreting a statute the court's fundamental objective is to ascertain and carry out the legislative intent." State V. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2010).

The statute is clearly worded regarding RCW 9.94A.535 sentences being solely "Determinate Sentences," and a determinate sentence would not be suject to an 'Indeterminate Sentence Review' by the Department of Correction's Indeterminate Sentence Review Board, however there is a clear showing this was ignored by the trial court's conduct. 2RP at 26;

"When the plain language is unambiguous, and the legislative intent is apparent, we will not construe the statue different." State V. JP, 147 Wn.2d at 450, 69 P.3d 318 (2003).

Therefore, this issue rest in whether the wording used in this statute is unambiguously worded, and whether the legislative intent is clearly apparent in the wording of RCW 9.94A.535 to make those exceptional sentences 'determinate sentences' only. CP 457-464;

"In judicial interpretation the first rule is the court must assume the legislature means exactly what they said." State V. McCraw, 127 Wn.2d 281, 878 P.2d 838 (1995).

The trial court imposed an exceptional sentence under 9.94A.535 statute provisions, as stated in the final judgment November 26, 2013, and therefore subject to the statutory wording of RCW 9.94A.535 solely. CP 164-176; CP 457-464;

Therefore the trial court only abused discretion when the court applied the 'indeterminate sentence standards' of RCW 9.94A.507 to a RCW 9.94A.535 sentence, where RCW 9.94A.535 specifically requires the trial court impose a determinate sentence, per statute's wording.

"Currently the sentence reform act specifies when sentences must be determinate in only two (2) situtations, RCW 9.94A. 505(2)(b)('an offense with no specific standard range') and RCW 9.94A.535('a sentence outside the standard range') see State V. Hagler, 150 Wn. App. 196, 208 P.3d 32 (2009).

Therefore, the issue presented here has been decided prior, and the reviewing court found that a sentence imposed under 9.94A.535 is a "determinate sentence" only, per statutory law. CP 463;

The State's attorney cannot prevail in claiming the trial court sentencing under RCW 9.94A.535 was not statutorily authorized, nor would such arguments prevail, where the legislature permitted this trial court's authority in the statutes.

Thereby, under established judicial interpretation of these RCW 9.94A.535 sentences, the trial court failed to properly impose the required determinate sentence, when trial court entered a order

on December 17, 2013 extending the January 1, 2014 release, and is allowing appellant held by the Department of Correction's I.S.R.B review committe as an indeterminate sentence.

The legislature clearly established in the 2005 legislatively imposed amendments to RCW 9.94A.535 the legislative intent that all RCW 9.94A.535 sentences are solely "determinate sentences", no longer subjected to RCW 9.94A.712 standards. CP 164-176; CP 462-463;

This legislative modification was in direct response to Blakley V. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), where the 9.94A.535 application of exceptional sentences was addressed, and the State's legislature attempted to avoid issues having indeterminate standard applied by the I.S.R.B. committee. see Laws of Washington, 2005, Ch. 68, Section 3. CP 462;

> "The fact there is a discretionary element to a sentencing does not render the statute unconstitutional. State V. Hrycenko, 85 Wn. App. 543, 933 P.2d 435 (1997).

The trial court chose to tailor the sentence in this case, where the circumstances warranted such discretion, with the defendant being sentenced after reversal of the original conviction, and was detained at the end of the statutory maximum sentence allowed. CP 164-176;

> "The trial court has all but unbridled discretion in fashion--ing the structure and length of an exceptional sentence" see State V. France, 176 Wn. App. 463, 308 P.3d 812 (2013).

The trial court considered many factors before imposing this exceptional sentence under RCW 9.94A.535, and the trial court found great public interest in having appellant treated in the community

upon release, where treatment was not provided in 1993 case, and it serves great public interest consistent with RCW 9.94A.010 to ensure treatment upon release in the present sentence.

The trial court followed the legislative intent stated in the wording of RCW 9.94A.535, and merely abused discretion applying the "indeterminate sentence standards", where the statute specifically is clear in limiting trial court's discretion, by stating the sentence must be a "determinate sentence" only. 2RP at 26 Line 13-25; 2RP at 27 Line 7;

The trial court abused discretion when it applied a clear legal standard the legislature specifically prohibited, therefore a trial court order allowing appellant held in violation of the statute is a reversible error, however the reviewing court must determine if a proper reading of RCW 9.94A.535 required the sentence be determinate only, per legislative command. CP 463;

The legislature excluded RCW 9.94A.712 (recodified 9.94A.507) in 2005 from RCW 9.94A.535 wording, therefore the trial court could not apply RCW 9.94A.712 to a RCW 9.94A.535 sentence on a crime committed allegedly in December 2008 thru July 2009. CP 462-463;

3. TRIAL COURT ERRED FINDING FACTUAL BASIS FOR THE ESSENTIAL ELEMENT OF 'SEXUAL CONTACT' TO SUSTAIN CHARGE OR CONVICT--ION OF CHILD MOLESTATION, WHERE RECORDS ESTABLISH ONLY A NON-SEXUAL INTENT OR PURPOSE FOR A TOUCH OUTSIDE CLOTHS, BY THE RELATED ADULT OVERNIGHT CARETAKER OF THE CHILD.

The Court of Appeals reversed the original verdict March 2013, finding erroneous the admission of character evidence in the trial held in May of 2011. CP 75-83;

The reviewing court stated in the opinion issued, there is no 'direct evidence' in the case, the appellant denied any act of sexual

contact with the child, leaving only the child testimony regarding the touch to the outside of the clothing, which apparently was not substantially overwhelming evidence of guilt. CP 75-86; 1RP at 15-42;

The appellant may challenge the factual basis for the alford plea on appeal, where the trial court must find the factual basis in the record to support the guilt to accept the plea. State V. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010); In Re PRP of Mendoza Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987).

> "Ordinarily, when a defendant pleads guilty, the factual basis for the offense is provided at least in part by the defendant's own admissions; with an alford plea however, the court must establish an entirely independant basis for the guilty plea, a basis which substitutes for an admission of guilty." State V. Scott, 150 Wn. App. 281, 207 P.3d 495 (2009); State V. D.T.M., 78 Wn. App. at 220, 896 P.2d 108 (1995). CP 116-125; CP 88; CP 115;

This is a case where the trial court could not find sufficient factual basis for the alford plea guilt, as the alleged victim did testify the touch charged was done for a legitimate caretaker type function, and the records clearly established the child was left in the appellant's actual 'care or custody' by the parents at the time of the fleeting touch to the outside of the child's clothing.

The trial court actually abused discretion by applying a wrong legal standard in Washington State law, to the proven facts of this case, apparently to establish a factual basis for accepting a alford plea, where the court ignored WAC 388-15-009(3), which states:

> "A parent or guardian of a child, a **person authorized by the**

parent or guardian to provide child care for the child, or a person providing medically recognized services for a child, **may touch the child in the sexual or other intimate parts** for the purpose of providing **hygiene, child care,** or **medical treatment** and diagnosis". see WAC 388-15-009(3).

The grave-men of the trial court's finding sufficient factual basis for the essential element of 'sexual contact' rests in WAC 388--15-009(3), where the law authorized appellant's touching of a child, so long as appellant was proven to have 'care or custody' of a child with parent's approval as the child care provider, and the touching of the sexual parts is to provide hygiene, child care, or medically recognized treatment. CP 42-48; CP 25; CP 213 Line 9-15; 1RP at 39-40;

This alleged victim is very clear describing a fleeting touch to the outside of his clothing, over a pull-up diaper, by a related adult, whom was entrusted with the child's care or custody of this four (4) year old boy overnight and daily, per records and testimony of witnesses. CP 265; CP 345; CP 346; CP 25; CP 422; CP 424-426; 1RP at 39-40;

The records established the appellant is related to the child, and was approved by the parents to provide child care daily for the child. 1RP at 101-125; 1RP at 94-96; 1RP at 83-86; 1RP at 53-54;

The record established Appellant drove the child to school on a daily basis for many months. CP 340; CP 353; CP 378; CP 396; CP 424-426; CP 422; 1RP at 46-54; 1RP at 55-62; 1RP at 62-72; 1RP at 72-86; 1RP at 114 Line 21;

The record established the child needed help with his pull-up diapers by his mother, therefore by care-takers also. CP 267 Line 7-22; CP 271; CP 213; CP 320 Line 13-20; 1RP at 94-95; 1RP at 93 Line 7-11; 1RP at 113-114;

The record established the appellant's prior sentence was now completed, and his rights restored by the superior court prior to the birth of appellant's son Harley, therefore he could have this child in his lawful care or custody. CP 213 Line 9-15; CP 395-401; CP 424; CP 410-411; 1RP at 48-54; 1RP at 80-86; CP 422; CP 279-282; CP 449;

The record established the touch is solely through clothing in the instance charged. CP 325 Line 24-25; 1RP at 38 Line 6-11;

This record however does not establish the touch was done for a intent or purpose of 'sexual gratification' which is a required and necessary ultimate fact of the essential element of 'sexual contact' for child molestation, and that is the grave-man of the trial court's finding factual basis in this case. State V. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006).

> "Neglegent or maltreatment means an act, or failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequ--ences of such a magnitude as to constitute a clear and pre--sent danger to a child's health, welfare or safty" WAC 388--15-009(5).

Therefore, under state law, the appellant, as the parental app--roved caretaker of the child, having sole care or custody over the child overnight and daily, was required to check the child's diaper to ensure the child's health and welfare while baby-siting.

The appellant would be guilty of inaction, creating a danger to the child's health, where not checking the pull-up diaper could lead to the medically recognized condition commonly called "diaper rash"

The medical condition is commonly caused by leaving a child in a wet or messy diaper, with urine or feces in contact with a child's skin. Therefore, it is reasonable to check a child's pull-up diaper by a fleeting touch outside the clothing, when a child is being baby-sat, especially overnight baby-sitting.

The child actually testified at the original trial in 2011, where he claimed the purpose of the touch outside the clothing is merely to check his pull-up diaper for wetness, a non-sexual type required care-taker functions for children.

Defense: Q. Do you recall how many times it happened?
MIF: A. "once" CP 302 Line 19-20; 1RP at 15 Line 1-2;

Defense: Q. Where you sitting down or standing?
MIF: A. "standing" CP 313 Line 24-25; 1RP at 26 Linr 6-7;

Defense: Q. Did you wear night time diapers?
MIF: A. "huh-uh" CP 320 Line 17-19; 1RP at 32 Line 21-23;

Defense: Q. No you didn't?
MIF: A. "pull-ups" CP 320 Line 17-19; 1RP at 32 Line 24-25;

The child is very clear in stating he wore pull-ups, and the child appears to have a clear memory of the event surrounding that fleeting touch to the outside of his clothing by the baby-sitter, whereby he testified about his diaper being checked.

Defense: Q. Did he check you pull-up or diaper and you didn't want it checked?
MIF: A **"Yes"** CP 327 Line 7-12; 1RP at 39 Line 14-19;

Defense: Q. Is that all this is a pull-up check?
MIF: A. **"Yeah"** CP 327 Line 13-14; 1RP at 39 Line 20-21;

Defense: Q. ...did he just come in and check you really quickly, and then go back to washing dishes?
MIF: A. **"Yeah"** CP 327 Line 1-4; 1RP at 39 Line 9-11;

Nothing in this testimony about a pull-up diaper being checked would lead a reasonable person to believe the touch is for anything

more than a mere diaper being checked, which is required under the laws in Washington State, when a child is left in appellant's 'care or custody' by the parents. CP 414 #12, #11, #24;

The trial court must independantly establish the entire record for guilt under the alford plea, and based on the facts of the case here, guilt cannot be established for a sexual offense, especially for child molestation, which requires 'sexual contact' with a child proven in the records.

State: Q. So, pajama time is when nighttime diapers come on?
MIF: A. **"Yes"** CP 330 Line 4-5; 1RP at 42 Line 11-12;

The State's attorney knew the child wore nighttime diapers, and still charged a sexual offense against the proven adult caretaker of the child in violation of WAC 388-15-009(3), then did not support a directed verdict after the child testified to the purpose being for a mere diaper checking through clothing.

State: Q. Ok, when you were with john in the livingroom you weren't wearing pajamas, is that my under-=standing?
MIF: A. **"No, I was"** CP 330 Line 6-8; 1RP at 42 Line 13-15;

State: Q. When john touched you did he say anything to you?
MIF: A. **"he didn't"** CP 330 Line 12-14; 1RP at 42 Line 19-21;

The child clarified the fact of the case during testimony under oath in a trial, and therefore the factual basis for a sexual crime simply does not exist in this record, therefore the trial court did abuse discretion finding a basis for 'sexual contact' to support the charge of child molestation. CP 25;

Therefore, the question before this court on review rests upon the court determining if the appellant was established as the child's

care-taker, with the parent's approval, at the time of the touch to the outside of the child's clothing, and whether there is any basis to believe the touch was for 'sexual contact' when the child told us the touch was merely to check his pull-up diaper, as state law allows the "sexual or other intimate parts" touch by a proven care--taker of a child, when providing hygiene, or child care. CP 415 #23;

Since the opinion of this court previously found that this is a case resting on the child's words, with no 'direct evidence' that shows a sexual crime was committed, then the testimony of the child given in the live trial should be informative to the facts, and the reviewing court should determine there is no 'factual basis' for a charge of child molestation in this case.

> "The title uncle was honorary, Mr. powell was just visiting the home.... Although he was the only adult present at the time, no evidence showed he had been expressly entrusted with the care of Wendy. Moreover, no touching of the genitals of a 10-year-old-girl, could conceivably be part of the care--taker function. The evidence is insufficient to support an inference that the defendant touched the child for the purpose of sexual gratification, as required in order to convict for child molestation, on one occasion defendant touch the underpants in the front part while assisting her off his lap..., and another occasion he touched her thigh through clothing..." State V. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991). CP 24-25; CP 54-57;

The appellant is proven to be more than a mere family friend in

the records of this case, where appellant was a related adult member of the child's family, whom was expressly entrusted with the child's actual 'care or custody' for baby-sitting, and there exists a very conceivable caretaker function checking a four (4) year old child's pull-up diaper, by a fleeting touch to the outside of the clothing, which Washington State law actually required.

Therefore, if the reviewing courts found the evidence clearly insufficient to establish 'sexual contact' element of child molest--ation under State V. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), then surely in light of the established evidence in the presented case now on review, there is a lack of factual basis for conviction of child molestation.

> "We agree, that under powell, and because Veliz touched A.F. over clothing, the state is required to prove that he touched her for sexual gratification, regardless of whether the area touched is characterized as intimate or sexual parts. State V. Veliz, 76 Wn. App. 775, 775 P.2d 189 (1995).

There simple is nothing in the current record that proved this alleged fleeting touch outside the clothing was for 'sexual gratifi--cation' as required for a convict of child molestation.

> "Evidence an unrelated adult, with no caretaker function has wiped a 5-year-old-girls genitals with a wash-cloth might be insufficient to prove he acted for the sole purpose of sexual gratification, had the act not been followed by him having her perform fellatio on him." State V. Johnson, 96 Wn.2d 926, 639 P.2d 1332 (1982).

This case is simply one the child claimed that appellant did touch him over clothing, while baby-sitting the child overnight at appellant's home. The Appellant is proven to have parent's approved care or custody of the child daily and overnight, at the time that the charged touch is alleged to have occurred, and the child told of the legitimate non-sexual purpose for the touch in live testimony at the 2011 trial. CP 211-213; CP 315-328; CP 343; CP 400-401; CP 422; CP 424-426; CP 415; CP 449; CP452-456; CP 459; 1RP at 42; 1RP at 39; 1RP at 32;

> "The fact finder can infer sexual gratification from the nature and circumstances of the act itself." State V. Tilton, 111 Wn. App. 423, 430, 45 P.3d 200, review denied 147 Wn.2d 1007, 56 P.3d 565 (2002).

However, the fact finder cannot infer sexual gratification in a case where the evidence contradicted the inference, and that is what this case shows in the testimonial records. WAC 388-15-009(3). CP 459;

> "However, inferences based on circumstantial evidence must be reasonable, and cannot be based on speculation. Jackson V. Virgina, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979).

The live testimony given under oath in this case record leaves the court no room for inferences, therefore the trial court erred in finding a factual basis for child molestation.

Therefore, unless it is a crime for the proven related adult caretaker to provide the child proper diaper checks, the case now before this court shows appellant is actually innocent of a sexual offense of any kind requiring sexual contact. CP 211-213; CP 23-25; CP 54-57; CP 315-328; CP 422; CP 1RP at 39; 1RP at 32;

This is an extremely unusual case, where the 'alford's plea' would not normally be over-laying a prior reversed jury trial, and this trial court had the benefit of the complete trial records for finding the factual basis, which makes the lack of 'factual basis' that much more disturbing on review.

There simply was no evidence in the case that a sexual crime was ever committed or even intended to be committed in the checking of the child's pull-up diaper by a fleeting touch to the outside of the child's clothing, when the adult caretaker was knowing to have care or custody of the child daily and overnight. CP 23-25;

The question before this reviewing court is simple, did this trial court error establishing the touch alleged outside clothing to check a pull-up diaper the child testified to wearing, would be sufficient 'factual basis' for the charged child molestation, when there is nothing claiming the fleeting touch was for any kind of sexual gratification. CP 66-71; 1RP at 39 Line 7-25;

The record established the appellant was the daily caretaker of the four (4) year old child, who still needed help with pull-up diapers and underwear, per his mother's trial testimony at the 2011 trial, thereby appellant did not commit sexual child molestation in the charged touch over the child's clothing, in light of WAC 388-15-009(3), and Washington State caselaws holdings.

4 THE TRIAL COURT ERRED INCLUDING A WASHED-OUT CONVICTION IN THE OFFENDER SCORE, WHERE EXCLUSION HAD VESTED PRIOR.

The inclusion of the conviction occuring before appellant's fifteenth (15) birthday is reversable error, where the rights to

exclusion of those prior juvenile adjudications vested under the 1993 convictions, and therefore the trial court abused discretion resurrecting the washed-out criminal history for use in currently calculated offender scores.

> "To warrant protection under the 'due process' clause a vested right must be more than a mere expectation based upon anticipated continuation of the existing law." see State V. Henning, 129 Wn.2d 512, 528, 919 P.2d 580 (1996) (quoting Caritas Servs, Inc. V. Dep't Soc & Health Servs, 123 Wn.2d 391, 414, 869 P.2d 28 (1994).

The reviewing courts have properly held that if there is a time when the law has vested, and the appellant has enjoyed that application of the law, then later changes to the laws shall not be used to infringe upon that enjoyment.

> "once a conviction washes out under the old rules, it stays washed-out." State V. Cruz, 139 Wn.2d at 193, 895 P.2d 384 (1999).

This is to say that once a person has been sentenced based on and offender score from which the juvenile prior convictions had been washed-out, the wash-out survives subsequent amendments to the sentencing reform act.

> "A retroactive law violates due process if the retroactive application of the statute deprives an individual of the vested right." State V. Shultz, 138 Wn.2d 638, 646, 980 P.2d 1265 (1999).

The issue in cruz, and in this case, is whether the law in effect when the current crime was committed is retroactive without

effecting a vested right under prior application of the law, and therefore the first step is to clearly determine when a right is completely vested in a criminal proceeding.

The right in the present wash-out became vested by order of the Court of Appeals in COA# 50285-9-I, where the prior 1993 case is remanded for exclusion of the washed-out juvenile history, and a modified judgment was placed on record.

This case is distinguishable from State V. Varga, 151 Wn. App. 179, 86 P.3d 139 (2004), where Mr. Varga did not actually enjoy a right to the wash-out in a prior sentence, therefore had never in fact had the right vested to the wash-out. The appellant herein is sure the reviewing court shall see the difference in this instance, as the case is more in line with the ruling in State V. T.K, 94 Wn.App 286, 971 P.2d 121 (1999), where because the right vested prior to the change in the law, we concluded that the new law could not retroactively require T.K. to meet the strickter conditions for obtaining a sealing order.

> "The statute impacts an offender's vested rights under a pre-existing law or 'changes the legal effects of prior facts or transactions'" State V. Schenck, 169 Wn. App. 633, 281 P.3d 321 (2012)(citing In Re PRP of Flint, 174 Wn.2d 539, 277 P.3d 657 (2012).

The use of the washed-out conviction would change the effects of "prior facts or transactions', where in 1989 the appellant plead guilty to the crimes, based solely upon the understanding that the crimes would never be used after appellant turned fifteen (15) years

of age, and therefore the plead entered would become unknowing and involuntary if the use of this prior history is allowed based upon a law enacted in 2002, almost 14 years after the plea is accepted in the juvenile case, therefore appellant must either be allowed to withdraw the plea from 1989, or the criminal conviction must not be used in the present criminal history, as such would change the entire knowledge factor of the plea agreement entered in 1989.

The reviewing courts have clearly established the a persons plea must be made with complete understanding of the legal effects and consequences of the plea agreement, and such cannot later be infringed by the State's changing the laws, once they get the case resolved by plea agreement, therefore the crime cannot be used in any proceeding after appellant turned 15 years of age, or the case plea must be subject to withdrawal.

> "Instead, a statute is retroactively applied if it takes away or impairs a party's vested right aquired under the existing laws." In Re PRP Flint, 174 Wn.2d at 547-48.

Therefore, even if the reviewing court found the right did not vest based upon the 1993 case judgment, the right did vest under a plea agreement's 'factual basis' of being knowing, as the party's knowledge of the legal consequences cannot be changed after there is acceptance of the plea contract, without invalidating the plea, and therefore relief must be provided in this cas, as clearly the conviction is listed in the current criminal history.

> "While due process generally does not prevent new laws from going into effect, it does prohibit changes to the law that

retroactively effect rights which vested under the prior law." State V. Godfrey, 84 Wn.2d at 962-63, 530 P.2d 630 (1975).

The reviewing court have held: 'Cruz, 139 Wn.2d 191, 985 P.2d 384 (1999); Smith, 144 Wn.2d 665, 30 P.3d 1245 (2001); and Herns, 111 Wn. App. 649, 45 P.3d 1116 ( ) thus stand for the proposi--tion that once a wash-out is vested, the convictions cannot be resurrected for offender score purposes by subsequent statutory amendments. see In Re PRP Nichols, 120 Wn. App. 425, 85 P.3d 955 (2004)

Theses reviewing court held: Defendant's wash-out of prior juvenile criminal history did not vest before the SRA changed, and thus those offenses could be counted in his criminal offender score calculation. see State V. Cunningham, 116 Wn. App. 219, 65 P.3d 325 (2003); State V. Perry, 110 Wn. App. 554, 42 P.3d 436 (2002); and State V. Swecker, 154 Wn.2d 660, 115 P.3d 297 (2005); State V. Varga, 151 Wn. App. 179, 86 P.3d 139 (2004); State V. Haviland, 177 Wn.2d 68, 301 P.3d 31 (2013).

However, in the present case a right vested under the 1993's case judgment & sentence, where the Court of Appeals previously remanded the case for resentencing without inclusion of juvenile history committed prior to age fiftenn (15), and to allow use of that history in the present judgment would effect that vest right established in the prior judgment.

In the alternative, the plea agreement would become unknowing and involuntary, where the appellant was informed, and accepted a

contract with the State's attorney based solely on the understanding that the charges would not be used as criminal history after the age of fifteen (15), which is violated by application of the 2002 change in law in the present case, therefore, like in State V. T.K. there is a vested right to the agreed understanding of the law continuing to exclude use of the plea contract case in future matters.

Additionally, the reviewing court should consider that had the 1989 convictions not washed-out at age fifteen (15), they could of been subjected to direct vacation, where the two (2) years required for vacation under formed 13.50.050 vested between January 17, 1991 and February 18, 1993, without any new convictions. Therefore like T.K. the appellant could have sought vacation well before the new 2013 conviction and sentenceing, had the crimes not washed-out of criminal history prior.

E. CONCLUSIONS

1. The trial court does not have the jurisdiction or authority to enter the December 17, 2013 order modifying the correct final judgment, increaseing the sentence by even a single day, where the finality of a judgment requires a legal error to modify the judg--ment, and not legal error was proven in the State's requests for sentence extension on behalf of the Department of Corrections in this case. Therefore, the December 17, 2013 order is an abuse of sound trial court discretion, applying the wrong legal standards, and reaching a view that no reasonable person would reach under s similar set of facts. CP 164-176; CP 180; CP 218;

2. The trial court abused discretion holding appellant past the January 1, 2014 release date established in the exceptional sentences under RCW 9.94A.535, where statute's wording required the sentence to be 'determinate' only, therefore not subject to an 'indeterminate sentence review' of the Department of Correction's committee. CP 462-463;

It is an abuse of discretion for the trial court to ignore wording of the statutory laws, where such shows the trial court's ruling is based upon the wrong legal standards. CP 180; CP 187-208; CP 177-179;

3. The trial court erred finding a 'factual basis' for the element of sexual contact in the charged child molestation, where the record established a mere fleeting touch outside the child's clothing for the sole purpose of checking the child's diaper, by the proven overnight adult caretaker of the child, whom was found related to the child, and had the parent's proven consent to care for their child at the time of the alleged touch.

Given these facts in the record, there is no 'factual basis' in this case for sexual contact or sexual gratification under the child molestation statute, thereby relief should be granted this appellant under this action.

The charged child molestation cannot be established where a record supports a proper caretaker function for the fleeting touch charged outside clothing, per WAC 388-15-00((3), when parents did approve the care or custody of their child with the related adult and the child claimed the touch was done to check his pull-up type

diaprer, the child was proven to be wearing at the time. CP 23-25; CP 54-57; CP 211-213; CP 286-401; CP 88-89; CP 26-40; CP 422; CP 424-426;

"Mere repetition of a statement does not make a statement true." State V. Perez, 137 Wn. App. 97, 151 P.3d 249 (2007).

4. The trial court including the washed-out crime in these proceedings is sufficient to warrant resentenceing in this action, where the right vested to the wash-out under prior law, and cannot be infringed by later amendments to the statutes, once vested by a prior judgment.

In the alternative, the use of the 1989 history would change facts already established, where the plea agreement would become unknowing and involuntary if the use of the 1989 juvenile history was allowed after age fifteen (15) in a future sentence, therefore the right vested under the plea agreement to enjoy this exclusion after age fifteen (15(, which should be upheld herein.

For these stated reasons, the reviewing court should grant the relief to this appellant, there simply is a lack of 'factual basis' for conviction under the knowing facts of this case.

DATED This 24th day of June, 2014.

Respectfully Submitted,

John E. Bettys

John Bettys, Pro Se, Appellant

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

2014 JUN 27 AM 11:06

DECLARATION OF SERVICE

GR 3.1

John Bettys, declare that on the 24th day of June, 2014, I deposited the following documents:

1. "Opening Brief of Appellant" COA# 71418-0-I
2. Declaration of Service
3.
4.
5.
6.

Or a true and correct copy thereof, in the internal mail system of Coyote Ridge Correctional Complex, in front of one or more correctional staff and made arrangements for postage, addressed as follows:

Court of Appeals, Div I
One Union Square
600 University St.
Seattle, WA. 98101

Erik Pedersen, SDPA
Skagit Co. Prosecuting Atty
605 South Third St.
Mount Vernon, WA 98273

I, John Bettys, declare under penalty of perjury, under the laws of the State of Washington, that the forgoing is true and correct.

DATED this 24th day of June, 2014, in Connell, WA.

John Bettys

ORIGINAL

(Signature)