NO. 44034-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

SERGEY GENSITSKIY,

Appellant.



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FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John P. Wulle, Judge

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# BRIEF OF APPELLANT

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STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred and violated appellant's constitutional right to have notice of the charges by permitting the State to amend charges after the State rested its case on Counts 7, 8, 9, 10 and 11. U.S. Const., amends. 6, 14; Const., art. I, § 22.[1]

2. There was insufficient evidence as a matter of law to support the conviction on Count 6.

3. There was insufficient evidence as a matter of law to support the conviction on Count 2.

4. The State failed to charge a crime in Count 7.

5. Appellant assigns error to Instruction No. 26, quoted in full in Appendix A. CP 47.

6. The court erred by failing to give a limiting instruction to the jury when witnesses were impeached with prior inconsistent statements.

7. The court erred by admitting evidence of an overheard private conversation, in violation of RCW 9.73.030 and .050.

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[1] Constitutional provisions and statutes are set out in Appendix B.

8. The Judgment and Sentence found appellant was convicted of child molestation in the first degree, a crime the State did not charge, in Count 7. CP 103.

9. Appellant assigns error to the court's finding in the Judgment and Sentence, CP 103, to the extent it applies to Counts 2 and 7:

> The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.507.

10. Appellant's sentence for crimes that may have been committed before the effective date of statutory amendments violates the Constitution's prohibition against ex post facto laws.

Issues Pertaining to Assignments of Error

1. Do the constitutional right to have notice of the accusation and CrR 2.1(d) permit the State to amend charges after it has rested its case to charge greater and different crimes and to expand the charging period from a few months to over sixteen years?

2. Where the State's witness denied he was ever molested, was there sufficient evidence to support a conviction?

3. Where the State's witness did not testify sexual contact occurred when she was less than 12 years old was there sufficient evidence of child molestation in the first degree?

4. Does a charge of child molestation 2° alleging the child was under age 14 and giving a charging period when the child was under age 12, support a conviction of any crime?

5. When the court admits evidence for a limited purpose and a party requests a limiting instruction, must the court give it at that time?

6. May the court admit evidence obtained in violation of the Privacy Act?

7. When a charge may have occurred before the effective date of a sentencing law, may the court apply the later amendment of that statute to the crime?

B. STATEMENT OF THE CASE

1. Substantive Facts

Sergey and Yelena Gensitskiy immigrated from the Ukraine with four children in 1990, settling in Clark County, Washington. They now have ten children the following ages at the time of trial: Svetlana (26), Victor (24), Diana (23), Zhanna

(21), David (20), Jennifer (19), Robert (18), Corrina (17), Vadim (14), and Samuel (6). RP 196-98, 1092-93.

The family maintains many home-country "old school" customs. They speak Ukrainian and English, eat Russian foods and attend Russian church. RP 387-89. They prohibit drinking, smoking, and sex outside of marriage. Television is not a pastime. They expect respect to elders, humility, hard work, contributions to the household, and church participation. RP 238, 422-24, 486-87, 794-95.

Sergey and Yelena are not educated professionals. They work very hard. Sergey drove truck at night, farmed, and did landscaping. Yelena was a housekeeper for wealthy households. Gradually the older children found work helping clean or do landscaping for the same households. RP 240, 366-72, 1019, 1119-20.

At their house in Orchards, Svetlana had her own room, but all the boys shared one bedroom and all the younger girls shared another. The baby slept with his parents. RP 1012-14.

The family bought a house with 18 acres near Battle Ground about 2004. With five bedrooms,

Svetlana and Victor each had a room, the other girls and boys shared bedrooms. RP 197-99, 390, 1016-17, 1076-77. When they bought an adult family home with six bedrooms in Vancouver, Yelena lived there with Sam, caring for the residents. Corrina lived there from 2006, when she was 13; Diana moved there in 2008. RP 752-53, 1007-08, 1025-26. Sergey and the other children primarily lived at Battle Ground. RP 199, 1119.

Mitch Edington hired Sergey for major landscaping in 1996. He became social friends with the family, visiting several times a year through the summer of 2010. He saw no sign of avoidance or aversion. The children adored their father, always clamoring onto his lap.[2] RP 1042-51.

The family did housework and yard work for Dorothy and Ray Buchner and for Randy and Tami Patterson. David worked for Pattersons' adult foster son, Chris Nicks. The employers were impressed with the children's hard work. RP 236-40. David socialized with Chris and Randy, boating, or quadding in the mountains. RP 241-42.

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[2] Svetlana still sat on her father's lap at age 25. RP 1062-63.

When David Gensitskiy was young, the Buchners offered to pay for college if he would keep his grades up. David did a lot of work at home, so they added the condition that he live on campus. In 2010, with their help he chose Edmonds Community College. David's parents were unhappy he was leaving the family home. RP 201-04, 372-74.

The summer of 2010, David was home less, staying with the Buchners, Chris Nicks and the Pattersons. His parents knew where he was. He spoke frequently with his mother by phone. He didn't see or talk to his dad much. RP 238-46.

Late that summer, the Pattersons and Buchners took a vacation on the coast. They took along Diana, David, and Corrina Gensitskiy. CP 146.[3]

As Diana saw David moving away from the family, she also wanted more independence. Other people's lives looked more exciting than living with her parents. She secretly began dating Chris Nicks in July, 2010, knowing her parents would not

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[3] A portion of the cross-examination of Corrina was not recorded. The court and parties prepared a Settlement of Record for that missing portion. CP 144-46; RP 761, 1380-86.

approve.[4] She thought he was divorced but he was only separated. He had his own business, home and two children. He urged her to move away and live her own life. RP 249-50, 426-30, 485, 597, 1036.

In September, 2010, Diana moved in with the Pattersons. Paying no rent, she could come and go as she pleased, buy a car and live like an adult. The Pattersons liked that she helped Chris with his children. Diana moved without telling her parents. She was afraid she would disappoint them; moving out without getting married was not done. She had always been a respectful child. It was her first act of rebellion. RP 426-30, 486, 671.

Diana left a lengthy letter saying how she loved her parents, why she was seeking her own way.

> I am writing this letter to my parents that I so deeply love and cherish. You have taught me the value of family that stays together and supports each other and loves unconditionally. In this letter I have no intention of hurting my mama and papa. I truly have no negatives feelings meant.
>
> ... All the affections you have given us is sincere and true. Walking in the door and greeted with a kiss and a hug. Sitting on papas lap and having conversations about life I have learned

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[4] Corrina knew of the relationship. CP 145.

> much valuable life traits I want to live by and carry. ...
>
> I express to everyone and my wonderful parents that I thank you for loving me and raising me up. I couldn't want anyone else. I have become the person I am with the positive uplifting attitude from my mom and dad.

Nonetheless, she wrote of her unhappiness cleaning and caring for residents at the adult care home, the recent family disruption over David leaving. She did not say where she was going. Ex. 2.

Yelena and Sergey were terrified for their daughter. Yelena thought she had been kidnapped until she found the letter. They called everyone, looking for her. Yelena drove all around Vancouver and three times to Edmonds to see if Diana was staying with David. For two weeks they didn't know what had happened to her. Yelena could not eat or sleep. Twice Sergey took Yelena to the emergency room, afraid she was having a heart attack from the stress. RP 427-28, 789-90, 1004, 1034-35, 1093-95.

When the children suggested Diana might be with Chris, Yelena called Tami Patterson. Tami did not reveal Diana was living in their home. Tami quit answering Yelena's many calls or responding to messages. RP 237-38. Sergey went to Tami's

workplace to ask her about Diana. He gave the receptionist a different name since Tami was refusing their calls, but Tami avoided him, leaving him in the lobby for 1-1/2 hours. RP 1096-97.

Tami insisted Diana call her parents. Diana said she couldn't right then. RP 659-62.

Sergey discovered from cell phone records Diana and Corrina had been communicating. Sergey asked Corrina about it, hoping she would tell him where Diana was. As Yelena, Sergey and Corrina wept, still Corrina refused. Sergey lost his patience and threw her cell phone to the floor, breaking it. RP 1100-05.

Randy Peterson finally told Diana she had to contact her parents or he would. Diana responded by telling him of a prior sexual experience. He understood her to say her father molested her. RP 438-39, 599-600, 619. She had no idea these comments would open floodgates to disrupt lives. RP 480-85. Tami said if it happened to her, it probably happened to the other children, too. When Tami asked if she wanted her to report it, Diana said she didn't know. Tami was a mandatory

reporter. She said Diana should report it; by morning, Diana agreed. RP 521, 665-67.

Diana called David in Edmonds. She asked if he thought their father was "a pervert." David suddenly "flashed" on a memory of an incident in the shower with his father when he was 4 or 5. His father touched his penis. Nothing like that ever happened again to him. He told Diana he had a sexual encounter as well. RP 214-15, 229, 235, 496.

Chris Nicks drove Diana to get David in Edmonds. RP 489-92. On Friday, October 1, 2010, David and Chris picked up Robert and Vadim from school. They drove to the YWCA. David told his younger brothers they were going to report that their father had molested them. If they had anything similar to report, it was up to them to decide whether to report it. RP 221-24, 247-52.

Tami and Diana picked up Corrina from school. Tami left the girls alone in the car. Diana asked if Corrina thought their father was perverted, and if she "wanted to say something and get out of the house." As Diana listened and talked to Corrina and David, Diana came to believe things they said

had happened to her too. RP 520-22, 529, 664-68, 758-59; CP 146.

Officer Rich responded to the YWCA. He met individually with Diana, David and Corrina; none of them revealed any details of abuse to him. He gave them each forms to write statements. He didn't talk to Robert or Vadim. RP 558-76.

Sergey and Yelena only learned where Diana was when the police came October 1 to take Sam, then 4, into protective custody. RP 1097. All the Gensitskiy children spent the next few days with the Pattersons in Diana's custody. RP 621-22, 695. After a court hearing, Robert, Vadim and Sam were returned to their mother, Yelena, to have no contact with Sergey. RP 126-27, 1011. David returned to college.

Diana and Corrina continued living with the Pattersons. The Pattersons were unhappy to learn of Diana's relationship with Chris. They asked her to move out. She moved in with Chris. The Pattersons did not see her again. Then Diana and Chris broke up. In July 2012, Diana moved in with her mother. RP 418-20, 426-27, 460, 517, 702-03.

Once Diana moved out of the Pattersons', she questioned what she had reported and experienced. Corrina and the Pattersons called her a traitor. They forbade her from talking with Corrina. RP 524-26. The Pattersons became Corrina's foster parents. RP 698. Thereafter Corrina was baptized. Tami Patterson didn't know if anyone consulted Corrina's parents about it. RP 711.

a. David, Count 1

David Gensitskiy testified the children in his family had very little freedom. His father was upset that he would work outside the family to make money, to support his own car[5] and have spending money. He expected David to work on the property for the entire family's benefit. RP 200-01.

David initially claimed he and his siblings were beaten at home with broomsticks, coat hangers, shoes, and hands. RP 213-14. He later described spankings becoming less frequent as he got older. He agreed all physical discipline stopped when the kids were 12-13. RP 237-38.

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[5] His parents gave him a Ford F-150 pickup truck for his 18th birthday in 2009. RP 258-62.

David testified to the one incident he had suddenly remembered at age 4 or 5 in the shower. He said his father fondled his penis and testes while himself having an erection. Nothing like that ever happened again. He never told anyone about it until 2010. RP 214-15, 220-21. Until Diana told him she was molested, this shower incident was "lost as in a repressed memory." Once Diana told him, David kept remembering more and more about the event. RP 264-66.

b. Diana, Counts 7-11

Diana recalled spankings in their home, occasionally with a belt, always on the butt, only if the children misbehaved or were dishonest. As the children got older, the spankings were replaced with sit-down talks. While she might have used the word "beaten" before, she believed "spanking" was more accurate. RP 418-22.

Diana testified that she had once believed her father had touched her inappropriately "down below." She thought she remembered waking up with a burning sensation when she was under age ten. It only happened once. Now she was not sure whether it was an accurate memory or not. RP 439-43.

Diana testified her father touched her breasts in a way that made her feel uncomfortable, but it was over her clothing and just a brushing past. It happened more than once. RP 441-42. She also recalled he would pull down her pants as a joke, walking behind her and tickling her. RP 443-45, 510. She recalled he walked into the bathroom once when she was showering, asked if she was in there, opened the shower door, but it was a joke. He did not touch her. There was never much privacy in a large family. RP 446-47.

The State questioned Diana about an earlier unsworn statement. Diana testified her father did not put his hands down her pants, although she told a detective he did. She did not recall whether her father pinched her bottom, although she had said he did. She denied he kissed her breasts and did not recall telling the detective he did. RP 448-50. She did not recall saying it happened as recently as summer 2010. RP 452-53.

Diana signed a Declaration prepared by Corrina's lawyer relating events very similar to what Corrina described; however, she testified she

and Corrina talked a lot and they adopted each other's information as their own. RP 467; Ex. 3.

Diana wrote in her initial statement that her father masturbated her. She testified, however, that he never put his hand on her privates. Once she reported it, David and Corrina said, "Me, too," they had been abused. Although Diana wrote a "report," Ex. 1, and signed the declaration, Ex. 3, she testified her written statements were not all truthful. Some of what she reported were not her experiences, but things David and Corrina said. RP 500-01, 511.

She found if she tried to correct what she had said, people called her a liar, a traitor. She had screaming matches with Chris about it. She came under pressure from all directions. Yet she testified that not everything she had reported was accurate. RP 502-05.

c. Robert, Count 12

On October 1, 2010, when asked if anything happened to him with his father, Robert said no. After staying with the Pattersons for a few days, where David told him what happened to him, Robert recalled a single incident when he was about 12.

He awoke in his bed to feel someone touching his testicles. He faced the wall and did not see who it was; but he concluded it was his father from the heavy breathing. Nothing like that ever happened to him again. RP 263, 321-26, 332-37, 348-50.

d. Vadim, Count 6

Vadim was born 11/20/97; he was 14 at the time of trial. Vadim testified that his father never did anything inappropriate to him. He made no report at the YWCA. After a few days in Diana's custody at the Pattersons, he realized his brothers and sisters were all saying bad things about his father. They all opposed their father and hinted he was a bad person. Vadim, then 12, got the idea that he should make up a story opposing his dad too. He and Robert talked to the detective again, twice in one day. Vadim figured Robert was talking bad about their dad, so he figured he would too. RP 401-02.

The prosecutor asked Vadim about his prior statements to the officer. Outside the presence of the jury and the witness, defense counsel asked that the prosecution clarify, while asking the witness about his prior statements, whether he was

agreeing he made the prior statements or agreeing what he'd said was true. RP 393-97. The State agreed it was only impeachment, saying it had to dismiss the charge involving Vadim, but it wanted to explore his credibility so as not to influence the other counts. RP 409-10.

Vadim told the detective once at age 10 or 11 he was sleeping in his father's bed, he woke for only a second, and felt something touch his penis. He testified this story was not true. RP 399-401, 406, 415-16.

Vadim testified that he had been influenced by people he lived with; but at the time of trial he had his own opinion regardless of where he lived. RP 413-14.

Contrary to its earlier assertion, the State did not dismiss Count 6. The court denied a defense motion to dismiss, nonetheless noting it was an extremely weak count. RP 822-32, 838-39, 1197-1200.

e. Corrina, Counts 2-5

Corrina testified her mother told her that her body belonged to her parents until she was married.

She said her father repeatedly put his hands down her pants and touched her breasts. RP 740-41.

Before she was 7, he would put her to bed, remove her pajamas, and rub the insides of the children's upper thighs on their skin. She did not remember if he touched her vagina. RP 742.

When she was 13 both parents told her to lift her shirt and bra so they could inspect how she was "developing." She claimed "they" often opened the door to the shower to look at her and sometimes touch her. RP 742-43, 779-80.

Corrina said her father would touch her butt after she was 10. She claimed he would put his hand over or under her clothes while he was driving to touch her vagina and butt. She said this behavior began when she was 11 or 12, and happened monthly, up to the day she left home. The last time it happened, he told her, "If you love me, you'll let me do this." She told him to stop, but he would still do it. RP 743-46.

She said he touched her breasts whenever she saw him, weekly from when she was 12 or 13. He pulled her shirt down and rubbed them, held them. He always unsnapped her bra. She would resist, but

he would overpower her. He would have her sit on his lap, then put his hands down her pants and touch her butt. Corrina claimed she saw him put his hands down Diana's pants, too. RP 745-51.

Corrina claimed she saw their father sexually abuse Jennifer, Zhanna, and Svetlana as well, at both houses. She once saw her mom and dad fondle Sam's penis and he cried. She was there in bed where it happened. RP 777; CP 145.[6]

Corrina never told an adult about what was happening. She testified she told one friend, Amy Quint, that her father improperly touched her. RP 751-52; CP 145. Ms. Quint, however, testified Corrina never said anything about sexual abuse. RP 1171-73. Corrina said much of the abuse occurred in the Vancouver adult family home, but none of the residents there ever saw it. RP 765.

Corrina recalled discipline included spanking and getting yelled at. RP 733-34. Yet she told the officer at the YWCA if she were sent back to her family, she would be physically harmed. She said she would be hit with 2x4s, ropes, switches,

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[6] The State did not file charges involving Sam, Svetlana, Zhanna, or Jennifer. CP 1-6, 13-18.

belts; she had lashes on her back once. She remained in foster care with the Pattersons. CP 145; RP 740.

The Pattersons took her traveling to California, Disneyland, Idaho, Arizona, and to Europe.[7] Her new life included jewelry and nail polish, which her parents didn't permit. RP 699-01, 793-95.

f. Other evidence

Dr. Daniel Reisberg, a memory expert, testified that false memories frequently are created by one person saying, "This happened to me, did it happen to you too?" Or, even more strongly, "I think this happened to you." False memories are reinforced by repeatedly thinking or telling them. Positive feedback from others, hearing "that happened to me, too," makes false memories stronger, clearer, more detailed, and completely inseparable from real memories. RP 959-65.

Svetlana Gensitskiy, age 25, testified her father never did anything of a sexual nature to her or a sibling. RP 1052-55. Corrina had a good

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[7] Corrina's two previous vacations, provided by the Buchners, had been to Disneyland when she was 4, and to Hawaii. RP 772-73.

relationship with their father. She would approach him when he worked on the computer, sit on his lap, and laugh and joke with him. Lana never saw her pull away from him. Unlike the older children, Corrina had much more freedom, did not get spanked, did what she wanted, and had fewer chores. RP 1057-58.

Zhanna Gensitskiy, age 21, was the family mediator. The other children often came to her with problems. If someone was being abused in the family, Zhanna would have known. No one ever reported touching problems to her. RP 1072-74, 1090.

The older sisters and Yelena agreed the younger children -- Corrina, Vadim and Sam -- rarely were spanked, Corrina only until age 5 or 6. The older children were helpful in guiding them, so they misbehaved less often. RP 1017-18, 1081.

None of the older girls experienced or witnessed Sergey put his hands under any daughter's clothes, snap their bras, pull down their pants, or otherwise be sexually inappropriate with them. RP 846-47, 1063-65, 1075-76, 1082-82.

Through the years, there were many times the children would fall asleep in their street clothes. Their parents would change them into their pajamas and get them into the right beds. Robert in particular had a bed-wetting problem until he was 15. Both parents would check his bed regularly, putting a hand under his covers to see if things were dry. RP 1019-23, 1055, 1112-18.

Sergey and Yelena specifically denied ever ordering Corrina to lift her shirt and bra for an "inspection" to see how she was developing. RP 1023-24. Yelena never told her children their bodies were not their own. RP 1033.

Sergey Gensitskiy did not recall ever spanking Corrina, not once. She was the youngest girl, and all her shenanigans seemed to go unpunished. He last spanked Diana when she was 10 or 11. He recalled a later incident with David, when he was maybe 16, rebellious and careless with expensive tools. RP 1109-11.

All the kids sat on his lap at different times, especially if he hadn't seen them in a few days. They would run to him, hug him, talk and laugh. Corrina sat on his lap, but he never put

her there. She would sit on his left knee while he did paperwork on the computer in the Vancouver house, to help him with grammar for official letters. RP 1112-14.

Sergey Gensitskiy testified he never abused or molested any of his children. He never put his hand down Corrina's pants or on her bottom. He never pulled his daughters' blouses down to look at their breasts. He never asked Corrina or Diana to let him look at their breasts. He never touched his children's genitals while putting them to bed. RP 1098-1100, 1111-19.

2. Procedural Facts

a. Amended Charges

On July 13, 2011, the State charged appellant Sergey Gensitskiy with 12 counts of child molestation and incest against five of his children. CP 1-6.[8] Count 2 charged child molestation 1° against Corrina alleged to have occurred 3/1/01-2/28/07. CP 7-12, 13-18, 37, 102.

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[8] The State filed an Amended Information August 30, 2011, correcting an apparent scrivener's error on the charging period of Count 2; it now read 3/1/01-2/28/07. CP 7-12.

The State rested its case on August 6, 2012. RP 821. As the defense moved to dismiss counts involving Diana, the State responded that it intended to amend the charges. RP 833-40.

The following day, the State presented a proposed Second Amended Information. It moved to amend Count 7 to charge child molestation 1° instead of 2°, and to expand all charging periods for Counts 7-11 to 7/16/94-10/1/10.[9] The defense objected, noting it was particularly prejudicial to expand the charging period by 16 years when the defense involved the State's witness's ability to remember; counsel did not cross-examine as he would have if the charges had involved that long a time period. RP 874-76.

After the defense cited State v. Pelkey, 109 Wn.2d 484 (1987), the State announced it would keep Count 7 as a charge of child molestation 2°, but still expand the charging period back to 1994, alleging Diana was less than 14 years of age. RP 1069-71. Defense counsel maintained his objection, again noting how the greatly expanded charging

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[9] Although this was counsel's oral representation, the charging period for Count 7 in fact ran 7/16/94-7/15/01. CP 15, 47, 103.

periods affected his ability to cross-examine. RP 1122-26. The State presented an altered version of its previous Second Amended Information to the court and counsel. RP 1165-67. After all parties had rested and after discussing instructions, the Court granted the State's motion to amend. RP 1242.

The Second Amended Information charged:

> **COUNT 07 - CHILD MOLESTATION IN THE SECOND DEGREE - 9A.44.083**
> That he, SERGEY V GENSITSKIY, in the County of Clark, State of Washington, between **July 16, 1994 and July 15, 2001**, on an occasion separate and distinct from that in Counts 8, 9, 10, and 11, did have sexual contact with D.S.G. (female), who was **less than fourteen years old** and not married to the defendant and the defendant was at least thirty-six months older than the victim; contrary to Revised Code of Washington **9A.44.083**.
> ...

CP 15-16 (emphases added). Diana was born July 16, 1989; the charging period ended before her twelfth birthday. RP 417-18. The jury instruction tracked this language. RP 1233, 1240; CP 47.

The Second Amended Information also changed the charge on Count 8 from child molestation 2° to incest 2°; and expanded the charging periods for Counts 8, 9, 10 and 11 to 7/16/94-7/15/10. For Count 8, this expanded the charging period by ten

years, from 7/16/97-7/15/03; for Counts 9-11, by sixteen years, from 6/1/10-9/30/10. Compare: CP 1-6, 7-12 and 13-18.

b. Limiting Instructions

In limine, the defense alerted the court to the distinction between impeachment under ER 613 and prior sworn statements permitted under ER 801(d)(1). He noted the need to give the jury limiting instructions, specifically regarding witnesses Diana and Vadim. RP 176-79.

Defense counsel raised this issue again during Vadim's direct examination and asked for a limiting instruction. The prosecutor agreed she was only impeaching the witness's credibility. She acknowledged there was no substantive evidence of the offense; she would have to dismiss the charge. The court acknowledged it was impeachment, but did not instruct the jury. RP 409-11.

Counsel renewed this effort for a timely instruction to distinguish between impeachment and substantive evidence after Diana's testimony. He proposed a written instruction. Again the court did not instruct the jury. RP 601-18.

After further impeachment, defense counsel consistently renewed his request for a limiting instruction. RP 714, 727-30, 1187-90. Ultimately, the court declined to give a mid-trial limiting instruction, but included one in final instructions to the jury. RP 1190; CP 28.

c. Privacy Act

In December, 2011, Diana called Randy to ask if Corrina could go for coffee. Rather than let Corrina go out, Randy invited Diana to their home. After the conversation, Randy's phone rang again. He found Diana had "butt-dialed" him. He overheard Diana talking with Yelena. RP 623-25.

Defense counsel objected, citing the privacy statute. The court said the statute was intended to limit law enforcement. It admitted the evidence. RP 625-29.

Randy heard Diana tell her mother she couldn't get Corrina out of the house, she didn't think the Pattersons trusted her anymore. He heard Yelena say they needed to get Corrina out of the house to "get her straightened out." RP 630, 1191-94.

d. Verdicts and Sentencing

The jury acquitted Mr. Gensitskiy of Counts 1 and 12, involving David and Robert. It found him guilty of Counts 2-5 (Corrina), Count 6 (Vadim), and Counts 7-11 (Diana), and found aggravating factors for each convicted count. CP 78-101.

The court entered judgment as follows:

2 Child Molestation 1° (Corrina)
3 Child Molestation 2° (Corrina)
4 Child Molestation 3° (Corrina)
5 Child Molestation 3° (Corrina)
6 Child Molestation 1° (Vadim)
7 Child Molestation 1° (Diana)[10]
8 Incest 2° (Diana)
9 Incest 2° (Diana)
10 Incest 2° (Diana)
11 Incest 2° (Diana)

CP 102-03. It found the defendant was subject to indeterminate sentencing under RCW 9.94A.507. For Counts 2, 6 and 7, it imposed a maximum sentence of life in prison, with an exceptional minimum term of 250 months per count. It imposed 116 months on Count 3, and 60 months each on the remaining counts. CP 103-06. It ordered no contact with Diana for life. CP 110.

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[10] First degree despite the charge and verdict of 2° for Count 7. CP 15-16, 93.

C. ARGUMENT

1. THE STATE MAY NOT AMEND THE CHARGES AFTER IT RESTS ITS CASE TO CHARGE A GREATER OR DIFFERENT CRIME.

> In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him ... .

Const., art. 1, § 22.

> A criminal charge may not be amended after the State has rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation against him or her. Such a violation **necessarily prejudices** this substantial constitutional right, within the meaning of CrR 2.1(e). The trial court committed reversible error in permitting this midtrial amendment.

State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987) (emphasis added). The State charged Ms. Pelkey with bribery; after resting its case, it amended the charge to trading in special influence. The Supreme Court reversed and dismissed.

In State v. Markle, 118 Wn.2d 424, 823 P.2d 1101 (1992), after resting the State amended the charges from two counts of statutory rape 1° and one count of indecent liberties to three counts of indecent liberties. The Supreme Court reversed the

convictions on the two amended counts, holding indecent liberties was not a lesser included offense of statutory rape.

In State v. Dallas, 126 Wn.2d 324, 892 P.2d 1082 (1995), the State charged possession of stolen property, but at the close of its case amended to theft. The Supreme Court reversed the conviction and dismissed the charge with prejudice. If two crimes are "related" but neither is a lesser included of the other, the mandatory joinder rule CrR 4.3.1(b)[11] requires the second charge to be brought in the original information or not at all.

a. The Amendment to Count 7 Requires Reversal.

The State's amendment of Count 7 violated the rule of Pelkey and Dallas. The State purported to keep the charge as child molestation 2°, applying that label and alleging that she was "less than fourteen years old;" but it amended the charging period to require an offense before Diana turned 12, which by definition would be child molestation 1°. It cited RCW 9A.44.083, the statute for child molestation 1°. Indeed, the court ultimately found

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[11] Quoted in Appendix B.

Mr. Gensitskiy was convicted of child molestation 1° and sentenced him for that crime. CP 103, 105.

Thus the State's post-resting amendment charged child molestation 1°, a different and greater crime than child molestation 2°, charged before trial. The elements are different: first degree requires the victim was "less than twelve years old," RCW 9A.44.083(1); second degree requires the victim was "at least twelve years old but less than fourteen years old," RCW 9A.44.086(1). And the penalty is greater: First degree is a class A felony with a maximum sentence of life in prison, RCW 9A.44.083(2); second degree is a class B felony with a maximum of ten years. RCW 9A.44.086(2).

Despite the title of the State's charge, the court found Mr. Gensitskiy guilty of child molestation 1°, a Class A felony subject to indeterminate sentencing. This offense was "related" to the original charge under CrR 4.3.1(b)(1), and not a lesser included. As in Dallas, supra, the conviction on Count 7 must be reversed and dismissed.

b. The Amendment to Count 8 Requires Reversal.

The State amended Count 8 from child molestation 2° to incest 2°. To be a lesser included offense, all of the elements of the lesser offense must be incorporated into the greater offense. Markle, 118 Wn.2d at 436.

Incest is a different crime, not a lesser included crime, of child molestation.

> **RCW 9A.64.020. Incest**
> (2)(a) A person is guilty of incest in the second degree if he or she engages in sexual contact with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

Incest requires a familial relationship, which child molestation does not. Child molestation requires specific ages and age differences, which incest does not. Compare: RCW 9A.64.020 with RCW 9A.44.083, .086, .089 (quoted in Appendix B).

It thus was reversible error to allow the State to amend its charge in Count 8 to incest 2°. As with Count 7, this count must be reversed and dismissed.

c. Amending the Charging Periods to Expand by Ten and Sixteen Years Requires Reversal of Counts 9, 10 and 11.

The State's amendments to Counts 9, 10 and 11 after resting its case expanded the charging periods from a span of four months within a year before the charge was filed (6/1/10-9/30/10), when the complaining witness was 20-21 years old; to a range of more than sixteen years (7/16/94-10/1/10), dating from when the witness was five years old. Defense counsel objected, noting his defense was based on the witness's memory; without charges going back to when she was a small child, he did not challenge on cross-examination the charges over those many years.

This case is thus very different from State v. DeBolt, 61 Wn. App. 58, 808 P.2d 794 (1991), in which the court permitted the State to amend its charging period for one count of indecent liberties from 3/1/88-3/30/88 to 12/26/87-4/13/88. This expansion of two and one-half months came after the

testimony of a 12-year-old child regarding events when she was 8 or 9.[12]

Counts 7-11 did not involve a child witness. Diana was 23 at the time of trial. The original charges dated from when she was 20-21.

This expansion of the charging periods vastly changed the charges being tried. It prejudiced the defense's substantial rights of confrontation and to present a defense regarding these many years and the witness's memory, and so was an abuse of discretion under CrR 2.1(d).[13]

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[12] Nor do the cases on which DeBolt relies begin to compare to the amendments here. State v. Brisebois, 39 Wn. App. 156, 692 P.2d 842 (1984), review denied, 103 Wn.2d 1023 (1985) (welfare fraud; amended 9/79-10/80 to 9/77-10/80); State v. Fischer, 40 Wn. App. 506, 699 P.2d 249, review denied, 104 Wn.2d 1004 (1985) (forgery erroneously charged 1/14/81 when affidavit of probable cause alleged 2/14/81; error not to permit amendment); State v. Allyn, 40 Wn. App. 27, 696 P.2d 45, review denied, 103 Wn.2d 1034 (1985) (possession of marijuana amended from 12/28/82 to 1/7/83; search of defendant's residence was 1/7/83, no possible prejudice).

[13] "**Amendment.** The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced."

2. THERE WAS INSUFFICIENT EVIDENCE AS A MATTER OF LAW TO SUPPORT COUNTS 2 AND 6.

Due process requires a conviction to be supported by sufficient evidence.

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, **any rational trier of fact** could have found the essential elements of the crime **beyond a reasonable doubt**.

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (Court's emphases), quoting Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); In re PRP of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011).

a. The Evidence was Insufficient to Support Count 6 Involving Vadim.

The sum and substance of the evidence for Count 6 is found in Vadim's testimony. RP 387-94, 398-408, 413-16. There was no other evidence of any offense against Vadim.

Vadim testified his father never did anything to him that he felt was inappropriate. RP 399. He acknowledged he told an officer of an incident once in his bed where he thought something touched his penis, but he testified that story was not true. RP 399-401. Vadim re-confirmed it was not true.

RP 406, 415. The State acknowledged it had no evidence and would have to dismiss. RP 409-10.

> It is elementary that impeaching evidence should affect only the credibility of the witness. It is incompetent to prove the substantive facts encompassed in such evidence.

State v. Fliehman, 35 Wn.2d 243, 245, 212 P.2d 794 (1949) (reversing negligent homicide conviction); State v. Sandros, 186 Wash. 438, 58 P.2d 362 (1936); State v. Johnson, 40 Wn. App. 371, 378-79, 699 P.2d 221 (1985); cf. State v. Nieto, 119 Wn. App. 157, 79 P.3d 473 (2003) (reversing rape of child conviction where complaining witness recanted her statement to police, inadmissible as substantive evidence; insufficient evidence to support conviction).

This case is similar to State v. Sua, 115 Wn. App. 29, 60 P.3d 1234 (2003). The State's witnesses for an indecent liberties charge wrote statements on a printed form alleging sexual contact. Neither statement was made under oath. At trial, they testified they lied in their statements. The prosecutor confronted them with their earlier statements, saying she was doing so solely for purposes of impeachment. The defense

requested a limiting instruction, the State did not oppose it, and the court instructed the jury **as the prior statements were presented** that they only went to credibility. Sua, 115 Wn. App. at 31-36.

The defense moved to dismiss, arguing the only evidence that a crime occurred was for impeachment purposes, there was no substantive evidence. "And just as the jury can't use it, the Court can't use it, either." Id., at 36.

The Sua trial court reserved ruling. The next day, "the State argued--in stark contrast to the position it had taken earlier" that the written statements were admissible as substantive evidence. Id. The court agreed. It denied motions for mistrial.

On appeal, Judge Morgan did his thorough detailed analysis of ER 801(d)(1) and its history. This Court held it was error to admit the written statements as substantive evidence. It reversed the conviction.

Unlike Sua, here the trial court did not admit Vadim's prior statements as substantive evidence. Like Sua, however, the State initially argued it was merely impeaching Vadim; it admitted it did not

have substantive evidence and would have to dismiss the charge. Also like Sua, the State later argued Vadim's testimony about his prior statements was sufficient to take the charge to the jury.

The trial court erred in refusing the motion to dismiss. This Court must reverse and dismiss Count 6. Green, supra; In re PRP of Heidari, 174 Wn.2d 288, 274 P.3d 366 (2012).

b. The Evidence Was Insufficient to Support Count 2 Involving Corrina.

Child molestation in the first degree requires proof of the following elements beyond a reasonable doubt:

> (1) A person is guilty of child molestation in the first degree when the person has ... sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083.

> "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2). "Sexual contact" thus requires two separate aspects: (1) touching of the sexual or other intimate parts; and (2) touching done for the purpose of gratifying sexual desire. There

must be evidence of both aspects beyond a reasonable doubt to prove "sexual contact."

i. Sexual or other intimate parts

In State v. R.P., 122 Wn.2d 735, 862 P.2d 127 (1993), the defendant was convicted of indecent liberties for picking up a girl, hugging her, holding her against her will, and placing a "hickey" or "passion mark" on her neck area with his lips. The Supreme Court reversed and dismissed that conviction for insufficient evidence of sexual contact. The indecent liberties statute required the same statutory definition of "sexual contact" as RCW 9A.44.010(2). State v. R.P., 67 Wn. App. 663, 666-67, 838 P.2d 701 (1992), reversed, 122 Wn.2d 735, 737, 862 P.2d 127 (1993). The dissent clarified that the aspect the majority found lacking was touching of the "sexual or other intimate parts." Id., 122 Wn.2d at 736-37 (Andersen, J., dissenting).

ii. Purpose of gratifying sexual desire

In State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992), the defendant was a close family friend known as "Uncle Harry." He was convicted of child

molestation in the first degree for hugging W.D., a fourth grader, around the chest as she sat on his lap; and for placing his hand under her skirt on the front and bottom of her underpanties while assisting her off his lap. On another occasion, while alone together in a truck, Uncle Harry touched both the child's thighs.

> Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. ... However, in those cases in which the evidence shows touching through clothing, **or touching of intimate parts of the body other than the primary erogenous areas,** the courts have required some additional evidence of sexual gratification.

Powell, 62 Wn. App. at 917 (citations omitted, emphasis added), quoted with approval in State v. Whisenhut, 96 Wn. App. 18, 23, 980 P.2d 232 (1999). The Powell court continued with an excellent contrast of cases in which there was sufficient evidence of sexual gratification:

> E.g., State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990) ("The defendant then rubbed the zipper area of the boy's pants for 5 to 10 minutes."); State v. Johnson, 96 Wn.2d 926, 639 P.2d 1332 (1982) (evidence an unrelated male with no caretaking function wiped a 5-year-old girl's genitals with a wash cloth might be insufficient to prove he acted for purposes of sexual gratification had that

> act not been followed by his having her perform fellatio on him); State v. Wilson, [56 Wn. App. 63, 68, 782 P.2d 224 (1989), review denied, 114 Wn.2d 1010 (1990)] (both incidents occurred where they would not be easily observed, and defendant was only partially clothed; victim of second incident was disrobed); State v. Brown, 55 Wn. App. 738, 780 P.2d 880 (1989) (multiple incidents including one in which defendant had victim operate a "penis enlarger"), review denied, 114 Wn.2d 1014 (1990); State v. Brooks, 45 Wn. App. 824, 727 P.2d 988 (1986) (whitish liquid found on infant's face, chest, and stomach; stain on infant's rubber booties identified as semen); In re Adams, 24 Wn. App. 517, 601 P.2d 995 (1979) (defendant removed victim's pants and was on top of her when discovered).

Powell, 62 Wn. App. at 917. See also: Whisenhut, 96 Wn. App. at 23-24 (an unrelated 15-year-old on three separate occasions reached behind his seat in the school bus and touched a 5-year-old girl's "genital area, a primary erogenous zone, under her skirt but over her body suit," the touching "was not open to innocent explanation").

Finding the evidence open to innocent explanation, the Court of Appeals reversed Mr. Powell's conviction. It held there was insufficient evidence of a purpose of sexual gratification. Powell, 62 Wn. App. at 918.

iii. Less than twelve years old

The evidence had to prove sexual contact occurred when Corrina was less than 12. Her age is an essential element of the crime. RCW 9A.44.083.

The only contact Corrina was certain occurred when she was "less than twelve years old" was her father touching her inner thighs in bed. As shown above, this contact was insufficient to be "sexual."

Her other allegations occurred "after she was ten," or when she was "eleven or twelve." While these actions "could" have occurred while she was less than twelve, the evidence did not establish they did.

> The due process clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. ... "[C]ould" is not the relevant standard. Proof beyond a reasonable doubt is the standard, and ... this welter of conflicting evidence does not amount to proof beyond a reasonable doubt.

State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Without proof beyond a reasonable doubt of all three of these elements, this Court must reverse and dismiss Count 2.

4. THE STATE FAILED TO CHARGE A CRIME IN COUNT 7.

The United States and Washington Constitutions require that all "essential elements" of a crime be pleaded in the information. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995); U.S. Const., amends. 6, 14; Const., art. I, § 22.

> The rationale underlying this rule is that a defendant must be apprised of the charges against him or her and allowed to prepare a defense. "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged."

State v. Johnson, 172 Wn. App. 112, 136, 297 P.3d 710 (2012).

When challenged for the first time on appeal, this Court construes the charging document liberally. It will find it sufficient "if the necessary elements appear in any form, or by fair construction may be found, on the face of the document." State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). But

> if the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it.

State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998). The court employs a two-part test:

> (1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so, (2) can the defendant show he or she was actually prejudiced by the inartful language.

McCarty, 140 Wn.2d at 425. "If the necessary elements are not found or fairly implied, however, we presume prejudice and reverse without reaching the questions of prejudice." Id.

The State claimed to be charging child molestation in the second degree. Yet it failed to include the essential statutory element that the victim was "at least twelve years old." RCW 9A.44.086(1). There is no conceivable form or fair construction by which this element can be found in Count 7. The charging period, in fact, ended before Diana's twelfth birthday.

The language of Count 7 was constitutionally deficient to charge a crime. That count must be dismissed.

5. THE COURT ABUSED ITS DISCRETION BY FAILING TO GIVE A LIMITING INSTRUCTION WHEN IT ADMITTED IMPEACHMENT EVIDENCE.

> **When evidence** which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose **is admitted, the court, upon request, shall** restrict the evidence to its proper scope and **instruct the jury** accordingly.

ER 105 (emphases added). When the court admitted the impeachment evidence, defense requested a limiting instruction; yet the court failed to give it.

"The rule is mandatory." State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990). Thus failure to give the instruction on request is an abuse of discretion.

This case was complex with twelve separate counts charged. The trial spanned nine days. During Diana's testimony alone, the jury heard both sworn statements under ER 801(d)(1), and unsworn prior inconsistent statements under ER 613. For proper consideration of this evidence, it was crucial the jury understand the difference as it heard the evidence. Getting an instruction many days later made it impossible for the jury to distinguish which inconsistent statements were substantive evidence and which merely went to credibility.

The prejudice is perhaps best seen by the verdict on Count 6: Although there was no substantive evidence that Vadim was molested, the

jury concluded it was proven beyond a reasonable doubt.

The trial court abused its discretion by failing to give a limiting instruction at the time of the impeachment testimony.

6. THE COURT ERRED BY ADMITTING EVIDENCE OF A PRIVATE CONVERSATION IN VIOLATION OF THE PRIVACY ACT.

RCW 9.73.030[14] prohibits "any individual" from intercepting a private communication transmitted by phone or other device designed to transmit.

> **RCW 9.73.050. Admissibility of intercepted communication in evidence**
> Any information obtained in violation of RCW 9.73.030 ... shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state ... .

Thus in State v. Christensen, 153 Wn.2d 186, 102 P.3d 789 (2004), the Supreme Court reversed a conviction when a witness testified she overheard the defendant's phone conversation with her daughter. The two people did not intend for the girl's mother to be listening to their conversation on the phone's base unit.

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[14] Quoted in full in Appendix B.

Similarly here, the conversation Diana and Yelena had was not intended for others' ears. Mr. Patterson listened to it on his telephone from Diana's telephone, both devices designed to transmit.

The statute's prohibition is mandatory. The evidence cannot be admitted even for impeachment. State v. Henderson, 16 Wn. App. 526, 557 P.2d 346 (1976).

The State used this evidence to impeach Diana and Yelena. Diana's testimony questioned whether Corrina's memories were accurate or influenced or created by others. The defense theory was that false memories are reinforced by repetition and supportive statements and people. Admitting this evidence undercut much of the defense theory and credibility, not merely as to counts involving Diana, but as to all the charges in the case. For this reason, this Court should reverse all counts and remand for a new trial.

7. THE SENTENCE IMPOSED ON COUNTS 2 AND 7 VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS.

A law that makes the punishment for a crime more burdensome after its commission is an ex post facto law.[15]

> A new law violates the prohibition against ex post facto laws if: (1) it aggravates a crime or makes it greater than it was when committed; (2) permits imposition of a different or more severe punishment than when the crime was committed; (3) changes the legal rules to permit less or different testimony to convict the offender than was required when the crime was committed; or (4) it is made retroactive and disadvantages the offender.

State v. Handran, 113 Wn.2d 11, 14, 775 P.2d 443 (1989). Enforcement of an ex post facto law is a violation of due process.[16] Bouie v. City of Columbia, 378 U.S. 347, 353-54, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964).

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[15] U.S. Const., art. I, § 10; Const., art. I, § 23; Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798); Collins v. Youngblood, 497 U.S. 37, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990); Weaver v. Graham, 450 U.S. 24, 29, 101 S. Ct. 960, 964, 67 L. Ed. 2d 17 (1981); Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925).

[16] U.S. Const., Amends. 5, 14; Const., art. 1, § 3; Handran, supra; State v. Gore, 101 Wn.2d 481, 489, 681 P.2d 227 (1984); United States v. Goodheim, 651 F.2d 1294 (9th Cir. 1981); United States v. Potts, 528 F.2d 883 (9th Cir. 1975).

The court imposed a sentence for Counts 2 and 7 under RCW 9.94A.507,[17] which provides for an indeterminate sentence on conviction of child molestation in the first degree. The statute places an offender under the jurisdiction of the Indeterminate Sentence Review Board (ISRB) for any period of time the Board may release him before the expiration of his maximum term. RCW 9.94A.507.

RCW 9.94A.507 was enacted by Laws 2001 2nd sp.s. c 12 §§ 301-363. Its effective date was September 1, 2001.

Prior to this statute, the law required a determinate sentence within the standard range or as an exceptional sentence. Former RCW 9.94A.120(1), (2).[18] After the 2001 amendment, this offense requires an indeterminate sentence of life, with a minimum term. RCW 9.94A.507.

The charging periods for Counts 2 and 7 predate the effective date of RCW 9.94A.507. While Count 2 straddles the effective date, the jury's

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[17] The statute is quoted in Appendix B.

[18] The complete text of this former statute is contained in Appendix C.

verdict may have been based on an act occurring before then.

In State v. Gurrola, 69 Wn. App. 152, 848 P.2d 199, review denied, 121 Wn.2d 1032 (1993), the defendant was convicted of rape of a child 1°, alleged to have occurred before April, 1990. The court imposed a sentence based on post-1990 amendments of the Sentencing Reform Act. This Court reversed, concluding retroactive application of the amendments were ex post facto laws.

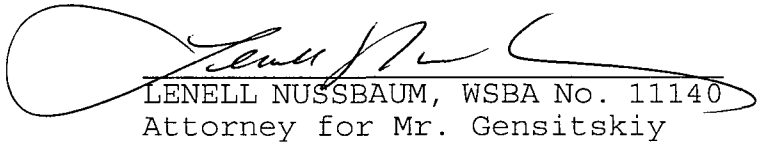
If Count 2 or 7 had sufficient evidence, this Court must vacate the indeterminate sentence and remand for a determinate sentence.

D. CONCLUSION

This Court should reverse the convictions, and dismiss Counts 2, 6, and 7-11.

DATED this 6th day of June, 2013.

Respectfully submitted,



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## APPENDICES

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# Appendix A

**INSTRUCTION NO. 26**

To convict the defendant of the crime of child molestation in the second degree, as charged in count 7, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between July 16, 1994 and July 15, 2001, on an occasion separate and distinct from that charged in Counts 8, 9, 10 and 11, the defendant had sexual contact with D.S.G. (female);

(2) That D.S.G. (female) was less than fourteen years old at the time of the sexual contact and was not married to the defendant;

(3) That D.S.G. (female) was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

# Appendix B

**APPENDIX B**

UNITED STATES CONSTITUTIONAL PROVISIONS

> "No State shall ... pass any ... ex post facto Law ... ."

United States Constitution, art. 1, § 10.

> "No person shall be ... deprived of life, liberty, or property, without due process of law; ... ."

United States Constitution, Amendment 5.

> 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.

United States Constitution, Amendment 6.

> "... [N]or shall any state deprive any person of life, liberty, or property, without due process of law; ..."

United States Constitution, Amendment 14, § 1.

WASHINGTON CONSTITUTIONAL PROVISIONS

Personal Rights. No person shall be deprived of life, liberty, or property, without due process of law.

Constitution, art. I, § 3.

**Rights of Accused Persons.** In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases ... ; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Constitution, art. I, § 22.

**Bill of Attainder, Ex Post Facto Law, Etc.** No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

Constitution, art. 1, § 23

(1) Sections 301 through 363 of this act shall not affect the validity of any sentence imposed under any other law for any offense committed before, on, or after September 1, 2001.

(2) Sections 301 through 363 of this act shall apply to offenses committed on or after September 1, 2001.

Laws 2001 2nd sp.s. c 12 § 503.

**RCW 9.73.030. Intercepting, recording, or divulging private communication--Consent required--Exceptions**

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual ... to intercept, or record any:

(a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication;

(b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

**RCW 9.94A.507. Sentencing of sex offenders**

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a

child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; ...

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c)(i) Except as provided in (c)(ii) of this subsection [if there is a prior conviction of a sex offense], the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535 [exceptional sentences], if the offender is otherwise eligible for such a sentence.

...

**RCW 9A.44.083. Child molestation in the first degree**

(1) A person is guilty of child molestation in the first degree when the person has ... sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the first degree is a class A felony.

**RCW 9A.44.086. Child molestation in the second degree**

(1) A person is guilty of child molestation in the second degree when the person has ... sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

(2) Child molestation in the second degree is a class B felony.

**RCW 9A.44.089. Child molestation in the third degree**

(1) A person is guilty of child molestation in the third degree when the person has ... sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Child molestation in the third degree is a class C felony.

**RCW 9A.64.020. Incest**

(2)(a) A person is guilty of incest in the second degree if he or she engages in sexual contact with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

(b) Incest in the second degree is a class C felony.

(3) As used in this second:

(a) "Descendant" includes stepchildren and adopted children under eighteen years of age;

(b) "Sexual contact" has the same meaning as in RCW 9A.44.010; and

(c) "Sexual intercourse" has the same meaning as in RCW 9A.44.010.

**2.1 THE INDICTMENT AND THE INFORMATION**

...

**(d) Amendment.** The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

**4.3.1 CONSOLIDATION FOR TRIAL**

...

**(b) Failure to Join Related Offenses.**

(1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

...

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

**RULE 613. PRIOR STATEMENTS OF WITNESSES**

**(a) Examining Witness Concerning Prior Statement.** In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

**(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party--opponent as defined in rule 801(d)(2).

**RULE 801. DEFINITIONS**

The following definitions apply under this article:

...

**(d) Statements Which Are Not Hearsay.** A statement is not hearsay if--

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; ... .

# Appendix C

TITLE 9. CRIMES AND PUNISHMENTS
CHAPTER 9.94A. SENTENCING REFORM ACT OF 1981

Rev. Code Wash. (ARCW) § **9.94A.120** (2000)

§ **9.94A.120.** Sentences (as amended by 2000 c 43 and c 226)

When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (4), (5), (6), and (8) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

(4) A persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death, notwithstanding the maximum sentence under any other law. An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years. An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section. In addition, all offenders subject to the provisions of this subsection shall not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release as defined under RCW 9.94A.150 (1), (2), (3), (6), (8), or (9), or any other form of authorized leave of absence from the correctional facility while not in the direct custody of a corrections officer or officers during such minimum terms of total confinement except: (a) In the case of an offender in need of emergency medical treatment; (b) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree; or (c) for an extraordinary medical placement when authorized under RCW 9.94A.150(4).

(5) (a) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include a term of community supervision or community custody as specified in (b) of this subsection, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

(i) Devote time to a specific employment or occupation;

(ii) Undergo available outpatient treatment for up to the period specified in (b) of this subsection, or inpatient treatment not to exceed the standard range of confinement for that offense;

(iii) Pursue a prescribed, secular course of study or vocational training;

(iv) Remain within prescribed geographical boundaries and notify the community corrections officer prior to any change in the offender's address or employment;

(v) Report as directed to a community corrections officer; or

(vi) Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030 and/or perform community service work.

(b) The terms and statuses applicable to sentences under (a) of this subsection are:

(i) For sentences imposed on or after July 25, 1999, for crimes committed before July 1, 2000, up to one year of community supervision. If treatment is ordered, the period of community supervision may include up to the period of treatment, but shall not exceed two years; and

(ii) For crimes committed on or after July 1, 2000, up to one year of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed two years. Any term of community custody imposed under this subsection (5) is subject to conditions and sanctions as authorized in this subsection (5) and in subsection (11)(b) and (c) of this section.

(c) The department shall discharge from community supervision any offender sentenced under this subsection (5) before July 25, 1999, who has served at least one year of community supervision and has completed any treatment ordered by the court.

(6) (a) An offender is eligible for the special drug offender sentencing alternative if:

(i) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.310 (3) or (4);

(ii) The offender has no current or prior convictions for a sex offense or violent offense in this state, another state, or the United States;

(iii) For a violation of the uniform controlled substances act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance; and

(iv) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence.

(b) If the standard range is greater than one year and the sentencing judge determines that the offender is eligible for this option and that the offender and the community will benefit from the use of the special drug offender sentencing alternative, the judge may waive imposition of a sentence within the standard range and impose a sentence that must include a period of total confinement in a state facility for one-half of the midpoint of the standard range. During incarceration in the state facility, offenders sentenced under this subsection shall undergo a comprehensive substance abuse assessment and receive, within available resources, treatment services appropriate for the offender. The treatment services shall be designed by the division of alcohol and substance abuse of the department of social and health services, in cooperation with the department of corrections.

The court shall also impose:

(i) The remainder of the midpoint of the standard range as a term of community custody which must include appropriate substance abuse treatment in a program that has been approved by the division of alcohol and substance abuse of the department of social and health services;

(ii) Crime-related prohibitions including a condition not to use illegal controlled substances;

(iii) A requirement to submit to urinalysis or other testing to monitor that status; and

(iv) A term of community custody pursuant to subsection (11) of this section to be imposed upon failure to complete or administrative termination from the special drug offender sentencing alternative program.

The court may prohibit the offender from using alcohol or controlled substances and may require that the monitoring for controlled substances be conducted by the department or by a treatment alternatives to street crime program or a comparable court or agency-referred program. The offender may be required to pay thirty dollars per month while on community custody to offset the cost of monitoring. In addition, the court shall impose three or more of the following conditions:

(A) Devote time to a specific employment or training;

(B) Remain within prescribed geographical boundaries and notify the court or the community corrections officer before any change in the offender's address or employment;

(C) Report as directed to a community corrections officer;

(D) Pay all court-ordered legal financial obligations;

(E) Perform community service work;

(F) Stay out of areas designated by the sentencing judge;

(G) Such other conditions as the court may require such as affirmative conditions.

(c) If the offender violates any of the sentence conditions in (b) of this subsection or is found by the United States attorney general to be subject to a deportation order, a violation hearing shall be held by the department unless waived by the offender.

(i) If the department finds that conditions have been willfully violated, the offender may be reclassified to serve the remaining balance of the original sentence.

(ii) If the department finds that the offender is subject to a valid deportation order, the department may administratively terminate the offender from the program and reclassify the offender to serve the remaining balance of the original sentence.

(d) The department shall determine the rules for calculating the value of a day fine based on the offender's income and reasonable obligations which the offender has for the support of the offender and any dependents. These rules shall be developed in consultation with the administrator for the courts, the office of financial management, and the commission.

(e) An offender who fails to complete the special drug offender sentencing alternative program or who is administratively terminated from the program shall be reclassified to serve the unexpired term of his or her sentence as ordered by the sentencing judge and shall be subject to all rules relating to community custody and earned early release time. An offender who violates any conditions of supervision as defined by the department shall be sanctioned. Sanctions may include, but are not limited to, reclassifying the offender to serve the unexpired term of his or her sentence as ordered by the sentencing judge. If an offender is reclassified to serve the unexpired term of his or her sentence, the offender shall be subject to all rules relating to earned early release time.

(7) If a sentence range has not been established for the defendant's crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community service work; until July 1, 2000, a term of community supervision not to exceed one year and on and after July 1, 2000, a term of community custody not to exceed one year, subject to conditions and sanctions as authorized in subsection (11)(b) and (c) of this section; and/or other legal financial obligations. The court may impose a sentence which provides more than one year of confinement if the court finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(8) (a) (i) When an offender is convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense and has no prior convictions for a sex offense or any other felony sex offenses in this or any other state, the sentencing court, on its own motion or the motion of the state or the defendant, may order an examination to determine whether the defendant is amenable to treatment.

The report of the examination shall include at a minimum the following: The defendant's version of the facts and the official version of the facts, the defendant's offense history, an assessment of problems in addition to alleged deviant behaviors, the offender's social and employment situation, and other evaluation measures used. The report shall set forth the sources of the evaluator's information.

The examiner shall assess and report regarding the defendant's amenability to treatment and relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum:

(A) Frequency and type of contact between offender and therapist;

(B) Specific issues to be addressed in the treatment and description of planned treatment modalities;

(C) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;

(D) Anticipated length of treatment; and

(E) Recommended crime-related prohibitions.

The court on its own motion may order, or on a motion by the state shall order, a second examination regarding the offender's amenability to treatment. The evaluator shall be selected by the party making the motion. The defendant shall pay the cost of any second examination ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost.

(ii) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this special sex offender sentencing alternative and consider the victim's opinion whether the offender should receive a treatment disposition under this subsection. If the court determines that this special sex offender

sentencing alternative is appropriate, the court shall then impose a sentence within the sentence range. If this sentence is less than eleven years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension:

(A) The court shall place the defendant on community custody for the length of the suspended sentence or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department of corrections under subsection (15) of this section;

(B) The court shall order treatment for any period up to three years in duration. The court in its discretion shall order outpatient sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court, and shall not change providers without court approval after a hearing if the prosecutor or community corrections officer object to the change. In addition, as conditions of the suspended sentence, the court may impose other sentence conditions including up to six months of confinement, not to exceed the sentence range of confinement for that offense, crime-related prohibitions, and requirements that the offender perform any one or more of the following:

(I) Devote time to a specific employment or occupation;

(II) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(III) Report as directed to the court and a community corrections officer;

(IV) Pay all *court-ordered legal financial obligations as provided in RCW 9.94A.030, perform community service work, or any combination thereof; or

(V) Make recoupment to the victim for the cost of any counseling required as a result of the offender's crime; and

(C) Sex offenders sentenced under this special sex offender sentencing alternative are not eligible to accrue any earned release time while serving a suspended sentence.

(iii) The sex offender therapist shall submit quarterly reports on the defendant's progress in treatment to the court and the parties. The report shall reference the treatment plan and include at a minimum the following: Dates of attendance, defendant's compliance with requirements, treatment activities, the defendant's relative progress in treatment, and any other material as specified by the court at sentencing.

(iv) At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment. Prior to the treatment termination hearing, the treatment professional and community corrections officer shall submit written reports to the court and parties regarding the defendant's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community supervision conditions. Either party may request and the court may order another evaluation regarding the advisability of termination from treatment. The defendant shall pay the cost of any additional evaluation ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost. At the treatment termination hearing the court may: (A) Modify conditions of community custody, and either (B) terminate treatment, or (C) extend treatment for up to the remaining period of community custody.

(v) If a violation of conditions occurs during community custody, the department shall either impose sanctions as provided for in RCW 9.94A.205(2)(a) or refer the violation to the court and recommend revocation of the suspended sentence as provided for in (a)(vi) of this subsection.

(vi) The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (A) The defendant violates the conditions of the suspended sentence, or (B) the court finds that the defendant is failing to make satisfactory progress in treatment. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.

(vii) Except as provided in (a)(viii) of this subsection, after July 1, 1991, examinations and treatment ordered pursuant to this subsection shall only be conducted by sex offender treatment providers certified by the department of health pursuant to chapter 18.155 RCW.

(viii) A sex offender therapist who examines or treats a sex offender pursuant to this subsection (8) does not have to be certified by the department of health pursuant to chapter 18.155 RCW if the court finds that: (A) The offender has already moved to another state or plans to move to another state for reasons other than

circumventing the certification requirements; (B) no certified providers are available for treatment within a reasonable geographical distance of the offender's home; and (C) the evaluation and treatment plan comply with this subsection (8) and the rules adopted by the department of health.

(ix) For purposes of this subsection (8), "victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. "Victim" also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

(x) If the defendant was less than eighteen years of age when the charge was filed, the state shall pay for the cost of initial evaluation and treatment.

(b) When an offender commits any felony sex offense on or after July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, request the department of corrections to evaluate whether the offender is amenable to treatment and the department may place the offender in a treatment program within a correctional facility operated by the department.

Except for an offender who has been convicted of a violation of RCW 9A.44.040 or 9A.44.050, if the offender completes the treatment program before the expiration of his or her term of confinement, the department of corrections may request the court to convert the balance of confinement to community supervision and to place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

(i) Devote time to a specific employment or occupation;

(ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(iii) Report as directed to the court and a community corrections officer;

(iv) Undergo available outpatient treatment.

If the offender violates any of the terms of his or her community supervision, the court may order the offender to serve out the balance of his or her community supervision term in confinement in the custody of the department of corrections.

Nothing in this subsection (8)(b) shall confer eligibility for such programs for offenders convicted and sentenced for a sex offense committed prior to July 1, 1987. This subsection (8)(b) does not apply to any crime committed after July 1, 1990.

(c) Offenders convicted and sentenced for a sex offense committed prior to July 1, 1987, may, subject to available funds, request an evaluation by the department of corrections to determine whether they are amenable to treatment. If the offender is determined to be amenable to treatment, the offender may request placement in a treatment program within a correctional facility operated by the department. Placement in such treatment program is subject to available funds.

(d) Within the funds available for this purpose, the department shall develop and monitor transition and relapse prevention strategies, including risk assessment and release plans, to reduce risk to the community after sex offenders' terms of confinement in the custody of the department.

(9) (a) (i) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, assault of a child in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW not sentenced under subsection (6) of this section, committed on or after July 1, 1988, but before July 25, 1999, the court shall in addition to the other terms of the sentence, sentence the offender to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.150 (1) and (2). When the court sentences an offender under this subsection to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of such community custody to which the offender may become eligible, in accordance with RCW 9.94A.150 (1) and (2). Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(ii) Except for persons sentenced under (b) of this subsection or subsection (10)(a) of this section, when a court sentences a person to a term of total confinement to the custody of the department of corrections for a

violent offense, any crime against a person under RCW 9.94A.440(2), or any felony offense under chapter 69.50 or 69.52 RCW not sentenced under subsection (6) of this section, committed on or after July 25, 1999, but before July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.150 (1) and (2). When the court sentences the offender under this subsection (9)(a)(ii) to the statutory maximum period of confinement, then the community placement portion of the sentence shall consist entirely of such community custody to which the offender may become eligible, in accordance with RCW 9.94A.150 (1) and (2). Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(b) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, or a serious violent offense, vehicular homicide, or vehicular assault, committed on or after July 1, 1990, but before July 1, 2000, the court shall in addition to other terms of the sentence, sentence the offender to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer. The community placement shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.150 (1) and (2). When the court sentences an offender under this subsection to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible, in accordance with RCW 9.94A.150 (1) and (2). Any period of community custody actually served shall be credited against the community placement portion of the sentence. Unless a condition is waived by the court, the terms of community placement for offenders sentenced pursuant to this section shall include the following conditions:

(i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(ii) The offender shall work at department of corrections-approved education, employment, and/r community service;

(iii) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(iv) The offender shall pay supervision fees as determined by the department of corrections;

(v) The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement; and

(vi) The offender shall submit to affirmative acts necessary to monitor compliance with the orders of the court as required by the department.

(c) As a part of any sentence imposed under (a) or (b) of this subsection, the court may also order any of the following special conditions:

(i) The offender shall remain within, or outside of, a specified geographical boundary;

(ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(iii) The offender shall participate in crime-related treatment or counseling services;

(iv) The offender shall not consume alcohol;

(v) The offender shall comply with any crime-related prohibitions; or

(vi) For an offender convicted of a felony sex offense against a minor victim after June 6, 1996, the offender shall comply with any terms and conditions of community placement imposed by the department of corrections relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(d) Prior to transfer to, or during, community placement, any conditions of community placement may be removed or modified so as not to be more restrictive by the sentencing court, upon recommendation of the department of corrections.

(10) (a) When a court sentences a person to the custody of the department of corrections for an offense categorized as a sex offense committed on or after June 6, 1996, but before July 1, 2000, the court shall, in

addition to other terms of the sentence, sentence the offender to community custody for three years or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer. The community custody shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.150 (1) and (2).

(b) Unless a condition is waived by the court, the terms of community custody shall be the same as those provided for in subsection (9)(b) of this section and may include those provided for in subsection (9)(c) of this section. As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department of corrections under subsection (15) of this section.

(c) At any time prior to the completion of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.195 and may be punishable as contempt of court as provided for in RCW 7.21.040.

(11) (a) When a court sentences a person to the custody of the department of corrections for a sex offense, a violent offense, any crime against a person under RCW 9.94A.440(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer. The community custody shall begin: (i) Upon completion of the term of confinement; (ii) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.150 (1) and (2); or (iii) with regard to offenders sentenced under subsection (6) of this section, upon failure to complete or administrative termination from the special drug offender sentencing alternative program.

(b) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in subsection (9)(b)(i) through (vi) of this section. The conditions may also include those provided for in subsection (9)(c)(i) through (vi) of this section. The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to (f) of this subsection. As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department of corrections under subsection (15) of this section. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(c) If an offender violates conditions imposed by the court or the department pursuant to this subsection during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.205 and 9.94A.207.

(d) Except for terms of community custody under subsection (8) of this section, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(e) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.195 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(f) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection (11)(f).

(g) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (i) The crime of conviction; (ii) the offender's risk of reoffending; or (iii) the safety of the community.

(12) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail administrators may schedule court-ordered intermittent sentences as space permits.

(13) (a) If a sentence imposed includes payment of a legal financial obligation, the sentence shall specify the total amount of the legal financial obligation owed, and shall require the offender to pay a specified monthly sum toward that legal financial obligation. Restitution to victims shall be paid prior to any other payments of monetary obligations. Any legal financial obligation that is imposed by the court may be collected by the department, which shall deliver the amount paid to the county clerk for credit.

(b) For an offense committed prior to July 1, 2000, the offender's compliance with payment of legal financial obligations shall be supervised by the department for ten years following the entry of the judgment and sentence or ten years following the offender's release from total confinement, whichever period ends later. All monetary payments ordered shall be paid no later than ten years after the last date of release from confinement pursuant to a felony conviction or the date the sentence was entered unless the superior court extends the criminal judgment an additional ten years. If the legal financial obligations including crime victims' assessments are not paid during the initial ten-year period, the superior court may extend jurisdiction under the criminal judgment an additional ten years as provided in RCW 9.94A.140, 9.94A.142, and 9.94A.145. If jurisdiction under the criminal judgment is extended, the department is not responsible for supervision of the offender during the subsequent period.

(c) For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The department of corrections shall supervise the offender's compliance with payment of the legal financial obligations for ten years following the entry of the judgment and sentence or ten years following the offender's release from total confinement, whichever period ends later. The department is not responsible for supervision of the offender during any subsequent period of time the offender remains under the court's jurisdiction.

(d) Independent of the department, the party or entity to whom the legal financial obligation is owed shall have the authority to utilize any other remedies available to the party or entity to collect the legal financial obligation. Nothing in this section makes the department, the state, or any of its employees, agents, or other persons acting on their behalf liable under any circumstances for the payment of these legal financial obligations. If an order includes restitution as one of the monetary assessments, the county clerk shall make disbursements to victims named in the order.

(14) Except as provided under **RCW 9.94A.140(1) and 9.94A.142(1), a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

(15) All offenders sentenced to terms involving community supervision, community service, community placement, community custody, or legal financial obligation shall be under the supervision of the department of corrections and shall follow explicitly the instructions and conditions of the department of corrections. The department may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed.

(a) The instructions shall include, at a minimum, reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision fee assessment.

(b) For offenders sentenced to terms involving community custody for crimes committed on or after June 6, 1996, the department may include, in addition to the instructions in (a) of this subsection, any appropriate conditions of supervision, including but not limited to, prohibiting the offender from having contact with any other specified individuals or specific class of individuals. For offenders sentenced to terms of community custody for crimes committed on or after July 1, 2000, the department may additionally require the offender to participate in rehabilitative programs or otherwise perform affirmative conduct, and to obey all laws.

The conditions authorized under this subsection (15)(b) may be imposed by the department prior to or during an offender's community custody term. If a violation of conditions imposed by the court or the department pursuant to subsection (10) of this section occurs during community custody, it shall be deemed a violation of community

placement for the purposes of RCW 9.94A.207 and shall authorize the department to transfer an offender to a more restrictive confinement status as provided in RCW 9.94A.205. At any time prior to the completion of an offender's term of community custody, the department may recommend to the court that any or all of the conditions imposed by the court or the department pursuant to subsection (10) or (11) of this section be continued beyond the expiration of the offender's term of community custody as authorized in subsection (10)(c) or (11)(e) of this section.

The department may require offenders to pay for special services rendered on or after July 25, 1993, including electronic monitoring, day reporting, and telephone reporting, dependent upon the offender's ability to pay. The department may pay for these services for offenders who are not able to pay.

(16) All offenders sentenced to terms involving community supervision, community service, community custody, or community placement under the supervision of the department of corrections shall not own, use, or possess firearms or ammunition. Offenders who own, use, or are found to be in actual or constructive possession of firearms or ammunition shall be subject to the appropriate violation process and sanctions. "Constructive possession" as used in this subsection means the power and intent to control the firearm or ammunition. "Firearm" as used in this subsection means a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

(17) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(18) A departure from the standards in RCW 9.94A.400 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in subsections (2) and (3) of this section, and may be appealed by the defendant or the state as set forth in RCW 9.94A.210 (2) through (6).

(19) The court shall order restitution whenever the offender is convicted of a felony that results in injury to any person or damage to or loss of property, whether the offender is sentenced to confinement or placed under community supervision, unless extraordinary circumstances exist that make restitution inappropriate in the court's judgment. The court shall set forth the extraordinary circumstances in the record if it does not order restitution.

(20) As a part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with other specified individuals or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision or community placement.

(21) The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

(22) In any sentence of partial confinement, the court may require the defendant to serve the partial confinement in work release, in a program of home detention, on work crew, or in a combined program of work crew and home detention.

(23) All court-ordered legal financial obligations collected by the department and remitted to the county clerk shall be credited and paid where restitution is ordered. Restitution shall be paid prior to any other payments of monetary obligations.

(24) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may, as part of any term of community supervision, order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(25) (a) Sex offender examinations and treatment ordered as a special condition of community placement or community custody under this section shall be conducted only by sex offender treatment providers certified by the department of health under chapter 18.155 RCW unless the court finds that: (i) The offender has already moved to another state or plans to move to another state for reasons other than circumventing the certification requirements; (ii) no certified providers are available for treatment within a reasonable geographic distance of the offender's home, as determined in rules adopted by the secretary; (iii) the evaluation and treatment plan comply with the rules adopted by the department of health; or (iv) the treatment provider is employed by the department. A treatment provider selected by an offender who is not certified by the department of health shall consult with a

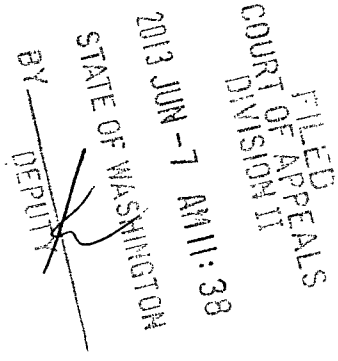
certified provider during the offender's period of treatment to ensure compliance with the rules adopted by the department of health. The frequency and content of the consultation shall be based on the recommendation of the certified provider.

(b) A sex offender's failure to participate in treatment required as a condition of community placement or community custody is a violation that will not be excused on the basis that no treatment provider was located within a reasonable geographic distance of the offender's home.

**HISTORY:** 2000 c 226 § 2; 2000 c 43 § 1. Prior: 1999 c 324 § 2; 1999 c 197 § 4; 1999 c 196 § 5; 1999 c 147 § 3; 1998 c 260 § 3; prior: 1997 c 340 § 2; 1997 c 338 § 4; 1997 c 144 § 2; 1997 c 121 § 2; 1997 c 69 § 1; prior: 1996 c 275 § 2; 1996 c 215 § 5; 1996 c 199 § 1; 1996 c 93 § 1; 1995 c 108 § 3; prior: 1994 c 1 § 2 (Initiative Measure No. 593, approved November 2, 1993); 1993 c 31 § 3; prior: 1992 c 145 § 7; 1992 c 75 § 2; 1992 c 45 § 5; prior: 1991 c 221 § 2; 1991 c 181 § 3; 1991 c 104 § 3; 1990 c 3 § 705; 1989 c 252 § 4; prior: 1988 c 154 § 3; 1988 c 153 § 2; 1988 c 143 § 21; prior: 1987 c 456 § 2; 1987 c 402 § 1; prior: 1986 c 301 § 4; 1986 c 301 § 3; 1986 c 257 § 20; 1984 c 209 § 6; 1983 c 163 § 2; 1982 c 192 § 4; 1981 c 137 § 12.

CERTIFICATE OF MAILING

I hereby certify that on this date I deposited a copy of the Brief of Appellant into the United States Mail, postage prepaid, addressed to:

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I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

6/6/2013 - SEATTLE, WA
Date and Place

Alexandra Fast
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