

No. 73580-2

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

IN RE THE RESTRAINT OF:

BRIAN T. STARK,

Petitioner.

OPENING BRIEF OF PETITIONER

Judgment in King County Superior Court No. 09-1-05650-8 KNT
The Hon. Andrea Darvas, Presiding

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A. ASSIGNMENTS OF ERROR

1. Mr. Stark received ineffective assistance of counsel at trial.
2. Mr. Stark received ineffective assistance of counsel on direct appeal.
3. Petitioner Brian T. Stark assigns error to Instruction No. 22, attached in App. B (Ex. 6).
4. Count I of the amended information charged an offense that was barred by the statute of limitations.
5. Mr. Stark assigns error the entry of the judgment and sentence, attached in App. A (Ex. 8).
6. The trial court erred by imposing a 36 month term of community custody for Count III.
7. The trial court erred by imposing the following conditions of community custody: 2, 3, 5, 6, 9, 10, 22, 23, 24, 25, 27, and 29. App. A.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The complaining witness, C.W., repeatedly claimed that her cousin, Jeffrey Stark, had been with her and Mr. Stark on a bike ride before Mr. Stark allegedly took her into a half-built house and molested her. Mr. Stark's trial counsel failed to interview Jeffrey Stark or call him as a witness.

Jeffrey Stark later found out that C.W. had claimed he was present, and gave a written statement that there was no bike ride and no half-built house. App. C (Ex. 24). Did Mr. Stark receive ineffective assistance of counsel when his attorney failed to interview and call Jeffrey as a witness at trial?

2. In Instruction No. 22, the trial court told the jury: “Evidence has been produced suggesting that the defendant committed acts of Child Molestation in the First Degree and Incest in the First Degree on multiple occasions.” Ex. 6 (App. B). Was this instruction an unconstitutional comment on the evidence, which weakened the State’s burden of proof and which caused a directed verdict on Counts II and III?

3. In Count I of the amended information, the State alleged that Mr. Stark committed the crime of attempted first degree child molestation between August 17, 1999, and December 31, 2000. Yet, the State did not file the amended information until October 7, 2010 (or even the original information until August 24, 2009). Exs. 1 & 2. Was Count I time-barred because the charge was filed after the expiration of the three year statute of limitation in RCW 9A.20.080?

4. As for Count III, the trial court sentenced Mr. Stark to serve 102 months in prison, followed by 36 months of community custody. Ex. 8.

Does this total sentence of 138 months illegally exceed the statutory maximum?

5. As conditions of community custody, the trial court imposed many restrictions on Mr. Stark's ability to have sex, possess pornography, attend adult-only events, have contacts with minors, and many other intrusive conditions. Ex. 8. Are some of these conditions unconstitutional or are they proper crime-related prohibitions?

6. Issues Nos. 2 through 5, *supra*, were not raised at trial or on direct appeal. Did Mr. Stark have effective assistance of counsel in prior proceedings?

C. STATEMENT OF FACTS

The facts of this case are set out in detail in the Personal Restraint Petition and are incorporated herein by reference.

D. ARGUMENT

1. *Jeffrey Stark's Post-Trial Statements Justify Vacating the Convictions Because He Was the One Independent Witness Who Could Have Testified that Mr. Stark Did Not Molest C.W. in a Half-Built House*

a. Summary

C.W. repeatedly claimed that her cousin, Jeffrey Stark, was present on a bike ride, immediately before Mr. Stark allegedly molested her in the half-built house in Maple Valley. She made this allegation to the police in May 2009; she repeated it in the defense interview in June 2010; she included this claim in the narrative she prepared for her counseling; she repeated the allegation at trial. Exs. 17, 18, 20; RP 241-46, 325-28. Yet, according to Jeffrey, there was no bike ride and he was never sent home from a half-built house, Ex. 24, a notable event that someone would typically recall a few years later.

Jeffrey should have been a witness at Mr. Stark's trial. He was the one person who could have rebutted C.W.'s otherwise uncorroborated claims as he was the only clearly identified person who was supposedly present immediately prior to a specific claimed incident. While C.W. also claimed that various incidents of abuse took place when her mother and brother were

at home, RP 216, 313-14, 583, her testimony was vague as to when exactly these things took place, never pinpointing her allegations in the way that she did related to Count II. Additionally, she never claimed that her mother or brother had seen her immediately prior to the claim of abuse as she did in this instance. Thus, Jeffrey's testimony would have discredited C.W.'s allegations not only with regard to Count II, but also would have carried over to discredit the State's allegations on other counts as well.

Jeffrey did not testify. He did not testify because Mr. Stark's trial counsel did not contact him, did not interview him and did not serve him with a trial subpoena. Ex. 16. Although Mr. Stark and his wife, Danelle, told Mr. Meryhew that they thought he should contact Jeffrey, and they gave them Mr. Stark's brother's phone number so he could find out how to contact Jeffrey, and although Mr. Stark would repeat this wish during the trial, Ex. 13 & 14, Mr. Meryhew never contacted Jeffrey and the jury never learned that Jeffrey disputed C.W.'s allegations.

**b. Mr. Stark's Attorney Was Ineffective
When He Failed to Interview and
Subpoena Jeffrey**

A person accused of a crime has the right under the Sixth and Fourteenth Amendments and article I, section 22, to effective assistance of

counsel. *Strickland v. Washington*, 466 U.S. 668, 685-90, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) While counsel is not expected to perform flawlessly, counsel is required to meet an objectively reasonable minimum standard of performance. *Id.* at 688. Evidence of ineffective assistance includes the failure to conduct appropriate investigations. *Strickland*, 466 U.S. at 691.

While considerable discretion is given to lawyers to make strategic decisions about what to investigate, “[w]hen defense counsel merely believes certain testimony *might* not be helpful, no reasonable basis exists for deciding not to investigate.” *Duncan v. Ornoski*, 528 F.3d 1222, 1234-35 (9th Cir. 2008) (emphasis in original). Accordingly, no deference is required to tactical decisions made by counsel where counsel fails to conduct appropriate investigations prior to making the tactical decision. *Rios v. Rocha*, 299 F.3d 796, 806-807 (9th Cir. 2002).

Here, Mr. Meryhew did not have a tactical reason not to interview and subpoena Jeffrey. Although he had some vague memory of some “external barrier” to contacting Jeffrey, he is not certain and has no notes or other records which would document this feeling he currently has. Ex. 16. On the other hand, Mr. Stark, Danelle Stark, and Sharon Stark all confirm that Jeffrey was available to Mr. Meryhew. He was in Washington State; he was

in close contact with his parents; he had the same phone number for years.¹ Exs. 13, 14, & 15. Thus, given Jeffrey's importance to the case, as a witness who would have denied C.W.'s claims that he was present at a key event, it was ineffective for Mr. Meryhew not to have interviewed him and secured his presence at trial. *See Lord v. Wood*, 184 F.3d 1083, 1095-96 (9th Cir. 1999) (failure to call key witnesses whose testimony undermined the prosecutor's case constituted deficient performance).

Under *Strickland*, to show prejudice, petitioners need not prove that "counsel's deficient conduct more likely than not altered the outcome in the case," but rather only must demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 693-694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Id.* at 695.

"Reasonable probability" does not require that the defendant demonstrate that the missing evidence probably would have resulted in acquittal. *United States v. Price*, 566 F.3d 900, 911 (9th Cir. 2009). Thus,

¹ If Jeffrey was truly unavailable, then his later statements would qualify as newly discovered evidence under RAP 16.4(c)(3).

determining prejudice does not entail an analysis of the sufficiency of the evidence, only “that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995). The Supreme Court has held that the standard was met when there was a reasonable probability that one juror “might have had reasonable doubt” as to the guilt of the defendant. *In re Stenson*, 174 Wn.2d 474, 493, 276 P.3d 286 (2012).²

This standard is met here and there is prejudice. Had Jeffrey testified, there is a reasonable probability that at least one juror might have had a reason to doubt C.W.’s allegations. It is reasonably probable that, if Jeffrey testified there was no bike ride, one juror would have concluded that C.W. was not telling the truth and would have voted against conviction. Because the evidence of each count was cross-admissible as to the other counts, if a juror who heard Jeffrey’s testimony had a reasonable doubt as to Count II, it is reasonably probable that the juror have voted not to find Mr. Stark guilty of Counts I, III and IV as well. All convictions should therefore be vacated.

² *Kyles*, *Stenson* and *Price* all involve violations of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), but the standard of materiality is the same in this arena as it is with ineffective assistance of counsel. See *Kyles*, 514 U.S. at 434 (adopting *Strickland* standard in *Brady* context).

c. **The Fact that Jeffrey Has Died Does Not Bar Granting Relief**

The State may try to claim that Jeffrey's statement is "hearsay" and unsworn, and that Mr. Stark should therefore spend the rest of his life in prison or on community custody because Jeffrey unfortunately died before he could sign an affidavit or an unsworn declaration or testify at a reference hearing. This Court should reject such a harsh result.

ER 1101 exempts from the coverage of the Rules of Evidence what it calls "Miscellaneous Proceedings" which specifically include "habeas corpus proceedings." ER 1101(c)(3).³ This exclusion applies here because "[p]ersonal restraint petitions are modern version of ancient writs, most prominently habeas corpus, that allow petitioners to challenge the lawfulness of confinement." *In re Coats*, 173 Wn.2d 123, 128, 267 P.3d 324 (2011) (citing *Toliver v. Olsen*, 109 Wn.2d 607, 609-11, 746 P.2d 809 (1987)). Consistent with this approach, the Supreme Court has unambiguously applied ER 1101(c)(3)'s exclusions for habeas cases to Personal Restraint Petition

³ Notably, the exclusion of habeas proceedings from the Rules of Evidence in Washington is not shared in all evidence codes. *See, e.g., former* FRE 1101(3) (pre-2011) (stating that rules of evidence applied to proceedings related to "habeas corpus under sections 2241-2254 of title 28, United States Code."). The original comment to ER 1101 (deleted in 2006, but which is included in the statutory appendix) makes it clear that Washington was adopting a rule that intentionally differed from the federal correlate.

cases. *In re Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001) (upholding consideration of hearsay in PRP because “evidence rules do not apply to habeas corpus proceedings pursuant to ER 1101(c)(3).”).

There is, therefore, no strict ban on the consideration of hearsay at in a habeas proceeding. The issue is one of reliability, not admissibility, and the fact that it is a judge, rather than a jury, who considers the evidence weighs heavily in favor of not barring admission of such evidence:

Therefore, the question a habeas court must ask when presented with hearsay is not whether it is admissible – it is always admissible – but what probative weight to ascribe to whatever indicia of reliability it exhibits. . . .

. . .

A procedure that seeks to determine hearsay’s reliability instead of its mere admissibility comports not only with the requirements of this novel circumstance, but also with the reality that district judges are experienced and sophisticated fact finders. Their eyes need not be protected from unreliable information in the manner the Federal Rules of Evidence aim to shield the eyes of impressionable juries. . . . Where the touchstone of a proceeding is “meaningfulness,” empowering a district court to review and assess all evidence from both sides is a logical process. It is one that bolsters the traditional power of the habeas court to “cut[] through all forms and go[] to the very tissue of the structure” of a proceeding and “look facts in the face.” *Frank v. Mangum*, 237 U.S. 309, 346, 349, 35 S. Ct. 582, 59 L. Ed. 969 (1915) (Holmes, J., dissenting). The habeas judge is not asked, as he would be in a trial, to administrate a complicated clash of adversarial viewpoints to synthesize a process-dependent form of Hegelian legal truth. . . . Rather,

in a detainee case, the judge acts as a neutral decisionmaker charged with seizing the actual truth of a simple, binary question: is detention lawful? This is why the one constant in the history of habeas has never been a certain set of procedures, but rather the independent power of a judge to assess the actions of the Executive.

Al-Bihani v. Obama, 590 F.3d 866, 879-80 (D.C. Cir. 2010).

To be sure, a prisoner cannot obtain a reference hearing based upon “[b]ald assertions and conclusory allegations” and for “matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief;” if the “evidence is based on knowledge in the possession of others,” the petitioner may either “present their affidavits” or “present evidence to corroborate what the petitioner believes they will reveal if subpoenaed.” *In re Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013) (quoting *In re Rice*, 118 Wn.2d 876, 885-886, 828 P.2d 1086 (1992)).

The evidence about Jeffrey here does not fit into the category of a “bald assertion” or a “conclusory allegation.” The evidence is supported not only by Jeffrey’s handwritten statement, but also, through declarations, by the witness who obtained the statement (Danelle Stark) and by Jeffrey’s step-

mother, who believes that the handwriting and signature could possibly be Jeffrey's.⁴

To be sure, regarding reference hearings, RAP 16.12, adopted in 1976, does state that “[t]he Rules of Evidence apply at the hearing.” However, ER 1101 was adopted almost three years later, in 1979, and thus may have repealed RAP 16.12's provision by implication. *See Local No. 497, Int'l Bhd. of Elec. Workers v. Public Util. Dist.*, 103 Wn.2d 786, 789-90, 698 P.2d 1056 (1985).

Alternatively, one can harmonize the provisions by recognizing that the purpose for RAP 16.12's language was obviously to protect *prisoners* from having claims summarily denied by reference to affidavits. *See Little v. Rhay*, 68 Wn.2d 353, 360, 413 P.2d 15 (1966) (upholding use of affidavits in habeas proceeding to deny claim). Notably, ER 1101(c) gives discretion to judges, stating that the Rules of Evidence “need not be applied” in the listed cases (which include habeas litigation). Thus, RAP 16.12 may set out the beginning point – that the Rules of Evidence apply to a reference hearing, but a judge, charged with the duty of enforcing the ancient writ of habeas corpus, has the discretion in a given case not to apply the Rules of Evidence

⁴ Any issue about the authenticity of Ex. 24 should be resolved at a reference hearing.

when the rigid application of such rules would run counter to the interests of justice. Notably, RAP 16.12's strictures about the Rules of Evidence can be waived. See RAP 1.2 (“(a) *Interpretation* Cases . . . will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands. . . . (c) *Waiver*. The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).”).

In any case, to qualify as an unsworn declaration under RCW 9A.72.085, a statement must only “substantially” contain the various words of that statute. The failure to comply with all of the requirements of that statute do not preclude consideration of statements intended to be unsworn declarations.⁵ Jeffrey Stark’s statement did not conform completely to RCW 9A.72.085, but he does state that he will “testify under oath” that the allegations were false. Jeffrey’s written statement was not simply a passing informal comment made without serious consideration, but rather was clearly

⁵ See *Veranth v. Department of Licensing*, 91 Wn. App. 339, 343-44, 959 P.2d 128 (1998) (citing RCW 4.36.240 (requiring court in every stage of an action to disregard any error or defect in pleadings or proceedings that does not prejudice the adverse party); *Griffith v. City of Bellevue*, 130 Wn.2d 189, 922 P.2d 83 (1996) (lack of signature on verification of a petition for writ of review did not deprive the court of jurisdiction)).

intended to be a serious and formal declaration as to his own knowledge of a key event in the legal system.

Where a non-lawyer attempts to submit a document in “legalese,” courts have typically taken a liberal view of such documents to protect the rights of prisoners. *See Fallen v. United States*, 378 U.S. 139, 84 S. Ct. 1689, 12 L. Ed. 2d 760 (1964) (letter sent by sick prisoner who was away from court after sentencing sufficient to constitute notice of appeal); *Coppedge v. United States*, 369 U.S. 438, 442 n.5, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962) (collecting cases where courts have taken a “liberal view” of papers filed by incarcerated defendants to preserve appellate jurisdiction). Jeffrey’s statement rises to the level of a lay person’s attempt to submit an unsworn declaration, and Mr. Stark should not be penalized because he used the wrong words.

Ultimately, though, the issue is not whether Jeffrey’s written statement would be independently admissible at trial before a jury under ER 801-802. Rather, the issue at this juncture is only whether, for purposes of a post-conviction petition, Jeffrey’s statement is admissible to show the prejudice from Mr. Meryhew’s lack of investigation. There is no dispute that Jeffrey was a material witness (named by C.W. as being present prior to key event), that Mr. Meryhew knew about Jeffrey and did not interview him, that

there was no tactical reason for the failure to interview and subpoena Jeffrey, and that Jeffrey was available to be interviewed and to testify. These facts can be established through non-hearsay witnesses, and thus the deficiency of Mr. Meryhew's performance can be established without regard to Jeffrey's statement.

To establish the next prong of the *Strickland* test, prejudice, one does not need to consider Jeffrey's statement "for the truth asserted" under ER 801:

[T]he statement "X is no good" circumstantially indicates the declarant's state of mind toward X and, where that mental state is a material issue in the case, such statement would be admissible with a limiting instruction. Technically it is not . . . hearsay since it is not being admitted for the truth of the matter alleged. We do not care whether X is in fact "no good" but only whether the declarant disliked him. However . . . the statement "I hate X" is direct evidence of the declarant's state of mind and, since it is being introduced for the truth of the matter alleged, must be within some exception to the hearsay rule in order to be admissible.

In re Penelope B, 104 Wn.2d 643, 653, 709 P.2d 1185 (1985), quoting *United States v. Brown*, 490 F.2d 758, 762-63 (D.C. Cir. 1973).

Similarly, here, the issue is not whether Jeffrey was telling the truth when he said there was no bike ride and no home being built and or when he said that C.W.'s claims were false. That may be the issue if the statements

were being offered for purposes of a jury trial. Rather, the issue now is, for purposes of establishing the prejudice prong of the *Strickland* test, what Jeffrey would have said (whether it was true or not) had Mr. Meryhew interviewed Jeffrey and called him as a witness. The operative issue is not whether there truly was a bike ride or half-built house, but rather whether *Jeffrey said* there was no bike ride and no half-built house. The out-of-court statements therefore are admissible, even under the strictures of the arcane hearsay rules.

Finally, the application of a hyper-technical rule of evidence to prevent consideration of Mr. Stark's claims on their merits would violate due process of law under the Fourteenth Amendment and article I, section 3. *See Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (“[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.”); *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (state rule of evidence cannot be used to deny defendant right to put on defense). Exclusion of Jeffrey's statement would “serve no legitimate purpose” or would promote a result that is “disproportionate to the ends” that the Rules of Evidence are intended to

promote. *Holmes v. South Carolina*, 547 U.S. 319, 326, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

Here, the tragedy of Jeffrey's death at a young age from a brain tumor should not compound the tragedy of incarcerating Mr. Stark potentially for the rest of his life because Jeffrey did not use the correct legal incantations in his statement. There is no legitimate purpose to barring consideration of Jeffrey's statement, and the consideration by judges of what he clearly had to say about C.W.'s claims would in no way cause confusion or prejudice in front of a jury.

The State had notice of Jeffrey's statement since February 2011, when Danelle Stark sent it to them. Ex. 14. In fact, the State and the police had notice of Jeffrey since C.W. referenced him in April 2009, and could easily have sent a detective to interview him then to see if he would verify C.W.'s claims. After Danelle Stark sent the State a copy of Jeffrey's statement, the State did not have to ignore it, and certainly could have conducted its own investigation of Jeffrey and what he had to say as far back as February 2011. Mr. Stark should not be penalized by the State's inaction. There is no unfairness to consideration of this evidence at this stage.

Accordingly, Mr. Meryhew was ineffective when he did not interview Jeffrey or call him as a witness. Mr. Stark can demonstrate prejudice. Mr. Stark's right to counsel under the Sixth and Fourteenth Amendments and article I, section 22, was violated. All four convictions should be vacated.

2. *The Trial Judge Illegally Commented on the Evidence*

Mr. Stark firmly denied ever touching C.W. in a sexual manner. While C.W. made various claims of molestation, her story changed repeatedly and there was no corroboration for her allegations. The case essentially boiled down to the jury having to decide whether the State had proven beyond a reasonable doubt that C.W.'s allegations were credible.

Yet, at the last minute, and probably inadvertently, the trial court commented on the evidence, and told the jury that, as it related to Counts II and III, the evidence supported C.W.'s claims. In Instruction No. 22, the "Petrich"⁶ instruction, the trial court modified the recommended language from WPIC 4.25, and told the jury:

Evidence has been produced suggesting that the defendant committed acts of Child Molestation in the First Degree and Incest in the First Degree on multiple occasions.

.....

App. B; Ex. 6 (emphasis added).

⁶ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

Article IV, section 16 to the Washington Constitution provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

“An impermissible comment is one which conveys to the jury a judge’s personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.” *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990). “A statement by the court constitutes a comment on the evidence if the court’s attitude toward the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement. [Citation omitted] The touchstone of error in a trial court’s comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). A jury instruction that resolves a disputed factual issue constitutes an impermissible comment on the evidence. *State v. Becker*, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997).

Here, Instruction No. 22 conveyed to the jury that the judge believed the State’s evidence – that the evidence suggested that in fact Mr. Stark had committed the crimes of child molestation in the first degree and incest in the first degree on multiple occasions – and that all the jury needed to do was to

be unanimous as to which time he committed the crime. While this may not have been the intent of the prosecutor who was focused on the requirements of *Petrich* and his own belief that he was not alleging multiple acts for Counts II and III,⁷ lay jurors cannot be expected to understand *Petrich* and the true intent of the judge by giving this instruction. A reasonable juror reading Instruction No. 22 would have no concept as to the reasons why the instruction was given, but would certainly focus on the language of the first line and the trial judge's belief that Mr. Stark was guilty. "[J]uries are presumed to follow their instructions," *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987), and thus one has to assume that the jurors took Instruction No. 22 at face value.

A judicial instruction that is a comment on the evidence can, under some circumstances, weaken the State's burden of proving guilt beyond a reasonable doubt to a jury, protected by the Sixth and Fourteenth

⁷ The prosecutor at trial proposed this language because he claimed that he had not alleged multiple acts per count, and thus WPIC 4.25's language was not accurate. RP 851-52. However, the State's witnesses clearly alleged multiple acts per count. For instance, C.W. told the investigating detective that once she moved to Maple Valley, the abuse allegedly took place every six months. RP 324.

But, the issue is not whether a *Petrich* instruction should have been given or not. Rather, the issue is once one was given, did the wording of the instruction improperly convey to the jury that the judge believed that Mr. Stark committed the stated crimes on multiple occasions and the only task for the jury was to agree unanimously which time or times he did it?

Amendments and article I, sections 3, 21 and 22. When a judge tells the jury that he or she believes that the defendant is guilty, this is equivalent to a mandatory presumption and a directed verdict. *See, e.g., State v. Becker*, 132 Wn.2d at 65 (special verdict form that constituted a comment on the evidence “was tantamount to a directed verdict”); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977) (“[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict.”); *Smith v. Curry*, 580 F.3d 1071 (9th Cir. 2009) (habeas relief granted where judge coerced verdict from hung jury by commenting on the evidence and using mandatory language).

On direct appeal, judicial comments on jury instructions are presumed prejudicial. The burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d 709, 725-26, 132 P.3d 1076 (2006) For a PRP, however, the petitioner must show prejudice. *See In re Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014).

Mr. Stark can meet his burden. There was a clear dispute over whether Mr. Stark ever, in any way, did anything inappropriate towards C.W. The judge’s instruction to the jury conveying her opinion that Mr. Stark

committed child molestation and incest on multiple occasions was clearly prejudicial.

This is also an issue that should have been raised on direct appeal where the standard of review was better than on collateral attack. *See State v. Levy, supra*. Given the lack of any other challenges to Counts II and III on direct appeal (where counsel only raised issues pertaining to Count I), there could be no possible tactical reason not to raise a challenge to this instruction on direct appeal. Thus, the failure to raise this issue on appeal violated Mr. Stark's rights to effective assistance of counsel on appeal, in violation of due process of law and the right to appeal, protected by the Fourteenth Amendment and article I, sections 3 & 22. There is prejudice because relief would have been granted on direct appeal under a more favorable standard of review. *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985); *In re Morris*, 176 Wn.2d 157, 166-68, 288 P.3d 1140 (2012); *In re Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

Finally, although the error here was not invited, with trial counsel proposing a proper *Petrich* instruction (Ex. 5), to the extent that trial counsel failed to except to the giving of Instruction No. 22, he was ineffective under the Sixth and Fourteenth Amendments and article I, section 22. *See State v.*

Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987) (ineffective not to propose proper instructions); *State v. Doogan*, 82 Wn. App. 185, 188-90, 917 P.2d 155 (1996) (ineffective to propose incorrect instructions).

Accordingly, because Instruction No. 22 violates both the Washington and United States Constitutions, and Mr. Stark's prior counsel should either have excepted to the instruction at trial or challenged it on direct appeal, this Court should grant the PRP and vacate the convictions.

3. *Count I Was Barred by the Statute of Limitations*

In Count I of the amended information, the State charged Mr. Stark with attempted child molestation in the first degree. Ex. 2. The charging period was October 17, 1999, until December 31, 2000, which mirrored the charging period in the "to convict" instruction (No. 17, Ex. 6). The amended information, however, was not filed until October 7, 2010.⁸ Yet, for the crime of attempted first degree child molestation, the applicable statute of limitation was only three years. RCW 9A.04.080(1)(h). Accordingly, the conviction is time-barred and should be vacated.

⁸ The original information, filed on August 24, 2009, charged one count of child molestation in the first degree for some of the period covered in Count I of the amended information, but Count I of the amended information extended back to August 17, 1999 – a full year before Count I of the original information. Exs. 1 & 2.

A statute of limitation protects accused persons “from having to defend themselves against charges when the basic facts may have become obscured by the passage of time. . . .” *Toussie v. United States*, 397 U.S. 112, 114, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970). Criminal limitations statutes, therefore, are “to be liberally interpreted in favor of repose.” *United States v. Habig*, 390 U.S. 222, 227, 88 S. Ct. 926, 19 L. Ed. 2d 1055 (1968). While not exactly jurisdictional, the expiration of a criminal statute of limitation “deprives a court of authority to enter judgment,” thereby effecting “the authority of a court to sentence a defendant for a crime.” *State v. Peltier*, 181 Wn.2d 290, 297, 332 P.3d 457 (2014).

RCW 9A.04.080(1)(h) generally sets a three year limitation for most felonies, with certain specified exceptions – “No other felony may be prosecuted more than three years after its commission.” At the time of the relevant charging period in Count I of the amended information, RCW 9A.04.080(1) contained a longer statute of limitation for certain specified sex offenses:

(c) Violations of the following statutes shall not be prosecuted more than three years after the victim's eighteenth birthday or more than seven years after their commission, whichever is later: RCW 9A.44.073, 9A.44.076, 9A.44.083, 9A.44.086, 9A.44.070, 9A.44.080, 9A.44.100(1)(b), or 9A.64.020.

Former RCW 9A.04.080(1)(c) (1998).

A 2006 amendment postponed the running of the limitations period for certain sex offenses until one year from the date of the suspect's identification by DNA testing. Laws of 2006, ch. 132, § 1. In 2009, the limitations period for specified sex offenses was further amended to allow prosecution up to the complainant's 28th birthday and, in 2013, the limitations period was extended to the complaint's 30th birthday. Laws of 2009, ch. 61, § 1; Laws of 2013, ch. 17, § 1. The 2009 amendments further added several new crimes to the list of covered offenses included in the expanded statute of limitation – 9A.44.079 and 9A.44.089, rape of a child in the third degree and child molestation in the third degree. Laws of 2009, ch. 61, § 1.

In contrast, *attempted* child molestation in the first degree has never been on the list of offenses subject to a longer statute of limitation either in the 1998 version of RCW 9A.04.080 or the 2009 version. Yet, criminal attempt is a separate offense from a completed crime and is charged under a separate statutory provision governing “anticipatory offenses” RCW 9A.28.020.⁹

⁹ During the charging period (8/17/99 to 12/31/00), this crime was defined as follows:

(continued...)

As this Court noted when holding that attempted harassment was not the same as harassment for purposes of DNA collection:

Attempted harassment is a distinct crime with distinct penalties. [Footnote omitted] All that is required in an attempted crime is that the accused take a substantial step toward the commission of a particular crime. Freeman was convicted of taking a substantial step toward committing harassment, but he was not convicted of "harassment under RCW 9A.46.020" as required by the statute.

State v. Freeman, 124 Wn. App. 413, 415-16, 101 P.3d 878 (2004).

This Court explained its holding by reference to basic principles of statutory construction:

When statutory language is unambiguous, the court will look only to that language to determine legislative intent. The court cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. The court should assume that the legislature means exactly what it says. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). Statutory language is unambiguous when it is not susceptible to two or more interpretations. *Delgado*, 148 Wn.2d at 726.

⁹(...continued)

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.

Former RCW 9A.28.020 (1994). Attempted first degree child molestation was designated as a Class B felony, although in 2001, the Legislature amended RCW 9A.28.020 to make an attempt to commit first degree child molestation a Class A felony. Laws of 2001, 2nd Sp. S, ch. 12, § 354.

Freeman, 124 Wn. App. at 415. See also *State v. Hale*, 65 Wn. App. 752, 757-58, 829 P.2d 802 (1992) (mandatory minimum for first degree murder did not apply to attempted first degree murder).

This reasoning applies here. In Count I of the amended information, the State charged Mr. Stark with criminal attempt – not with child molestation in the first degree. While the Legislature, at various times, changed RCW 9A.04.080, adding various crimes to the section that allows for prosecution years after the alleged offense, the Legislature did not add to the statute *an attempt* to commit one of the enumerated crimes in RCW 9A.04.080(1)(c). Given the policy of construing such statutes in favor of repose, it is apparent that a charge of attempted first degree child molestation, charged under RCW 9A.28.020, is subject only to the three year statute of limitation set out in RCW 9A.04.080(1)(h).

For Count I of the amended information, this time passed between August 17, 2002, and December 31, 2003 – long before the State filed either the information or the amended information in this case. Count I was therefore time-barred and the trial court did not have the authority to enter judgment or otherwise sentence Mr. Stark on that count. *State v. Peltier*, *supra*.

To be entitled to relief under RAP 16.4, a petitioner must show constitutional error that resulted in actual and substantial prejudice or nonconstitutional error that resulted in a complete miscarriage of justice. *In re Cook*, 114 Wn.2d 802, 810-13, 792 P.2d 506 (1990). The fact that Mr. Stark was charged and convicted after the statute of limitations for the crime of attempted child molestation in the first degree implicates the complete miscarriage of justice standard. This Court should grant the PRP and order that the conviction in Count I be vacated and the charge dismissed. *See In re Stoudmire*, 141 Wn.2d 342, 355, 5 P.3d 1240 (2000). Because vacating Count I would change the offender score for the other counts, reducing the standard range for Count II to 98-130 month, Mr. Stark should have a new sentencing hearing.

4. *The Community Custody Term on Count III is too Long*¹⁰

For Count III, the trial court imposed a determinate sentence of 102 months in prison, and then ordered community custody for 36 months. Ex. 8. This term of community custody, however, is illegal and should be changed.

¹⁰ Mr. Stark recognizes that, because of the life sentence for Count II, the length of community custody for Count III is only pertinent if the conviction for Count II is vacated.

A term of confinement, combined with a term of community custody, cannot exceed the statutory maximum for the crime as provided in RCW 9A.20.021; the trial court must reduce the term of community custody if the combined total is beyond the maximum sentence. RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012).

Count III, incest in the first degree, is a Class B felony, RCW 9A.64.020, which carries a statutory maximum confinement sentence of 120 months. RCW 9A.20.021(1)(b). Here, the trial court sentenced Mr. Stark to 102 months on count III with 36 months of community custody exceeding the statutory maximum by 18 months. This term for community custody therefore is illegal and should be reduced to 18 months.

5. *Certain Sentence Conditions Are Illegal*

The trial judge ordered that Mr. Stark, who will be on community custody for the rest of his life after his release from prison, be subject to a series of burdensome and intrusive personal restrictions. These restrictions limit Mr. Stark's ability to have contact with "minors," but then, paradoxically, also limit his ability to go to places where only adults can go.¹¹

¹¹ Compare, e.g., Condition 23 (cannot enter "any places where minors congregate") with Condition 27 (cannot go "to any location which requires you to be over 21 years of age").

Many of the conditions in the judgment are vague, are not crime-related, and unlawfully interfere with Mr. Stark's fundamental constitutional rights. Because there may not be an scienter requirement for a violation of these conditions, *see State v. McCormick*, 166 Wn.2d 689, 213 P.3d 32 (2009), particular scrutiny of these conditions is required.¹²

Under the Sentencing Reform Act of 1981, RCW 9.94A, a court has the authority to impose "crime-related prohibitions and affirmative conditions as part of a felony sentence. RCW 9.94A.505(8). RCW 9.94A.703(3)(f) allows a court to order, as condition of community custody compliance with any "crime related prohibition."

"'Crime-related prohibition' means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). While review of most conditions of community custody is for "abuse of discretion," *State v.*

¹² The fact that Mr. Stark has not yet been released on community custody does not bar him from raising these challenges now. *State v. Bahl*, 164 Wn.2d 739, 744-52, 193 P.3d 678 (2008). Similarly, the fact that some of the conditions were not challenged in the trial court or were "invited" by Mr. Stark's attorney does not bar relief. *See In re West*, 154 Wn.2d 204, 215, 110 P.3d 1122 (2005) ("The fact that a defendant agreed to a particular sentence does not cure a facial defect in the judgment and sentence where the sentencing court acted outside its authority."); *In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002) (granting relief on collateral review where the defendant invited an erroneous sentence because an illegal sentence is a "fundamental defect that inherently results in a miscarriage of justice.").

Sanchez Valencia, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010), a “[m]ore careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). “Imposition of an unconstitutional condition would, of course, be manifestly unreasonable.” *State v. Bahl*, 164 Wn.2d at 753.

A review of the various conditions imposed in Ex. 8 leads to the conclusion that many of the conditions are clearly illegal. Moreover, some of these restrictions are absolute bans, imposed for the rest of Mr. Stark’s life, with no limit to duration (i.e. Nos. 3, 5, 9, 22, 23, 29). Others are dependent upon the approval of a “treatment provider” or a therapist (Nos. 2, 6, 24, 25, 27).

Although Mr. Stark’s counsel and the trial judge seemed to assume that Mr. Stark would have a treatment provider who could make various decisions, at this juncture, it is not known whether Mr. Stark will in fact have a treatment provider or therapist for the rest of his life. Mr. Stark may finish treatment in custody and not have a treatment provider in the community years down the road. Alternatively, even without treatment in custody, Mr. Stark may still be released from prison by the ISRB and placed on

supervision. Once in the community, because Mr. Stark denied committing the charged crimes, he may never start treatment at all – the CCO might decide not to refer him for an evaluation, or, if evaluated, treatment might not be recommended. The false assumption that Mr. Stark will have a “treatment provider” must be kept in mind when reviewing each condition.

a. Restrictions on Contact with Minors

Conditions Nos. 2, 22, 23 and 25 all impose restrictions on contact with minors, associational restrictions on dating or forming relationships with people/families with minors, or geographic restrictions on going to places where minors congregate. Yet, the term “minor” is not defined, and it is unclear whether it means someone under the age of 16,¹³ 18,¹⁴ or someone under the age of 21.¹⁵

This term is therefore unconstitutionally vague in violation of the Due Process Clauses of the Fourteenth Amendment and article I, section 3. *See State v. Bahl*, 164 Wn.2d at 752-53. Moreover, to the extent it pertains to

¹³ *See* RCW 46.61.5055(6) (penalties for driving while intoxicated if minor passenger in vehicle, defining “minor” as being under 16).

¹⁴ *See* RCW 9.68A.011(5) (sexual exploitation of children chapter defines “minor” to be someone under 18).

¹⁵ *See* RCW 66.44.270 (crime of furnishing alcohol to “minors” is defined as people under 21).

contact with “minors” over the age of 16, it is not a valid crime-related prohibition under RCW 9.94A.703(3)(e) and RCW 9.94A.505(8), since C.W. was under the age of 16. This condition therefore violates Mr. Stark’s right to freedom of association and freedom of speech under the First Amendment and article I, sections 4 & 5, since C.W. was under 16. *See State v. Riles*, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998), *abrogated on other grounds, State v. Sanchez Valencia, supra* (striking condition of no contact with minors for person convicted of raping 19 year old woman).

The life-time ban on Mr. Stark’s contacts with minors also interferes with his own ability to be a parent in the future, a right that is protected by various provisions of the federal and state constitutions and their penumbra. *In re Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010); U.S. Const. amends. I, IV, V, IX, & XIV; Const. art. I, §§ 3, 5, & 7. While some restrictions are appropriate in a case of intra-familial sex abuse, the lack of any justification for a *life-time* ban on having direct or indirect contact with minors or being in positions of trust or authority with them makes the conditions illegal. *In*

re Rainey, 168 Wn.2d at 381-82 (striking down lifetime ban on contact with daughter).¹⁶

b. Possession or Perusing Pornography

In *State v. Bahl, supra*, the Supreme Court struck down on vagueness and First Amendment grounds a condition of community custody that banned accessing or possessing pornographic materials. 164 Wn.2d at 753-58. The holding of *Bahl* requires the invalidation of Condition No. 6 which bans Mr. Stark from purchasing, owning, possessing, perusing any “pornography,” including magazines, books, videos, DVDs, catalogues “or any other material(s) which can be viewed or read for personal sexual gratification.”

Not only is this not a valid crime-related prohibition under RCW 9.94A.505(8) and RCW 9.94A.703, there being no tie between the allegations and any films or books or magazines, but Condition No. 6 is far more damaging than the condition at issue in *Bahl* since it includes viewing or reading material “for personal sexual gratification.” This would include reading books with sexually stimulating passages such as novels by James

¹⁶ Even though Condition No. 2's restrictions on contact with minors is subject to the approval of the treatment provider (whose existence is completely speculative at this point), Condition No. 22's ban on having a position of authority or trust over a minor is absolute, and would prevent Mr. Stark from ever having a parental role over a child.

Joyce or D.H. Lawrence. Condition No. 6 should be stricken as a violation of RCW 9.94A.505 & 703, the First and Fourteenth Amendments, and article I, sections 3 & 5.

c. **No Entry to Adult or Sex Related Businesses and Chat Lines**

Condition No. 3 bans entry to “sex related business[s] to include x-rated movies, adult bookstores, strip clubs, and or any location where the primary source of business is related to adult/sexually explicit material.” Condition No. 29 bans “sex lines/sex chat lines via phone.” These are lifetime bans, which cannot be waived even by a hypothetical treatment provider.

In *Bahl*, the Supreme Court upheld against a vagueness attack a challenge to a condition banning going to “establishments whose primary business pertains to sexually explicit or erotic material.” *State v. Bahl*, 164 Wn.2d at 758-60. However, the Court did not address whether such a condition was a valid “crime related prohibition” under RCW 9.94A.505(8) and RCW 9.94A.703(3)(f), nor did the Supreme Court address a prohibition on going to businesses related to “adult” material.

Here, a ban on going to businesses that cater to “adults”(such an off-track betting parlor) and a ban on “sex lines” or “sex chat lines” are vague and interfere with freedom of speech and association in violation of the First

and Fourteenth Amendments and article I, sections 3, 4, & 5. *State v. Bahl*, 164 Wn.2d at 752-53. Moreover, there is no tie to the alleged offense, and thus the conditions are not valid crime related prohibitions under RCW 9.94A.505(8) and RCW 9.94A.703(3)(f).

d. Drug Paraphernalia

Condition No. 5 imposes a ban on possession of “paraphernalia” that can be used for ingestion or processing of controlled substances. The Supreme Court has found such a condition to be unconstitutionally vague. *State v. Sanchez Valencia, supra*. That holding applies here and the condition should be stricken under the Due Process Clauses of the Fourteenth Amendment and article I, section 3, and as not being a proper crime-related prohibition under RCW 9.94A.505(8) and RCW 9.94A.703(3)(f).

e. Alcohol and Casinos Restrictions

Condition No. 9 prohibits the use, possession or consumption of alcohol, while Condition No. 27 bans Mr. Stark from entering bars/taverns/lounges or other places where alcohol is the primary source of business, including casinos. The offenses in this case had nothing to do with alcohol or gambling. Thus, these two conditions are not crime-related and are not appropriate under RCW 9.94A.505(8) and RCW 9.94A.703(3)(f). *See*

State v. Julian, 102 Wn. App. 296, 305, 9 P.3d 851 (2000) (“In the absence of a finding that use or possession of alcohol contributed to the offense, the court exceeded its statutory authority by imposing the condition.”).

Mr. Stark recognizes that other panels of the Court of Appeals have not followed *Julian*, pointing to RCW 9.94A.703(3)(e)’s specific mention of the authority to ban the consumption of alcohol. See *State v. Jones*, 118 Wn. App. 199, 207, 76 P.3d 258 (2003). However, nothing in RCW 9.94A.703 allows a court to ban the *possession* of alcohol or ban the entrance into establishments where alcohol is consumed.

Thus, a lifetime ban on Mr. Stark going to a lounge to listen to music (but not consume alcohol) or going to a casino to gamble (or to see a show) has no relationship to the charges in this case. They are not valid crime-related prohibitions under RCW 9.94A.505(8) and RCW 9.94A.703(3)(f), and interfere with Mr. Stark’s associational rights, freedom of speech and assembly, protected by the First and Fourteenth Amendments and article I, sections 4 & 5.

f. Not Going to Adult-Only Locations and Not Going to Parks or Schools

Condition No. 23 bars Mr. Stark from entering “any parks/playgrounds/schools and or any places where minors congregate.” The

literal reading of this provision bars Mr. Stark from any park or school, without regard to whether they are places where minors congregate. Such a provision is vague, is not crime-related, and violates Mr. Stark's associational rights, freedom of travel, and freedom of speech under the First, Fourth, Ninth and Fourteenth Amendments and article I, sections 3, 4 and 5. *See United States v. Peterson*, 248 F.3d 79, 86, (2nd Cir. 2001) (“[I]t is unclear whether the prohibition applies only to parks and recreational facilities in which children congregate, or whether it would bar the defendant from visiting Yellowstone National Park or joining an adult gym.”).

Similarly, Condition No. 27's bar on Mr. Stark going to any “location which requires you to be over 21 years of age” also is illegal. This condition would prohibit Mr. Stark from going, for instance, to a museum's “over 21” night, a night of skiing for adults only, or a church class for adult education. Ex. 27. There is no basis for such a broad prohibition under RCW 9.94A.505(8) and RCW 9.94A.703(3)(f), and such a ban violates the First, Fourth, Ninth and Fourteenth Amendments and article I, sections 3, 4 and 5.

g. Ban on Sex

In Condition No. 24, the court banned Mr. Stark, for the rest of his life, from having “[g]enital sexual contact in a relationship until the therapist

approves of such.” If Mr. Stark does not have a therapist, he therefore can never have conventional sex in a relationship (i.e. with his spouse).¹⁷

Not only is this not a valid crime-related prohibition under RCW 9.94A.505(8) and RCW 9.94A.703(3)(f), but individuals have the right to have sexual relationships as a matter of substantive due process and privacy, protected by the explicit language and the penumbra of the First, Fourth, Ninth and Fourteenth Amendments and article I, sections 3, 4, 5 & 7. *See Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). A lifetime ban on Mr. Stark ever having conventional sex in a relationship (if he does not have a therapist) violates these basic human rights. Such a condition also constitutes cruel and unusual punishment, in violation of the Eighth Amendment and article I, section 14, as well as violating to Mr. Stark’s equal protection rights under the Fourteenth Amendment and article I, section 12. *See Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (striking down forced sterilization as punishment for convictions); *Mickle v. Henrichs*, 262 F. 687 (D.C. Nev.

¹⁷ This restriction apparently does not ban Mr. Stark from non-genital contact sexual experiences with people outside of a “relationship,” which apparently would encourage him to have atypical sexual experiences outside of a relationship (i.e. with an escort).

1918) (punishment of vasectomy violates 8th Amendment); *State v. Brown*, 284 S.C. 407, 326 S.E.2d 410 (1985) (voluntary surgical castration to obtain suspended sentence void as cruel and unusual).

6. *Mr. Stark Received Ineffective Assistance of Counsel*

Mr. Stark has already discussed why his trial counsel and appellate counsel were ineffective for not challenging Instruction No. 22, and why trial counsel was ineffective for not interviewing and calling as a witness Jeffrey Stark. The other challenges raised in this PRP – the statute of limitations issue on Count I of the amended information, the community custody term on Count III and the community custody conditions – are all the basis of “free standing” claims for relief under RAP 16.4.

However, all of these challenges (apart from those related to Jeffrey Stark) should have been raised earlier, at trial and on direct appeal. The failure to file proper motions at trial or raise meritorious appellate issues is ineffective. *See, e.g., State v. Reichenbach*, 153 Wn.2d 126, 130-31, 101 P.3d 80 (2004) (no possible legitimate tactic to fail to move to suppress evidence); *In re Maxfield*, 133 Wn.2d 332, 334, 945 P.2d 196 (1997) (ineffective to fail to argue state constitutional grounds for suppression motion). Accordingly, if Mr. Stark is in any way prejudiced by having to

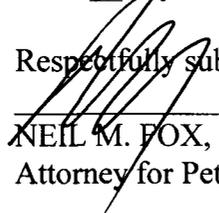
litigate these issues in the context of a PRP, relief should be granted under RAP 16.4 because of the denial of the right to effective assistance of counsel at trial and on appeal, in violation of the Due Process, right to counsel and right to appeal provisions of the Sixth and Fourteenth Amendments and article I, sections 3 & 22. *Strickland v. Washington, supra; Evitts v. Lucey, supra; In re Morris, supra; In re Orange, supra;*

E. CONCLUSION

For the foregoing reasons, and the reasons set out in the Personal Restraint Petition, this Court should enter an order vacating the convictions in King County Superior Court No. 09-1-05650-8 KNT and releasing Mr. Stark from custody, subject to retrial. The conviction for Count I should be vacated and the charge dismissed, and, if there is no retrial, Mr. Stark should be resentenced on the other counts. Alternatively, the term of community custody for Count III should be reduced to 18 months. The Court should order that the following conditions of community custody be stricken or modified: 2, 3, 5, 6, 9, 10, 22, 23, 24, 25, 27, and 29.

DATED this 5 day of March 2015.

Respectfully submitted,

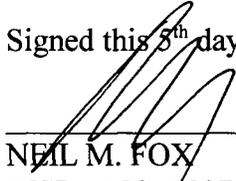


NEIL M. FOX, WSBA NO. 15277
Attorney for Petitioner

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

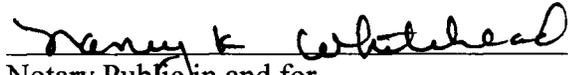
After being first duly sworn, on oath, under penalty of perjury under the laws of the State of Washington, I verify this brief and I depose and say: That, I am the attorney for the petitioner, that I have read the brief, know its contents, and I believe the brief is true.

Signed this 5th day of March 2015, at Seattle, Washington



NEIL M. FOX
WSBA NO. 15277

Subscribed and sworn to before me this 5th day of March 2015.



Notary Public in and for
the State of Washington, residing at Seattle



APPENDIX A

FILED

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KENT, WA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
)	No. 09-1-05650-8 KNT
)	
Vs.)	JUDGMENT AND SENTENCE
)	FELONY (FJS)
BRIAN T. STARK)	
)	
_____)	Defendant,

I. HEARING

I.1 The defendant, the defendant's lawyer, BRAD MERYHEW, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Danella Stark & numerous other family members.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 10/27/2010 by jury verdict of:

Count No.: I Crime: ATTEMPTED CHILD MOLESTATION IN THE FIRST DEGREE- DOMESTIC VIOLENCE
 RCW 9A.28.020 & 9A.44.083 Crime Code: 11071
 Date of Crime: 8/17/1999 TO 12/31/2000 Incident No. _____

Count No.: II Crime: CHILD MOLESTATION IN THE FIRST DEGREE- DOMESTIC VIOLENCE
 RCW 9A.44.083 Crime Code: 01071
 Date of Crime: 1/1/2004 TO 8/16/2005 Incident No. _____

Count No.: III Crime: INCEST IN THE FIRST DEGREE
 RCW 9A.64.020(1) Crime Code: 00924
 Date of Crime: 8/17/2003 TO 8/17/2006 Incident No. _____

Count No.: IV Crime: CHILD MOLESTATION IN THE THIRD DEGREE- DOMESTIC VIOLENCE
 RCW 9A.44.089 Crime Code: 01074
 Date of Crime: 8/17/2007 TO 9/30/2007 Incident No. _____

[] Additional current offenses are attached in Appendix A

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a firearm in count(s) _____ RCW 9.94A.510(3).
- (b) While armed with a deadly weapon other than a firearm in count(s) _____ RCW 9.94A.510(4).
- (c) With a sexual motivation in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a protected zone in count(s) _____ RCW 69.50.435.
- (e) Vehicular homicide Violent traffic offense DUI Reckless Disregard.
- (f) Vehicular homicide by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g) Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h) Domestic violence offense as defined in RCW 10.99.020 for count(s) _____.
- (i) Current offenses encompassing the same criminal conduct in this cause are count(s) _____ RCW 9.94A.589(1)(a).

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):
 Criminal history is attached in Appendix B.
 One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	9	X	149 TO 198 MONTHS	75% OF STANDARD	111.75 TO 148.50 120 MONTHS	10 YRS AND/OR \$20,000
Count II	9	X	149 TO 198 MONTHS		149 TO 198 MONTHS	LIFE AND/OR \$50,000
Count III	9	VI	77 TO 102 MONTHS		77 TO 102 MONTHS	10 YRS AND/OR \$20,000
Count IV	9	V	60 MONTHS		60 MONTHS	5 YRS AND/OR \$10,000

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):

Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in Appendix D. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.
 The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
 - Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.
 - Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
 - Date to be set.
 - Defendant waives presence at future restitution hearing(s).
 - Restitution is not ordered.
- Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs; Court costs are waived; (RCW 9.94A.030, 10.01.160)
- (b) \$100 DNA collection fee (RCW 43.43.754)(mandatory for crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs; Recoupment is waived (RCW 9.94A.030);
- (d) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA; VUCSA fine waived (RCW 69.50.430);
- (e) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived; (RCW 9.94A.030)
- (f) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (g) \$ _____, Incarceration costs; Incarceration costs waived (RCW 9.94A.760(2));
- (h) \$ _____, Other costs for: _____

4.3 PAYMENT SCHEDULE:

Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 600.00 + RESTITUTION. The 780

payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied. Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

- Court Clerk's trust fees are waived.
- Interest is waived except with respect to restitution.

4.4 The defendant, having been convicted of a FELONY SEX OFFENSE, is sentenced to the following:

(a) DETERMINATE SENTENCE : Defendant is sentenced to a term of confinement in the custody of the
 King County Jail King County Work/Education Release (subject to conditions of conduct ordered
this date) Department of Corrections, as follows, commencing: immediately;
 Date: _____ by _____ a.m. / p.m.

120 months/days on count I; _____ months/days on count _____; _____ months/days on count _____;
102 months/days on count II; _____ months/days on count _____; _____ months/days on count _____;
60 months/days on count IV; _____ months/days on count _____; _____ months/days on count _____.

ALTERNATIVE CONVERSION - RCW 9.94A.680 (LESS THAN ONE YEAR ONLY):
_____ days of total confinement are hereby converted to:
 _____ days/ hours community restitution (for nonviolent offense) under the supervision of the
Department of Corrections to be completed: on a schedule established by the defendant's Community
Corrections Officer; or as follows: _____. If the defendant is not
supervised by the Department of Corrections, this will be monitored by the Helping Hands Program.
 Alternative conversion was not used because: Defendant's criminal history, Defendant's
failure to appear, Other: _____.

COMMUNITY CUSTODY for FAILURE TO REGISTER AS A SEX OFFENDER under RCW
9A.44.130(11)(a) committed on or after 6-7-2006 as to Counts _____ is ordered
pursuant to RCW 9.94A.545(2) and RCW 9.94A.715 for the range of 36 months.
APPENDIX H, Community Custody conditions, is attached and incorporated herein.

COMMUNITY CUSTODY (CONFINEMENT LESS THAN ONE YEAR except for Failure to
Register as a Sex Offender under RCW 9A.44.130(11)(a) committed on or after 6-7-06) as to Counts
_____, for crimes committed on or after 7-1-2000, is ordered for a period of 12 months. The
defendant shall report to the Department of Corrections within 72 hours of this date or of his/her release if
now in custody; shall comply with all the rules, regulations and conditions of the Department for
supervision of offenders; shall comply with all affirmative acts required to monitor compliance; and shall
otherwise comply with terms set forth in this sentence. Sanctions and punishments for non-compliance will
be imposed by the Department of Corrections or the court.
 APPENDIX ____: Additional Conditions are attached and incorporated herein.

COMMUNITY CUSTODY (CONFINEMENT OVER ONE YEAR) as to Counts _____:
pursuant to RCW 9.94A.700, for qualifying crimes committed before 6-6-1996, is ordered for 24 months
or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer, up to
36 months. Sanctions and punishments for non-compliance will be imposed by the Department of
Corrections or the court.
APPENDIX H, Community Custody conditions, is attached and incorporated herein.

COMMUNITY CUSTODY (CONFINEMENT OVER ONE YEAR) as to Counts II, III :
pursuant to RCW 9.94A.715 for qualifying crimes (non RCW 9.94A.507 offenses) is ordered for 36
months. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections
or the court.
APPENDIX H, Community Custody conditions, is attached and incorporated herein.

(b) INDETERMINATE SENTENCE – QUALIFYING SEX OFFENSES occurring after 9-1-2001:
The Court having found that the defendant is subject to sentencing under RCW 9.94A.507, the defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately; [] (Date): _____ by _____ m.

Count II: Minimum Term: 180 months/days; Maximum Term: _____ years/life;

Count _____: Minimum Term: _____ months/days; Maximum Term: _____ years/life;

Count _____: Minimum Term: _____ months/days; Maximum Term: _____ years/life;

Count _____: Minimum Term: _____ months/days; Maximum Term: _____ years/life.

COMMUNITY CUSTODY: pursuant to RCW 9.94A.507 for qualifying SEX OFFENSES committed on or after September 1, 2001, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence as set forth above. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections or by the court.
APPENDIX H: Community Custody conditions, is attached and incorporated herein.

4.5 ADDITIONAL CONDITIONS OF SENTENCE

The above terms for counts I, II, III, + IV are consecutive / concurrent.

The above terms shall run [] CONSECUTIVE [] CONCURRENT to cause No.(s) _____

The above terms shall run [] CONSECUTIVE [] CONCURRENT to any previously imposed sentence not referred to in this order.

[] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (For crimes committed after 6-10-1998.)

[] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (For crimes before 6-11-1998 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is 180 months.

Credit is given for time served in King County Jail or EHD solely for confinement under this cause number pursuant to RCW 9.94A.505(6): [] _____ day(s) or days determined by the King County Jail.

[] Jail term is satisfied and defendant shall be released under this cause.

4.6 NO CONTACT: For the maximum term of LIFE years, defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: _____

Any minors without supervision of a responsible adult who has knowledge of this conviction; THE DEFENDANT MAY HAVE CONTACT WITH E.S. (DOB 9-21-00) WHILE IN DOC CUSTODY; THE DEFENDANT MAY ALSO HAVE CONTACT WITH DANELLE STARK WHILE IN DOC CUSTODY.

4.7 DNA TESTING: The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

HIV TESTING: For sexual offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

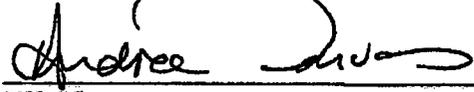
4.8 SEX OFFENDER REGISTRATION:

The defendant shall register as a sex offender as ordered in APPENDIX J.

4.9 ARMED CRIME COMPLIANCE, RCW 9.94A.475,.480. The State's plea/sentencing agreement is attached as follows:

The defendant shall report to an assigned Community Corrections Officer within 72 hours of release from confinement for monitoring of the remaining terms of this sentence.

Date: Dec. 17, 2010

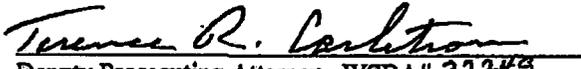


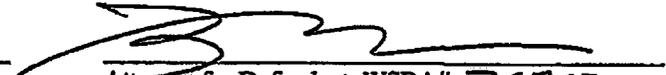
JUDGE

Print Name: Darvas ANDREA DARVAS

Presented by:

Approved as to form:


Deputy Prosecuting Attorney, WSBA# 32249
Print Name: TERENCE R. CARLSTROM


Attorney for Defendant, WSBA# 26797
Print Name: ROD A. MEYLER

~~ANDREA DARVAS~~

BEST IMAGE POSSIBLE

FINGERPRINTS



RIGHT HAND
FINGERPRINTS OF:

BRIAN T STARK

DEFENDANT'S SIGNATURE:

DEFENDANT'S ADDRESS:

325 UNION AVE SE #151
RENTON, WA 98059

DATED:

12-17-10

Andre Muc
JUDGE, KING COUNTY SUPERIOR COURT

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK
BY: Donna R. Risher
DEPUTY CLERK

CERTIFICATE

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

OFFENDER IDENTIFICATION

S.I.D. NO. WA25291353
DOB: AUGUST 31, 1972
SEX: M
RACE: W

CLERK

BY: _____
DEPUTY CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

BRIAN T. STARK

Defendant,

No. 09-1-05650-8 KNT

APPENDIX G
ORDER FOR BIOLOGICAL TESTING
AND COUNSELING

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 12/17/10



JUDGE, King County Superior Court

ANDREA DARVAS

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

STATE OF WASHINGTON]	Cause No.: 09-1-05650-8
]	
	Plaintiff]	
	v.]	JUDGMENT AND SENTENCE (FELONY)
STARK, Brian T		APPENDIX H
	Defendant]	COMMUNITY PLACEMENT / CUSTODY
]	
DOC No. 344634]	

The court having found the defendant guilty of offense(s) qualifying for community placement, it is further ordered as set forth below.

COMMUNITY PLACEMENT/CUSTODY: Defendant additionally is sentenced on convictions herein, for the offenses under RCW 9.94A.507 committed on or after September 1, 2001 to include up to life community custody; for each sex offense and serious violent offense committed on or after June 6, 1996 to community placement/custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.728 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, but before June 6, 1996, to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2) whichever is longer; and on conviction herein 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, any crime against a person where it is determined in accordance with RCW 9.94A.602 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement.

Community placement/custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

09-1-05650-8
STARK, Brian T 344634
Page 1 of 4

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during the term of community placement/custody:

- (1) Report to and be available for contact with the assigned Community Corrections Officer as directed;
- (2) Work at Department of Corrections' approved education, employment, and/or community service;
- (3) Not consume controlled substances except pursuant to lawfully issued prescriptions;
- (4) While in community custody not unlawfully possess controlled substances;
- (5) Pay supervision fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location;
- (7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision, or both (RCW 9.94A.505);
- (8) Notify community corrections officer of any change in address or employment; and
- (9) Remain within geographic boundary, as set forth in writing by the Community Corrections Officer.

WAIVER: The following above-listed mandatory conditions are waived by the Court:

(b) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement / custody:

CCI and OAA Only: Abide by any DOC imposed conditions:

1. OAA Only: Obey all municipal, county, state, tribal, and federal laws.
2. No direct and/or indirect contact with minor aged persons. *without approval of treatment provider.*
3. Do not enter sex related business to include x-rated movies, adult bookstores, strip clubs, and or any location where the primary source of business is related to adult/sexually explicit material.
4. Register as a Sex Offender with sheriffs office in the county of residence as required by law.
5. Do not possess paraphernalia that can be used for ingestion or processing of controlled substances.
6. Do not purchase, own, possess or peruse any pornography, to include but not limited to magazines, books, videos, DVD's, catalogues or any other material(s) which can be viewed or read for personal sexual gratification. ~~Specifically (but not limited to), you are prohibited from viewing any material(s) which depict minors and/or adults in naked or partially dressed state, sexually provocative poses or "vulnerable" poses, involved in any sort of erotic, sexual or physical touching (self or others of any sex or age).~~ *except as permitted by treatment provider.*
7. Submit to and be available for urine/breathalyzer testing as directed
8. Submit to and be available for polygraph examination as directed
9. Do not use/possess/purchase/consume alcohol.
10. Do not use/possess/consume any controlled substances without a lawfully issued prescription.
11. ~~Do not enter drug areas as defined by court or CCO~~
12. ~~Abide by a curfew of 10pm-5am unless directed otherwise. Remain at registered address or~~

* while in custody, defendant may have contact with his son, Zachary Stark DOB 9-21-00. *if*

09-1-05650-8

STARK, Brian T 344634

Page 2 of 4

~~address previously approved by CCO during these hours.~~

13. Residence and/or living arrangements must receive prior approval of the CCO.
14. If a resident at a specialized housing program, comply with all rules of housing program.
15. Obey all municipal County State Tribal and Federal laws
16. Must maintain employment, education, and/or community service approved by the Washington State Department of Corrections.
17. Abide by all directives of the CCO or other CCO's acting in his/her absence related to obtaining evaluations and/or counseling determined applicable to supervision. Attend all related appointments (unless excused); follow all requirements, conditions, and instructions related to the recommended evaluation/counseling; sign all necessary releases of information; and enter and complete the recommended programming.
18. Should the CCO determine it applicable, obtain a mental health and or sexual deviancy evaluation upon referral and follow through with all recommendations of the evaluator. Should mental health treatment and or sexual deviancy treatment be recommended, enter and abide by all programming rules, regulations and requirements. Attend all related appointments (unless excused); follow all requirements, conditions, and instructions related to the recommended evaluation/counseling; sign all necessary releases of information; and enter and complete the recommended programming.
19. Do not change residence and/or work location without the prior permission of the supervising CCO.
20. ~~No internet access or use, including email, without the prior approval of the supervising CCO.~~
21. Be available for and submit to breathanalysis upon the request of the CCO and/or the chemical dependency treatment provider.
22. Do not hold any position of authority or trust involving minors.
23. Do not enter any parks/playgrounds/schools and or any places where minors congregate.
24. Inform the supervising Community Corrections Officer and/or sexual deviancy provider of any dating relationship and disclosure of sex offender status must occur prior to any genital sexual contact. Genital sexual contact in a relationship is prohibited until the ~~CCO~~ and/or therapist approves of such.
25. Do not date women/men nor form relationships with families who have minor children unless ~~directed otherwise by the supervising CCO.~~ *approved by treatment provider.*
26. Do not possess deadly weapons.
27. Do not enter any bars/taverns/lounges or other places where alcohol is the primary source of business. This includes casinos and or any location which requires you to be over 21 years of age.
28. Must consent to DOC home visits to monitor compliance with supervision. Home visits include access for the purposes of visual inspection of all areas of residence in which the offender lives or has exclusive/joint control/access. *sex R A*
29. No ~~chat rooms via the internet~~ or sex lines/chat lines via phone.
30. ~~Do not use internet without CCO approval.~~
31. Have no direct or indirect contact with the victim(s) of this offense, ~~or their families.~~
32. *Mr. Stark may have contact with his wife, Danielle Stark, while incarcerated at the Department of Corrections.*

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STARK, Brian T 344634

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Dec. 17, 2010
DATE



JUDGE, KING COUNTY SUPERIOR COURT ANDREA DARVI

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Page 4 of 4

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
Plaintiff,)
)
vs.)
BRIAN T. STARK)
Defendant,)

No. 09-1-05650-8 KNT

APPENDIX J
JUDGMENT AND SENTENCE
SEX/ KIDNAPPING OFFENDER NOTICE OF
REGISTRATION REQUIREMENTS

SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, RCW 9A.44.140, Laws of 2010, ch. 267, sec. 1-7., RCW 10.01.200. You are required to register your complete residential address with the sheriff of the county where you reside, because you have been convicted of one of the following sex or kidnapping offenses: *Child Molestation 1, 2 or 3; Commercial Sexual Abuse of a Minor (formerly Patronizing a Juvenile Prostitute); Communication with a Minor for Immoral Purposes; Criminal Trespass against Children; Custodial Sexual Misconduct 1; Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct 1 or 2; Failure to Register as a Sex Offender; Incest 1 or 2; Indecent Liberties; Kidnapping 1 or 2 (if victim is a minor and offender is not the minor's parent); Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct 1 or 2; Promoting Commercial Sexual Abuse of a Minor; Promoting Travel for Commercial Sexual Abuse of a Minor; Rape 1, 2, or 3; Rape of a Child 1, 2, or 3; Sending, Bringing Into State Depictions of a Minor Engaged in Sexually Explicit Conduct 1 or 2; Sexual Exploitation of a Minor; Sexual Misconduct With A Minor 1; Unlawful Imprisonment (if victim is a minor and offender is not the minor's parent); Viewing Depictions of a Minor Engaged in Sexually Explicit Conduct 1 or 2; Voyeurism; any gross misdemeanor that is under RCW 9A.28, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030 or RCW 9A.44.130 or a kidnapping offense under 9A.44.130; or any felony with a finding of sexual motivation (RCW 9.94A.835 or RCW 13.40.135).*

If you are out of custody, you must register within 3 business days of being sentenced.

If you are in custody, you must register within 3 business days from the time of your release.

If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of residence to the county sheriff within 3 business days of moving.

If you change your residence to a new county within this state, you must register with the sheriff of the county of your new residence within 3 business days of moving. In addition, you must provide, by certified mail, with return receipt requested, or in person, signed written notice of your change of address to the sheriff of the county where you last registered within 3 business days of moving.

If you plan to attend or work at a public or private school or institution of higher education in Washington, you are required to notify the county sheriff for the county of your residence within 3 business days prior to arriving at the school to work or attend classes.

If you lack a fixed residence, you are required to register as homeless. You must also report in person to the sheriff of the county where you registered on a weekly basis. You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff upon request. If you are under DOC supervision and lack a fixed residence, you must register in the county where you are being supervised. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county within 3 business days.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 3 business days after returning to this state.

If you move to a new state, you must register with the new state within 3 business days after establishing residence. You must also send written notice, within 3 business days of moving to the new state, to the county sheriff with whom you last registered in Washington State.

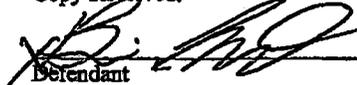
If you are not a resident of Washington, but attend school, are employed, or carry on a vocation in the State of Washington, you must register with the county sheriff for the county where your school, place of employment, or vocation is located.

Your duty to register does not end until you have obtained a court order specifically relieving you of the duty to register or you have been informed in writing by the sheriff's office that your duty to register has ended. Your duty to register DOES NOT end when your DOC supervision ends.

The King County Sheriff's Office sex offender registration desk is located on the first floor of the King County Courthouse- 516 3rd Avenue, Seattle, WA.

Failure to comply with registration requirements is a criminal offense.

Copy Received:


Defendant Date 12/7/10


JUDGE ANDREA DARVA

APPENDIX J Rev. 6/10/2010
Distribution:
Original/White - Clerk
Yellow - Prosecutor
Pink - King County Jail
Goldenrod - Defendant

APPENDIX B

No. 22

Evidence has been produced suggesting that the defendant committed acts of Child Molestation in the First Degree and Incest in the First Degree on multiple occasions. A separate crime is charged in each count. To convict the defendant on the count of Child Molestation in the First Degree, one particular act of molestation must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. To convict the defendant on the count of Incest in the First Degree, one particular act of sexual intercourse must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of child molestation or incest.

APPENDIX C

To whom it may concern,

Approximately when I was 14 or 15 I stayed the night with my uncle Brian and he bought me a baseball mit made by Nike at Target and that night we watched ~~TV~~ I slept on the couch and the next day I played with my little cousins outside, right out front. What I remember is Brian mowing the lawn and then I went home. The allegations that Caitlin made are false because we never went on a bike ride and Brian never told me to go home. There was no home unbuilt that we went to and that is the truth I will testify under oath that the allegations are false that I was ^{not} there and he ^{never} said that to me.

J. E. Esler

STATUTORY APPENDIX

Relevant Statutory Provisions and Rules

ER 801 provides in part:

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 802 provides:

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

ER 1101 provides:

(a) Courts Generally. Except as otherwise provided in section (c), these rules apply to all actions and proceedings in the courts of the state of Washington. The terms "judge" and "court" in these rules refer to any judge of any court to which these rules apply or any other officer who is authorized by law to hold any hearing to which these rules apply.

(b) Law With Respect to Privilege. The law with respect to privileges applies at all stages of all actions, cases, and proceedings.

(c) When Rules Need Not Be Applied. The rules (other than with respect to privileges, the rape shield statute and ER 412) need not be applied in the following situations:

(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a).

(2) Grand Jury. Proceedings before grand juries and special inquiry judges.

(3) Miscellaneous Proceedings. Proceedings for extradition or rendition; detainer proceedings under RCW 9.100; preliminary determinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily; habeas corpus proceedings; small claims court; supplemental proceedings under RCW 6.32; coroners' inquests; preliminary determinations in juvenile court; juvenile court hearings on declining jurisdiction; disposition, review, and permanency planning hearings in juvenile court; dispositional determinations related to treatment for alcoholism, intoxication, or drug addiction under RCW 70.96A; and dispositional determinations under the Civil Commitment Act, RCW 71.05.

(4) Applications for Protection Orders. Protection order proceedings under RCW 7.90, 7.92, 10.14, 26.50 and 74.34. Provided when a judge proposes to consider information from a criminal or civil database, the judge shall disclose the information to each party present at the hearing; on timely request; provide each party with an opportunity to be heard; and, take appropriate measures to alleviate litigants' safety concerns. The judge has discretion

not to disclose information that he or she does not propose to consider.

(d) Arbitration Hearings. In a mandatory arbitration hearing under RCW 7.06, the admissibility of evidence is governed by MAR 5.3.

Former FRE 1101 provided in part:

(d) Rules inapplicable.—The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury.—Proceedings before grand juries.

(3) Miscellaneous proceedings.—Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part.— In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: . . . habeas corpus under sections 2241-2254 of title 28 . . .

RAP 1.2 provides:

(a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of

cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

(b) Words of Command. Unless the context of the rule indicates otherwise: "Should" is used when referring to an act a party or counsel for a party is under an obligation to perform. The court will ordinarily impose sanctions if the act is not done within the time or in the manner specified. The word "must" is used in place of "should" if extending the time within which the act must be done is subject to the severe test under rule 18.8(b) or to emphasize failure to perform the act in a timely way may result in more severe than usual sanctions. The word "will" or "may" is used when referring to an act of the appellate court. The word "shall" is used when referring to an act that is to be done by an entity other than the appellate court, a party, or counsel for a party.

(c) Waiver. The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).

RAP 16.4 provides:

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the

petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government, and sufficient reasons exist to require retroactive application of the changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, or .100. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

RAP 16.12 provides:

If the appellate court transfers the petition to a superior court, the transfer will be to the superior court for the county in which the decision was made resulting in the restraint of petitioner or, if petitioner is not being restrained on the basis of a decision, in the superior court in the county in which petitioner is located. If the respondent is represented by the Attorney General, the prosecuting attorney, or a municipal attorney, respondent must take steps to obtain a prompt evidentiary hearing and must serve notice of the date set for hearing on all other parties. The parties, on motion, will be granted reasonable pretrial discovery. Each party has the right to subpoena witnesses. The hearing shall be held before a judge who was not involved in the challenged proceeding. The petitioner has the right to be present at the hearing, the right to cross-examine adverse witnesses, and the right to counsel to the extent authorized by statute. The Rules of Evidence apply at the hearing. Upon the conclusion of the hearing, if the case has been transferred for a reference hearing, the superior court shall enter findings of fact and have the findings and all appellate court files forwarded to the appellate court. Upon the conclusion of the hearing if the case has been transferred for a determination on the merits, the superior court shall enter findings of fact and conclusions of law and an order deciding the petition.

RCW 4.36.240 provides:

The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect.

RCW 46.61.5055(6) provides in part:

Penalty for having a minor passenger in vehicle. If a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 committed the offense while a passenger under the age of sixteen was in the vehicle, the court shall:

(a) Order the use of an ignition interlock or other device for an additional six months;

(b) In any case in which the person has no prior offenses within seven years, and except as provided in RCW 46.61.502(6) or 46.61.504 (6), order an additional twenty-four hours of imprisonment and a fine of not less than one thousand dollars and not more than five thousand dollars. One thousand dollars of the fine may not be suspended unless the court finds the offender to be indigent
.....

RCW 9.68A.011(5) provides:

(5) "Minor" means any person under eighteen years of age.

RCW 9.94A.030(10) provides:

"Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders

directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.505 provides in part:

(8) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

RCW 9.94A.701 provides in part:

(9) The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.703 provides in part:

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) Mandatory conditions. As part of any term of community custody, the court shall:

(a) Require the offender to inform the department of court-ordered treatment upon request by the department;

(b) Require the offender to comply with any conditions imposed by the department under RCW 9.94A.704;

(c) If the offender was sentenced under RCW 9.94A.507 for an offense listed in RCW 9.94A.507(1)(a), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;

(d) If the offender was sentenced under RCW 9A.36.120, prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) Waivable conditions. Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as determined by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) Discretionary conditions. As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) 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;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions. . . .

RCW 9A.04.080 (2013) provides:

(1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.

(a) The following offenses may be prosecuted at any time after their commission:

(i) Murder;

(ii) Homicide by abuse;

(iii) Arson if a death results;

(iv) Vehicular homicide;

(v) Vehicular assault if a death results;

(vi) Hit-and-run injury-accident if a death results (RCW 46.52.020(4)).

(b) Except as provided in (c) of this subsection, the following offenses shall not be prosecuted more than ten years after their commission:

(i) Any felony committed by a public officer if the commission is in connection with the duties of his or her office or constitutes a breach of his or her public duty or a violation of the oath of office;

(ii) Arson if no death results;

(iii)(A) Violations of RCW 9A.44.040 or 9A.44.050 if the rape is reported to a law enforcement agency within one year of its commission.

(B) If a violation of RCW 9A.44.040 or 9A.44.050 is not reported within one year, the rape may not be prosecuted more than three years after its commission; or

(iv) Indecent liberties under RCW 9A.44.100(1)(b).

(c) Violations of the following statutes, when committed against a victim under the age of eighteen, may be prosecuted up to the victim's thirtieth birthday: RCW 9A.44.040 (rape in the first degree), 9A.44.050 (rape in the second degree), 9A.44.073 (rape of a child in the first degree), 9A.44.076 (rape of a child in the second degree), 9A.44.079 (rape of a child in the third degree), 9A.44.083 (child molestation in the first degree), 9A.44.086 (child molestation in the second degree), 9A.44.089 (child molestation in the third degree), 9A.44.100(1)(b) (indecent liberties), 9A.64.020 (incest), or 9.68A.040 (sexual exploitation of a minor).

(d) The following offenses shall not be prosecuted more than six years after their commission or their discovery, whichever occurs later:

- (i) Violations of RCW 9A.82.060 or 9A.82.080;
- (ii) Any felony violation of chapter 9A.83 RCW;
- (iii) Any felony violation of chapter 9.35 RCW;
- (iv) Theft in the first or second degree under chapter 9A.56 RCW when accomplished by color or aid of deception; or
- (v) Trafficking in stolen property in the first or second degree under chapter 9A.82 RCW in which the stolen property is a motor vehicle or major component part of a motor vehicle as defined in RCW 46.80.010.
- (e) The following offenses shall not be prosecuted more than five years after their commission: Any class C felony under chapter 74.09, *82.36, or 82.38 RCW.
- (f) Bigamy shall not be prosecuted more than three years after the time specified in RCW 9A.64.010.
- (g) A violation of RCW 9A.56.030 must not be prosecuted more than three years after the discovery of the offense when the victim is a tax exempt corporation under 26 U.S.C. Sec. 501(c)(3).
- (h) No other felony may be prosecuted more than three years after its commission; except that in a prosecution under RCW 9A.44.115, if the person who was viewed, photographed, or filmed did not realize at the time that he or she was being viewed, photographed, or filmed, the prosecution must be commenced within two years of the time the person who was viewed or in the photograph or film first learns that he or she was viewed, photographed, or filmed.

(i) No gross misdemeanor may be prosecuted more than two years after its commission.

(j) No misdemeanor may be prosecuted more than one year after its commission.

(2) The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.

(3) In any prosecution for a sex offense as defined in RCW 9.94A.030, the periods of limitation prescribed in subsection (1) of this section run from the date of commission or one year from the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing or by photograph as defined in RCW 9.68A.011, whichever is later.

(4) If, before the end of a period of limitation prescribed in subsection (1) of this section, an indictment has been found or a complaint or an information has been filed, and the indictment, complaint, or information is set aside, then the period of limitation is extended by a period equal to the length of time from the finding or filing to the setting aside.

RCW 9A.20.021 provides in part:

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or

by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine. . . .

RCW 9A.28.020 provides:

(1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

(2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

(3) An attempt to commit a crime is a:

(a) Class A felony when the crime attempted is murder in the first degree, murder in the second degree, arson in the first degree, child molestation in the first degree, indecent liberties by forcible compulsion, rape in the first degree, rape in the second degree, rape of a child in the first degree, or rape of a child in the second degree;

(b) Class B felony when the crime attempted is a class A felony other than an offense listed in (a) of this subsection;

(c) Class C felony when the crime attempted is a class B felony;

(d) Gross misdemeanor when the crime attempted is a class C felony;

(e) Misdemeanor when the crime attempted is a gross misdemeanor or misdemeanor.

RCW 9A.44.083 provides:

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, 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.64.020 provides:

(1) (a) A person is guilty of incest in the first degree if he or she engages in sexual intercourse 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 first degree is a class B felony.

(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 section:

(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.

RCW 9A.72.085 provides in part:

(1) Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

(a) Recites that it is certified or declared by the person to be true under penalty of perjury;

(b) Is subscribed by the person;

(c) States the date and place of its execution; and

(d) States that it is so certified or declared under the laws of the state of Washington.

(2) The certification or declaration may be in substantially the following form:

"I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct":

.....
(Date and Place) (Signature)

RCW 66.44.270 provides in part:

Furnishing liquor to minors — Possession, use — Penalties — Exhibition of effects — Exceptions.

(1) It is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years or permit any person under that age to consume liquor on his or her premises or on any premises under his or her control. For the purposes of this subsection, "premises" includes real property, houses, buildings, and other structures, and motor vehicles and watercraft. A violation of this subsection is a gross misdemeanor punishable as provided for in chapter 9A.20 RCW.

U.S. Const. amend. I provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VI provides:

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 defense.

U.S. Const. amend. VIII provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. IX provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. XIV, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3 provides:

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

Wash. Const. art. I, § 4 provides:

The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

Wash. Const. art. I, § 5 provides:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

Wash. Const. art. I, § 7 provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

Wash. Const. art. I, § 12 provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. art. I, § 14 provides:

Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Wash. Const. art. I, § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for

waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (Amendment 10) provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or 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 charged to have been committed and the right to appeal in all cases: *Provided*, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Wash. Const. art. IV, § 16 provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

WPIC 4.25 (2008) provides:

The [State] [County] [City] alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant [on any count] of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime).

Passed the House March 7, 1998.
Passed the Senate March 4, 1998.
Approved by the Governor March 30, 1998.
Filed in Office of Secretary of State March 30, 1998.

CHAPTER 221

[Substitute House Bill 1441]

VOYEURISM

AN ACT Relating to the crime of voyeurism; reenacting and amending RCW 9A.04.080; adding a new section to chapter 9A.44 RCW; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. A new section is added to chapter 9A.44 RCW to read as follows:

(1) As used in this section:

(a) "Photographs" or "films" means the making of a photograph, motion picture film, videotape, or any other recording or transmission of the image of a person;

(b) "Place where he or she would have a reasonable expectation of privacy" means:

(i) A place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or

(ii) A place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance;

(c) "Surveillance" means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person;

(d) "Views" means the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity.

(2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films another person, without that person's knowledge and consent, while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.

(3) Voyeurism is a class C felony.

(4) This section does not apply to viewing, photographing, or filming by personnel of the department of corrections or of a local jail or correctional facility for security purposes or during investigation of alleged misconduct by a person in the custody of the department of corrections or the local jail or correctional facility.

Sec. 2. RCW 9A.04.080 and 1997 c 174 s 1 and 1997 c 97 s 1 are each reenacted and amended to read as follows:

(1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.

(a) The following offenses may be prosecuted at any time after their commission:

- (i) Murder;
- (ii) Homicide by abuse;
- (iii) Arson if a death results;
- (iv) Vehicular homicide;
- (v) Vehicular assault if a death results;
- (vi) Hit-and-run injury-accident if a death results (RCW 46.52.020(4)).

(b) The following offenses shall not be prosecuted more than ten years after their commission:

(i) Any felony committed by a public officer if the commission is in connection with the duties of his or her office or constitutes a breach of his or her public duty or a violation of the oath of office;

(ii) Arson if no death results; or

(iii) Violations of RCW 9A.44.040 or 9A.44.050 if the rape is reported to a law enforcement agency within one year of its commission; except that if the victim is under fourteen years of age when the rape is committed and the rape is reported to a law enforcement agency within one year of its commission, the violation may be prosecuted up to three years after the victim's eighteenth birthday or up to ten years after the rape's commission, whichever is later. If a violation of RCW 9A.44.040 or 9A.44.050 is not reported within one year, the rape may not be prosecuted: (A) More than three years after its commission if the violation was committed against a victim fourteen years of age or older; or (B) more than three years after the victim's eighteenth birthday or more than seven years after the rape's commission, whichever is later, if the violation was committed against a victim under fourteen years of age.

(c) Violations of the following statutes shall not be prosecuted more than three years after the victim's eighteenth birthday or more than seven years after their commission, whichever is later: RCW 9A.44.073, 9A.44.076, 9A.44.083, 9A.44.086, 9A.44.070, 9A.44.080, 9A.44.100(1)(b), or 9A.64.020.

(d) The following offenses shall not be prosecuted more than six years after their commission: Violations of RCW 9A.82.060 or 9A.82.080.

(e) The following offenses shall not be prosecuted more than five years after their commission: Any class C felony under chapter 74.09, 82.36, or 82.38 RCW.

(f) Bigamy shall not be prosecuted more than three years after the time specified in RCW 9A.64.010.

(g) A violation of RCW 9A.56.030 must not be prosecuted more than three years after the discovery of the offense when the victim is a tax exempt corporation under 26 U.S.C. Sec. 501(c)(3).

(h) No other felony may be prosecuted more than three years after its commission; except that in a prosecution under section 1 of this act, if the person who was viewed, photographed, or filmed did not realize at the time that he or she

was being viewed, photographed, or filmed, the prosecution must be commenced within two years of the time the person who was viewed or in the photograph or film first learns that he or she was viewed, photographed, or filmed.

(i) No gross misdemeanor may be prosecuted more than two years after its commission.

(j) No misdemeanor may be prosecuted more than one year after its commission.

(2) The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.

(3) If, before the end of a period of limitation prescribed in subsection (1) of this section, an indictment has been found or a complaint or an information has been filed, and the indictment, complaint, or information is set aside, then the period of limitation is extended by a period equal to the length of time from the finding or filing to the setting aside.

Passed the House March 11, 1998.

Passed the Senate March 10, 1998.

Approved by the Governor March 30, 1998.

Filed in Office of Secretary of State March 30, 1998.

CHAPTER 222

[Engrossed Substitute House Bill 1769]

ELECTRONIC COMMUNICATION OF PRESCRIPTION INFORMATION

AN ACT Relating to electronic transfer of prescription information; amending RCW 69.41.010 and 69.50.101; adding a new section to chapter 69.41 RCW; and adding a new section to chapter 69.50 RCW.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 69.41.010 and 1996 c 178 s 16 are each amended to read as follows:

As used in this chapter, the following terms have the meanings indicated unless the context clearly requires otherwise:

(1) "Administer" means the direct application of a legend drug whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(a) A practitioner; or

(b) The patient or research subject at the direction of the practitioner.

(2) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a legend drug, whether or not there is an agency relationship.

(3) "Department" means the department of health.

(4) "Dispense" means the interpretation of a prescription or order for a legend drug and, pursuant to that prescription or order, the proper selection, measuring,

(b) (a) of this subsection does not apply if upon transfer an agreement for different terms of transfer is reached between the collective bargaining representatives of the transferring employees and the participating fire protection jurisdictions.

(4) If upon transfer, the transferring employee receives the rights, benefits, and privileges established under subsection (3)(a)(i) through (iv) of this section, those rights, benefits, and privileges are subject to collective bargaining at the end of the current bargaining period for the jurisdiction to which the employee has transferred.

(5) Such bargaining must take into account the years of service the transferring employee accumulated before the transfer and must be treated as if those years of service occurred in the jurisdiction to which the employee has transferred.

NEW SECTION. Sec. 11. A new section is added to chapter 35A.14 RCW to read as follows:

Upon the written request of a fire protection district, code cities annexing territory under this chapter shall, prior to completing the annexation, issue a report regarding the likely effects that the annexation and any associated asset transfers may have upon the safety of residents within and outside the proposed annexation area. The report must address, but is not limited to, the provisions of fire protection and emergency medical services within and outside of the proposed annexation area. A fire protection district may only request a report under this section when at least five percent of the assessed valuation of the fire protection district will be annexed.

NEW SECTION. Sec. 12. A new section is added to chapter 35A.92 RCW to read as follows:

Code cities conducting annexations of all or part of fire protection districts shall, at least through the budget cycle, or the following budget cycle if the annexation occurs in the last half of the current budget cycle, in which the annexation occurs, maintain existing fire protection and emergency services response times in the newly annexed areas consistent with response times recorded prior to the annexation as defined in the previous annual report for the fire protection district and as reported in RCW 52.33.040. If the code city is unable to maintain these service levels in the newly annexed area, the transfer of firefighters from the annexed fire protection district as a direct result of the annexation must occur as outlined in section 10 of this act.

Passed by the Senate March 6, 2009.

Passed by the House April 1, 2009.

Approved by the Governor April 10, 2009.

Filed in Office of Secretary of State April 13, 2009.

CHAPTER 61

[Senate Bill 5832]

STATUTES OF LIMITATION—SEX OFFENSES—AGE OF VICTIM

AN ACT Relating to allowing the prosecution of sex offenses against minor victims until the victim's twenty-eighth birthday if the offense is listed in RCW 9A.04.080(1) (b)(iii)(A) or (c); and amending RCW 9A.04.080.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 9A.04.080 and 2006 c 132 s 1 are each amended to read as follows:

(1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.

(a) The following offenses may be prosecuted at any time after their commission:

- (i) Murder;
- (ii) Homicide by abuse;
- (iii) Arson if a death results;
- (iv) Vehicular homicide;
- (v) Vehicular assault if a death results;
- (vi) Hit-and-run injury-accident if a death results (RCW 46.52.020(4)).

(b) The following offenses shall not be prosecuted more than ten years after their commission:

(i) Any felony committed by a public officer if the commission is in connection with the duties of his or her office or constitutes a breach of his or her public duty or a violation of the oath of office;

(ii) Arson if no death results; or

(iii)(A) Violations of RCW 9A.44.040 or 9A.44.050 if the rape is reported to a law enforcement agency within one year of its commission; except that if the victim is under fourteen years of age when the rape is committed and the rape is reported to a law enforcement agency within one year of its commission, the violation may be prosecuted up to ~~((three years after))~~ the victim's ~~((eighteenth))~~ twenty-eighth birthday ~~((or up to ten years after the rape's commission, whichever is later))~~.

(B) If a violation of RCW 9A.44.040 or 9A.44.050 is not reported within one year, the rape may not be prosecuted: ~~((A))~~ (I) More than three years after its commission if the violation was committed against a victim fourteen years of age or older; or ~~((B))~~ (II) more than three years after the victim's eighteenth birthday or more than seven years after the rape's commission, whichever is later, if the violation was committed against a victim under fourteen years of age.

(c) Violations of the following statutes ~~((shall not))~~ may be prosecuted ~~((more than three years after))~~ up to the victim's ~~((eighteenth))~~ twenty-eighth birthday ~~((or more than seven years after their commission, whichever is later))~~: RCW 9A.44.073, 9A.44.076, 9A.44.083, 9A.44.086, 9A.44.070, 9A.44.080, 9A.44.100(1)(b), 9A.44.079, 9A.44.089, or 9A.64.020.

(d) The following offenses shall not be prosecuted more than six years after their commission: Violations of RCW 9A.82.060 or 9A.82.080.

(e) The following offenses shall not be prosecuted more than five years after their commission: Any class C felony under chapter 74.09, 82.36, or 82.38 RCW.

(f) Bigamy shall not be prosecuted more than three years after the time specified in RCW 9A.64.010.

(g) A violation of RCW 9A.56.030 must not be prosecuted more than three years after the discovery of the offense when the victim is a tax exempt corporation under 26 U.S.C. Sec. 501(c)(3).

(h) No other felony may be prosecuted more than three years after its commission; except that in a prosecution under RCW 9A.44.115, if the person

who was viewed, photographed, or filmed did not realize at the time that he or she was being viewed, photographed, or filmed, the prosecution must be commenced within two years of the time the person who was viewed or in the photograph or film first learns that he or she was viewed, photographed, or filmed.

(i) No gross misdemeanor may be prosecuted more than two years after its commission.

(j) No misdemeanor may be prosecuted more than one year after its commission.

(2) The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publicly resident within this state.

(3) In any prosecution for a sex offense as defined in RCW 9.94A.030, the periods of limitation prescribed in subsection (1) of this section run from the date of commission or one year from the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing, whichever is later.

(4) If, before the end of a period of limitation prescribed in subsection (1) of this section, an indictment has been found or a complaint or an information has been filed, and the indictment, complaint, or information is set aside, then the period of limitation is extended by a period equal to the length of time from the finding or filing to the setting aside.

Passed by the Senate March 4, 2009.

Passed by the House April 1, 2009.

Approved by the Governor April 10, 2009.

Filed in Office of Secretary of State April 13, 2009.

CHAPTER 62

[Senate Bill 5903]

PUBLIC WORKS CONTRACTS—RESIDENTIAL CONSTRUCTION

AN ACT Relating to public works contracts for residential construction; and amending RCW 39.12.030.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 39.12.030 and 1989 c 12 s 9 are each amended to read as follows:

(1) The specifications for every contract for the construction, reconstruction, maintenance or repair of any public work to which the state or any county, municipality, or political subdivision created by its laws is a party, shall contain a provision stating the hourly minimum rate of wage, not less than the prevailing rate of wage, which may be paid to laborers, workers, or mechanics in each trade or occupation required for such public work employed in the performance of the contract either by the contractor, subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract, and the contract shall contain a stipulation that such laborers, workers, or mechanics shall be paid not less than such specified hourly minimum rate of wage. If the awarding agency determines that the work

the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Comment 1008

This rule is the same as Federal Rule 1008 and defines a specialized approach to determining questions under rule 104

for matters within the scope of Title X. RCW 4.44.080 and .090 allocate questions of law and fact to the court and jury, respectively. The rule is more specific than the statutes but does not conflict with them. The statutes are not superseded.

TITLE XI. MISCELLANEOUS RULES**RULE 1101. APPLICABILITY OF RULES**

(a) **Courts Generally.** Except as otherwise provided in section (c), these rules apply to all actions and proceedings in the courts of the state of Washington. The terms "judge" and "court" in these rules refer to any judge of any court to which these rules apply or any other officer who is authorized by law to hold any hearing to which these rules apply.

(b) **Law With Respect to Privilege.** The law with respect to privileges applies at all stages of all actions, cases, and proceedings.

(c) **When Rules Need Not Be Applied.** The rules (other than with respect to privileges) need not be applied in the following situations:

(1) **Preliminary Questions of Fact.** The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a).

(2) **Grand Jury.** Proceedings before grand juries and special inquiry judges.

(3) **Miscellaneous Proceedings.** Proceedings for extradition or rendition; detainer proceedings under RCW 9.100; preliminary determinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily; habeas corpus proceedings; small claims court; supplemental proceedings under RCW 6.32; coroners' inquests; preliminary determinations in juvenile court proceedings under RCW Title 13; juvenile court hearings on declining jurisdiction under RCW 13.40.110; disposition hearings in juvenile court; review hearings in juvenile court under RCW 13.32A.190 and RCW 13.34.130(4); dispositional determinations related to treatment for alcoholism, intoxication, or drug addiction under RCW 70.96A; and dispositional determinations under the Civil Commitment Act, RCW 71.05.

(4) **Applications for Domestic Violence Protection.** Protection order proceedings under RCW 26.50 and 10.14. When a judge proposes to consider information from a domestic violence database, the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and, take appropriate measures to alleviate litigants' safety concerns. The judge has discretion not to disclose information that he or she does not propose to consider.

(d) **Arbitration Hearings.** In a mandatory arbitration hearing under RCW 7.06, the admissibility of evidence is governed by MAR 5.3. [Amended effective January 1, 1980; August 27, 1980; September 1, 1989; September 1, 1992; September 21, 1999.]

Comment 1101

Federal Rule 1101 has been modified by deleting references to matters heard only in federal court and by adding references to certain proceedings heard in the state courts. The rule conforms substantially to previous Washington practice.

Section (a). The rules of evidence apply generally to civil and criminal proceedings, including mental commitment proceedings, reference hearings, and juvenile court factfinding and adjudicatory hearings. See RCW 71.05.250, RCW 71.05.310, MPR 3.4, RAP 16.12, JuCR 3.7, and JuCR 7.11. Juvenile court hearings on whether to decline jurisdiction are not excused from the operation of the rules. These hearings have a substantial impact upon the case and deserve the formality of evidentiary rules. Cf. *In re Harbert*, 85 Wn.2d 719, 538 P.2d 1212 (1975).

The words "judge" and "court" are used interchangeably throughout the rules and refer to a judge, judge pro tempore, commissioner, or any other person authorized to hold a hearing to which the rules apply.

Section (b). The law concerning privileged communications applies to all proceedings, including those listed in section (c).

Subsection (c)(1). This portion of the rule is a restatement of a similar provision in rule 104. The rules need not be applied, for example, at a hearing on a motion to suppress evidence. *United States v. Matlock*, 415 U.S. 164, 39 L.Ed.2d 242, 94 S.Ct. 988 (1974); 32B Am.Jur.2d Federal Rules of Evidence (1982). The rule, like all of the other rules, does not attempt to specify the situations in which due process would require a full evidentiary hearing. That determination is made by reference to constitutional law.

In the absence of a constitutional requirement, the rule still does not prevent the court from requiring a certain measure of reliability with respect to the admission of evidence in proceedings specified in section (c). The court should have the discretion to require an appropriate level of formality.

Subsection (c)(2). The statutes contain special evidentiary provisions for grand juries and inquiry judges. See RCW 10.27.120, .130, .140, .170. Although there are no Washington cases directly in point, the majority view is that the validity of grand jury indictment may not be challenged on the basis of insufficient or incompetent evidence unless none of the witnesses was competent. *Annot.*, 37 A.L.R.3d 612 (1957); *Annot.*, 39 A.L.R.3d 1064 (1971).

Subsection (c)(3). Proceedings with respect to extradition, rendition, and detainers are essentially administrative in nature and the rules of evidence have traditionally not applied.

Gibson v. Beall, 249 F.2d 489 (D.C.Cir.1957); *United States v. Flood*, 374 F.2d 554 (2d Cir.1967).

The view that the rules of evidence do not apply to preliminary determinations in criminal cases is consistent with the Superior Court Criminal Rules. See, e.g., CrR 3.2(k), relating to hearings on pretrial release. The rule refers to "determinations" rather than to "examinations," the federal rule's terminology. This change was made to clarify the intent to relax the rules of evidence with respect to all preliminary matters, not just at hearings in which the accused gives testimony.

The normal rules of evidence do not apply to hearings with respect to sentencing or probation. *State v. Short*, 12 Wn.App. 125, 528 P.2d 480 (1974); *State v. Shannon*, 60 Wn.2d 883, 376 P.2d 646 (1962); *State v. Kuhn*, 81 Wn.2d 648, 503 P.2d 1061 (1972). As to sentencing proceedings in cases involving the death penalty, see also RCW 10.95. As to search warrants, see CrR 2.3(c). The rules do not apply to hearings with respect to pretrial release. CrR 3.2(k).

The provision regarding contempt applies to contempt committed in the presence of the court as defined by RCW 7.20.030.

The rule clarifies the law with respect to habeas corpus hearings. A statute, RCW 7.36.120, directs the court to hear and determine the matter "in a summary way." The Supreme Court has held that the trial court may thus determine factual matters by reference to affidavits. *Little v. Rhay*, 68 Wn.2d 353, 413 P.2d 15, cert. denied, 385 U.S. 96 (1966). Later, a division of the Court of Appeals held that such affidavits should be considered only to assist in formulating the issues of fact and not in themselves to determine disputed questions of material fact. *Little v. Rhay*, 8 Wn.App. 725, 509 P.2d 92 (1973). A dissenting opinion argued that the majority opinion nullified the statute and disregarded earlier decisions of the Supreme Court. Rule 1101 adopts the approach taken by the earlier Supreme Court decisions. This is contrary to Federal Rule 1101, which makes the rules of evidence applicable to federal habeas corpus proceedings, but the underlying federal

statute requires testimony to be taken. *Walker v. Johnston*, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941).

The rules do not apply to small claims courts, supplemental proceedings, or to coroners' inquests, primarily because the purposes of these proceedings would be frustrated by strictly imposing rules of evidence. As a practical matter, the rules have not been applied to these proceedings in the past.

Factfinding and adjudicatory hearings in juvenile court are conducted in accordance with the rules of evidence. JuCR 3.7 and JuCR 7.11. Once the facts have been determined, however, the appropriate form of disposition is determined with less formality. The situation is analogous to the distinction between a criminal trial and sentencing. Rule 1101 thus authorizes a relaxation of the rules of evidence for disposition hearings in juvenile court. A corresponding relaxation of the rules is authorized for dispositional determinations under the Uniform Alcoholism and Intoxication Treatment Act, RCW 70.96A, and the Civil Commitment Act, RCW 71.05.

Comment 1101

[1989 Amendment]

[Section (d).] The 1989 amendment reflected a contemporaneous amendment to the Mandatory Arbitration Rules, which in turn addressed the applicability of the Rules of Evidence to mandatory arbitration hearings. A new section (d) was added to ER 1101, providing simply that the admissibility of evidence in a mandatory arbitration proceeding "is governed by MAR 5.3." The cross reference was appropriate because, under mandatory arbitration, the Rules of Evidence cannot be said clearly to apply or not to apply. Rather, the extent of their applicability is left to the determination of the arbitrator under MAR 5.3.

RULE 1102. AMENDMENTS [RESERVED]

RULE 1103. TITLE

These rules may be known and cited as the Washington Rules of Evidence. ER is the official abbreviation.

(b) The release of the conditions described in subsection (a) of the first section of this Act shall not take effect with respect to any of the certain portions until such time as an exchange of real property for that certain portion is executed in accordance with the terms of agreement described in subsection (a) of this section.

Approved January 2, 1975.

Public Law 93-594

AN ACT

January 2, 1975
[H. R. 5264]

To amend section 3(f) of the Federal Property and Administrative Services Act of 1949, with respect to American Samoa, Guam, and the Trust Territory of the Pacific Islands.

40 USC 472.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3(f) of the Federal Property Administrative Services Act of 1949 is amended by inserting after the words "Puerto Rico," the words "American Samoa, Guam, the Trust Territory of the Pacific Islands,".

Approved January 2, 1975.

Public Law 93-595

AN ACT

January 2, 1975
[H. R. 5463]

To establish rules of evidence for certain courts and proceedings.

Federal Rules
of Evidence.
28 USC app.
Effective date.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.

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Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of Rules

(a) Courts and magistrates.—These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the District of the Canal Zone, the United States courts of appeals, the Court of Claims, and to United States magistrates, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms “judge” and “court” in these rules include United States magistrates, referees in bankruptcy, and commissioners of the Court of Claims.

(b) Proceedings generally.—These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under the Bankruptcy Act.

(c) Rule of privilege.—The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable.—The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact.—The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.

(2) Grand jury.—Proceedings before grand juries.

(3) Miscellaneous proceedings.—Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(e) Rules applicable in part.—In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: the trial of minor and petty offenses by United States magistrates; review of agency actions when the facts are subject to trial de novo under section 706(2)(F) of title 5, United States Code; review of orders of the Secretary of Agriculture under section 2 of the Act entitled “An Act to authorize association of producers of agricultural products” approved February 18, 1922 (7 U.S.C. 292), and under sections 6 and 7(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C.

11 USC 1 note.

499f, 499g(c)); naturalization and revocation of naturalization under sections 310-318 of the Immigration and Nationality Act (8 U.S.C. 1421-1429); prize proceedings in admiralty under sections 7651-7681 of title 10, United States Code; review of orders of the Secretary of the Interior under section 2 of the Act entitled "An Act authorizing associations of producers of aquatic products" approved June 25, 1934 (15 U.S.C. 522); review of orders of petroleum control boards under section 5 of the Act entitled "An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes", approved February 22, 1935 (15 U.S.C. 715d); actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); criminal libel for condemnation, exclusion of imports, or other proceedings under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301-392); disputes between seamen under sections 4079, 4080, and 4081 of the Revised Statutes (22 U.S.C. 256-258); habeas corpus under sections 2241-2254 of title 28, United States Code; motions to vacate, set aside or correct sentence under section 2255 of title 28, United States Code; actions for penalties for refusal to transport destitute seamen under section 4578 of the Revised Statutes (46 U.S.C. 679); actions against the United States under the Act entitled "An Act authorizing suits against the United States in admiralty for damage caused by and salvage service rendered to public vessels belonging to the United States, and for other purposes", approved March 3, 1925 (46 U.S.C. 781-790), as implemented by section 7730 of title 10, United States Code.

Rule 1102. Amendments

infra.

Amendments to the Federal Rules of Evidence may be made as provided in section 2076 of title 28 of the United States Code.

Rule 1103. Title

These rules may be known and cited as the Federal Rules of Evidence.

SEC. 2. (a) Title 28 of the United States Code is amended—

(1) by inserting immediately after section 2075 the following new section:

28 USC 2076.

"§ 2076. Rules of evidence

Report to Congress.

"The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by Act of Congress. Any rule whether proposed or in force may be amended by Act of Congress. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect. Any such amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress"; and

