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DIVISION II  
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NO. 35741-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

JOEY URUO,

Appellant.

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BRIEF OF APPELLANT

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John A. Hays, No. 16654  
Attorney for Appellant

1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084

 ORIGINAL

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court denied defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when it refused to grant a new trial after the jury repeatedly indicated it was deadlocked and the court refused to declare a mistrial. CP 72-86.

2. The trial court's denial of defendant's hearsay objection to Dr. Stirling's testimony denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. RP 30-34, 250-285.

3. The trial court erred when it imposed community custody conditions not authorized by the legislature. CP 116-117, 124-126.

*Issues Pertaining to Assignment of Error*

1. Does a trial court deny a defendant his or her right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refuses to grant a mistrial after the jury repeatedly indicates it is deadlocked?

2. Does the improper admission of hearsay evidence deny a defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when the defendant objected to the evidence and but for the admission of the hearsay the jury would have acquitted the defendant?

3. Does a trial court have inherent authority to impose community custody conditions not authorized by the legislature?

## STATEMENT OF THE CASE

### *Factual History*

In 2002, the defendant Joey Uruo was living in a small house in Vancouver, Washington, with his wife Amy and their three daughters, Jenna, Jackie and Justine. RP 425, 542, 573, 616. At some point during this time period the defendant's brother and his three children lived with them, and at another time a family friend and her children lived with them. RP 119-120, 582-584, 631-632. The defendant also had another daughter from a prior relationship by the name of Kathryn Uruo. RP 67-69. In February of 2002, Kathryn came to live with the defendant and his family because her alcohol and drug-addicted mother could not properly care for her. RP 72-73. At the time Kathryn was 10-years-old and in the fifth grade, as was Jenna, the oldest of the defendant's other three daughters. RP 91. Kathryn and Jenna were six months apart in age. *Id.*

After living a number of months with the defendant and his family, Kathryn returned to live with her mother, who claimed that she could provide a stable home for her daughter. RP 78-80. However, within a short period of time Kathryn's mother began abusing alcohol and drugs again, and Kathryn returned to live with the defendant and his family. RP 84-86. By the time she moved out of the family home for the second time, Kathryn had spent about three and one-half years with her father, her step mother, and her

three half sisters. RP 115-116.

According to Kathryn, her father repeatedly sexually molested her for the entire time she lived with him and his family. RP 263. She claimed that this conduct included oral-genital contact, and hundreds upon hundreds of instances of penile-vaginal intercourse. RP 177. As an example, she claimed that the defendant had repeatedly raped her on a number of different occasions while she slept on the top bunk of a bed while one of her sisters and an adult family friend slept on the bottom bunk, and while the friend's daughter slept on the floor of the same bedroom. RP 81-89. She also claimed that he had raped her on the bed in his bedroom while her sisters were at the locked door asking what was going on in the bedroom. RP 181. Kathryn's sisters denied these claims. RP 456, 467, 478, 548.

While later speaking to an investigating detective Kathryn claimed that the hundreds of instances of rape had occurred exclusively in the family home, sometimes when no one else was present, and sometimes when other people were present in other rooms, or when the other persons were in the same room but asleep. RP 80-201. By contrast, she testified at trial that some of the instances of abuse occurred outside the home at other locations, such as outdoors or at the defendant's place of employment. RP 90-91.

During trial Kathryn claimed that she had told her three sisters that the defendant was raping her. RP 261. However, all three of them denied that

Kathryn had ever made a claim to them that their father was sexually abusing her, although one of them did state that Kathryn had once complained about the defendant putting his hands on her shoulders. RP 479. Kathryn also claimed that her father repeatedly physically abused her in front of her sisters, leaving bruises on her body, and that she was so traumatized by the abuse that she began cutting herself. RP 92-100. However, her three sisters denied that the defendant had ever physically abused Kathryn or them. RP 441-456, 476-488, 542-568. They also stated that they had never seen any bruises, red marks, or cuts on Kathryn's body. *Id.* Jenna particularly stated that she and Kathryn participated in sports together, that they showered at the same time, and that she had never seen any cuts or bruises on Kathryn. RP 451-452.

According to Kathryn the last instance of sexual abuse occurred around Memorial Day while she and the defendant were the only ones at home. RP 109. She said that on this occasion the defendant raped her even though she was "on her period" and tried to dissuade him with this fact. RP 108-109. Kathryn further claimed that the defendant had wiped himself off with an old shirt and he got both blood and semen on it. *Id.* Kathryn went on to state that she showed this shirt to her sisters in an attempt to get them to believe her. *Id.* However, her sisters denied that they had ever seen or heard of the shirt or Kathryn's claims concerning it. RP 450, 488-490.

Around the time of this last claimed instance of abuse Kathryn's

mother was living in Oklahoma and had told Kathryn that she would send her a ticket so she could come and visit. RP 665. However, the defendant told Kathryn that she could not go to Oklahoma for a visit because her mother had failed to send any type of ticket and the family did not have enough money to finance the trip. RP 665. Later that same day Kathryn called "911" while her father and step-mother were gone and reported her claims that her father had been sexually abusing her. *Id.* Within a short time a police officer and a CPS worker arrived and took her out of the home. RP 105-106.

A police officer later came back to the family home and retrieved the shirt Kathryn had claimed the defendant used to wipe himself off after the last instance of abuse. RP 354-361. At the request of the officer the defendant's wife searched and found it at the bottom of a laundry hamper in the bedroom where Kathryn and her sister slept. *Id.* DNA testing by the Washington State Crime Lab revealed that the shirt had the defendant's semen on it as well as Kathryn's blood on it. RP 323-327. The defendant and his wife later told the police on separate occasions that the defendant's semen got on the shirt when Kathryn had barged into their bedroom while they were having sex. RP 384-387, 362-364. According to the defendant and his wife the defendant had grabbed the shirt and covered himself with it. *Id.*

### ***Procedural History***

The Clark County Prosecutor charged the defendant by amended

information with two counts of first degree rape of a child, three counts of second degree rape of a child, one count of fourth degree rape of a child, and one count of fourth degree assault. CP 17-18. The case later came on for trial before a jury with the state calling eight witnesses in its case-in-chief. RP 67, 239, 251, 301, 311, 346, 381, 404. The defense called ten witnesses, after which the state called two witnesses in rebuttal. RP 422, 469, 511, 517, 522, 542, 572, 582, 592, 615, 700, 703.

One of the state's witnesses was Dr. John Sterling, a Vancouver Pediatrician with special training in diagnosing child sexual abuse. RP 250-253. He examines many children each year at the request of the Vancouver Police Department and he testifies for the Clark County Prosecutor about five or six times a year in cases alleging child sexual abuse. RP 250-258. Prior to his testimony the defense moved in limine to preclude Dr. Sterling from testifying as to what Kathryn told him during her examination. RP 30-34. In support of its motion the defense argued that these statements were hearsay and irrelevant in that they were not made for the purpose of a medical diagnosis, rather they were made for forensic purposes under guise of a medical diagnosis. *Id.* The court denied the motion. RP 34.

After explaining his training and expertise, Dr. Sterling testified to the usual procedures he follows when examining a child who has claimed sexual abuse. RP 257-258. He then testified that on June 30, 2005, he examined

Kathryn Uruo at his office. RP 258-259. His physical examination of her showed her hymen to be completely intact, with no evidence of tears and no evidence of scarring. RP 271-274, 285. He also testified that she claimed that her father had repeatedly had sexual intercourse with her since she was in the fifth grade, that he also beat her repeatedly with a belt, a stick and his fist. RP 263-267. According to Dr. Sterling, Kathryn told him that around last memorial day the defendant had sexual intercourse with her while she was on her period, that she had told her sister, and that her sister had encouraged her to tell someone. RP 262. Dr. Sterling also testified that she told him that she was so traumatized by the abuse that she would repeatedly cut herself on the wrist, and that on one occasion she had taken her stepmother's medication in a suicide attempt. RP 267-270. Dr. Sterling went on to tell the jury that Kathryn had told him that on the occasion in which she had taken the pills, her father had found out and had hit and kicked her. *Id.*

Following the reception of evidence in this case the court instructed the jury without objection from the defense, and the parties presented closing argument. RP 614, 713-725, 725-806. Following argument the jury retired for deliberation. CP 85. This occurred on November 12, 2006, at 4:47 p.m. CP 85. The record is silent as to how long they deliberated that evening, although one would expect that the judge allowed them to deliberate for at

least a few hours before sending them home for the evening.<sup>1</sup> The next day the jury returned for further deliberations. CP 85. Although the trial record is silent on the time those deliberations began, at 9:43 the court reported to counsel that one of the jurors was ill and could not continue deliberating. CP 85. Although the court considered replacing that juror with an alternate, at the defense's request the court allowed the jury to continue deliberations with eleven jurors. *Id.*

At 3:02 p.m. on the second day of deliberations, the jury sent out a note that stated as follows:

We are not able to agree on a decision. What should we do if no one is willing to change their decision.

CP 73 (emphasis in original).

The court returned the note at 3:05 p.m. with written instructions stating: "Please continue to deliberate." CP 73. Once again, the record is silent on how long the court kept the jury in deliberation on this day, although counsel anticipates that the state will stipulate that it was at least until 5:00 p.m. if not later.

On November 14, 2006, the jury returned for a third day of deliberation. CP 85. The record is again silent as to the time the jury

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<sup>1</sup>Defense counsel has attempted to discover exactly when the jury began and ended deliberations each day. Unfortunately, the court clerk, the bailiff, and the judge did not keep a record of these times.

returned in the morning, although the defense anticipates that the state will stipulate that it was probably at 8:00 or 9:00 a.m. In any event, at 11:15 a.m. the jury sent out a second note that stated as follows:

Do we have to decide a verdict on every count? Can we be unanimous on all but one count? Would it be a hung jury if we can't decide only on one count?

CP 72.

The record is silent as how the court replied to this question, if it did at all. Two hours after the jury sent this note to the court, they returned verdicts of "not guilty" on counts I, II, III, IV, V, and VII, and "guilty" on count VI. CP 65-71. Following reception of the verdicts the court ordered a presentence investigation report and put the matter over for sentencing. RP 814-815.

On November 14, 2006, the parties again appeared before the court. RP 809. At that time the court sentenced the defendant to 14 months in prison, which was within the standard range. CP 108-126. The court also imposed 36 to 48 months of community custody. CP 113. The community custody conditions the court imposed included the following:

- ☒ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a sexual deviancy treatment program as established by the community corrections officer and/or the treatment facility. Defendant shall not change sex offender treatment provides or treatment conditions without first notifying the Prosecutor, community corrections officer and shall not change providers

without court approval after a hearing if the prosecutor or community corrections officer object to the change. "Cooperate with" means the offender shall follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity.

- ☒ Defendant shall, at his or her own expense, submit to periodic polygraph examinations at the direction of his/her community corrections officer to ensure compliance with the conditions of community placement/custody.

CP 116-117.

In this case the court also imposed the following crime related conditions and special conditions as part of appendix F attached to the judgment and sentence:

5. You shall not possess, use or own firearms, ammunition or deadly weapons. Your Community Corrections Officer shall determine what those deadly weapons are.

10. You shall take Antabuse per your Community Corrections Officer's direction, if so ordered.

CP 124-126.

Following imposition of sentence the defendant filed timely notice of appeal. RP 132.

## ARGUMENT

### **I. THE TRIAL COURT DENIED DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT FAILED TO DECLARE A MISTRIAL AFTER THE JURY REPEATEDLY INDICATED IT WAS DEADLOCKED.**

The decision whether or not to declare a mistrial based upon a jury's failure to reach a verdict (and the decision whether or not to grant a motion for new trial based upon a refusal to declare a mistrial) lies within the sound discretion of the trial court and will not be reversed except upon proof that the trial court abused its discretion. *State v. Crowell*, 92 Wn.2d 143, 594 P.2d 905 (1979). However, the appellant need not make as strong a showing of abuse of discretion when seeking to set aside an order refusing to grant a new trial than when seeking to set aside an order granting a new trial. *O'Brien v. Seattle*, 52 Wn.2d 543, 327 P.2d 433 (1958).

In determining whether or not a jury is deadlocked, the court should consider a number of factors, including the length of time the jury has deliberated, the volume and complexity of the evidence, and the jury's own statements on the subject. *State v. Taylor*, 109 Wn.2d 438, 745 P.2d 510 (1987). As concerns this last factor, Division I of this court has stated:

While the length of deliberations is a relevant factor [in determining whether to discharge a jury], the more important consideration is whether there is a possibility that the jury can reach a verdict within a reasonable time. *The most reliable source as to this information is the jury itself.*

*State v. McCullum*, 28 Wn.App. 145, 152, 622 P.2d 873 (1981) (quoting *United States v. Lansdown*, 460 F.2d 164, 169 (4th Cir. 1972) (brackets and emphasis supplied by court in *McCullum*.)

Finally, the “right to a fair and impartial trial demands that a judge not bring to bear coercive pressure upon the deliberations of a criminal jury.” *State v. Boogaard*, 90 Wn.2d 733, 585 P.2d 789 (1978). Under this principle, if the defendant can establish “a reasonably substantial possibility that the verdict was improperly influenced by the trial court’s intervention,” then the conviction must be reversed and the case remanded for retrial. *State v. Watkins*, 99 Wn.2d 166, 660 P.2d 1117 (1983).

For example, in *State v. Boogaard, supra*, the defendant was charged with second degree theft and the case eventually went to a two-day jury trial. At mid-afternoon on the second day of trial the jury retired for deliberations. When no verdict was forthcoming by 9:30 p.m., the court summoned counsel, and sent the bailiff to inquire how the jury stood numerically. The bailiff returned with the information that they were 10 to 2. Upon learning this information, the court summoned the jury back into court, asked the foreman what the history on the vote had been, and asked each juror whether or not another half hour of deliberations might result in a verdict. When 11 of the 12 responded in the affirmative, the court sent the jury in for more deliberations. They shortly came back with a verdict of guilty. The

defendant then appealed, arguing that the court had improperly influenced the verdict.

On appeal, the Washington Supreme Court reversed, holding as follows.

We have heretofore recognized that the right of jury trial embodies the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel; and that an instruction which suggests that a juror who disagrees with the majority should abandon his conscientiously held opinion for the sake of reaching a verdict invades that right, *however subtly the suggestion may be expressed*. *State v. Ring*, 52 Wn.2d 423, 325 P.2d 730 (1958); *Iverson v. Pacific Am. Fisheries*, 73 W.2d 973, 442 P.2d 243 (1968). The questioning of individual jurors, with respect to each juror's opinion regarding the jury's ability to reach a verdict in a prescribed length of time, after the court was apprised of the history of the vote in the presence of the jurors, unavoidably tended to suggest to minority jurors that they should "give in" for the sake of that goal which the judge obviously deemed desirable - namely, a verdict within a half hour.

*State v. Boogaard*, 90 Wn.2d at 736. (emphasis added).

Similarly, in *State v. Crowell*, *supra*, the defendant was charged with the larceny of 33 head of cattle. Shortly after noon on the last day of trial the jury retired for deliberation. At 6:30 in the evening, in response to a juror's question about arranging for suitcases, the bailiff informed the jury that evening lodging was unavailable for them, that they would be required to deliberate until they reached a verdict, and that if they hadn't reached a verdict by 10:00 p.m. the judge had indicated he would declare a mistrial. The jury then deliberated until 11:00 p.m., at which time they rendered guilty

verdict. Following reception of the verdict, the defendant moved for a new trial, arguing that the bailiff's comments improperly coerced the jury to return a guilty verdict. The trial denied the defendant's motion and later imposed sentence. The defendant appealed.

After the Court of Appeals affirmed, the defendant sought and obtained further review by the Supreme Court. In its opinion the Supreme Court reviewed a number of related cases in which similar comments by the bailiff had merited a new trial. It then reversed, stating as follows.

In each of these cases, as in this case, an out-of-court communication by a bailiff reasonably could have prejudiced the jurors' verdict. The communication was considerably more influential than an innocuous statement or an expression of an apparent concern. *See [State v.] Smith*, [43 Wn.2d 307, 311, 261 P.2d 109 (1953)] (bailiff asking jurors to lower voices); *State v. Forsyth*, 13 Wn.App. 133, 137, 533 P.2d 847 (1975) (bailiff expresses obvious concern about young, complaining witness in molestation case).

Indeed, the bailiff's statements here can be viewed as designed to hasten the jury's verdict. We recently ruled that a new trial was necessary in a similar situation. *See State v. Boogaard*, 90 Wn.2d 733, 740, 585 P.2d 789 (1978) (trial judge's examination of jurors coerced them into hastening their verdict and required new trial).

*State v. Crowell*, 92 Wn.2d at 148.

In the case at bar the jury deliberated for three separate days. By 3 p.m. on the second day, after around ten to twelve hours of deliberations, the jury sent out a note that it was deadlocked. CP 86. In spite of this statement, the court ordered the jury to continue deliberating, which the jury did for the

remainder of the day and probably into the evening. The jury then returned for a third day of deliberation. The note the jury prepared at 11:15 a.m. on the third day of deliberation reveals that the jury was one hung on one count.

This note states:

Do we have to decide a verdict on every count? Can we be unanimous on all but one count? Would it be a hung jury if we can't decide only on one count?

CP 72.

The record in this case does not include the court's reply to this question. However, the record is clear that the court did have the jury continue deliberations, and that within a relatively short time span the jury returned a verdict of "guilty" on count VI and "not guilty" on all other counts. In light of the jury's statement in the second note, the verdicts indicate that the jury was hung on Count VI, the only count upon which it convicted the defendant. As in *Crowell*, the court's insistence that the jury continue in spite of three days of deliberations and two notes indicating that it was hung on one count had the effect of informing the jury that the court was requiring the jury to return a verdict on Count VI. As in *Crowell*, this coercion by the court denied the defendant his right to a fair trial. Consequently this court should reverse conviction on Count VI and remand for a new trial.

**II. THE TRIAL COURT'S DENIAL OF DEFENDANT'S HEARSAY OBJECTION TO DR. STIRLING'S TESTIMONY DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

Under ER 801(c) hearsay is defined as “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.” Under ER 802 hearsay is “not admissible except as provided by these rules, by other court rules, or by statute.” One of these exceptions is found in ER 803(a)(4), which allows the admission over a hearsay exception of a “Statement for Purposes of Medical Diagnosis or Treatment.” The following examines this hearsay exception.

Under ER 803(a)(4) statements made for the purpose of medical diagnosis or treatment are considered an exception to the hearsay rule. This rule states:

**(a) Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(4) *Statement for Purposes of Medical Diagnosis.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4).

Traditionally, this exception “applies only to statements ‘reasonably

pertinent to diagnosis or treatment.’ Thus, statements as to causation (“I was hit by a car”) would normally be allowed under this exception, while statements as to fault (“ . . . which ran a red light”) would not. 5A K. Tegland, *Washington Practice* § 367 at 224 (2d ed. 1982).

However, over the last few decades, the courts of this state have carved out an exception which allows a health care provider, under appropriate circumstances, to testify to a child’s identification of the perpetrator of a crime against the child. In a 1993 case, Division I of the Court of Appeals described this exception as follows:

ER 803(a)(4) allows the admittance of hearsay testimony if the statement was made for the purpose of a medical diagnosis or treatment. Normally, such testimony is not admissible if it identifies the perpetrator of a crime, but an exception has arisen to this rule when the victim is a child. *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505, *review denied*, 112 Wn.2d 1014 (1989).

In *Butler*, this court examined at length the purposes of ER 803(a)(4) and the times when hearsay evidence concerning the identity of the perpetrator of a crime can be admitted when the victim is a child. This court ruled that such statements could be admitted as part of the doctor’s testimony regarding medical treatment if the information was necessary for diagnosis and treatment. In ruling that the incriminating identification was necessary for diagnosis and treatment in that case, we reasoned that, in abuse cases, it is important for the child to identify the abuser in seeking treatment because the child may have possible psychological injuries and also may be in further danger, due to the continued presence of the abuser in the child’s home. *Butler*, 53 Wn.App. at 222-23, 766 P.2d 505; *see also In re Dependency of S.S.*, 61 Wn.App. 488, 503, 814 P.2d 204, *review denied*, 117 Wn.2d 1011, 816 P.2d 1224 (1991).

*State v. Ashcraft*, 71 Wn.App. 444, 456, 859 P.2d 60 (1993).

As is apparent from the court's comments in *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505 (1989), and *Ashcraft*, the justification for allowing a treatment provider to testify to the child's identification of the alleged perpetrator of abuse lies within the court's belief that part of the treatment provider's duty and function is to identify the abuser, thereby allowing the treatment provider to gauge what type of psychological damage occurred, what type of treatment is necessary, and what steps will be necessary to prevent future abuse. As such, the courts have held that these statements, in the context of child abuse cases, fall generally within the category those made "for the purpose of diagnosis or treatment."

For example, in *State v. Butler, supra*, the babysitter of a 2½-year-old child took the infant to the hospital after noting several bruises about the child's face. During the examination the child told the attending physician that his "daddy" (meaning his mother's boyfriend) had thrown him off the bunk bed. When questioned about this, the defendant stated that the child, whom he had been watching, fell off the bed. At trial the court allowed the physician to testify to the child's statement of who caused her injuries. Following conviction the defendant appealed, arguing that the trial court erred when it allowed the physician to testify as to what the child said.

On appeal the court of appeals first reviewed the similar fact patterns in *State v. Bouchard*, 31 Wn.App. 381, 639 P.2d 761 (1982), and *State v.*

*Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986). The *Butler* court stated the following concerning these cases:

In *State v. Bouchard*, 31 Wn.App. 381, 382, 639 P.2d 761, review denied, 97 Wn.2d 1021 (1982), Bouchard was convicted of indecent liberties with his 3-year-old granddaughter. The child suffered a perforated hymen. The incident occurred when the child was visiting her grandparents. *Bouchard*, at 382, 639 P.2d 761. When the child returned home, her mother noticed blood on her daughter's body. Her mother testified that when she questioned her daughter, she told her mother that "grandpa did it." The attending physicians also testified that the child made similar statements to them. *Bouchard*, at 383, 639 P.2d 761.

Bouchard argued on appeal that the child's statements to the physicians were inadmissible hearsay. *Bouchard*, at 383, 639 P.2d 761. Without analysis, the court held that "[t]he statements to the attending doctors are clearly admissible under ER 803(a)(4) as statements 'of the cause or external source' of the injury and as necessary to proper treatment." *Bouchard*, at 384, 639 P.2d 761.

In *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379, review denied, 107 Wn.2d 1009 (1986), the facts were very similar. Robinson was found guilty of indecent liberties with a 3-year-old girl. *Robinson*, at 615, 722 P.2d 1379. Robinson argued on appeal that admission of the child's statements made to the nurse and doctor at the hospital where she was treated were inadmissible hearsay. *Robinson*, at 615, 722 P.2d 1379. The statements to the nurse and doctor identified Robinson as the abuser. The court disposed of Robinson's argument in a footnote by holding that "[t]he statements to Nurse Billings and Dr. Kania are also admissible as statements made for purposes of diagnosis and treatment. ER 803(a)(4)." *Robinson*, at 616 n. 1, 722 P.2d 1379.

*State v. Butler*, 53 Wn.App. 219-220 (footnotes omitted).

In *Butler* the court went on to examine the application of the rule under analogous federal cases. The court noted:

This approach to child hearsay in the context of ER 803(a)(4) was further refined in *United States v. Renville*, 779 F.2d 430 (8th Cir.1985). Renville was convicted by a jury of two counts of sexual abuse of his 11-year-old stepdaughter. *Renville*, at 431. Renville argued on appeal that the trial court erred by permitting a physician to testify to statements by the victim during his examination identifying Renville as her abuser. *Renville*, at 435. Specifically, Renville argued that the hearsay exception found in Fed.R.Evid. 803(4) did not encompass statements of fault or identity made to medical personnel. *Renville*, at 435-36.

The *Renville* court pointed out that the crucial question under the rule was whether the out-of-court statement of the declarant was "reasonably pertinent" to diagnosis or treatment. *Renville*, at 436. The court began its analysis by stating the two-part test for the admissibility of hearsay statements under Fed.R.Evid. 803(4) that the court set forth in *United States v. Iron Shell*, 633 F.2d 77 (8th Cir.1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981).

"[F]irst, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." *Renville*, at 436.

The test reflects the twin policy justifications advanced to support the rule. First, it is assumed that a patient has a strong motive to speak truthfully and accurately because the treatment or diagnosis will depend in part upon the information conveyed. The declarant's motive thus provides a sufficient guarantee of trustworthiness to permit an exception to the hearsay rule. *Iron Shell*, 633 F.2d at 84. Second, we have recognized that "a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription.

*State v. Butler*, 53 Wn.App. at 219-220.

After reviewing these cases, the court in *Butler* went on to affirm, noting that, as in *Bouchard* and *Robinson*, the child's statements to the

treatment provider were necessary to determine the source of the injuries, and thereby determine what treatment to provide and what steps to take to protect the child from further injury.

Similarly, in *State v. Ashcraft, supra*, the babysitter of a 3-year-old child called the police after she discovered a number of bruises on the infant. After the initial investigation, CPS took custody of the child and had her examined by a physician. During this examination, the physician found numerous injuries and bruises of a type commonly associated with physical abuse. The state then charged the mother with numerous counts of assault after the child told the physician that her mother had hurt her. Following conviction, the mother appealed, assigning error to the court's admission of the physician's testimony that the child told him that "My mama did it."

After reviewing the history behind ER 803(a)(4), and the recent expansion of it for child abuse cases, the court held as follows:

Similarly, in the present case, the victim lived in the accused's home. The child had been determined to be the victim of probable abuse, raising questions of possible psychological injuries, as well as questions with respect to her safety. Therefore, as in *Butler*, [the child's] identification was necessary to allow for her proper diagnosis and treatment.

*State v. Ashcraft*, 71 Wn.App. at 456-67.

In each of these cases just cited, *Butler, Robinson, Bouchard, Renville, and Ashcraft*, the common thread that runs throughout is the

immediate need to determine the source of the injuries in order to determine what treatment is appropriate, and what steps are necessary to shield the child from further abuse. As the court notes in both *Butler and Renville*, “first, the declarant’s motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be consistent with the purposes of promoting treatment or diagnosis.” *Butler*, 53 Wn.App. at 220.

In each of these cases these two criteria were met in that the suspicious injuries had just been discovered and the placement of the child back into the home of the alleged perpetrator was an imminent possibility. By contrast, in the case at bar, under like any of the cited cases, there was no question as to the identity of the alleged perpetrator. Neither was there a need to protect the young woman from the alleged perpetrator because CPS had moved her out of her home. In addition, the young woman had repeatedly identified the defendant to the police.

Finally, unlike the cited cases in which the children were taken to a treating physician for treatment, in this case the child was specifically sent to Dr. Sterling by the police for the sole purpose of gaining the physician’s opinion as an expert witness for the prosecution. In other words, Dr. Sterling was performing a forensic examination, not an examination for the purpose of treating the person examined. Thus, neither of the criteria required under

*Butler* and *Renville* or any of the other cases cited was present in the cause currently before this court.

In other words, in this case the young woman's foster mother did not take her to Dr. Sterling to get a diagnosis or to get treatment. Rather, she took the young woman to the physician because the police told her to in order to aid their preparation for the state's case against the defendant. Under these circumstances the 15-year-old young woman's statements to the physician were not "consistent with the purposes of promoting treatment" as is required under *Butler* and *Renville*. Neither were the child's statements "consistent with the purposes of promoting treatment or diagnosis" since neither the foster mother nor the young woman were going to Dr. Sterling for diagnosis or treatment.

Far from a medical examination intended to promote the health and well being of the young woman, the examination in this case was solely a forensic exercise in the pursuit of evidence to use against the defendant contrived by the state to circumvent the hearsay rule. To sanction the use of such evidence invites the state to preface every claim of sexual abuse with a trip to the state's special consulting physician during which the child will be asked to repeat his or her prior claims of abuse to the physician, and thereby overcome the fundamental principles of the hearsay rule under the magic wand of ER 803(a)(4).

Under the facts of this case, the young woman's statements to the physician as to who the abuser was and what he did do not meet the requirements of the ER 803(a)(4) exception to the hearsay prohibition. Thus, there were not admissible to prove the identity of the perpetrator and the facts of the alleged molestations. Under the doctrine of harmless error, a trial court's error of a non-constitutional magnitude such as occurred in this case warrants reversal if the defendant can show a reasonable probability that but for the error, the jury would have returned a verdict of acquittal. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). As the following explains, in the case at bar the defendant can meet this burden.

In this case the defendant's daughter testified to numerous instances of sexual abuse that she claimed happened over a lengthy period of time with many of the instances of abuse having happened in a very small home in the same room as many other sleeping family members. She also claimed to have disclosed this abuse to her three sisters, two of whom flatly denied having heard any such claim, and the third having stated that the claim was not of sexual abuse. The jury obviously had a difficult time in finding that these claims and the state's remaining evidence constituted proof beyond a reasonable doubt in that (1) the jury acquitted on six of seven counts, (2) the jury twice sent out notes that they could not agree on verdicts, and (3) the jury's deliberations spanned three days before the verdicts were finally

returned. Under these facts the improper admission of any evidence would be sufficient to change what would have been an acquittal to a conviction. The defendant argues that this is precisely what happened in this case when the court improperly overruled the defendant's objection to Dr. Sterling's testimony concerning what the complaining witness said to him. As a result, the improper admission of this evidence denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. Consequently the defendant is entitled to a new trial.

### **III. THE TRIAL COURT ERRED WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.**

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus, a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar, the defendant argues that the trial court exceeded its statutory authority when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out this argument.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two

conditions.

In the case at bar the jury found the defendant guilty of one count of third degree rape of a child under RCW 9A.44.079. Under RCW 9.94A.030(41)(a)(i) the term “sex offense” is defined to include any “felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11).” Thus, a violation of RCW 9A.44.083 is a sex offense. The imposition of community custody for sex offense sentences of confinement for one year or more is controlled by RCW 9.94A.715. This statute states in part:

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712. . . . committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. . . .

RCW 9.94A.715(1).

As this statute explicitly states it applies to when the court sentences a person “to the custody of the department for a sex offense not sentenced under RCW 9.94A.712.” Thus the trial court in the case at bar had authority to impose community custody. Subsection 2 of this statute states the following concerning the conditions of community custody the trial court may impose:

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in

RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

RCW 9.94A.715(2).

As RCW 9.94A.715(2)(a) states, "the conditions of community custody shall include those provided for in RCW 9.94A.700(4)." In addition, "[t]he conditions may also include those provided for in RCW 9.94A.700(5)." Herein one finally finds the actual conditions. Subsection 4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

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

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

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

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

RCW 9.94A.700(4).

Section (5) of this same statute provides the trial court with authority to impose further conditions. It states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

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

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

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

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

RCW 9.94A.700(5).

Under these provisions no causal link need be established between the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8<sup>th</sup> ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). In the case at bar the trial court imposed the following conditions among others:

- ☒ Defendant shall enter into, cooperate with, fully attend and successfully complete all in-patient and outpatient phases of a sexual deviancy treatment program as established by the community corrections officer and/or the treatment facility. Defendant shall not change sex offender treatment provides or treatment conditions without first notifying the Prosecutor, community corrections officer and shall not change providers without court approval after a hearing if the prosecutor or community corrections officer object to the change. “Cooperate with” means the offender shall follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity.

- ☒ Defendant shall, at his or her own expense, submit to periodic polygraph examinations at the direction of his/her community corrections officer to ensure compliance with the conditions of community placement/custody.

CP 116-117.

These two conditions of community custody noted above deal with the requirement that (1) the defendant undergo and cooperate with sexual deviancy treatment, and (2) that the defendant submit to periodic polygraphs to help determine his compliance with his sexual deviancy treatment. These provisions are specifically allowed under RCW 9.94A.700(5)(c) “as “crime-related treatment or counseling services.” Periodic polygraphs are certainly an integral part of that treatment. The decision in *State v. Combs*, 102 Wn.App. 949, 10 P.3d 1101 (2000), illustrates this point.

In *Combs*, the defendant pled to a charge of child molestation. As part of the judgment and sentence the court ordered the defendant to submit to periodic polygraph examinations in order to monitor his compliance with his conditions of community custody. He then appealed, arguing that the trial court erred when it ordered the polygraph examinations because the order does not state the purpose or limit the subject matter of the examinations. The defendant maintained that under the decision in *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), the scope of the polygraph examination must be limited to the authorized purpose of monitoring his compliance with the

court's order and that it could not be used by the state to search for other criminal violations. In addressing this argument, the court held as follows:

Relying on *Riles*, we conclude that the language of Mr. Combs's judgment and sentence, taken as a whole, impliedly limits the scope of polygraph testing to monitor only his compliance with the community placement order and not as a fishing expedition to discover evidence of other crimes, past or present. While not discouraging the use of pre-printed sentencing forms, we want to take this opportunity to strongly encourage the parties to carefully tailor them to conform to the particular nuances of each case. Here, Mr. Combs's judgment and sentence should have explicitly contained the monitoring compliance language. As a policy matter, cautious attention to detail in the sentencing forms will serve to better inform offenders of their rights, insure protection of those rights, and prevent confusion amongst judges, defendants and community corrections officers regarding the applicable legal standard.

*State v. Combs*, 102 Wn.App. at 952-953.

In the case at bar the specific polygraph language in the judgment and sentence does contain appropriate limiting language where it states that the purpose of the polygraph will be "to ensure compliance with the conditions of community placement/custody." Thus, the court did not err when it imposed this condition by itself. However, this provision must be seen in conjunction with the preceding treatment requirement, wherein the court requires the defendant to "cooperate" with treatment, and then defines the term "cooperate" as "follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity."

The problem with this language is that one of the requirements of sexual deviancy treatment is for the patient to reveal all prior and current deviant sexual thought and acts. Thus, a reasonable sexual deviancy treatment provider and a reasonable community corrections officer would interpret these two provisions to require the defendant to reveal all of his prior deviant sexual acts, including those unknown to the state and which will subject him to further criminal liability. In essence then, these two provisions seen in conjunction to each other will require the defendant to waive his Fifth Amendment right against self-incrimination. To the extent these provisions do require such a waiver, they exceed the court's authority.

In this case the court also imposed the following crime related conditions and special conditions as part of appendix F attached to the judgment and sentence:

5. You shall not possess, use or own firearms, ammunition or deadly weapons. Your Community Corrections Officer shall determine what those deadly weapons are.

10. You shall take Antabuse per your Community Corrections Officer's direction, if so ordered.

CP 124-126.

That portion of part 5 that prohibits the defendant from possessing "deadly weapons" is not only unworkable but invalid. While the court does have authority to prohibit a defendant from possessing firearms, it does not

have the authority to prohibit a defendant from possessing “deadly weapons.” Indeed, this term is so ambiguous as to give the defendant’s probation officer blanket authority to prevent the defendant from possessing a steak knife, a bottle of bleach, a motor vehicle, or a razor blade just to name a few items that can qualify as “deadly weapons” depending upon how they are used. The trial court did not have authority to impose this condition. *See e.g., Combs, supra* at 954 (“Although the Sentencing Reform Act of 1981 contains a provision that does not allow a convicted felon to use or possess a firearm and/or ammunition, there is no such provision that allows the court to prohibit the use or possession of any other type of weapon. Accordingly, the court exceeded its authority when this term was included in the sentencing order.)

Finally the trial court also abused its discretion when it ordered that the defendant take antabuse at the direction of his community corrections. First, the trial court had the option to find that the defendant was chemically dependent and that this dependency “related to” the crimes he committed but the trial court declined to do so. This finding is included on page 2 of the judgment and sentence and is unchecked in this case. CP 129. Indeed, there was no evidence to indicate that alcohol had anything to do with the case at bar. Second, the term “antabuse” is a brand name for the prescription drug disulfiram. *See* <http://www.disulfiram.com>. Community Corrections

Officers are not medical doctors, they did not have the legal authority to prescribe this drug, and they do not have the medical knowledge necessary to determine whether this drug should or should not be used. The legislature specifically recognized this fact under Washington Deferred Prosecution statute found at RCW 10.05.150(7), wherein the legislature states the following:

A deferred prosecution program for alcoholism shall be for a two-year period and shall include, but not be limited to, the following requirements:

. . .

(7) The decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment shall be reserved to the treating facility and the petitioner's physician;

RCW 10.05.150(7).

Thus, the trial court abused its discretion when it gave the community corrections officer authority to require the defendant to take antabuse.

In a recent decision (filed ten days preceding the filing of this brief) this court ruled that constitutional arguments such as these are not ripe for decision given the fact that the state had not sought to sanction the defendant for violation of any of the conditions the defendant herein claims are improper. In this case, *State v. Motter*, No. 34251-2-II (filed 7-24-05), a defendant convicted of first degree burglary appealed his sentence, arguing that the trial court imposed a number of community custody conditions that

violated certain constitutional rights and which were not authorized by the legislature. One of these conditions prohibited the defendant from possessing “drug paraphrenalia” which the court said included such items as cell phones and data recording devices. This court refused to address this condition on the basis that the issue was not ripe for decision. This court held:

Moreover, Motter’s challenge is not ripe. In *State v. Massey*, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in *State v. Langland*, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law’s constitutionality is not ripe for review unless the challenger was harmed by the law’s alleged error. Here, Motter claims that the court order could prohibit his possession of innocuous items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from pop cans to coffee filters. Thus, we can review Motter’s challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

*State v. Motter*, No. 34251-2-II (filed 7-24-05)

The defendant herein argues that this decision, while appropriate at the time of *Massey* and *Langland*, is inappropriate now, and that by applying it in *Motter* and applying it in the case at bar this court violates the defendant’s right to procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment by denying the defendant appellate review as guaranteed under Washington

Constitution, Article 1, § 22. The following presents this argument.

A criminal defendant does not have a federal constitutional due process right to either post-conviction motions or to appeal. *Rheurark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981); . However, once the state acts to create those rights by constitution, statute or court rule the protections afforded under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect. *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986). For example, once the state creates the right to appeal a criminal conviction, in order to comport with due process, the state has the duty to provide all portions of the record necessary to prosecute the appeal at state expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The state also has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1, § 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right includes the protections of procedural due process. At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and

United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

*In re Messmer*, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

In *Massey* and *Langland* the defendant's procedural due process right "to be heard or defend before a competent tribunal" was not violated even though the court found the defendant's constitutional challenge to certain probation conditions was not ripe. The reason is that in these cases the defendants had the right to contest the constitutionality of those conditions before the court in the future were the Department of Corrections to seek to sanction the defendant for failure to comply with conditions the defendant felt were unconstitutional. The problem with the decision in *Motter*, and the problem in the case at bar, is that probation violation claims are no longer adjudicated in court. Rather, they are adjudicated before a Department of

Corrections hearing officer who only has the authority to determine (1) what the conditions were, (2) whether or not DOC has factually proven a violation of those conditions, and (3) what the appropriate sanction should be if the violation was proven.

Under WAC 137-104-050 the Department of Corrections has adopted procedures whereby defendants accused of community custody violations are tried before a DOC hearing officer on the claims of violation, not before a court. The first two sections of this code section provide as follows:

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

WAC 137-104-050.

There is no provision under this administrative code, nor under any of the other sections of WAC 137-104 to allow the defendant to challenge the constitutionality of community custody conditions that the court imposed. In addition, while this administrative code section does grant the right to appeal, it does not grant the defendant the right at the appellate level to challenge the constitutionality of the community custody conditions imposed by the court.

This section, WAC 137-104-080, states as follows:

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the: (a) Crime of conviction; (b) Violation committed; (c) Offender's risk of reoffending; or (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

WAC 137-104-080.

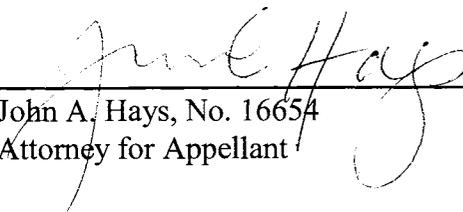
Under WAC 137-104-080 and the procedures by which community custody violations are no longer adjudicated in court, the effect of the decision in *Motter* is to deny a defendant procedural due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment by refusing to hear constitutional challenges to community custody provisions at the direct appeal level (not ripe), and then refuse to hear constitutional challenges at the violation level under WAC 137-104 (no authority to hear the claim). Thus, to comport with minimum due process, this court should find that the defendant's constitutional challenges to community custody conditions may be heard as part of a direct appeal from the imposition of the sentence.

## CONCLUSION

The defendant is entitled to a new trial based upon the trial court's actions coercing a verdict, and based upon the admission of improper hearsay, the admission of which secured a guilty verdict. In the alternative, this court should order the trial court to strike the improper community custody conditions it imposed in the judgment and sentence.

DATED this 3<sup>rd</sup> day of August, 2006.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

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

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

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 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 of 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.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

## ER 801

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.

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

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

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

## ER 802

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

**ER 803(a)(4)**

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

**RCW 9.94A.700**

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

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

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

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

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community

placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

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

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

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

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

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

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

#### **RCW 9.94A.715**

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such

time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

(2)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a

date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

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

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

#### **RCW 9A.44.079**

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

(2) Rape of a child in the third degree is a class C felony.

**RCW 10.05.150**  
**Alcoholism program requirements**

A deferred prosecution program for alcoholism shall be for a two-year period and shall include, but not be limited to, the following requirements:

(1) Total abstinence from alcohol and all other nonprescribed mind-altering drugs;

(2) Participation in an intensive inpatient or intensive outpatient program in a state-approved alcoholism treatment program;

(3) Participation in a minimum of two meetings per week of an alcoholism self-help recovery support group, as determined by the assessing agency, for the duration of the treatment program;

(4) Participation in an alcoholism self-help recovery support group, as determined by the assessing agency, from the date of court approval of the plan to entry into intensive treatment;

(5) Not less than weekly approved outpatient counseling, group or individual, for a minimum of six months following the intensive phase of treatment;

(6) Not less than monthly outpatient contact, group or individual, for the remainder of the two-year deferred prosecution period;

(7) The decision to include the use of prescribed drugs, including disulfiram, as a condition of treatment shall be reserved to the treating facility and the petitioner's physician;

(8) All treatment within the purview of this section shall occur within or be approved by a state-approved alcoholism treatment program as described in chapter 70.96A RCW;

(9) Signature of the petitioner agreeing to the terms and conditions of the treatment program.

**WAC 137-104-050**

(1) Offenders accused of violating any of the conditions or requirements of community custody will be entitled to a hearing, prior to the imposition of sanctions by the department.

(2) The hearing shall be conducted by a hearing officer in the department's hearing unit, and shall be considered as an offender disciplinary proceeding and shall not be subject to chapter 34.05 RCW, the Administrative Procedure Act.

**WAC 137-104-080**

(1) The offender may appeal the decision of the hearing officer within seven calendar days to the appeals panel. The request for review should be submitted in writing and list specific concerns.

(2) The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to the:

- (a) Crime of conviction;
- (b) Violation committed;
- (c) Offender's risk of reoffending; or
- (d) Safety of the community.

(3) The appeals panel will also examine evidence presented at the hearing and reverse any finding of a violation based solely on unconfirmed or unconfirmable allegations.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 JOEY URUO, )  
 )  
 Appellant, )

CLARK CO. NO: 06-1-00448-5  
APPEAL NO: 35741-1-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON )  
 ) vs.  
 COUNTY OF CLARK )

CATHY RUSSELL, being duly sworn on oath, states that on the 3<sup>RD</sup> day of AUGUST, 2007, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS  
PROSECUTING ATTORNEY  
1200 FRANKLIN ST.  
VANCOUVER, WA 98668

JOEY URUO  
C/O AMY URUO  
P.O. BOX 5984  
VANCOUVER, WA 98668

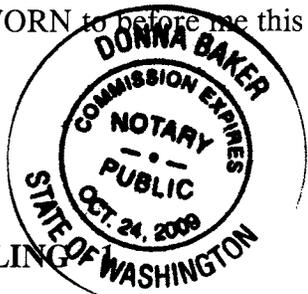
and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 3<sup>RD</sup> day of AUGUST, 2007.

*Cathy Russell*  
\_\_\_\_\_  
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 3<sup>RD</sup> day of AUGUST, 2007.



*John A. Hays*  
\_\_\_\_\_  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
Commission expires: 10-24-09

AFFIDAVIT OF MAILING

John A. Hays  
Attorney at Law  
1402 Broadway  
Longview, WA 98632  
(360) 423-3084