

NO. 37267-3-II

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

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STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
JACK HYDER,  
  
Appellant.

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FILED  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY ASD  
DEPUTY

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FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY  
  
The Honorable F. Mark McCauley, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to conduct an *in camera* review of private records for evidence exculpatory for the defense, as requested.

2. The trial court erred by admitting evidence obtained by the state's abuse of process.

3. The trial court erred by admitting into evidence personal health care information obtained in violation of The Uniform Health Care Information Act, RCW Ch. 70.02, and the defendant's rights to privacy and confidentiality in his medical records.

4. The trial court erred by compelling defendant's mental health counselors to testify as to privileged communications they received from him.

5. The trial court erred in failing to place a juror under oath during the jury selection process.

6. The trial court erred by failing to enter written findings of fact and conclusions of law to support an exceptional sentence.

7. The jury's answers to special interrogatories were not sufficient to support an exceptional sentence above the standard range.

8. The trial court erred by imposing an exceptional sentence above the statutory maximum.

9. The trial court erred by imposing an indeterminate, and so illegal, sentence.

10. The trial court erred by counting a military court-martial conviction as a "prior conviction" for sentencing purposes.

Issues Pertaining to Assignments of Error

1. Where the law requires an *in camera* review of confidential documents, does the court abuse its discretion by not conducting such a review and instead releasing the entire file to both counsel?

2. Does the state abuse process by obtaining a search warrant to obtain the defendant's medical records after a case is pending before a different judge in the same court, to avoid the requirements of notice and opportunity to object provided by statute and court rule?

3. Does the court err by admitting evidence obtained as a result of this abuse of process?

4. Does a patient have a testimonial privilege of statements made to mental health

counselors once those counselors have complied with the mandatory reporting statute?

5. Did the trial court err by allowing a juror to participate in voir dire without being sworn under oath?

6. Must the trial court enter written findings of fact and conclusions of law to support an exceptional sentence?

7. Where the court's instructions do not define any of the terms in the special interrogatories to the jury, do not limit the special allegations to the legal definitions of the aggravating factors, and are not limited to the specific count for which it is asked, are the special verdicts adequate to support an exceptional sentence?

8. Where the jury's special interrogatories finding "multiple events over a prolonged period of time" could have been based solely on the elements of the crime of conviction, can they support an exceptional sentence?

9. Is whether an aggravating factor is "substantial and compelling" a fact that must be

submitted to the jury instead of decided by the court? U.S. Const., amends. 6, 14.

10. Where the court's sentence exceeds the statutory maximum and includes the statement "not to exceed statutory maximum," is the sentence determinate as required by the SRA?

11. Did the state meet its burden of proving a court-martial's elements, that it was of this defendant, and that it was comparable to a state crime?

B. STATEMENT OF THE CASE

1. Factual Background

Jack Hyder, a graduate of the United States Military Academy, married Judy D'Angelo. After he completed veterinary school, they moved from New York to Ocean Shores, Washington, where he established his veterinary practice and they raised their family. RP(11/9)<sup>1</sup> 188-92.

The Hyders' marriage produced eleven children: Luke was born in 1983; Evelyn in 1984; Elena Rose (Rosey) in 1987; John Gabriel in 1990; Mark, 1992;

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<sup>1</sup> The Report of Proceedings is indicated by "RP(date)". Unless the year is specified, it is 2007, the year the trial occurred.

Mary, 1994; Josephine, 1995; Elise, 1997; Annie, 1999; Max, 2000; and Michael, 2002. RP(11/9) 188.

The Hyders home-schooled the children. The home schedule was structured to keep everyone active and contributing. Mornings were spent in their home's school room working on their lessons. Afternoons the children did their household chores, made trips to the library, music lessons, and any shopping or doctor's appointments they might need. They had weekly social interaction with other homeschool families. RP(11/9) 230-40. They attended church weekly. The children served in the Catholic church as altarboys and choir members. As a teenager, Evelyn played the piano or organ for services. RP(11/7) 5-7; RP(11/9) 38-43.

Dr. Hyder built the family home in Ocean Shores. He developed adjacent lots for investment. He and the boys built one of those homes, an opportunity to learn carpentry skills. The family had a large garden and kept some livestock. RP(11/1) 49-52; RP(11/5) 116-19.

The family was well known in Ocean Shores. People were impressed with how bright, polite, and engaged the children were in social settings.

Everyone perceived them as loved, happy, and well adjusted. They were impressed with how much the children seemed to adore and respect their parents. RP(11/9) 3-22, 26-33; RP(11/8) 257-61.

Dr. Hyder believed in distinct roles for men and women. Men dealt with the outside world; women were to stay in the home with the children, more protected from worldly influences. Judy Hyder had a college degree. She didn't always agree with her husband. RP(11/9) 237-38; RP(11/1) 124.

Judy's family -- her father, two sisters and two brothers -- lived in New York City. They were a close family of Italian descent. None of Judy's siblings had children. The D'Angelos visited the Hydres regularly. Judy went to New York once a year, usually with some of the children. The D'Angelos paid for their travel. Financially well off, the D'Angelos showed the Hyder children "all the best glitz" of New York. RP(11/8) 129; RP(11/13) 40-52.

The D'Angelos never liked Jack Hyder. RP(11/7) 161-62. They perceived him as too restrictive with his family. Dr. Hyder perceived

them as interested in disrupting his family with unhealthy influences. RP(11/8) 238-39, 245.

In 2000, Annie, age 1-1/2, drowned in a small pond on the property. The tragedy profoundly affected the family. Some of the older children felt guilty for not watching the younger ones well enough; Dr. Hyder felt guilty for having built the pond at all. Some of the children blamed him for the death. RP(11/6) 144; RP(11/7) 97-100. Judy Hyder noticed her husband became more protective of his children after Annie died. RP(11/13) 4-5. He also became more physically affectionate toward them, holding them closer and tighter. RP(11/13) 77-78.

The D'Angelos told Luke he could live with them in New York while he attended college. They'd buy him a car and set him up. They made this offer directly to Luke, not through his parents. Jack and Judy demanded the D'Angelos respect their parental authority. When they then asked Jack and Judy to let them take Evelyn to Italy with them in 2002, Jack resisted, but Judy insisted she go. RP(11/13) 53-54; RP(11/6) 27-28; RP(11/9) 91-95.

When Evelyn returned, she maintained frequent communication with Donna by email. RP(11/13) 56.

Evelyn was very bright. She told her mother she wanted to go to college. Dr. Hyder did not want her to go to college. Jack and Judy discussed this topic frequently, Judy trying to persuade him it was appropriate. He would not relent. RP(11/13) 47, 59-60; RP(11/1) 124-25.

In 2002, Luke was admitted to the United States Military Academy at West Point. RP(11/1) 124-25. In late June, the family held a huge party to celebrate and send him off, with a roasted pig and 65 guests. RP(11/9) 88-90. Judy and son John flew with Luke to New York to report to the Academy. While Jack drove them to the Seatac airport, Evelyn called Donna in New York.

Evelyn told Donna her father had "great affection" for her and had "fondled" her. Donna recalled she said he'd touched her breasts and genitals. When Judy arrived in New York, Donna told her that Jack had been molesting Evelyn. Donna was a social worker; she insisted Judy report it to CPS. When Donna told Evelyn she had to report the abuse to authorities, Evelyn got very

upset. RP(11/8) 183-84, 204, 209, 223, 245-46;  
RP(11/9) 101-02.

Judy returned to Washington and made the report to CPS. CPS forwarded the report to the Grays Harbor County Sheriff. Judy then moved with the children to New York. Judy remained in contact with Jack, trying to help him take whatever steps were necessary to get the family back together. RP(11/13) 102-04; RP(11/9) 156-57.

Jack met with Deacon Pellegrino from his church. RP(11/9) 64. The deacon told Jack he'd have to go through therapy for sex offenders. Deacon Pellegrino told Judy it would take three to twelve months of therapy to reunite the family. Judy was anxious about the timeline; she was expecting a baby in September. She remembered calculating they could possibly reunite as early as October. RP(11/9) 111-15.

The deacon said the first step was to take responsibility. He told Judy, who told Jack, that the first step was to admit he'd abused Evelyn. He could not get any further in therapy without

admitting the abuse.<sup>2</sup> The night before she moved to New York, Judy told Jack to do whatever counseling the deacon said; she would return with the children as soon as the counselor said it was okay. RP(11/9) 116, 120-21.

September 12, 2002, Judy delivered baby Michael in New York. He had many physical problems. Jack flew out to see them. Deacon Pellegrino reported to Judy that Jack was not cooperating, was not acknowledging the abuse. Judy gave him an ultimatum: he had to admit he had done these things and get counseling or she would not return to him. RP(11/13) 6-12, 141-43.

Baby Michael died in New York October 13, 2002. RP(11/9) 155, 188-89.

While Judy and the children lived in New York, they all worked with counselors. Evelyn never told Judy directly what had occurred, but the therapists would relate back to Judy what Evelyn told them. Judy then relayed that information to Jack. Jack

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<sup>2</sup> See, e.g., State v. J.S., 70 Wn. App. 659, 662, 855 P.2d 280 (1993) (state's expert testified not possible for person to make progress in sexual offender treatment if person denies having a problem; first step in treatment requires taking responsibility for sexually inappropriate behavior).

admitted whatever Judy told him so he could reunite his family. RP(11/9) 151-59.

By spring, Jack's therapist explained to work toward reuniting the family, they needed to live closer than 3,000 miles apart. In April, 2003, Judy made plans to return to Washington. Until then, there were no allegations that Jack had abused Rosey. RP(11/13) 123-25.

Judy returned to Washington in the spring of 2003 with her youngest six children. They continued to live separately from Jack, although they had visits. The entire family worked with counseling professionals, who communicated with one another. RP(11/13) 83-87, 105-06, 155-57.

Rosey chose to stay in New York. The family there agreed to support her. Evelyn was admitted to the University of Notre Dame. RP(11/13) 123, 129.

CPS forwarded a report to the Grays Harbor County Sheriff when it first received it in July, 2002. The information didn't warrant further investigation, according to the detective, until Donna D'Angelo contacted him in the spring of 2003. He faxed statement forms to Donna; she and Rosey

faxed statements back to him. The detective met in June, 2003, with Evelyn, Judy and Luke, who declined to give statements. RP(11/5) 15-19, 28-33, 36-38.

In February, 2004, a relative phoned the detective and said Evelyn was "ready to give a statement." Luke submitted a written statement later that year. Rosey emailed a statement in November, 2004, reporting her father had molested her. RP(11/5) 19-21.

## 2. Charges and Convictions

In December 2005, the state charged Dr. Jack Hyder with seven counts:

- 1 Rape of a child 1° against Rosey;
- 2 Child molestation 1° against Rosey;
- 3 Rape of a child 1° against Evelyn;
- 4 Child molestation 1° against Evelyn;
- 5 Rape of a child 2° against Evelyn;
- 6 Child molestation 2° against Evelyn;
- 7 Incest 2° against Evelyn.

CP 1-4.

The state alleged aggravating factors to support an exceptional sentence above the standard range: the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time, RCW

9.94A.535(3)(g); and the defendant used his position of trust or confidence to facilitate the commission of the current offense, RCW 9.94A.535(3)(n). CP 10-11.

From December 21, 2005, when these charges were filed, the court ordered no contact between the Hyder children and their father. RP(11/13) 87.

Trial occurred in October-November, 2007. At the close of evidence, the court directed a verdict of not guilty on Counts 3 and 4, holding there was insufficient evidence that Evelyn was abused before age 12. RP(11/14) 174-200.

The jury found Dr. Hyder not guilty of abusing Rosey, Counts 1, 2; and not guilty of sexual intercourse with Evelyn, Count 5. CP 23-25.

The jury found Dr. Hyder guilty of Count 6, child molestation 2°, and Count 7, incest 2°, against Evelyn.<sup>3</sup> CP 26-27; 35-48. The jury responded "yes" on both special verdicts for each of the two counts. CP 12-20, 28-29.

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<sup>3</sup> RCW 9A.44.086; RCW 9A.64.020(2).

3. Facts Relevant to Appeal

a. Jury selection

Prior to voir dire, the court clerk swore in the panel of potential jurors to answer the voir dire questions truthfully. RP(10/31/07) (Supp. VD) 2. After the court had given the jury general instructions and read the charges, Virginia McCaughan, Juror #25, arrived in court. The court announced it would not review the previous instructions and charges again. RP(10/31/07) (Supp. VD) 11.

The court did not swear in Ms. McCaughan.

Ms. McCaughan answered questions during voir dire. RP 10/31/07 (Supp. VD) 99. The defense used all of its peremptory challenges. Ms. McCaughan was seated as Juror #7, designated as the first alternate. CP 89-91. Prior to deliberations, Juror #14 was excused, as was alternate juror #4. CP 86-88. As a result, Ms. McCaughan sat on this jury for deliberations.

b. Discovery of CPS files

The defense moved to compel discovery of the CPS files in the case. The state responded that these records were "not in the State's control,"

defense counsel must go through the Title 13 procedures to obtain the records with a subpoena duces tecum to CPS. The court ordered defense counsel to follow the procedure with notice to CPS. RP(10/23/06) 30-31.

The state also argued the records were not discoverable. Counsel explained he sought CPS interviews with the children discussing the alleged sexual abuse. The court found such interviews would be material to the defense if they existed. RP(10/23/06) 31-32.

DSHS responded to defense counsel's subpoena duces tecum by submitting its file to the court for *in camera* review. Instead of conducting the review, the court ordered both counsel to copy and review the entire file. It sealed the file and ordered that both counsel could not further disclose any information in the file. CP 50-54; RP(11/21/06) 46.

The CPS file contained notes of a report from Norm Nickle that Dr. Hyder had met with him in July, 2002. The notes indicated that Dr. Hyder reported to Mr. Nickle that he had molested his daughter for several years and was very remorseful.

When asked, Dr. Hyder did not know whether the matter had been reported to CPS. He was surprised to learn if reported to CPS it also would be reported to law enforcement. After this first appointment, the therapist received a call from Dr. Hyder's lawyer canceling further appointments. CP 92-114.

The state advised the court and counsel that it intended to call Mr. Nickle as a witness. Due to this newly discovered evidence, the court continued the trial date. RP(11/27/06) 49-62.

c. Search warrant for medical records

Det. McGowan contacted Mr. Nickle by email November 26, 2006. Mr. Nickle had no independent recollection of meeting with Dr. Hyder 4-1/2 years earlier. CP 92-114.

Det. McGowan prepared an affidavit and search warrant to obtain Dr. Hyder's "medical records" held by Hoy & Nickle Associates. The prosecuting attorney approved the affidavit. They presented the search warrant not to Judge McCauley, the judge assigned to this case, but instead to Judge Godfrey. Nothing in the affidavit suggested the case was already charged, the defendant was

represented by counsel, or that the case was pending before another judge in the same court. No notice of the search warrant was provided to the defense. RP(10/30) 15-24; RP(11/5) 21-22; CP 83-85, 92-114.

After seizing Dr. Hyder's medical records at Hoy & Nickle Associates with this search warrant, the state called Ms. Hoy, a sex offender treatment provider ("SOTP"), and Mr. Yunck, the polygraph examiner she used, as its witnesses for trial. RP(11/2) 131-220. It did not call Mr. Nickle.

d. Motion to exclude evidence

Before trial, the defense moved to exclude the testimony and records of Trudy Hoy and Ron Yunck. The defense cited Dr. Hyder's privacy rights in his medical records, the distinction between the purpose of mandatory reporting and testimonial privilege, and the statutory confidentiality and privilege of communications with counselors. The court acknowledged it was a "difficult issue," but denied the motion. RP(10/30) 14-63.

The defense renewed its motion during trial before the witnesses testified. The court denied the motion. RP(11/2) 129.

Ms. Hoy testified she is a SOTP. She interviewed Dr. Hyder for 2-4 hours October 3, 2002.<sup>4</sup> During her interview, Dr. Hyder told her he had sexual contact with his daughter, Evelyn, from when she was about 12. He admitted he had touched her breast and vaginal area over clothing many times. He denied any sexual contact with Rosey. Ms. Hoy referred Dr. Hyder to Mr. Yunck for a forensic sexual history,<sup>5</sup> an essential part of Ms. Hoy's evaluation. She met with Dr. Hyder again in December, 2002. He affirmed to her everything he had admitted to Mr. Yunck. RP(11/2) 131-46.

Mr. Yunck testified he interviewed Dr. Hyder on two occasions, October 25 and November 1, 2002.<sup>6</sup> Dr. Hyder admitted sexual contact with Evelyn between her ages of 12-17, and described the specific type of contacts. He said it occurred 2-3 times a week for four years, and 4-5 times a week

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<sup>4</sup> This was shortly after Jack returned from visiting Judy and baby Michael in New York.

<sup>5</sup> The parties agreed there would be no mention of polygraphy. RP(10/30) 105-06.

<sup>6</sup> About two weeks after baby Michael's death.

for two years. He denied any molestation of Rosey.  
RP(11/2) 193-99.

During Ms. Hoy's testimony, she acknowledged the release forms she used for Dr. Hyder said the only person who would receive any information from his communications with her was his psychologist, and she had permission to obtain information from his wife. Exhs. 36-37; RP(11/2) 167-68.

The defense moved for a mistrial at sidebar on the grounds that Ms. Hoy had no obligation to report the communications to the state, as they were confidential and privileged. The court denied the motion. RP(11/2) 220-22.

Dr. Richard Ofshe, an expert on false confessions, testified for the defense. He explained how people are motivated to falsely confess to crimes they did not commit if there are extraordinary pressures and motivations to do so, for example, at the risk of losing your entire family. He observed that false confessions are often indicated when the confessor obtains information from some source other than his own experience. RP(11/9) 160-80.

Judy Hyder testified that she relayed to Jack the partial details of Evelyn's allegations as she had heard them, initially from her sister, and later from Evelyn's therapist in New York. RP(11/9) 116-24, 151-60.

Judy learned the full specifics of her daughters' allegations after seeing their written statements. She knew they could not have happened. Their statements sounded "like a novel," completely unrealistic and inconsistent with the family's life and Judy's experience in their household. RP(11/13) 113-15, 136.

e. Instructions

The only instruction the court gave the jury regarding the special allegations was:

You will also be given a special verdict form for each Count. If you find the defendant not guilty of the particular Count, do not use the special verdict form for that Count. If you find the defendant guilty of a particular Count, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no". If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 19.

The court provided the jury with the following special interrogatory forms for each count:

We the jury, return a special verdict by answering as follows:

1. Was the offense part of an ongoing pattern of sexual abuse of Evelyn Hyder, a person under the age of 18 years, as manifested by multiple incidents over a prolonged period of years?

ANSWER: \_\_\_\_\_

2. Did the defendant use his position of trust to facilitate the commission of the current offense(s)?

ANSWER: \_\_\_\_\_

The jury answered "yes" to both questions for both Counts 6 and 7. CP 28-29.

f. Motion for new trial

The defense moved for a new trial in part on the grounds that it was error to admit the testimony of Ms. Hoy and Mr. Yunck and error not to suppress the results of an improper search warrant. The court denied the motion. CP 30-32; RP(1/8/08) 16-21.

g. Sentencing

At sentencing, the court ruled, over objection, that a military conviction counted as a prior sex offense. Sentencing Exs. 1, 2. It

calculated an offender score of 6 and a standard range of 57-75 months on child molestation, and 41-54 months on incest. It imposed an exceptional sentence above the standard range of 78 months for child molestation, and 42 months for incest; plus 36-48 months of community supervision for each count. It ordered that the sentences run consecutively. The judgment and sentence form stated after the community custody provision: "with confinement not to exceed the statutory maximum." CP 35-48.

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED DUE PROCESS AND APPELLANT'S CONSTITUTIONAL RIGHT TO PRIVACY BY NOT EXCLUDING THE TESTIMONY OF WITNESSES HOY AND YUNCK.

An appellate court reviews *de novo* the trial court's denial of appellant's motion to suppress and its ruling on the scope of a privilege or mandatory reporting law. United States v. Romo, 413 F.3d 1044, 1046 (9th Cir. 2005), cert. denied, 547 U.S. 1048 (2006); United States v. Chase, 340 F.3d 978, 981 (9th Cir. 2003)(en banc), cert. denied, 540 U.S. 1220 (2004).

a. The Constitutional Right of Privacy

Article I, § 7, of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

This constitutional provision provides greater protection to a person's "private affairs" than does the Fourth Amendment of the United States Constitution.<sup>7</sup> It "'clearly recognizes an individual's right to privacy with no express limitations' and places greater emphasis on privacy." State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).<sup>8</sup>

"Private affairs" are "those privacy interests which citizens of this state had held, and should

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<sup>7</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ... ." U.S. Const., amend. 4.

<sup>8</sup> The law is settled that the privacy protections of article I, § 7, are qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment. Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994). Consequently it is unnecessary to engage in a Gunwall analysis to determine whether a claim under article I, § 7, warrants an inquiry on independent state grounds. McNabb v. Department of Corrections, 163 Wn.2d 393, 399-400, 180 P.3d 1257 (2008); State v. Archie, \_\_\_ Wn. App. \_\_\_ (No. 60227-6-I, 1/12/2009) (Slip Op. at 4 n.3).

be entitled to hold, safe from government trespass." State v. Myrick, 102 Wn.2d 506, 510-11, 688 P.2d 151 (1984); State v. Jordan, 160 Wn.2d 121, 131, 156 P.3d 893 (2007).<sup>9</sup> Article I, section 7, mandates exclusion of evidence obtained in violation of personal privacy rights. It "strictly requires exclusion of evidence obtained by unlawful governmental intrusions." State v. Chenoweth, 160 Wn.2d 454, 472 & n.14, 158 P.3d 595 (2007).

b. The Trial Court Erred and Violated Appellant's Right to Due Process When it Refused to Conduct an In Camera Review for Exculpatory Evidence and Released the Entire CPS File to Both Parties.

In Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987), the defendant was charged with sexual abuse of his daughter. The defense sought discovery of the records of Pennsylvania's Children & Youth Services (CYS)<sup>10</sup> by serving it with a subpoena. As here, statute

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<sup>9</sup> Information in a motel registry is a private affair under art. I, § 7, because it reveals sensitive, discrete, and private information about the motel's guest, although a statute requires the motel to maintain such records.

<sup>10</sup> The equivalent of Child Protective Services (CPS). Ritchie, 480 U.S. at 42.

protected the privacy of the CYS file with certain exceptions.<sup>11</sup> As here, the prosecutor did not have the file and was not aware of its contents.<sup>12</sup> The defense requested disclosure of a specific medical report, arguing the file might contain names of witnesses or other exculpatory evidence. The trial judge did not examine the file, but accepted CYS's counsel's report that there was no medical report in the file. The judge denied the motion.

The United States Supreme Court held that the Fourteenth Amendment's guarantee of due process requires the government

to turn over evidence in its possession that is both **favorable to the accused** and material to guilt or punishment. ... [E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Ritchie, 480 U.S. at 57 (emphasis added).

The United States Supreme Court rejected the very procedure the trial court used in this case.

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<sup>11</sup> See RCW Chapter 13.50.

<sup>12</sup> Ritchie, 480 U.S. at 44 n.4.

It disapproved of the Pennsylvania Supreme Court's holding

that defense counsel must be allowed to examine all of the confidential information, both relevant and irrelevant, and present arguments in favor of disclosure. The court apparently concluded that whenever a defendant alleges that protected evidence might be material, the appropriate method of assessing this claim is to grant full access to the disputed information, regardless of the State's interest in confidentiality. **We cannot agree.**

Id. at 59 (emphasis added). The United States Supreme Court reversed this broad disclosure of the file. Instead, it remanded for the trial court to review the records *in camera*.

We find that Ritchie's interest (as well as that of the Commonwealth) in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted **only to the trial court for *in camera* review.** Although this rule denies Ritchie the benefits of an "advocate's eye," we note that the trial court's discretion is not unbounded. If a defendant is aware of specific information contained in the file (e.g., the medical report), he is free to request it directly from the court, and argue in favor of its materiality.

Id., 480 U.S. at 60 (bold emphasis added).

Our state courts have followed this procedure.

To justify *in camera* review of a record that is otherwise deemed privileged or confidential by statute, the defendant must establish "a basis for his claim

that it contains material evidence." ... There must be a "plausible showing" that the information will be both material and favorable to the defense.

State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006); State v. Knutson, 121 Wn.2d 766, 771, 854 P.2d 617 (1993).

In Gregory, the Court reversed a rape conviction, holding the defense made an adequate showing that dependency files likely would contain evidence to contradict the complaining witness's testimony and support the defense. It held that the court's failure to conduct an *in camera* review pursuant to Ritchie was an abuse of discretion. Gregory, 158 Wn.2d at 795.

In this case, defense counsel appropriately requested *in camera* review of the CPS file. He specifically asked the court to release interviews with the complaining witnesses regarding the alleged sexual abuse. He did not ask the court to turn over the entire file to both counsel.

The trial court abdicated its responsibility to review the files in search of exculpatory evidence. It already had found that defense counsel's request met the materiality requirement, warranting the *in camera* review. RP(10/23/06) 31-

32; State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993). The court abused its discretion and violated due process by not conducting that review, and instead releasing the entire file to both counsel. U.S. Const., amend. 14; Const., art. I, § 3.

The result was to disclose evidence damaging to the defense which otherwise would have remained confidential within the records. The state had not requested the court to search for such evidence. It certainly had not met the threshold requirements of Ritchie and Kalakosky, supra.

The evidence the state obtained, specifically Mr. Nickle's report, defendant's medical records, and the testimony of Ms. Hoy and Mr. Yunck, should have been suppressed as the fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 484, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995).

- c. It was Constitutional Error for the State to Obtain a Warrant for Appellant's Medical Records Rather than Use the Statutory Procedures for Seeking Release of Such Records.
  - i. The Uniform Health Care Information Act, RCW Chapter 70.02

In 1991, the Legislature enacted the Uniform Health Care Information Act, RCW Chapter 70.02. In doing so, it made specific findings.

The legislature finds that:

(1) Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests.

...  
(3) In order to retain the full trust and confidence of patients, health care providers have an interest in assuring that health care information is not improperly disclosed and in having clear and certain rules for the disclosure of health care information.

(4) Persons other than health care providers obtain, use, and disclose health record information in many different contexts and for many different purposes. It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.

(5) The movement of patients and their health care information across state lines, access to and exchange of health care information from automated data banks, and the emergence of multistate health care providers creates

**a compelling need** for uniform law, rules, and procedures governing the use and disclosure of health care information.

RCW 70.02.005 (emphasis added).

There is no question that Dr. Hyder was obtaining health care from Mr. Nickle, Ms. Hoy, and Mr. Yunck.<sup>13</sup>

(1) Except as authorized in RCW 70.02.050, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent and employee of a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization. A disclosure made under a patient's written authorization must conform to the authorization.

RCW 70.02.020(1).

RCW 70.02.050 provides in relevant part:

(2) A health care provider **shall disclose** health care information about a patient without the patient's authorization if the disclosure is:

...

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<sup>13</sup> Only credentialed health professionals may be certified as sex offender treatment providers. RCW 18.155.020(1); WAC 246-930-020. "Health care" means any care, service, or procedure provided by a health care provider to diagnose, treat, or maintain a patient's physical or mental condition. RCW 70.02.010(5). "Health care provider" means a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession. RCW 70.02.010(9).

(b) To federal, state, or local law enforcement authorities **to the extent** the health care provider is **required** by law  
... .

...  
(e) Pursuant to compulsory process in accordance with RCW 70.02.060.

RCW 70.02.060 provides the procedure for obtaining health care information:

(1) Before service of a discovery request or compulsory process on a health care provider for health care information, an attorney shall provide advance notice to the health care provider and the patient or the patient's attorney involved through service of process or first class mail, indicating the health care provider from whom the information is sought, what health care information is sought, and the date by which a protective order must be obtained to prevent the health care provider from complying. ...

(2) Without the written consent of the patient, the health care provider **may not disclose** the health care information sought under subsection (1) of this section **if the requester has not complied with the requirements of subsection (1) of this section.** In the absence of a protective order ... forbidding compliance, the health care provider shall disclose the information in accordance with this chapter. ...

Thus the legislature explicitly recognizes the privacy in a person's medical records. It explicitly provides a procedure by which, should there be a valid legal reason, a party to litigation may obtain those records. That

procedure, however, requires that advance notice be given to the health care provider, the patient and the patient's attorney, to permit an opportunity to obtain a protective order -- before the records are disclosed.<sup>14</sup>

In Wynn v. Earin, 163 Wn.2d 361, 369-70, 181 P.3d 806 (2008), the Supreme Court held the provisions in the Health Care Information Act, RCW Ch. 70.02, override the common law witness immunity rule.<sup>15</sup>

[RCW 70.02.060] plainly contemplates that the Act applies when disclosure is sought during or in preparation for judicial proceedings ... .

Wynn, 163 Wn.2d at 372. In other words, the provisions of the Act, designed to protect confidential patient information, prevail over the

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<sup>14</sup> Compare: The Federal Health Insurance Portability and Accountability Act (HIPAA) Standards, 45 C.F.R. § 164.512, requiring notice to the patient and an opportunity to object.

<sup>15</sup> In Wynn, the Supreme Court found Mr. Wynn had waived his rights protected by the Health Care Information Act by failing to object on any basis when the counselor testified at the child custody hearing. Unlike in Wynn, here the defense objected vociferously and repeatedly to the witnesses testifying regarding Dr. Hyder's health care information on the basis of privilege and privacy. RP(10/30) 15-65; RP(11/2) 129, 220-22.

protections of testifying under subpoena. Id. at 379.

Similarly, the provisions of this Act must prevail over the prosecutor's use of a search warrant to seize a person's medical records from a health care provider. The prosecutor had recourse to the statutory procedure, with advance notice to the defendant and his counsel. Her failure to use this procedure violated his right to privacy in his health care records, and so article I, section 7 of the Constitution. The evidence so seized should have been suppressed.

ii. The State Abused Process and Violated Rules of Discovery to Obtain the Search Warrant to Avoid Giving Advance Notice to the Defense.

The Criminal Rules, Title 4, provide procedures from arraignment until trial.<sup>16</sup> CrR 4.7 controls discovery. It provides the court "may require" the defendant to disclose medical or scientific reports, but specifically limits such a

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<sup>16</sup> "These rules govern the procedure in the courts of general jurisdiction of the State of Washington in all criminal proceedings and supersede all procedural statutes and rules that may be in conflict and shall be interpreted and supplemented in light of the common law and the decisional law of this state." CrR 1.1.

possibility to those reports which the defendant intends to use at a hearing or a trial. CrR 4.7(g).<sup>17</sup> CrR 4.7(d) permits the court to issue subpoenas for material held by others. "Subpoenas shall be issued in the same manner as in civil actions." CrR 4.8.

Civil Rule 45(b) provides that a subpoena may command a person to produce documents or things as designated, but it requires that the subpoena "shall be served on each party" "no fewer than five days prior to service of the subpoena on the person named therein." The court, upon prompt motion, may quash or modify an unreasonable or oppressive subpoena. "Unless an adverse party has notice of the subpoena, it is difficult to imagine how he can move to quash or modify it." State v. White, 126 Wn. App. 131, 134, 107 P.3d 753, review denied, 155 Wn.2d 1023 (2005).

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<sup>17</sup> (g) **Medical and Scientific Reports.** Subject to constitutional limitations, the court may require the defendant to disclose any reports or results, or testimony relevant thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which the defendant intends to use at a hearing or trial.

Thus in State v. White, the Court of Appeals held the prosecutor abused process when it served a subpoena duces tecum on a third party and never filed the subpoena with the court nor served it on White or his counsel. As here, the prosecutor in White obtained evidence of the defendant's statement to a third party regarding the incident underlying the charge.

In White, however, the statement the prosecutor obtained was exculpatory. The state never used it in court nor to discover further evidence or privileged or strategic information it could use to White's disadvantage. The court of appeals therefore affirmed the lower court, finding the error was harmless. Id., 126 Wn. App. at 135-36 & n.7.

In this case, the state similarly abused process. It had its detective obtain a search warrant for confidential medical records held by a third party, rather than follow the procedures mandated by the Criminal Rules or the Health Information Privacy Act. Either would have required notice to the defendant before any records were turned over to the state.

Unlike White, the error here was not harmless. As a result of the illegally seized records, the state called Ms. Hoy and Mr. Yunck to testify. It had the complete records of their communications from Dr. Hyder from more than five years earlier. All of this evidence came in and was crucial to the jury's verdicts convicting Dr. Hyder of Counts 6 and 7.

d. The Mandatory Reporting Law Does Not Exempt the Disclosures in This Case.

RCW 26.44.010 states the legislature's purpose in mandating reports of child abuse.

The Washington state legislature finds and declares: The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of nonaccidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in **emergency** intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate authorities. **It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such**

**children: PROVIDED, That such reports shall be maintained and disseminated with strictest regard for the privacy of the subjects of such reports ... .**

RCW 26.44.010 (emphases added). Thus the purpose of this statute is to assure official notice of abuse, permit emergency intervention and to provide protective services to the abused or neglected child.

Hoy & Nickle Associates were mandatory reporters under RCW 26.44.030.

(1)(a) When any practitioner, ... social service counselor, [or] psychologist ... has reasonable cause to believe that a child has suffered abuse or neglect, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency or to the department ... .

(2) The reporting requirement of subsection (1) of this section does not apply to the discovery of abuse or neglect that occurred during childhood if it is discovered after the child has become an adult. However, if there is reasonable cause to believe other children are or may be at risk of abuse or neglect by the accused, the reporting requirement of subsection (1) of this section does apply.

...  
(7) ... Information considered privileged by statute and not directly related to reports required by this section must not be divulged without a valid written waiver of the privilege.

...  
(11) Upon receiving a report of alleged child abuse and neglect, the department or investigating law

enforcement agency **shall have access to all relevant records of the child** in the possession of mandated reporters and their employees.

RCW 26.44.030 (emphases added).

Hoy & Nickle Associates made the statutorily mandated report when Norm Nickle reported to CPS in July, 2002. Judy Hyder had moved with all her children to the east coast. No emergency intervention was necessary to protect the children. Det. McGowan contacted Evelyn Hyder, but she did not wish to make any statement.

The statute provides that the state shall have access to all relevant "records of the child," not all records of the alleged abuser. RCW 26.44.030(11). Hoy & Nickle Associates had no records of the child.

The state did not seize Dr. Hyder's records from Hoy & Nickle Associates nor seek to compel Ms. Hoy's and Mr. Yunck's testimony until November, 2006. By that time, Evelyn Hyder was an adult. Dr. Hyder was still living apart from his wife and children, and under court order to have no contact with any of his minor children. RCW 26.44.030(2). Thus there was no reasonable cause to believe other children were or may have been at risk of abuse.

Hoy & Nickle Associates complied with the mandatory reporting statute when Mr. Nickle made his report. The statute, however, expressly protects all other privileged communications. RCW 26.44.030(7). Thus the state and the court violated this statute by compelling disclosure and testimony of appellant's communications with Ms. Hoy and Mr. Yunck.

- e. A Statutory Privilege Protects a Privacy Right and Prevented the Court from Compelling Defendant's Counselors to Testify Over His Objection.

(2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

RCW 5.60.060 (emphasis added). "Priests, lawyers, doctors, counselors, and others are still prohibited from disclosing sacred privileges." Wynn v. Earin, supra, 163 Wn.2d at 386-87 (Chambers, J., concurring).

RCW 18.83.110 provides:

Confidential communications between a client and a psychologist shall be privileged against compulsory disclosure to the same extent and subject to the same conditions as confidential

**communications between attorney and  
client ... .<sup>18</sup>**

These statutes create, in addition to the blanket confidentiality of health care records discussed below, a testimonial privilege that prevents a counselor from testifying to a client's communications over his objection. See generally United States v. Chase, supra, 340 F.3d at 982-89 (confidentiality differs from testimonial privilege under state and federal laws).

[T]he question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence ... ." ... Both "reason and experience" persuade us that it does.

Jaffee v. Redmond, 518 U.S. 1, 9-10, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996). In Jaffee, the Supreme Court held federal rule of evidence 501 includes a psychotherapist-patient privilege. In doing so, it recognized RCW 18.83.110, supra, as one of the fifty states' enactments of

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<sup>18</sup> Exception is made for the limitations under RCW 70.96A.140 and 71.05.360(8) and (9), relating to involuntary commitment or detention of the mentally ill, not relevant here.

psychotherapist-patient testimonial privilege.  
Id., 518 U.S. at 13 n.11.

Our state courts have not faced this direct issue, but faced an equivalent one in State v. Glenn, 115 Wn. App. 540, 62 P.3d 921, review denied, 149 Wn.2d 1007 (2003). In that child molestation and child rape case, the court affirmed the suppression of the defendant's confession to his clergyman under RCW 5.60.060(3). The church reported the contents of the statements to law enforcement, pursuant to a church doctrine of protecting children. The state argued any privilege was thereby waived.

The court noted:

The trial court did not hold that the church could not *report* the contents of Glenn's statements. It merely said that Eide [the clergyman] could not **testify in court** as to the contents of Glenn's statements. Further, RCW 26.44.060(1) and (3) provide immunity from liability to those who *report* instances of child abuse, even if they obtain the information through conversations protected by the clergy/penitent privilege.

Glenn, 115 Wn. App. at 553 (court's italics; bold emphasis added).

Thus the mandatory "report" of RCW 26.44.030 does not destroy a privilege. It does not permit a

counselor to testify to or "be examined" about the privileged communication in court.

The mandatory reporting statute recognizes this distinction. While requiring certain professionals to make reports, it nonetheless protects privilege:

(7) ... Information considered privileged by statute and not directly related to reports required by this section must not be divulged without a valid written waiver of the privilege.

RCW 26.44.030(7).

RCW 5.60.060(2), quoted above, also demonstrates this distinction. In RCW 5.60.060(1), the testimonial privilege of spouses and domestic partners explicitly provides:

But this exception shall not apply to a ... criminal action or proceeding for a crime committed by said spouse or domestic partner against any child of whom said spouse or domestic partner is the parent or guardian ... .

RCW 5.60.060(1). The legislature did not provide this exception for the privilege for counselors.

RCW 5.60.060(2).

The mandatory report for child abuse is analogous to the "dangerous patient" exception that exists in some states for mental health practitioners.

The Tarasoff<sup>19</sup> duty, by definition, lifts the blanket of *confidentiality* covering psychotherapist-patient communications under state law. Ordinarily, however, the Tarasoff duty does not abrogate the *testimonial privilege* in state courts.

United States v. Chase, supra, at 985 (court's emphases). Thus a counselor must make the mandatory report required by RCW 26.44.030. Nonetheless, as in Glenn, supra, the counselor cannot be compelled to testify to that patient's communications, which otherwise remain privileged.

A similar situation existed in King v. Riveland, 125 Wn.2d 500, 886 P.2d 160 (1994). There inmates participating in the Department of Corrections' (DOC) sex offender treatment program had signed a confidentiality agreement when they entered the program. The DOC later revised its policies to allow release of all SOTP records to prosecutors or the attorney general, who would consider committing inmates as sexually violent predators (SVPs) under the Community Protection Act. The inmates sought to enjoin the DOC from

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<sup>19</sup> Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 550 P.2d 334 (1976) (despite confidentiality, therapist may have duty to warn subject of patient's serious threat).

releasing information they had disclosed under the confidentiality agreements.

The Supreme Court upheld the confidentiality agreements. The Community Protection Act required DOC to refer a person to a prosecutor if he appeared to meet the criteria of SVP, and to provide "documentation of institutional adjustment and treatment received." But the Court held:

It does not appear that documentation of institutional adjustment and treatment necessarily includes a history of what the inmate has said or written during treatment. ...

The disclosure laws of relevance to this case are set forth in the Uniform Health Care Information Act of 1991, RCW 70.02. This act provides that a health care provider 'may not disclose health care information about a patient to any other person without the patient's written authorization'. RCW 70.02.020. In addition, '[a] disclosure made under a patient's written authorization must conform to the authorization.' RCW 70.02.020. The trial court found that the SOTP constitutes a form of mental health care provided by mental health providers. The court also found that the DOC's proposed release of information would not conform to the authorization signed by the inmates.

The DOC responds that disclosure of the files is mandatory under RCW 70.02.050(2)(b), which provides that a health care provider shall disclose health care information about a patient without the patient's authorization if the disclosure is to federal, state, or local law enforcement authorities to the extent the health care provider is

required by law. RCW 70.02.050(2)(b). As discussed earlier, however, **the Community Protection Act does not require disclosure of the entire SOTP file and the DOC cites to no other law mandating disclosure.**

King, supra, 125 Wn.2d at 511, 513 (emphasis added).

Thus although, as here, a statute mandated some communication or report for purposes of SVP consideration, that mandatory report did not eviscerate the privileged communications between the inmates and their sex offender treatment providers. The Supreme Court went on at great length about the importance of confidentiality in counseling as a matter of public policy. King, 125 Wn.2d at 514-15.

The trial court here erred in holding that the state could compel appellant's sex offender treatment provider to testify to all communications he made to her or her associates in seeking treatment, when her office already had made the report mandated by statute. In so doing, it violated his privileged communications.

It therefore was error for the court to compel Ms. Hoy and Mr. Yunck to testify to their communications from Dr. Hyder.

f. These Errors Require Reversal and Remand for New Trial.

As shown above, the state obtained this evidence in violation of Constitution, art. I, § 7.

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. ... Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence.

State v. Ladson, supra, 139 Wn.2d at 359-60; Wong Sun, supra. As a result, the trial court should have suppressed the testimony of Ms. Hoy and Mr. Yunck.

The error is not harmless. The state charged Dr. Hyder with seven separate counts of sexual abuse. He successfully defended against every charge except two. The testimony of Ms. Hoy and Mr. Yunck supported those two charges and no others.

The proper remedy is for this court to reverse the convictions and remand for a new trial without the testimony of Dr. Hyder's counselors.

2. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO TRIAL BY JURY WHEN THE COURT SEATED A JUROR WHO WAS NOT SWORN UNDER OATH DURING VOIR DIRE.

The United States and Washington Constitutions guarantee an accused a right to trial by an impartial jury.<sup>20</sup>

*Voir dire* examination serves to protect [the right to an impartial jury] by exposing possible biases, both known and unknown, on the part of potential jurors. Demonstrated bias in the responses to questions on *voir dire* may result in a juror's being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. **The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.**

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 78 L. Ed. 2d 663, 104 S. Ct. 845 (1984) (bold emphasis added).

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<sup>20</sup> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ... ." U.S. Const., amend. 6, applicable to the states by U.S. Const., amend. 14.

"In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed ... ." Const., art. I, § 22.

"The right of trial by jury shall remain inviolate ... ." Const., art. I, § 21.

The oath for *voir dire* is essential for this process.

We begin with the understanding that *voir dire* is a preliminary examination to ascertain the qualifications of potential jurors as well as any disqualifying bias or prejudice. Literally, the term means "to speak the truth" and denotes the oath administered.

United States v. Wooten, 518 F.2d 943, 945 (3d Cir. 1975). Our legislature has provided:

A *voir dire* examination of the panel shall be conducted for the purpose of discovering any basis for challenge for cause and to permit the intelligent exercise of peremptory challenges.

RCW 4.44.120.

Our Supreme Court long ago held the oath is required before *voir dire*.

*Voir dire* examination was a well-recognized and settled practice at common law. Literally, it means "to speak the truth." **It refers to an oath administered to a prospective witness or juror, and also to the examination itself to ascertain whether he possesses the required qualifications, he being sworn to make true answers to the questions about to be asked him concerning the matter.** ... Since the common law, unless otherwise provided by statute, is in force and effect in this state, it is immaterial that the statute is silent on the question of oaths to prospective jurors on *voir dire* examinations thereunder.

State v. Lloyd, 138 Wash. 8, 13-14, 244 Pac. 130 (1926) (emphasis added). See also State v. Tharp, 42 Wn.2d 494, 499, 256 P.2d 492 (1953) (oath required before *voir dire* of potential jurors); State v. Voorhies, 12 Wash. 53, 40 Pac. 620 (1895); Tarver v. State, 500 So. 2d 1232, 1241-42 (Ala. Cr. App. 1986); In re de Martini, 47 Cal. App. 228, 229-30, 190 Pac. 468 (1920)<sup>21</sup>.

In Lloyd, the Court reversed a murder conviction because the trial judge refused to swear the jury veniremen for *voir dire*. Instead, the court directed the clerk to enter into the journal record that the entire jury panel had been sworn to give true answers to questions.

Neither of appellants nor their respective counsel was present in court at the time the trial judge had sworn all the ninety-nine jurors, then serving at that term of court in each and all of the cases to be called, as recited in the foregoing order.

Id. at 11. The court reversed, not because the jurors were not sworn, but because they were not sworn in the presence of the defendants on trial.

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<sup>21</sup> "[T]he oath of a prospective juror on his *voir dire* examination binds him, under the pains and penalties of perjury, to truthfully answer the questions that may be propounded to him by either court or counsel."

The error was constitutional and structural, requiring a new trial. Id. at 15-16.<sup>22</sup>

In Tharp, the court concluded Mr. Tharp waived his right to have a jury sworn when he accepted the jury as selected. The court did not have the record of *voir dire* examination before it. It also had no record of whether appellant had exercised all his peremptory challenges.

He must show the use of all of his peremptory challenges or he can show no prejudice arising from the selection and retention of a particular juror to try the cause, and is barred from any claim of error in this regard.

Tharp at 486.

In this case, we have the complete record of the *voir dire* and the record showing appellant exercised all his peremptory challenges. He never "accepted the jury." Nonetheless, the unsworn juror remained on the jury and ended up in deliberations.

[A] litigant is entitled to have his case submitted to a jury selected in the manner required by law; and further, that, if the selection is not made substantially in the manner required by

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<sup>22</sup> In Tharp, the court misconstrued the Lloyd issue, describing it as denying defense counsel's request to examine the jury as to their general qualifications. Tharp at 502.

law, an error may be claimed without showing prejudice, which will be presumed.

State v. Tingdale, 117 Wn.2d 595, 602, 817 P.2d 850 (1991), quoting Roche Fruit Co. v. Northern Pac. Ry., 18 Wn.2d 484, 487, 139 P.2d 714 (1943).

This Court should follow Lloyd, reverse the conviction, and remand for a new trial with a properly sworn jury.

3. THE SENTENCE VIOLATES THE SENTENCING REFORM ACT.

a. The Trial Court Failed to Enter Written Findings of Fact to Support an Exceptional Sentence.

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

RCW 9.94A.535.

Paragraph 2.4 of the Felony Judgment and Sentence states:

EXCEPTIONAL SENTENCE: Substantial and compelling reasons exist which justify an exceptional sentence:

...  
... above the standard range for Count(s) 6 & 7.

...  
Findings of Fact and Conclusions of Law are attached in Appendix 2.4. [X] Jury's special interrogatory is attached. *The court has entered oral findings to support this sentence.*

CP 36. No written Findings of Fact or Appendix 2.4 are attached. CP 35-48. The court erred in failing to enter written findings of fact.

The statute requiring written findings is as clear as the directive of JuCR 7.11(d), which requires written findings whenever a juvenile conviction is appealed. The appellate courts have held this failure justified reversal and dismissal when the findings were not entered until after the defendant filed his appellate brief. State v. Witherspoon, 60 Wn. App. 569, 805 P.2d 248 (1991), State v. Charlie, 62 Wn. App. 729, 815 P.2d 819 (1991), and State v. McCrorey, 70 Wn. App. 103, 851 P.2d 1234 (1993).

We recognize that in some cases remand might be an appropriate remedy. Here, however, the defendant will suffer obvious prejudice by remand. We reach that conclusion for two reasons. First, the practice of permitting findings to be entered after the appellant has framed the issues in his brief has an appearance of unfairness. ... Second, and perhaps more important, Witherspoon has been in custody since his notice of appeal was filed ... . If we were merely to remand for entry of findings, Witherspoon must be afforded an opportunity to assign error to the written findings after they are entered. This may necessitate supplementation of the briefs and the record. This court would then be required to revisit the case in order to address all of the assignments of error.

This process would obviously take some time. If, upon its completion, we were to rule in Witherspoon's favor, we could not afford him the same relief we can now, because he is continuing to serve the term of confinement. This is real prejudice and it is not due to any fault of Witherspoon or his counsel. In our judgment, the only just result is to reverse and order dismissal of the charge.

Witherspoon, 60 Wn. App. at 572.

As in Witherspoon, Dr. Hyder is serving a term of confinement and has filed this, his appeal brief. For the same reasons, this Court should reverse and dismiss the charge.

In the alternative, it should reverse and remand for resentencing within the standard range.

b. The Sentence Exceeds the Statutory Maximum, is Indeterminate, and so Illegal.

Child molestation in the second degree is a class B felony with a statutory maximum sentence of ten years. RCW 9A.44.086(2); RCW 9A.20.021(1)(b). Incest in the second degree is a class C felony with a statutory maximum sentence of five years. RCW 9A.64.020(2); RCW 9A.20.021(1)(c).

Except [for purposes of recovering restitution], a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the

statutory maximum for the crime as provided in chapter 9A.20 RCW.

RCW 9.94A.505(5); former RCW 9.94A.120(13).

The court imposed a sentence of 78 months and 42 months in prison on Counts 6 and 7, respectively; and 36-48 months of community custody on each count, "with confinement not to exceed statutory maximum." It ordered the two sentences to be served consecutively. CP 39-40.

The two sentences of confinement total 120 months; the two terms of community custody total 72-96 months. The overall total sentence is thus 192-216 months -- more than the statutory maximum of fifteen years.

In State v. Linerud, \_\_\_ Wn. App. \_\_\_ (No. 60769-3-I, 12/29/2008), the court rejected a sentence that went beyond the statutory maximum but included the language "not to exceed statutory maximum." It held it was indeterminate.

[T]he SRA requires courts to impose a determinate sentence, which is "a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, [or] of community supervision."

... Considering both the legal and policy arguments, we hold that a sentence is indeterminate when it puts the burden on the DOC rather than the sentencing

court to ensure that the inmate does not serve more than the statutory maximum.

Linerud, Slip Op. at 2 (quoting RCW 9.94A.030(18)).

For the same reason as in Linerud, the sentence in this case is indeterminate, and so invalid on its face. This court should remand the case for resentencing.

c. The Community Custody Term Exceeds That Permitted by the Law in Effect at the Time of the Offenses.

Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.

RCW 9.94A.345. The sentencing statute in effect at the time of these offenses provided:

When a court sentences a person to the custody of the department of corrections for an offense categorized as a sex offense committed on or after June 6, 1996, the court shall, in addition to other terms of the sentence, sentence the offender to community custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer. The community custody shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.150(1) and (2).

RCW 9.94A.120(10)(a) (1996) and (1998).<sup>23</sup>

Instead of imposing community custody as specified by this statute, the court imposed a range of 36-48 months, without regard to earned early release. The statute providing for a community custody range was enacted after the beginning of the later charging period of these crimes: December 28, 1998, for Count 7.<sup>24</sup> Nothing defined the jury's verdict as being based on any act after this date. Therefore, no law increasing the sentence after this date can be applied to this case.

This sentence violates the statute in effect at the time and constitutes an *ex post facto* law. U.S. Const., art. I, § 10<sup>25</sup> prohibits the State

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<sup>23</sup> The applicable version of the Sentencing Reform Act, RCW Ch. 9.94A, for Count 6 would be that in effect in 1996; for Count 7, 1998. These are the earliest dates in which the crimes of conviction may have occurred.

<sup>24</sup> CP 3. "Community custody range" means the minimum and maximum period of community custody included as part of a sentence under RCW 9.94A.715, as established by the commission or the legislature under RCW 9.94A.850, for crimes committed on or after July 1, 2000." RCW 9.94A.030(6) (2008). It appears this provision and RCW 9.94A.715 were enacted in Laws 2001 2nd sp.s. c 12 §§ 301-302.

<sup>25</sup> "No State shall ... pass any ... *ex post facto* Law ... ."

from enacting laws that retroactively increase the punishment for a crime after its commission. State v. Pillatos, 159 Wn.2d 459, 475, 150 P.3d 1130 (2007); Weaver v. Graham, 45 U.S. 24, 30, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

The community custody portion of this sentence must be vacated and remanded for resentencing under the law applicable in December, 1998.

d. The Jury's Special Verdicts are Not Sufficient to Support an Exceptional Sentence.

The state alleged two aggravating factors in this case:

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

...  
(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.535; CP 10-11.

Following Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Legislature adopted an exclusive list of aggravating factors. RCW 9.94A.535(3). In so doing, it adopted the factors that had evolved in court decisions to support exceptional sentences.

The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances.

Laws 2005 c. 68 § 1; Note on Intent, RCW 9.94A.537.

The statutory aggravating factors, therefore, must be read in the context of the pre-Blakely court decisions that defined them.

By definition, the standard range sentence is adequate for the vast majority of cases of a particular crime. Sentences above the standard range must be based on some fact not already inherent in the crime of conviction. State v. Ferguson, 142 Wn.2d 631, 644-49, 15 P.3d 1271 (2001); State v. Dunaway, 109 Wn.2d 207, 218-19, 743 P.2d 1237 (1987).

Neither of the jury's special verdicts required it to find the alleged factor was separate and distinct from the essential elements of the charged crime. State v. Ferguson, supra.

i. Part of an Ongoing Pattern

The jury found Dr. Hyder guilty of two counts. Each count required one incident of sexual contact with the same victim. Each occurred while she was under age eighteen, as defined by the charging

periods: 1996-1998 for Count 6, 1998-2002 for Count 7. Thus, by definition, to convict the defendant the jury had to have found he committed "multiple" (at least two) separate acts of sexual contact against the same person under age 18 between 1996 and 2002 -- a prolonged period of time.

Under the court's instructions and interrogatories, the jury could have found the "pattern" from the same two acts that were the basis for the convictions on the two counts. In fact, the court explicitly instructed the jury it did not have to find all the alleged acts occurred:

INSTRUCTION No. 14

The State alleges that the defendant committed acts of Child Molestation in the Second Degree on multiple occasions. To convict the defendant of Child Molestation in the Second Degree, one particular act of Child Molestation in the Second Degree 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 in the Second Degree.

INSTRUCTION NO. 16

The State alleges that the defendant committed acts of Incest in the Second Degree on multiple occasions. To convict the defendant of Incest in the Second

Degree, one particular act of Incest in the Second Degree 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 Incest in the Second Degree.

CP 18.

Thus, as defined for the jury, this "aggravating factor" required nothing more than the elements of the crimes charged. The jury's finding of this factor therefore cannot support an exceptional sentence. Ferguson, Dunaway, supra.

In its oral ruling, the trial court relied on this factor to support an exceptional sentence.

It is not typical to have molestation go on for years and years as it did occur in this case according to the finding -- the aggravating finding of the jury. So it went on for a prolonged period of time  
... .

RP(1/8/08) 127. The court erred by interpreting this finding so broadly, when the instructions did not require the jury's finding to be so broad.

ii. Use of Position of Trust

Under the pre-Blakely version of the statute, courts affirmed exceptional sentences for an abuse of a trust relationship for a sex offense when there was a familial or household relationship between the offender and the victim. See, e.g.,

State v. Hamby, 69 Wn. App. 131, 848 P.2d 198 (1993) (mother of victims under 12); State v. Jennings, 106 Wn. App. 532, 24 P.3d 430 (2001) (father of newborn); State v. J.S., 70 Wn. App. 659, 855 P.2d 280 (1993) (stepbrother of 4-year-old); State v. Bedker, 74 Wn. App. 87, 95-96, 871 P.3d 673 (1994) (half-brother ages 4-7); State v. Quiqq, 72 Wn. App. 828, 866 P.2d 655 (1994) (father-like relationship from infancy to age 5).

The court's instructions here required the jury to find a family relationship to convict Dr. Hyder of Count 7, incest. CP 18 (Instruction 15). Thus the use of the parental relationship could not support both this conviction and an exceptional sentence. Ferguson, supra.

Nor could it be used to support an exceptional sentence on Count 6, because the jury's special verdict form overlapped the two convictions for this interrogatory:

Did the defendant use his position of trust to facilitate the commission of the current offense(s)?

By permitting the jury to consider the abuse of trust as to more than one "current offense," and without defining what "current offense(s)" meant,

the answer to this interrogatory can be read to mean either or both of Counts 6 and 7. The interrogatory does not restrict the jury to considering only one or the other counts.

In State v. Grewe, 117 Wn.2d 211, 813 P.2d 1238 (1991), the Court acknowledged that the cases upholding an "abuse of trust" relationship were further distinguished by the victims' very young ages. See also, e.g., State v. Stevens, 58 Wn. App. 478, 794 P.2d 38 (1990) (all under age 7); State v. Grewe, supra (11-year-olds and 8-year-old).

When analyzing abuse of trust, the focus is on the defendant. The inquiry is whether the defendant was in a position of trust, and further whether this position of trust was used to facilitate the commission of the offense. Whether the defendant is in a position of trust depends on the length of the relationship with the victim, ... the trust relationship between the primary care give[r] and the perpetrator of a sexual offense against a child, ...; the vulnerability of the victim to trust because of age, ...; and the degree of the defendant's culpability, ... .

Bedker, supra, 74 Wn. App. at 95. The court did not instruct the jury on any of these factors to define the special allegation of abuse of trust relationship.

Unlike all these cases involving younger children, this case involved an older child. In fact, the trial court directed verdicts of not guilty for charges pre-dating Evelyn's 12th birthday. The jury's verdict on Count 6 required only a single incident of sexual contact while age 12 or 13; and on Count 7, while ages 14-17.

The jury's special verdict of using a trust relationship, therefore, is insufficient to support an exceptional sentence.

iii. The Court Relied on Other Factors Not Presented to or Found by the Jury.

The SRA explicitly provides that an exceptional sentence cannot be based on facts that were not admitted or proven.

In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. ... Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence. **Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the presumptive sentence range except upon stipulation or when specifically provided for in RCW 9.94A.390(2)(c), (d), (f), and (g).**

Former RCW 9.94A.370(2) (1996) (emphasis added).

Furthermore, any fact that supports an exceptional sentence must be proved to the jury, not the court. Blakely, supra; State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005); RCW 9.94A.535, .537.

In his lengthy oral ruling, the judge cited other aspects of the evidence that he found supported an exceptional sentence: e.g., Evelyn's loss of her relationship with her family; the judge's belief that she will need a lot of counseling. "I can't imagine the things she'll suffer for the rest of her life because of what happened to her." Yet he did imagine, explicitly on the record: problems he foresaw in her future relationships; tensions in any marriage; fears she will have if and when she has a daughter. RP(1/8/08) 128-29.

A judge's imagined problems are not a valid basis for an exceptional sentence. Because his exercise of discretion, whether to impose an exceptional sentence, was based on reasons not permitted by the statute, this court should reverse the exceptional sentence and remand for sentencing

within the standard range. In re VanDelft, 158 Wn.2d 731, 743, 147 P.3d 573 (2006).

5. APPELLANT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS VIOLATED BY THE IMPOSITION OF AN EXCEPTIONAL SENTENCE IN THIS CASE.

a. The SRA and Blakely

In Blakely v. Washington, supra, the United States Supreme Court held Washington's sentencing reform act, RCW Ch. 9.94A, violated the Sixth Amendment right to a jury trial to the extent it permitted exceptional sentences above the standard range based on facts found by the court. It held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

In Blakely, the Court explained that the "'statutory maximum' for Apprendi purposes is the maximum sentence a judge may imposed *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. ... In other words, the "statutory maximum" is the maximum that a judge may impose "without any additional findings."

In re VanDelft, supra, 158 Wn.2d at 740, quoting Blakely, 542 U.S. at 303-04. The sentence here was exceptional both for being longer than the standard

range term and for running consecutively. RCW 9.94A.589(1)(a); VanDelft, 158 Wn.2d at 742-43.<sup>26</sup>

Following Blakely, the legislature created a new procedure for imposing an exceptional sentence above the standard range.

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. ...

...  
(6) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction **if it finds**, considering the purposes of this chapter, **that the facts found are substantial and compelling reasons** justifying an exceptional sentence.

RCW 9.94A.537 (emphases added). The legislature then provided an exclusive list of "aggravating

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<sup>26</sup> "There is no dispute that the legislature has characterized consecutive sentences imposed under [RCW 9.94A.589](1)(a) as exceptional, requiring a finding of an aggravating factor for support. ... Blakely and Hughes squarely apply to consecutive sentencing decisions under (1)(a)."

factors" that would support a sentence above the standard range. RCW 9.94A.535(3).<sup>27</sup>

The state thus must prove beyond a reasonable doubt to a jury "aggravating factors" to support an exceptional sentence. Yet the statute left to the court the crucial determination whether those "factors" were "substantial and compelling."

b. Whether an Aggravating Factor is Substantial and Compelling and Not Inherent in the Crime are Facts that Must Be Proven to a Jury.

Whether an aggravating factor exists is not, alone, sufficient to support an exceptional sentence. Many of the aggravating factors will be present in a case to some degree. But only if the factor is "substantial and compelling" will it permit a sentence above the standard range. RCW 9.94A.535 and .537; Dunaway, supra, 109 Wn.2d at 218-19 (must be "of a kind not usually associated with the commission of the offense[s] in question"); State v. Payne, 45 Wn. App. 528, 531, 726 P.2d 997 (1986). This quality is a fact that

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<sup>27</sup> The court held this statutory procedure can be applied in any case in which there had not been a plea or trial by the time the statute was effective. State v. Pillatos, supra. Thus it applies to this case.

also must be found by a jury beyond a reasonable doubt. Blakely, supra.

Neither of the jury's special verdicts required it to find a factor was substantial and compelling in this case. RCW 9.94A.535, .537.

By allowing a court to make these findings instead of the jury, the statute violates the Sixth Amendment right to a jury trial. Blakely, supra; VanDelft, supra.

6. THE COURT ERRED IN COUNTING THE MILITARY CONVICTION IN THE OFFENDER SCORE.

The court found Dr. Hyder had one previous conviction for a sex offense, increasing his offender score by 3 points.

An appellate court reviews an offender score *de novo*. State v. Booker, 143 Wn. App. 138, 141-42, 176 P.3d 620 (2008). Because Dr. Hyder challenged the state's allegation of a prior conviction, the state was required to prove it by a preponderance of the evidence. State v. Payne, supra, 117 Wn. App. at 108.

The best evidence of a prior conviction is a certified copy of the judgment. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002).

A court may consider a foreign indictment and information, but it should be aware that facts and allegations in the foreign record that do not directly relate to the elements of the charged offense may be unreliable.

Payne, 117 Wn. App. at 105. The court may look at the facts alleged in the charging document to determine the comparable Washington offense. State v. Southerland, 43 Wn. App. 346, 250-51, 716 P.2d 933 (1986).

a. The Court Erred by Admitting Sentencing Exhibit 1.

"Authentication is a threshold requirement designed to assure that evidence is what it purports to be." 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 900.2, at 175; § 901.2 at 181-82 (4th ed. 1999).

At sentencing, the state presented, over objection, Exhibit 1: a letter from an Assistant Attorney General, enclosing non-certified copies of investigative reports. None are shown to have been considered by or even presented to the court-martial. The state presented no witness to authenticate these documents.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in

any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

ER 1005. No other evidence of the contents was given. Furthermore, even if admissible under the rules of evidence, the substance of these documents does not satisfy the state's burden of proving the elements of the crime of conviction.

In Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005), the defendant appealed from a mandatory minimum sentence based on three prior convictions for violent felonies. Under Taylor v. United States, 495 U.S. 7575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), the court could look at statutory elements, charging documents, and jury instructions to determine whether the prior conviction was for a violent felony. In Shepard, however, as here, the issue was whether a sentencing court, considering a guilty plea, could also look at police reports.

The Supreme Court concluded that the sentencing court could not consider such information. ... Indeed, consideration of those police reports would offend a

defendant's right to have a jury determine disputed facts used to increase a sentence, as set forth in cases subsequent to Taylor, such as Apprendi  
... .

State v. Moncrief, 137 Wn. App. 729, 733, 154 P.3d 314 (2007) (court's emphases).

Sentencing Exhibit 1 was inadmissible for purposes of proving the elements of a crime. It was error for the court to admit it.

b. Exhibit 2 Is Insufficient to Prove the Elements of a Comparable Crime.

But the Court in Shepard also stated in dicta that in guilty plea cases, "the statement of factual basis for the charge, ... shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact *adopted by the defendant* upon entering the plea," constitute evidence of the facts of the offense upon which a subsequent sentencing court could properly rely.

Moncrief, 137 Wn. App. at 733.

The state here also presented a certified copy of the Staff Judge Advocate's Recommendation; General Court-Martial Order Number 9; Decision of the United States Army Court of Military Review; and General Court-Martial Order Number 14; from the general court-martial case of United States v. First Lieutenant Jack T. Hyder, U.S. Army. Sentencing Ex. 2.

None of these documents is a judgment. There does not appear to be any charging document, as in Southerland, supra, and State v. Duke, 77 Wn. App. 532, 892 P.2d 120 (1995). There is no transcript of any official hearing. There is no stipulation signed by the defendant to establish facts, as in State v. Moncrief, supra.

None of these documents includes fingerprints, photographs, signatures, or another method of identifying that it was imposed on this defendant.

The only statute cited is "Article 134."

In State v. Duke, the court considered a similar prior conviction from a court-martial.

The military adjudication at issue was based on a violation of article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Duke, 77 Wn. App. at 534-35. "Washington has no offense which, on its face, compares to the 'catchall' provision of article 134." Id. In Duke, however, the court also had the charging document. From that document, the court determined the elements of the underlying crime.

To determine if a foreign crime is comparable to a Washington offense, the court must first look to the elements of the crime. ... More specifically, the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed. ... [T]he elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.

State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

The state did not present a charging document, a judgment, a statute with the elements, or any adequate record of the elements of the conviction of court-martial here. For these reasons, it was error for the court to rely on this court-martial as a prior conviction in the offender score.

The case should be remanded for resentencing without considering any prior conviction.

c. This Court Should Reconsider the Holding in Morley, supra.

In State v. Morley, supra, a 5-4 opinion<sup>28</sup> held that a prior military court-martial counted as a prior conviction under RCW 9.94A.030. The dissenting members observed the distinct difference between a military tribunal and a court of law, as stated by the United States Supreme Court:

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

Burns v. Wilson, 346 U.S. 137, 140, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953).

We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of

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<sup>28</sup> It is notable that none of the five-member majority -- Dolliver, J., with Durham, Smith, Guy & Talmadge, JJ. -- remain, while all four dissenting members -- Johnson, J., with Madsen, Alexander, and Sanders, JJ. -- are still on the Court.

people charged with offenses for which they can be deprived of their life, liberty or property.

United States ex rel. Toth v. Quarles, 350 U.S. 11, 16, 76 S. Ct. 1, 100 L. Ed. 8 (1955).

The dissent in Morley would have held that to be a "conviction" under RCW ch. 9.94A, the conviction had to be "pursuant to Title 10," which provides for specific criminal procedures. Since equivalent procedures are not guaranteed in military tribunals, those members of the Court would have excluded such prior proceedings counting in an offender score.

Appellant urges this Court to reconsider Morley, given the developments and revelations in recent years regarding military tribunals,<sup>29</sup> and adopt the reasoning of the dissent -- or at least urge the Washington Supreme Court to do so in the context of this case.

D. CONCLUSION

It was constitutional error to admit the testimony of Ms. Hoy and Mr. Yunck in this case.

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<sup>29</sup> See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006).

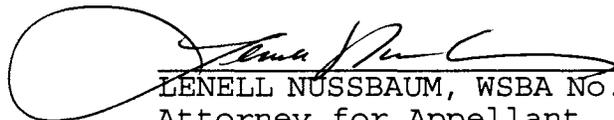
This error requires reversal and remand for a new trial.

It was error to proceed to trial with a juror who was not sworn under oath for voir dire. The error is structural and requires remand for a new trial.

The jury's special verdicts were not sufficiently defined to support an exceptional sentence. Whether the alleged factors were "substantial and compelling" also needed to be found by a jury. And the court did not enter written findings of fact. As a result, if not remanded for a new trial, the case should be remanded for resentencing within the standard range.

The state failed to meet its burden of proving that a prior court-martial involved this defendant and was comparable to a state crime. It was error therefore to count it in the offender score. Any remand for resentencing should exclude this event from the offender score.

DATED this 23<sup>d</sup> day of January, 2009.

  
LENELL NUSSBAUM, WSBA NO. 11140  
Attorney for Appellant

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STATE OF WASHINGTON  
BY DEBRA

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

STATE OF WASHINGTON,	)	
	)	NO. 37267-3-II
	)	
Respondent,	)	DECLARATION OF
v.	)	SERVICE
	)	
JACK HYDER,	)	
	)	
<u>Appellant.</u>	)	

I declare that on this date I served on the parties listed below a copy of the Brief of Appellant by depositing the same in the United States Postal Service, postage prepaid, addressed as follows:

Mr. David Ponzoha, Clerk  
Washington Court of Appeals  
Division Two  
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I declare under penalty of perjury under the laws of the state of Washington  
that the above statement is true and correct to the best of my knowledge.

January 20, 2009, Seattle, WA        
Date and Place      HEATHER MUWERO  
Legal Assistant to Lenell Nussbaum