

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| A. ASSIGNMENTS OF ERROR | 1 |
| B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR | 2 |
| C. STATEMENT OF THE CASE..... | 3 |
| 1. <u>Procedural history</u> | 3 |
| 2. <u>Evidence presented at fact-finding</u> | 5 |
| D. ARGUMENT | 6 |
| 1. <u>THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF FELONY HARASSMENT BECAUSE THE STATE PRESENTED NO EVIDENCE TO SHOW THE THREAT ACTUALLY CAUSED Z.D.'S MOTHER TO FEAR Z.D. WOULD KILL HER</u> | 6 |
| 2. <u>THE RECORD DOES NOT SUPPORT A MANIFEST INJUSTICE DISPOSITION</u> | 9 |
| a. Z.D.'s need for unspecified treatment does not support imposition of a manifest injustice disposition | 11 |
| b. There was no evidence Z.D. would receive the necessary treatment while committed in the JRA..... | 12 |
| c. The record does not support a finding that Z.D. is a high risk to reoffend..... | 13 |
| d. The manifest injustice disposition was clearly excessive | 13 |
| E. CONCLUSION..... | 16 |

TABLE OF AUTHORITIES

| <u>WASHINGTON CASES</u> | <u>Page</u> |
|--|--------------------|
| <i>State v. Baldwin</i> , 150 Wn.2d 448, 78 P.3d 1005 (2003)..... | 10 |
| <i>State v. B.E.W.</i> , 65 Win. App. 370, 828 P.2d 87 (1992)..... | 14 |
| <i>State v. C.G.</i> , 150 Wn.2d 604, 80 P.3d 594 (2003)..... | 7, 8, 9 |
| <i>State v. E.J.H.</i> , 65 Win. App. 771, 830 P.2d 375 (1992)..... | 14 |
| <i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)..... | 7 |
| <i>State v. J.M.</i> , 144 Wn.2d 472, 28 P.3d 720 (2001)..... | 7 |
| <i>State v. J.N.</i> , 64 Wn. App. 112, 823 P.2d 1128 (1992)..... | 10, 11 |
| <i>State v. J.V.</i> , 132 Wn. App. 533, 132 P.3d 1116 (2006)..... | 11 |
| <i>State ex. rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971) | 14 |
| <i>State v. P.B.T.</i> , 67 Wn. App. 292, 834 P.2d 1051 (1992), <i>rev. denied</i> , 120 Wn.2d 1021, 844 P.2d 1017 (1993) | 9 |
| <i>State v. Rhodes</i> , 92 Wn.2d 755, 600 P.2d 1264 (1979) | 10, 12 |
| <i>State v. S.S.</i> , 67 Wn. App. 800, 840 P.2d 891 (1992) | 13 |
| <i>State v. Tai N.</i> , 127 Wn. App. 733, 113 P.3d 19 (2005), <i>rev. denied</i> , 156 Wn.2d 1019, 132 P.3d 735 (2006) | 10 |
| <i>State v. Taulala</i> , 54 Wn. App. 81, 771 P.2d 1188 (1989)..... | 14 |
| <i>State v. Wood</i> , 42 Wn. App. 78, 709 P.2d 1209 (1985)..... | 14 |

| <u>UNITED STATES CASES</u> | <u>Page</u> |
|--|--------------------|
| <i>Jackson v. Virginia</i> , 443 U.S. 307, 99 W. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... | 7 |

| <u>REVISED CODE OF WASHINGTON</u> | <u>Page</u> |
|--|--------------------|
| RCW 9A.04.110(27)(a)1 | 7 |
| RCW 9A.46.020..... | 6 |

| | |
|--------------------------------|---------|
| RCW 9A.46.020(1), (2) | 3, 6, 7 |
| RCW 9A.46.020(2)(b) | 7 |
| RCW 13.40.020(17) | 9 |
| RCW 13.40.010(2)(a), (f) | 9 |
| RCW 13.40.160(2) | 9, 10 |
| RCW 13.40.230(2) | 10 |
| RCW 13.40.0357 | 13 |

A. ASSIGNMENTS OF ERROR

1. The State did not prove all of the elements of felony harassment beyond a reasonable doubt, in violation of Z.D.'s constitutional due process rights.

2. Appellant assigns error to Finding of Fact 5, which provides:

Kristen [D.] was scared by [Z.D.]’s statement and use of the knife pointing it at Kristen [D.]’s face.

Clerk’s Papers [CP] 17.

3. Appellant assigns error to Conclusion of Law 3, which provides:

Based upon the facts and circumstances established by the testimony and evidence admitted during the fact facing hearing, and considering the demeanor and credibility of the witnesses, the court finds the respondent did threaten to kill Kristen [D.] immediately or in the future.

4. Appellant assigns error to Conclusion of Law 4, which provides:

Based upon the facts and circumstances established by the testimony and evidence admitted during the fact facing hearing, and considering the demeanor and credibility of the witnesses, the court finds the respondent, by his words and conduct, placed Kristen [D.] in reasonable fear that the threat would be carried out.

5. Appellant assigns error to Conclusion of Law 5, which provides:

The facts established by the evidence and testimony presented at the fact-finding hearing prove beyond a reasonable doubt that on or about November 19, 2010, the Respondent, [Z.D.], committed the crime of Harassment-Threat to Kill as charged in the Information.

CP 17-18.

6. The juvenile court erred in imposing a manifest injustice disposition. CP 6, 7.

7. The court erred in finding community based treatment cannot meet appellant's needs and that this supported imposition of a manifest injustice disposition. CP 6.

8. The court erred in finding Z.D. is a high risk to reoffend, and that this supported imposition of a manifest injustice disposition. CP 6.

9. The manifest injustice disposition of 30 to 40 weeks is clearly excessive. CP 8.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted unless the State proves every element of the crime beyond a reasonable doubt. To prove the crime of felony harassment, the State must prove beyond a reasonable doubt not only that the defendant uttered a threat to kill, but also that it caused the person threatened to fear the defendant would kill her. Did the

State sustain its burden of proof, where the alleged victim specifically testified that her son pointed a knife at her and said he was “going to use it,” and that she knew he “wasn’t going to kill me” and that she knew “he had no intentions on using it”?¹ Assignments of Error No. 1, 2, 3, 4, and 5.

2. The juvenile court found the aggravating factor that commitment was necessary for the appellant to obtain treatment. Was there insufficient evidence to support the court’s finding? Assignments of Error No. 6 and 7.

3. The juvenile court found the aggravating factor of high risk of re-offense. Was the evidence insufficient to support the court’s finding where the appellant has no criminal history? Assignment of Error No. 8.

4. Is the manifest injustice disposition of 30 to 40 weeks clearly excessive under the circumstances? Assignment of Error No. 9.

C. STATEMENT OF THE CASE

1. Procedural history:

Appellant Z.D. was charged in the Juvenile Division of Grays Harbor County Superior Court with one count of felony harassment—threat to kill. CP 1-2; RCW 9A.46.020(1)(a)(i) and (2)(b).

The fact-finding hearing was held before the Honorable David Edwards on December 16, 2010, after which the judge found Z.D.

¹RP at 14, 17.

committed the offense as charged. Report of Proceedings [RP] at 23-24.

The court entered findings of fact on January 13, 2011, including:

5. Kristen [D.] was scared by [Z.D.]’s statement and use of the knife pointing it at Kristen [D.]’s face.

CP 17.

The court entered conclusions of law, including:

3. Based upon the facts and circumstances established by the testimony and evidence admitted during the fact finding hearing, and considering the demeanor and credibility of the witnesses, the court finds the respondent did threaten to kill Kristen [D.] immediately or in the future.
4. Based upon the facts and circumstances established by the testimony and evidence admitted during the fact facing hearing, and considering the demeanor and credibility of the witnesses, the court finds the respondent, by his words and conduct, placed Kristen [D.] in reasonable fear that the threat would be carried out.
5. The facts established by the evidence and testimony presented at the fact-finding hearing prove beyond a reasonable doubt that on or about November 19, 2010, the Respondent, [Z.D.], committed the crime of Harassment-Threat to Kill as charged in the Information.

CP 17.

After a disposition hearing on January 6, 2011, Judge Edwards imposed a manifest injustice disposition in excess of the standard range (local sanctions), ordering Z.D. to spend 30 to 40 weeks in custody at the

Juvenile Rehabilitation Administration (JRA). RP at 40.

The court noted that Z.D. was evaluated by a doctor who was unable to make a specific diagnosis, but had concerns about the potential for violent behavior. RP at 38, 39. Judge Edwards stated:

I think [Z.] needs treatment that simply is not available in this community. I think—I think he has the potential to be a radically dangerous individual and he's only 14. It's hard—it's hard to reach that conclusion about someone so young, but you're scary. You're a scary guy. And I think the—the best thing that the court system can do for you is to get you someplace where you can receive some intensive therapy on a daily basis and I think Echo Glen is that—probably that place.

RP at 39.

The court's written basis for imposing this disposition provides:

[X] Other: The respondent has a need for significant treatment. Needed treatment is not available in the community. The respondent poses a high risk to re-offend.

CP 6.

Timely notice of appeal was filed on January 11, 2011. CP 13.

This appeal follows.

2. Evidence presented at fact-finding:

Kristin D., mother of Z.D., testified that she was on the phone to her mother in the kitchen of her house in Central Park, Washington. RP at 13. This occurred a few weeks before November 19, 2010. RP at 9. Z.D. came into the room and she said something to him, and he said “don't

F'ing touch me[.]” RP at 14. She said that she put her arm around his neck with his back against her chest and that he then picked up a knife. RP at 14. She said he told her “if you piss me off enough, I’m going to use it.” RP at 14. Kristen D.’s mother heard the statement over the phone and repeated it to him, and Z.D. said that he was only kidding. RP at 16. He then went to his bedroom. RP at 15.

Kristen D. stated that that she knew he wasn’t going to kill her and that she knew that he had no intention of using the knife. RP at 14, 17, 18.

Z.D. stated that he held that knife but denied that he threatened to kill his mother and denied that he was going to hurt her in any way. RP at 19.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF FELONY HARASSMENT BECAUSE THE STATE PRESENTED NO EVIDENCE TO SHOW THE THREAT ACTUALLY CAUSED Z.D.’S MOTHER TO FEAR Z.D. WOULD KILL HER.

Z.D. was charged and convicted of felony harassment, RCW 9A.46.020(1), (2). CP 1, 5. The statute provides that a person is guilty of harassment if “[w]ithout lawful authority, the person knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person,” and “[t]he person by words or conduct

places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1); CP 1. To "threaten" is "to communicate, directly or indirectly the intent . . . [t]o cause bodily injury in the future to the person threatened or to any other person." RCW 9A.04.110(27)(a). The crime is elevated to a felony if the threat to cause bodily injury is a threat "to kill the person threatened or any other person." RCW 9A.46.020(2)(b).

The State did not prove all the elements of felony harassment, as the State did not prove that the threat to use the knife was a threat to kill or that it caused Z.D.'s mother to fear being killed.

In reviewing the sufficiency of the evidence to uphold the conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Even when viewed in the light most favorable to the State, the evidence is insufficient to prove felony harassment in this case. The State was required to prove beyond a reasonable doubt that the defendant's words or conduct placed the person threatened in reasonable fear the threat would be carried out. *State v. J.M.*, 144 Wn.2d 472, 482, 28 P.3d 720

(2001); RCW 9A.46.020(1). The State must show the person threatened was placed in reasonable fear of the actual threat made. *State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003) ("the State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out."). Thus, because felony harassment requires proof that the threat made was a threat to kill, the State must also show the person threatened was placed in reasonable fear the threat to kill would be carried out. *Id.* at 609-10, 612. In other words, the State must show the threat caused the victim actually to fear the defendant would kill her. *Id.* It is not enough for the State to show the threat caused the victim to fear some lesser harm. *Id.*

In *C.G.*, while being disciplined at school, C.G. said to the vice-principal "I'll kill you Mr. Haney, I'll kill you." *Id.* at 606-07. At the adjudicatory hearing, Haney testified C.G.'s threat caused him "concern" and made him fear C.G. might try to harm him or someone else in the future, but he never testified the threat caused him to fear for his life. *Id.* at 608. The Washington Supreme Court reversed the adjudication, finding the State had not proved all the elements of the crime. The Court explained the statute requires proof of reasonable fear that the threat to kill would be carried out as an element of the offense. *Id.* at 612. Because the victim did not testify the threat caused him to fear for his life, the

adjudication for felony harassment could not be sustained. *Id.*

As in *C.G., Z.D.*'s mother never testified that the threat to use the knife caused her to fear for her life. In fact, the State presented absolutely no evidence that the threat to kill had any impact on her other than she was "surprised"² and "scared."³ In the absence of such proof, the conviction must be reversed and remanded for dismissal with prejudice. See, *C.G.*, 150 Wn.2d at 612.

2. THE RECORD DOES NOT SUPPORT A MANIFEST INJUSTICE DISPOSITION.

A juvenile court may only impose a sentence outside the standard range if it determines that a sentence within the standard range would "effectuate a manifest injustice." A juvenile court must impose a sentence within the standard range unless it finds that such a sentence would impose a manifest injustice. RCW 13.40.160(2); *State v. P.B.T.*, 67 Wn. App. 292, 300, 834 P.2d 1051 (1992), *rev. denied*, 120 Wn.2d 1021, 844 P.2d 1017 (1993). The Juvenile Justice Act (JJA) defines "manifest injustice" as "a disposition that would either impose an excessive penalty on the juvenile or would impose a serious and clear danger to society in light of the purposes of this chapter." RCW 13.40.020(17). Those purposes include protection of the citizenry and provision of necessary

²RP at 14.

³RP at 18.

treatment, supervision and custody for juvenile offenders. RCW 13.40.010(2)(a), (f).

The JJA requires a juvenile court's finding of manifest injustice be supported by clear and convincing evidence, and the resulting sentence must not be clearly excessive. RCW 13.40.160(2), .230(2). The "clear and convincing" standard "is the civil counterpart to 'beyond a reasonable doubt.'" *State v. Rhodes*, 92 Wn.2d 755, 760, 600 P.2d 1264 (1979), overruled on other grounds, *State v. Baldwin*, 150 Wn.2d 448, 78 P.3d 1005 (2003). In reviewing a trial court's finding of manifest injustice, the appellate court engages in three inquiries: (1) whether the reasons given by the trial court are supported by substantial evidence; (2) whether those reasons support the determination of a manifest injustice disposition beyond a reasonable doubt; and (3) whether the disposition is either clearly excessive or clearly too lenient. RCW 13.40.230(2); *Rhodes*, 92 Wn.2d at 760. The "manifest injustice" threshold is substantial and requires exceptional circumstances; there may not be an upward departure from the standard range unless there is clear and convincing evidence that a standard range disposition presents a clear danger to society. *Id.* at 759; *State v. Tai N.*, 127 Wn. App. 733, 741, 113 P.3d 19 (2005), *rev. denied*, 156 Wn.2d 1019, 132 P.3d 735 (2006); RCW 13.40.020(17).

The court's factual findings will be reversed on appeal if there is

not substantial evidence in the record to support them. *State v. J.N.*, 64 Wn. App. 112, 114, 823 P.2d 1128 (1992). Furthermore, this Court must also find that “the standard range for this offense and this defendant must present, beyond a reasonable doubt, a clear danger to society.” *State v. T.E.C.*, 122 Wn. App. 9, 18, 92 P.3d. 263, *rev. denied*, 152 Wn.2d 1012, 106 P.3d 243 (2004) (citing *State v. J.N.*, 64 Wn. App. 112, 114, 823 P.2d 1128 (1992)).

a. Z.D.'s Need For Unspecified Treatment Does Not Support Imposition of a Manifest Injustice Disposition.

In support of the manifest justice disposition, the court found that “[t]he respondent has a need for significant treatment” and that “[n]eeded treatment is not available in the community.” CP 6.

A finding that community-based treatment is impossible requires at least some evidence that appropriate structured community-based treatment had failed in the past. *State v. J.V.*, 132 Wn. App. 533, 132 P.3d 1116 (2006). In *J.V.*, the probation counselor recommended the manifest injustice disposition because the child needed structured treatment. *Id.* at 538. The court upheld the disposition because extensive efforts had been made to treat the child in the community; he had been terminated from drug treatment court for multiple violations. *Id.* at 543, 537-38.

Here, by contrast, Z.D. was administered a psychological

evaluation, but the doctor was unable to make a specific diagnosis. RP at 34, 38-39. At adjudication the court expressed concern about alleged sexual offenses by Z.D. and concerns about “future sexual offenses.” RP at 34. Z.D.’s mother denied any sexual offense by Z.D. RP at 36, 37. Moreover, there was no indication that Z.D. had refused treatment previously.

b. There Was No Evidence Z.D. Would Receive Treatment While Committed in the JRA.

The evidence is also insufficient because the State presented no evidence Z.D. would receive appropriate treatment while committed. See *State v. T.E.C.*, 122 Wn. App. 9, 22, 92 P.3d 263 (2004) (upholding a finding appropriate treatment was available in JRA based on testimony to that effect). There was no evidence to support the court’s bare assertion that Z.D. requires treatment “that simply is not available in this community” and that he would get targeted treatment in JRA. RP at 39, 40.

Division I of this Court has warned of a need for caution when courts use the manifest injustice disposition exception in an effort to provide “treatment.” *State v. S.S.*, 67 Wn. App. 800, 807, 840 P.2d 891 (1992). Courts cannot ignore the “punitive as well as treatment function” of involuntary confinement. *Id.* Essentially, every child who commits an

offense is likely in need of some treatment. But imposition of a manifest injustice disposition is an exceptional situation, limited to those very few cases where it is necessary to protect society or the juvenile. See *Rhodes*, 92 Wn.2d at 760. There is no dispute Z.D. needs some form of treatment or counseling, but that alone cannot support commitment to custody when the prosecution has utterly failed to prove treatment within the community would be insufficient.

c. The Record Does Not Support A Finding That Z.D. Is A High Risk To Reoffend.

Z.D. has no prior criminal history. RP at 32. As such, there is no evidence supporting a finding that Z.D. will offend again, much less that he represents a "high risk" to reoffend. CP 6.

d. The Manifest Injustice Disposition Was Clearly Excessive.

A manifest injustice disposition is only affirmed on appeal if it is not clearly excessive. RCW 13.40.230. That standard cannot be met in this case. Z.D. was committed to the JRA for 30 to 40 weeks, much higher than the standard range for his offense. RCW 13.40.0357. His disposition is clearly excessive in light of the standard range.

Manifest injustice dispositions meet the "not clearly excessive" standard when the juvenile has lengthy criminal history or when a probation counselor recommends a longer commitment due to probation

violations. *State v. Minor*, 133 Wn. App. 636, 645-46, 137 P.3d 872 (2006), revs' on other grounds, 162 Wn.2d 796 (2006); *State v. E.J.H.*, 65 Win. App. 771, 776, 830 P.2d 375 (1992); *State v. B.E.W.*, 65 Win. App. 370, 375-76, 828 P.2d 87 (1992). That is not the case here. Z.D. has no prior criminal history.

In addition, the length of an exceptional sentence cannot come out of thin air. *State v. Wood*, 42 Wn. App. 78, 84, 709 P.2d 1209 (1985). Absent an explanation for the term of commitment, the disposition constitutes an abuse of discretion. *S.S.*, 67 Wn. App. at 819; *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). An abuse of discretion exists when the term is based on untenable grounds or has no basis in the evidence before the court. *State v. Tauala*, 54 Wn. App. 81, 88, 771 P.2d 1188 (1989).

The court appears to have simply imposed the time allowed based on the deputy prosecutor's and juvenile probation officer's recommendation. The probation officer's statement to the court clearly shows the range requested was pulled from thin air. At adjudication, when asked about a range by the court, the officer stated:

Well, that—I'm—thank you for asking that question because initially when—when Ms. Valentine and—and I talked about that we were thinking about a year. And I know this morning thinking about it we—we somehow got to talking about it and the number that Ms. Valentine came up with, given the time that he's been here, given the fact that he has no history, I—I felt that was probably more appropriate. So I think 30 to 40 is—is—is a good range.

RP at 39-40.

No evidence specifically indicated a need for commitment for any length of time. The reasons the court relied on in imposing the manifest injustice disposition were not supported by substantial evidence and did not clearly and convincingly support the disposition. Additionally, given Z.D.'s lack of any prior criminal history, the manifest injustice disposition is clearly excessive. Therefore, this Court should reverse the manifest injustice disposition.

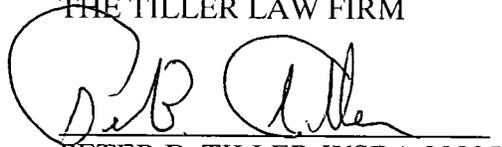
F. CONCLUSION

Based on the above, Z.D. respectfully requests this Court to reverse and dismiss his conviction.

In the alternative, Z.D., respectfully requests this Court reverse the disposition and remand for resentencing within the standard range.

DATED: March 28, 2011.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Z.D.

EXHIBIT A

STATUTES

RCW 9A.46.020

Definition — Penalties.

(1) A person is guilty of harassment if:

(a) Without lawful authority, the person knowingly threatens:

(i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or

(ii) To cause physical damage to the property of a person other than the actor; or

(iii) To subject the person threatened or any other person to physical confinement or restraint; or

(iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

(2)(a) Except as provided in (b) of this subsection, a person who harasses another is guilty of a gross misdemeanor.

(b) A person who harasses another is guilty of a class C felony if either of the following applies: (i) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or (ii) the person harasses another person under

subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

(3) The penalties provided in this section for harassment do not preclude the victim from seeking any other remedy otherwise available under law.

RCW 13.40.160

Disposition order — Court's action prescribed — Disposition outside standard range — Right of appeal — Special sex offender disposition alternative.

(1) The standard range disposition for a juvenile adjudicated of an offense is determined according to RCW 13.40.0357.

(a) When the court sentences an offender to a local sanction as provided in RCW 13.40.0357 option A, the court shall impose a determinate disposition within the standard ranges, except as provided in subsection (2), (3), (4), (5), or (6) of this section. The disposition may be comprised of one or more local sanctions.

(b) When the court sentences an offender to a standard range as provided in RCW 13.40.0357 option A that includes a term of confinement exceeding thirty days, commitment shall be to the department for the standard range of confinement, except as provided in subsection (2), (3), (4), (5), or (6) of this section.

(2) If the court concludes, and enters reasons for its conclusion, that disposition within the standard range would effectuate a manifest injustice the court shall impose a disposition outside the standard range, as indicated in option D of RCW 13.40.0357. The court's finding of manifest injustice shall be supported by clear and convincing evidence.

A disposition outside the standard range shall be determinate and shall be comprised of confinement or community supervision, or a combination thereof. When a judge finds a manifest injustice and imposes a sentence of confinement exceeding thirty days, the court shall sentence the juvenile to a maximum term, and the provisions of RCW 13.40.030(2) shall be used to determine the range. A disposition outside the standard range is appealable under RCW 13.40.230 by the state or the respondent. A

disposition within the standard range is not appealable under RCW 13.40.230.

(3) When a juvenile offender is found to have committed a sex offense, other than a sex offense that is also a serious violent offense as defined by RCW 9.94A.030, and has no history of a prior sex offense, the court, on its own motion or the motion of the state or the respondent, may order an examination to determine whether the respondent is amenable to treatment.

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

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

- (a)(i) Frequency and type of contact between the offender and therapist;
- (ii) Specific issues to be addressed in the treatment and description of planned treatment modalities;
- (iii) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members, legal guardians, or others;
- (iv) Anticipated length of treatment; and
- (v) Recommended crime-related prohibitions.

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

After receipt of reports of the examination, the court shall then consider whether the offender and the community will benefit from use of this special sex offender disposition alternative and consider the victim's opinion whether the offender should receive a treatment disposition under this section. If the court determines that this special sex offender disposition alternative is appropriate, then the court shall impose a determinate disposition within the standard range for the offense, or if the court concludes, and enters reasons for its conclusions, that such disposition would cause a manifest injustice, the court shall impose a disposition under option D, and the court may suspend the execution of the disposition and place the offender on community supervision for at least two years. As a condition of the suspended disposition, the court may impose the conditions of community supervision and other conditions, including up to thirty days of confinement and requirements that the offender do any one or more of the following:

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

(ii) Undergo available outpatient sex offender treatment for up to two years, or inpatient sex offender treatment not to exceed the standard range of confinement for that offense. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The respondent shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the probation counselor, and the court, and shall not change providers without court approval after a hearing if the prosecutor or probation counselor object to the change;

(iii) Remain within prescribed geographical boundaries and notify the court or the probation counselor prior to any change in the offender's address, educational program, or employment;

(iv) Report to the prosecutor and the probation counselor prior to any change in a sex offender treatment provider. This change shall have prior approval by the court;

(v) Report as directed to the court and a probation counselor;

(vi) Pay all court-ordered legal financial obligations, perform community restitution, or any combination thereof;

(vii) Make restitution to the victim for the cost of any counseling reasonably related to the offense;

(viii) Comply with the conditions of any court-ordered probation bond;
or

(ix) The court shall order that the offender shall not attend the public or approved private elementary, middle, or high school attended by the victim or the victim's siblings. The parents or legal guardians of the offender are responsible for transportation or other costs associated with the offender's change of school that would otherwise be paid by the school district. The court shall send notice of the disposition and restriction on attending the same school as the victim or victim's siblings to the public or approved private school the juvenile will attend, if known, or if unknown, to the approved private schools and the public school district board of directors of the district in which the juvenile resides or intends to reside. This notice must be sent at the earliest possible date but not later than ten calendar days after entry of the disposition.

The sex offender treatment provider shall submit quarterly reports on the respondent's progress in treatment to the court and the parties. The reports shall reference the treatment plan and include at a minimum the following: Dates of attendance, respondent's compliance with requirements, treatment activities, the respondent's relative progress in treatment, and any other material specified by the court at the time of the disposition.

At the time of the disposition, the court may set treatment review hearings as the court considers appropriate.

Except as provided in this subsection (3), after July 1, 1991, examinations and treatment ordered pursuant to this subsection shall only be conducted by certified sex offender treatment providers or certified affiliate sex offender treatment providers under chapter 18.155 RCW. A sex offender therapist who examines or treats a juvenile sex offender pursuant to this subsection does not have to be certified by the department of health pursuant to chapter 18.155 RCW if the court finds that: (A) The offender has already moved to another state or plans to move to another state for reasons other than circumventing the certification requirements; (B) no certified sex offender treatment providers or certified affiliate sex

offender treatment providers are available for treatment within a reasonable geographical distance of the offender's home; and (C) the evaluation and treatment plan comply with this subsection (3) and the rules adopted by the department of health.

If the offender violates any condition of the disposition or the court finds that the respondent is failing to make satisfactory progress in treatment, the court may revoke the suspension and order execution of the disposition or the court may impose a penalty of up to thirty days' confinement for violating conditions of the disposition. The court may order both execution of the disposition and up to thirty days' confinement for the violation of the conditions of the disposition. The court shall give credit for any confinement time previously served if that confinement was for the offense for which the suspension is being revoked.

For purposes of this section, "victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged. "Victim" may also include a known parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

A disposition entered under this subsection (3) is not appealable under RCW 13.40.230.

(4) If the juvenile offender is subject to a standard range disposition of local sanctions or 15 to 36 weeks of confinement and has not committed an A- or B+ offense, the court may impose the disposition alternative under RCW 13.40.165.

(5) If a juvenile is subject to a commitment of 15 to 65 weeks of confinement, the court may impose the disposition alternative under RCW 13.40.167.

(6) When the offender is subject to a standard range commitment of 15 to 36 weeks and is ineligible for a suspended disposition alternative, a manifest injustice disposition below the standard range, special sex offender disposition alternative, chemical dependency disposition alternative, or mental health disposition alternative, the court in a county with a pilot program under *RCW 13.40.169 may impose the disposition alternative under *RCW 13.40.169.

(7) RCW 13.40.193 shall govern the disposition of any juvenile adjudicated of possessing a firearm in violation of RCW 9A.41.040(2)(a)(iii) or any crime in which a special finding is entered that the juvenile was armed with a firearm.

(8) RCW 13.40.308 shall govern the disposition of any juvenile adjudicated of theft of a motor vehicle as defined under RCW 9A.56.065, possession of a stolen motor vehicle as defined under RCW 9A.56.068, taking a motor vehicle without permission in the first degree under RCW 9A.56.070, and taking a motor vehicle without permission in the second degree under RCW 9A.56.075.

(9) Whenever a juvenile offender is entitled to credit for time spent in detention prior to a dispositional order, the dispositional order shall specifically state the number of days of credit for time served.

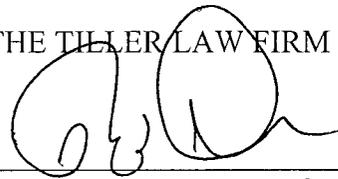
(10) Except as provided under subsection (3), (4), (5), or (6) of this section, or option B of RCW 13.40.0357, or RCW 13.40.127, the court shall not suspend or defer the imposition or the execution of the disposition.

(11) In no case shall the term of confinement imposed by the court at disposition exceed that to which an adult could be subjected for the same offense.

Z.D.
Echo Glen
33010 SE 99th Street
Snoqualmie, WA 98065

Dated: March 28, 2011.

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

CERTIFICATE OF
MAILING

2

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE – P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828