

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

NO. 42058-9-II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL E.M. KLEIN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY  
CAUSE NO. 09-1-00458-6

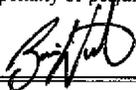
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**BRIEF OF RESPONDENT**

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**I. COUNTERSTATEMENT OF THE ISSUES:**

1. Whether a “different” judge presided over the resentencing hearing after the defendant prevailed on his first appeal and elected specific performance of the original plea offer.
2. Whether the defendant knowingly, intelligently, and voluntarily pleaded guilty when he elected specific performance of the original plea offer,
3. Whether the community custody condition that prohibits the defendant from purchasing, possessing, or viewing pornographic materials as defined by his sexual deviancy therapist or community corrections officer is unconstitutionally vague.

**II. STATEMENT OF THE CASE:**

The State initially charged Daniel Elyahshua M. Klein with several sex crimes involving multiple child victims. CP 60-63; Supp. CP [Information (10/28/2009); Amended Information (2/11/2010)]. In exchange for Klein’s guilty plea, the State agreed to dismiss several charges. CP 48-59; Supp. CP [Third Amended Information (3/22/2010)].

The Honorable George Wood presided over the change of plea hearing. RP (3/22/2010) at 1-2. Klein pleaded guilty to two charges of communication with a minor for immoral purposes in violation of RCW 9.68A.090(2).<sup>1</sup> CP 48-59; RP (3/22/2010) at 7. Judge Wood found Klein

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<sup>1</sup> Because Klein had a history of prior sex offenses, the charged crimes were Class C felonies with standard range sentences of 51-60 months and a maximum penalty of five years imprisonment.

entered his plea knowingly, intelligently, and voluntarily. RP (3/22/2010) at 4-10. Judge Wood then ordered a pre-sentence investigation report (PSI). *See* Supp. CP [Criminal Minutes (3/22/2010); PSI Order (3/22/2010)]

The Honorable Ken Williams presided over Klein's sentencing hearing. While the State agreed to recommend a sentence of 51 months, *see* Supp. CP [Prosecuting Attorney's Plea Offer (12/1/2009)]; RP (3/22/2010) at 8, the deputy prosecutor misstated the agreement and asked the trial court to impose a sentence within the standard range of 51-60 months. RP (4/29/2010) at 3. Judge Williams imposed a 60-month confinement term. CP 35; RP (4/29/2010) at 16. Judge Williams reasoned a 51-month sentence was inappropriate in light of Klein's criminal history, the nature of the offenses, and the fact he committed the underlying charges while under court supervision. RP (4/29/2010) at 12-16, 21.

In his first appeal, Klein argued the State breached the express terms of the plea agreement. The State conceded error. This Court accepted the State's concession and remanded for further proceedings, allowing Klein to either (1) obtain specific performance of his plea agreement, or (2) withdraw his plea and proceed to trial. This Court stated if Klein elected specific performance then a different judge should preside over the resentencing hearing.

After his successful appeal, Klein appeared before Judge Wood. RP (4/26/2011) at 1. Klein informed Judge Wood that he was demanding “specific performance of the plea bargain,” and “[would] not be withdrawing his plea.” RP (4/26/2011) at 2. Judge Wood carefully reviewed the constitutional rights that Klein would waived by electing specific performance and affirming his guilty plea:

THE COURT: ... Mr. Klein, just to kind of verbally go over this with you a little bit, you understand that you have the right to withdraw your plea of guilty to the two charges. If you do withdraw your guilty plea, that means the State can then pursue all the charges that they originally filed against you.

MR. KLEIN: Yes, your Honor.

THE COURT: And -- but you do have that right.

MR. KLEIN: Yes.

THE COURT: And if you do choose to do that, you will -  
- then we go back to kind of square one.

MR. KLEIN: Yes, I understand that.

THE COURT: And you get to go to trial and get to contest and have a jury and call witnesses and so forth.

MR. KLEIN: I'm so tired of being here, I'm ready to just get on with my life.

THE COURT: Okay. All right. So it's your choice, then, to go ahead and just maintain that guilty plea in the original -- by “specific performance” we mean that the State would have the requirement to argue to the Court that you should receive 51 months, and you need to

understand the Court is not bound by that agreement. The Court can sentence you anywhere within the standard range, which the maximum here would be 60 months. Do you understand that?

MR. KLEIN: Yeah.

THE COURT: Okay. So my understanding is you wish to proceed to sentencing, and are you doing that freely and voluntarily?

MR. KLEIN: Yeah, your Honor.

THE COURT: Okay. Anybody -- have you had a chance to talk it over with Mr. Stalker?

MR. KLEIN: Yes, sir, I have.

THE COURT: Okay. Do you feel like you need any further time to consider it?

MR. KLEIN: No, your Honor.

THE COURT: Okay. All right. Well, let's proceed to sentencing[.]

RP (4/26/2011) at 6-8. Judge Wood entered an order memorializing Klein had chosen specific performance. CP 25; RP (4/26/2011) at 6-7. Klein also signed this order. CP 25; RP (4/26/2011) at 6-7.

The State asked the trial court to follow the agreed recommendation (51 months). RP (4/26/2011) at 8. Similarly, the defense asked the court to impose a confinement term of 51 months. RP (4/26/2010) at 11. The defense also asked the trial court to strike the community custody condition prohibiting Klein from purchasing,

possessing, or viewing “pornographic materials” as defined by his sexual deviancy therapist and community corrections officer. RP (4/26/2011) at 8-9. *See also* CP 24.

Judge Wood refused to accept the sentence recommendation and imposed a confinement term of 60 months. CP 12. Judge Wood explained:

I’ve read the presentence investigation that was conducted. I thought it was very thoroughly done. And I think based upon what I’ve read, I think Mr. Klein is a danger and that what he’s done is -- deserves the maximum here in this case, so I will sentence him to the 60 months.

RP (4/26/2011) at 12. The trial court did not alter the prohibition on pornography, reasoning the Department of Corrections (DOC) is “not going to get him for something that’s not truly pornographic in the sense that we understand it, so I don’t think there’s going to be an issue there.” RP (4/26/2011) at 10.

After the trial court announced its sentence, Klein immediately suffered buyer’s remorse: “This is not fair, man. It is not fair. The deal was 51 months. The deal was 51 months.” RP (4/26/2011) at 16. *See also* RP (4/26/2011) at 19. Defense counsel tried to remind Klein that they had previously discussed the possibility that Judge Wood might impose a 60-month sentence. RP (4/26/2011) at 16. Nonetheless, Klein insisted on

taking his case to trial if the trial court imposed a maximum sentence. RP (4/26/2011) at 15.

Klein refused to sign his judgment and sentence. CP 21-22; RP (4/26/2011) at 15-16. This second appeal follows.

**III. ARGUMENT:**

**A. A DIFFERENT JUDGE PRESIDED OVER THE SENTENCING HEARING PURSUANT TO THIS COURT'S DIRECTIVE.**

Klein argues a “different” judge failed to preside over the resentencing hearing as ordered by this Court after his successful appeal. *See* Brief of Appellant at 4-6. He alleges, without providing any factual support, that Judge Wood told Judge Williams what sentence to impose during the first sentencing hearing. *See* Brief of Appellant at 4-5. Klein also claims “Judge Wood and Judge Williams essentially constituted a single judicial entity” because (1) they both presided over several hearings related to the underlying prosecution, (2) Judge Wood accepted/reviewed the initial guilty plea, and (3) Judge Wood read the presentence investigation report. *See* Brief of Appellant at 4-5. Klein appears to conclude that the appearance of fairness doctrine requires a Jefferson County judge to preside over a third sentencing hearing because he cannot receive a fair sentence in Clallam County. *See* Brief of Appellant at 5-6.

He believes the last available judge in Clallam County will “perceive an assault on the integrity of the court and be inclined to circle the wagons by re-entering the [same] sentence.” See Brief of Appellant at 5-6. The argument is devoid of any merit.

1. This Court should refuse to consider Klein’s argument because he fails to provide any legal or factual support for the claim.

Where a defendant fails to support an argument with citation to relevant legal authority or the factual record, the appellate court will not consider the issue. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Ensley v. Pitcher*, 152 Wn. App. 891, 906 n. 12, 222 P.3d 99 (2009) (citing RAP 10.3(a)(6)); *Smith v. State*, 135 Wn. App. 259, 270 n. 11, 144 P.3d 331 (2006). Additionally, when a defendant fails to cite authority for his position, the appellate courts may assume that no authority exists to support the claim. See *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978), *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978) (the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none). This Court should refuse to consider Klein’s argument.

Here, Klein fails to provide any facts to support his allegation that Judge Wood and Judge Williams conspired to impose a maximum

sentence regardless of the agreed recommendation between the parties. *See* Brief of Appellant at 4-6. While he attached several incomplete criminal minutes as appendices to his brief,<sup>2</sup> *see* Brief of Appellant at Appendix B, he did not properly designate these minutes as clerk's papers pursuant to RAP 9.6. Thus, these appendices are not part of the record, and this Court should not consider their contents. *See* RAP 9.1(a) (record on review consists of verbatim report of proceedings, clerk's papers designated under RAP 9.6, exhibits, and administrative record); *State v. Detrick*, 90 Wn. App. 939, 941 n.1, 954 P.2d 949 (1998) (refusing to review claimed error in denying motion to sever where motion was not included in record); *State v. Garcia*, 45 Wn. App. 132, 140, 724 P.2d 412 (1986) (declining to address ineffective assistance claim where appellant failed to provide relevant record or photography to which counsel allegedly should have objected). This Court should reject Klein's argument because he fails to provide any citations to the appellate record.

Should this Court accept the appendices, Klein fails to cite any law to support the inference that he draws from the attached minutes: *i.e.* Judge Williams and Judge Wood operated as a single judge for purposes of sentencing. As a general rule, judicial personnel may change before the admission of evidence at trial or "the exercise of judgment and the

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<sup>2</sup> The State notes some of the minutes are missing pages.

application of legal knowledge to, and judicial deliberation of, facts known only to the predecessor. *State v. Johnson*, 55 Wn.2d 594, 596, 349 P.2d 227 (1960) (citing *Commonwealth v. Thompson*, 328 Pa. 27, 195 A. 115, 114 A.L.R. 432 (1937); *Durden v. People*, 192 Ill. 493, 61 N.E.317, 55 L.R.A.240 (1901)). *See also State v. Bowen*, 12 Wn. App. 604, 609-10, 531 P.2d 837 (1975) (affirming the authority of a judge to impose a sentence even if he did not preside over the trial).

The mere fact Judge Wood and Judge Williams both presided over preliminary hearings<sup>3</sup> related to the prosecution does not establish an error. Furthermore, the hearings over which the two judges presided did not involve the exercise of judgment or the application of law to facts that was only known to the predecessor.

Klein failed to provide this Court with any law or facts that would support his allegations that Judge Williams and Judge Wood acted as a single judicial entity, or that his resentencing hearing was somehow unfair. Therefore, this Court should refuse to consider his argument.

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<sup>3</sup> The criminal minutes attached to the Brief of Appellant show the two judges participated in hearings that involved (1) a first appearance and bail setting, (2) trial resets and scheduling, (3) motions for substitution of counsel, (5) motions to bifurcate proceedings, (6) arraignments, (7) change of plea, (8) sentencing, (9) restitution matters, (10) transport orders, and (11) resentencing.

2. A different judge did preside over the sentencing hearing after the defendant's first successful appeal.

On April 29, 2010, Judge Williams presided over the sentencing hearing. RP (4/29/2010) at 1-2. Judge Williams advised the parties that he had “reviewed a fairly lengthy PSI[.]” RP (4/29/2010) at 2. The parties affirmed they had read the same report and that it did not misstate any facts.<sup>4</sup> RP (4/29/2010) at 2-3. After hearing the parties’ arguments and recommendation, Judge Williams articulated his reasons for a 60-month sentence: (1) Klein’s criminal history, (2) the nature of the offenses, and (3) the fact he committed the underlying charges while under supervision of the court. RP (4/29/2010) at 12-16, 21.

On April 26, 2011, after Klein’s successful appeal, Judge Wood presided over the second sentencing hearing. RP (4/26/2011) at 1. Judge Wood also imposed a 60-month sentence:

One of the things the Court does in these types of cases ... is order a presentence investigation[.] ... [I]t’s required so the Court ... can look at the history and make a decision, a more informed decision than would normally make if it just came before me on a burglary or something of that effect.

I’ve read the presentence investigation that was conducted. I thought it was very thoroughly done. And I think based upon what I’ve read, I think Mr. Klein is a

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<sup>4</sup> The defense did object to certain legal conclusion the PSI included. RP (4/29/2010) at 2-3.

danger and that what he's done is – deserves the maximum here in this case, so I will sentence him to 60 months.

RP (4/26/2011) at 12.

The facts clearly establish that a “different” judge presided over the resentencing. Contrary to Klein’s remark that “it is barely conceivable that Judge Wood would not have communicated to Judge Williams his preference regarding sentencing,” the record shows the two judges imposed a 60-month sentence based upon objective facts: his criminal history, the nature of his crimes, the continued threat he posed to the community, and the recommendations in the PSI. This Court should affirm. *See State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981) (“The sentencing of criminals is subject to the exercise of sound judicial discretion which will not be set aside absent an abuse.”).

To the extent Klein argues that his sentence was vindictive, *see* Brief of Appellant at 5-6, such a claim fails. There is no evidence of vindictive sentencing. A defendant’s due process rights are violated if judicial vindictiveness plays a role in resentencing after a successful appeal. In *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the U.S. Supreme Court held that a rebuttable presumption of vindictiveness arises when a court imposes a more severe sentence after a successful appeal. However, the presumption does not

apply when a new judge presides over resentencing. *State v. Parmelee*, 121 Wn. App. 707, 710-12, 90 P.3d 1092 (2004) (citing *Texas v. McCullough*, 475 U.S. 134, 140, 106 S.Ct. 976, 89 L.Ed.2d 104 (1986); *Alabama v. Smith*, 490 U.S. 794, 799, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)).

Here, Klein did not receive a more severe sentence. CP 12, 35. Furthermore, as noted above, Judge Williams imposed Klein's first sentence, and Judge Wood imposed the current and second sentence. Moreover, objective facts available to both judges supported the 60-month sentence. There is no reason in fact or law to "presume" the trial court was vindictive when it imposed the same sentence.

Finally, Klein has failed to demonstrate any potential bias on behalf of Judge Wood, Judge Williams, or even the Honorable S. Brooke Taylor (the last available superior court judge). The right to a fair hearing under the federal due process clause prohibits actual bias and "the probability of unfairness." *State v. Chamberlin*, 161 Wn.2d 30, 38, 162 P.3d 389 (2007) (citing *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)). An assertion of an unconstitutional risk of bias must overcome a presumption of honesty and integrity accruing to judges. *Chamberlin*, 161 Wn.2d at 38 (citing *Withrow*, 421 U.S. at 47). *See also In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004) (when deciding to reassign a

case to a different judge, the appellate court must first determine whether the trial court has shown personal bias); *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945 (1993) (presumption judges perform functions regularly and properly without bias or prejudice).

Here, nothing in the record shows personal bias on the part of the trial court. The involvement of more than one judge during preliminary hearings was not unusual. There is nothing in the record to show the judges discussed or sought to impose a particular sentence. In fact, both Judge Williams and Judge Wood carefully explained why they refused to accept the agreed recommendation.

After Klein's successful appeal, the trial court followed this Court's directive. A "different" judge did in fact impose Klein's sentence. The 60-month sentence was fair and properly imposed. This Court should affirm.

**B. KLEIN KNOWINGLY, INTELLIGENTLY,  
AND VOLUNTARILY PLEADED GUILTY TO  
THE CRIMES CHARGED.**

Klein argues he did not voluntarily plead guilty at his resentencing. *See* Brief of Appellant at 6-8. He claims the trial court conducted a deficient inquiry when assessing whether his plea was entered voluntarily. *See* Brief of Appellant at 7-8. According to Klein, RCW 9.94A.431

required the trial court to inform him that it was not inclined to follow an agreed sentencing recommendation before it accepted his guilty plea. The argument is without merit.

First, Washington's case law rejects Klein's interpretation of RCW 9.94A.431. In *State v. Weaver*, 46 Wn. App. 35, 39-41, 729 P.2d 64 (1986), *review denied*, 107 Wn.2d 1031 (1987), the appellate court considered whether the defendant must be informed of his right to withdraw his plea when the court chooses to disregard the recommended sentence. The appellate court held that neither CrR 4.2(f), nor former RCW 9.94A.090,<sup>5</sup> imposed such an obligation. *Weaver*, 46 Wn. App. at 40. According to *Weaver*, a defendant may only withdraw a guilty plea to correct a " 'manifest injustice', an injustice which is *only* obvious, directly observable and not obscure." 46 Wn. App. at 40 (emphasis in original). "Indicia of manifest injustice include: denial of effective counsel; nonratification of a plea by the defendant or his representative; involuntariness of the plea; failure by the prosecutor to keep the plea agreement." *Weaver*, 46 Wn. App. at 40. The appellate court concluded that "[t]he [trial] court's failure to sentence according to the prosecutor's recommendation is not grounds, by itself, for withdrawal of the plea."

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<sup>5</sup> RCW 9.94A.090 was recodified as RCW 9.94A.431 pursuant to the Laws of 2001 ch. 10 § 6.

*Weaver*, 46 Wn. App. at 41 (citing *In re Hughes*, 19 Wn. App. 155, 161, 575 P.2d 250 (1978)). The trial court did not commit reversible error when it did not inform Klein that it was not inclined to accept a 51-month sentence before it accepted the guilty plea.

Second, the trial court's inquiry was more than adequate to ensure Klein decision to elect specific performance and affirm his original guilty plea was fully informed. A defendant's decision to plead guilty must be knowing, intelligent, and voluntary. *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). To qualify as a knowing and intelligent plea, a guilty plea must be made with a correct understanding of the charge and the consequences of pleading guilty. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). A guilty plea is not knowingly made when it is based on misinformation regarding sentencing consequences. *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988).

Here, the trial court carefully reviewed the constitutional rights Klein waived by maintaining his plea of guilty and electing specific performance of his plea agreement. RP (4/26/2010) at 6-8. The trial court reminded Klein that his demand for specific performance required the State to recommend a 51-month sentence; but it did not bind the trial court, which remained free to impose a sentence anywhere within the standard range:

THE COURT: Okay. All right. So it's your choice, then, to go ahead and just maintain that guilty plea in the original -- by "specific performance" we mean that the State would have the requirement to argue to the Court that you should receive 51 months, and *you need to understand the Court is not bound by that agreement. The Court can sentence you anywhere within the standard range, which the maximum here would be 60 months.* Do you understand that?

MR. KLEIN: Yeah.

RP (4/26/2011) at 7 (emphasis added). Klein affirmed he discussed his "specific performance" demand with his attorney and that he did not require additional time to consider the potential adverse consequences of his decision. RP (4/26/2011) at 8. Additionally, Klein's attorney reminded him that they had discussed such a sentence was a possible result when he exhibited buyer's remorse after receiving a second 60-month sentence. RP (4/26/2011) at 16. The factual record demonstrates that Klein knowingly, intelligently, and voluntarily pleaded guilty with a complete understanding of the sentencing consequences that could follow his demand for specific performance.

Third, Klein was not "induced to sell his birthright [(a jury trial)] for a 'mess of pottage[.]'" *See* Brief of Appellant at 7. In exchange for his guilty plea, the State agreed to dismiss multiple sex offenses. If Klein had withdrawn his guilty plea and proceeded to trial, the State was free to file and prosecute every charge that existed prior to the plea bargain. *See State*

*v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006). By accepting the State's plea offer, Klein was able to significantly reduce his risk of adverse punishment.

Finally, Klein's proposed rule requiring judges to inform defendants when they are disinclined to follow sentence recommendations before accepting a guilty plea would substantially reduce the number of cases resolved via plea negotiations. A defendant will always revoke his plea whenever he/she learns that a judge will not accept the recommendation. Thus, the proposed rule would deprive the plea bargaining process of its main resource-saving advantages. *See Brady v. United States*, 397 U.S. 742, 752, 90 S.Ct. 1463 (1970) ("with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof"). The proposed rule would also deprive the State of guilty pleas that are factually justified. Due process does not require such a radical departure from the existing criminal justice process. *See United States v. Ruiz*, 536 U.S. 622, 632, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002) (holding due process does not require the State to disclose the identity of a confidential informant prior to the acceptance or rejection of a plea offer). Here, the State adhered to the terms of the plea bargain, and Klein

affirmed his guilty plea with a correct understanding of the charge and the possible consequences. RP (4/26/2011) at 6-8. Due process requires no more.

C. THE COURT ERRED WHEN IT IMPOSED  
THE CONTESTED COMMUNITY CUSTODY  
CONDITION.

Klein contends the community custody condition prohibiting him from purchasing, possessing, or viewing pornographic materials is unconstitutionally vague. The State concedes error. The State respectfully asks this Court to remand for resentencing, instructing the trial court to strike/correct this contested condition.

In *State v. Bahl*, the Washington Supreme Court examined a similar community custody condition that restricted the defendant's possession of pornographic materials. 164 Wn.2d 739, 743-44, 193 P.3d 678 (2008). The condition did not define pornography, but left the responsibility to the discretion of the defendant's community corrections officer. *Bahl*, 164 Wn.2d at 743. The high court held that such a condition was unconstitutionally vague because it failed to provide ascertainable standards. *Bahl*, 164 Wn.2d at 757-58. *See also State v. Sansone*, 127 Wn. App. 630, 111 P.3d 1251 (2005) (holding a condition of community placement that prohibited the defendant from possessing or perusing

pornography without approval from his probation officer was unconstitutionally vague).

Here, Klein's sentence prohibits him from purchasing, possessing, or perusing pornographic materials unless given prior approval by his sexual deviancy therapist and his supervising community corrections officer. CP 24. Additionally, the challenged condition places the burden of defining "pornographic materials" on his therapist or community corrections officer. CP 24. While the State disagrees the condition leaves Klein to "wonder" what the term "pornographic materials" encompasses, *see* Brief of Appellant at 10, the State concedes that under the present law the challenged condition grants his therapist and community corrections officer overly broad interpretive powers. This Court should remand the matter, instructing the trial court to strike the contested condition or require greater specificity.

#### **IV. CONCLUSION:**

The State respectfully asks this Court to affirm (1) Klein's convictions for communications with a minor for immoral purposes, and (2) Klein's sentence of 60-months confinement. However, because the community custody condition pertaining to "pornographic materials" is

vague, the State respectfully requests that this Court remand for the limited purpose of correcting/striking this particular condition.

DATED: September 26, 2011.

DEBORAH KELLY,  
PROSECUTING ATTORNEY



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# CLALLAM COUNTY PROSECUTOR

September 26, 2011 - 2:36 PM

## Transmittal Letter

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Court of Appeals Case Number: 42058-9

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Answer/Reply to Motion: \_\_\_\_

■ Brief: Respondent's

Statement of Additional Authorities

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Objection to Cost Bill

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