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COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Appellant

v.

A.W., Appellant

DWIGHT A FINCH, Real Party in Interest

---

ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WAHKIAKUM COUNTY

---

BRIEF OF APPELLANT STATE OF WASHINGTON

---

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by allowing Dwight Finch, the alleged rapist of A.W., to intervene in A.W.'s juvenile offender matter.
2. The trial court erred by ordering A.W. to submit to a polygraph examination. *See* CP224-26.
3. The trial court erred by not requiring Finch and/or his attorney Duane Charles Crandall, to pay the cost of providing A.W. with counsel with which to respond to the citizen complaint alleging a violation of A.W.'s SSODA sentence.

## **II. ISSUES PRESENTED**

1. Whether the juvenile court may allow the juvenile offender's alleged rapist to intervene in the juvenile court action?
2. Whether the juvenile court may, at the request of the alleged rapist, order a polygraph examination directed toward whether the juvenile offender "truthfully and accurately reported the allegation of molestation regarding" the intervener?
3. Whether this matter should be remanded to a different judge?
4. Whether the intervener and his trial court counsel, Duane Crandall, should be required to reimburse the State of Washington for the cost of A.W.'s court appointed counsel in both the trial court and this court?

### III. STATEMENT OF THE CASE

On June 6, 2011, A.W. was charged by information with one count of child molestation in the first degree and one count of rape of a child in the first degree. CP 6. The victim of both offenses was W.A.W. *Id.* These charges were resolved by the entry of a guilty plea to the molestation charge on September 12, 2011. CP 10, 13.

On January 9, 2012, the juvenile court entered a Special Sex Offender Disposition Alternative (SSODA). CP 13. The order of disposition requires A.W. to "Obey all Municipal, County, State and Federal laws." CP 18. The order also requires A.W. to participate in a qualified SSODA Program. CP 17 and 22. Finally, the order of disposition stated that "Treatment compliance shall could be monitored every 6 months through a polygraph, if available." CP 22.

A.W. entered treatment with Steven Powell, a licensed clinical social worker and a certified sex offender treatment therapist, in March of 2012. CP 57-58. While Mr. Powell utilizes polygraph examinations with adult clients, he does not utilize them with adolescents. CP 59, 74. Mr. Powell does not polygraph minors because such tests are considered coercive because of their developmental maturity. CP 59 and 61. Mr. Powell's position is based upon research that he received from the Association of Treatment of Sexual Abusers. CP 60-62. *See also* CP 105-168.

Two or three months after beginning treatment, A.W. disclosed to Mr. Powell, that he had been abused in the past by Dwight Finch. CP 65-69. Mr. Powell promptly reported the allegations to law enforcement. RP 65-66. Mr. Powell has not discussed the allegations with A.W. after the initial disclosure so as not to contaminate the investigation and because such abuse is “not traditionally something that you deal with early on in this type of treatment.” CP 71. *See also* CP 87-88.

A.W.’s disclosures resulted in the filing of criminal charges against Finch. *See* CP 48, ¶¶ 1, 2, and 5. Finch obtained an order in his criminal case that compelled A.W. to submit to a polygraph examination. The entry of this order was preceded by Judge Sullivan’s questioning of A.W.’s treatment provider, at a hearing conducted without prior notice to A.W. *See* CP 52-103. This order was stayed by the Court of Appeals and the State’s appeal from this order is currently pending. *Id.*, at ¶¶ 9-12. *See also* CP 172-176.

On August 8, 2013, Finch filed a complaint in A.W.’s juvenile court matter. CP 35. This complaint requested leave to intervene in A.W.’s juvenile court matter on the grounds that Finch “utterly and categorically” denies molesting and raping A.W. CP 35, at ¶ 2.

Finch’s complaint was accompanied by a “Motion to Compel Polygraph to Review Alleged Violation of SSODA Sentence.” CP 67. This

motion, which was prepared by attorney Duane Crandall, contends that A.W. has “violated the conditions of his sentence by committing the offense of false reporting.” CP 72. The motion concludes with an acknowledgment that A.W. was entitled to a court appointed attorney to respond to Finch/Crandall’s complaint. CP 73 (“Since this claim of a probation violation could result in further jail time for [A.W.], he is entitled to a court appointed attorney.”).

The State of Washington opposed Finch’s intervention in the juvenile court matter. *See generally* CP 207. The State, which is satisfied with A.W.’s participation in his SSODA treatment and with his progress in his SSODA program, had no basis to believe that A.W. is currently in violation of his SSODA disposition. CP 49, ¶ 6, . The juvenile court was similarly satisfied with A.W.’s progress, finding no violations at prior review hearings. *See, e.g.*, CP 23. The State also indicated that a polygraph of A.W. would not alter the course of Finch’s criminal case. *See* CP 48-49, at ¶¶ 4 and 5.

Wahkiakum County Superior Court Judge Michael Sullivan granted Finch’s request for a hearing on his citizen probation violation complaint. CP 46. Judge Sullivan, as requested by Finch’s attorney, Mr. Crandall, appointed an attorney to represent A.W. with respect to Finch’s citizen complaint. CP 47. The State filed a timely motion to have the cost of A.W.’s counsel borne by the party that brought the probation violation. *See* CP 222.

Judge Sullivan conducted a hearing on Finch's citizen complaint on September 9, 2013.<sup>1</sup> Finch, citing to CrRLJ 2.1, asserted that a citizen could intervene in a criminal case and could file a citizen complaint. CP 242-43. Finch also urged Judge Sullivan to order the polygraph examination "*sua sponte*" so as to moot out the appeal the State had filed in Finch's case and "to free up" Judge Sullivan's calendar. CP 244-45. Finch, however, offered no evidence to rebut A.W.'s treatment provider's testimony or the literature which established that a polygraph was contra-indicated.

During its argument, the State was repeatedly interrupted by Judge Sullivan, who expressed dismay over A.W.'s treatment provider's position on polygraph examinations. See CP 258-262. When A.W.'s attorney attempted to speak on behalf of A.W., Finch objected, apparently feeling that the prosecuting attorney "represented" A.W. with respect to Finch's motion. See CP 267 ("How many attorneys does [A.W.] get?").

A.W. denied the allegations made by Finch and noted that no order requiring him to show cause had been entered by the court. RP 268. Finch countered that Judge Sullivan had "a right to inquire" based upon "a compelling bit of evidence", namely Finch's purportedly favorable polygraph examination. RP 269-70.

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<sup>1</sup>The verbatim report of proceedings from this hearing may be found in the clerk's pages. See CP 238- 291.

The court took Finch's request for a polygraph examination of A.W. under advisement. The court also took the State's request that Mr. Crandall, who prosecuted the instant action be required to pay the cost of A.W.'s court-appointed counsel under advisement. CP 289-90.

After the hearing, Judge Sullivan granted Finch's request for a polygraph, by signing Finch's proposed order. *Compare* CP 224 with CP 244, 279, 281-282. This order stated, in part, as follows:

1. Defendant [A.W.] is ordered to take a polygraph examination to determine whether he has complied with his treatment program; said appointment to be made w/in 30 days; actual exam may be later than 30 days.
2. Part of the polygraph examination will be specifically directed toward whether the Defendant truthfully and accurately reported the allegation of molestation regarding Dwight Finch.

CP 224. Judge Sullivan did add a provision to the order which required the polygraph report to be mailed to the Wahkiakum County Clerk for placement in sealed file for the court's *in camera* review. *Id.* The order did not address the State's request for recovery of A.W.'s attorney fees.

Both A.W. and the State filed timely notices of appeal. CP 227 and 233. A.W. was granted an order of indigency and counsel, who will be paid from public funds, has been appointed to represent him in this court. CP 231. Finch's request for court appointed counsel to respond to A.W. and the State's appeal has, to date, been denied. *See* CP 292.

#### IV. ARGUMENT

##### A. **An Alleged Rapist May Not Intervene in His Alleged Victim's Juvenile Court Proceedings.**

The only parties to a juvenile prosecution are the juvenile offender and the State of Washington. The State may only appear in a juvenile offender proceeding through a prosecuting attorney, the attorney general, or the juvenile court probation officer. *See* RCW 10.01.190; RCW 13.40.090; RCW 36.27.020(4) and (6). Finch is neither an attorney nor a probation officer. *See* CP 35.

The general rule is that non-parties may not intervene in criminal matters. *See, e.g., State v. Savoie*, 164 Wn. App. 156, 262 P.3d 535 (2011) (error to allow victim's family to intervene in murder prosecution); *State v. Cloud*, 95 Wn. App. 606, 976 P.2d 649 (1999) (error to allow defendant's former counsel to intervene in ineffective assistance of counsel hearing). This prohibition, however, does not apply when a statute or court rule specifically authorizes third party involvement. *See State v. Mendez*, 157 Wn. App. 565, 574, 238 P.3d 517 (2010), *review granted and remanded*, 172 Wn.2d 1003 (2011).

Victims of crimes may intervene in a criminal matter to enforce restitution awards because a statute specifically authorizes this participation. *See State v. Wiens*, 77 Wn. App. 651, 894 P.2d 569, *review denied*, 127 Wn.2d 1021 (1995). Department of Labor and Industries may intervene in

a criminal matter to obtain restitution for the Crime Victim's Compensation fund. *See State v. Gonzalez*, 168 Wn.2d 256, 262, 226 P.3d 131 (2010); RCW 13.40.190(2); RCW 9.94A.753(7).

Victims of crimes and witnesses may intervene in a criminal matter to assert their privacy rights when discovery is sought from them or discovery is sought from a third party that relates to them. *See, e.g.*, CrR 4.8(b)(4).

The Department of Corrections may intervene in a criminal matter to correct errors in a judgment and sentence. *See* RAP 16.18.

Every citizen may intervene in a concluded criminal matter to assert his or her own Const. art. I, § 10 right to open courts. *See generally State v. Richardson*, 177 Wn.2d 351, 302 P.3d 156 (2013) (third party can intervene in a criminal matter to unseal a sealed file); *Yakima County v. Yakima Herald-Republic*, 170 Wn.2d 775, 801, 246 P.3d 768 (2011) (third party may intervene in a criminal case, after trial has concluded, for the limited purpose of moving to unseal a court record related to the case); *State v Mendez, supra* (a non-party may intervene in a criminal case to assert the public's Const. art. I, § 10 right to public hearings); GR 15(c)(1) ("In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to seal or redact the court records.").

Here, the general prohibition upon intervention in a criminal case applies. Finch is not the victim in A.W.'s juvenile proceeding. Finch is not

the recipient in A.W.'s juvenile proceeding of a CrR 4.8 subpoena for production. Finch was never barred from any hearing in A.W.'s juvenile court proceedings. Finch is not an employee of the Department of Corrections or the Department of Labor and Industries.

Finch has never identified a statute, court rule, or case law that allows an alleged rapist to intervene in a juvenile offender's action for the purpose of filing a motion to compel a polygraph examination and/or a motion to modify or enforce the terms of a SSODA disposition. This Court may, therefore, assume that none exists. *See State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (where no legal authorities are cited in support of a proposition, a court will assume that counsel, after diligent search, was unable to find any). Finch's lack of standing, alone, will require the vacation of the polygraph order.

The order cannot be saved by characterizing it as a "*sua sponte*" order of Judge Sullivan. *See, e.g.*, CP 69. Finch clearly initiated the process by which the order for polygraph was entered, not Judge Sullivan. Finch should not be able to avoid his lack of standing through the pretext of labeling the order as one that arose unprompted from Judge Sullivan's own brain.

The purpose of the polygraph examination, moreover, is investigative. The Code of Judicial Conduct prohibits judges from investigating facts in a

matter pending before the judge. CJC Rule 2.9(C) advises a judge that s/he shall consider only the evidence presented by the parties unless expressly authorized by law. No law authorizes a judge to initiate his or her own investigation into a probation violation.

**B. The Court Violated the Doctrine of Separation of Powers by Allowing An Alleged Rapist/Citizen to File and Prosecute an Alleged Probation Violation in a Juvenile Court Proceeding.**

Judge Sullivan allowed Finch and Crandall to assume the role of prosecutor to file a probation violation against A.W. in A.W.'s case. This not only violated separation of powers, but also violated A.W.'s due process rights.

In Washington, the prosecuting attorney is a constitutionally created locally elected office in the executive branch of government. Const. art. XI, §§ 4, 5; *State v. Campbell*, 103 Wn.2d 1, 25-26, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985) (recognizing prosecuting attorney as executive branch official); *State v. Cascade District Court*, 94 Wn.2d 772, 781-782, 621 P.2d 115 (1980) (same); *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (same). The prosecuting attorney enjoys significant discretion in whether to file charges or probation violations. *See generally* RCW 9.94A.411; *State v. Howard*, 106 Wn.2d 39, 44, 772 P.2d 783 (1985); *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984). The exercise of this discretion requires the prosecuting attorney to consider a myriad of factors

including the cost of prosecution, the strength of the case, the public interest, the motives of the complaining witness, the availability of diversion programs in the community, the criminal history of the offender, and the extent of the harm caused by the offense. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 97 S. Ct. 2044, 2051-52, 52 L. Ed. 2d 752 (1977); *Newman v. United States*, 382 F.2d 479, 481-82 (D.C. Cir. 1967).

A prosecutor's decision not to file charges is virtually unreviewable by the courts. The first barrier to judicial review of the prosecutor's decision to not file charges is the inability of a private citizen to establish standing to compel the prosecution. *See, e.g., Kelly v. Dearington*, 23 Conn. App. 657, 583 A.2d 937 (1990) (surveying cases that hold a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another); *see also Leeke v. Timmerman*, 454 U.S. 83, 86-87, 102 S. Ct. 69, 70 L. Ed. 2d 65 (1981) (a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973) (same). *Accord* RCW 9.94A.401 (the prosecution standards contained in Chapter 9.94A RCW "are not intended to, do not and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party in litigation with the state").

The second barrier to judicial review of a prosecutor's discretionary decision to not file charges is the separation of powers doctrine. This doctrine recognizes that the executive branch may not exercise judicial power, and the judiciary is prohibited from entering upon executive functions. *People v. Smith*, 53 Cal. App. 3d 655, 126 Cal. Rptr. 195, 198 (1975). Numerous courts have concluded that the judiciary improperly enters upon executive branch functions when it attempts to initiate criminal charges. *See, e.g., Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 379-380 (2nd Cir. 1973); *People v. Smith, supra*; *State v. Iowa District Court for Johnson County*, 568 N.W.2d 505, 508 (Iowa Sup. 1997) (citing 63C Am. Jur.2d *Prosecuting Attorneys* § 21, at 134-35 (1997)).

During the early years of statehood, a citizen, who was unsatisfied with a prosecutor's charging decision, had a mechanism for initiating charges. By 1971, the legislature removed any such right. *See* Laws of 1971, ex. sess. ch. 67, § 20 repealing RCW 10.28.160 (a territorial statute that authorized indictments obtained by private prosecutors). Now, the only remaining option for an aggrieved citizen, is to petition the governor.<sup>2</sup> RCW 43.10.232 (attorney general may prosecute a criminal case at the governor's

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<sup>2</sup>A court rule, CrRLJ 2.1(c), authorizes citizens to file charges in district court. This court rule, which violates separation of powers by authorizing the judicial branch to exercise executive branch authority, does not apply to proceedings in juvenile court. *See* CrRLJ 1.1 ("These rules govern the procedure in the courts of limited jurisdiction of the State of Washington. . . ."); JuCR 1.4(b) (stating that Superior Court Criminal Rules apply in juvenile offense proceedings).

request).

A prosecutor who refuses to file charges or refuses to bring a motion to modify a sentence or a probation violation cannot be removed from a case or recalled from office.<sup>3</sup> *In re Recall of Lindquist*, 172 Wn.2d 120, 133-134, 258 P.3d 9 (2011); *State v. Heaton*, 21 Wash. 59, 56 P. 843 (1899). A prosecutor may only be replaced by a “special prosecutor” in accordance with statute. *Id.* The only statutory grounds for replacing a prosecuting attorney with a special prosecuting attorney is when the prosecuting attorney fails, from sickness or other cause, to attend court. RCW 36.27.030.

In the instant case, the Wahkiakum County Prosecuting Attorney’s Office has repeatedly appeared in A.W.’s matter. No conflict of interest or other ethical rule prevents the Wahkiakum County Prosecuting Attorney’s Office from representing the State of Washington in A.W.’s matter.<sup>4</sup> The

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<sup>3</sup>Of course, if private individuals “are unsatisfied [with a prosecutor’s inaction], they are free to express their feelings at the polls” at the next regular election. *In re Padgett*, 678 P.2d 870, 873 (Wyo. 1984). *Accord Venhaus v. Pulaski County*, 186 Ark. 229, 691 S.W.2d 141, 144 (1985).

<sup>4</sup>The fact that A.W. is the defendant in this matter and a victim in Finch’s matter does not create a conflict of interest that would justify the removal of the Wahkiakum County Prosecuting Attorney’s Office. *See, e.g., State v. Romley*, 181 Ariz. 378, 891 P.2d 246, 250-51 (1995); *Commonwealth v. Price*, 454 Pa. Super. 88, 684 A.2d 640, 642 (1996); Alabama Ethics Opinion RO-91-44.

The fact that the State of Washington filed an appeal from the order entered in *State of Washington v. Dwight Finch*, Wahkiakum County Superior Court Cause No. 12-1-00007-2, that required A.W. to submit to a polygraph examination did not disqualify the Wahkiakum County Prosecuting Attorney’s Office from proceeding in either this matter or Finch’s prosecution. *See People v. Superior Court (Humberto S.)*, 43 Cal. 4th 737, 182 P.3d 600, 76 Cal. Rptr. 3d 276 (2008) (a

State of Washington, on ample grounds, determined that it was inappropriate to file charges or a probation violation against A.W. for reporting the abuse he suffered at the hands of Finch. *See* CP 49. The State also had valid reasons for deciding that it was inappropriate to require A.W. to take a polygraph regarding his report that Finch sexually abused him. *See* CP 48-49, §§ 4 and 5; CP 249; RCW 10.58.038.

Even if grounds existed for the appointment of a special prosecuting attorney for the filing of an appropriate motion to modify the disposition and/or allege a sentencing violation, neither Duane C. Crandall nor Dwight Finch were qualified to fill the position. Duane C. Crandall is not qualified to serve as a special prosecuting attorney by virtue of his representation of Finch in *State of Washington v. Dwight Finch*, Wahkiakum County Superior Court Cause No. 12-1-00007-2. *State v. Tracer*, 173 Wn.2d 708, 719-20, 272 P.3d 199 (2012). Dwight Finch is not qualified to serve as a special prosecuting attorney for an even more compelling reason— he is not authorized to practice law in Washington. Judge Sullivan, therefore, erred in allowing Crandall and Finch to prosecute their alleged violation motion.

The extent of this error is compounded by Finch's personal interest in the outcome of the action. The United States Supreme Court ruled in

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prosecutor, who argued that the child victim's medical and psychotherapy records, were not properly disclosed to the defendant's counsel and who sought the appointment of a guardian ad litem to protect the child victim's interests, was not disqualified from the criminal prosecution of the alleged child rapist).

*Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 804, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987), that a private attorney who is prosecuting a criminal charge must be as disinterested in the outcome as a public prosecutor who undertakes the criminal charge. Due process was violated in *Young* by appointing a corporation's attorney to bring a contempt charge for violating an order that benefitted the corporation. The violation occurs even if no prosecutorial impropriety actually occurs. Here, Finch is more interested in the benefits that might accrue to him if A.W. were to "flunk"<sup>5</sup> a polygraph,<sup>6</sup> than he is in the harm that a polygraph examination could do to A.W.'s treatment regime.

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<sup>5</sup>Studies have demonstrated that the emotional nature of the "relevant questions" that are asked of rape victims, in themselves, can result in the registering of a falsehood. *See State v. Brown*, 297 Ore. 404, 687 P.2d 751, 768 (1984) (citing D. T. Lykken, *A Tremor in the Blood* 114, 126 (1981)).

<sup>6</sup>Finch's hopes that the polygraph would result in the termination of his prosecution for raping A.W. are unrealistic. The State is prepared to continue with that prosecution, regardless of the outcome of any polygraph. *See* CP 49 at ¶ 5. An adverse polygraph result would not provide any basis for the trial court to dismiss Finch's pending rape charges over the State's objection. *See* CrR 8.3(c)(3) ("The court may not weigh conflicting statements and base its decision [on the defendant's pre-trial motion to dismiss] on the statement it finds the most credible."). Finally, an adverse polygraph result could not be considered in determining Finch's guilt or innocence. *State v. Thomas*, 150 Wn.2d 821, 860, 83 P.3d 970 (2004) (the results of polygraph tests are not admissible in Washington courts absent stipulation from both parties); CP 48 at ¶ 4.

**C. Polygraph Examinations Are Not Authorized to Confirm or Dispel an Alleged Rapist's Allegations of False Swearing.**

A disposition order is entered when a juvenile offender is found guilty of an offense. *See* JuCR 7.12. Once entered, the disposition order may only be modified by the juvenile court pursuant to a motion filed by a party or the court. JuCR 7.14(b). Modification, whether sought by a party or the court on its own motion, must be authorized by statute. *See* JuCR 7.14(a) (“A disposition order may only be modified in accordance with RCW 13.40.190 and 13.40.200.”).

While polygraph examinations may be ordered as part of a SSODA, either initially or in a subsequent modification of the SSODA, the polygraph examination must serve a therapeutic purpose. The polygraph examination may only be used to monitor the offender’s compliance with the conditions of the sentence. It is inappropriate to use a polygraph examination as a fishing expedition to discover evidence of other crimes, past or present. *State v. Combs*, 102 Wn. App. 949, 952-53, 10 P.3d 1101 (2000).

While the *Combs* case did not outline the characteristics of a proper polygraph, the State contends that a therapeutic polygraph must either be ordered by the defendant’s treatment provider or approved of by the treatment provider. In either instance, the defendant’s treatment provider should be the individual who determines the scope of the questions to be asked.

Here, the undisputed record is that A.W.'s treatment provider opposes the polygraph examination on the grounds that such a test can have a deleterious effect upon A.W.'s sex offender treatment. *See generally* CP 59-62, 74. A.W.'s treatment provider's opinion is supported by the literature, *see* 105-168, and was unrebutted by Finch. Furthermore, the sole purpose of the instant polygraph examination is to obtain "evidence" to support Finch's allegation of "false reporting." CP 72. This fact alone requires the vacation of the polygraph order.

The polygraph order's requirement that A.W. specifically be asked questions "directed toward whether [A.W.] truthfully and accurately reported the allegation of molestation regarding Dwight Finch", CP 77, is contrary to public policy. Victim participation in the prosecution of suspected criminals is a key ingredient in the criminal justice system's ability to incapacitate or deter actual or potential offenders, and thus reduce the social costs of crime.<sup>7</sup> Since these societal benefits may often be outweighed by substantial psychological and financial costs incurred by the victim as a result of participating in a trial, victims are likely to report crimes and testify in court against criminals at rates that are less than optimal. Indeed, less than 50% of

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<sup>7</sup>*See generally* Const. art. I, § 35 ("Effective law enforcement depends on cooperation from victims of crime. ").

rapes are even reported to the police.<sup>8</sup>

Among the more commonly cited reasons for a victim's reluctance to report a rape or to see a prosecution through to the end are (1) embarrassment of answering a stranger's questions about what happened; (2) self-blame or a feeling that the rape was somehow the victim's fault; (3) fear of an assailant's retaliation; (4) desire to conceal the victim's own behavior before the rape, such as the use of drugs or alcohol; and (5) fear of the societal and official skepticism about the legitimacy of the complaint. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology 1194, 1201-54 (1997) (summarizing the research about why rape victims choose not to report sexual assaults, why police clear reported rapes at such a low level, and why the attrition rate for rape cases is so high).

Lawmakers have attempted to reduce barriers to victim participation in sexual assault prosecutions. In addition to rape shield laws which generally exclude the complaining witness's sexual behavior unrelated to the offense being prosecuted,<sup>9</sup> many legislatures, including Washington's legislature, prohibit law enforcement agencies, prosecutors, and other

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<sup>8</sup>Callie Marie Rennison, Bureau of Justice Statistics, Dep't of Justice, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, NCJ 194530 (Aug. 2002), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=1133> (Last visited Mar. 21, 2013).

<sup>9</sup>See, e.g., RCW 9A.44.020.

government officials from asking or requiring that a sexual assault victim submit to a polygraph examination or any other form of a mechanical or electrical lie detector examination as a condition for proceeding with any criminal investigation or prosecution of an offense alleged sex offense. *See* RCW 10.58.038.

Here, Judge Sullivan's polygraph order is inconsistent with legislative policy and with Const. art. I, § 35's mandate that victims be accorded "due dignity and respect" in the criminal justice system. Victims of sexual assaults should not be presumed to be liars. Instead, they, like all other witnesses, are entitled to an initial presumption that they will honor their oath to tell the truth when testifying.

**D. Judge Sullivan Has Demonstrated an Inability to Ignore Finch's Purportedly Successful Polygraph Test.**

An appellate court may order that a matter be reassigned upon remand to preserve public confidence in the impartial and fair administration of justice. *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989). Reassignment is appropriate where the trial judge has engaged in conduct that gives rise to the appearance of impropriety or a lack of impartiality in the mind of a reasonable member of the public. *United States v. White*, 846 F.2d 678 (11th Cir.), *cert. denied*, 488 U.S. 984 (1988).

The federal appellate courts consider three factors in deciding whether "unusual circumstances" warrant reassignment. *See, e.g., United Nat'l Ins.*

*Co. v. R & D Latex Corp.*, 242 F.3d 1102, 1118 (9th Cir. 2001). The three factors are:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

*Id.* at 1118-19. This test does not require an appellate court to find that the trial court judge could not be impartial on remand. *See, e.g., Ellis v. U.S. Dist. Court (In re Ellis)*, 356 F.3d 1198, 1211 (9th Cir. 2004) (“Whether or not he would reasonably be expected to put out of his mind the information previously disclosed or the conclusions previously drawn, and without ourselves reaching any determination as to his ability to proceed impartially, to preserve the appearance of justice, and consistent with the purposes of Rule 32, we conclude reassignment is appropriate.”).

Here, Judge Sullivan has twice ordered A.W. to submit to a polygraph examination as to the truthfulness of his report of abuse at the hands of Finch. *See* CP 68-69, 224. The sole justification advanced for requiring A.W. to submit to such a polygraph examination is Finch’s claim that he “passed” a polygraph ““with flying colors.”” *See* CP 35 at ¶ 1; CP 25 at ¶ 4, CP 33-34;

CP 270. Judge Sullivan's reliance upon inadmissible evidence<sup>10</sup> to compel A.W. to take a polygraph makes it highly unlikely that he would disregard Finch's allegedly successful polygraph if called upon to adjudicate the truth of A.W.'s allegations<sup>11</sup> or to pass upon whether A.W. has successfully fulfilled the terms of his SSODA disposition. Given that A.W.'s SSODA sentence is scheduled to conclude in early 2014 and Finch's rape trial has not yet begun, the minimal potential for waste or duplication of judicial resources that would occur if Judge Sullivan should be directed to recuse himself from any matter involving A.W. is outweighed by the need to proceed in a manner that preserves the appearance of justice.

Remand to a different judge is also appropriate under this court's own precedent. In *State v. Romano*, 34 Wn. App. 567, 569, 662 P.2d 406 (1983), this court remanded a matter to a different judge even though "[a] careful search of the record fails to reveal even the slightest hint that the judge acted in any other but a forthright and open manner." This step was taken to preserve the appearance of fairness after the judge "contacted at least two

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<sup>10</sup>The State never stipulated to the admission of Finch's polygraph test. *See, e.g.*, CP 48. The State repeatedly advised Judge Sullivan that polygraph tests are inadmissible absent a stipulation from the parties. *See, e.g.*, CP 217, citing *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011). Judge Sullivan never ruled upon this objection.

<sup>11</sup>*See State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991) (the court will disregard inadmissible matters in a bench trial).

friends of his in the jewelry business to verify defendant's statements regarding his income.” *Id.* at 568.

In *State v. Madry*, 8 Wn. App. 1, 504 P.2d 1156 (1972), this court remanded a matter to a different judge after the trial judge personally investigated allegations of prostitution arising from a hotel owned by the defendant and another member of the bench. This step was taken to preserve the appearance of fairness even though the court was confident that “the respected and able trial judge” was motivated to impose a harsher sentence upon the defendant based upon his desire to satisfy the public that the entire local judiciary did not approve of the illegal activities that were linked to the hotel. *Id.* at 70.

Here, Judge Sullivan questioned A.W.’s treatment provider about A.W.’s report that Finch had raped and molested A.W., in a hearing to which A.W. was given no notice and no ability to participate. *See* CP 52-103; CP 189-190. Even if this court were convinced that Judge Sullivan could still fairly adjudicate any matters related to A.W.’s allegations, the very existence of this *ex parte* investigation beclouds the entire proceeding. It is, therefore, incumbent upon this court to remand this matter to another judge. *See generally Diimmel v. Campbell*, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966).

**E. Finch and/or Crandall are Responsible for the Costs of the Prosecution of Their Probation Violation.**

A prosecuting attorney must consider a myriad of factors in deciding whether to file charges or a probation violation. Among those factors, is the cost of the prosecution. *See, e.g., State v. Howard*, 106 Wn.2d 39, 44, 772 P.2d 783 (1985); RCW 9.94A.411(1)(f); National District Attorney's Association, *National Prosecution Standards*, Std. 4-2.4(j) (3rd ed. 2012). The cost of prosecution includes payment of an attorney for an indigent defendant. *Howard*, 106 Wn.2d at 44 (“an intrinsic part of the prosecution of every criminal case filed against an indigent defendant is the provision of assigned counsel to represent that person.”).

In *Howard*, the Washington Supreme Court recognized that when the Attorney General’s Office decides to file a criminal charge, the office

should be subject to the same type of constraints as limit local prosecutors. The expenses of charging a crime, and the ability to shift responsibility for these expenses to another level of government camouflages the true costs of the decision. Resources are limited, and by placing responsibility for all direct costs of a criminal case with the official making the charging decision, we encourage wise and efficient allocation of these limited resources.

*Howard*, 106 Wn.2d at 44.

There is no principled basis for not extending the rule from *Howard* to a private individual who decides to file a criminal complaint. Allowing Finch and Crandall to shift the cost of their probation violation to

Wahkiakum County and to the Office of Public Defense (OPD) discourages the wise and efficient allocation of limited resources. Finch and/or Crandall should be required to reimburse both the county and OPD for the cost of providing A.W. with counsel with respect to their citizen complaint probation violation.

Requiring Attorney Crandall to reimburse the county and OPD for the cost of A.W.'s court-appointed counsel is also appropriate pursuant to CR 11. CR 11 applied to the citizen complaint probation pleadings Crandall filed in juvenile court. *See* JuCR 1.4(b) (superior court criminal rules apply to juvenile offense proceedings), CrR 8.2 (CR 7(b) governs motions in criminal cases), CR 7(b)(3) ("All motions shall be signed in accordance with rule 11."). CR 11(a) provides that an attorney's signature on a pleading, motion or legal memoranda constitutes the attorney's certification that the attorney has

read the pleading, motion, or legal memorandum, and that to the best of the ... attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) [the pleading, motion, or memorandum] is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; [and] (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

CR 11(a) continues:

If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion ... may impose upon the person who signed it ... an appropriate sanction, which may include an order to pay to the other party ... the amount of the reasonable expenses incurred because of the filing ... including a reasonable attorney fee.

Sanctions may be imposed under CR 11 for two types of filings: baseless filings and filings made for improper purposes. *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883, 912 P.2d 1052 (1996). This case concerns both types of filings.

A filing is “baseless” when it is “(a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.” *MacDonald*, 80 Wn. App. at 883-84 (quoting *Hicks v. Edwards*, 75 Wn. App. 156, 163, 876 P.2d 953 (1994), *review denied*, 125 Wn.2d 1015 (1995)). Finch’s and Crandall’s argument that they should be able to usurp the role of the prosecuting attorney to file and prosecute a citizen probation violation was, as discussed *supra*, not warranted by existing law. Finch’s and Crandall’s position that an alleged rapist and/or the alleged rapist’s attorney may act as a private prosecutor despite their clear conflict of interest is not supported by a good faith argument for the alteration of existing law.

The record, moreover, also establishes that the citizen probation violation complaint was interposed for an improper purpose. Finch candidly

admitted at the September 9, 2013, hearing that he brought the citizen probation violation complaint as a means of mooting out the State's appeal from the polygraph order that was entered in Finch's criminal prosecution. *See* CP 244. Finch also candidly admitted that he brought the motion in an effort to get A.W. incarcerated. *See* CP 73 (stating this motion could result in additional jail time for A.W.); CP 244 and 254 (urging the court to require the prosecutor to prosecute a probation violation against A.W.). Finch also candidly admitted that he brought the motion in an effort to force the State to abandon its prosecution of him. *See* CP 244-45 (asking the court to compel A.W. to take a polygraph to free up the trial judge's calendar).

While not overtly stated, it is also clear that Finch brought this motion in the hopes of deterring A.W. from cooperating with the State in its prosecution of Finch. This court, therefore, should require Finch and Crandall to pay the costs of their failed prosecution of A.W.

## **V. CONCLUSION**

The State respectfully requests that this court reverse the order requiring A.W. to submit to a polygraph examination. The State respectfully requests that this court require any further proceedings related to A.W.'s allegation that Finch raped or molested him be presided over by a judge other than Judge Sullivan. Finally, the State respectfully requests that this court

require Finch and/or Crandall to reimburse the county and OPD for the cost of A.W.'s court-appointed trial and appellate counsel.

Respectfully submitted this 25th day of October, 2013.

A handwritten signature in cursive script that reads "Pamela Beth Loginsky". The signature is written in black ink and is positioned above a horizontal line.

PAMELA B. LOGINSKY

WSBA No. 18096

Special Deputy Prosecuting Attorney

PROOF OF SERVICE

Today I sent by electronic mail and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to the following counsel:

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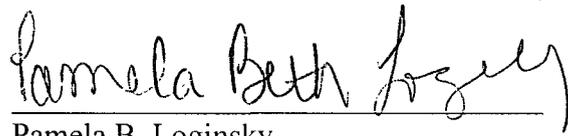
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STATE OF WASHINGTON  
BY: [Signature] DEPUTY

Today, I placed a copy of the document to which this proof of service is attached in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to:

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containing a copy of the document to which this proof of service is attached.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Pamela B. Loginsky  
WSBA 18096

Dated: October 25, 2013

Done in Olympia, Washington