

NO. 49183-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL BRADY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan Serko, Judge

No. 01-1-06116-1

BRIEF OF RESPONDENT

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¹ *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

B. STATEMENT OF THE CASE.

Defendant was convicted for 17 counts of first degree child rape, 7 counts of first degree child molestation, and 6 sexual exploitation of a minor counts for stopping to take pictures as he "alternated between raping and molesting" two little girls who had the grave misfortune of becoming his stepdaughters when they were too young, too vulnerable, to protect themselves from him. CP 55-56, 59-60. On at least 4 separate occasions, defendant "raped, molested, and sexually exploited" 7 year old S.S. and 9 year old K.S. CP 55. His crimes against those children first came to light through the efforts of a school counselor. CP 56. Child Protective Services intervened. CP 56. K.S. revealed defendant sexually abused her and her sister. CP 56. He had been abusing K.S. for two years. She showed her mother where to find the "pink vibrator and lubricant" he sometimes used. CP 56; CP 300.² He also used his penis to penetrate them vaginally and orally over an extended period of time on different dates. CP 60; CP296. During one 40 minute session of sexual abuse, he paused long enough "to pose himself and the girls for [] picture[s]." CP 60.

No less than 19 of his 31 charges were proved through pictures he took of the abuse. CP 60. That tragic but irrefutable proof of his guilt was the product of commendable-independent efforts the children's mother undertook to ensure he would not get away with those crimes. CP 56. She

² Citations to CPs above 283 estimate supplemental designations.

began speaking with him in the jail to elicit admissions. CP 56. After she told him his crimes "excited her," he admitted to keeping 150 pictures of the abuse on their computer. CP 56; 300. He reminisced about how her girls reacted to the pain of being raped. CP 300. She gave the computer to police. CP 56. Defendant confessed to having "intercourse with [his] step-daughters[]" CP 301. There was an "indication" he "traded" pictures of the crimes "with another." CP295. It tragically proved true. By 2006 the trial prosecutor encountered child-porn cases where offenders had pictures of defendant's crimes. They persist on the internet, likely never to be clawed back. RP (3/24/06) 7-8. K.S. was acting out by October 29, 2002. CP 301. Her mother knew she needed counseling their family could not afford. *Id.*

An unrelenting effort to avoid, chip away at, or otherwise undermine the sentence defendant received for his crimes commenced. The richly-deserved 636 month exceptional prison term was the first to fall. CP 67; 27. His 1st PRP resulted in a windfall 26.5 year reduction in that term due to the coincidence of being imposed in-between *Blakely's* invalidation of Washington's judge-decided penalty factor scheme and enactment of the jury-based fix. CP 168-70; RCW 9.94A.535 (2001); RCW 9.94A.537 (Ch. 68, LAWS of 2005, effective date April 15, 2005); *State v. Pillatos*, 159 Wn.2d 459, 465, 150 P.3d 1130 (2007). The remand order vacating the 2002 sentence gave effect to a decision singularly directed at the validity of the exceptional-prison term post-*Blakely*. CP 167-70. The narrow focus

of the October 13, 2005, decision accorded with defendant's failure to challenge any other component of the 2002 judgment, to include the child-protecting community custody conditions he wants this Court to remove so he can possess pornography and avoid plethysmograph³ testing able to reveal if he poses a measurable threat to children.

A hearing was held to bring the prison term into compliance with *Blakely* March 24, 2006. RP(3/24) 8. Most of the hearing was directed at identifying the standard prison terms applicable to his many convictions. RP(3/24) 2-10, 12-25. Defense counsel shockingly trivialized crimes that made it impossible for society to ever trust defendant near its children:

This is, you might say, [in] an otherwise law-abiding life, a blip. A blip may be too minor a term [,] perhaps an aberration [.]

RP(3/24) 11. These remarks conveyed defendant's own startlingly skewed, self-centered and, in its lack of introspection, dangerous, perspective of his crimes. For according to him his lawyer:

was right by just saying, "Hey, this is just a little mark in his life." He underscored that tremendously.

RP(3/24) 27. *Just a little mark in his life*—as if raping children entrusted to one's care is a minor run-in with the law. The court was unsurprisingly:

³ "[P]lethysmograph testing attempts to measure sexual arousal with a[] device attached to the penis while the subject is shown images of [] sexual activity." *State v. Johnson*, 184 Wn. App. 777, 781, fn.3, 340 P.3d 230 (2014).

**[s]hocked [by] [his] conduct, [as] [h]is [] crimes [we]re
horrific and will have a lasting lifetime affect on these
two little girls as well as their mother.**

RP(3/24) 30 (emphasis added).

The court was advised it could "revisit" other conditions imposed in 2002 if it perceived a need. RP (3/24) 8-9. It did not. RP(3/24) 29-38; CP 68-81. Only the duration of community custody was addressed. RP (3/24) 29-30. No discretion was exercised to alter conditions imposed through the Appendix H order filed in 2002. *Id.*; CP 48-49. The 2006 judgment ordered defendant to comply "with the orders of the court" as required by DOC. CP 76, 80 (emphasis added). Unable to impose the consecutive-prison term perceived just, the court "reluctantly" imposed one at the high-end of the standard range. RP (3/24) 28-30; CP 75.

Defendant's 2nd PRP was correctly addressed by this Court's March 24, 2006, order transferring it to the Supreme Court pursuant to RCW 10.73.140. CP 317 (No. 34238-3-II) (citing *In re Pers. Restraint of Fawcett*, 147 Wn.2d 298, 301, 53 P.3d 972 (2002); *In re Pers. Restraint of Perkins*, 143 Wn.2d 261, 19 P.3d 1027 (2001)). The evidentiary claims it raised were dismissed June 19, 2006. CP329 (No. 78493-1).

Defendant's 2nd appeal of sentence was decided July 30, 2007. CP 82 (No. 34715-6-II). At issue was his challenge to the DNA-testing order

that would facilitate his apprehension should he reoffend. Also challenged was his offender score and community custody term, without challenging the conditions raised here. *Id.* His sentence became final June 4, 2008, according to this Court's Mandate. *Id.*

Defendant's 3rd PRP was dismissed by this Court April 17, 2009. CP 319. (No. 38583-0-II). There, as here, he claimed a monitoring condition of his community custody was too vague. *Id.* He also did not want DOC to have authority over his living arrangements or controlled substance consumption. *Id.* The PRP was dismissed because he failed to prove actual prejudice as required for a PRP to prevail. *Id.* (citing *State v. Bahl*, 164 Wn.2d 793, 193 P.3d 678 (2008); *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 85, 660 P.2d 263 (1983)). He did not assign error to the conditions challenged in this appeal.

A 4th PRP was granted by the Supreme Court September 10, 2010. CP 321 (No. 83699-0). Six exploitation convictions were vacated for what appeared to be the unit of prosecution problem addressed in *State v. Root*, 141 Wn.2d 701, 704, 9 P.3d 214 (2000). Resentencing was unnecessary as the vacated convictions did not impact defendant's offender score. CP 321. His community custody conditions were not challenged.

A 5th PRP was dismissed by the Supreme Court December 7, 2009. CP 322-25 (No. 83129-7). Sexual motivation designations were claimed to

be error. *Id.* Collateral relief was denied due to defendant's failure to prove actual and substantial prejudice or a complete miscarriage of justice. *Id.* The conditions challenged here were not raised.

A 6th PRP was dismissed by the Supreme Court March 28, 2011. CP 326-28 (No. 85163-8). The PRP unsuccessfully challenged the proof for his remaining exploitation convictions as well as the effectiveness of trial counsel. His inability to prove prejudice again required dismissal. *Id.* The conditions challenged here were not raised.

A 7th PRP was dismissed by the Supreme Court September 19, 2011. CP 332-34 (No. 85785-7). Ineffective appellate counsel and LFOs were raised without a showing of prejudice. *Id.* The conditions challenged here were not raised.

An 8th PRP was dismissed by the Supreme Court June 4, 2012. CP 335 (No. 86640-6). It challenged the trial court's unwillingness to let him argue for less incarceration when his judgment was corrected. *Id.* The Supreme Court held the requested modification was beyond the trial court's jurisdiction to grant. *Id.* There was no prejudice and the conditions challenged here were not raised. *Id.*

A 9th "mixed" PRP was dismissed by the Supreme Court June, 28, 2012. CP 338 (No. 86856-5). It attacked his 17 child rape convictions. *Id.*

Double jeopardy and ineffective assistance were raised. *Id.* Conditions challenged here were not.

Defendant improperly tried to file a 10th PRP in this Court. CP 341 (46416-1-II). Adapting to his last failure, he reasserted double jeopardy in isolation. This Court correctly transferred the PRP to the Supreme Court October 14, 2014, as required by RCW 10.73.140, where it was dismissed May 29, 2015. CP 343 (No.90902-4). Neither of the conditions challenged in this appeal were raised.

C. ARGUMENT.

"[P]revention of child abuse is of the highest priority[.]" *C.J.C. v. Corp. of Catholic Bishop*, 138 Wn.2d 699, 727, 985 P.2d 262 (1999). Laws enacted to protect children from those who would subject them to sexual abuse should be construed in any constitutional way that maximizes our capacity to protect them despite lawful burdens that fall upon sex offenders. For our laws are wisely not designed for their convenience. *E.g., Beggs v. State, Dept., Social & Health Services*, 171 Wn.2d 69, 80, 247 P.3d 421 (2011). This is because we know they "often pose a high risk of re-offense[.]" *State v. Heiskell*, 129 Wn.2d 113, 117, 916 P.2d 366, 368 (1996). The prognosis of curing them is poor. *See* RCW 71.09.010. And the great consequence of being wrong about their commitment to self-control can be counted in the victimization of more innocent children we

are supposed to protect. *E.g.*, *In re Detention of Thorell*, 149 Wn.2d 724, 763, 72 P.3d 708 (2003).

1. THIS CASE SHOULD BE REMANDED FOR A HEARING ON WHETHER TO TRANSFER THE TIME-BARRED MOTION AS A PRP, WHICH WILL EITHER HAVE TO BE DISMISSED AS SUCCESSIVE OR TRANSFERRED ON TO THE SUPREME COURT AS A MIXED PETITION.

Orders are void when issued without lawful authority. *State v. Zavala-Reynoso*, 127 Wn. App. 119, 122, 110 P.3d 827 (2005). Motions made to correct mistakes claimed to be present in a final judgment are governed by CrR 7.8(b)(1). *State v. Zavala-Reynoso*, 127 Wn. App. 119, 13, 110 P.3d 827 (2005). They "shall be made within a reasonable time and for reason[n] [(b)](1), not more than 1 year after the [] order [] was entered, and [are] further subject to RCW 10.73.090, .100, .130, and .140." CrR 7.8(b)⁴ (emphasis added). Parties cannot by agreement or error validate a void order issued by a court in derogation of statute. *E.g. State v. Peltier*, 181 Wn.2d 290, 297, 332 P.3d 457 (2014); *In re Pers. Restraint of Call*, 144 Wn.2d 315, 334, 28 P.3d 709 (2001).

CrR 7.8 (c)(2)'s mandatory transfer provision provides:

The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion *is not barred by RCW 10.73.090* and either (i) the defendant has

⁴ "A motion under section (b) does not affect the finality of the judgment or suspend its operation." *Id.*

made a substantial showing that he [] is entitled to relief or
(ii) resolution of the motion will require a factual hearing.

Id. (emphasis added). The RCW 10.73.090 time-bar incorporated into CrR
7.8 (c)(2) provides:

No petition or motion for collateral attack on a judgment
and sentence in a criminal case may be filed more than one
year after the judgment becomes final if the judgment and
sentence is valid on its face and was rendered by a court of
competent jurisdiction.

RCW 10.73.090 (1). Defendant's sentence became final in 2008. RCW
10.73.090(3)(b); CP 82.

Defendant's untimely motion to clarify or modify sentence was
improvidently decided below, for operation of RCW 10.73.090's time-bar
deprived that court of jurisdiction to issue the order on appeal. A "motion
to clarify" DOC's discretion under the order could not be granted, for
courts do not issue advisory opinions on enforcement, which is another
way stating courts do not pass upon issues that are not ripe for review. *See*
State v. Rice, 159 Wn. App. 545, 573, 246 P.3d 234, 248 (2011), *aff'd on*
other grounds, 174 Wn.2d 884, 279 P.3d 849 (2012); *State v. Wilson*, 96
Wn. App. 382, 393, fn.4, 980 P.2d 244, 250 (1999) (citing *Walker v.*
Munro, 124 Wn.2d 402, 418, 879 P.2d 920 (1994)). Vague conditions
must be timely struck, modified, appealed or collaterally attacked. *E.g.*,
CrR 7.8; *Bahl*, 164 Wn.2d at 743; *In re Pers. Restraint of Stenson*, 150
Wn.2d 207, 210, 76 P.3d 241 (2003).

Defendant's motion to modify conditions is a CrR 7.8(b)(1) motion to strike them. The trial court lacked jurisdiction to rule on it because it was filed approximately 8 years after his sentence became final. RAP 7.8(c)(2); RCW 10.73.090. So the motion should have been transferred to this Court as a PRP. *Id.* Jurisdiction can be raised to vacate orders any time. ***Bour v. Johnson***, 80 Wn. App. 643, 646-47, 910 P.2d 548 (1996). Since the validity of the challenged conditions is not properly before this Court, the merits of defendant's 3rd appeal should not be considered.

- a. This Court previously held incorrectly transferred motions should be remanded, so defendants can decide whether to move for dismissal or accept a transfer that may preclude subsequent review.

To enable defendants to avoid the rule against successive petitions, this Court decided incorrectly transferred motions should not be converted to PRPs despite the judicial economy achieved through conversion. ***State v. Smith***, 144 Wn. App. 860, 863, 184 P.3d 666 (2008). They are to be remanded, so transfer can be averted through dismissal.

Pursuant to ***Smith*** the motion underlying the appealed order should be remanded, so defendant can postpone the filing of his 11th PRP through dismissal of his motion. If he elects to proceed, it must be returned to this Court as an untimely PRP.

- b. If defendant's motion is returned as a PRP, it can only be dismissed as successive or transferred to the Supreme Court.

When a subsequent PRP is transferred to this Court, review is governed by RCW 10.73.140. If this Court finds the petitioner already raised similar grounds for relief, RCW 10.73.140 divests it of jurisdiction. *Matter of Bell*, ___ U.S. ___, 387 P.3d 719, 721 (2017). This Court can only dismiss the PRP or transfer it to the Supreme Court if RAP 16.4(d)⁵ appears to apply. *Matter of Johnson*, 131 Wn.2d 558, 566, 933 P.2d 1019 (1997). Under RAP 16.4(d), "[n]o more than one petition for similar relief [] will be entertained without good cause shown." *Id.* By its terms, RAP 16.4(d) controls in this Court as well as the Supreme Court; whereas, RCW 10.73.140 applies to this Court alone. *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 362-63, 256 P.3d 354 (2011).

Although this Court lacks jurisdiction to review subsequent PRPs that raise similar grounds for review, it is nevertheless to dismiss them if they are untimely without a time-bar exception and successive. *Bell*, 387 P.3d at 721; *Johnson*, 131 Wn.2d at 566, fn.3; *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 86–87, 74 P.3d 1194 (2003). Successive petitions

⁵ RAP 16.4(d): Restrictions. The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, or .100. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

seek "similar relief" if they raise matters previously decided on the merits. *Bell*, 387 P.3d at 722. Revising rejected legal arguments neither creates new claims nor constitutes good cause to reconsider old claims. Identical grounds may be proved by different allegations. So also, identical grounds may be supported by different argument, couched in different language, or vary in immaterial respects. *In re Pers. Restraint of Jeffries*, 114 Wn.2d 485, 487, 789 P.2d 731 (1990).

Defendant's motion is a successive attempt to collaterally attack the community custody conditions of his sentence. There is no good cause shown for his failure to raise its claims in any one of the last 8 PRPs to follow since the judgment became final. This Court correctly transferred his 2nd and 10th PRP pursuant to RCW 10.73.140. CP 317 (No. 34238-3-II); CP 341 (No. 46416-1-II). But dismissal would be more appropriate here since the motion is untimely under RCW 10.73.090 and successive under RAP 16.4 (d), for he advanced a theory of vagueness to challenge a different condition of community custody in his 3rd PRP. CP 319-20 (No. 38583-0-II). That claim was rejected on the merits with citation to *Bahl*. *Id.* Defendant cannot create a new claim by revising that claim to target a different condition with an identical theory of vagueness. *Jeffries*, 114 Wn.2d at 487; *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 760, 101 P.3d 1 (2004). Dismissal would be proper if the claims raised in the appeal were properly before this Court. *Turay*, 150 Wn.2d at 87.

If defendant's revised claims were deemed different enough from those raised in his 3rd PRP to avoid *Turay's* successive-petition rule, RCW 10.73.140 would require this Court to transfer them to the Supreme Court. The Supreme Court would be called upon to decide if either claim avoided RCW 10.73.090's time-bar due to a facial invalidity or RCW 10.73.100 exception. Conditions are only facially invalid if the invalidity is apparent without elaboration or resort to documents extraneous to the judgement. *In re. Pers. Restraint of Adams*, 178 Wn.2d 417, 424-25, 309 P.3d 451 (2013). The challenged pornography condition may be facially invalid as *Bahl* found similar conditions unconstitutionally vague. But the same is not true of plethysmograph testing when treatment is imposed. *Bahl*, 164 Wn.2d at 758; *State v. Johnson*, 184 Wn. App. 777, 780-81, 340 P.3d 230 (2014) (citing *State v. Riles*, 135 Wn.2d 326, 352, 957 P.2d 665 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010)); *State v. Castro*, 141 Wn. App. 485, 494-95, 170 P.3d 78 (2007). The result is an unreviewable-mixed petition. *See In re Pers. Restraint of Hankerson*, 149 Wn.2d 702-03, 72 P.3d 703 (2003). And defendant's pre-enforcement challenge to plethysmograph testing will not be ripe unless DOC someday tries to order it for monitoring instead of the court-ordered treatment.

Furthermore, if one assumed the pornography condition is facially invalid, and it had not been raised in a mixed petition with a time-barred claim, it is not clear a pre-enforcement challenge could prevail in a PRP

where relief requires proof of *actual* and substantial prejudice. *E.g.*, *In re Pers. Restraint of Snively*, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014); *In re Pers. Restraint of Smalls*, 182 Wn. App. 381, 391, 335 P.3d 949 (2014) *but cf. In re Pers. Restraint Goodwin*, 146 Wn.2d 861, 876, 50 P.3d 618 (2002). But, again, review would require the appeal to be converted into a PRP contrary to *Smith*, 144 Wn. App. at 863. Remand for vacation of the order and dismissal or return as a PRP governed by *Turay* and RCW 10.73.140 appears to be required by *Smith*.

2. DEFENDANT WRONGLY ASSERTS THIS COURT INADVERTENTLY VACATED THE CONDITIONS IMPOSED TO PROTECT OTHER CHILDREN FROM BEING RAPED BY HIM WHEN IT VACATED HIS PRISON TERM TO CORRECT A BLAKELY PROBLEM.

Although RAP 2.5 enables this Court to revisit cases again "before [it]," a case is only properly "before" it when transferred through a rule-compliant appeal (RAP 2.2), an order granting discretionary review (RAP 2.3), or a PRP (RAP 16.4). The latter provides for review of untimely challenged community custody conditions. *Id.*; CrR 7.8 (b)(2)-(c); RCW 10.73.090. When prior appellate decisions are reviewed in a subsequently filed PRP, they are construed as superseding lower court decisions only on the issues decided by the appellate court. *See State v. Stein*, 140 Wn. App. 43, 56, 165 P.3d 16 (2007) (citing *State v. Strauss*, 119 Wn.2d 401, 412, 832 P.2d 78 (1992)). Decisions are limited to the case before an appellate

court as defined by the court. *Ashwander v. TVA*, 297 U.S. 288, 339, 56 S.Ct. 466 (1936). Even core questions of judicial business will not be reached unless indispensably involved in a litigation. And then, only to the extent so involved. *Youngstown Sheet & Tube co. v. Sawyer*, 343 U.S. 579, 594, 72 S.Ct. 863 (1952).

Lower courts trying to interpret the scope of higher court rulings should not haphazardly treat as dispositive rulings that do not answer the question presented in the case at bar. *State v. Frost*, 160 Wn.2d 765, 775, 161 P.3d 361 (2007); *Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 114-15, 163 P.3d 807 (2007). The words used by higher courts to communicate their decisions similarly derive meaning from context. See *State v. Smith*, 48 Wn. App. 33, 35, 737 P.2d 723 (1987). By binding meaning to context, courts safeguard against words selected to achieve a considered purpose being misapplied to destabilize an aspect of a decision or the law that was not before the court. *E.g.*, *State v. Kelly*, 168 Wn.2d 72, 81-82, 226 P.3d 773 (2010). A contrary rule would absurdly⁶ call upon courts to write with tedious precision and exhaustive qualification

⁶ *E.g.*, Hamlet Act V Scene 1, Lines 114-27:

Hamlet: [W]hose grave's this [] ?
First Clown: Mine, sir. []
Hamlet: What man does thou dig it for?
First Clown: For no man, sir.
Hamlet: For what woman, then?
First Clown: For none, neither.
Hamlet: Who is to be buried in't?
First Clown: One that was a woman, sir, rest her soul, she's dead.
Hamlet: How absolute the knave is! We must speak by the card, or equivocation will undo us[.]

that would do more to confound than clarify judicial intent. *E.g. Id.*; *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992); *Orr v. Allen*, 248 U.S. 35, 36, 39 S.Ct. 23 (1918).

Defendant contends the community custody conditions imposed in his 2002 judgment were nullified when his prison sentence was brought into compliance with *Blakely* in 2006. That now final judgment can only be attacked through an untimely PRP. And this 3rd appeal, which is actually his 11th PRP, can only be reviewed by the Supreme Court.

Proper procedure aside, if the meaning of this Court's remand order could be accurately construed without regard for its context, petitioner's claim it eliminated the challenged conditions might be valid. For at the end of a 3 page decision singularly devoted to deciding if the *exceptional prison term* of his sentence was authorized by law, this Court wrote:

Accordingly, it is hereby [] Ordered that this petition is granted, petitioner's sentence is vacated, and this case is remanded for resentencing.

CP 170. But context does matter. And the challenged conditions are not a part of that context because they were not at issue in the Court's decision, nor was any other condition of his sentence. In that limited context, the word "sentence" was safely used as a synonym for prison time, *e.g.*:

the trial court imposed high-end standard range sentences []. It then imposed an exceptional sentence by running the concurrent sentences [] consecutively for a total sentence of

636 months. The trial court found the three aggravating factors supported the exceptional sentence [.]

CP 168. So the remand order did not supersede the 2002 sentence beyond the exceptional prison term reviewed. It cannot be presumed this Court intended to deviate from the "well established" rule that imposition of an unauthorized sentence "is grounds for reversing only the erroneous portion of the sentence imposed[.]" *State v. Eilts*, 94 Wn.2d 489, 496, 617 P.2d 993 (1980); *State v. Kilgore*, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). But one would have to assume as much to construe the order's expedient use of the word "sentence" in this context as reaching beyond the prison term the decision addressed to invalidate conditions that were not before the Court. Because this Court is presumed to have followed the law, one must in turn conclude the conditions imposed in 2002 survived remand in 2006.

Trial courts are also presumed to know the law. *See State v. Mires*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970); *Douglas Northwest, Inc. v. Bill O'Brien & Sons Const., Inc.*, 64 Wn. App. 661, 681, 828 P.2d 565 (1992); *State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991). So it must be presumed the trial court construed the 2006 order according to Supreme Court cases that have consistently held correcting a sentence in excess of statutory authority does not affect the finality of any valid portion of the sentence. *Id.*; *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). That presumption combines with proof the court was aware of its discretion to revisit the conditions when it did not

do so. RP (3/24) 8-9. Knowledge of their existence can be inferred from the fact the court "spent the better part of [a] week and [] breaks reviewing the entire record[.]" RP (3/24) 6. The court likely left them alone because neither party asked the court to reconsider them. As a result, they remain among the "orders of the court" incorporated into the judgement entered in 2006. *See* CP 76, 80 (emphasis added).

It was not an abuse of the trial court's discretion to refrain from reaching beyond this Court's remand order to take up previously imposed conditions neither party addressed and remained on remand according to precedent. *State v. Rowland*, 160 Wn. App. 316, 324-31, 249 P.3d 635 (2011) (citing *Kilgore*, 167 Wn.2d at 40), *affm'd* 174 Wn.2d 150, 272 P.3d 242 (2012)); *Goodwin*, 146 Wn.2d at 877. Especially when the surest way to avoid later claims it reopened them through an exercise of discretion was to simply leave them alone. *Id.*

From a practical perspective, the court had good reason to leave them alone. It perceived defendant's crimes to be "horrific" with a "lasting lifetime" impact on his child victims. RP (3/24) 30. Beyond his crimes' immediate impact, revictimization was ensured by the 150 grim souvenirs he created to relive them. For "pornography's continued existence causes the child victims continuing harm by haunting the[m] in years to come." *Osborne v. Ohio*, 495 U.S. 103, 111, 110 S. Ct. 1691 (1990). It stands to reason the court wanted to preserve every condition that could protect

future children from being victimized by defendant. Prohibiting him from possessing pornography served that purpose as "pedophile[s]" are known to use pornography to lure or lower the inhibitions of children targeted for abuse. ER 201; Handbook for Working with Defendants and Offenders with Mental Disorders, Third Edition, (2003, WL 25569733). Meanwhile, treatment-based plethysmographs may someday provide the only warning defendant is poised to reoffend. *E.g.*, **Heiskell**, 129 Wn.2d at 117; **Castro**, 141 Wn. App. at 494.

3. DEFENDANT'S PREMATURE REQUEST TO PASS COSTS ALONG TO OUR TAXPAYERS SHOULD BE DENIED AS A COST BILL HAS YET TO BE SUBMITTED AND THERE IS NO INJUSTICE IN A CHILD RAPIST WHO HAS FILED 10 PRIOR PRPs AND 2 APPEALS BEING ORDERED TO PAY FOR HIS 3rd APPEAL.

a. Defendant's objection should await a bill.

Review of appellate costs follow objection to a bill. RAP 14.4-14.5; **State v. Sinclair**, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016); **State v. Caver**, 195 Wn. App. 774, 784-86, 381 P.3d 191 (2016); **State v. Nolan**, 141 Wn.2d 620, 8 P.3d 300 (2000); **State v. Blank**, 131 Wn.2d 230, 243-44, 930 P.2d 1213 (1997). Defendant should not be preemptively insulated from repaying our community for his appeal.

b. Money defendant receives would be well directed to repayment of costs.

RCW 10.73.160(1) authorizes the imposition of costs. Imposition of costs has been historically considered an appropriate means of ensuring

able-bodied offenders "repay society for [] what it lost as a result of [their] crime." *State v. Barklind*, 87 Wn.2d 814, 820, 557 P.2d 314 (1976). This community-centric concept of restorative justice has been subordinated to an offender-centric concern about difficulties attending repayment. *State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015). Ability to pay is not an indispensable concern. *Sinclair*, 192 Wn. App. at 389.

Defendant is a college graduate with a long employment history, which included work as an accountant. CP 309. He boasts of possessing the technical skills requisite to fix prison computer systems. RP (3/24) 26. He purportedly created a prison database. RP (3/24) 27. He worked as a law clerk. RP (3/24) 27. All of which proves him to be capable of gainful employment upon his release. Directing some of the money he will earn to repaying the public for enormous costs it incurred on his behalf is far more just than shifting them to hardworking taxpayers, who rarely if ever avail themselves of the judicial resources he has rapaciously consumed since being convicted of raping two children tragically entrusted to his care.

D. CONCLUSION.

The underlying motion is improperly before this Court as it should have been transferred as an untimely and successive PRP. According to *Smith*, 144 Wn. App. at 863, the case should be remanded for dismissal or returned as a PRP; whereupon, it should be dismissed as successive or

transferred on to the Supreme Court. It is premature to decide costs, but there is certainly no justice in shifting them to the community we serve.

RESPECTFULLY SUBMITTED: February 23, 2017.

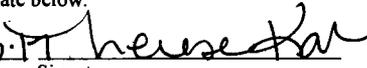
MARK LINDQUIST
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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail or~~
ABC-LMI delivery to the attorney of record for the appellant and appellant
c/o his attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

2.23.17 
Date Signature

PIERCE COUNTY PROSECUTOR

February 23, 2017 - 3:41 PM

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