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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM HOWARD THOMPSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
AND
IN REGARD TO THE PERSONAL RESTRAINT PETITION OF
WILLIAM THOMPSON
Superior Court No. 16-1-00704-8

BRIEF OF RESPONDENT

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**I. COUNTERSTATEMENT OF THE ISSUES
DIRECT APPEAL**

1. Whether evidence, instruction, and argument made it manifestly apparent to the jury that a single act must support each conviction?

2. Whether the issue of the scope of the no contact order was preserved in the trial court?

(a) Whether the no contact order prohibiting Thompson from contacting the victim's family erroneously included persons who do not need such protection under the unique circumstances of the case? (PARTIAL CONCESSION OF ERROR)

3. Whether the trial court ordered unconstitutionally vague or overbroad conditions of community custody?

PERSONAL RESTRAINT PETITION

1. Whether the trial court erred by sentencing Thompson on an incorrect offender score?

2. Whether the trial court erred in imposing an exceptional sentence without appropriate jury findings of aggravating circumstances?

3. Whether the aggravating circumstances were improperly charged in violation of double jeopardy?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

William Howard Thompson was charged in the original information filed in Kitsap County Superior Court with second degree rape of a child, domestic violence and first degree incest, domestic violence. CP 1-3. A first amended information charged an additional count of first degree incest and added to each charge special allegations of use of position of trust and ongoing pattern of sexual abuse. CP 25-28. A second amended information added another count of first incest, domestic violence (count IV) with the same special allegations. CP 37. A third amended information was filed again adding an additional count of first degree incest, domestic violence with the abuse of trust and ongoing pattern aggravators included. CP 44-45. Finally, a fourth amended information was filed, which changed an error in the date range in count II and continued the five counts and special allegations from the third amended information. CP

The matter proceeded to trial on these five charges. The jury found Thompson guilty of all five counts. CP 89-90. The jury returned special verdicts finding as to each count that Thompson and the victim were members of the same household or family, that Thompson's acts

constituted an ongoing pattern of sexual abuse of a victim under the age of 18, and that Thompson used a position of trust to facilitate his crimes. CP 91-100.

Thompson was sentenced to 280 months, which is the high-end of the standard range on an offender score of 12. CP 112-13.

Thompson timely appealed. CP 124. Thompson also asserted a CrR 7.8 motion that the trial court transferred to this Court as a personal restraint petition.

B. FACTS¹

MT began living with her father when she was five or six years old. 4RP 626. Her parents were divorced and she lived with her father, stepmother, and three stepsiblings. 4RP 626-27. They moved into a residence where MT had a downstairs bedroom and the other children had bedrooms upstairs. 4RP 629.

When MT was 12 years old, her father raped her for the first time. 4RP 630. No one else was home and MT was watching television. 4RP 630. Her father called her into his room. 4RP 631. He told her that he

¹ Trial transcripts are numbered by volume and will be referred to as 1RP, 2RP, etc. Other volumes will be referred to by date.

was going to do things to her and that if she told anyone she and her family would be hurt. 4RP 631. He began to touch her chest. 4RP 632. He reached down her pants to her underwear and took off her pants and underwear. 4RP 632-33. He put his finger inside of her. 4RP 633. MT was afraid and cried. 4RP 633-34.

Thompson then had MT lay down and he removed his clothes and the rest of her clothes. 4RP 634. He then got on top of her and put his penis in her vagina. 4RP 635. Finished, Thompson cleaned himself with a towel and gave the towel to MT to clean herself. 4RP 635.

Another time, MT was uncertain about the dates, Thompson asked her to shower with him. 4RP 637. Again, no one else was home. 4RP 638. They undressed and got in the shower together. 4RP 638. MT did not object because of her father repeatedly telling her that others would be hurt if she told. 4RP 638. He picked her up and repeatedly put his penis inside her. 4RP 639.

Another time, again when no one else was home, Thompson called MT into his bedroom and this time he told her they were going to 69. 4RP 640. He explained the behavior to her and then the two got undressed. 4RP 640-41. He instructed her to climb atop him and he licked her while he placed his penis in her mouth. 4RP 641. This last move caused her to

run to the bathroom and vomit after which the incident ended. 4RP . 4RP 641.

Another time, others were home during the abuse. 4RP 642. It was very early morning before the family was awake and he came to her room and had her “kiss it.” 4RP 642. She again vomited but just a little bit in her mouth. 4RP 644.

Those four particular incidents were a part of ongoing abuse. 4RP 647. There was no “regular schedule” but the abuse sometimes happened as often as twice a week and sometimes a couple of months would pass in between incidents. 4RP 647. The incidents of abuse lasted three or four years until MT was 16 or 17 years old. 4RP 650. One day Thompson simply told her that they were done and the abuse ended. 4RP 650-51.

Eventually, the abuse was reported to school personnel. 4RP 653-54. MT sought out a supportive teacher when her grandmother died. 4RP 654-55. MT inadvertently disclosed and the teacher advised her that he had to report. 4RP 655-66. The next day, MT met with law enforcement officers. 4RP 662. With law enforcement, MT engaged in a wiretapped conversation with her father. 4RP 662.

Law enforcement officers interviewed MT at her school. 4RP 607. MT was pleasant but sometimes emotional and “weepy” during the

interview. 4RP 607.

III. ARGUMENT

A. THE EVIDENCE, JURY INSTRUCTIONS, AND PROSECUTOR ELECTION MADE IT MANIFESTLY APPARENT TO THE JURY THAT EACH COUNT MUST BE SUPPORTED BY A DIFFERENT ACT.

Thompson argues that it was not manifestly apparent to the jury that a single act must support each conviction. This claim is without merit because the combination of multiple act jury instructions and the prosecutor's election protected Thompson against double jeopardy.

Jury instructions must clearly convey the law: "They must make the relevant legal standard manifestly apparent to the average juror." *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). "Accordingly if it is not manifestly apparent to a criminal trial jury that the State is not seeking to impose multiple punishments for the same offense, the defendant's right to be free from double jeopardy may be violated." 140 Wn. App. at 367, citing *State v. Noltie*, 116 Wash.2d at 848-49, 809 P.2d 190. Review is de novo; the reviewing court considers the evidence, arguments, and instructions in decide the manifestly apparent question. *State v. Mutch*, 171 Wn.2d 646, 664, 254 P.3d 803 (2011).

In the present case, the jury was instructed that Thompson's not

guilty pleas put “in issue every element of each crime charged.” CP 60 (instruction #3). And the same instruction advised the jury that “[t]he State. . .has the burden of proving each element of each crime beyond a reasonable doubt.” Id. Further, the jury was instructed that

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 63 (instruction #6); WPIC 3.01.

Further, following the “to convict” instructions, on each count the jury was instructed that

In alleging that the defendant committed [rape of a child, incest] as charged in [various counts], the State relies upon evidence regarding a single act constituting the alleged crime. To convict the defendant, you must unanimously agree that this specific act was proved.

CP 74-78 (instructions 17-21); WPIC 4.26. The comment to WPIC 4.26 notes that the instruction should be used where “the jury heard evidence of multiple acts but the prosecutor has elected to specify one act as constituting the criminal conduct.”

Thompson argues that the prosecutor’s election should be ignored or at least discounted because it was just argument. Brief at 20-21. But, as noted above, WPIC 4.26 is to be given under circumstances where the prosecution will elect. Here, the prosecutor made the requisite election in her closing. Thompson

does not say where else such an election is to be done. The Washington Supreme Court has held that a clear election by the prosecution “in its closing argument” was sufficient even in the absence of a *Petrich* instruction. *State v. Carson*, 184 Wn.2d 207, 225, 357 P.3d 1064 (2015) (citing three other cases where prosecution made election in closing).

Here, the prosecutor gave a clear election in closing.

The first count, Rape of a Child in the Second Degree, and the second count, Incest in the First Degree, those two counts go together. Those counts are for the first time that Mona was raped when she was 12.

The third count, Incest in the First Degree. That count is for the time that he raped her in the shower.

The fourth count of Incest in the First Degree is for the time that she was down on all fours forced to give her dad oral sex.

And the next count of Incest in the First Degree is for the time that she was forced to give him oral sex for the first time. When he described to her what 69 was for the first time. And she ended up throwing up after he shoved his penis in her mouth.

So to recap: Count I and Count II are the taking the virginity instance; Count III is for the shower; Count IV is for when she was down on all fours in her bedroom; And Count v. is for the first time that he

made her have oral sex.

6RP 956-57. Moreover, a review of MT's testimony reveals that she particularly described these four incidents out of many others.

As to the multiple acts instructions given, in *State v. Borshiem*, 140 Wn. App. 357, 165 P.3d 417 (2007), the jury was instructed that

There are allegations that the Defendant committed acts of rape of child on multiple occasions. To convict the Defendant, *one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt.* You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

140 Wn. App. at 364 (emphasis by the court). This instruction was infirm because "neither this instruction, nor any other, informed the jury that each "crime" required proof of a different act." *Id.* at 367. This infirmity is easily seen in the failure to refer to any count or crime in the italicized clause. In contrast, the present instruction not only required the finding of a specific act but also required that the particular act be tied to a particular count. The modified *Petrich* instructions used in this case addressed and corrected the problem seen in *Borsheim*.

The Washington Supreme Court has never held that a modified *Petrich* instruction is required in cases where there is exact congruence between the number of incidents shown and the number of charges. *State*

v. Carson, 184 Wn.2d 207, 222, 357 P.3d 1064 (2015). Moreover, such instructions are unnecessary when the state elects which acts it relies on for conviction on each count. 184 Wn.2d at 227. “[A]n election can be made by the prosecuting attorney in a verbal statement to the jury as long as the prosecution clearly identifie[s] the act upon which the charge in question is based.” *Id.* (second bracket by the court) (internal quotation omitted), *citing State v. Thompson*, 169 Wn. App. 436, 474-75, 290 P.3d 996 (2012).

There is no authority found that requires a trial court in a multiple act case to include the phrase “separate and distinct” in its jury instructions. *See State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) *review denied* 130 Wn.2d 1013 (1996) (“The trial court must also instruct the jury that they must be unanimous as to which act constitutes the count charged and that they are to find “separate and distinct acts” for each count when the counts are identically charged.”).

There are, then, three ways in which double jeopardy concerns are alleviated in a multiple-act case: by congruence of acts and charges, by the prosecutor’s clear election of which acts apply to which charge, and by modified *Petrich* instruction. Each is an acceptable method as long as it is manifestly apparent to the jury that a conviction must be based on one criminal act. *See also State v. Land*, 172 Wn. App. 593, 600-04, 295 P.3d

782 (2013), *review denied* 177 Wn.2d 1016 (2013) (if evidence, argument, and instructions create clear distinction between different crimes, there child molestation and child rape, it is manifestly apparent that state was not seeking multiple punishment for same offense).

In the present case, two of the three ways to avoid double jeopardy concerns were used--a modified *Petrich* instruction for each count and a clear election from the prosecutor. The task of deciding one act for each count was made manifestly apparent to this jury. There was no error.

B. THE NO CONTACT ORDER ISSUE WAS NOT PRESERVED BELOW BUT IF REVIEWED THE BLANKET ORDER IS TOO BROAD AND SHOULD BE MODIFIED TO ADDRESS THE ACTUAL RELATIONSHIPS IN THIS CASE.

Thompson next claims that the trial court abused its discretion by applying a condition of sentence to Thompson that prohibits contact with the victim and her family. This claim was not preserved below. But if it is reviewable, the state agrees that the order is too broad in that it impacts several persons where there is no compelling state interest in protecting them from Thompson.

1. Unpreserved Error

At sentencing, the defense addressed neither the state's request for the no contact order nor the trial court's order. RAP 2.5(a) provides that

“[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” The exceptions found in the rule do not apply in this case: the trial court had jurisdiction, there was no failure to establish facts upon which relief can be granted, and the present issue is not a “manifest error affecting a constitutional right.” RAP 2.5(a)(1), (2), and (3).

This situation dovetails with the reasons for rule 2.5(a):

The underlying policy of the rule is to encourage[s] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (En banc) (internal quotation omitted; bracket by the court). Here, it is not apparent on its face that the particular condition complained of is illegal. Thus the trial court did not exercise its discretion in an illegal or erroneous manner because Thompson failed to ask the trial court not to impose the condition. Further, Thompson's argument here is not simply that the present no-contact order is improper as a matter of law, but is based on facts picked from throughout the record. The trial court was presented with neither Thompson's legal nor factual argument below and he now asks this court to consider both. *See State v. Valencia*, 169 Wn.2d 782, 786, 239 P.3d

1059 (2010) (a constitutional challenge to a sentencing condition may be reviewed for the first time on appeal as long as the issue is purely legal, does not require factual development, and is final).

An appellate raising an unpreserved error on appeal is required to show that the matter constitutes a manifest constitutional error. RAP 2.5(a) (3). Here that that analysis begins with the understanding that Thompson does assert his relational rights. But the unpreserved error must also be “manifest.” This requires showing that the alleged error had “actual and identifiable consequences to [the sentencing] of the case.” *O’Hara*, 167 Wn.2d at 99 (alteration added). The *O’Hara* Court explains:

The determination of whether there is actual prejudice is a different question and involves a different analysis as compared to the determination of whether the error warrants a reversal. In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

167 Wn.2d at 99-100 (internal citation, page breaks, and footnotes omitted). In the present case, the trial court could not have foreseen the

claimed error. If this court places itself in the shoes of the trial court, it becomes clear that the trial court was not in a position to correct a potential problem here without objection or argument from the defense.

The present issue, if error, is not manifest and is unpreserved and should not be reviewed.

2. *The trial court's no contact order was too broad.*

A sentencing court has discretion to impose “any crime-related prohibitions.” RCW 9.94A.703(3)(f). A crime-related prohibition prohibits “conduct that directly relates to the crime for which the offender has been convicted.” RCW 9.94A.030(10). The word “directly” does not require that the condition be causally related to the crime. *See State v. Autry*, 136 Wn. App. 460, 467, 150 P.3d 580 (2006). A condition that interferes with a fundamental right must be “reasonable necessary to accomplish the essential needs of the State and public order.” *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

In part, Thompson’s argument relies on his fundamental right to marry. And even though he is incarcerated, “there remain certain aspects of marriage that may not be denied absent a compelling state interest.” *Warren*, 165 Wn.2d at 34. The *Warren* case involved a no contact order prohibiting the defendant from contacting his wife, the mother of the two

stepchildren that were his victims. 165 Wn.2d at 31-32. In *Warren*, a compelling state interest was found in that the wife was the mother of the victims and in that she and the victim children needed protection. 165 Wn.2d at 34. She had been pressured by the defendant to take the victims out of school and avoid subpoenas and she testified against the defendant.

The present case is not the same. Here, one person that Thompson is prohibited from contacting is his wife, who is not MT's mother. Further, the state is not aware of any undue pressure that Thompson placed upon his wife. She testified in the defense case-in-chief in favor of Thompson. MT has stated that Thompson's family did not believe her. CP 105. Moreover, MT left that home in favor of living with her biological mother. The state concedes that there does not appear to be a compelling interest in prohibiting Thompson from having contact with his wife.

However, the blanket order remains half-correct. That is, it should apply with full force as to MT's biological mother. Thompson can claim no similar relational rights with regard to his ex-wife. *See* Presentence investigation at CP 105 (wherein MT and her mother express continuing fear of Thompson).

Similarly, it is difficult to argue a compelling interest with regard

to Thompson's stepchildren because they are now adults. Further, each of the stepchildren testified on behalf of Thompson. Thus, with regard to these non-victim, adult children, the order should not stand.

However, bearing the nature of Thompson's convictions in mind, it must be noted that adult children may undertake to have their own children. Given the crimes, the domestic violence aspect of them, the abuse of a position of trust in doing them, and the ongoing pattern of them, Thompson should be prohibited from any contact with minor children of any stripe, including in particular those who are family members.

The state concedes that the offending provision must be stricken. But it should be replaced with an order specifically prohibiting contact with MT, her biological mother, and any minor children in the home.

C. CONDITIONS OF SENTENCE THAT PROHIBIT THOMPSON FROM "SEXUALLY EXPLICIT MATERIAL" AND FROM "SEXUALLY EXPLOITIVE MATERIAL" ARE CRIME-RELATED AND NOT UNCONSTITUTIONALLY VAGUE OR OVER BROAD.

Thompson next claims that the trial court erred by imposing unconstitutionally vague or over broad conditions of sentence. Specifically, Thompson argues that the prohibitions on possessing or accessing "sexually explicit material" and "sexually exploitive materials"

are unconstitutionally vague or overbroad. This claim is without merit because these conditions are well-applied as crime-related prohibitions given the nature of the offenses and the state's interest in rehabilitation of sex offenders.

First, with regard to the phrase "sexually explicit material" there are in fact two conditions of community custody in this case that use that phrase. One is found in the body of the judgement and sentence and reads

Possess/access no sexually explicit materials and/or information pertaining to minors via computer (i.e., internet)

CP 116. Thompson assigns error to this provision. Another use of the phrase is found in judgement and sentence appendix F, number 10; that provision says

Not to possess or access sexually explicit material [of children] (depictions or descriptions of nudity, including sexual or excretory activities or organs, in a lascivious way) or frequent adult bookstores, arcades or places where sexual entertainment is provided and shall not access child pornography, or any information pertaining to minors via the computer, i.e., Internet.

CP 122. The qualifying phrase "of children" is hand-written into the condition. The conditions in appendix F were incorporated into the judgment and sentence. CP 116. Thompson has not assigned error to and does not discuss this second use of the phrase "sexually explicit material."

A trial court's statutory authority to impose community custody

conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). But if statutory authority obtains, a trial court's imposition of community custody conditions is discretionary and will not be reversed unless manifestly unreasonable. *Valencia, supra*, 169 Wn.2d at 791. Conditions of sentence are not ***presumed to be constitutional. 169 Wn.2d at 793. Imposing an unconstitutional condition is manifestly unreasonable. *Id.* at 792. But a trial court may always impose crime-related prohibitions. RCW 9.94A.703. Such conditions "prohibit conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The term "directly related" is broadly defined to include things that are "reasonably related" to the crime. *State v. Irwin*, 191 Wn.App. 644, 656, 364 P.3d 830 (2015).

The vagueness doctrine serves to give notice to a citizen of proscribed conduct and serves to protect against arbitrary enforcement. *Valencia*, 169 Wn.2d at 791. But the person upon whom the conditions are imposed need not be able to predict with absolute certainty what conduct is prohibited. *Id.* at 793. Impossible standards of specificity are not required. *See State v. Norris*, 1Wn. App.2d 87, 94, 404 P.3d 83 (2017). There must be "ascertainable standards of guilt to protect against arbitrary enforcement." *Valencia*, 169 Wn.2d at 794, *quoting State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008).

But courts require a “stricter standard of definiteness” where, as here, the provision concerns material protected by the First Amendment. *Bahl*, 164 Wn.2d at 754. The ultimate standard by which these conditions are judged is when “persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite.” 164 Wn.2d at 754 (alterations by the court). The related constitutional doctrine of over breadth applies when an enactment (here a condition) “reaches a substantial amount of constitutionally protected speech or expressive conduct.” *State v. Patterson*, 196 Wn. App. 451,457, 389 P.3d 612 (2016) *review denied* 187 Wn.2d 1022 (2017). “A statute or ordinance will be overturned only if the court is unable to place a sufficiently limiting construction on a standardless sweep of legislation.” *Patterson*, 196 Wn. App. at 458.

In *State v. Bahl*, our Supreme Court engaged the struggle that always attends attempting to define the word “pornography.” The word remains inscrutable and a condition of sentence using the word was held to be unconstitutionally vague. *Id.* at 758. However, the *Bahl* court decided that the use of the term “sexually explicit” is not constitutionally infirm. *Id.* at 760. Thus *Bahl* does not support Thompson’s argument here.

Nevertheless, Thompson argues that *Bahl*’s acceptance of the phrase “sexually explicit” is very narrow and applies to frequenting sex-

related businesses only. The *Bahl* case addressed the rule that “because of the inherent vagueness of language, citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute”—“[s]uch sources are considered ‘presumptively available to all citizens.’” 164 Wn.2d at 756. That rule was not applied because such presumptively available material still failed to establish the ordinary meaning of ‘pornograph.’ *Id.* There appears to be no such failure with regard to the phrase ‘sexually explicit.’

In *Bahl*, the presumptively available material included RCW 9.68.130(2), which defines the term as

any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

164 Wn.2d at 759-60 (page break omitted). The availability of this definition “bolsters our conclusion that “sexually explicit,” in the context used, is not unconstitutionally vague.”

Significantly, *Bahl* did not require that such statutory citation be placed in the condition. Although it may be good practice to do so, no case found requires such citations. Moreover, the *Bahl* analysis of the

phrase is on all fours with the second use of the phrase “sexually explicit material” in the present case. There, the context that mattered was that the phrase was meant to apply to businesses that provide sexual entertainment. 164 Wn.2d at 759. Here, in the second use, the provision also relates to a prohibition on attending such businesses. But as noted, Thompson has not challenged the second use.

As to the more general use of the term in the first usage, the Court in *State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018) held that the phrase passed a constitutional vagueness challenge when used in a condition that did not include sex-related businesses. 191 Wn.2d at 681. Moreover, although the condition in question contained statutory citations, nowhere in the decision does the court say that the same is necessary.

Nguyen’s convictions were for child rape and molestation. He argued, with regard to crime-relatedness, that the state’s reading of the phrase would allow a prohibition on possession of sexually explicit material to apply in all sex cases. 191 Wn.2d at 685. The Court retorted “[t]hat is no different from requiring all drunk drivers to refrain from using alcohol or all persons convicted of drug offenses not to use drugs.” *Id.* Moreover, “the State need not establish that access to “sexually explicit material” *directly caused* the crime of conviction or will necessarily prevent the convict from reoffending.” *Id.* (emphasis by the court).

In *Nguyen*, the Supreme court has broadened the universe of conditions that may be considered crime-related with regard to sex offenders with a single observation:

Nguyen committed sex crimes and, in doing so, established his inability to control his sexual urges. It is both logical and reasonable to conclude that a convicted person who cannot suppress sexual urges should be prohibited from accessing “sexually explicit materials,” the only purpose of which is to invoke sexual stimulation.

Nguyen, 191 Wn.2d at 686. The Supreme Court repeated these findings with regard to the is discussion of the joined appellant’s challenge to prohibitions against attending sex related businesses. 191 Wn.2d at 687.

The other condition here challenged by Thompson is that he not “Possess/access no sexually exploitive materials(as defined by the Defendant’s treating therapist or CCO).” CP 116. This Court has thoroughly considered this exact condition and held that it is not unconstitutional. *State v. Perkins*, 178 Wn. App. 1024, *5, __P.3d __ (2013) (UNPUBLISHED AND UNBINDING). This because statutory definitions of sexual exploitation of a minor under RCW 9.68A.040(1) and RCW 9.68A.011(4) defining sexually explicit conduct, taken together, in a manner that does “not require a person of ordinary intelligence to guess at what is meant.” *Id.*

Perkins is the only case found that addresses the ‘sexually

exploitive' language. It is significant that the *Perkins* decision predates *Nguyen*. The reasoning of the latter case, as noted, is driven by the Supreme Court's accurate understanding that the commission of sex crimes evinces "an inability to control sexual urges." Thompson's on going pattern of sexual abuse of his underage, biological daughter demonstrates his inability to control himself.

Both the conditions here challenged are related to Thompson's crimes. Both of the complained-of phrases have passed scrutiny on review. The trial court has authority to apply crime-related conditions and did not abuse its discretion in imposing these conditions.

IV. PERSONAL RESTRAINT PETITION

V. AUTHORITY FOR RESTRAINT

The authority for the restraint of William Howard Thompson lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County on June 22, 201, in cause number 16-1-00704-8, upon Thompson's conviction of one count first degree child rape and three counts of first degree incest. CP 111.

A. PERSONAL RESTRAINT STANDARDS.

Thompson's personal restraint petition originated in the superior court under CrR 7.8. The trial court transferred that motion to this court,

finding that although the motion was timely, Thompson failed to make a “substantial showing that . . . he is entitled to relief.”

Thompson’s petition purports to raise three issues: that the trial court sentenced him on an incorrect offender score, that the trial court improperly used aggravating circumstances to enhance his sentence, and that by improperly charging aggravating circumstances, the state violated double jeopardy.

The present petition is timely. RCW 10.73.090(1).

“Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *In re Hagler*, 97 Wn.2d 818, 824, 650 P.3d 1103 (1982). Thompson must prove error by a preponderance of the evidence. *In re Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015). Then, if he is able to show error, he must also prove prejudice. *Crow*, 187 Wn. App. at 421. Constitutional error must have resulted in actual and substantial prejudice. *In re Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). “Actual and substantial prejudice, which ‘must be determined in light of the totality of circumstances,’ exists if the error ‘so infected petitioner’s entire trial that the resulting conviction violates due process.’” *Crow*, 187 Wn. App. at 421 (*quoting In re Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985)).

If the error is nonconstitutional, the petitioner must meet a stricter standard and demonstrate that the error resulted in a fundamental defect which inherently resulted in a complete miscarriage of justice. *In re Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015) (subsequent Habeas Corpus proceedings not cited). This standard requires more than a “mere showing of prejudice.” *In re Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004).

The showings of error and prejudice must be supported by particular facts that, if proven, would entitle Thompson to relief and these factual allegations must be based on more than speculation and conjecture. RAP 16.7(a) (2); *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied* 506 U.S. 958 (1992). Conclusory allegations are insufficient. *Cook*, 114 Wn.2d at 813-14. The petition should be denied absent a prima facie showing of either actual and substantial prejudice or a fundamental defect. *In re Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). If this showing is made, but the record is insufficient, a reference hearing may be ordered. 177 Wn.2d at 18.

I. Offender Score

Thompson claims that the trial court sentenced him on an incorrect offender score. This is incorrect. It appears that the Thompson’s error is found in his assertion that the trial court erroneously gave him 12 points as

his “prior conviction score.” Petition at 2. Since he has no “prior convictions” he believes the score should be zero. Obviously, Thompson misses the scoring of “other current offenses.”

RCW 9.94A.589(1)(a) provides

whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using *all other current* and prior convictions as if they were prior convictions for the purpose of the offender score. . .

(emphasis added). Next, subsection (17) of that statute provides that if the present conviction is a sex offense “count three points for each adult and juvenile prior sex offense.”

Here, each of Thompson’s convictions is a “sex offense.” By RCW 9.94A.030(47)(a)(i), violations of “9A.44 RCW,” are sex offenses and Thompson’s child rape conviction is under RCW 9A.44.076. CP 111. In the same provision, subsection (a)(ii) includes violations of RCW 9A.64.020. Thompsons first degree incest convictions were under RCW 9A.64.020. CP 111-12.

Each of Thompson’s other current sex offenses were counted as three points against each of the other sex offenses. There was no error.

2. Aggravating Circumstances

Thompson next claims that the trial court improperly used aggravating circumstances to enhance his sentence. The three aggravating circumstances alleged, domestic violence, abuse of position of trust, and on-going pattern of sexual abuse, were found by special verdict beyond a reasonable doubt on each of the four counts charged. CP 91-100; *see* CP 79 (jury instructed that aggravating circumstances must be proven beyond a reasonable doubt and unanimously).

But the jury's findings are irrelevant to this argument because the trial court did not use the jury verdicts to go above the standard range. As can be seen, Thompson's 12 points generated a standard range of 210-280 months on the child rape conviction. CP The trial court sentenced him to the top end of the range. Pursuant to RCW 9.94A.507, this standard range number is considered the minimum term for that offense with the maximum being life. CP 113. This claim has no factual support.

3. Charging Aggravating Circumstances

Again here Thompson argues that there were errors in the submission of the aggravating circumstances to the jury. Again the obvious response is that since the trial court did not in fact enhance Thompson's sentence by going above the standard range, there is no issue regarding the jury's findings of aggravating circumstances.

As shown, the 280 months imposed is not an "enhanced sentence"

as Thompson seems to think it is. After that, the state frankly does not understand Thompson's double jeopardy concerns. There was no error.

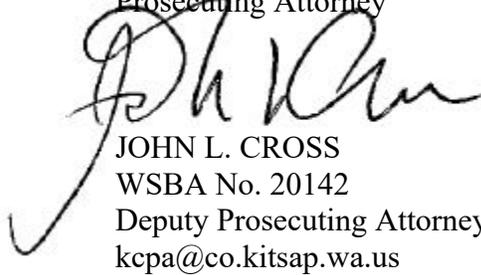
VI. CONCLUSION

For the foregoing reasons, Thompson's conviction and sentence should be affirmed.

DATED July 8, 2019.

Respectfully submitted,

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KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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