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NO. 53087-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT HUYCK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Jack Nevin, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
B. <u>STATEMENT OF THE CASE</u>	3
1. <u>Procedural Facts</u>	3
2. <u>Substantive Facts</u>	4
C. <u>ARGUMENTS</u>	11
1. PROSECUTORIAL MISCONDUCT DEPRIVED HUYCK OF A FAIR TRIAL.....	11
(a) <u>Relevant Facts</u>	11
(b) <u>Applicable Law</u>	12
2. THE TRIAL COURT'S CONSIDERATION OF POTENTIAL "GOOD TIME" CREDITS WHEN IMPOSING SENTENCE WAS IMPROPER.....	16
3. SEVERAL COMMUNITY CUSTODY CONDITIONS SHOULD BE STRICKEN BECAUSE THEY ARE NOT CRIME-RELATED.	20
4. THE \$200 CRIMINAL FILING FEE SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE BASED ON HUYCK'S INDIGENCY.....	27
D. <u>CONCLUSION</u>	28

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Crow</u> 187 Wn. App. 414, 349 P.3d 902 (2015)	17
<u>In re Personal Restraint of Atwood</u> 136 Wn. App. 23, 146 P.3d 1232 (2006)	19
<u>In re Personal Restraint of West</u> 154 Wn.2d 204, 110 P.3d 1122 (2005)	19
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012) <u>cert. denied</u> , 136 S. Ct. 357 (2015)	12, 13
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008)	24
<u>State v. Bautista–Caldera</u> 56 Wn. App. 186, 783 P.2d 116 (1989)	14
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988)	13
<u>State v. Bourgeois</u> 72 Wn. App. 650, 866 P.2d 43 (1994)	17
<u>State v. Buckner</u> 74 Wn. App. 889, 876 P.2d 910 (1994) <u>reversed on other grounds</u> , 125 Wn.2d 915 (1995)	17, 18
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012)	12
<u>State v. Fisher</u> 108 Wn.2d 419, 739 P.2d 683 (1987)	17, 20
<u>State v. Irwin</u> 191 Wn. App. 644, 364 P.3d 830 (2015)	20, 22

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Johnson</u> 180 Wn. App. 318, 327 P.3d 704 (2014).....	22
<u>State v. Kinzle</u> 181 Wn. App. 774, 326 P.3d 870 (2014).....	22
<u>State v. McCormick</u> 166 Wn.2d 689, 213 P.3d 32 (2009).....	25
<u>State v. Nguyen</u> 191 Wn.2d 671, 425 P.3d 847 (2018).....	26
<u>State v. Norris</u> 1 Wn. App. 2d 87, 404 P.3d 83 (2017),.....	25
<u>State v. O’Cain</u> 144 Wn. App. 772, 184 P.3d 1262 (2008).....	21, 23, 26
<u>State v. Ramirez</u> __Wn.2d__, 426 P.3d 714 (2018).....	3, 27, 28
<u>State v. Riley</u> 121 Wn.2d 22, 846 P.2d 1365 (1993).....	22
<u>State v. Sledge</u> 133 Wn.2d 828, 947 P. 2d 1199 (1997).....	17
<u>State v. Thorgerson</u> 172 Wn.2d 438, 258 P.3d 43 (2011).....	13
<u>State v. Zimmer</u> 146 Wn. App. 405, 190 P.3d 121 (2008).....	21
 <u>FEDERAL CASES</u>	
<u>Packingham v. North Carolina</u> __U.S.__, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017).....	23, 24

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUES AND OTHER AUTHORITIES</u>	
House Bill 1783	27, 28
Juvenile Justice Act.....	17
Laws of 2018, ch. 269, § 6.....	27
Laws of 2018, ch. 269, § 17.....	27
RCW 9.94A .030.....	20
RCW 9.94A.505.....	20
RCW 9.94A.703.....	20, 25
RCW 9.94A.728.....	18
RCW 9.94A.729.....	18, 19, 20
RCW 10.01.160	27
RCW 10.101.010	27
RCW 36.18.020	27
Sentencing Reform Act.....	17, 18
U.S. Const. Amend. VI.....	12
U.S. Const. Amend. XIV	12
Const. Art. I, § 22.....	12

A. ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived appellant of a fair trial.
2. The trial court erred in sentencing appellant by considering how much earned early release he might be eligible for it setting the minimum term of incarceration.
3. The trial court erred in prohibiting appellant's use of alcohol as a condition of community custody. CP 145 (Condition 11).
4. The trial court erred in prohibiting appellant from entering areas where children's activities regularly occur. CP 146 (Condition 19).
5. The trial court erred in prohibiting appellant from entering drug areas. CP 146 (Condition 21).
6. The trial court erred in prohibiting appellant from entering anywhere that alcohol is the primary source of business or if you have to be 21 years of age or older to enter. CP 146 (Condition 22).
7. The trial court erred by requiring appellant to be evaluated for alcohol and/or chemical dependency. CP 146 (Condition 23).
8. The trial court erred in prohibiting appellant from accessing or using the internet. CP 146 (Conditions 24).
9. The trial court erred in prohibiting appellant from using a computer, phone or computer-related device or to accessing any social media sites. CP 146, (Condition 25).

10. The trial court erred by requiring appellant to obtain mental health and anger management evaluations. CP 146 (Condition 26).

11. The \$200 criminal filing fee should be stricken from the judgment and sentence based on appellant's indigency.

Issues Pertaining to Assignments of Error

1. Appellant's teenage daughter accused him of raping and molesting her when she was a young child. Her mother and the wife of the accused testified she did not believe the accusations, noting they were similar to those depicted in a television show they watched together shortly before the allegations arose. The daughter testified next but concluded early when she had an apparent emotional breakdown when asked to provide details of the abuse. Was appellant deprived of a fair trial when the following day the prosecutor opened the day by eliciting from the daughter that her mother never hugged her after her emotional breakdown at trial the day before, thereby improperly appealing to the passion and prejudices of jurors?

2. Should this Court remand for resentencing because the trial court improperly considered how much earned early release time appellant might be eligible for in setting the minimum term of incarceration?

3. Should this Court strike several conditions of community custody and remand to the trial court for resentencing, where those

conditions bear no relationship to the convicted offenses and are therefore not crime-related, as required by statute?

4. Under the Washington Supreme Court's recent decision in State v. Ramirez, ___Wn.2d___, 426 P.3d 714 (2018), must the \$200 criminal filing fee be stricken from the judgment and sentence, where appellant was indigent at the time of sentencing?

B. STATEMENT OF THE CASE

1. Procedural Facts

In March 2017, the Pierce County Prosecutor charged appellant Robert Warren Huyck with three counts of first degree child molestation and one count of first degree child rape. CP 3-4. The prosecution alleged Huyck molested and raped his youngest child and daughter, J.H., when she was under 12 years of age. CP 1-2.

Huyck was found guilty as charged following a jury trial before the Honorable Jack Nevin, Judge. CP 98-101; 1RP-10RP.¹ Huyck was sentenced on December 14, 2018, to 260 months to life for the rape and

¹ There are eleven individually paginated volumes of verbatim report of proceedings referenced as follows: **1RP** – October 22, 2018; **2RP** – October 23, 2018; **3RP** – October 24, 2018; **4RP** – October 25, 2018; **5RP** – October 29, 2018; **6RP** – October 30, 2018; **7RP** – October 31, 2018; **8RP** – November 1, 2018; **9RP** - November 5, 2018; **10RP** November 7, 2018; and **11RP** – December 14, 2018.

concurrent 198-month to life sentences for each molestation. CP 130-46; 1RP 14-15.

Huyck appeals. CP 149-68.

2. Substantive Facts²

By the time of trial, Huyck was 57 years old (d.o.b. August 20, 1961) and had been married to Deanne Huyck (Deanne) for 34 years. 5RP 73; 8RP 6. They had six children together, listed here with their ages at the time of trial; Ryan (34), Sara (32), Joshua (28), Caleb (21), Ben (19) and J.H. (17). 5RP 74, 166; 7RP 42; 8RP 7-10. J.H. was born June 28, 2001. 5RP 73, 166. According to Deanne, “Caleb is on the autism spectrum and things that are upsetting and that are difficult are difficult for him in a way that’s magnified.” 5RP 106.

On January 5, 2016, J.H. attempted suicide by ingesting Tylenol. 5RP 102-04; 6RP 39, 44; 8RP 56. When Huyck got home from work that day he found her dressed in dark clothes laying on the floor in apparent stomach pain. When Huyck asked what she was doing, J.H. admitted she had done something “stupid” by taking Tylenol but could or would not say how many pills she had taken. 8RP 56. Huyck and Deanne discussed what to do, and eventually decided to take J.H. to the hospital because they were unsure whether J.H. had ingested a lethal dose or not. 5RP 102-

² Additional facts are set forth in the appropriate argument sections.

04; 6RP 52; 8RP 57-59. Huyck took J.H. to the emergency room at St. Anthony's hospital while Deanne stayed with Ben and Caleb, who both still lived at home. 6RP 52; 8RP 59.

At St. Anthony's it was learned J.H. had taken twice the lethal dose of Tylenol. 8RP 98. It was also discovered she had been cutting her arms and thighs. 8RP 60-61. J.H. was treated for the Tylenol overdose and cuts and then transported by ambulance to Mary Bridge Children's Hospital and Huyck followed in his car. 8RP 61-62.

Huyck recalled being asked by staff at Mary Bridge if he could provide a reason for J.H.'s suicide attempt. Huyck offered that she was depressed about the anniversary of her maternal grandmother's death and about being bullied at school. 8RP 62. Huyck also recalled leaving J.H.'s room at both St. Anthony's and Mary Bridge at the request of the treatment providers so they could ask J.H. about any abuse issues. 8RP 63. Several days later, J.H. was transferred to a children's psychiatric hospital in Seattle, where she remained for about two weeks before coming home. 8RP 63-65.

While J.H. was at the psychiatric hospital, Huyck was directed by her treatment providers to make his home safe for when she returned, which meant removing items she might use to hurt herself, much of which had been done already out of concerns for Caleb's occasional violent

behaviors. 8RP 66-67. When Huyck searched J.H.'s room, he found an empty Tylenol bottle and a bloody modified razor under her bed, which he removed. 8RP 66.

According to J.H., she attempted suicide on January 5, 2016 because she was depressed and feeling alone at home and school, and there seemed to be no path out of her depression. 6RP 39. J.H. denied the alleged sexual abuse was the basis for the attempt, offering that it was a "background factor," but not the catalyst, which instead was her perceived lack of family support exacerbated by the anniversary of her grandmother's passing, with whom she had been very close, and whose death she blamed on her mother. 6RP 40-43. The recent loss of an aunt and Caleb's drug-induced psychosis episode also played factors in her depression. 6RP 41. J.H. noted the same depression had prompted her to start cutting herself in 2015. 6RP 47.

J.H. initially denied that staff at the hospitals she was in after the suicide attempt ever asked if she had been abused. 6RP 54. Later she said she could not remember. 6RP 55. Eventually J.H. testified she recalled being asked in Huyck's absence if she had ever been sexually abused and that she had denied it. 6RP 56-57.

J.H. recalled that when she started cutting herself, she had been trying to come up with a way to move out of the family home, and that

was still on her mind when she attempted suicide. 6RP 57-58. Her hope had been to move in with her brother Joshua and his wife. 6RP 58. When she mentioned the idea to her father, he seemed “mostly okay about it.” 6RP 58.

After J.H. was discharged from the hospital she started treatment with Dr. Naomi Huddleston, a clinical child psychologist. 6RP 59, 136. They met for the first time on January 27, 2016. 6RP 139. They then met weekly from February through April 2016. 6RP 150. Huddleston recalled J.H.’s main concerns during the initial few months were about being bullied in school since kindergarten and her brother Caleb’s “explosive” episodes. 6RP 146. She also claimed she “felt picked on and blamed for everything,” that her parents treated her like an accidental “afterthought,” and her mother loved her brothers more than her. 6RP 146-47. Based on these feelings, Huddleston diagnosed J.H. with a “major depressive disorder.” 6RP 151.

The April 6, 2016 session between Huddleston and J.H. was the first time J.H. raised the prospect that she had been sexually abused by her father but refused to divulge details. 6RP 151-52. Huddleston, a mandatory reporter, did not report the allegation because of the lack of detail. 6RP 154. The subject was not mentioned at their April 13, 2016 session, but did come up again at the April 20, 2016 session. 6RP 159.

According to Huddleston, at the April 20th session J.H. claimed her father had sexually abused her from the age of 4 until a few year ago. She could not provide a specific time that it stopped. 6RP 159. J.H. explained it started with her father having her sit on his lap as he watched pornography on a computer, and that it eventually progressed to him touching her inappropriately. 6RP 160-61. J.H. told Huddleston her father would also molest her while they played board games on his bed, and that he told her not to tell anyone or he would stop playing with her. 6RP 161. J.H. told Huddleston the last time it happened was when she was still in elementary school, and that she had told her father that she did not want him to do it anymore. 6RP 161. J.H. told Huddleston that after the sexual abuse stopped, her father became verbally abusive towards her. 6RP 162. J.H. told Huddleston that one of her most vivid memories of sexual abuse was when her father took her into the bathroom, pulled down her pants and “started feeling her.” 6RP 162. Huddleston reported J.H.’s claims to “CPS.” 6RP 162.

At trial, J.H. reiterated the claims she had made to Huddleston a year and a half earlier, albeit with more detail. 5RP 184-85; 6RP 8-33. Regarding the bathroom incident, J.H. explained that as they were playing a board game her father asked her if she wanted to try something. When she did not respond, J.H. claims her father took her into the bathroom,

removed her shorts and underwear, lay her on the floor and started to touch her vagina with his hands and mouth. 5RP 188-90. When J.H. told him to stop, he did. 6RP 5-6.

J.H. claimed she later confronted her father in his room about the alleged past abuse when she was in middle school. She claimed he responded by telling her that if she told anyone, all of her siblings would go to foster care and Caleb would kill himself. 6RP 36-37. She also claimed she discussed the abuse with a middle school friend, "Jenna," at one point. 6RP 38, 105.

J.H. also recalled revealing prior abuse to her mother, Deanne, twice, once after they watched an episode of "Criminal Minds" that involved sex abuse, and once outside Huddleston's office before an appointment. 6RP 66-67, 100.

Deanne confirmed that in late March or early April 2016, after they had watched an episode of "Criminal Minds," J.H. told her she had been sexually abused by her father when she was between the ages of four and seven in a manner similar to the sexual abuse portrayed in the show. 5RP 113-17, 123, 152-57. Deanne recalled that when she questioned J.H. about the accusation, J.H. got upset and they "had words." 5RP 123. Deanne decided not to report the claim because she did not believe them.

5RP 123-24. Three weeks later J.H. made similar claims to Huddleston.
5RP 163.

Huyck testified. 8RP 6-156. He acknowledged J.H. received less attention from him as a result of Ben and Caleb's behavioral problems growing up. 8RP 20-22. He also acknowledged he and J.H. would sometimes play cards or board games on the bed in the master bedroom. 8RP 52, 108. He denied, however, ever touching J.H. inappropriately or ever watching pornography with her, or that he ever looked at pornography on the family's computers, noting he had rigged their modem to prevent access to such materials. 8RP 43, 53-54, 94, 110, 112, 122-23, 134. He also denied ever warning J.H. against telling anyone about his alleged abuse. 8RP 59.

In closing argument, Huyck's counsel argued J.H.'s suicide attempt was a plea for more attention, and that when her parents did not respond as she suspected, she resorted to false sexual abuse allegations against her father. 9RP 90.

C. ARGUMENTS

1. PROSECUTORIAL MISCONDUCT DEPRIVED HUYCK OF A FAIR TRIAL.

(a) Relevant Facts.

J.H.'s mother, Deanne, testified at Huyck's trial as a prosecution witness. 5RP 72-165. Deanne testified that after she and J.H. watched an episode of "Criminal Minds" together, J.H. accused Huyck of having sexually molested her in the past, but Deanne did not believe her given J.H.'s inability to describe the alleged misconduct with any detail. 5RP 114-17, 123-24, 152-57.

The next prosecution witness was J.H. 5RP 165. She first testified about her general background and the layout of the family home. 5RP 165-83. The prosecutor then began questioning J.H. about the sex abuse allegations she had made. 5RP 184-88. When the prosecutor's questions delved into exactly what J.H. claimed Huyck did to her, J.H. refused to provide details, stating, "I don't want to describe it." 5RP 190. The prosecutor asked if it would help "to take a break," J.H. replied, "I don't know." The prosecutor's subsequent request to recess for the day because J.H. was "in tears" was granted. 5RP 190; 6RP 3.

J.H. retook the witness stand as the first witness the next day. 6RP 4. Over defense relevance objection, the prosecutor was allowed to

inquire of J.H. who the two women were that were seated in the front row of the galley when she testified the day before on the basis it was relevant to “her demeanor and bias.” 6RP 4. J.H. explained they were her mother’s best friend and an aunt, both who she considered friends with her mother more than her. Id. The following exchange then occurred:

[PROSECUTOR:] Likewise, after court yesterday, at any time either yesterday here at the courthouse or at home, did your mom ever give you a hug yesterday?

[J.H.:] No.

[PROSECUTOR:] Did that include before court and after court.

[J.H.:] Yes.

6RP 4-5. The prosecutor then elicited details from J.H. about alleged sexual abuse. 6RP 5-33.

(b) Applicable Law.

The right to a fair trial is a fundamental liberty guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012), cert. denied, 136 S. Ct. 357 (2015). Reversal is warranted when the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Prejudice is established when

it is shown there is a substantial likelihood the prosecutor's misconduct affected the verdict. Id. at 760.

If a defendant fails to object to the misconduct at trial, reversal is still warranted if the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Id. at 760-61. Under this heightened standard of review, the defendant must show that “(1) ‘no curative instruction would have obviated any prejudicial effect on the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making a prejudice determination, this Court should “focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” Id. at 762.

It is improper for a prosecutor “to inflame the passions or prejudices of the jury.” Glasmann, 175 Wn.2d at 704 (quoting Am. Bar Ass'n, Standards for Criminal Justice, std. 3-5.8(c) (2d ed. 1980)). For example, during closing argument a prosecutor may not deliberately appeal to the jury's passions and prejudice and encourage a verdict not based on properly admitted evidence. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

Argument that “exhorts the jury to send a message to society about the general problem of child sexual abuse” qualifies as such an improper emotional appeal. State v. Bautista–Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (emphasis omitted).

Here, the prosecutor used J.H.’s emotional breakdown at the end of her first day of testimony to garner sympathy and passion from the jury for J.H. by eliciting on her second day of testimony that her mother never comforted her after her emotional breakdown the day before. 6RP 4-5. This inquiry did not provide evidence relevant to whether Huyck sexually abused J. H. Instead, the inquiry served only to prejudice the jury against Huyck by demonizing his wife Deanne, who supported his defense by stating she did not believe J.H.’s allegation of sexual abuse, as an uncaring mother more inclined to provide a defense for her husband than provide emotional support for her child. This could serve only to inflame the passions of jurors in favor of J.H. by making them more likely to give her the benefit of the doubt with regard to the allegations. This cut directly against the reasonable doubt standard applicable to criminal prosecutions, thereby effectively lowering the prosecution’s burden of proof to convict.

There was no physical evidence supporting J.H.’s claims against her father. There were no eyewitnesses. There was no evidence supporting the notion that Huyck was sexually attracted to children, much

less to his own children. Therefore, jurors had to decide whether to convict based solely on who they believed, J.H., who made repeated uncorroborated claims Huyck exposed her to pornography and touched her inappropriately, or Huyck, who admitted not giving J.H. as much attention as she deserved growing up but steadfastly denied sexually abusing her. By demonizing the one prosecution witness that did not believe J.H.'s allegations of abuse, J.H.'s mother Deanne, the prosecutor improperly inflamed the passion and prejudiced of the jurors in favor of J.H. and the prosecution and against Huyck and his defense.

To the extent defense counsel's relevance objection made just prior to the offending inquiry by the prosecutor failed to adequately alert the trial court to the improper nature of the prosecution tactic, a point Huyck does not concede, the prosecutor's misconduct was nonetheless so blatant and ill-intentioned that it warrants reversal even under the heightened standard of review because no instruction could have cured the resulting prejudice. Although who the woman were in the front row during J.H.'s initial testimony may have had some relevance to J.H.'s demeanor as a witness, whether her mother hugged her following her emotional breakdown *after* she had concluded her first day of testimony had no relevance whatsoever to her credibility and served only to encourage jurors to be sympathetic to J.H. based on nonevents that had nothing to do

with whether the allegations against Huyck were true or false. In other words, the prosecutor's improper inquiry had no legitimate purpose at trial and served only to blatantly inflame the passions and prejudices of jurors against Huyck and in favor of J.H. in a case that turned on which of them jurors believed more. Instructing jurors to ignore the evidence would have been futile in light of how emotionally charged it was. This Court should therefore reverse Huyck's convictions.

2. THE TRIAL COURT'S CONSIDERATION OF POTENTIAL "GOOD TIME" CREDITS WHEN IMPOSING SENTENCE WAS IMPROPER

Huyck was sentenced on December 14, 2018. 11RP 3-22. The prosecution recommended a high-end standard range sentence of 318 months (26.5 years) to life. 11RP 6-7. The defense requested a low-end standard range sentence of 240 months (20 years) to life, noting "[t]here's very little good time given in these cases." 11RP 10.

Following the recommendations from the defense and prosecution, the following exchange occurred:

THE COURT: Tell me, if you would, to refresh my recollection, how, if at all, the nature of this offense impacts upon the DOC good time calculation, if, in fact –

[DEFENSE COUNSEL]: I think it is 10 percent.

THE COURT: Is it different than that which would be otherwise afforded?

[DEFENSE COUNSEL]: I think it's 10 percent.

[PROSECUTOR]: My recollection is 15 percent.

[DEFENSE COUNSEL]: Or 15.

[PROSECUTOR]: But I'm not entirely sure about that.

[DEFENSE COUNSEL]: I know they change it periodically. I know it's not more than 15.

THE COURT: That's why I asked, actually.

11RP 10-11.

Thereafter, following Huyck's brief allocution (11RP 13-14), the court imposed a 260-month to life sentence for the rape conviction, and concurrent 198-month sentences for each of the molestation convictions. CP 130-46; 11RP 14-15.

Both this Court and the Supreme Court have repeatedly cautioned lower courts not to rely on the possibility of good time credits when imposing sentence. This is true under both the Sentencing Reform Act (SRA) and Juvenile Justice Act (JJA). See, e.g., State v. Sledge, 133 Wn.2d 828, 845, 947 P. 2d 1199 (1997); State v. Fisher, 108 Wn.2d 419, 429 n.6, 739 P.2d 683 (1987); In re Crow, 187 Wn. App. 414, 425, 349 P.3d 902 (2015); State v. Buckner, 74 Wn. App. 889, 899, 876 P.2d 910 (1994), reversed on other grounds, 125 Wn.2d 915, 919 (1995); State v. Bourgeois, 72 Wn. App. 650, 659-661, 866 P.2d 43 (1994).

The reasoning behind these cases is simple, it is "inappropriate" to determine the length of a sentence by relying on an "entirely speculative prediction of the likely behavior of an offender while in confinement." Fisher, 108 Wn.2d at 430 n.6. Stated another way, "There is no guaranty

credits will ever be earned, either because the prisoner fails to qualify or because the Legislature alters the rules." Buckner, 74 Wn. App. at 899.

According to the SRA, good time credits play no role until the offender begins serving his sentence. Specifically, RCW 9.94A.728 provides no person committed to the custody of the DOC may leave confinement before his sentence expires, except in a few specifically delineated circumstances, one of which is "An offender may earn early release time as authorized by RCW 9.94A.729." RCW 9.94A.728(2).

That statute provides:

The term of the sentence of an offender committed to a correctional facility operated by the department may be reduced by earned release time in accordance with procedures that shall be developed and adopted by the correctional agency having jurisdiction in which the offender is confined. The earned release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction. The correctional agency shall not credit the offender with earned release credits in advance of the offender actually earning the credits.

RCW 9.94A.729(1)(a).

Regardless of the type of sentence imposed, earning early release credits are not guaranteed. The offender may ultimately not qualify for any credits at all, or the Legislature may choose to modify or extinguish the program altogether. Moreover, the SRA specifically delegates to the

Department of Corrections (DOC) the power to award early release credits and may do so only after the offender has been sentenced and actually earned the credits. RCW 9.94A.729(1)(a). See In re Personal Restraint of Atwood, 136 Wn. App. 23, 26, 146 P.3d 1232 (2006) ("Correctional authorities, both county and state, have original authority over good time awards."); In re Personal Restraint of West, 154 Wn.2d 204, 212, 110 P.3d 1122 (2005) (statutory language grants exclusive authority to determine prisoner's earned early release time to the correctional agency having jurisdiction over the offender; trial court's handwritten notation restricting good time rendered judgment and sentence facially invalid). If the DOC cannot assume credits will ultimately be earned, courts should not either.

Here, the sentencing court imposed a 260-month term of incarceration for Huyck's rape conviction, just less than 10% more than the 240-month recommendation by defense counsel, which is about how much "good time" credits both the prosecutor and defense counsel guesstimated Huyck would be eligible to earn. It cannot reasonably be disputed that the trial court considered the amount of earned early release time Huyck was eligible to earn in deciding how long of a sentence to impose. This is the only reasonable inference that can be drawn from the court's inquiry about "good time" credits; why would the court ask about "good time" credits if it was not using it to determine the length of

Huyck's sentence? This is prohibited under RCW 9.94A.729(1)(a), Fisher, and the other cases rejecting consideration at sentencing of potential earned early release credits.

The trial court unlawfully invaded the DOC's exclusive province by considering possible good time credits when determining an appropriate sentence. Therefore, if this Court upholds the convictions, it should still remand for resentencing.

3. SEVERAL COMMUNITY CUSTODY CONDITIONS SHOULD BE STRICKEN BECAUSE THEY ARE NOT CRIME-RELATED.

Sentencing courts have authority to require offenders to comply with "any crime-related prohibitions" during the course of community custody. RCW 9.94A.703(3)(f); see also RCW 9.94A.505(9) ("As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter."). A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A .030(10).

A sentencing court's imposition of crime-related community custody conditions is reviewed for abuse of discretion. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). Appellate courts review the factual bases for crime-related conditions under a "substantial evidence"

standard. Id. In State v. Zimmer, Zimmer was convicted of methamphetamine possession. 146 Wn. App. 405, 410-11, 190 P.3d 121 (2008). The trial court imposed a community custody condition prohibiting her possession of cellular phones and data storage devices. Id. at 411. The appellate court reversed, holding the condition did not directly relate to Zimmer's crimes. Id. at 413. Though such devices may be used to further illegal drug possession, the court explained, there was no evidence in the record (1) that Zimmer possessed a cell phone or data storage device in connection with possessing methamphetamine, or (2) that she intended to distribute or sell methamphetamine using such devices. Id. at 414.

In State v. O'Cain, O'Cain was convicted of second degree rape. 144 Wn. App. 772, 774, 184 P.3d 1262 (2008). As a condition of community custody, the trial court prohibited O'Cain from accessing the internet without prior approval from his CCO and sex offender treatment provider. Id. at 774. The appellate court struck the condition, reasoning:

There is no evidence in the record that the condition in this case is crime-related. There is no evidence that O'Cain accessed the internet before the rape or that internet use contributed in any way to the crime. This is not a case where a defendant used the internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that internet use contributed to the rape.

Id. at 775.

Similarly, in State v. Johnson, 180 Wn. App. 318, 330-31, 327 P.3d 704 (2014), this Court struck an internet-related condition because “there [were] no findings suggesting any nexus between [the defendant’s] offense and any computer use or Internet use.”

By contrast, in State v. Riley, restriction on Riley’s computer use was crime-related because he was convicted of computer trespass and was a “self-proclaimed computer hacker.” 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). In Irwin, a prohibition on possessing a computer or computer related device was crime-related where the record contained evidence “that Irwin took and stored pornographic images as part of his of molesting underage females.” 191 Wn. App. at 658. Similarly, in State v. Kinzle, the court upheld a condition prohibiting Kinzle from dating women with minor children or forming relationships with families who have minor children because his victims were “children with whom he came into contact through a social relationship with their parents.” 181 Wn. App. 774, 785, 326 P.3d 870 (2014).

Several of the conditions imposed on Huyck are not crime related. For instance, the trial court imposed condition 24: “No internet access or use without prior approval of the supervising CCO, Treatment Provider, and the Court.” CP 146. The court also imposed condition 25: “No use of a computer, phone, or computer-related device with access to the Internet

or on-line computer service except as necessary for employment purposes (including job searches). The CCO is permitted to make random searches of any computer, phone or computer-related device which the defendant has access to monitor compliance with this condition. Also, do not access any social media sites (Facebook, Twitter, Snapchat, etc.) of any kind.” CP 146.

O’Cain is directly on point. There is no evidence in the record that Huyck used the internet, e-mail, or any social media sites to perpetrate the offenses. Although J.H. claimed some of the abuse occurred while watching pornography on a computer, but there was no allegation he used the internet to access the pornography or to further the alleged sexual abuse. To the contrary, a search of the Huyck family computer failed to reveal the presence of any pornographic materials. 6RP 189-91. Similarly, there is no evidence that Huyck used a cell phone or social media sites to further the sexual abuse of J.H.

Notably, the United States Supreme Court has held conditions restricting a sex offender’s access to all social networking sites violates the First Amendment. In Packingham v. North Carolina, __U.S.__, 137 S. Ct. 1730, 1737, 198 L. Ed. 2d 273 (2017), the Court struck down a North Carolina statute that made it a felony for a registered sex offender to gain

access to a number of websites, including common social media websites, like Facebook and Twitter. The Court held the prohibition was unconstitutional, emphasizing “the State may not enact this complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.” Id. at 1738.

Packingham demonstrates courts must take particular care in evaluating conditions, like those here, that may burden sensitive First Amendment freedoms. State v. Bahl, 164 Wn.2d 739, 757-58, 193 P.3d 678 (2008). Such conditions must be “narrowly tailored and directly related to the goals of protecting the public and promoting the defendant’s rehabilitation.” Id. at 757. Barring Huyck access to the internet, e-mail, and computers fails both this heightened standard and the lower crime relatedness standard, where there was no nexus between Huyck’s offenses and any internet, computer or phone use. The conditions should be stricken.

The trial court also imposed condition 19: “Stay out of areas where children’s activities regularly occur or are occurring,” and provided several examples like daycare facilities, playgrounds, and sports fields being used for youth sports. CP 146. This condition is likewise not crime-related. As discussed, all the alleged incidents occurred in the Huyck home with his biological daughter. There were no allegations that

Huyck lurked in areas like playgrounds or arcades, searching for a victim. Nor was there any suggestion Huyck used such locations to facilitate the convicted offenses.

Conditions like the one imposed here can be particularly difficult to comply with. For instance, in State v. McCormick, 166 Wn.2d 689, 692, 213 P.3d 32 (2009), the sentencing court required that McCormick “not frequent areas where minor children are known to congregate.” His special sex offender sentencing alternative (SSOSA) was ultimately revoked when he went to a food bank that happened to be in the same building as a grade school. *Id.* at 693-96.

Again, courts must be careful to impose only crime-related prohibitions. The restriction on Huyck going to “areas where children’s activities regularly occur or are occurring” does not meet that standard, where there is no nexus between such locations and the convicted crimes. This condition should likewise be stricken.

The trial court also ordered Huyck to “not use or consume any alcohol.” CP 145 (condition 11). RCW 9.94A.703(3)(e) permits sentencing courts to prohibit offenders “from possessing or consuming alcohol.” However, as the court of appeals recently recognized, using alcohol is different than consuming alcohol. State v. Norris, 1 Wn. App. 2d 87, 99-100, 404 P.3d 83 (2017), reversed on other grounds, State v.

Nguyen, 191 Wn.2d 671, 425 P.3d 847 (2018). The statute authorizes restriction only on “consuming alcohol.” There is no evidence in the record that Huyck used alcohol in any way in the commission of the offenses. The word “use” should be stricken from condition 11.

Similarly, the trial court ordered that Huyck “not enter drug areas as defined by the court or CCO,” obtain evaluations for alcohol and chemical dependency, mental health and anger management, and “not enter any bars/taverns/lounges or other places where alcohol is the primary source of business. This includes casinos and or any location which requires you to be over 21 years of age.” CP 146, conditions 21, 22, 23 & 26). Like the other improper conditions, these are not crime related because there is no evidence drugs, alcohol, anger or mental health issues contributed to the commission of Huyck’s offenses. To the contrary, Huyck’s un rebutted claims reported in the Department of Corrections presentence report are that alcohol is “not a huge part of his life” and that neither he nor any of his immediate family have had troubles with illegal drugs or alcohol. CP 110. Likewise, Huyck denied ever being diagnosed with mental or emotional health issues. CP 110.

If this Court upholds Huyck’s convictions, it should still strike the eight challenged community custody conditions (11, 19, & 21-26) and remand to the trial court for resentencing. O’Cain, 144 Wn. App. at 775.

4. THE \$200 CRIMINAL FILING FEE SHOULD BE STRICKEN FROM THE JUDGMENT AND SENTENCE BASED ON HUYCK'S INDIGENCY.

In Ramirez, 426 P.3d at 717, 722, the Washington Supreme Court discussed and applied House Bill (HB) 1783, which took effect on June 7, 2018 and applies prospectively to cases on direct appeal. HB 1783 amended RCW 10.01.160(3) to mandate: "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 6. The bill also amended RCW 36.18.020(2)(h) to prohibit imposing the \$200 criminal filing fee on indigent defendants. Laws of 2018, ch. 269, § 17. Under RCW 10.101.010(3)(c), a person is "indigent" if he or she receives an annual income after taxes of 125 percent or less of the current federal poverty level.

This amendment "conclusively establishes that courts do not have discretion to impose such LFOs" on individuals "who are indigent at the time of sentencing." Ramirez, 426 P.3d at 723. In Ramirez, the court struck discretionary LFOs and the \$200 criminal filing fee because Ramirez was indigent at the time of sentencing, i.e., his income fell below 125 percent of the federal poverty guideline. Id.

At sentencing, the trial court ordered Huyck to pay the previously mandatory \$200 criminal filing fee. CP 133. The trial court, however,

found Huyck to be indigent and allowed him to seek appellate review at public expense. CP 173-74. The record therefore demonstrates Huyck was indigent at the time of sentencing. HB 1783 applies prospectively to Huyck because his direct appeal is still pending. As such, the sentencing court improperly imposed the \$200 criminal filing fee, which may not be imposed on indigent defendants. Ramirez, 426 P.3d at 723.

D. CONCLUSION

Egregious prosecutorial misconduct warrants reversal of Huyck's convictions. In the alternative, remand for resentencing is necessary.

DATED this 24th day of July 2019.

Respectfully submitted,

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