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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

RUSSELL PAUL KASSNER, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENT OF ERROR**

Appellant assigns no error to the trial court's factual findings, but complains generally about the trial court's failure to grant his CrR 7.8 motion.

## **II. ISSUES PRESENTED**

1. Did the trial court abuse its discretion in finding that the defendant had failed to produce any evidence in support of his claim that the trial court failed to consider his capacity to commit a crime as a juvenile when he pleaded guilty to the crime as an adult?
2. Has the defendant failed to establish a basis for escaping the one-year time-bar of RCW 10.73.090?
3. Has the defendant failed to establish any error constituting a fundamental defect that resulted in a complete miscarriage of justice?

## **III. STATEMENT OF THE CASE**

Eleven-year-old B.K. reported that defendant forced her to remove her clothes, held her down, and penetrated her vagina with his finger; she got away from him and ran into her bedroom, but he forced his way in and repeated the attack. She also disclosed that when she was about four years old, the defendant forced her to remove her clothes and touched her all over her body, including on her private parts. He also

made her touch his penis. Law enforcement referred the case to the Spokane County Prosecutor's Office on October 17, 1995 - after the defendant's eighteenth birthday - and the State charged the defendant with rape in the second degree for his conduct as a 17-year-old, and with molestation in the first degree for his conduct *on or about* the time he was 10 or 11 years-old. CP 1. The charging document was filed on November 28, 1995.

The defendant decided to seek an agreed SOSSA (Special Sexual Offender Sentencing Alternative) sentence pursuant to a plea agreement.

On March 15, 1996, Kassner entered a guilty plea to the child molestation count in exchange for dismissal of the more serious rape charge, an agreement not to charge further related charges, and a recommendation for a SOSSA sentence.<sup>1</sup> CP 54 (Guilty Plea, at 4).<sup>2</sup> He admitted that he touched B.K., and that he touched her for sexual gratification. CP 57. He informed his counsellor, Paul Wert, during his

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<sup>1</sup> Defendant moved to withdraw his plea, yet fails to include his plea of guilty with the clerk's papers in this case.

<sup>2</sup> A supplemental designation of clerk's papers is filed contemporaneously herewith and are expected to be numbered 51-65.

psychological and psychosexual evaluation<sup>3</sup> that he was *14 or 15* years old at the time the charged molestation. *See*, Attach. A at A-3.

Although his sentencing range was 51 to 68 months, Kassner was ordered to serve just three months of confinement under the Special SOSSA option. CP 8. However, his SOSSA was revoked on August 8, 1997, because he failed to comply with sex offender treatment, drug monitoring, and polygraph requirements. He was ordered to serve the remaining portion of his 51-month sentence. CP 63-65 (Order Modifying Sentence).

The State charged Kassner with Failure to Register as a Sex Offender on July 21, 2015, under Spokane County Superior Court No. 15-1-02716-7. He pleaded guilty to the charge on August 5, 2015,

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<sup>3</sup> After his guilty plea on March 15, 1996, the trial court ordered a presentence investigation, (CP 59-61) and, additionally, ordered a SSOSA evaluation to be conducted by Paul Wert, (CP 62). These actions were required by then existing RCW 9.94A.120(8)(a)(i), *et. seq.* The judge was required to receive and review these evaluations and investigations before sentencing. RCW 9.94A.120(8)(a)(ii) (1996). However, such evaluation reports were considered confidential and were not filed as regular public documents, and were kept in a confidential file or confidential portion of the court's file. When this case was back-scanned, and the hard file destroyed, it is apparent that these documents were not preserved in the court file. However, the original prosecutor's files contain copies of the evaluation report and has been attached hereto as Attachment A. These records are now considered public records. *See John Does G v. Dept. of Corrections*, No. 94203-0 (Feb 22, 2018).

and was sentenced the same day. The Judgment and Sentence was not filed until the following day. CP 38.

Kassner then filed a motion to withdraw his plea to the *original* sex offense on October 26, 2016, more than twenty years after he had entered the plea. CP 13-16. For various reasons, that motion was not heard until July 13, 2017. At that time, the Court reserved judgment on the motion and directed the parties to supplement the briefing. *See* CP 35-36. The Court also directed the defendant to provide a transcript of the 2006 guilty plea hearing. *Id.* The State responded to the trial court's request and filed its response on August 22, 2017. CP 37-43. Defendant failed to file a response in this case and failed to obtain a sentencing transcript.

#### IV. ARGUMENT

##### 1. Standard of Review for CrR 7.8 appeal.

Appellate review of a trial court's denial of a CrR 7.8 decision is limited to determining whether the trial court abused its discretion in denying defendant's motion. *See State v. Larranaga*, 126 Wn. App. 505, 509, 108 P.3d 833 (2005); *State v. Gaut*, 111 Wn. App. 875, 881, 46 P.3d 832 (2002). Consequently, review on appeal of a CrR 7.8 motion is limited to the issues originally raised. *Id.*

In this case, this Court may affirm the trial court's rejection of Mr. Kassner's motion under CrR 7.8(b)(2) on any grounds supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

2. Petitioner's burden and one-year time limit on collateral relief.

When considering constitutional arguments raised in a personal restraint petition, the court determines whether the petitioner can show that a constitutional error caused actual and substantial prejudice. *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). A stricter standard governs consideration of nonconstitutional arguments raised in a personal restraint petition. When considering nonconstitutional arguments, the court determines whether the petitioner has established that the claimed error is "a fundamental defect resulting in a complete miscarriage of justice." *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013).

Here, Kassner raises no constitutional issues, so he must show *both* that the trial court abused its discretion in denying his motion, and as a result, the error constitutes a fundamental defect that results in a complete miscarriage of justice.

The one-year time-bar applies to CrR 7.8 motions.<sup>4</sup> Generally, if the superior court determines that a motion for relief from a judgment and sentence under CrR 7.8 is time-barred under RCW 10.73.090, the court transfers the motion to the Court of Appeals for consideration as a personal restraint petition. CrR 7.8(c)(2); *see also State v. Flaherty*, 177 Wn.2d 90, 92-93, 296 P.3d 904 (2013).

**A. THE DEFENDANT’S CLAIM FAILS TO ESTABLISH THAT AT THE TIME OF THE OFFENSE HE WAS UNDER THE AGE OF 12.**

The defendant fails to establish that he was under the age of twelve at the time of the offense<sup>5</sup> because (1) he made statements he was older than 12 at the time of the offense,<sup>6</sup> (that he was 14 or 15), and, (2), because the information’s “on or about” language covers any period up to and including

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<sup>4</sup> The same provisions and limitations apply in both the trial court and the appellate court to applications for postconviction relief. *In re Pers. Restraint of Becker*, 143 Wn.2d 491, 497, 20 P.3d 409 (2001); *State v. Brand*, 65 Wn. App. 166, 174, 828 P.2d 1, *aff’d*, 120 Wn.2d 365, 842 P.2d 470 (1992).

<sup>5</sup> Defendant did not file any declaration regarding his age or in support of any of his allegations. All of defendant’s claims arise from his misplaced notion that the information contains all of the historical facts of the case, which is incorrect for many reasons.

<sup>6</sup> The defendant informed his counsellor, Paul Wert, during his psychological and psychosexual evaluation that he was 14 or 15 years of age at the time of the charged molestation. *See Attach. A*. This report was required for sentencing in this matter, and was ordered by the court. *See CP 59-61*.

the statute of limitations.<sup>7</sup> See, e.g., *State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996) (where time is not a material element of the charged crime, the language “on or about” is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi); and see *State v. Osborne*, 39 Wash. 548, 81 P. 1096 (1905) (prosecution for rape where evidence at trial established that the rape occurred a week or two weeks prior to the date alleged in the information); *State v. Oberg*, 187 Wash. 429, 432, 60 P.2d 66 (1936) (prosecution for sodomy where the State alleged that the act occurred “on or about April 3,” but the victim testified that the act occurred on June 20, over two months later); *State v. Thomas*, 8 Wn.2d 573, 586, 113 P.2d 73 (1941); see also RCW 10.37.050(5), (7) (an information is sufficient if it indicates that the crime was committed before the information was filed and within the statute of limitations, and the crime is stated with enough certainty for the court to pronounce judgment upon conviction.)<sup>8</sup>

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<sup>7</sup> When Kassner was 15, the victim would have been eight or nine years of age, which is under the 11 years of age as is required for the crime of first degree child molestation under RCW 9A.44.083.

<sup>8</sup> A first-degree child molestation may be prosecuted up to ten years after its commission or, if committed against a victim under the age of eighteen, up to the victim’s thirtieth birthday, whichever is later. RCW 9A.04.080(1)(c).

The defendant did not seek to obtain a bill of particulars to limit the breadth of the charging period, and his admission that he was 15 years of age at the time of the offense factually belies his present unsupported claim that he was under the age of 12 at the time it occurred. Apparently, the defendant relies on the information as proof of facts, when it is not. *See State v. Tvedt*, 153 Wn.2d 705, 719, 107 P.3d 728 (2005) (noting “[t]he information is not evidence, of course; unless included in the jury instructions, the State is not required to prove nonessential facts in an information”). Kassner’s claim confuses the law governing the information and the law governing the proof of elements of a crime, and, at most, establishes a minor variance between the facts of conviction and the information.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY RULING THE DEFENDANT FAILED TO ESTABLISH HIS CLAIM THAT THE SENTENCING COURT FAILED TO ADDRESS COMPETENCY, OR MAKE A FINDING REGARDING DEFENDANT’S COMPETENCY.**

The trial court found the defendant had failed to provide a “sufficient record to determine whether the original court conducted a capacity hearing regarding the oldest charge and defense counsel represented to this Court that the transcripts are no longer in existence.” CP 48 (Finding

of Fact No. 6). This *unchallenged finding* is a verity on appeal<sup>9</sup> and is supported by the defendant's admitted failure at that time, and at any time thereafter, to provide any transcript of any hearing held during the course of that case, even though defendant acknowledges that such transcripts exist.<sup>10</sup>

The trial court properly denied Kassner's requested relief because he failed to provide support for his complaint. That is his burden.<sup>11</sup> Bare allegations unsupported by citation to authority, references to the record, or persuasive reasoning cannot sustain the petitioner's burden of proof. He may not rely on conclusory allegations, but must show with a preponderance of competent, admissible evidence that the error caused him

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<sup>9</sup> Any unchallenged findings of fact are considered to be verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Bonds*, 174 Wn. App. 553, 562, 299 P.3d 663 (2013).

<sup>10</sup> See Declaration of Richard Wall, filed with this Court on January 11, 2018. Additionally, counsel for defendant has failed to provide a transcript of the lower court's CrR 7.8 motion.

<sup>11</sup> See *Matter of Cook*, 114 Wn.2d 802, 814, 792 P.2d 506 (1990).

After establishing the appropriateness of collateral review, a petitioner will be entitled to relief only if he can meet his ultimate burden of proof, which, on collateral review, requires that he establish error by a preponderance of the evidence. *Hews*, 99 Wn.2d at 89, 660 P.2d 263; see also *State v. Kitchen*, 110 Wn.2d 403, 413, 756 P.2d 105 (1988) (personal restraint petitioner must show that, more likely than not, his rights were actually and substantially prejudiced).

prejudice. *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 636, 362 P.3d 758 (2015); *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004); *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986) (where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies on conclusory allegations, a court should decline to determine the validity of a personal restraint petition).

Our courts have purposefully imposed limitations on these collateral attacks, and these limitations are soundly based because “collateral attacks, such as personal restraint petitions, may undermine the principles of finality of litigation, degrade the prominence of trial, and sometimes cost society the right to punish admitted offenders.” *Cook*, 114 Wn.2d at 809. These requirements of a factual basis and evidentiary support are threshold procedural bars.<sup>12</sup> Courts should refuse to reach the merits of any petition

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<sup>12</sup> Where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies solely on conclusory allegations, a court should decline to determine the validity of a personal restraint petition. *Williams*, [111 Wn.2d] at 365, 759 P.2d 436. We emphasize that the quoted principle from *Williams*, is mandatory; compliance with that threshold burden is an absolute necessity to enable the appellate court to make an informed review. Lack of such compliance will necessarily result in a refusal to reach the merits. *Williams*, at 365, 759 P.2d 436.

*Cook*, 114 Wn.2d at 813-14.

that fails to comply. Therefore, the trial court did not abuse its discretion in finding the defendant failed to meet his burden of proof in establishing that his claimed violation, from two decades ago, actually occurred.

**C. THE DEFENDANT’S CLAIM THAT “THERE IS NO TIME LIMIT FOR VACATING A JUDGMENT OF CONVICTION ENTERED IN THE ABSENCE OF A FINDING OF CAPACITY IS INCORRECT. DEFENDANT’S RELIANCE ON *STATE v. GOLDEN* IS MISPLACED. THE ONE-YEAR TIME LIMITATION FOR FILING PETITIONS FOR COLLATERAL RELIEF APPLIES TO THIS CASE AND THE DEFENDANT’S FAILURE TO MOVE FOR RELIEF IN THE TWENTY YEARS SINCE HIS CASE WAS FINAL WAS UNREASONABLE.**

1. The one-year time limit bars any collateral relief.

Defendant’s reliance on *State v. Golden*, 112 Wn. App. 68, 47 P.3d 587 (2002), as removing the RCW 10.73.090 one-year time limit for filing collateral relief is without support. In *Golden*, this Court determined the defendant *had never been advised of his one-year time limit on seeking collateral relief* and the *State conceded* that Mr. Golden received no notice of his right to collateral review and the time restrictions. *Golden*, 112 Wn. App. at 77-78.

Here, there is no record of Mr. Golden having been informed about the rights and restrictions of chapter 10.73 RCW. The record does contain a form entitled “Notice of Rights.” Clerk’s Papers at 11. But this list does not mention collateral review.

*Id.* at 78.

In *Golden*, the court noted that the time-bar in RCW 10.73.090(1) is *conditioned on compliance* with RCW 10.73.110. *Golden*, 112 Wn. App. at 78 (citing *In re Pers. Restraint of Vega*, 118 Wn.2d 449, 451, 823 P.2d 1111 (1992)).

Here, unlike in *Golden*, it is beyond peradventure that Kassner was advised of the time-bar to filing for collateral relief - the trial court complied with RCW 10.73.110, giving Kassner the appropriate notice of the one-year time limit on seeking collateral relief, which he acknowledged by his signature. CP 10-11. Therefore, his motion for collateral relief is time-barred, and has been time-barred for some twenty years.

**D. RESPONDENT’S OVERARCHING RELIANCE ON DICTA IN GOLDEN IS MISPLACED IN LIGHT OF THE MORE RECENT STATE SUPREME COURT DECISION STATE v. POSEY.**

Respondent relies heavily on this Court’s decision in *Golden*. While not essential to that court’s decision that the superior court retained jurisdiction to decide a collateral attack on the validity of a guilty plea entered by a ten-year-old even after the defendant turned 18 years of age, that court, in dicta, discussed the three components of “complete jurisdiction,” and stated that RCW 9A.04.050 (presumption of incapacity of 10-year-old juvenile) controlled the jurisdictional ability of the superior court to act in a case. *Golden*, 112 Wn. App. at 77. In discussing the jurisdictional components of the case, *Golden* relied on dicta from *State v. Werner*, 129 Wn.2d 485,

918 P.2d 916 (1996). *See Golden*, 112 Wn. App. at 77, stating jurisdiction requires the “power to enter the judgment,” citing *Werner*, 129 Wn.2d at 493.<sup>13</sup>

In *State v. Posey*, 174 Wn.2d 131, 272 P.3d 840 (2012), our Supreme Court analyzed the issue of whether a statute, such as RCW 9A.04.050, could divest the court of their criminal jurisdiction and settled the issue with a resounding no. Jurisdiction over felonies and juveniles was constitutionally derived:

In adopting Washington Constitution article IV, section 6 the people of this state granted the superior courts original jurisdiction “in all criminal cases amounting to felony” and in several other enumerated types of cases and proceedings. In these enumerated categories where the constitution specifically grants jurisdiction to the superior courts, the legislature cannot restrict the jurisdiction of the superior courts.

*Posey*, 174 Wn.2d at 135.

The Court noted that *Werner’s* distinction between subject matter jurisdiction and “the power or authority to render the particular judgment” rested on “an antiquated understanding of subject matter jurisdiction.” *Posey*, 174 Wn.2d at 138. The Court then noted that *Werner* was not the only opinion embracing that antiquated decision. *Id.* at 138-39.

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<sup>13</sup> In *State v. Posey*, the Court notes that this “three jurisdictional elements” approach from *Werner* was largely dicta, (fn. 1), and that their jurisprudence was “not a model of clarity.” 174 Wn.2d 131, 137-38, 272 P.3d 840 (2012).

The Supreme Court in *Posey* did away with *Werner* analysis. To the extent *Golden* holds that RCW 9A.04.050 is a statute depriving the court of jurisdictional “authority to act” it is overruled *sub silentio* by *Posey, supra*. The trial court entering Kassner’s judgment and sentence had both subject matter jurisdiction, and personal jurisdiction. The Court in *Posey* has considered the constitutional grant of subject matter jurisdiction to the superior courts, and accorded it the centrality that it deserves. Article IV, section 6 is dispositive and *Posey* has overruled precedents that erroneously classify the superior court’s jurisdiction as statutory. The legislature cannot, by statute, alter the constitutional jurisdiction of the superior courts. Contrary to Kassner’s claims, RCW 9A.04.050 is not a jurisdictional statute.

**E. THE DEFENDANT IS BARRED FROM COMPLAINING REGARDING THE AGREEMENT HE REACHED.**

The defendant has dirty hands.<sup>14</sup> He is barred from attacking his plea agreement by *In re Pers. Restraint of Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984). In *In re Barr*, our Supreme Court held that a plea can be voluntary

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<sup>14</sup> While the superior court was not operating in equity, necessary to defendant’s position is the claim that the court’s decision results in a complete miscarriage of justice. Similarly, and basic to equity, is the proposition that a court of equity will not intervene on behalf of a party whose conduct has been unconscientious, unjust, or marked by a lack of good faith. *Portion Park, Inc. v. Bond*, 44 Wn.2d 161, 170, 265 P.2d 1045 (1954).

and intelligent absent a factual basis for the ultimate charges, as long as the plea is based on informed review of all the alternatives and the defendant understands the nature of the consequences of the plea. *Id.* at 269-70. The defendant does not allege or complain he was misinformed as to the plea agreement, and, indeed, his plea statement indicates just the opposite – he understood what benefits he was obtaining and does nothing to refute the knowing and voluntary nature of his plea. Moreover, he waited more than twenty years to attack the plea. Here, Kassner raises a procedural or evidentiary issue, the alleged failure to make a capacity determination, which is a procedural violation rather than a constitutional claim.<sup>15</sup> Because this claim falls on the side of being a procedural claim – that a capacity statute, RCW 9A.04.050 was not followed, this claim is not cognizable at this time in a personal restraint petition, because where a claim merely asserts a violation of the rules of criminal procedure, which this claim does, failure to bring an appeal *forecloses* relief in a personal restraint petition.

A plea does not become invalid because an accused chooses to plead to a related lesser charge that was not committed in order to avoid certain conviction for a greater offense. *See, e.g., People v. Martin*, 58 Ill.App.3d 633, 16 Ill.Dec. 237, 374 N.E.2d 1012 (1978); *People v. Johnson*, 25 Mich.App. 258, 181 N.W.2d 425 (1970); *People v. Clairborne*, 39 A.D.2d 587, 331 N.Y.S.2d 780 (1972). *See*

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<sup>15</sup> This is a statutory issue under RCW 9A.04.050. A hearing is required in juvenile court, but not in adult court. *See* JuCR 7.6(e). Therefore, this is a procedural claim, rather than one of constitutional import.

*generally* J. BOND, PLEA BARGAINING AND GUILTY PLEAS § 3.55(a), (b) (1982). The choice to plead to such lesser charges is voluntary if it is based on an informed review of all the alternatives before the accused. *See North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). What must be shown is that the accused understands the nature and consequences of the plea bargain and has determined the course of action that he believes is in his best interest. *See Williams v. State*, 316 So.2d 267 (Fla.1975). *See also, State v. Majors*, 94 Wn.2d 354, 616 P.2d 1237 (1980).

*In re Barr*, 102 Wn.2d at 269-70 (holding modified by *Matter of Hews*, 108 Wn.2d 579, 741 P.2d 983 (1987)). And in this regard, our State Supreme Court has decided that even if there is a constitutional problem with a guilty plea, that to obtain relief, “the petitioner must show not only error, but also actual and substantial prejudice. Prejudice at the guilty plea stage means that the defendant would more likely than not have refused to plead guilty and would have insisted on going to trial.” *State v. Buckman*, -- Wn.2d --, 409 P.3d 193, 201 (2018). The test is objective, and not based on defendant’s self-serving statements that but for the claimed error, he would have refused to plead guilty. *Id.* at 200.

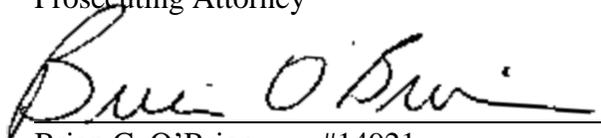
Mr. Kassner entered into the agreement and received its benefits, yet now seeks to undo it more than 20 years later. What he requests would be a complete miscarriage of justice if granted. His requested relief should be denied.

## V. CONCLUSION

The defendant fails to establish that he was under the age of twelve at the time of the offense. The trial court did not abuse its discretion in finding the defendant failed to meet his burden of proof in establishing that his claimed violation actually occurred. The defendant was advised of the time limit to file for collateral relief; therefore, his motion for collateral relief is time-barred, and has been time-barred for over twenty years. Defendant raises a procedural or evidentiary issue, the alleged failure to make a capacity determination, rather than a constitutional claim. He fails to establish that the claimed error is “a fundamental defect resulting in a complete miscarriage of justice.”

Dated this 28 day of February, 2018.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian O'Brien", written over a horizontal line.

Brian C. O'Brien #14921  
Deputy Prosecuting Attorney  
Attorney for Respondent/Appellant

# ATTACHMENT A

Paul M. Wert, Ph.D.

Clinical Psychology

SPOKANE COUNTY  
PUBLIC DEFENDER

May 10, 1996

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Doug Boe  
Assistant Public Defender  
Spokane County Courthouse  
West 116 Broadway  
Spokane, Wash. 99260

Re: Kassner, Russell

Dear Mr. Boe:

Following your referral, Russell Kassner was seen for the purpose of psychological and psychosexual assessment. Mr. Kassner was first interviewed face-to-face on April 19, 1996, with a second interview on May 8, 1996. Prior to interviewing Mr. Kassner, I reviewed various documents which were provided by your office. The documents included information from the Spokane Police Department concerning Mr. Kassner's charge of first degree child molestation. The information also included a letter from G. Kassner, Russell's father. In addition to face-to-face interviewing, and review of provided collateral information, Russell Kassner was also administered an objective personality inventory, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2).

PERSONAL/INTERPERSONAL HISTORY:

Russell (Rusty) Kassner reported that he was born in Corpus Christi, Texas on September 11, 1977. Rusty was adopted by V. and G. Kassner when he was only two or so months old. At the same time, Rusty's older sister, K., who is currently 21 years of age was also adopted. Concerning his biological parents, Rusty stated that it was his understanding that his biological mother had one child in addition to him and K. The mother apparently killed this child when she pushed the child down a flight of stairs. According to Rusty, his biological mother was diagnosed as paranoid schizophrenic. It was Rusty's understanding that she may still be in prison. Rusty reported that his biological father died shortly after Rusty was born. Rusty describes him as having been a "war veteran," but that did not know in which war he may have participated.

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According to Rusty, his older sister, K [redacted], was in an "orphanage" in Spokane when she first came to the attention of V [redacted] and G [redacted] Kassner. Later, the Kassner's traveled to Texas to pick up Rusty. The Kassner's subsequently adopted two more sets of siblings. L [redacted], age 12, and B [redacted], age 11 are natural siblings, as are J [redacted], age 11, and A [redacted], age 8.

According to Rusty, his family has lived in the [redacted] area, as well as [redacted], and by [redacted] Road. While living in the [redacted] area, Rusty stated that he spent "lots of time" in the woods. According to Rusty, his father is an accountant with the Federal Government. Rusty stated that "he's really into computers." Rusty describes his mother as being an administrator at Spokane Falls Community College. Rusty describes his father as being something of a "workaholic." He stated that during his developmental years, he was probably closer to his mother than his father. For discipline, Rusty recalled occasional spankings, but for the most part discipline would involve such measures as "time out."

Concerning his relationship with his siblings, Rusty stated that "me and K [redacted] were like best friends." He stated that his relationship with L [redacted] was adequate. He described his relationship with B [redacted], as being, for the most part, "alright." According to Rusty, he "used to pick on the younger kids."

Rusty stated that he began playing ice hockey at age 11. By age 14, during the season his team would go to games out of town every other weekend. This was the case for two or so years. Rusty reported that during this time, his father would go on the trips with him. Rusty seemed to enjoy this, and stated that "I really miss it." He stated that at 16, however, he stopped playing ice hockey. He reported that "I just kind of gave it up to have fun with my friends more."

Rusty attended a number of elementary schools. He began school at Lake Spokane Elementary, and later attended Nine Mile Falls Elementary. He attended the Spokane Lutheran School for fourth grade, as well as for parts of seventh and eighth grades. Rusty also attended Indian Trail Elementary School, as well as Westview Elementary School. As his family would move, he stated that "I'd just switch around." When asked how he felt about having to do so, he stated that "I didn't like it a lot." Nevertheless, up until the fifth grade, Rusty stated that he received primarily A grades. He stated that in fifth grade, however, "I got rebellious." When asked why he felt this occurred, he stated that "I guess I was just trying to show off for my friends." He stated that at school, he began "getting in a lot of trouble." By the end of fifth grade, Rusty's grades had dropped significantly. He finished sixth grade at Westview Elementary, and then began attending Salk Middle School. He attended

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Salk for seventh and part of eighth. He finished eighth grade, as previously mentioned, at Spokane Lutheran School. During his junior high school years, Rusty stated that his grades were somewhat improved. He was playing soccer, and was apparently fairly good. He stated that he had to have a certain grade point average in order to play soccer, which motivated him to some degree. Rusty stated that he left Salk during the eighth grade, and briefly attended Spokane Lutheran School as he had been suspended from Salk for verbal abuse of his teachers, and throwing various articles in the classroom. He was later allowed back in to Salk, where he finished eighth grade.

Rusty attended Shadle Park High School for three quarters of the ninth grade. He was behind in credits, however, and as a result, transferred to Jansch, where he could make up the credits more quickly. Rusty began skipping school, however, and continued to do so through tenth grade. He in fact had to repeat tenth grade. He returned to Shadle, but was expelled after being involved in a fight. He returned to Jansch, which he later quit in order to participate in Life Skills. It was around this time that Rusty's girlfriend, ██████ became pregnant by Rusty. Rusty was 17 years of age at the time, while ██████ was 15. According to Rusty, he left school in order to work. According to Rusty, he "had a whole bunch of jobs." He worked for various fast food restaurants, car washes, and telemarketing companies. According to Rusty, ██████ gave birth to their son, ██████, on May 19, 1995. Rusty also stated, however, that two months after ██████ was born, he and ██████ "broke up." According to Rusty, he cannot currently see his son. He stated that an order of protection had been filed. According to Rusty, ██████ "said I tried to run over the stroller with my bike." He also stated that he on one occasion had bitten ██████ "in self defense." He stated that "she was on top of me, hitting me on the back of the head." According to Rusty, ██████ continues to live with her parents. Rusty stated that ██████'s parents have never particularly liked him.

Prior to his arrest on the currently pending charge on November 14, 1995, Rusty stated that "I was starting to get on my feet." He stated that he was working at Dakota Direct, doing telemarketing. He stated that "I liked it."

OFFENSE-RELATED INFORMATION:

Rusty Kassner acknowledged having had sexual contact with his adoptive sister, B█████. According to Rusty, the contact occurred approximately four years ago. It was Rusty's recollection that he was around 14 or 15 years of age, while B█████ was 7 or 8. According to Rusty, he had reviewed the Spokane Police report, and felt that the prepared report inaccurately recounted the time frame during which the sexual

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contacts occurred. When asked what would occur with B [REDACTED], he stated that "we just touched each other." He stated that they would become involve in mutual genital touching. He stated that they would also "play games naked." He stated that at times, he would have B [REDACTED] masturbate him to the point of ejaculation. He stated that he also engaged B [REDACTED] in two acts of cunnilingus. He stated that on one occasion, he attempted to have intercourse with her, but stated that "it didn't work." According to Rusty, the sexual contacts continued "over a couple of months." He recalled that the contacts stopped when he began dating a "girlfriend" when he was 15 years of age. He stated that there were no sexual contacts with B [REDACTED] subsequent to that time. As suggested earlier, reports from the Spokane Police Department suggest discrepancies between the "official" version of events versus the events as described by Rusty Kassner.

Concerning the client's sexual history, he stated that he could recall playing "spin the bottle" with other children in his neighborhood during his childhood years. He stated that at times, this would involve "getting undressed." When asked if there was any genital touching, he replied with "not normally." According to the client, there were never any sexual contacts with his older sister, K [REDACTED]. Also according to the client, he had not started to masturbate prior to the incidents of sexual contact with his adopted sister, B [REDACTED]. Subsequent to these incidents, the client stated that at age 15, he became sexually involved with a girlfriend, with whom he had first intercourse. He reports having been sexually involved with approximately 12 peer age or near peer age females since that time. He stated that his longest sexual involvement was with his girlfriend, [REDACTED]. This involvement was approximately 14 months in duration. The client acknowledged some ongoing sexual attraction to younger females. He stated, however, that this changed somewhat approximately one year ago. He stated that at that time, he "saw a real woman." When asked where this occurred, he stated that this occurred at DejaVu, where his sister is a stripper. He stated that he has occasionally frequented the club. He stated that he has never seen his sister dance or strip, and that if he is on the premises, he goes outside when she does so. He also stated that he is not allowed to speak with his sister while she is working. According to the client, his masturbatory fantasies involve only females who are his approximate same age or older. He stated that he will often fantasize sexual involvement with his former girlfriend, [REDACTED].

Concerning past sexual abuse of the client, according to Rusty, while in elementary school at Westview Elementary in Spokane, he was sexually touched by the principal at that time. According to Rusty, he was 10 or 11 years of age. He stated that he and one other individual were repeatedly touched on the buttocks by the principal. According to Rusty, his parents, and the parents of the other boy involved were aware

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of the incidents. It is Rusty's understanding, however, that little or no action was taken against the principal.

**SUBSTANCE USE/ABUSE HISTORY:**

The client acknowledged using some amount of alcohol throughout adolescence. He will at times drink to a point of intoxication. He stated, however, that he does not drink hard liquor, as he vomits blood when he does so. He also stated that if drinking beer to any significant excess, he will also vomit. Earlier in adolescence, the client also used LSD and marijuana. He has tried cocaine, but stated that "I don't like it." He has also used methamphetamine on a few occasions, but describes it as a "real dirty drug." According to the client, two or so months ago, he began using heroine intravenously. He stated, however, that he stopped doing so. He reported that "I guess God helped me out or something."

**PSYCHOMETRIC TEST RESULTS:**

As mentioned previously, the client was administered an objective personality inventory, the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). The interpretive information which follows should be viewed as only one source of hypothesis about the individual being evaluated. No decisions should be based solely on the information contained in this report. This material should be integrated with all other sources of information in reaching professional decisions about this individual. This report is confidential and intended for use by qualified professionals only.

**Welsh Code: 4'217-809\536: F\L:K:**

Concerning configural validity scale interpretation, the client appeared to respond to test question frankly and openly. The validity scales, however, indicate an individual with limited personal resources. Such individuals are likely to have a relatively poor self-concept and to be strongly dissatisfied with themselves, but lacking in the skills necessary to change their situation. Such individuals generally have low egostrength, and a general ineffectiveness in dealing with the problems of daily life.

Concerning configural clinical scale interpretation, individuals with similar codetypes often exhibit depression and agitation in response to vocational or family problems, financial problems, legal difficulties, and/or substance abuse problems. They may be depressed, but typically do not report classical signs of depression. Such individuals are usually somewhat introverted and shy, and may have inadequate social skills. They are often manipulative and passive dependent in their relationships with others.

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Individuals with similar codetypes may have chronic problems with authority figures. Such individuals are generally not satisfied with their current life situation, or with themselves. They may not, however, be consciously aware of the degree to which they feel dissatisfied, or may have learned to adjust to long-term or long-term dissatisfaction.

**SUMMARY AND RECOMMENDATIONS:**

In way of summation, Rusty Kassner, in fact presented as a somewhat depressed young man. He also presented as being at core rather rebellious. Rusty's adolescent years have been fraught with a good deal of turmoil, and moderate antisocial acting-out. Rusty seems to have become quite involved in negative attention getting behaviors. This became the case despite the fact that Rusty apparently has tested as well above average intellectually. According to Rusty, his life in general was becoming more focused until the time of his arrest in November of 1995. Rusty does, however, acknowledge some amount of acting out as a juvenile, which occurred around the age of 14 or 15, as did the sexual abuse of his sister. As an adult, Rusty also has a charge of city theft which is still pending. According to Rusty, he came to the attention of authorities for not paying for gasoline. He stated that he also has a pending charge for possession of stolen property. He reported that a "friend" left his cellular phone in his truck, which was found when Rusty was pulled over as his tail lights were out. According to Rusty, however, "after this month, it's going to be pretty smooth."

Concerning treatment, Rusty stated that he felt he needed treatment, because "I realize what I did was sick." When asked if he was concerned that he might at some point in the future again have sexual contact with a preadolescent female, he stated that "there's a maybe." He stated that without treatment, he felt that "something could happen again."

Concerning recommendations, I would recommend that Rusty Kassner be granted the Special Sex Offender Sentencing Alternative (SSOSA). Should the court see this recommendation as being appropriate, I would respectfully recommend the following:

1. That Rusty Kassner, following sentencing, begin participating in specialized treatment for sexual offenders, either with this writer, or with Edward J. Averett, M.S., Certified Sex Offender Treatment Provider.
2. That Rusty attend all scheduled meetings, abide by all treatment and probationary restrictions, and complete all assignment, and/or

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responsibilities associated with his treatment program.

3. That Rusty agree not to be alone with minor females without a designated chaperon present as well. Perhaps within the near future, one or both of Rusty's parents can be designated as a chaperon. This would allow Rusty the possibility of once again being around family members, and being able to participate appropriately in certain family activities. Rusty seems very much in need of being able to do so.
4. That Rusty Kassner entirely refrain from the use of drugs and/or alcohol, and that he agree to periodic random monitoring through TASC.
5. That Rusty agree to periodic polygraphing in order to monitor the restrictions and prohibitions of his probation.
6. That Rusty agree to find and maintain gainful employment in order to cover the cost of treatment, polygraphing, etc.

As Rusty, in general, presents as emotionally immature 18 year old, he may have some difficulty in meeting the responsibilities inherent in participation in SSOSA. Hopefully, his assigned Community Corrections Officer will make some allowance for Rusty's young age, and inexperience in terms of independent living. While in treatment, Rusty will need to continue to acknowledge and accept, in degrees, personal responsibility for his actions with his adoptive sister. He will need to improve social and relationship skills in order to improve his ability to meet social and sexual needs through appropriate relationships with age-mates. He will need to explore unresolved personal and familia! issues which have contributed to his pattern of underachievement over the past few years.

I hope that this information will be of some help to you in the management of this case. Thank you for referring Rusty Kassner for assessment. Please feel free to call or write if I can be of further assistance.

DIAGNOSES:

Axis I: R/O Depressive Disorder, NOS.

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Axis II: Personality Disorder, NOS, with depressive and passive-aggressive features.

Sincerely,



Paul M. Wert, Ph.D.  
Licensed Psychologist  
Certified Sex Offender Treatment Provider

PMW/rr

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

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL KASSNER,

Appellant.

NO. 35628-1-III

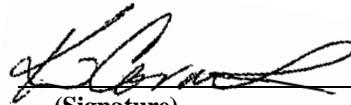
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 28, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Richard Wall  
rdwallps@comcast.net

2/28/2018  
(Date)

Spokane, WA  
(Place)

  
\_\_\_\_\_  
(Signature)

**SPOKANE COUNTY PROSECUTOR**

**February 28, 2018 - 11:39 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
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**Superior Court Case Number:** 95-1-02520-1

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