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No. 54171-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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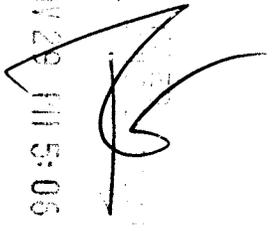
STATE OF WASHINGTON,

Respondent,

v.

JOHN COLEMAN,

Appellant.

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

The Honorable James D. Cayce

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APPELLANT'S OPENING BRIEF

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OLIVER R. DAVIS  
Attorney for Appellant  
WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## A. ASSIGNMENTS OF ERROR

1. In the defendant's jury trial on two counts of child molestation (one count for each alleged victim, C.V. and M.D.), the convictions violated the requirement of jury unanimity under State v. Petrich.<sup>1</sup>

2. The trial court abused its discretion in admitting hearsay statements made by the alleged victims, under authority of RCW 9A.44.120 and State v. Ryan.<sup>2</sup>

3. The trial court violated Blakely v. Washington<sup>3</sup> when it imposed exceptional sentences of incarceration above the standard range without submitting the aggravating facts to the defendant's jury.

4. If this Court reverses the defendant's exceptional sentences under Blakely v. Washington, principles of statutory authority, double jeopardy and mandatory joinder require that remand be limited to the purpose of entry of standard range terms.

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<sup>1</sup>State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

<sup>2</sup>State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

<sup>3</sup>Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2531, \_\_\_ L.Ed.2d \_\_\_ (2004).

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the jury verdicts of guilt on the two child molestation counts were reached with constitutionally adequate assurances of jury unanimity, where there was no election in closing argument and no Petrich instruction, and where no "continuing course" exception to the Petrich rule applied because the evidence from the children and the other prosecution witnesses clearly alleged distinct and separately identifiable instances of alleged sexual contact, occurring at different times and different locations, during a three-year charging period.

2. The trial court abused its discretion in admitting hearsay statements (not otherwise admissible under a hearsay exception) made by the alleged victims under RCW 9A.44.120 and State v. Ryan, where the declarants' motives for making the allegations were unclear, where the general character of the declarants for truth was not good, where the statements were not spontaneous, where the child interviewers were persons seeking information about sexual offenses in an official capacity, where there was a possibility that the declarants' recollections were faulty, and where

the circumstances surrounding the statements were not conducive to reliability.

3. Whether the trial court violated Blakely v. Washington and erred in imposing exceptional sentences above the standard range where the aggravating factors in support thereof were not submitted to the defendant's jury for proof beyond a reasonable doubt.

4. Whether a reversal of the defendant's exceptional sentences under Blakely would require remand limited to entry of standard range terms, or whether the State may be allowed to now pursue a jury hearing on the aggravating facts previously not submitted to the jury, in the absence of statutory authority for such a sentencing procedure, and in violation of the mandatory joinder rule and principles of double jeopardy.

### **C. STATEMENT OF THE CASE**

The defendant was charged and convicted of one count first degree child molestation (sexual contact) as to each of two alleged victims, C.V. and M.D., allegedly occurring at various times during a charging period of January 1, 1999 through January 31, 2002. CP 1-5. According to the affidavit of probable cause, the defendant

John Coleman, C.V.'s uncle, touched the children on their private areas on occasions when C.V. and her friend M.D. would visit the defendant at his home in Federal Way, and on outings with him. The instances of sexual contact occurred at various locations within the house and elsewhere. CP 3-5.

At trial, several hearsay witnesses were presented under authority of the trial court's State v. Ryan ruling prior to trial. 9/11/03 at 4, 37, 70, 103, 140. In addition, the children M.D. and C.V. both testified at trial. 9/15/03 at 8, 73. The trial court did not give a unanimity instruction and the State did not elect any of the specific instances of molestation in closing argument to the jury. 9/16/03 at 3-49; CP 164-178. The jury convicted Mr. Coleman as charged of one count first degree child molestation as to each child. CP 162-63.

Following an unsuccessful effort to classify the defendant as a persistent offender, the State sought and the trial court imposed exceptional sentences of 300 months concurrent terms of incarceration on the two counts. 4/23/04 at 6-11.

Mr. Coleman appeals. CP 200.

## D. ARGUMENT

### 1. MR. COLEMAN'S RIGHT TO A UNANIMOUS JURY WAS VIOLATED BY THE ABSENCE OF A PETRICH INSTRUCTION OR AN ELECTION BY THE STATE IN CLOSING ARGUMENT.

(a). No election or unanimity instruction. Mr. Coleman was charged with one count of first degree child molestation, per RCW 9A.44.083, as to each alleged victim. CP 1-2. The information and the jury instructions alleged a charging period of over three years, from January 1, 1999 through January 31, 2002. CP 1-2; CP 164-78 (Jury instructions, Instr. Nos. 8, 9).

At trial, the children and the State's hearsay witnesses testified that there were multiple incidents of touching, and many of these incidents were described in general terms, such as statements by the children that the defendant "would" touch them. But the State also elicited several or more specific instances of touching of M.D. and C.V. by the defendant, including discrete incidents of molestation, distinguished with particularity, and occurring at different locations and on different dates and times. See infra.

Nonetheless, in closing argument, the State did not elect from any of these incidents and argue to the jury that a particular incident or incidents were proved beyond a reasonable doubt, and did not tell the jury it was required to unanimously decide on one such incident with respect to each count charged as to each victim. Instead, the prosecutor told the jury merely that “this case comes down to basically one simple question: Did the defendant touch those girls?” 9/16/03 at 7. The State reiterated later in closing argument that the purpose of the jury’s deliberations was to agree as a jury whether the defendant touched the victims:

[Y]our purpose during the course of your deliberations is to answer the question to the best of your ability, as a group of twelve of you, did Uncle Johnny touch these girls.

9/16/03 at 23. Following closing argument the case was submitted to the jury without a unanimity instruction. CP 164-78; see WPIC 4.25.<sup>4</sup>

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<sup>4</sup>Pattern jury instruction WPIC 4.25 provides:

There are allegations that the defendant committed acts of {describe conduct} 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.

Mr. Coleman argues that his right to a unanimous jury verdict was violated by the failure of the State to make an election and of the trial court to provide the jury with a unanimity instruction.

**(b). The right to a unanimous verdict means that in multiple act cases the State must make an election or the court must instruct on unanimity.** Criminal defendants have a right to a unanimous jury verdict. Wash. Const. art. 1, sec. 21. This right includes the right to an expressly unanimous verdict. Wash. Const. art. 1, sec. 21 states:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases.

By allowing verdicts of nine or more only in civil cases, the final clause of sec. 21 implicitly recognizes that unanimous verdicts are required in criminal cases. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). In addition, under federal law, the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a unanimous jury verdict. U.S. Const., Amend. 6; United States v. Linn, 31 F.3d 987, 991 (10th Cir.1994).

Under this right, a defendant may be convicted only when a unanimous jury concludes that the specific criminal act charged in the information (including proper amendments and lesser offenses) has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (failure to compel State to elect which of numerous incidents of sexual contact was to be relied on for conviction for each charge coupled with failure to instruct jury that all jurors must agree that same underlying criminal act had been proved beyond a reasonable doubt warranted a new trial). When the prosecutor presents evidence of several acts by the defendant, any of which might if proved form the basis of the count charged, either the State must tell the jury which particular act to consider in its deliberations as the alleged crime (an election by the prosecutor), or the court must instruct the jury that it is required to agree on a particular criminal act (by including a unanimity, or, in Washington, a "Petrich" instruction). State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Petrich, 101 Wn.2d at 570). Federal law also recognizes the right to a specific unanimity instruction in multiple act cases. United States v. Payseno, 782 F.2d 832, 836 (9th Cir.1986) ("When it appears . . . that a

conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice. To correct any potential confusion in such a case, the trial judge must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts").

The unanimity instruction issue (referred to here as the Petrich issue) affects the defendant's state and federal constitutional rights, and a failure by the defense to request a unanimity instruction below should not preclude the reviewing court from addressing the question. State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998), review denied, 137 Wn.2d 1016 (1999) ("A unanimity instruction is required, whether requested or not, when a jury could find from the evidence that the defendant committed a single charged offense on two or more distinct occasions").

The Petrich rule therefore applies to this "multiple act" case, a case where multiple acts apparently were committed, any one of which could constitute the crime charged. The Petrich Court relied on its prior decision in State v. Workman, wherein the Court had

reversed a conviction involving one charge of carnal knowledge because the evidence tended to prove three distinct commissions of the offense at different times and places. State v. Workman, 66 Wash. 292, 119 P. 751 (1911). The Workman Court had stated:

[W]here the evidence tends to show two separate commissions of the crime, unless there is an election it would be impossible to know that either offense was proved to the satisfaction of all of the jurors beyond a reasonable doubt. The verdict could not be conclusive on this question, since some of the jurors might believe that one of the offenses was so proved and the other jurors wholly disbelieve it but be just as firmly convinced that the other offense was so proved. The greater the number of offenses in evidence, the greater the possibility, or even probability, that all of the jurors may never have agreed as to the proof of any single one of them. . . . [T]he proper course in such a case, after the evidence is in is to require the state to elect which of such acts is relied upon for a conviction.

Workman, at 294-95. The absence of an election or a unanimity instruction in this case was error. Furthermore, as argued below, there can also be no “continuing course” exception to the Petrich rule under any reasonable reading of the facts in this case.

**(c). A continuing course exception to the Petrich rule is not applicable to the present case where the charging period was several years long and the evidence established specific**

**discrete incidents, including incidents occurring in different locations.** The “election or unanimity instruction” requirement of Petrich does not apply where the case does not involve discrete acts but instead alleges a “continuing course of conduct.” In such situations the jury need not be unanimous on a discrete incident. In contrast with multiple act cases, in so-called “continuous act” cases, no election or jury unanimity instruction is required, because in those cases the entire continuing “course of conduct” forms the basis of one count in an information. Petrich, 101 Wn.2d at 571 (evidence of a series of sexual contacts with a child does not establish a “continuous course of conduct” when the incidents occur at different times or places). As the Court in Petrich points out, the concept of “one continuing offense” is thus a distinct one from the concept of “several distinct acts,” each of which could be the basis of a criminal charge, which is the normal case in which a unanimity instruction is required. Petrich, 101 Wn.2d at 571 (citing United States v. Berardi, 675 F.2d 894 (7th Cir.1982)); see People v. Mota, 115 Cal.App.3d 227, 171 Cal.Rptr. 212 (1981).

Whether one continuing offense may be charged depends upon a commonsense evaluation of the facts. State v. Craven, 69

Wn. App. 581, 588, 849 P.2d 681 (1993). If the defendant has engaged in multiple acts clearly intended to piece together to form a singular objective, the evidence tends to establish a continuing course of conduct. State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (two acts of cocaine delivery within a short period of time, one in a restaurant, and one in a nearby parking lot, involving the same parties, constituted continuing course of conduct of delivering the cocaine); State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). Here, the defendant's instances of touching the victims were not aspects of a larger objective, they were individual offenses, but committed multiple times during the charging period. There was no proof that the defendant engaged in an ongoing enterprise intended to achieve a singular objective, and the evidence does not justify dispensing with the constitutional unanimity guarantee under a theory of "continuing course of conduct." Petrich, at 571; cf. Fiallo-Lopez, 78 Wn. App. at 724.

An additional important factor to consider includes whether the defendant's actions occurred within a short time frame in the same place, or were separate in time and place. State v. Stockmyer, 83 Wn. App. 77, 87-88, 920 P.2d 1201 (1996); State v.

Crane, 116 Wn.2d 315, 326, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); Petrich, 101 Wn.2d at 571. At the utmost, the Washington cases have found continuing courses on the basis of time frames measured in months. See, e.g., Kitchen (one count of second degree rape but several sexual acts occurring between July 1983 and October 1983); State v. Gitchel, 41 Wn. App. 820, 822, 706 P.2d 1091 (1985) (one count of statutory rape but two separate sexual acts which occurred "on or about June to July, 1983"); State v. Barrington, 52 Wn. App. 478, 482, 761 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989) (where the defendant promoted the prostitution of one minor during a 3-month period).

The more typical "continuing course" case involves far shorter periods of time. For example, in State v. Craven, it was held that the defendant's assaults on a baby over a period of three weeks constituted a continuing course of conduct. Craven, 69 Wn. App. at 581, 589. Likewise, in State v. Crane, the Supreme Court held that assaults on a three-year-old boy occurring over a two hour span were a continuous course of conduct. State v. Crane, 116 Wn.2d at 315. Other cases emphasizing the criteria of a short

time frame include a case where the defendant committed two assaults upon his ex-wife during a single burglary, State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); and where the defendant promoted the prostitution of two minors during a 10-day period, State v. Gooden, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988). The requirement of a short time makes sense because where the incidents occurred in a short time, it is more difficult to produce evidence allowing a jury to identify one act distinctly, and the defendant's alleged actions are more likely to be a part of some scheme. On the other hand, where acts occurred over a long period of time, in different places, there will usually be evidence of distinct acts and a continuing course theory is not appropriate.

In the present case, the defendant was charged with one count of sexual molestation as to each child, allegedly occurring during a charging period of well over three years. No Washington case has ever held that a period of time this long qualifies as the "short period of time" that is generally a necessary component of continuing course cases.

Most critically, however, the victims in this case were clearly able to and did testify to specific discrete acts, making the

continuing course exception inapplicable. It would be untenable for a trial court to have found that a continuing course theory was appropriate in this case, where the hearsay witnesses and the victims identified distinct instances of conduct in time. The same evidence also established that various incidents occurred at different places. And finally, critical to the reversible error analysis, there were varying degrees of proof and evidence regarding the different incidents, as shown below.

For example, the school counselor, Ms. Barnes, testified that C.V. told her that she and the defendant and M.D. would go on outings, and C.V. specifically stated that she, M.D. and the defendant had gone to the movies a week previously to see "Snow Dogs." However, C.V. testified that there was no touching by Mr. Coleman during this outing. 9/11/03 at 80-81.

Then social worker Marjorie Trudnowski was told by C.V. on January 23, 2002, that the defendant had touched her the previous week ("Last Friday") when they all went to see the movie "Snow Dogs." 9/11/03 at 103. C.V. told Ms. Trudnowski that the defendant touched her on her privates, and that the touching had

been under her clothes. 9/11/03 at 103. She indicated that the defendant was sitting in between the two girls. 9/11/03 at 104.

Trudnowski also testified that C.V. described specific different locations where the touching would occur, including her grandmother's home, the defendant's home, and the defendant's car. 9/11/03 at 105. She described a specific instance in which she and M.D. were in the defendant's bedroom at his condominium, in which the defendant touched both of them. 9/11/03 at 105.

M.D. told her mother Collette Dalby about the first time the defendant allegedly touched her, which was "one particular instance" in which the defendant told M.D. that he was teaching M.D. about sex. 9/11/03 at 24-25. M.D. also told child interview specialist Christine Liebsack that the defendant touched her one time when she was spending the night at the defendant's home. 9/11/03 at 164-65. This was a night when the defendant's daughter was staying with the defendant, and the touching occurred in the defendant's bedroom. 9/11/03 at 165. Liebsack asked M.D. when the defendant touched her like this, and she stated it was some time in July, 2001, after M.D. had gotten out of

school for the summer. 9/11/03 at 173, 183. M.D. also testified that the first touching incident occurred "two weeks" after M.D. met Mr. Coleman. 9/11/03 at 173.<sup>5</sup>

In addition, M.D. also told the interviewer about the time she, C.V. and the defendant went to see the movie "Snow Dogs," and she stated that the defendant's daughter was there, "so nothing really happened." 9/11/03 at 185.

M.D. testified that she recalled a specific incident of touching where she and C.V. were watching the movie "The Mummy Returns" with the defendant in the livingroom of his apartment. 9/11/03 at 95. M.D. was sitting in the room's leather chair with Mr. Coleman, and he reached his hand inside her shirt and began rubbing. 9/15/03 at 95. This lasted a few minutes and then M.D. told the defendant she had to go the bathroom, in order to stop the touching. When she returned, M.D. sat on the floor with C.V. and continued watching the movie. 9/15/03 at 95-96. Defense counsel cross-examined M.D. with reference to M.D.'s prior statement to

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<sup>5</sup>Mrs. Dalby testified that her daughter M.D. and C.V. went on frequent outings with the defendant, but she stated that there was only one single discrete occasion when M.D. spent the night at the defendant's home, a condominium in Federal Way. 9/11/03 at 5, 8-9, 14, 22.

the prosecutor's interviewer that the incident of touching in the livingroom occurred when no one else was present. 9/15/03 at 116. The State then engaged in re-direct examination of M.D. about that incident and her apparent inconsistencies, and the defense re-crossed. 9/15/03 at 127-28.

M.D. also described a specific incident where the defendant touched her in his bedroom, stating that she was on the bed telling jokes with Mr. Coleman, and he began touching her under her underwear. 9/15/03 at 96-97. M.D. got off the bed and slept on the floor with C.V. 9/15/03 at 97. Mr. Coleman's daughter was staying with the defendant at the time, and was sleeping in the livingroom; the defendant had closed the door to the bedroom. 9/15/03 at 97-98.<sup>6</sup>

On both of these occasions, the State had asked M.D. to specifically recall one discrete incident where the defendant's touching of her occurred in the livingroom, and one incident where it occurred in the bedroom of the apartment. 9/15/03 at 95 ("Can

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<sup>6</sup>Melissa Piatt, the defendant's twenty-two year old daughter and the cousin of M.D., testified that she was at her father's house around Christmas time of 2001. During the stay, Ms. Piatt heard her father and the girls, M.D. and C.V., in the defendant's bedroom, "rough housing." 9/15/03 at 131-33. The door to the bedroom was sometimes open and sometimes closed while this was going on. 9/15/03 at 134.

you tell me about a time that happened in the living room, can you think of one?”), and 96 (Can you tell me about one of those times that it happened in the bedroom?”).

In addition, M.D. notably described a specific incident in which the defendant allegedly had her touch his penis. 9/15/03 at 101. This discrete incident began when the defendant and M.D. were on Mr. Coleman's bed. The defendant allegedly said it was “his turn.” 9/15/03 at 101-02. M.D. touched the defendant as he asked, but then left to go to the bathroom to “get out of it.” Of this incident, M.D. testified that the defendant did not say anything when it was happening, and she said that she touched Mr. Coleman because she was scared and thought that if she did not the defendant would tell her aunt and uncle what had been going on. 9/15/03 at 102-03.

M.D. also recalled an instance in which she saw the defendant touching C.V. underneath her shirt. 9/15/03 at 98. M.D. stated that Mr. Coleman was rubbing C.V., and M.D. was sleeping on the floor but could see the defendant and C.V. on the bed. 9/15/03 at 98-99.

When, as here, the evidence presented tends to involve separate actions taking place at specific, identified different times and locations, and over a longer rather than a short period of time, it tends to show several distinct acts, rather than a continuing course, and requires a unanimity instruction or an election. State v. Handran, 113 Wn.2d at 17 (assault); State v. Stockmyer, 83 Wn. App. at 87-88. Only cases involving a short time frame and incidents occurring at the same location support a continuing course theory, see, e.g., Fiallo-Lopez, supra. Without a short time period, without any evidence showing the conduct all occurred in one place, and most importantly, where the evidence established particular identifiable instances of criminal conduct from which the jury could have and should have been required to choose, a continuing course theory is inapplicable and cannot justify the absence of a unanimity instruction or an election in closing argument. The verdicts in this case offer no assurances that the jurors chose specific instances of the crime and agreed those particular instances were proved beyond a reasonable doubt, and this error of unanimity requires reversal. State v. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 570. This is not a case, for

example, in which a mentally unstable and incomprehensible victim was allegedly battered by her husband while living in a secluded area such that they were always out of view, where no particular incident, or act of assault on a given date, could reasonably be expected to be provable by the State. This case is also not about the molestation of a very young or a barely competent child who simply cannot testify to discrete incidents at all, but can only say "it happened." Such cases may be appropriate for a continuing course theory, but the present case is not because the evidence showed discrete incidents, which were severable, independent, and not committed as component parts of a larger singular plan. Here, just as in Workman and Petrich, the only connection between the incidents was that the victim in each count was the same person; this is not enough to call the offense one transaction where there are discrete incidents. Petrich, at 571 (citing Royce and Waits, The Crime of Incest, 5 N.Ky.L.Rev. 191 (1978)).

In addition, the fact that these various incidents were supported by different levels of detail and proof goes to the extreme prejudice of the Petrich error, because the jury may well have aggregated weak claims to conclude the defendant must

have touched the victims at some point in the several-year charging period. State v. Workman 294-95. This case is akin to Petrich and State v. Kitchen, sexual offense cases in which the State's evidence was of significantly varying weight as to some of the incidents of touching compared to others, and in our case also including outright inconsistencies as to whether certain incidents occurred. Petrich, at 573; State v. Kitchen, at 412.

A Petrich error is presumed to be prejudicial and is not harmless " 'if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt.' " Kitchen, 110 Wn.2d at 411 (quoting State v. Loehner, 42 Wn.App. 408, 411, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn.2d 1011 (1986)). This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. See State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); Pope v. Illinois, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987). This means that affirmance in the face of a Petrich error requires the conclusion that reasonable jurors could come to only one conclusion: that

every single incident of sexual contact alluded to by the State's evidence in this case, including those on which there were varying degrees of evidence and certain outright inconsistencies, was proved beyond a reasonable doubt. For example, in Kitchen, the Court was faced with the danger that the jurors had not been constrained by an election or unanimity requirement from the possibility of some of them choosing to rely on different incidents than other jurors, to find guilt on the counts charged.

Applying the above test to the cases at bench, we affirm the Court of Appeals decision to reverse and remand Kitchen. . . and we reverse and remand Mr. Coburn's conviction. In both Mr. Coburn's and Mr. Kitchen's trials the prosecution placed testimony and circumstantial proof of multiple acts in evidence. There was conflicting testimony as to each of those acts and a rational juror could have entertained reasonable doubt as to whether one or more of them actually occurred. For example, some jurors may have based their verdict in State v. Albert Coburn on the testimony of the complaining witness in count 1 that Mr. Coburn touched her and attempted to touch her cousin when they were in the woods, while others may have based their decision on incidents that allegedly took place in the bedroom. Some jurors may have believed that Mr. Coburn touched the complaining witness in count 3 on the night she became upset while others determined that she was upset that night for other reasons, relying upon another act as basis for their verdict. Similarly, a reasonable juror could have doubted the Kitchen complaining witness' testimony that incidents

occurred in a shower and believed that only those acts before school in the trailer actually occurred. Faced with these trial records, we cannot say that failure to ensure that Mr. Coburn and Mr. Kitchen were afforded a unanimous jury verdict was harmless error. Their convictions are therefore reversed.

Kitchen, at 412.

The error in this case is not harmless because of the inconsistencies and contradictions in some of the children's trial and hearsay accounts of various of the incidents of sexual contact. It cannot be said that no rational juror could have any reasonable doubt about any of the incidents, or that a rational juror could come to only one conclusion - that every single incident mentioned at trial was proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411. Mr. Coleman urges this Court to reverse his convictions for an absence of adequate assurances of jury unanimity. State v. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 570; United States v. Payseno, 782 F.2d at 836.

**2. THE HEARSAY STATEMENTS OF C.V. AND M.D. WERE ERRONEOUSLY ADMITTED UNDER A STATE V. RYAN ANALYSIS.**

**(a). The hearsay evidence was erroneously admitted.**

When the State seeks to introduce an alleged child sex offense

victim's hearsay statements under RCW 9A.44.120, the trial court must determine if the time, content, and circumstances of the statements provide sufficient indicia of reliability. RCW 9A.44.120(1). The statute requires a showing the child was under ten years old at the time of the statement, that the child either testify at the trial or be legally unavailable to do so, and that the statements manifest reliability. RCW 9A.44.120 provides in part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another . . . , not otherwise admissible by statute or court rule, is admissible in evidence in . . . criminal proceedings . . . in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness[.]

RCW 9A.44.120(1).

The Supreme Court case of State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984), and its related cases identify nine nonexclusive factors that aid the trial courts in making the required "reliability" determination:

- (1) Did the declarant have a motive to lie;
- (2) What is the general character of the declarant;

- (3) Did more than one person hear the statement;
- (4) Was the statement spontaneous;
- (5) When was the statement made and what is the relationship between the declarant and the witness;
- (6) Was the statement an express assertion about past facts;
- (7) Could cross examination show the declarant's lack of knowledge;
- (8) Is there merely a remote possibility that the declarant's recollection is faulty; and
- (9) Were the circumstances surrounding the statements conducive to reliability.

State v. Ryan, 103 Wn.2d at 175-76; see State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991); Dutton v. Evans, 400 U.S. 74, 88-89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970). The trial court need not find that every factor supports reliability; it is sufficient that the court concludes that these factors are substantially met. State v. Swan, 114 Wn.2d at 652. Because the trial court is considered to be in the better position to observe and evaluate the demeanor of these hearsay witnesses (who describe the children's statements to them and the circumstances surrounding their making), State v. Miller, 22 Wn.App. 960, 963, 593 P.2d 177, review denied, 92 Wn.2d 1031 (1979), the appellate courts review the trial court's reliability determination for manifest abuse of discretion. Swan, 114 Wn.2d

at 665. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable reasons or grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

The trial court held a Ryan hearing, beginning with the testimony of the children's teacher Ms. McAlpin. 8/27/03 (vol. 1) at 7. The first thing this and later testimony showed was that the reputations of both children for reliability and accurate reporting were not good. McAlpin stated that C.V.'s personality was that she "doesn't like to be wrong" and that she was careful "to say things the way that she wanted to be said." 8/27/03 (vol. 1) at 10. It was noted but not emphasized that C.V. had a learning disability that required special education classes in reading and writing. 8/27/03 (vol. 1) at 9-10. McAlpin described the other child M.D. as a "flighty" child who "had a hard time keeping things in focus." 8/27/03 (vol. 1) at 11. She stated that M.D. had a reputation for liking to "embellish things." 8/27/03 (vol. 1) at 35. On several instances, for example, M.D. had approached her teacher and announced that M.D.'s family was moving from the area, and

engaging her teacher in "tearful goodbyes," only to re-appear at school the next day. 8/27/03 (vol. 1) at 35-36.

The circumstances of the reporting also raised concerns for reliability by virtue of their uncertain motivation and the possibility the statements were made as part of fighting between the girls and their schoolmates. McAlpin testified that both children were involved in a group of girls in which there was much bickering and argument, "and they would get quite heated and mean at times." 8/27/03 (vol. 1) at 12-13. In January of 2002, the girls had been "arguing again," and M.D. approached McAlpin and said that C.V. was "threatening to tell her secret." 8/27/03 (vol. 1) at 14-15. McAlpin knew M.D. had claimed to have been abused by a family member and a school boy in the past, so McAlpin thought she knew what M.D. was talking about. 8/27/03 (vol. 1) at 15. When McAlpin later questioned C.V., C.V. was "very defensive and upset that she was being called in to talk to the teacher about this," but she stated she had an "Uncle Johnny." 8/27/03 (vol. 1) at 15. Ms. McAlpin asked C.V., "is he touching you?," and C.V. stated that "Uncle Johnny" had been touching she and M.D. 8/27/03 (vol. 1) at 14-16. She stated that the defendant was touching her both under

her clothes and over them. 8/27/03 (vol. 1) at 16. McAlpin then questioned M.D. about what C.V. had said, and M.D. stated, "I was hoping she would tell you." 8/27/03 (vol. 1) at 17. M.D. stated that "it had been happening to her too." 8/27/03 (vol. 1) at 17.

M.D. also later told prosecutor's office interviewer Liebsack that she had refrained from telling her mother, who liked the defendant, about what had been going on with Mr. Coleman because she wanted to go on the trip to Hawaii that he was offering the girls. 8/27/03 (vol. 1) at 66-67.

M.D. had also made similar allegations in the past with unclear outcome. McAlpin revealed that M.D. had reported to her the previous October that a male student from the fourth grade had come into her house and tried to kiss her, and also pinned her down in the yard trying to do the same thing; this boy then was subject to CPS involvement. 8/27/03 (vol. 1) at 19-20. McAlpin noted that a month previous to the children's allegations in the present case, in late December or early January, M.D. and C.V. had both been taught a sex education course in her class that involved discussions of sexual abuse. 8/27/03 (vol. 1) at 23-25.

Later on the day of the allegations to the teacher, M.D. and C.V. were playing at M.D.'s house and M.D. called her mother, Mrs. Dalby, into the room. 8/27/03 (vol. 2) at 3. Mrs. Dalby testified that one of the children told her that "Uncle Johnny had been touching them . . . in an inappropriate manner." 8/27/03 (vol. 2) at 7. The girls did not want to talk about the matter and stated that they felt they had better tell Mrs. Dalby about it because C.V. had talked to someone at school and "they figured they had better tell me before somebody else called me." 8/27/03 (vol. 2) at 8. The girls gave no specifics about when or where these instances had happened. 8/27/03 (vol. 2) at 18. Mrs. Dalby revealed, importantly, that M.D. had some problems with telling the truth; in particular, M.D. had previously accused her brother Garrett of molesting her, which turned out to have been an exaggeration, and M.D. had then claimed she did not understand what molestation meant. 8/27/03 (vol. 2) at 20-21.

The children's statements were also relatively inconsistent. A trial court does not abuse its discretion in finding that the children's statements were consistent and therefore reliable where a child repeats similar statements to different people on different

occasions. State v. Lopez, 95 Wn.App. 842, 853, 980 P.2d 224 (1999). Here, however, the evidence showed that both C.V. and M.D. made highly contradictory statements about when abuse had occurred.

For example, also testifying at the Ryan hearing was social worker Marjorie Trudnowski, who interviewed C.V. in the context of a DCFS investigation into the child's welfare, on January 22, 2002, in the child's school counselor's office. C.V. was asked if she knew why she was there, and replied it was about Uncle John. Upon questioning about "what happened with her Uncle John," C.V. said the defendant had been touching her in places where he was not supposed to. 7/2/03 at 36, 43. C.V. stated that the defendant had touched her in her privates, under her clothes. 7/2/03 at 45. C.V. also stated, however, that the defendant had touched her the previous week when they all went to see the movie "Snow Dogs." 7/2/03 at 45.

However, school counselor Christine Barnes testified that she interviewed C.V. after hearing of her allegations from Ms. McAlpin. 7/2/03 at 95. C.V. told Ms. Barnes that when she was in third grade some people had come to her school and asked her if

she was being touched, and she said “no” (no further details were given). 7/2/03 at 99. The witness tried to determine from C.V. when the last time was that the alleged touching by the defendant had happened, and C.V. told Ms. Barnes that she and M.D. had been to the movies two weeks ago but nothing had happened there. 7/2/03 at 99, 108.

Finally, CPS social worker Simon Gobina testified that he had interviewed C.V. in April of 2001 [during the charging period] following a referral that the child was being babysat by a sex offender. 8/27/03 (vol. 2) at 28-29. C.V. told Mr. Gobina that there was no inappropriate touching by Mr. Coleman, and the CPS worker concluded that there was no need to engage in further investigation. 8/27/03 (vol. 2) at 31-32.

Additionally, in the present case, the vast bulk of the hearsay statements sought to be admitted were made to educational and governmental employees with an interest in the case; specifically, a teacher with a statutory reporting duty, a counselor with the same duty and an additional professional responsibility to elicit facts, a social worker seeking evidence of abuse, and a “prosecution child interview specialist” gathering

evidence for litigation. Such statements should be considered unreliable, under the age-old and better rationale that such statements utterly lack the spontaneity and reliability that is the touchstone of hearsay reliability. See, e.g., State v. Flett, 40 Wn.App. 277, 286, 699 P.2d 774 (1985) (excited utterance); compare State v. Lopez, 95 Wn.App. at 853 (professional interviewers enhance reliability of child hearsay).

The totality of the circumstances of these statements indicates it was an abuse of discretion to admit the statements as trial evidence under the Ryan factors. Under State v. Ryan, the statements of C.V. and M.D. should not have been admitted because the declarants' motives for making their allegations were dubious, having arisen out of a fight between the children and/or with schoolmates where the motivation for the statements was dubious. In addition, the general character of the declarants for truth was universally agreed to be not good, the statements were not spontaneous and the child interviewers were persons seeking information about sexual offenses in an official capacity. Furthermore, given the vagueness of the children's trial testimony and the significant inconsistencies in their accounts, there was a

possibility that the declarants' recollections were faulty. In general these circumstances surrounding M.D.'s and C.V.'s statements were not conducive to reliability, and the trial court abused its discretion in admitting the statements under the child hearsay statute, RCW 9A.44.120, and the State v. Ryan factors.

**(b). The erroneous admission of the hearsay evidence requires reversal because the hearsay witnesses provided a substantial part of the testimony against the defendant.** Mr. Coleman argues that the Ryan error requires reversal of the defendant's two child molestation convictions. The children did testify at trial. However, first, there was no physical evidence or any corroborative evidence of any "hue and cry" by the children at the time of the alleged incidents, or evidence of a third party as to observed or overheard activity. And there was no indirect evidence of abuse, such as any precocious knowledge of sexual activity, Swan, 114 Wn.2d at 623, because both children had either claimed prior abuse, been questioned by the government about abuse prior to their current revelations, or had very recently been involved in sexual education and discussions with the other girl about molestation.

Where children's hearsay statements are erroneously admitted, the non-constitutional error is reversible if, within reasonable probabilities, the outcome of the trial would have been affected if the error had not occurred. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Here, in addition, the trial testimony of the children in this case amounted in great part to mere general claims of abuse. C.V. testified at trial she went to the defendant's house a lot, on weekdays and weekends. 9/11/03 at 20-21. C.V. stated that the defendant touched her on her private areas. 9/11/03 at 27-28. This mostly occurred in the defendant's bedroom, and it occurred "more than five times." 9/11/03 at 30-32. When asked if this occurred more than ten times, the witness responded, "I don't know." 9/11/03 at 32.

M.D. testified that she and C.V. spent the night at the defendant's house a few times. She stated that the defendant had touched her in places he shouldn't, and that this had occurred more than fifteen times. 9/11/03 at 94.

In contrast, it was the multiple hearsay witnesses who offered the bulk of the inculpatory evidence against Mr. Coleman. These witnesses provided the more specific facts about the nature

of the children's alleged incidents, their location, and evidence of their timing (the affidavit of probable cause contained incidents occurring outside the charging period, CP 3-5). For example, it was hearsay witness Trudnowski who told the jury that C.V. stated that the defendant had touched her the previous week when they all went to see "Snow Dogs." 9/11/03 at 103. It was through this witness that the jury gained corroboration of C.V.'s claim that the defendant touched her on her privates under her clothes, 9/11/03 at 103, and that this touching also occurred in the defendant's home, and in his car, 9/11/03 at 105-06.

In this case, M.D.'s and C.V.'s testimony was not sufficiently detailed with respect to establishing proof of two counts of molestation beyond a reasonable doubt, and the cumulative testimony from all of the hearsay witnesses, together providing the substantial part of the evidence especially as to the nature and dates of the alleged touching incidents, therefore created reversible prejudice. See Traver v. State, 568 N.E.2d 1009, 1013-14 (Ind.1991) (child hearsay statements admitted in absence of the required foundation was reversible error because the sum of the adults' testimony was greater than that of the children's). Mr.

Coleman argues that this Court should reverse his convictions based on the hearsay error in the present case.

**3. MR. COLEMAN'S EXCEPTIONAL SENTENCE  
MUST BE REVERSED AND THE CASE  
REMANDED FOR IMPOSITION OF A STANDARD  
RANGE TERM.**

At sentencing, the State sought and the trial court imposed from the bench an exceptional sentence of 300 months concurrent terms of incarceration on both counts, based on an abuse of a position of trust and a pattern of ongoing abuse. 4/23/04 at 9-11. Mr. Coleman argues that his exceptional sentence violated his constitutionally guaranteed right to a jury trial where the trial court found the facts supporting the exceptional sentence from the bench and did so by a mere preponderance of the evidence.

**(a). Imposing an exceptional sentence from the bench by a preponderance of the evidence violates a defendant's Sixth Amendment right to a jury trial.** The United States Supreme Court recently rendered its decision in Blakely v. Washington, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2531, \_\_\_ L.Ed.2d \_\_\_ (2004), which ruled a Washington defendant's exceptional sentence violated the Sixth Amendment right to a jury trial. In

Blakely, the Court re-emphasized its earlier decisions in Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Ring v. Arizona, 536 U.S. 584, 604, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and held that an exceptional sentence imposed by a Washington court based upon a trial court finding of the aggravating factors by a preponderance of the evidence standard, violated the defendant's right to a jury trial as it was a sentence greater than the maximum the court could have imposed based upon the jury's verdict. Blakely, 124 S.Ct. at 2537-38. The Court noted that the "statutory maximum" was not the artificially created maximum listed in the statute, but "is the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant." (Emphasis in original.) Blakely, 124 S.Ct. at 2537.

In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

(Emphasis in original.) Id. Thus Mr. Coleman's statutory maximum is the high end of the standard range.

In the present case the trial court found, by a preponderance of the evidence, the stated aggravating factors of abuse of trust and ongoing abuse. This is precisely the process of imposing a sentence above the standard range the United States Supreme Court ruled in Blakely violated the defendant's constitutionally protected right to a jury trial. Issues raised for the first time on appeal are generally not subject to review. RAP 2.5; State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). However, an exception to this rule exists for issues involving manifest constitutional error. RAP 2.5(a). In addition, the Blakely v. Washington rule applies to Mr. Coleman. Griffith v. Kentucky, 479 U.S. 314, 322, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (at a minimum, all defendants whose cases were still pending on direct appeal at the time of the law-changing decision are entitled to invoke the new rule and benefit from the change in the law). Mr. Coleman also did not waive the right to a jury trial on the aggravating factors used to increase his punishment, any such waiver of an unknown right would in any event be invalid as unknowing. State v. Harris, \_\_\_ Wn. App. \_\_\_, \_\_\_, 99 P.3d 902, 908-09 (2004).

Accordingly, the trial court's imposition of an exceptional sentence violated Mr. Coleman's Sixth Amendment right to a jury trial and the sentence must be reversed.

**(b). Resentencing on remand is limited, by the invalidation of the SRA's exceptional sentence procedures and by double jeopardy and mandatory joinder, to the standard range.** Washington courts now lack statutory authority to impose exceptional sentences. In Blakely, the United States Supreme Court invalidated that portion of the SRA which authorized the imposition of exceptional sentences. See Blakely, 124 S.Ct. at 2538 ("Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid."). Because the exceptional sentencing scheme in the SRA is constitutionally invalid, no exceptional sentence can be imposed in this case on remand. At least one state supreme court has agreed with this analysis. In State v. Gould, relying on Apprendi, the Kansas Supreme Court ruled its sentencing statute, which authorized upward departures from a standard range sentence similar to Washington's based upon a court's finding by a preponderance of the evidence of one or more aggravating factors,

unconstitutional. State v. Gould, 271 Kan. 394, 23 P.3d 801, 813 (2001). As a result, the Court reversed the defendant's sentence and remanded for resentencing within the standard range. Id. at 814. Here, since the statutory scheme authorizing exceptional sentences has been invalidated, the only remaining remedy for the violation of Mr. Coleman's Sixth Amendment and due process rights is reversal of his exceptional sentence and remand for resentencing to a standard range sentence.

In addition, principles of double jeopardy and mandatory joinder preclude the imposition of an exceptional sentence on remand. "[A]ggravating circumstances that make a defendant eligible for the death penalty or an exceptional sentence 'operate as the functional equivalent of an element of a greater offense.' " Ring, 536 U.S. at 609. Conviction or acquittal on a lesser included offense bars re prosecution for a greater offense under double jeopardy. State v. McMurray, 40 Wn.App. 872, 874, 700 P.2d 1203 (1985); see also State v. Roybal, 82 Wn.2d 577, 580-83, 512 P.2d 718 (1973); Brown v. Ohio, 432 U.S. 161, 169-70, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); and Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). Therefore, once a defendant

has been convicted of an offense that constitutes a final conviction, double jeopardy bars the State from reprosecution of a greater offense.

Finally, the State's failure to join additional charges that are part of the "same conduct" that the State is aware of the grounds for, when it files the initial charges, requires dismissal of the additional charges if later pursued. CrR 4.3(c)(3); see State v. Holt, 36 Wn.App. 224, 227-29, 673 P.2d 627 (1983) (State violated mandatory joinder requiring dismissal of additional charges when it failed to bring all charges at one trial); State v. Russell, 101 Wn.2d 349, 353, 678 P.2d 332 (1984) (failure to join second degree felony murder in the original information precludes its inclusion for the first time by way of amendment in the second trial).

Here, Mr. Coleman was convicted of child molestation. His sentence beyond that authorized by the jury's verdicts was based on aggravating circumstances that in essence amounted to elements of greater crimes. Ring, 536 U.S. at 609. Since there never was a finding beyond a reasonable doubt on the aggravating sentencing elements, the State cannot now attempt to prove these elements. The trial court may only impose a standard range

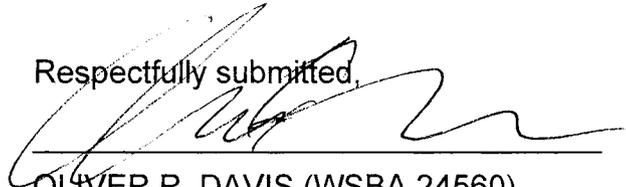
sentence on remand on child molestation or offend principles of double jeopardy and mandatory joinder.

**E. CONCLUSION**

For the reasons stated, Mr. Coleman submits this Court must reverse his convictions and remand for a new trial, and in any event reverse his exceptional sentences.

DATED this 29 day of November, 2004.

Respectfully submitted,



OLIVER R. DAVIS (WSBA 24560)  
Washington Appellate Project-91052  
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 54171-4-1
	)	
JOHN COLEMAN,	)	
	)	
APPELLANT.	)	

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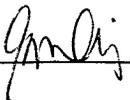
**DECLARATION OF SERVICE**

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 29<sup>TH</sup> DAY OF NOVEMBER, 2004, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- KING COUNTY PROSECUTOR'S OFFICE  
APPELLATE DIVISION  
KING COUNTY COURTHOUSE, W-554  
516 THIRD AVENUE  
SEATTLE, WA 98104
- JOHN COLEMAN  
DOC# 955951  
MONROE CORRECTIONAL COMPLEX  
PO BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2004.

x \_\_\_\_\_ 

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