No. 100506-7
COA No. 37574-9-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CRAIG RUSSELL JUNGERS,

Petitioner.

PETITION FOR REVIEW

On Review From Grant County Superior Court
The Hon John Antosz, Presiding
The Hon. David Estudillo, Presiding
The Hon. Thomas Middleton, Presiding

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A. INTRODUCTION

This case involves what ought to be a fairly non-controversial proposition – that when a lawyer fails to prepare for a serious criminal trial, the client should not pay for the lawyer's mistakes with their life. Rather, the trial court should remove the lawyer and continue the trial long enough for the client to obtain a lawyer who actually would work on the case.

In contrast, the Court of Appeals essentially blamed the Mr. Jungers for hiring a lawyer who was simply "too busy" in other parts of the state to give Jungers' Grant County case sufficient attention, affirming the denial of his motion to continue the case to obtain substitute counsel. This decision conflicts with this Court's past precedent, raises constitutional issues under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22, of the Washington Constitution, and involves issues of public importance. This Court should accept review under RAP 13.4(b)(1), (3) and (4).

This case also involves a constitutional challenge to a 2004 amendment to the Special Sex Offender Sentencing Alternative ("SSOSA") statute that requires sentencing courts to "give great weight to the victim's opinion whether the offender should receive a treatment disposition." Laws of 2004, ch. 176, § 4. This statute violates the separation of powers and the proportionality requirements of the Eighth and Fourteenth Amendments and article I, section 14. This Court should accept review under RAP 13.4(b)(3) & (4).

B. IDENTITY OF PETITIONER

Craig Russell Jungers, the petitioner below, asks this Court to accept review of the Court of Appeals' decision terminating review set out in Section C, *infra*.

C. COURT OF APPEALS' DECISION

Mr. Jungers seeks review of the unpublished opinion of Division Three of the Court of Appeals in *State of Washington v. Craig Russell Jungers*, No. 37574-9-III, issued on September 9,

2021. A copy is attached in Appendix A. An order denying a timely motion for reconsideration and amending the opinion was issued on December 2, 2021. A copy is attached in Appendix B.

D. ISSUES PRESENTED FOR REVIEW

1. Mr. Jungers retained a law firm from the Seattle area to represent him in a Grant County case. His first lawyer left the firm and Jungers was passed off to another lawyer, Harry Steinmetz. Mr. Steinmetz had a busy trial schedule in counties west of the mountains, often failed to appear in Grant County, and generally was unprepared. On the eve of trial, Mr. Jungers tried to retain local counsel, but she would only appear if the court continued the case long enough for her to become prepared. Did the trial court violate Mr. Jungers' right to counsel under the Sixth and Fourteenth Amendments and article I, section 22, when denying the motion to continue so that new counsel could take over, and was Mr. Jungers' subsequent guilty plea constitutionally

invalid as it was entered with a lawyer in whom Mr. Jungers legitimately lost confidence after a breakdown of communication?

2. Before denying the motion to continue for substitute counsel, did the Sixth and Fourteenth Amendments and article I, section 22, require that trial court hold an *in camera* hearing?

3. Is the provision of the SSOSA statute, RCW 9.94A.670(4), that requires a court to give "great weight" to a victim's opinion an unconstitutional violation of the separation of powers and a violation of the proportionality requirement of the Eighth and Fourteenth Amendments and article I, section 14?

4. Did the trial court abuse its discretion when denying the SSOSA sentence, a result that sent a disabled senior citizen to prison in a pandemic?

E. STATEMENT OF THE CASE

Mr. Jungers is a 78-year old disabled veteran with no criminal history, who in the 1960s served our country in the Navy

and Central Intelligence Agency.[1] In 2018, in Grant County Superior Court, the State charged him with child sex offenses that dated back a decade. CP 1-3. Mr. Jungers retained a law firm in King County ("Newton and Hall") to represent him. CP 15-17. As the Court of Appeals exhaustively detailed, the lawyers from this firm (first Elizabeth Mount Penner and then Harry Steinmetz) repeatedly failed to appear in court in Grant County, were too busy with other cases to give full attention to Mr. Jungers' matter, were going on vacation outside the country, did not investigate the case, did not interview witnesses, and rarely met with Mr. Jungers to review the case with him. The failure of the "Newton and Hall" lawyers to take the case seriously earned the ire of various Grant County judges who repeatedly chastised counsel for the lack of progress on the case. Slip Op. at 3-11; RP I 6-104. At one point, Mr. Jungers spoke up in court and expressed his dissatisfaction about his lawyers' failure to communicate with him. RP I 56-59.

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[1] CP 86, 240-43.

Although Mr. Steinmetz apparently thought the case would be resolved with a guilty plea and a SSOSA sentence, it seemed apparent that the chances of a SSOSA sentence were minimal. The SSOSA evaluator initially concluded that Mr. Jungers was "not an appropriate candidate for the SSOSA sentencing option," but then revised her opinion to conclude that Jungers was only "a *minimally appropriate candidate* for the SSOSA sentencing option." Slip Op. at 8-9 (court's emphasis).

With trial rapidly approaching, Mr. Steinmetz still had not investigated the case. He informed the State that Mr. Jungers would plead guilty and seek a SSOSA sentence. Mr. Jungers did not want to pursue this option. Instead, he sought new counsel (Ms. Lylianne Couture), who was local and willing to take on the case. To allow Mr. Steinmetz to withdraw and Ms. Couture to substitute in and prepare for trial, Mr. Jungers sought a few month continuance. CP 26-33, 40-43. Oral argument on the motion to

substitute counsel was held in open court, with the prosecutor present. Slip Op. at 11-16; RP I 110-43.

During the hearing, Mr. Jungers relayed to the judge how he had limited communication with Steinmetz and that he did not understand even the charges against him as a result of Steinmetz's busy schedule and failure to meet with him. RP I 139-41. In fact, there was little dispute that Mr. Steinmetz had not prepared for trial. *See* CP 41 ("it does not appear that ***any*** trial preparation has been completed at this time.") (emphasis in original). There was also little dispute that Steinmetz's busy schedule and lack of communication with his client had led to a complete breakdown of the attorney-client relationship. RP I 124 ("Mr. Jungers has no faith in my ability to proceed with this case. He does not listen. He is not interested in what I have to say about the case. There's been a complete breakdown of communications.").

The trial court denied the continuance motion, finding that Mr. Steinmetz could get ready for trial quickly by doing witness

interviews, effectively denying the substitution of counsel. RP I 135-39. Knowing that Steinmetz was not prepared, the State then threatened to amend the information. At that point, stuck with a lawyer in whom he lost confidence, Jungers pled guilty. RP I 146-60.

A few months later, the sentencing judge rejected the SSOSA option. The court specifically gave the opinion of the victim "great weight." RP II 88-89, 91-92. Mr. Jungers was then sent off to prison in the middle of the pandemic. RP II 93.

F. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. *Mr. Jungers Was Denied the Right to Counsel of His Choice*

The Sixth Amendment (as incorporated in the Fourteenth Amendment) and article I, section 22, both guarantee the right to counsel in a criminal case. The right to counsel includes the right to counsel of one's choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006).

In this case, Mr. Jungers' right to counsel of his choice was violated when the trial court denied his request to continue the case long enough so that he could retain local counsel who might actually work on his case. As a result of the denial of this continuance, Mr. Jungers' guilty plea was not knowing and voluntary, in violation of the right to due process of law, the right against self-incrimination, the right to counsel, and the right to a jury trial. U.S. Const. amends. V, VI and XIV; Const. art. I, §§ 3, 9, 21 and 22. *See United States v. Velazquez*, 855 F.3d 1021, 1037 (9th Cir. 2017) (erroneous denial of substitution of counsel required vacation of plea, citing *Perry v. Leeke*, 488 U.S. 272, 280, 109 S. Ct. 594, 102 L. Ed. 2d 624 (1989)).

Applying *State v. Hampton*, 184 Wn.2d 656, 361 P.3d 734 (2015), the Court of Appeals affirmed the trial court's denial of a continuance to allow for substitute counsel. Slip Op. at 20-26. The court concluded that Mr. Jungers only tried to substitute

counsel as a "result of reluctance to face the moment of truth and a desire to delay." Slip Op. at 32.

This conclusion is contradicted by the court's own conclusions when addressing the issue of whether the trial court should have held an *in camera* hearing. There, the Court of Appeals noted that the prosecutor was well aware of Steinmetz's lack of preparation: "The extent of Mr. Steinmetz's preparation and lack thereof was discussed at many prior hearings. Ms. Bittle [the prosecutor] knew that Mr. Steinmetz had not arranged witness interviews. She knew that Mr. Steinmetz had been focused on negotiating a plea agreement." Slip. Op. at 31-32.

If everyone knew that Mr. Steinmetz was not prepared for a jury trial, Mr. Jungers' desire to change counsel on the eve of trial was rational and not a result of wanting to delay the "moment of truth." While *Mr. Steinmetz's* life may have been easier if Jungers pled guilty and sought a SSOSA sentence, that was not a sensible option for a 77-year old man with severe physical

disabilities facing decades in prison in a case where a judge would likely reject a SSOSA sentence given the poor evaluation.

While an attorney has broad authority to determine strategy, *State v. Cross*, 156 Wn.2d 580, 612, 132 P.3d 80 (2006), the client still retains control of the objectives of representation and a lawyer "shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." RPC 1.2(a). *See Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004).

Mr. Jungers did not want to plead guilty. He wanted a trial, but he wanted a trial with a lawyer who had worked on his case rather than a lawyer who was perpetually consumed by other cases and could not be bothered even to come to court. Mr. Jungers expressed his dissatisfaction with his lawyers on the record in August 2020. RP I 58-59. In court on January 27, 2020, Mr. Jungers again spoke up, stating that his ability to consult with Steinmetz had been "limited" and that Steinmetz would not share

key documents from the case with him that "would explain to me precisely what it is that I am alleged to have done. Mr. Steinmetz has never managed to produce that document. . . . it hinges around what I was being asked to admit to when I changed my plea. . . . I can't plead guilty to something that I don't know what it is I'm supposed to have done, can I?" RP I 139-41.

That Mr. Steinmetz had been too busy to have explained even the nature of the charges to Mr. Jungers illustrates the complete breakdown in communication that characterized Mr. Steinmetz's and Mr. Jungers' professional relationship. This breakdown of communication – rather than Mr. Steinmetz's theoretical abilities to get up to speed before the looming trial date – is the reason the trial court erred when denying substitution of counsel. The issue was not, as the trial court concluded, whether Mr. Steinmetz was capable to prepare the case quickly. RP I 130-31. Rather, the focus should have been on the breakdown of communication. *See United States v. Nguyen*, 262 F.3d 998, 1003

(9th Cir. 2001) ("the District Judge focused exclusively on the attorney's competence and refused to consider the relationship between Nguyen and his attorney. Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense.").

Here, the Court of Appeals seemed to blame Mr. Jungers for not previously speaking up about *Mr. Steinmetz* (as opposed to Ms. Penner) earlier.[2] However, it is a bit unfair to expect a senior citizen with limited exposure to the legal system to stand up in court repeatedly and criticize their own attorney. Indeed, when Mr. Jungers did try to speak up in August 2020, the judge initially chastised him about speaking personally to the court when he had (stand-in) counsel to assist him. RP I 57-59. That Mr. Jungers said

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[2] *See* Slip Op. at 24 ("Mr. Jungers argues that he made the trial court aware of his issues with counsel at the August 20 hearing, but in context, Mr. Jungers's complaints at that time were directed at Ms. Penner (who he referred to as Ms. Mount), not Mr. Steinmetz.").

anything in court at all after being told not to speak should then not be turned against him as evidence.

The Court of Appeals also relied on the fact that "Mr. Jungers could afford retained counsel and was demonstrably able to hire and replace his lawyers quickly." Slip Op. at 29. Yet, this fact too should not be used against Mr. Jungers. *See United States v. Santos*, 201 F.3d 953, 958-59 (7th Cir. 2000) (that politician defendant could hire another lawyer should not be used as reason to deny a continuance and thus deny her counsel of choice).

The fact that Mr. Jungers was diligent and hired counsel as soon as he was charged, and then diligently hired new counsel when it was clear that the firm he paid money to had not done any trial preparation and trial was fast approaching, should not be used against him. Indeed, that Jungers paid money to a firm that ignored the case, ignored him and thumbed its nose at the Grant County Superior Court are facts that support the exercise of discretion *to extend* deadlines, rather than deny Mr. Jungers relief.

In re Pers. Restraint of Fowler, 197 Wn.2d 46, 479 P.3d 1164 (2021), is instructive. There, this Court recently held that it had the power to extend the collateral attack deadline (RCW 10.73.090) where a defendant hired a lawyer to file a Personal Restraint Petition ("PRP"), the lawyer took the money but then stopped communicating, and at the last minute, the defendant's family had to hire a second lawyer who filed a "placeholder" petition on the eve of the expiration of the deadline. *Id*. at 48-52. Even though Mr. Fowler had resources to hire a new lawyer, *see id.* at 63-66 (Whitener, J., dissenting), the Court held that the collateral attack deadline should be continued where Fowler diligently obtained new counsel just as the deadline was expiring. *Id.* at 56.

The holding of *Fowler* makes sense. Lay consumers of legal services may still have faith in the system and do not want to have to find new lawyers after having paid large portions of their life savings to one firm already. People hire lawyers with the

expectation that even if the lawyer is busy or hard to reach that at some point the lawyer will give their full attention to a case. This is a reasonable position for normal people. That a lawyer takes money and does not do the work is a problem with the legal system and is not the "fault" of the client.

Thus, while Mr. Jungers may have had resources to hire lawyers, the fact that he trusted that Mr. Steinmetz would get up to speed after taking over from Ms. Penner in the Summer of 2019 was not a sign of his desire for "delay." Just as Mr. Fowler obtained new counsel late in the game and a deadline was extended, here too, Mr. Jungers obtained new counsel at the last minute when he legitimately lost confidence it Steinmetz. Mr. Jungers was diligent and did all he could to find a lawyer who would not just take his money and not do the work. He was not just seeking delay – he was seeking a lawyer in whom he could have confidence to prepare the case.

Mr. Jungers was denied counsel of his choice in violation of the right to counsel under the Sixth and Fourteenth Amendments and article I, section 22. This denial resulted in a guilty plea that was not knowing, intelligent and voluntary in violation of the Fifth, Sixth and Fourteenth Amendments and article I, sections 3, 9, 21 and 22. *See United States v. Velazquez*, 855 F.3d at 1037.

The conflict with *Hampton* and the constitutional issues involved justify review under RAP 13.4(b)(1) & (3). However, review should also be granted as an issue of public importance under RAP 13.4(b)(4). This Court has been very concerned about making sure that defendants receive vigorous representation by their lawyers. *See In re Pers. Restraint of Fowler*, *supra*; *State v. Vazquez*, 198 Wn.2d 239 494 P.3d 424 (2021) (reversal where lawyer failed to object to inadmissible evidence).

Here, the issue is not ineffectiveness *per se*, but whether a client stuck with a lawyer whose lack of preparation and failure to

communicate – on a trajectory to a train wreck at trial – should be allowed new counsel. Mr. Jungers was diligent and proactive. He should not be punished as a result. The Court should accept review and reverse.

2. *The Superior Court Should Have Held an In Camera Hearing*

When asking to withdraw, Mr. Steinmetz stated did not want to reveal attorney-client confidences. CP 32; RP I 124. Yet, all discussions about Mr. Jungers' dissatisfaction with Mr. Steinmetz and Ms. Penner took place in open court, with the prosecutor and the public listening in.

Under the Sixth and Fourteenth Amendments and article I, section 22, hearings on motions to withdraw and/or substitute counsel need to take place *in camera* without the prosecutor or public present. *See, e.g., In re Pers. Restraint of Stenson,* 142 Wn.2d 710, 717-18, 726-29, 731, 737-39, 764-65, 16 P.3d 1 (2001) (trial court conducted series of *in camera* hearings on

motion to substitute counsel); *United States v. Velazquez*, 855 F.3d at 1034-35 (an inquiry into a request for a new lawyer requires private and in depth questions of the attorney or defendant); *United States v. Nguyen*, 262 F.3d at 1004 ("For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'") (quoting *United States v. Moore*, 159 F.3d 1154, 1160 (9th Cir. 1998))

Logically, this is appropriate because the defendant and counsel must be able to discuss highly confidential, privileged information in order for the court to determine whether there is an irreconcilable conflict undermining the constitutional right to counsel. *See Yakima v. Yakima Herald Republic*, 170 Wn.2d 775, 803, 246 P.3d 768 (2011) (attendance of public at hearing to request funds for defense "would hurt the overall process of providing the defendant an adequate defense given the need to keep defense strategies from the prosecution, maintain

attorney-client confidences, and protect the right against self-incrimination.").

In contrast, here, the prosecutor and public were present during the inquiry about Mr. Jungers' dissatisfaction with counsel. They were present when the trial judge asked Mr. Steinmetz "if you think you did something wrong," to which Mr. Steinmetz predictably responded, "I don't believe I did anything wrong." RP I 125.[3]

Yet, it was clear that Mr. Steinmetz had done "something wrong" – he had not prepared for trial, he had not conducted any interviews, he had barely met with his client, and he was essentially tied up in trial after trial in Western Washington for months. Rather than this information being fully discussed in a closed hearing from which the State was excluded, the State became privy to confidential information that it should not have

[3] Ms. Couture's filings (CP 40-43) should have been sealed as well.

had access to – the fact that a week or so before trial, defense counsel had done nothing at all to prepare for trial and the fact that Mr. Jungers had limited communications with his lawyer. This knowledge gave the State an incalculable tactical advantage in the plea bargaining process once the trial court denied a lengthy continuance. At that point, the State knew Jungers had counsel who was not prepared for trial and a lawyer in whom Jungers had lost confidence. The trial court's failure to hold an *in camera* hearing was an independent violation of the Sixth and Fourteenth Amendments and article I, section 22, and a violation that magnified the harm resulting from the denial of the continuance and substitution of counsel.

The Court of Appeals rejected this argument, citing only to a Ninth Circuit case, *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986). Slip Op. at 31. However, in *McClendon*, the issue was not whether the inquiry about substitution of counsel should have been *in camera*, but only about the thoroughness of

the inquiry upon a day-of-trial motion to fire counsel. Here, the issue is was whether the prosecutor should have been present at all during the trial court's inquiry.

While, as the Court of Appeals recognized, the prosecutor certainly knew of Mr. Steinmetz's failure to interview State's witnesses, Slip Op. at 31-32, with *in camera* proceedings, the prosecutor would not have known (1) about Steinmetz's failure to conduct an independent defense investigation, (2) about Steinmetz's failure to meet with his client and explain the case to him, and (3) about the depths of Jungers' lack of trust in his lawyer and the full extent of their communication breakdown. These are facts that the State should not have known and facts that the State then capitalized on by threatening to increase the charges if the case was not quickly resolved. *See* RP I 147-48 (State references that after the denial of substitution of counsel, it threatened to amend the information and Mr. Steinmetz asked to get the original deal back).

The issue of the right to have an *in camera* hearing is constitutionally based, and thus review is required under RAP 13.4(b)(3). It is also an issue that this Court has not squarely ruled on in the past and thus it is an issue of public importance that justifies review under RAP 13.4(b)(4). This Court should accept review and reverse.

3. *The SSOSA Statute Unconstitutionally Gives "Great Weight" to the Opinion of the Victim*

The SSOSA statute requires that when determining whether to impose a prison sentence or a suspended community-based treatment sentence, the "*court shall give great weight to the victim's opinion* whether the offender should receive a treatment disposition under this section." RCW 9.94A.670(4) (emphasis added). This "great weight" requirement was added in 2004. Laws of 2004, ch. 176, § 4.

While judges can always consider the opinions of victims before sentencing someone, *see State v. Hays*, 55 Wn. App. 13,

17, 776 P.2d 718 (1989), a legislative requirement to afford any particular factor "great weight" illegally trenches on judicial sentencing powers under Article IV, section 1. *See State v. Barber*, 170 Wn.2d 854, 872, 248 P.3d 494 (2011) (specific performance remedy for breach of plea to recommend illegal sentence "allows the prosecutor, as a member of the executive branch, to bind the court to a particular sentence through the plea agreement. This invades the court's prerogative to impose what it considers to be an appropriate sentence in the case before it"); *State ex rel. Schillberg v. Cascade Dist. Court*, 94 Wn.2d 772, 775-78, 621 P.2d 115 (1980) (deferred prosecution for alcohol treatment is a sentencing alternative and judicial act).

Moreover, a statute requiring "great weight" to be given to a victim's opinion as to sentence violates the proportionality requirements of the Eighth Amendment (as incorporated by the Fourteenth Amendment) and article I, section 14. Generally, a sentence is unconstitutional under the Eighth Amendment if it

"grossly disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 60, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Article I, section 14, requires that sentences of "ordinary imprisonment are commensurate with the crimes for which such sentences are imposed." *State v. Fain*, 94 Wn.2d 387, 397, 617 P.2d 720 (1980).

Stronger in its protections than the Eighth Amendment, article I, section 14's proportionality test requires consideration of the following factors:

> (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction.

State v. Bassett, 192 Wn.2d 67, 83, 428 P.3d 343 (2018) (citing *State v. Fain*, 94 Wn.2d at 397).

A victim's opinions about the fate of the defendant does not appear in these criteria for proportionate sentences. This is for good reason. A criminal case is not a private cause of action by which a wronged victim seeks vengeance or retribution against a

particular defendant. Rather, criminal cases, as opposed to private tort actions, are brought by the sovereign, the State, which represents all people, including the defendant,[4] in an effort to deter, restrain, punish or rehabilitate those who harm society as a whole.[5] Thus, a statute that makes a private party's wishes for sentencing paramount (the only factor of many to which "great weight" is given), detracts from the public nature of the proceeding and shifts the focus away from the characteristics of the defendant, the nature of the crime and the interests of society to whether a particular victim wants the defendant to die in prison or not.

This shift can easily cause great sentencing disparities based on raw emotion that has nothing to do with the proportionality

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[4] *See State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

[5] *See Bergman v. State*, 187 Wash. 622, 625, 60 P.2d 699 (1936) ("In a general way, it may be said that a crime is an offense against the public, while a tort is a private injury.").

required by article I, section 14, and the Eighth Amendment. If there are two identically situated defendants, and a SSOSA was appropriate both for them and society, but based on the anger of only one victim, one defendant goes to prison and one does not, the constitutional principle of proportionality is violated. The sentence would be imposed not by reference to the requirements of article I, section 14, or the Eighth Amendment, but by reference to the personal desire of a private person.

Moreover, the emphasis on the victim's wishes creates the potential for sentencing disparities based on extra-legal considerations such as the status of the victim. For instance, in this case, the trial judge was very impressed with the written submissions of H.N. and her mother. RP II 87. Yet, there may be other cases where the victim may not write as well or as persuasively, may not speak English fluently, or may lack the economic resources to participate in and attend sentencing hearings. Indeed, given the documented history of implicit racial

bias in Washington State's legal system,[6] giving "great weight" to the opinions of victims could well increase sentencing disparities based on improper considerations such as the socio-economic status or ethnicity of victims and their families.

The issue of the constitutionality of the 2004 "great weight" amendments to SSOSA statute has not yet been before this Court. Review should be granted under RAP 13.4(b)(3) and (4) and the Court should reverse.

4. *The Trial Court Abused Its Discretion When Denying a SSOSA*

Review of the trial court's decision regarding a SSOSA is based on an abuse of discretion standard. *State v. Sims*, 171 Wn.2d 436, 445, 256 P.3d 285 (2011). A decision that is "manifestly unreasonable" is an abuse of discretion. *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 668, 260 P.3d 874 (2011).

Although the trial judge did go through the process of

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[6] *See State v. Gregory*, 192 Wn.2d 1, 22-23, 427 P.3d 621 (2018).

examining the key factors in RCW 9.94A.670(4) in relation to the evidence, RP II 78-92, it is "manifestly unreasonable" to send a 77-year old physically infirm person with no criminal record, who was amenable to treatment, to prison during the COVID-19 pandemic, where he will most likely die. Such a decision is an abuse of discretion. This Court should accept review under RAP 13.4(b)(1)-(4) and reverse.

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G. CONCLUSION

For the above-noted reasons, this Court should accept review and reverse.

DATED this 27th day of December 2021.

I certify that this motion contains 4881 words (as calculated with the WordPerfect Word Count function), excluding the categories set out in RAP 18.17.

Respectfully submitted,

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APPENDIX A

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CRAIG RUSSELL JUNGERS, Appellant.	))))))))))	No. 37574-9-III UNPUBLISHED OPINION

SIDDOWAY, J. — Craig Jungers appeals the judgment and sentence entered following his plea of guilty to three counts of first degree child molestation. He contends (1) he was deprived of his constitutional right to retained counsel of his choice; (2) he was constructively deprived of legal representation in negotiating his guilty plea; (3) RCW 9.94A.670(4)'s provision that a sentencing court "shall give great weight to the victim's opinion" whether an offender receives the special sex offender sentencing alternative (SSOSA) violates separation of powers, and denying him a SSOSA based on

his victim's wishes constitutes cruel and unusual punishment; and (4) the trial court abused its discretion in denying him the SSOSA.

We find no error or abuse of discretion and affirm.

FACTS AND PROCEDURAL BACKGROUND

In October 2018, then 17-year-old H.N.[1] reported to police that Craig Jungers had sexually assaulted her multiple times some 10 years earlier. She told police she did not previously report the assault because Mr. Jungers was a friend of her family. She changed her mind when she became aware that Mr. Jungers had befriended a 9-year-old girl who came from a broken home, lived with an elderly grandmother, and had spent time alone with Mr. Jungers at his home. She feared Mr. Jungers was taking advantage of the girl.

Having obtained a phone intercept order, law enforcement recorded a telephone conversation between H.N. and Mr. Jungers on October 22. Although Mr. Jungers initially objected to speaking with H.N. on the phone and insisted that they meet where they could not be monitored, he was gradually drawn into a conversation with her about how their sexual contact started and the molestation that had occurred. He claimed that H.N. had initiated the sexual contact. During the conversation, Mr. Jungers repeatedly expressed concern that he could go to prison for the rest of his life.

[1] We refer to juvenile victims using initials or pseudonyms. *See* Gen. Order of Division III, *In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), http://www.courts.wa.gov/appellate_trial_courts/.

The next day, as H.N. walked out of her house, Mr. Jungers slowly drove by. H.N. called her mother in a panic and her mother called police. Officers took Mr. Jungers into custody that day and on October 24, he was charged with three counts of child molestation in the first degree and one count of indecent liberties (forcible compulsion).

2018 proceedings

Mr. Jungers was represented by privately-retained counsel in all of the proceedings below. At his first appearance on October 24, he was accompanied by Bradley Barshis, who told the court that his firm would be filing a notice of appearance. A notice of appearance was filed on November 13 by Elizabeth Mount Penner, a lawyer with Newton and Hall, a Kent-based law firm. Mr. Barshis was also present at the arraignment, which took place on November 13, and he explained that he and Ms. Penner were with the same firm. The trial court set the omnibus hearing for January 8, readiness for January 28, and trial for January 30.

2019 proceedings

At the January 8 omnibus hearing, Ms. Penner appeared by telephone. The prosecutor, Carlee Bittle, informed the court that the parties were still in "discovery mode" and she was following up on material requested by the defense, so the omnibus

was being continued by agreement. Report of Proceedings (RP)[2] at 29. Ms. Bittle reported that the defense had not yet set any interviews. Omnibus was reset to February 25, readiness to March 18, and trial, March 20.

At the February 25 omnibus hearing, Mr. Jungers was present but Ms. Penner was not. Ms. Bittle explained that Ms. Penner had called the prior week to say she would be unavailable but had been told that a continuance could be agreed on and had advised her client of the agreed, continued dates. Mr. Jungers affirmed that he had discussed the continuance with Ms. Penner and he signed the revised scheduling order. Omnibus was continued to April 22, readiness May 13, and trial May 15.

At the April 22 omnibus hearing, Mr. Jungers was represented by a stand-in lawyer not associated with Newton and Hall. Ms. Bittle informed the court that Ms. Penner was requesting a continuance of trial to the first week of August due to her involvement in a jury trial, her unavailability for the entire month of June, and her need to interview witnesses in July. Ms. Bittle explained that the victim had her own reasons for wanting to avoid a May trial date (she was graduating from high school) so the State had no objection. Ms. Bittle stated, "I believe this should be the final continuance in this matter." RP at 38-39. The trial court expressed displeasure that defense counsel had not

[2] All proceedings other than sentencing are included in a single, consecutively-paginated transcript which we refer to simply as "RP." The transcript of the sentencing is referred to as "RP (Sentencing)."

yet conducted any interviews, but continued the trial date to August 7. Omnibus was scheduled for July 22.

On June 20, Ms. Penner, who had evidently left the Newton and Hall firm, filed a notice of withdrawal and substitution of counsel, identifying Harry Steinmetz as "substituting attorney." CP at 19. Mr. Steinmetz appeared for the July 22 omnibus hearing. Mr. Steinmetz informed the trial court that although he had only recently joined Newton and Hall, he had met with Mr. Jungers, reviewed most of the discovery, spoken with the prosecutor, and "I do have a plan of where I want to go with this." RP at 47. He apologized for Ms. Penner "dropp[ing] the ball" but told the court "I think we've made more progress in the last month than has been made in the entire time of this case." *Id.* Ms. Bittle said she believed "a short continuance would be appropriate." RP at 56. The trial court continued the trial date to October 9, with an omnibus hearing scheduled for August 20.

At around this same time, Mr. Steinmetz was arranging for a certified sexual offender treatment provider to evaluate Mr. Jungers for purposes of seeking a SSOSA should Mr. Jungers plead guilty or be found guilty of the charges. The evaluation was funded privately by Mr. Jungers, with the understanding that the provider, Julie Crest, would initially forward her completed report only to Mr. Steinmetz. Ms. Crest conducted her first clinical interview and testing of Mr. Jungers on July 31. She performed a second clinical interview of Mr. Jungers on August 7.

The August 20 omnibus hearing was not attended by Mr. Steinmetz or Ms. Bittle. An associate of Mr. Steinmetz's appeared with Mr. Jungers and another deputy prosecutor appeared for the State. Mr. Steinmetz's associate told the court that Mr. Steinmetz would be involved in other trials "for quite a while" and was asking that the trial be continued to December 4. RP at 51-52. The trial court expressed annoyance with another request to continue. Mr. Steinmetz's associate stated his understanding that Mr. Steinmetz "is currently in negotiations with Ms. Bittle and those are ongoing." RP at 53. The prosecutor filling in for Ms. Bittle told the court that the State opposed a further continuance and "[t]he victim was very specific that she does not want another continuance." RP at 53. The prosecutor informed the court that the victim was enlisting in the military, which created additional cause for concern about any continuance.

The trial court was reminded that Mr. Steinmetz had taken over Mr. Jungers's defense after Ms. Penner left his firm, at which point Mr. Jungers tried to interject. The trial court allowed him to speak briefly, and Mr. Jungers said:

> MR. JUNGERS: I had a difficult time contacting Ms. Mount [Penner].
>
> THE COURT: Okay.
>
> MR. JUNGERS: She put me off on my visit to their officers [sic] to look at discovery and never renewed it. So, there was a lot of discovery that I never looked at. She made one appearance here, one appearance by telephone and one appearance by proxy, somebody else somewhere, some guy I've never seen before and one time there was nobody here at all and the prosecutor actually helped me. So, really I understand there were

> continuances, but there wasn't anything being done to forward my defense. Now, thanks to emails on my part, we're getting some progress.

RP at 58-59.

The trial court declined at the August hearing to continue the trial date. It determined from Mr. Steinmetz's associate that Mr. Steinmetz could "probably" attend a continued omnibus hearing in two weeks and re-set the omnibus hearing for September 4. RP at 59.

Mr. Steinmetz appeared on September 4 and made his own request for a continuance due to an eight week murder trial scheduled to begin in about a week. Ms. Bittle objected again, noting the case had already been continued six times and the victim was trying to move forward with her life. The court informed Mr. Steinmetz that if it were to continue the date, there would likely not be any more continuances granted absent an emergency. The trial court then continued the omnibus hearing to November 6, with trial set for December 4.

An associate of Mr. Steinmetz's appeared at the November 6 hearing and reported that Mr. Steinmetz was still involved in the murder trial, which had run longer than expected. Ms. Bittle informed the court that "the victim in this matter has contacted not only our office, but also the law enforcement that's been working on this case and let them know that she'd like to have this case moving forward. It's been going on for a year." RP at 85. The trial court continued omnibus for a week, to November 13.

On November 11, Ms. Crest completed a confidential SSOSA evaluation of Mr. Jungers, in which she expressed her opinion that "Mr. Jungers' is not an appropriate candidate for the SSOSA sentencing option." Clerk's Papers (CP) at 170 (text prior to revision). She reported the following conclusions:

> Mr. Jungers is a 76-year-old man who is admitting to having engaged in sexual contact several years ago against a then 7-9-year-old female child. He and his wife had befriended the child and her mother via the mother's relationship with their son. Mr. Jungers described an unusually close and emotionally distorted relationship with the child throughout several years. He described the child as "special, impossible to say no to". Although Mr. Jungers now admits that he did engage in sexual contact against the child and that he was aroused and used that arousal for his own sexual gratification, he continues to describe the child as the initiator of the sexual contact. At times, he portrays himself as a victim to his report of her overtures.
>
> Given his narrative that it was the child's sexual interest and curiosity that initiated and sustained the sexual contact, Mr. Jungers has expressed little or no understanding of the harm he perpetrated on this child. He is almost exclusively focused on portraying himself as having been co-opted by the child into the sexual contact. He certainly regrets his sexual contact against the child, but at this point his regret is primarily related to the consequences he is facing, as well as the consequences for his wife.

CP at 169-70 (text prior to revision). The report remained confidential for the time being.

On November 13, a Wenatchee lawyer who was acquainted with Mr. Steinmetz appeared on his behalf and reported that Mr. Steinmetz was still "in the middle of a murder trial" in King County. RP at 90. He said the murder trial was expected to go several more weeks and requested a trial continuance to mid-January. A prosecutor

appearing for Ms. Bittle objected, telling the court that there had been eight prior continuances.

Speaking of Mr. Steinmetz, the trial court said:

> Well, if he's in trial he's not gonna be ready by December 2nd. I mean he's just not. I don't think there's any doubt about that. On the flip side, I want to have him here present so we can talk to him and say hey, is this a case you're committed to or do you have other matters that you are committed to as well and just don't have the time to give to this case? Because we can't continue—continue to continue it out if he's gonna be that busy that he cannot handle this case.

RP at 92. After confirming that the Wenatchee lawyer could appear on November 25 if Mr. Steinmetz could not, the court set a status hearing for November 25, and a CrR 3.5 hearing for November 27. It did not continue the trial date. It told the Wenatchee lawyer that if Mr. Steinmetz was "done with trial, we want him here, physically here," otherwise "we need some type of update from him to figure out . . . is he gonna be able to basically give time to this case." RP at 93.

Ms. Bittle and Mr. Steinmetz had completed an order on omnibus hearing, which the lawyers delivered for filing during the November 13 hearing. Reviewing it, the trial court commented on its report that the State intended to amend the information. The prosecutor said that Ms. Bittle intended to add two special allegations.

On November 22, Ms. Crest revised her SSOSA evaluation and provided a new confidential report. This time, she expressed the opinion that "Mr. Jungers' is a *minimally appropriate candidate* for the SSOSA sentencing option." CP at 170 (as

revised) (emphasis added). She nonetheless recommended "that he be given the opportunity to participate in a community based SSOSA treatment program" and "be scheduled for treatment progress review hearings at 3-month intervals to ensure that he is moving forward in his accountability for his actions and his understanding of the harm he perpetrated on the victim." CP at 170 (as revised). The revised report still remained confidential.

Mr. Steinmetz personally appeared on November 25 hearing and asked the trial court to continue trial to January 23. He informed the trial court he had another "hard set" trial that could not be changed. RP at 101. He said he had proposed to Ms. Bittle "that I would be in touch with her over the Christmas holidays. She'll have some availability and will be a little easier for us to communicate back and forth and see if we can come to a resolution. I think we're at a point where we can discuss a productive resolution of this." *Id.* The State again objected to the continuance, but asked that any continued dates be "hard set;" Mr. Steinmetz assured the court that "if there is no movement on resolution, I will be ready to go." RP at 102-03. The trial court continued the trial date to January 23, 2020, the CrR 3.5 hearing to January 15, and the readiness hearing to January 21.

2020 proceedings

At the time set for the CrR 3.5 hearing on January 15, Mr. Jungers stipulated to the admissibility of his statements. A lawyer from Ephrata stood in for Mr. Steinmetz, explaining that Mr. Steinmetz was "concerned about snowmageddon coming over the mountains." RP at 108. The stand-in lawyer said he had discussed the stipulation with Mr. Jungers, who understood its contents, and Mr. Jungers affirmed to the court that he had signed and understood "everything . . . that is concerned with this." RP at 109. When the trial court told those present that it would see them at the readiness hearing on January 21, Ms. Bittle mentioned that she believed, based on her conversations with the defense attorney, that Mr. Jungers would be changing his plea on the 21st.

Instead, on the following day, January 16, Mr. Steinmetz filed a motion for an order authorizing him to withdraw as counsel. In his affidavit in support of the motion, Mr. Steinmetz informed the court that "[o]n January 15th, 2020, the Defendant informed me he has chosen to dismiss me as counsel in this matter," and, "Given the restraints of attorney-client privilege, it would be improper for me to reveal the reasons for his so requesting to the Court." CP at 29. It continued, "The Defendant advised he would be hiring Lylianne Couture of the Couture Law Firm," and that Mr. Steinmetz had contacted Ms. Couture, who "advised that the Defendant had contacted her about representation." CP at 30.

Ms. Bittle filed a 6-page objection and declaration. After recounting the history of continuances, she informed the court that she and Mr. Steinmetz had discussed a proposed resolution on December 23; on January 9, she was notified by Mr. Steinmetz that Mr. Jungers had signed off on the proposed resolution; the victim had agreed to the proposed resolution; on January 10, Mr. Steinmetz corresponded with her about language for Mr. Jungers' statement on plea of guilty; and on January 15, Mr. Jungers stipulated to the admissibility of his statements, as expected. She testified that "[o]n the afternoon of January 15," however, she received a telephone call from Ms. Couture, who "advised that the defendant was in her office and wanted to know the status of the case." CP 39. She testified, "I advised that it was the State's belief that the parties had reach[ed] a resolution but that trial was set for the following Wednesday." CP at 39. Ms. Bittle testified that on January 16, she received an e-mail from Ms. Couture stating that she expected to be "formally" retained on January 22 and would ask that the trial be continued to April. Ms. Bittle responded to Ms. Couture that the court had ruled in November that there would be no more continuances and the State would be asking that trial proceed as scheduled.

Ms. Couture's motion for an order allowing her to be substituted as counsel was heard on January 27. Mr. Steinmetz was present. The trial court commented that in the parties' last appearance, it was led to believe the case was resolved and that Mr. Jungers would enter a plea. It asked what happened. Given the issues on appeal, we quote at length from comments made at the hearing.

Mr. Steinmetz explained that when he and Mr. Jungers had discussed early in his representation how to proceed and had some disagreements,

> the conversation shifted towards how could we resolve this case so he would not end up in prison and that's been what I've been trying to accomplish since I've been into the case you know a little less than six months. And without—without revealing any confidences, I believe at this point, Mr. Jungers has no faith in my ability to proceed with this case. He does not listen. He is not interested in what I have to say about the case. There's been a complete breakdown of communications as far as any kind of trust or understanding, the ability to work together and he wants another attorney and that's fine. I would not stand in his way. It's my understanding he's hired a very competent attorney to represent him and wants to proceed to trial.

RP at 124.

The trial court observed that it did not sound like Mr. Steinmetz had done anything wrong; rather, Mr. Jungers just decided he did not want to follow Mr. Steinmetz's recommendation. He asked if *Mr. Steinmetz* believed he did something wrong, and Mr. Steinmetz answered:

> I don't believe I did anything wrong. The biggest issue, I suppose in my representation, is that I proceeded as if this case was going to resolve and as a consequence, we have a trial date on Wednesday and I'm not prepared to proceed at that point.

RP at 125.

The trial court expressed frustration that Mr. Steinmetz was not ready to proceed to trial. It questioned Mr. Steinmetz, Ms. Couture and Ms. Bittle about the number of expected witnesses and when their interviews could be arranged. It

determined that there were four known potential witnesses and "then there is [the] possibility of another witness or two that might come out because of who is interviewed." RP at 129. Ms. Bittle projected that the State could make the witnesses available for interview within a week.

The trial court expressed resignation that a continuance was required, since the failure to interview witnesses could lead to reversal of any verdict on the basis of ineffective assistance of counsel. It continued:

> The question I have is why three months though? I know your schedule, Ms. Couture, doesn't allow you because you say you have these other matters that you're dealing with. But I don't see this as being a three month continuance quite frankly and so the question is if I give you one or two weeks, are you gonna be prepared for trial? If not, Mr. Steinmetz, who I don't have any reason to believe he's not capable of proceeding, this is his case still and so I expect he's gonna get these witness interviews done and go forward.
>
> MS. COUTURE: Your Honor, I don't think I could be ready in two weeks. I would have to practically clear my whole schedule to get that accomplished.
>
> THE COURT: So then I don't think you have the ability to substitute in as counsel at this point if you're not gonna be able to be prepared to go forward. Because again, and it's not through your fault, I know you're coming in late but this is a year and a half old case. And your client knew Mr. Steinmetz was in this case since at least June. He put an appearance in. They've had discussions. They've talked. I was here two months ago and he was here as well and we said hey, there's no more continuances. This case is either gonna go forward or it's gonna get resolved. And I don't hear anything by way of some type of major complaint, unless somebody can point it out, that says Mr. Steinmetz for whatever reason is not capable, he's been incompetent in some form or fashion. It sounded like it was gonna be resolved and for whatever reason it was not. And so again, I'm not hearing anything by way of Mr.

> Steinmetz is not capable of handling this case or that he's done something that's extremely prejudicial that's caused somehow, Mr. Jungers some type of prejudice at this point.
>
> . . . .
>
> So basically, I'm gonna grant a continuance, but it's only gonna be two weeks. In two weeks those interviews should be done. Obviously, if there's some other major issue that comes up, we will deal with it at that point in time.
>
> Ms. Couture, I'm happy to enter you as substitution—substituted counsel, but only under the condition that you're aware this is going to trial in two weeks and it's not gonna be put aside for your other matters that you may have.

RP at 130-32.

After Ms. Couture declined substitution on that basis, Mr. Steinmetz asked the court what it recommended to improve communications with Mr. Jungers,

> because at this point, as I said, we have a break—a complete breakdown. He's not communicating with me about anything substantive and he doesn't want to hear what I have to say.
>
> THE COURT: I don't know if I have an answer for that off the top of my head. All I can say is from the record, it looks like there was good communication up until the 15th of this month and—
>
> MR. STEINMETZ: I would not characterize it as good.
>
> THE COURT: Okay. Well, it sounded like there was a discussion. Again, we can go back over the history. The 15th 3.5 statement was stipulated to, presumably under your advice. So, I presume that you advised Mr. Jungers of this and I asked him in court, is this your signature, did you go over this with your attorney? I heard no complaints. I heard nothing about hey, my attorney is not informing me of any issues. I asked him, are you sure, this your signature, you went forward? Yes. And then I heard from [stand-in counsel] saying hey, this is gonna be resolved in the next hearing dates. And again, I presumed that representation came from you telling [stand-in counsel] yep, I've talked to Mr. Jungers, you know, we discussed whatever issues there are and Mr. Jungers didn't say at the 3.5

> hearing when he heard [stand-in counsel] say that I don't remember Mr. Jungers saying hey, wait a minute, I'm not aware of any of this or what's happening with the case. So, it sounds like there was decent communication, if not good communication, up through the 15th of this month. Between the 15th and the 16th you get a phone call that simply says hey, I want to ask Ms. Couture now to represent me. I'm not sure where the breakdown in communication occurred at that point other than, again, the only thing—from the outside looking in right now, it sounds like it was resolved and for whatever reason decided I don't want to resolve it. So, I'm not sure again, where that statement, it's not the best communication, is coming from.
>
> MR. STEINMETZ: Well and Your Honor, I really can't reveal that without revealing confidences. So, you've put me in an awkward position. But I can represent to the Court in good faith that we've had a breakdown of communication and it has been difficult throughout my pendency in this case and I think Mr. Jungers would agree with that.
>
> MR. JUNGERS: Absolutely.
>
> THE COURT: So, sir, I can tell you this. I'm happy to assign a new attorney for you if you want, but you've got to find somebody who is ready to go to trial because I have not hear[d] anything that tells me Mr. Steinmetz is somehow incapable or not able to take this case to trial on your behalf.

RP at 133-35. The trial court concluded its oral ruling by explaining why it believed the factors relevant to permitting substitute counsel identified in *State v. Hampton*, 184 Wn.2d 656, 662, 361 P.3d 734 (2015), supported its decision. It scheduled the readiness hearing for February 10 and the trial for February 12.

Instead, a change of plea hearing was held on February 3. Mr. Steinmetz was present as Mr. Jungers's counsel. The State informed the court that after the January 27 hearing, it worked quickly with Mr. Steinmetz to schedule witness interviews, it informed him it would be moving to amend the charges with additional enhancements, and Mr.

Steinmetz had asked the State if it remained willing to agree to the earlier-negotiated plea, which it was. Mr. Jungers agreed to plead guilty to three counts of child molestation in the first degree and the State agreed to dismiss the indecent liberties charge. Mr. Jungers intended to ask for a SSOSA and the State would request standard range sentencing.

At the hearing at which Mr. Jungers entered his guilty plea, the trial court questioned Mr. Jungers directly and extensively in order to determine the knowing and voluntary nature of the plea. Mr. Jungers affirmed his understanding of rights he was giving up and stated in his own words what he did to make him guilty of the crimes he pled guilty to. The trial court accepted the plea.

In a March 21 presentence investigation (PSI) report, the Department of Corrections (DOC) recommended against a SSOSA because Mr. Jungers "showed no remorse for his actions, nor did he take responsibility for his actions." CP at 99. It quoted Ms. Crest as opining that Mr. Jungers "is not an appropriate candidate for the SSOSA sentencing option," and agreed with her. CP at 90.

In a supplemental PSI report, DOC community corrections officer Mariah Fernandez reported to the court that after seeing her report, Mr. Steinmetz contacted her and questioned where she obtained a copy of Ms. Crest's original November 11 report. Apparently he had not intended DOC to receive it. Mr. Steinmetz provided Ms. Fernandez with Ms. Crest's revised November 22 report. In the supplemental PSI, Ms.

Fernandez reported respects in which she believed Mr. Jungers had not been forthcoming with DOC. She stated that Ms. Crest's revised opinion did not change DOC's recommendation against a SSOSA.

A sentencing hearing was held on April 9. Both the State and Mr. Jungers filed extensive sentencing memoranda. H.N. and her mother filed victim impact statements. DOC had forwarded a victim impact statement from a second young woman, B.V., who, as a child, had been present during incidents taking place between H.N. and Mr. Jungers. The State agreed that Mr. Jungers met the statutory criteria for a SSOSA but disagreed that it was an appropriate sentence and asked the court to sentence him to a term of 130 months to life in prison.

H.N. read her victim impact statements to the court. In it, she said, "I spent ten years in my own little mental prison and I think he should get his." RP (Sentencing) at 51. H.N.'s mother read her own victim witness statement, in which she said, "I just want my daughter to feel safe. I want her to be able to go about town and not have that edging fear of possibly seeing him . . . . The only way I can feel this can happen is if he can get [the] maximum sentence." RP (Sentencing) at 43.

Mr. Steinmetz argued for a suspended sentence of 98 months upon successful completion of a SSOSA. In addition to arguing why Mr. Jungers qualified for the sentencing alternative, Mr. Steinmetz reviewed the number of physical ailments suffered

by his 77-year-old client and emphasized that Mr. Jungers was extremely at risk of the COVID-19 virus.

In announcing its sentencing decision, the trial court addressed each matter courts are directed by RCW 9.94A.670(4) to consider in determining whether to order the sentencing alternative. When it reached the "victim's opinion" consideration, it observed that H.N.'s and her mother's statements to the court were "powerful, very telling and informative." RP (Sentencing) at 87. It noted that by statute, it was to give "great weight" to the victims' opinions. Addressing victims' interests in general and H.N.'s interests in particular, it said:

> [THE COURT:] . . . I've been a judge for over 20 years, but in these kinds of cases, especially the sexual offense cases, I've come to conclude that sometimes my sentencing means more to victims and their healing than I thought. So that it's not just representative of justice. Because sometimes I'll tell people, look, regardless of what my sentencing, it doesn't equate to what you've lost. And we all know that.
>
> Taking that notion aside for a minute, sometimes what the court does can bring healing to victims. And I never knew that until a couple years ago. And that's a finding I have in this case, is that this will help her heal and get on with her life. And the reason I say that in this case, there were some specific things that I said that I read that to me were very telling. So where the mother says—and I believe this—where she says, "I just want my daughter to feel safe. I want her to be able to go about town and not have that edging fear of possibly seeing him. I want her to feel like she can breathe and finally live her life. The only way I feel this can happen is if he serves the maximum sentence."
>
> That's what the statute is addressing, I believe . . . .
>
> . . . .

> And so I know we could try to craft an order that says, don't have any contact with [H.N]. We may or may not be able to do banishment orders, those are usually unconstitutional, like don't go into a certain town. It still might be stipulated to. But I don't think she'd feel safe. I really don't. And so that's a large factor for me to consider here today.
>
> As I said, that's something that I've learned, that sometimes it makes a difference in people's lives just what the court sentences.

RP (Sentencing) at 88-90. Mr. Steinmetz did not object to the trial court's discussion of victims' interests or its observation that it was directed by statute to give the victim's opinion great weight.

After reviewing the five policy rationales for sentencing, the trial court announced it would not grant the request for a SSOSA. It imposed concurrent indeterminate sentences of 114 months to life. Mr. Jungers appeals.

ANALYSIS

It is well settled that a plea of guilty forecloses appeal except as to collateral questions such as the validity of the statute violated, the sufficiency of the information, the jurisdiction of the court, or the circumstances surrounding the plea. *State v. Saylors*, 70 Wn.2d 7, 9, 422 P.2d 477 (1966)). Mr. Jungers makes six assignments of error that we analyze as raising four collateral questions.

I. MR. JUNGERS DOES NOT DEMONSTRATE THAT DENIAL OF HIS REQUEST FOR A CONTINUANCE AND SUBSTITUTION VIOLATED DUE PROCESS

We first review Mr. Jungers's challenge to the trial court's refusal to continue trial and substitute Ms. Couture as his lawyer through the lens of his desire to proceed to trial

with his counsel of choice. Review of the challenge through the lens of his claim of constructive denial of counsel is reviewed in section II. Well-settled case law governs this review of the trial court's decision.

Under the Sixth Amendment to the United States Constitution, defendants able to retain a private attorney generally have the right to the counsel of their choice. *Hampton*, 184 Wn.2d at 662. The right to counsel of choice is not absolute, however, and one limit on the right is "a trial court's wide latitude in balancing the right to counsel of choice . . . against the demands of its calendar." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). When a criminal case has been set for trial, court rules provide that "no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown." CrR 3.1(e).

When a defendant desires new counsel but requires a continuance to do so, we review a trial court's denial of a continuance to determine "whether it was 'so arbitrary as to violate due process.'" *Hampton*, 184 Wn.2d at 663 (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964)). In *Hampton*, our Supreme Court held that the trial court's task in such cases is to "'weigh the defendant's right to choose his counsel against the public's interest in the prompt and efficient administration of justice,'" and when engaging in this "highly fact dependent" process it can consider "all relevant information." *Id.* at 669 (quoting *State v. Aguirre*, 168 Wn.2d 350, 365, 229

P.3d 669 (2010)). It explicitly blessed courts' consideration of 11 factors described in 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.4(c) at 822-25 (4th ed. 2015). It observed that "[n]ot all factors will be present in all cases, and thus a trial court need not evaluate every factor in every case." *Hampton*, 184 Wn.2d at 670. We review a trial court's decision for abuse of discretion. *Id.*

In deciding to grant Mr. Jungers a two-week continuance but not a three-month continuance, the trial court analyzed 10 of the 11 *Hampton* factors, as follows:

> *Factor 1: Whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar*

Based on the facts that the information was filed in October 2018 and, following a number of continuances, the trial court set a hard date that all the parties should have been ready for, the court found that the request did not come at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar.

> *Factor 2: The length of the continuance requested*

The trial court observed that a three-month continuance to interview five or six witnesses "seems a little extraordinary." RP at 136. As such, the trial court determined the length of the continuance "doesn't seem to match what is being done here." *Id.*

> *Factor 3: Whether the continuance would carry the trial date beyond the period specified in the state speedy trial act*

Because the parties were 15 months into the case, the trial court observed, "[W]e're definitely past what the normal speedy trial is." RP at 137.

Factor 4: Whether the court had granted previous continuances at the defendant's request

The trial court found it had granted at least three or four continuances (the State's view was that the number was considerably higher). The court noted that when it granted the last continuance, it told the parties they must be ready to go by the next trial date.

Factor 5: Whether the continuance would seriously inconvenience the witnesses

The trial court found the main witness, the alleged victim, had been trying to get into the military and had been putting it off because of the trial. The trial court found this to be a serious inconvenience to the main witness.

Factor 6: Whether the continuance request was made promptly after the defendant first became aware of the grounds advanced for discharging his or her counsel

The trial court first observed that it was not sure if the request was made promptly or not. It had not perceived any breakdown in communication between Mr. Jungers and Mr. Steinmetz. Instead, the trial court found that "it sounds like there was a recommendation made and eventually somebody said I don't agree with the recommendation. It doesn't sound like there was a defect or deficiency in representation." RP at 137-38.

Factor 7: Whether the defendant's own negligence placed him or her in a situation where he or she needed a continuance to obtain new counsel

While the trial court did not characterize Mr. Jungers as negligent, it observed that Mr. Steinmetz had been on the case for six or seven months before the court was made

aware of an issue with communication. The court also determined that whoever was at fault for the late request for a continuance, "[I]t's not the Court's fault and certainly not the State's fault at this point or the complaining witness's fault." RP at 138.

Mr. Jungers argues that he made the trial court aware of his issues with counsel at the August 20 hearing, but in context, Mr. Jungers's complaints at that time were directed at Ms. Penner (who he referred to as Ms. Mount), not Mr. Steinmetz. Mr. Jungers informed the court at the August 20 hearing that he was "getting some progress" at that point. RP at 59. If there *was* an earlier, serious breakdown of communication between Mr. Steinmetz and Mr. Jungers, the trial court was not made aware of it until the motion to substitute counsel.

Factor 9: Whether there was a rational basis for believing that the defendant was seeking to change counsel primarily for the purpose of delay

The trial court stated that looking at the timing of the request "from the outside" and based on "what had happened immediately prior to" the request, there was "some indication" that Mr. Jungers was seeking to delay rather than go forward with the recommended plea. RP at 138. It admitted that it did not know that, exactly.

Factor 10: Whether current counsel was prepared to go to trial

The trial court observed that Mr. Steinmetz was not able to go to trial on the originally-scheduled date but he could be prepared "shortly." RP at 138.

Factor 11: Whether denial of the motion was likely to result in identifiable prejudice to the defendant's case of a material or substantial nature

The trial court observed that in light of its willingness to grant a two-week continuance, Ms. Couture had not been able to identify "prejudice to the defendant's case" of a material or substantial nature. RP at 139. She had identified the need to conduct witness interviews, but the court's questioning revealed that it was feasible to complete the witness interviews in less than two weeks, and Mr. Jungers had not demonstrated otherwise.

The *Hampton* factor that the trial court did not address, and which is the major focus of Mr. Jungers's argument on appeal, is factor 8, "[w]hether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation." *Hampton*, 184 Wn.2d at 670. If Mr. Jungers could demonstrate a complete breakdown in communication or irreconcilable conflict with Mr. Steinmetz, that would be a sufficient and independent constitutional error, as discussed in section II, below. But as discussed further below, the trial court reasonably found that Mr. Jungers had not shown any sign of dissatisfaction with Mr. Steinmetz until he changed his mind about accepting Mr. Steinmetz's recommendation that he plead guilty.

The trial court's findings on the *Hampton* factors support its decision not to continue trial for three months. Its findings are supported by the history of proceedings

in the case, the information provided by Ms. Bittle, Mr. Steinmetz and Mr. Jungers, and reasonable inferences from that information. No abuse of discretion is shown.

II. MR. JUNGERS DOES NOT DEMONSTRATE THAT DENIAL OF HIS REQUEST CONSTRUCTIVELY DENIED HIM REPRESENTATION BY COUNSEL

We next review Mr. Jungers's contention that the trial court's refusal to continue trial given what he contends was a "complete breakdown" in communication and "irreconcilable conflict" with Mr. Steinmetz constructively denied him representation by counsel in plea negotiations. Am. Opening Br. of Appellant at 16, 32. As observed in *United States v. Velazquez*, 855 F.3d 1021, 1034 (9th Cir. 2017), the Sixth Amendment's guarantee of effective assistance of counsel applies at the plea-bargaining stage, so constructive denial of counsel can occur at that phase just as it can at trial. *See accord In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 722, 16 P.3d 1 (2001) ("If the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates the defendant's Sixth Amendment right to effective assistance of counsel."). It is in connection with this challenge that Mr. Jungers argues that the trial court should have conducted an *in camera* hearing.

Mr. Jungers twice emphasizes that this is a narrow, record-based claim of *denial* of counsel, not any other claim of ineffective assistance of counsel. He emphasizes that distinct matters such as Ms. Penner's and Mr. Steinmetz's alleged lack of diligence is likely to be the basis of a nonrecord-based claim of ineffective assistance of counsel, to

be raised in a personal restraint petition (PRP). Am. Opening Br. of Appellant at 25 n.7, 29 n.11. It is prudent for appellate counsel to forego challenges on direct appeal that cannot be demonstrated in the appellate record. Nonrecord evidence can be presented in a PRP, but a PRP may not raise an issue that was raised and rejected on direct appeal unless the interests of justice require relitigation of the issue. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 750, 101 P.3d 1 (2004). We respect the distinction that counsel is drawing. We analyze this challenge as depending on a complete breakdown of communication and irreconcilable conflict that is allegedly demonstrated in the record.

To determine whether an irreconcilable conflict requires substitution of counsel, the Washington Supreme Court has adopted a three-factor test identified by the Ninth Circuit Court of Appeals. *Stenson*, 142 Wn.2d at 723-24 (citing *United States v. Moore*, 159 F.3d 1154 (9th Cir. 1998)). The factors are "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion." *Moore*, 159 F.3d at 1158-59. As *Moore* explains, the same test is applied in evaluating whether an irreconcilable conflict exists and whether the trial court erred in failing to substitute counsel. *Id.* at 1158. The "adequacy of the inquiry" factor is concerned with whether the inquiry created a "sufficient basis for reaching an informed decision." *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986). While a formal, in-depth, private investigation into the specific details of the dispute is favored, a formal investigation is

not required if the judge's own observations and the defendant's description of the issue provide a sufficient basis for reaching an informed decision. *Id.*

Federal appeals courts have held that a trial court fails to make an adequate inquiry when it does not inquire into how long a continuance would be needed for new counsel, makes no attempt to gauge the inconvenience caused by such a delay, does not question the attorney or defendant about the degree to which their animosity prevented adequate preparation, and does not ask why the motion had not been made earlier. *Moore*, 159 F.3d at 1161; *United States v. D'Amore*, 56 F.3d 1202, 1205 (9th Cir. 1995), *overruled on other grounds by United States v. Garrett*, 179 F.3d 1143 (9th Cir. 1999); *United States v. Nguyen*, 262 F.3d 998, 1004 (9th Cir. 2001).

Here, the trial court did inquire into the continuance that would be needed for new counsel. Ms. Couture never budged from her stated need for a three month continuance, and Mr. Steinmetz's estimate, which was credible based on what the trial court heard from him and the prosecutor, was that he could be ready in two weeks. The trial court was cognizant of the inconvenience that would be caused by delay—most significantly, the interference in the life of H.N., who had graduated from high school the year before and was pressing the prosecution and law enforcement about when she could get on with her life. The trial court's questions sought an explanation of when the issue arose that resulted in the motion.

The trial court's inquiry into the nature of the conflict between Mr. Jungers and Mr. Steinmetz was narrower than in cases relied on by Mr. Jungers, but it was reasonably narrower. It was a material circumstance that Mr. Jungers could afford retained counsel and was demonstrably able to hire and replace his lawyers quickly.[3] From that, it was reasonable to infer that Mr. Jungers would have replaced Mr. Steinmetz earlier if he was dissatisfied with his representation.

As the trial court observed, Mr. Jungers consistently attended hearings. Mr. Jungers was present when Mr. Steinmetz's associates or local counsel stood in for him. Mr. Jungers was present when the trial court and counsel discussed the fact that Mr. Steinmetz had not yet interviewed the handful of witnesses expected to be called at trial. Mr. Jungers did not make any complaints about Mr. Steinmetz before the motion to substitute counsel. Asked on January 15, 2020, if he understood the stipulation to admissibility of his statements that was presumably recommended by Mr. Steinmetz, Mr. Jungers told the court, "I understand everything that—that is concerned with this." RP at 109.

[3] By the time of Mr. Jungers's first appearance, which took place the day after his arrest and within two days of his intercepted phone call from H.N., he had retained counsel from a King County criminal defense firm. On January 15, 2020, Mr. Jungers appeared at 11:00 a.m, in the morning with Mr. Steinmetz's associate to stipulate to the admissibility of his statements, and managed to schedule a meeting with Ms. Couture to discuss *her* engagement that afternoon. *See* CP at 39.

Knowing that Mr. Jungers could have discharged Mr. Steinmetz at any time, and knowing from Ms. Bittle's opposition that she and Mr. Steinmetz believed Mr. Jungers had agreed to a plead guilty, it makes sense that the question in the trial court's mind was narrow: "So, between January 15 and the following Monday, what happened?" RP at 123. He asked that question, and Mr. Steinmetz and Mr. Jungers provided him with the same answer. Mr. Steinmetz said the trial court correctly surmised that Mr. Jungers led him to believe that he was willing to take the plea that Mr. Steinmetz had negotiated with Ms. Bittle. But then Mr. Jungers changed his mind. Mr. Jungers agreed, telling the trial court in his own words that Mr. Steinmetz had been unable to provide Mr. Jungers with a document that would "explain to me precisely what it is that I am alleged to have done," and "I can't plead guilty to something that I don't know what it is I'm supposed to have done." RP at 140-41.

We do not see how it would have been helpful for the trial court to ask Mr. Steinmetz *why* he recommended that Mr. Jungers plead guilty, or how he explained that recommendation to his client. The trial court was aware of the police reports. It knew the intercepted telephone call would be admitted at trial. One can surmise why defense counsel would recommend a plea. It might have been prudent for the trial court to question Mr. Jungers even more closely about why he decided to consult a second lawyer, if for no other reason than to avoid an issue like this on appeal. The trial court

could draw on its experience, however. As the Supreme Court of Michigan observed decades ago:

> Reluctance on the part of many defendants to face the reality on trial day morning that the moment of truth is at hand is a familiar fact of life in the criminal justice system. Experienced trial judges, such as the able judge in this case, are thoroughly familiar and regularly confronted with trial day adjournment requests, advanced for countless reasons and frequently coupled with parallel and conditional requests to discharge counsel and proceed [p]ro se.

People v. Anderson, 398 Mich. 361, 247 N.W.2d 857 (1976). Importantly, given an opportunity to explain any respect in which he was unable to communicate with Mr. Steinmetz, Mr. Jungers identified none. *See* RP at 139-41.

Mr. Jungers argues that the trial court's failure to question Mr. Steinmetz and Mr. Jungers *in camera* was error that allowed the State to obtain privileged information that it used to coerce Mr. Jungers into signing the plea agreement. There is no requirement that a trial court conduct a private, in camera hearing when presented with a motion to substitute counsel. *McClendon*, 782 F.2d at 789 (no abuse of discretion when trial court questioned the defendant and counsel on the record).

The contention that argument in the presence of Ms. Bittle gave her new leverage is unpersuasive. Nothing of import revealed at the January 27 hearing was new to the prosecution. The extent of Mr. Steinmetz's preparation and lack thereof was discussed at many prior hearings. Ms. Bittle knew that Mr. Steinmetz had not arranged witness interviews. She knew that Mr. Steinmetz had been focused on negotiating a plea

agreement. Ms. Couture informed Ms. Bittle in a e-mail on January 16 that she had just been retained and would need a three month continuance. Mr. Jungers is not assigning error on appeal to the failure of *Mr. Steinmetz and Ms. Couture* to request argument outside the presence of the prosecutor. He does not demonstrate anything revealed during the course of the hearing that should have caused the trial court, sua sponte, to order that the argument move *in camera.*

A week after the motion for substitution was denied, Mr. Jungers reconsidered and entered the originally-agreed plea. The trial court was understandably very thorough in questioning Mr. Jungers about its voluntariness. *See* RP at 149-57. Mr. Jungers gave clear, direct answers that affirmed the knowing and voluntary nature of his plea. *See id.* We have no reason to disregard his clear answers to the trial court's questions in favor of his self-serving argument on appeal that his actions were not voluntary. Mr. Jungers's entry of unambiguous guilty pleas knowing that he was otherwise about a week away from trial is strong evidence that his request for substitution of counsel was the result of reluctance to face the moment of truth and a desire to delay.

III. PARTICULARLY GIVEN THE POLICY REASONS FOR THE EXISTENCE OF THE SSOSA, THERE IS NOTHING UNCONSTITUTIONAL ABOUT GIVING "GREAT WEIGHT" TO THE OPINION OF A VICTIM

Mr. Jungers next argues that the statutory directive of RCW 9.94A.670(4) to give great weight to the victim's opinion violates separation of powers. He also argues that when the trial court gave great weight to H.N.'s opinion he was subjected to cruel and

unusual punishment. The State responds that while Mr. Jungers's challenges are constitutional in nature, he cannot demonstrate the "manifest" constitutional error that would cause us to review an error that was not preserved in the trial court. We agree with the State but exercise our discretion to address the challenges. *See* RAP 2.5(a) ("The appellate court *may* refuse to review any claim of error which was not raised in the trial court." (Emphasis added.)).

Nature and history of the sentencing alternative

The nature and history of the sentencing alternative has relevance to our constitutional analysis. RCW 9.94A.670 sets out general criteria for who is eligible for a SSOSA, such as lack of prior history of sex crimes, an established relationship with the victim, and a standard range exceeding 11 years. *See generally* RCW 9.94.670(2). Once the offender satisfies the initial criteria, the court must then weigh factors identified in RCW 9.94.670(4).

"The state legislature enacted SSOSA in 1984 to permit trial courts to suspend the sentences for first time offenders in exchange for treatment and supervision." *State v. Pratt*, 196 Wn.2d 849, 855, 479 P.3d 680 (2021) (citing SUBSTITUTE H.B. 1247, 48th Leg., Reg. Sess. (Wash. 1984)). "The legislature developed the sentencing alternative with recommendations from the Sentencing Guidelines Commission, which in turn relied on input from treatment professionals and victim advocates." *Id.* The commission

reported to the legislature that treating offenders was a 'major concern' for victims and their families because in many cases

> "sex offenders commit their crimes against children related to them by blood or marriage. Family friends are also common offenders in these type of crimes. Given these relationships, *many victims and their families want to see the offender receive help rather than a prison sentence.*"

Id. at 856 (emphasis added) (quoting SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE at 2 (Feb. 1984)). "The commission also noted that '[w]ithout the cooperation of victims, the criminal justice system is ineffective in responding to sexual abuse; *the effect of a sentencing policy on victims' attitudes toward reporting is therefore critical*.'" *Id.* (emphasis added) (alteration in original) (quoting SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE at 2-3 (Feb. 1984)).

"During the 2004 session, the legislature amended the SSOSA in order to 'further increase the protection of children from victimization by sex offenders.'" *Id.* (quoting ENGROSSED SUBSTITUTE H.B. 2400, at 2, 58th Leg., Reg. Sess. (Wash. 2004)). "Testimony from the legislative hearings emphasized that '[t]he majority of sex crimes against children are committed by people who have a relationship with the child' or occur in 'the family context.'" *Id.* (alteration in original) (quoting H.B. REP. ON ENGROSSED SUBSTITUTE H.B. 2400, at 10, 5, 58th Leg., Reg. Sess. (Wash. 2004)). "These relationships between offender and victim make it less likely that abuse would be reported by victims or caregivers as '[f]amily members are often reluctant to report sex

offenses if they feel the perpetrator will get a lengthy prison sentence.'" *Id.* (quoting H.B. REP. ON ENGROSSED SUBSTITUTE H.B. 2400, at 8, 58th Leg., Reg. Sess. (Wash. 2004)).

"Aside from adding RCW 9.94A.670(2)(e)'s requirement for an 'established relationship' or 'connection' between an offender and victim, the 2004 legislature also added additional SSOSA amendments to acknowledge that SSOSA victims, because of their relationships with their abusers, would have an investment in the offender's sentencing and treatment." *Id.* at 857. "The legislature provided multiple opportunities for victims to address the court." *Id.* (citing RCW 9.94A.670(4), (8)(b), (9)).

As explained by the Washington Supreme Court, "[t]he legislature intended SSOSA's purpose to be a narrow tool in circumstances where a victim would be reluctant to report abuse and unwilling to participate in prosecution *without the promise of a shortened sentence and treatment for an offender*." *Id.* at 857-58 (emphasis added). "The ongoing involvement of a victim in his or her abuser's supervision and treatment makes sense only where the legislature believed a victim would be personally invested in their abuser's confinement and rehabilitation." *Id.*; *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976) ("It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it.").

The legislative intent and policy are clear—the SSOSA was enacted to incentivize victims to report abuse when they would otherwise be deterred from reporting by the prospect of the abuser receiving a standard sentence. If a victim *wants* their abuser to receive a standard sentence, allowing the abuser to benefit from a SSOSA would be contrary to the legislature's intent and policy.

Separation of powers doctrine

The doctrine of separation of powers "'preserves the constitutional division between the three branches of government'" and ensures that the activities of one branch do not "'threaten or invade the prerogatives of another.'" *In re Estate of Hambleton*, 181 Wn.2d 802, 817, 335 P.3d 398 (2014) (quoting *State v. Elmore*, 154 Wn. App. 885, 905, 228 P.3d 760 (2010)). "The legislature violates separation of powers principles when it infringes on a judicial function." *Id.* A statute is presumed constitutional, *State v. Maciolek*, 101 Wn.2d 259, 263, 676 P.2d 996 (1984), and if the legislative enactment is reasonably capable of a constitutional construction, it must be given that construction. City of *Seattle v. Drew*, 70 Wn.2d 405, 408, 423 P.2d 522 (1967).

In Washington, it is well established that the authority to determine the sentencing process lies with the legislature. *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996) ("[T]he determination of penalties for crimes is a legislative function."); *State v. Ammons*, 105 Wn.2d 175, 181, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930,

107 S. Ct. 398, 93 L. Ed. 2d 351 (1986) (holding that whatever discretion a trial court has in sentencing is discretion that is granted by the legislature).

Contrary to Mr. Jungers's assertions, the intent of the legislature in enacting the SSOSA was not to save State financial resources or to favor treatment over confinement. As explained above, "[t]he legislature intended SSOSA's purpose to be a narrow tool in circumstances where a victim would be reluctant to report abuse and unwilling to participate in prosecution without the promise of a shortened sentence and treatment for an offender." *Pratt*, 196 Wn.2d at 857-58. Requiring the sentencing court to place "great weight" on the victim's statement conforms to the legislature's policy and intent and falls within its realm of deciding what discretion to grant to sentencing courts. Accordingly, it does not violate separation of powers.

Constitutional protections against cruel or cruel and unusual punishment

The Eighth Amendment to the federal constitution prohibits the infliction of "cruel and unusual punishment." Article I, section 14, of the Washington Constitution bars cruel punishment. *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014). The state constitutional provision is more protective than the Eighth Amendment in this context. *Id.* (citing *State v. Rivers*, 129 Wn.2d 697, 712, 921 P.2d 495 (1996); *State v. Fain*, 94 Wn.2d 387, 392, 617 P.2d 720 (1980)).

Our Supreme Court has identified four factors applied in determining whether a punishment is "cruel" within the meaning of article I, section 14, of the Washington

Constitution: "(1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction." *Rivers*, 129 Wn.2d at 713.

As acknowledged by Mr. Jungers in his statement on plea of guilty, the standard range sentence for child molestation in the first degree, given his offender score, was an indeterminate life sentence with a minimum term of 98 to 130 months. The sentence imposed by the trial court was an indeterminate life sentence with a minimum term of 114 months.

Mr. Jungers makes no effort to analyze his 114 month to life indeterminate sentence under the factors that determine whether a punishment is "cruel" within the meaning of the Washington Constitution. Instead, he argues that allowing H.N.'s wishes to affect his eligibility for a *sentencing alternative* constitutes cruel punishment because it is irrelevant to proportionality. He cites no authority for the proposition that the criteria for a sentencing alternative can render an otherwise constitutional sentence "cruel" punishment.

"'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988) (internal quotation marks omitted) (quoting *In re Request*

of Rosier, 105 Wn.2d 606, 616, 717 P2d 1353 (1986)). Mr. Jungers's assignment of error on cruel punishment grounds does not merit review.

IV. MR. JUNGERS DOES NOT IDENTIFY A BASIS FOR REVIEW OF THE TRIAL COURT'S DISCRETION

Finally, Mr. Jungers argues that even if the trial court followed the proper process, it was manifestly unreasonable to send a 77-year-old physically infirm person with no criminal record, who was amenable to treatment, to prison during the COVID-19 pandemic. The record reveals that when Mr. Jungers was taken into custody, the Grant County Jail medical clinic initially expressed reservations about its ability to house him. By February 4, 2020, however, a registered nurse with the clinic wrote a letter "[t]o whom it may concern," reporting that although Mr. Jungers's "needs are extensive, we have been able to find accommodations for Inmate Jungers." CP at 71.

Mr. Jungers characterizes *State v. Sims*, 171 Wn.2d 436, 256 P.3d 285 (2011), as holding that review of a trial court's decision whether to order a SSOSA is based on an abuse of discretion standard. But the Supreme Court held in *Sims*, citing *State v. Osman*, 157 Wn.2d 474, 482 n.8, 139 P.3d 334 (2006), that "[t]he grant of a SSOSA sentence is *entirely* at a trial court's discretion, so long as the trial court does not abuse its discretion *by denying a SSOSA on an impermissible basis.*" *Sims*, 171 Wn.2d at 445 (emphasis added). This is consistent with RCW 9.94A.585(1), which provides that a "sentence within the standard range . . . for an offense shall not be appealed." The only exception is

if the sentencing court fails to comply with procedural or constitutional requirements. *Osman*, 157 Wn.2d at 481-82.

Mr. Jungers concedes that the trial court went "through the process of examining the key factors in RW 9.94A.670(4) in relation to the evidence." Am. Opening Br. of Appellant at 50. We have rejected his argument that denial of the SSOSA violated his state and federal protection against cruel or cruel and unusual punishment, which is the only constitutional issue he raises. No basis for appealing his standard range sentence is shown.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Pennell, C.J.

Staab, J.

APPENDIX B

FILED
DECEMBER 2, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CRAIG RUSSELL JUNGERS, Appellant.	)))))))))	No. 37574-9-III ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied.

IT IS ORDERED the motion for reconsideration of this court's decision of September 9, 2021, is hereby denied.

IT IS FURTHER ORDERED the opinion filed September 9, 2021, is amended as follows:

The following footnote is inserted after the citation "Am. Opening Br. of Appellant at 25 n.7, 29 n.11." on the first line of page 27:

> In a motion for reconsideration, Mr. Jungers characterizes us as "detail[ing]" how Ms. Penner and Mr. Steinmetz "were . . . too busy with other cases to give full attention to Mr. Jungers' matter, did not investigate the case . . . and rarely met with Mr. Jungers to review the case with him." Mot. for Recons. (Sept. 28, 2021) at 1-2 (on file with court). The record on appeal establishes that Ms. Penner and Mr. Steinmetz often sent other lawyers to hearings, that witnesses had not been interviewed, and that Mr. Jungers voiced a complaint about Ms. Penner in August 2019. We expressed no view on these

matters identified by the motion, however, which were not raised as an issue on appeal.

IT IS SO ORDERED.

PANEL: Judges Siddoway, Pennell, Staab

FOR THE COURT:

REBECCA L. PENNELL
Chief Judge

STATUTORY APPENDIX

Laws of 2004, ch. 176 (excerpts attached to Statutory Appendix)

RAP 13.4(b) provides:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RPC 1.2 provides in part:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

RCW 9.94A.670 (June 12, 2008 to May 6, 2009) provided in part:

> (2) An offender is eligible for the special sex offender sentencing alternative if:
>
> (a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense. If the conviction results from a guilty plea, the offender must, as part of his or her plea of guilty, voluntarily and affirmatively admit he or she committed all of the elements of the crime to which the offender is pleading guilty. This alternative is not available to offenders who plead guilty to the offense charged under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and *State v. Newton*, 87 Wash.2d 363, 552 P.2d 682 (1976);
>
> (b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state;
>
> (c) The offender has no prior adult convictions for a violent offense that was committed within five years of the date the current offense was committed;
>
> (d) The offense did not result in substantial bodily harm to the victim;

(e) The offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime; and

(f) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years. . . . .

. . . .

(4) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment. If the court

determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.712, a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension:

(a) The court shall order the offender to serve a term of confinement of up to twelve months or the maximum term within the standard range, whichever is less. The court may order the offender to serve a term of confinement greater than twelve months or the maximum term within the standard range based on the presence of an aggravating circumstance listed in RCW 9.94A.535(3). In no case shall the term of confinement exceed the statutory maximum sentence for the offense. The court may order the offender to serve all or part of his or her term of confinement in partial confinement. An offender sentenced to a term of confinement under this subsection is not eligible for earned release under RCW 9.92.151 or 9.94A.728.

(b) The court shall place the offender on community custody for the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.712, or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.

> (c) The court shall order treatment for any period up to five years in duration. The court, in its discretion, shall order outpatient sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court. If any party or the court objects to a proposed change, the offender shall not change providers or conditions without court approval after a hearing. . . .

RCW 10.73.090 provides in part:

> (1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for

> the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

Wash. Const. art. I, § 3, provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 9, provides:

> No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Wash. Const. art. I, § 14, provides:

> Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Wash. Const. art. I, § 21, provides:

> 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 in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 22 (amend. 10), provides in part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases. . . .

Wash. Const. art. IV, § 1, provides:

> The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

CERTIFICATION OF ENROLLMENT

ENGROSSED SUBSTITUTE HOUSE BILL 2400

Chapter 176, Laws of 2004

(partial veto)

58th Legislature
2004 Regular Session

SEX CRIMES AGAINST MINORS--SENTENCE ENHANCEMENTS

EFFECTIVE DATE: 6/10/04 - Except sections 2 through 6, which become effective 7/1/05

Passed by the House March 10, 2004
Yeas 95 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 10, 2004
Yeas 40 Nays 7

BRAD OWEN

President of the Senate

Approved March 26, 2004, with the exception of section 1, which is vetoed.

GARY F. LOCKE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 2400** as passed by the House of Representatives and the Senate on the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

March 26, 2004 - 4:34 p.m.

Secretary of State
State of Washington

ENGROSSED SUBSTITUTE HOUSE BILL 2400

AS AMENDED BY THE SENATE

Passed Legislature - 2004 Regular Session

State of Washington 58th Legislature 2004 Regular Session

By House Committee on Appropriations (originally sponsored by Representatives McMahan, Carrell, Mielke, Talcott, Crouse, Bush, Ahern, Newhouse, G. Simpson, Woods and Orcutt)

READ FIRST TIME 03/02/04.

AN ACT Relating to sentence enhancement for sex crimes against minors; amending RCW 9.94A.670, 9.92.151, and 9.94A.728; reenacting RCW 9.94A.515 and 9.94A.712; creating new sections; prescribing penalties; and providing an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

***NEW SECTION.** Sec. 1. (1) The legislature finds that sex offenses against children are among the most heinous of crimes and that the legislature has a paramount duty to protect children from victimization by sex offenders. Sentencing policy in Washington state should ensure that punishment of sex offenders is pursued to the extent that such punishment does not jeopardize the safety of children or hinder the successful prosecution of sex offenses against children.*

The legislature finds that offenders with the most serious sex offenses against children including, but not limited to, rape in the first and second degree, rape of a child in the first and second degree, child molestation in the first degree, indecent liberties with forcible compulsion, and kidnapping in the first or second degree with a sexual motivation should be subject to life sentences. The legislature finds that since September of 2001, these and other most

serious sex offenses have been subject to life sentences under a determinate-plus sentencing structure. Those offenders who are more likely than not to reoffend are kept in prison and those who present a low risk to reoffend are released under supervision for the remainder of their life and may be reincarcerated for serious violations that do not constitute a new sex offense. The legislature further finds that persons subject to determinate-plus sentencing who receive a special sex offender sentencing alternative sentence that is subsequently revoked are subject to life sentences as if they had not received a sentencing alternative. The legislature also finds that these offenders' failure in treatment is likely to make it harder for them to receive a release from prison to lifetime community custody. The legislature intends to reiterate its commitment to life sentences for these offenders by reenacting the law on seriousness levels of offenses and determinate-plus sentencing that sets the minimum sentence levels for these offenders.

(2) The legislature also finds that the special sex offender sentencing alternative was enacted in 1984 to protect victims of sexual assault. A 1991 evaluation of the effectiveness of the sentencing alternative concluded that it accurately selected sex offenders who, with supervision and treatment, reoffend at lower rates and that the use of the sentencing alternative does not increase risk to the community. Today, strong support for the special sex offender sentencing alternative continues among advocates for children who are victims of sexual assault and prosecutors who prosecute sex offenses against children.

(3) The legislature further finds that several weaknesses in the structure and administration of the special sex offender sentencing alternative have been identified and should be addressed. In addition, a comprehensive analysis and evaluation of the special sex offender sentencing alternative is needed to ensure that efforts to reform the sentencing alternative do not result in jeopardizing the safety of children or hindering the successful prosecution of sex offenses against children.

(4) The legislature intends to protect children from victimization by sex offenders by taking immediate action to make changes in the special sex offender sentencing alternative to address perceived

weaknesses in the program, and thoroughly evaluating its effectiveness to determine whether additional changes are needed to further increase the protection of children from victimization by sex offenders.

Sec. 1 was vetoed. See message at end of chapter.

Sec. 2. RCW 9.94A.515 and 2003 c 335 s 5, 2003 c 283 s 33, 2003 c 267 s 3, 2003 c 250 s 14, 2003 c 119 s 8, 2003 c 53 s 56, and 2003 c 52 s 4 are each reenacted to read as follows:

TABLE 2

CRIMES INCLUDED WITHIN

EACH SERIOUSNESS LEVEL

XVI	Aggravated Murder 1 (RCW 10.95.020)
XV	Homicide by abuse (RCW 9A.32.055)
	Malicious explosion 1 (RCW 70.74.280(1))
	Murder 1 (RCW 9A.32.030)
XIV	Murder 2 (RCW 9A.32.050)
	Trafficking 1 (RCW 9A.40.100(1))
XIII	Malicious explosion 2 (RCW 70.74.280(2))
	Malicious placement of an explosive 1 (RCW 70.74.270(1))
XII	Assault 1 (RCW 9A.36.011)
	Assault of a Child 1 (RCW 9A.36.120)
	Malicious placement of an imitation device 1 (RCW 70.74.272(1)(a))
	Rape 1 (RCW 9A.44.040)
	Rape of a Child 1 (RCW 9A.44.073)
	Trafficking 2 (RCW 9A.40.100(2))
XI	Manslaughter 1 (RCW 9A.32.060)
	Rape 2 (RCW 9A.44.050)
	Rape of a Child 2 (RCW 9A.44.076)
X	Child Molestation 1 (RCW 9A.44.083)
	Indecent Liberties (with forcible compulsion) (RCW 9A.44.100(1)(a))

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435.

Sec. 4. RCW 9.94A.670 and 2002 c 175 s 11 are each amended to read as follows:

(1) Unless the context clearly requires otherwise, the definitions in this subsection apply to this section only.

(a) "Sex offender treatment provider" or "treatment provider" means a certified sex offender treatment provider as defined in RCW 18.155.020.

(b) "Substantial bodily harm" means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any body part or organ, or that causes a fracture of any body part or organ.

(c) "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. "Victim" also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

(2) An offender is eligible for the special sex offender sentencing alternative if:

(a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense;

(b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state; ((~~and~~))

(c) The offender has no prior adult convictions for a violent offense that was committed within five years of the date the current offense was committed;

(d) The offense did not result in substantial bodily harm to the victim;

(e) The offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime; and

(f) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years.

(3) If the court finds the offender is eligible for this alternative, the court, on its own motion or the motion of the state or the offender, may order an examination to determine whether the offender is amenable to treatment.

(a) The report of the examination shall include at a minimum the following:

(i) The offender's version of the facts and the official version of the facts;

(ii) The offender's offense history;

(iii) An assessment of problems in addition to alleged deviant behaviors;

(iv) The offender's social and employment situation; and

(v) Other evaluation measures used.

The report shall set forth the sources of the examiner's information.

(b) The examiner shall assess and report regarding the offender's amenability to treatment and relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum:

(i) Frequency and type of contact between offender and therapist;

(ii) Specific issues to be addressed in the treatment and description of planned treatment modalities;

(iii) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;

(iv) Anticipated length of treatment; and

(v) Recommended crime-related prohibitions and affirmative conditions, which must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances.

(c) The court on its own motion may order, or on a motion by the state shall order, a second examination regarding the offender's amenability to treatment. The examiner shall be selected by the party making the motion. The offender shall pay the cost of any second examination ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost.

(4) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the

victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment. If the court determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.712, a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension:

(a) The court shall order the offender to serve a term of confinement of up to twelve months or the maximum term within the standard range, whichever is less. The court may order the offender to serve a term of confinement greater than twelve months or the maximum term within the standard range based on the presence of an aggravating circumstance listed in RCW 9.94A.535(2). In no case shall the term of confinement exceed the statutory maximum sentence for the offense. The court may order the offender to serve all or part of his or her term of confinement in partial confinement. An offender sentenced to a term of confinement under this subsection is not eligible for earned release under RCW 9.92.151 or 9.94A.728.

(b) The court shall place the offender on community custody for the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.712, or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.

((~~(b)~~)) (c) The court shall order treatment for any period up to ((~~three~~)) five years in duration. The court, in its discretion, shall order outpatient sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court. If any

party or the court objects to a proposed change, the offender shall not change providers or conditions without court approval after a hearing.

(d) As conditions of the suspended sentence, the court shall impose specific prohibitions and affirmative conditions relating to the known precursor activities or behaviors identified in the proposed treatment plan under subsection (3)(b)(v) of this section or identified in an annual review under subsection (7)(b) of this section.

(5) As conditions of the suspended sentence, the court may impose one or more of the following:

(a) ((~~Up to six months of confinement, not to exceed the sentence range of confinement for that offense;~~

~~(b)~~)) Crime-related prohibitions;

((~~(c)~~)) (b) Require the offender to devote time to a specific employment or occupation;

((~~(d)~~)) (c) Require the offender to remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

((~~(e)~~)) (d) Require the offender to report as directed to the court and a community corrections officer;

((~~(f)~~)) (e) Require the offender to pay all court-ordered legal financial obligations as provided in RCW 9.94A.030;

((~~(g)~~)) (f) Require the offender to perform community restitution work; or

((~~(h)~~)) (g) Require the offender to reimburse the victim for the cost of any counseling required as a result of the offender's crime.

(6) At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment.

(7)(a) The sex offender treatment provider shall submit quarterly reports on the offender's progress in treatment to the court and the parties. The report shall reference the treatment plan and include at a minimum the following: Dates of attendance, offender's compliance with requirements, treatment activities, the offender's relative progress in treatment, and any other material specified by the court at sentencing.

(b) The court shall conduct a hearing on the offender's progress in treatment at least once a year. At least fourteen days prior to the

hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding the offender's supervision and treatment. At the hearing, the court may modify conditions of community custody including, but not limited to, crime-related prohibitions and affirmative conditions relating to activities and behaviors identified as part of, or relating to precursor activities and behaviors in, the offender's offense cycle or revoke the suspended sentence.

(8) At least fourteen days prior to the treatment termination hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding the offender's supervision and treatment. Prior to the treatment termination hearing, the treatment provider and community corrections officer shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community custody conditions. ((~~Either party may request, and the court may order, another evaluation regarding the advisability of termination from treatment. The offender shall pay the cost of any additional evaluation ordered unless the court finds the offender to be indigent in which case the state shall pay the cost.~~)) The court may order an evaluation regarding the advisability of termination from treatment by a sex offender treatment provider who may not be the same person who treated the offender under subsection (4) of this section or any person who employs, is employed by, or shares profits with the person who treated the offender under subsection (4) of this section unless the court has entered written findings that such evaluation is in the best interest of the victim and that a successful evaluation of the offender would otherwise be impractical. The offender shall pay the cost of the evaluation. At the treatment termination hearing the court may: (a) Modify conditions of community custody, and either (b) terminate treatment, or (c) extend treatment in two-year increments for up to the remaining period of community custody.

(9)(a) If a violation of conditions other than a second violation of the prohibitions or affirmative conditions relating to precursor behaviors or activities imposed under subsection (4)(d) or (7)(b) of this section occurs during community custody, the department shall

either impose sanctions as provided for in RCW 9.94A.737(2)(a) or refer the violation to the court and recommend revocation of the suspended sentence as provided for in subsections (6) and (8) of this section.

(b) If a second violation of the prohibitions or affirmative conditions relating to precursor behaviors or activities imposed under subsection (4)(d) or (7)(b) of this section occurs during community custody, the department shall refer the violation to the court and recommend revocation of the suspended sentence as provided in subsection (10) of this section.

(10) The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.

(11) The offender's sex offender treatment provider may not be the same person who examined the offender under subsection (3) of this section or any person who employs, is employed by, or shares profits with the person who examined the offender under subsection (3) of this section, unless the court has entered written findings that such treatment is in the best interests of the victim and that successful treatment of the offender would otherwise be impractical. Examinations and treatment ordered pursuant to this subsection shall only be conducted by sex offender treatment providers certified by the department of health pursuant to chapter 18.155 RCW unless the court finds that:

(a) The offender has already moved to another state or plans to move to another state for reasons other than circumventing the certification requirements; or

(b)(i) No certified providers are available for treatment within a reasonable geographical distance of the offender's home; and

(ii) The evaluation and treatment plan comply with this section and the rules adopted by the department of health.

(12) If the offender is less than eighteen years of age when the charge is filed, the state shall pay for the cost of initial evaluation and treatment.

(4) The sentencing guidelines commission shall review the following issues to determine whether modifications in the special sex offender sentencing alternative will increase its effectiveness with respect to protecting children from sexual victimization, successfully prosecuting sex offenses against children, and appropriately punishing perpetrators of sex offenses against children:

(a) Eligibility for the sentencing alternative, including whether the commission of certain types of offenses should render an offender ineligible, whether the disclosure of multiple victims in the course of evaluating an offender should render an offender ineligible, and whether the sentencing alternative should be limited to offenses within families;

(b) Minimum terms of incarceration, including imprisonment at a state facility;

(c) Appropriate conditions or restrictions that should be placed on offenders who receive a sentence alternative; and

(d) Standards for revocation of a sentencing alternative suspended sentence.

(5) The institute and the sentencing guidelines commission shall report their results and recommendations to the appropriate standing committees of the legislature no later than December 31, 2004.

NEW SECTION. **Sec. 8.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 9.** Sections 2 through 6 of this act take effect July 1, 2005.

Passed by the House March 10, 2004.
Passed by the Senate March 10, 2004.
Approved by the Governor March 26, 2004, with the exception of certain items that were vetoed.
Filed in Office of Secretary of State March 26, 2004.

Note: Governor's explanation of partial veto is as follows:

"I am returning herewith, without my approval as to section 1, Engrossed Substitute House Bill No. 2400 entitled:

"AN ACT Relating to sentence enhancement for sex crimes against minors;"

This bill makes improvements in the Special Sex Offender Sentencing Alternative, which is often needed to get convictions, hold sex offenders accountable, and protect child victims.

I have vetoed section 1, the intent section, because it includes rhetorical language that could inadvertently be misused to increase taxpayers' liability for harm that should be the responsibility of sex offenders themselves. Section 1 discusses a paramount duty of the Legislature to protect children from victimization by sex offenders. Although I agree that the state has the responsibility to take action within its powers and authority, this language could be misunderstood to create a new duty, which would be a higher duty than many equally important government actions and protections. In addition, the section discusses structure and administrative weaknesses in the Special Sex Offender Sentencing Alternative. Taken out of context, this language could be misunderstood and used to indicate an admission of liability when none exists.

For these reasons, I have vetoed section 1 of Engrossed Substitute House Bill No. 2400.

With the exception of section 1, Engrossed Substitute House Bill No. 2400 is approved."

Certificate of Service

I, Neil Fox, certify that on December 27, 2021, I served the attached pleading on counsel for the Respondent by filing it through the Portal, which will send notice to all parties.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 27th day of December 2021, at Seattle, Washington.

s/ Neil M. Fox
WSBA No. 15277
Attorney for Petitioner

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LAW OFFICE OF NEIL FOX PLLC

December 27, 2021 - 2:31 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	37574-9
Appellate Court Case Title:	State of Washington v. Craig Russell Jungers
Superior Court Case Number:	18-1-00668-9

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