NO. 91368-4
COA NO. 71418-0-I

THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

V.

JOHN E. BETTYS,
Petitioner,

PETITION FOR REVIEW

By: John E. Bettys, Pro Se
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A. IDENTITY OF THE APPELLANT

I, John Bettys, Appellant, Pro Se, hereby asks the Court to accept review of the Court of Appeals decision terminating review designated in Part-B of this petition.

B. COURT OF APPEALS DECISION

The January 20, 2015 "unpublished opinion" of the Court of Appeals division one, and the February 6, 2015 "order denying a motion for reconsideration. A copy of the "unpublished opinion" is in the Appendix-A at pages 1 through 6. A copy of the order denying petitioner's motion for reconsideration is in Appendix-B at page 1.

C. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals erred in allowing the trial court's modification of a correct sentence without legal errors present requiring the modification for correction.

2. The Court of Appeals erred in the failure to address the statutory language of RCW 9.94A.535, which required that the exceptional sentence must be a "determinate" type of sentence, not subject to ISRB controls.

3. The Court of Appeals erred in determination of evidence sufficient to support "sexual contact" element of child molestation conviction after child testified completely to the non-sexual purpose or intent of the touching over the clothing charged in the information.

4. The Court of Appeals erred by allowing the inclusion of "washed-out" juvenile adjudications in present offender scoring, when the exclusion right "vested" prior to the 2002 statutory amendments, under both a prior criminals judgment and sentnece and prior Court of Appeals ruling.

ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

1. The Court of Appeals ignored the caselaw holding and the procedural 'due process' clause prohibitation, by the allowance of the modification to a correct final judgment and sentence. There is a clear record establishing the trial court was presented with absolutely no 'legal error' in the original judgment and sentence requiring the December 17, 2013 modification. In effect the Court of appeals opinion allowed the trial court's modification of this correct criminal judgment and sentence, merely because trial court later felt a different outcome was more favorable, after sentence was already being served. Court of Appeals opinion violated both the United States and Washington's constitutional protections of the 'double jeopardy' clause, by allowing an increase in the terms of the confinement. Court's opinion extends the trial court full authority to modify any final judgment and sentence at anytime the trial courts feel a different outcome has became more favorable, contrary to 'double jeopardy' protections and long settled holding caselaw regarding modification of correct judgments and sentences.

2. Court of Appeals failed to address statutory interpretation where RCW 9.94A.535 statue wording required exceptional sentences be "determinate" sentences. The procedural 'due process' requires this

statute followed as worded by the trial court, without discretionary deviations in the terms of the sentence imposed. Where Legislature has stated the terms and conditions of the law in the wording of the statute, the trial court is without discretionary power to ignore a required provision of the law in entering the judgment and sentence. Court of Appeals opinion would ignore the long standing presidence, and create authority for the trial court to ignore the legislatively imposed requirements of the law. All exceptional sentences must be treated as "determinate" sentences, not subjected to ISRB authority or controls, as legislatively determined in RCW 9.94A.535 wording.

3. The Court of Appeals ignored direct evidence given under oath in live testimony to establish sufficient basis for finding an element of "sexual contact" in child molestation. The Court's own opinion rests on "hearsay" evidence in the probable cause, which is not a direct quote from the victim, ignoring live recantations of the very statement relied upon to find "sexual contact" elements. Court of Appeals opinion ignored the fact the victim was in direct care of the Petitioner, and the Petitioner is a related adult given parentally approved care of the victim, whom claimed in live trial testimony that the touch over clothing was for the actual purposes and intent to check a pull-up diaper the child claimed to have been wearing under his clothing at the time of the touching. The Court's opinion is contrary to the long settled caselaw on the issue, with no explaination for deviations from the case holdings.

4. The Court of Appeals opinion failed to uphold case rulings in State V. Varga, 151 Wn.2d 179, 86 P.3d 139 (2002), while Court's

ruling relied on this caselaw to make claim the 1989 "washed-out" juvenile adjudications could be revived for current scoring. The right of Petitioner had previously 'vested' in the washed-out type status of the 1989 adjudications in both a prior criminal judgment and sentence and prior Court of Appeals opinion No. 50285-9-1 that is ignored here. Court of Appeals current opinion is contrary to the actual holding in State V. Varga, 151 Wn.2d 179, 86 P.3d 139 (2002), requiring correction to allow continuation of the "washed" status afforded the juvenile adjudications previously, based on a right having completely vested prior to the change in the statute in 2002 laws. Appedix-C.

D. STATEMENT OF THE CASE FACTS

In 2011, John Bettys was convicted by a jury of first degree child molestation and sentenced to life without parole.[1] In 2013, the Court of Appeals reversed his conviction based on the improper admissions of evidence of a prior sexual offense, admitted under a statutory provision deemed unconstitutional.[2] Appendix-D.

On remand, Bettys accepted an 'alford plea' to third degree child molestation to avoid the potential of life without parole's sentence, in compliance with North Carolina V. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) standards.CP 116-125.

Because Bettys had a previous conviction between 1990-93 for a sexual offense, and an offender score calculated at 10 points, his standard range was 72-96 months confinement. However, trial court

1. Skagit County Superior Court No. 10-1-00159-9.
2. State V. Bettys, noted at 174 Wn. App. 1002 (2013).

recognized Bettys should be sentenced under the statutory maximum of 60 months for his current class-C felony child molestation, and reduced the standard sentence range of 72-96 months. 2 RP 26-27.

The trial court imposed an illegal exceptional "indeterminate" sentence term under former RCW 9.94A.712(3)[3], setting both a maximum and minimum term at the 60 month statutory maximum for the class-C felony offense. CP 164-176; 3 RP 4-5.

The exceptional sentence required the Department of Corrections to either provide sex offender treatment commencing before January 1, 2014, or release Bettys to the community to obtain Court's approved sex offender treatment under supervision of the DOC. CP 164-169.

In December 2013, the trial court learned that the imposed date of January 1, 2014 was not feasible to start treatment in DOC, because nothing could be undertaken with Bettys until the parole board met on January 15, 2014 regarding in-custody treatment. The trial court did modify its original judgment and sentence, extending confinement for Bettys until February 1, 2014 to provide DOC time to review Bettys' for their sex offender treatment programs (SOTP) in-custody. CP 180.

At a review hearing held on February 5, 2014, Bettys moved trial court to reconsider its order extending confinement in violations of the 'double jeopardy' clause protections, as modification of correct judgment and sentneces is disallowed constitutionally, which trial court denied. At the time, Bettys was housed at the Twin Rivers Unit of the Monroe Correctional Complex (MCC-TRU) awaiting admissions into the sex offender treatment required by the judgment terms. CP 218.

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1. RCW 9.94A.712 was recodified as RCW 9.94A.507 in 2008.

Bettys appealed, contending the trial court lacked authority to modify the correct original sentence in violation of double jeopardy clause protections. Bettys also appealed trial court's findings for 'sexual contact' element of child molestation, contending the record contained insufficient evidence to reach a factual basis of 'sexual contact' intent or purpose. Bettys additionally challenged Court's application of an "indeterminate" exceptional sentnece in violations of RCW 9.94A.535 statutory wording and that trial court incorrectly included washed-out juvenile adjudications in his offender score, as the right to washed status vested prior to the change in statutory laws of 2002 allowing inclusion.

On May 27, 2014, Bettys discovered evidence proving the perjury committed during the February 5, 2014 review hearing in trial court and filed a motion addressing the lies of Attorney General "Ronda Laron" in the trial court records. The trial court heard motions July 10, 2014 and determined the court lacked authority to hold a non-party "Ronda Larson" or "DOC" in contempt, under the criminal cause No. 10-1-00159-9 at this time. Appendix-F.

E. ARGUMENTS WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeals Erred in Allowing the Trial Court's Modification of a Correct Sentence where No 'Legal Error' was Presented Requiring Sentence Modification for Correction, in the Violation of 'double jeopardy' protections.

The sentence imposed did not contain 'legal error' requiring the later modification, as the sentence contained sufficient provisions a reasonable person would understand, and did not require treatment be solely provided while in-custody of the DOC agency. CP 164-176.

The Court of Appeals refused to uphold established and settled Supreme Court caselaw prohibiting modification of a correct sentence, where Supreme Court held "the double jeopardy clause continues to prohibit the increase of the correct sentence." State V. Hardesty, 129 Wn.2d 315, 915 P.2d 1080 (1996)(citing United States V. DiFranscesco, 449 U.S. 117, 101 S.Ct. 426 (1980); see also United States V. Lange, 85 U.S. (18 wall) 163, 175, 21 L.Ed. 872 (1873). See Appendix-A at 3.

The trial court's provisional sentence required sex offender's treatment commenced by January 1, 2014, either in DOC custody or on Bettys release to the community January 1, 2014. This sentence did not place any obligation on DOC to ensure treatment January 1, 2014, where Bettys would merely be released if not participating in their sex offender's treatment in-custody by January 1, 2014 and he would participate in a trial court approved sex offender treatment in the community, within 30 days after release. CP 164-176; 2 RP 26-28.

The Court of Appeals errors in opinion, finding that State V. Smith, 159 Wn. App. 694, 247 P.3d 775 (2011), was similar to these circumstances of Bettys' sentence. In Smith, trial court determined extraordinary circumstances prohibiting the original sentence terms from being executed would warrant modification of a sentence. Herein, unlike Smith, the original sentence did not cease to be enforcable as ordered due to changes in the laws after sentencing. Nothing stopped Bettys from being released on January 1, 2014 as directed, if not in the DOC's sex offender's treatment program on that date, as settled in the original judgment and sentence terms. 2 RP 26-28; CP 180.

The Court of Appeals opinion relied on CrR 7.8 to circumvent the constitutional protections of double jeopardy, which only "applies to

extraordinary circumstances, State V. Dennis, 67 Wn. App. 863, 840 P.2d 909 (1992), and no extraordinary circumstances were presented in this case." State V. Cortez, 73 Wn. App. 838, 871 P.2d 660 (1994); State V. Brand, 120 Wn.2d 396, 842 P.2d 470 (1992); State V. Lamb, 162 Wn. App. 614, 262 P.3d 89 (2011).

CrR 7.8 motions are reviewed "for an abuse of discretion." In Re Personal Restraint of Cadwallader, 155 Wn.2d 876, 123 P.3d 456 (2005). "A trial court abuses discretion when it exercises its discretion in a manifestly unreasonable manner, or when exercise of discretion is based on untenable grounds or reasons." State V. Aguirre, 78 Wn. App. 682, 871 P.2d 616 (1994). Appendix-E # 5.

Where trial courts exercise of discretion is contrary to both a constitutional protection and standing caselaw holdings, there is a manifest error in the exercise of the discretionary powers, based on untenable grounds, which must be corrected on review. The DOC's now determining they could not place Bettys in their sexual offender's treatment program by January 1, 2014 is not actually an extraordinary circumstance in this instance, as the trial court provisioned this original judgment and sentence to address that possibility during the original sentencing proceeding. CP 164-176; Appendix-E # 2-12.

"In absence of a showing of some statutory ground for vacation or modification of a judgment after its rendition and proper entry, the trial court is without power to vacate or modify its final judgments." Ex Parte Lucas, 26 Wn.2d 289, 173 P.2d 774 (1946). There simply was no legal error presented to the trial court to allow modification of the judgment and sentence, not even a CrR 7.8 motion was filed by the state's attorney claiming any error in this action. Appendix-E #5,#10.

"A legal error in a judgment and sentence entered in a criminal case may be corrected by the trial court upon discovery. This does not effect the finality of a correct judgment, valid when it was pronounced." Stiltner V. Rhay, 258 F.Supp. 487, 491 (E.D. Wash 1965); State V. Price 59 Wn.2d 788, 790, 370 P.2d 979 (1962). "A correct judgment and sentence entered in a criminal cause is final and may not be reviewed or revised." State V. Mempa, 78 Wn.2d 530, 477 P.2d 178 (1970); State V. Loux, 69 Wn.2d 855, 420 P.2d 693 (1966) cert. denied 389 U.S. 997, 87 S.Ct. 1319 (1967). Appendix-E #15, #16.

"It is well established that double jeopardy clause prevents the subsequent increase in punishment, as well as repeated prosecutions." United States V. Best, 591 F.2d 484 (9th Cir 1978); United States V. Benz, 282 U.S. 304 51 S.Ct. 113 (1931). "Procedural due process is absolute in the sense that it does not depend upon the merits of the claimant's substantive assertion." Hamdi V. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633 (2004). "Our Government must proceed accourding to the law of the land, that is accourding to the written constitution and statutory provisions." In Re Winship, 397 U.S. 358, 90 S.Ct. 1086 (1970). Appendix-E #10, #11, #12, #13, #14, #15, #5.

Court of Appeals failed to establish 'legal error' in the record which would allow the trial court to modify the correct judgment and sentence, whereby the sentence could ~~have~~ be upheld by Bettys release to the community for treatment, even if DOC could not provide sexual offender treatment before January 1, 2014. The trial court envisioned this possibility at the time of sentencing, and included remedy for a DOC failure to treat Bettys, thereby Court of Appeals opinion allows violation of standing caselaw and the constitutional protections.

Because the Court of Appeals failed to follow Supreme Court's rulings on the matter in its opinion, and allowed violation of the Fifth Amendment clause protections against double jeopardy, Bettys has herein met the required holdings for acceptance of review, and therefore this court should review the error of the Court of Appeals, providing necessary relief from the error in the opinion.

2. The Court of Appeals Erred in the Failure to Address the Statutory Language of RCW 9.94A.535, Which Required that Exceptional Sentence Must be a Determinate Sentence, Not Subject to ISRB Controls.

This question raises an issue of statutory interpretation, which is a question of law, reviewed de novo. State V. Ammons, 136 Wn.2d 453, 963 P.2d 812 (1998). "Statutory interpretation begins with the statutes plain meaning. Lake V. Woodcreek Homeowners, 169 Wn.2d 516, 243 P.3d 1283 (2010). The Court discerns plain meaning from "the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole". State V. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009). Only "if the statutory language is ambiguous do we resort to aids of the construction". State V. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007). The Courts primary goal is to construe the statute in a manner that is consistant with the legislative intent. Appendix-G Page #203; CP 457-464.

Court of Appeals erred not addressing the claimed error, whereby the wording of RCW 9.94A.535 is clear that all exceptional sentences must be determinate sentences, not subjected to the ISRB reviews. The record in this action established the trial court enter an exceptional sentence under RCW 9.94A.507(3), which uses RCW 9.94A.535 specifically

as legislative authority under RCW 9.94A.507(3), therefore showing a clear legislative intent that all exceptional RCW 9.94A.507(3) type sentences are to be held in accourdence with the terms and provision of the RCW 9.94A.535 exceptional sentence statute.

The trial court was informed in the pre-sentence memorandum that imposition of an exceptional sentence would require conversion of the RCW 9.94A.507 indeterminate sentence into a determinate sentence under RCW 9.94A.535 statutory provision cited directly in RCW 9.94A.507(3) statute provisions. Appendix-H Page 4; 2 RP at 18; 2 RP at 26-27.

Court of Appeals completely ignored this claimed error, and the judgment was upheld as an "indeterminate exceptional sentence", which there exists no basis in the law for such a sentences imposition, as legislature chose to specifically structure trial courts' discretion regarding exceptional sentences, even those imposed under provisions of RCW 9.94A.507(3), by their directive that such sentences are held in compliance with the provisions of RCW 9.94A.535 laws.

Court of Appeals error in this instance should be reviewed, and legislative intent upheld as stated in the law, thereby interest in having the matter clairified, justifies review under this petition.

3. The Court of Appeals Erred in Determination of Evidence Sufficient to Support "Sexual Contact" Element of Child Molestation Conviction After the Child Testified to the Non-sexual Purposes or Intent of the Touch over the Clothing this State Charge in the Information.

First, the Court of Appeals mischaraterized the issue as Bettys request to withdraw the "alford plea" agreement, which is not actually the nature of the issue presented. Bettys understands that both the child molestation first degree and child molestation third degree are

identical in their element of sexual contact, and merely seeks the review of the trial court's finding of the factual basis under the alford plea contract. See "Opening Brief of Appellant #71418-0-I."

"Ordinarilly, when a defendant pleads guilty the factual basis for the offense is provided at least in part by the defendant's admission, with an alford plea however the court must establish an entirely independent factual basis for the guilty plea, a basis which substitutes for an admission of guilt. State V. Scott, 150 Wn. App. 281, 207 P.3d 495 (2009).

Court of Appeals reviewed the probable cause in part and found that the third-party hearsay statements formed factual or inferred basis for the element of sexual contact, ignoring the child's live under oath statements recanting the hearsay alleged, where child's sworn statement claimed that Bettys did not say anything to him at the time of the touching over clothing. CP 26-40; 1 RP at 42 Line 19-21.

When reviewing the matter to determine factual basis of this element, the entire record should be reviewed, determining through totality if sufficient evidence supported finding sexual contact, not selecting parts the court finds favorable, and ignoring this records recanted portions. CP 26-40; Appendix-I; 1 RP at 39; 1 RP at 42.

"A parent or guardian, a person authorized by a parent or guardian to provide child care, or persons providing medically recognized treatment for a child may touch the child in sexual or intimate parts for the purposes of providing hygiene, child care, medical treatments." WAC 388-15-009(3). Appendix- J #3.

Court of appeals opinion ignored the fact the child told the actual purpose of the touch outside clothing and under oath, and

that the purpose or intent for the touch alleged by the child was for a completely non-sexual intent. There is direct evidence the touch outside the clothing is for the hygiene purpose of checking the child's diaper, as testified to under oath by the child. The facts in the child's testimony coupled with the fact Bettys was a parent approved adult caretaker, baby-sitting the child overnight at the Bettys' home, and that Bettys is a related adult would in essence establish that the touch is for a legitimate care function allowed by Washington State laws, under child-care. Appendix - J.

The record contains testimony from the child's mother and the wife of Bettys, whom both claimed the child was wearing diapers at the time relevant to the charges, and they help the child with his diapers and dressing themselves. 1 RP at 93-95; 1 RP at 113-115.

The record additionally contains a report from Dr. John Yuille, forensic interview specialist whom after review of the evidence and child's interviews determined the child disclosed a touch outside of his clothing which no one attempts to determine the purpose, and that his professional opinion with 40 years experiance is the child never disclosed sexual abuse of any kind. Appendix-I Page 5.

Court of Appeals opinion is contrary to its own decisions in State V. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), where it is established: "The title uncle was honorary, Mr. Powell was just visiting the home.... Although he was the only adult present at the time, no evidence showed he had been entrusted with the care of Wendy. Moreover, no touching of the genitals of a 10 year-old girl, could conceivably be part of the caretaker function. The evidence is insufficient to support an inference that defendant

touched the child for the purpose of sexual gratification, on one occasion defendant touched the under pants in the front part..., and another occasion he touched her thigh through clothing..."

In the present action, Mr. Bettys was entrusted with care of the child specifically, is a related adult, and there is caretaker functions alleged by the child to explain the touch as non-sexual in purpose or intent. The child's sworn testimony states in parts:

Attorney: Do you recall how many times it happened?

Child: Once. 1RP 15 Line 1-2.

Attorney: Did he check your pull-up or diaper and you didn't want it checked?

Child: Yes. 1RP 39 Line 14-19.

Attorney: Is that all this is a pull-up check?

Child: Yeah. 1RP 39 Line 20-21.

Attorney: ...did he just come in and check you really quickly, and then go back to washing dishes?

Child: Yeah. 1RP 39 Line 9-11.

The Court of Appeals, in their opinion asks that the direct sworn evidence from the child be ignored, and a third-party type 'hearsay' statement be held more reliable to establish a factual basis for findings of sexual contact under child molestation in this matter. Court of Appeals relies on a statement recanted in the child's sworn testimony, where the child during his initial forensic interview supposedly claimed he was told not to tell as the basis for finding sexual contact. However, the direct sworn testimony of the Child recants this statement:

Attorney: When John touched you did he say anything to you?

Child: He didn't. 1RP 42 at Line 19-21.

"Direct evidence is evidence which, if believed, proves the fact without inference or presumption. Rashdan V. Geissberger, 764 F.3d 1179 (9th Cir. 2014). The child's sworn testimony is a form of direct evidence, and completely established the purpose or intent of the touching over his clothing. 1 RP at 39; 1 RP at 32-33.

Court of Appeals relies on circumstantial evidence, in its attempt to overcome the direct evidence in the record, by claim that the third-party hearsay stated in probable cause supported a reasonable presumption or inference that the touch is for the intent of sexual contact in child molestation. This conclusion is mere speculation, without support in the entirety of these records, even by the young child. 1 RP 1-126; Appendix-I; Appendix-J.

"However, inferences based on circumstantial evidence must be reasonable, and cannot be based on mere speculation". Jackson V. Virgina, 443 U.S. 307, 319 99 S.Ct. 2781 (1979). "An inference should not arise where there exists other reasonable conclusions that would follow from the circumstances". State V. Motter, 139 Wn. App. 797, 162 P.3d 1190 (2007)(citing State V. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989). "A presumption is only allowed when no more than one conclusion can be drawn from any set of circumstances". State V. Jackson, 112 Wn.2d 867, 774 P.2d 1211 (1989).

Herein, the Court of Appeals opinion should be reviewed on the basis that the opinion is contrary to cases in both Supreme Court and its own prior rulings. The recanted statement cannot be held the sole basis for finding sexual contact, where direct evidence of the intent or purpose of the touch over clothing was

stated directly by this child in sworn testimony, and that purpose claimed the touch over clothing is for a legitimate caretaker's function, performed by the related adult, specifically entrusted with the care of the child at the time relevant to the touching over the clothing. There is no reasonable person whom would in fact assume the touch over the clothing under these circumstances would be anything other than to check the diaper, as child stated in his sworn testimony. 1 RP 1-126; Appendix-J #3; Appendix-I Page 5.

The courts have long held to the requirements for some other additional evidence to establish sexual contact when the touching is alleged to be solely over the clothing, and the other evidence simply is not available in the record to establish the touch was for any sexual purpose or intent. See State V. Johnson, 96 Wn.2d 926, 639 P.2d 1332 (1982); State V. Veliz, 76 Wn. App. 775, 775 P.2d 189 (1995).

Court of Appeals opinion relying on third-party hearsay to establish an element disproved by the alleged victim should not be upheld, and the finding of sexual contact revered in the act performed by the related caretaker to ensure hygiene of child, as such is within the greatest interest of the public at large.

The child care should not result in sexual abuse charges in such a case where the child claimed the touch non-sexual.

4. The Court of Appeals Erred by Allowing these Inclusion of Washed-Out Juvenile Adjudications in Present Offender Scoring, When Exclusions Right Vested Prior to the 2002 Statutory Amend--ments Under Both a Prior Criminal Judgment and Sentence and Prior Court of Appeals Ruling.

"A retroactive law violates due process when it deprives an individual of a vested right." State V. Shultz, 138 Wn.2d 638, 646, 980 P.2d 1265 (1999)(citing State V. Hennings, 129 Wn.2d 512, 528, 919 P.2d 580 (1996). It is Bettys contention the inclusion of the 1989 juvenile adjudications violates the contractual holding under the plea agreements, where Bettys accepted the plea with the full understanding that this conviction would not be included on future adult conviction records.

Thus, the critical inquiry is whether the prospective 2002 SRA amendments to 9.94A.525 and 9.94A.030 alter the legal consequences of the 1989 plea agreement contract terms, which under the law of the case doctrine Bettys is entitled to continue to enjoy laws in effect at the time of the plea ratification between the parties, and thus the 2002 SRA amendment requires that vested right infringed under the current criminal conviction.

The laws in effect in 1989 ensured that juvenile adjudications would not be included in future adult sentencings, and thus those must remain precluded at present. The nature of juvenile courts in 1989 establish the due process safe guards were non-existent in the juvenile process, making the distiction necessary. Since the legislature started treating juvenile and adult crime similar in the 2002 SRA amendments, the juvenile courts have established the necessary due process protections for juveniles, as those offenses will follow the juvenile for the rest of their live in adult court proceedings.

Court of Appeals opinion relying on State V. Varga, 151 Wn.2d 179, 193-95, 86 P.3d 139 (2004) is erroneous, as in that decision

the courts found that varga's prior offense had not vested under a prior judgment as washed-out, therefore could not be held for that purpose in the current offender scoring. Appendix-C page 2.

Allowing the 1989 adjudication revived here would violate a standing in plea contract terms, as Bettys entered the plea with full knowledge and understanding that the adjudication would not be included in his adult records for any later purpose, and this understanding has retroactively been changed after Bettys became an adult. Therefore, the 2002 SRA amendment effected the legal consequences of the 1989 plea contract entered between Bettys and the State of Washington some 12 years after ratification. This is the very evil that the courts found did not exist in Varga's case, which allowed application of the amended statue there.

Bettys should be allowed to withdraw the plea agreement for the 1989 crime, if this 2002 SRA amendment is found to change the understanding relied upon at the time of the plea entry in 1989, which is shown by the records, per well settled case holdings.

Court of Appeals should have determined that the law of the case doctrine applied to hold the State of Washington to their agreed terms that the 1989 conviction would not be used in any of Mr. Bettys adult criminal history.

This matter is of great public interest, and should be here reviewed to clarify the holding under prior plea contracts, as a defendant has the vested right to expect the law under which any plea is ratified by the parties to remain valid for the life of the parties, held for all purposes under those terms knowingly accepted between the parties, not later amended to benifit either

of the parties to the contract detramental to the other party as is done by the State of Washington legislatively changing those laws in effect when the plea contract was accepted.

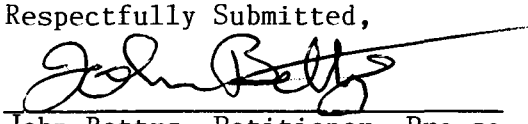
This is the very retroactive type amendment that both the United States and Washington constitution prohibits, making the matter ripe for review here.

F. CONCLUSIONS

For the reasons herein stated, and in the interest of the public at large, these matters should be accepted for review.

DATED This 25th day of April, 2015.

Respectfully Submitted,



John Bettys, Petitioner, Pro se

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOHN EDWARD BETTYS, Appellant.	)	No. 71418-0-I DIVISION ONE UNPUBLISHED OPINION FILED: January 20, 2015

TRICKEY, J. — Sentences may be modified under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, in specific, carefully delineated circumstances. Here, such circumstances were present. The trial court's intent in imposing the defendant's sentence was to ensure that the defendant received the requisite counseling services during his confinement. The trial court merely granted the State an additional month to enable the State to commence treatment. Because the defendant was provided with those services, he was not entitled to early release. We affirm.

FACTS

In 2011, John Bettys was convicted by a jury of first degree child molestation and sentenced to life without parole.[1] In 2013, this court reversed his conviction based on the improper admission of evidence of a prior sex offense.[2]

On remand, Bettys pleaded guilty to third degree child molestation entering an Alford plea. North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162

[1] Skagit County Superior Court No. 10-1-00159-9.
[2] State v. Bettys, noted at 174 Wn. App. 1002 (2013).

(1970). Because Bettys had a previous conviction for a sexual offense and an offender score of 9 plus, he was sentenced to the statutory maximum of 60 months. The court imposed an exceptional indeterminate sentence under former RCW 9.94A.712, setting both the maximum and minimum terms at 60 months, the statutory maximum. The sentence required the Department of Corrections (DOC) to provide sex offender treatment to commence by January 1, 2014, or release Bettys to the community to obtain sex offender treatment while still under the supervision of the DOC.

In December 2013, the court learned that the imposed date of January 1, 2014 was not feasible because nothing could be undertaken until the parole board met on January 15, 2014. The trial court modified its judgment and sentence, extending the date to provide treatment from January 1, 2014, to February 1, 2014.

At a review hearing held on February 5, 2014, Bettys moved the court to reconsider its order extending the treatment date until February 1, 2014. At that time, Bettys was enrolled in the sex offender program.

Bettys appeals, contending that the trial court had no authority to modify the sentence. Bettys also appeals his guilty plea contending there was an insufficient factual basis and that the court incorrectly included a juvenile offense in his offender score.

ANALYSIS

Bettys contends the trial court erred in modifying his original sentence by extending the timeframe within which the DOC had to begin sex offender treatment from January 1, 2014, to February 1, 2014. Bettys argues the court lacked authority to reconsider or modify the original sentence.

In support of his argument, Bettys relies on State v. Shove, 113 Wn.2d 83, 776 P.2d 132 (1989). In Shove, the court reversed a postjudgment sentencing modification because there was no specific statutory authority for the modification. Shove is distinguishable because the court modified the sentence based on changes in the defendant's situation that had occurred since the entry of judgment. Even in Shove, our Supreme Court recognized that final judgments in both criminal and civil cases may be faceted or altered whenever "the interests of justice most urgently require." Shove, 113 Wn.2d at 88; see also State v. Hardesty, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996) ("A court has jurisdiction to amend a judgment to correct an erroneous sentence, where justice requires, under CrR 7.8.").

This case is more similar to State v. Smith, 159 Wn. App. 694, 247 P.3d 775 (2011). There, the court held that the elimination of the partial confinement programs was an extraordinary circumstance that warranted modification of the sentence. Here, as in Smith, the circumstances could not have been envisioned at the time of sentencing.

Further, the trial court was amending the judgment to accomplish exactly what was meant when the sentence was imposed—to obtain treatment for Bettys while still under the supervision of DOC. This was not a modification of a judgment because of changed circumstances. Rather, the extension of one month within which to provide treatment accomplished exactly what the court wanted in imposing the sentence.

Guilty Plea

Bettys next contends he is entitled to withdraw his plea to third degree child molestation because there is no factual basis establishing the "sexual contact" element of the charge.

The guilty plea contained Bettys' statement:

> 11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement:
>
> This guilty plea is made pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); State v. Newton, 87 Wn.2d 363, 552 P.2d 682 (1976), State v. Zhao, 157 Wn.2d 188, 193, 137 P.3d 835, 837 (2006) and In Re Pers. Restraint of Barr, 102 Wn.2d 265, 684 P.2d 712 (1984). Pursuant to this case law, I agree there is a factual basis for the plea to *a more serious charge* based upon the reading of the declaration for determination of probable cause filed with the court February 19, 2010. I know and understand the evidence that could be used to attempt to convict me on the originally charged offenses (having reviewed the discovery and heard testimony in a prior trial), the elements of the originally charged offense, the elements of the amended charge, that the evidence did not support the amended charge and, that the sanctions or consequences of the amended charges were less onerous to him than the sanctions or consequences of the original charge. With all of this in mind, I make an informed, knowing and intelligent choice to freely and voluntarily enter a plea of guilty to the amended charge.
>
> [XX] Instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea and for the factual basis for the greater offenses.[3]

The statement of probable cause noted that the child stated that he was touched twice in the groin area by Bettys and was told not to tell anyone. The statement provided sufficient evidence for the court to believe that a jury could find Bettys guilty of first degree child molestation.

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[3] Clerk's Papers at 124.

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Furthermore, at the time Bettys pleaded guilty, he agreed that the facts submitted would be sufficient to find him guilty:

> THE COURT: To me that means you're not admitting having committed this particular offense, but you do believe if you went to trial you could be found guilty of this or even a more serious charge and a more serious penalty, and based on the circumstances you want to take advantage of the prosecutor's offer; is all of that correct?
>
> MR. BETTYS: That is correct, Your honor.[4]

The court then found that the reports filed in the case and the court's prior knowledge of having conducted the jury trial in this case was sufficient to find a factual basis to find Bettys guilty.

Finally, Bettys contends that the trial court incorrectly included a washed-out conviction in calculating his offender score. This claim is based on obsolete statutory provisions. Under the original SRA, juvenile convictions did not constitute "criminal history" for crimes committed after the defendant's 23rd birthday. Former RCW 9.94A.030(6) (1981) (LAWS OF 1981, ch. 137, § 3). This rule was abolished in 1997. Since then, the definition of "criminal history" has been the same for juvenile and adult convictions. LAWS OF 1997, ch. 338, § 2(12) (RCW 9.94A.030(11)).

The effect of these changes was clarified in 2002:

> A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.

LAWS OF 2002, ch. 107, § 2(13)(c) (RCW 9.94A.030(11)(c)). For crimes committed after the effective date of the 2002 amendment, the former rules for the "wash out" of juvenile convictions no longer apply. State v. Varga, 151 Wn.2d 179, 193-95, 86 P.3d 139 (2004).

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[4] Report of Proceedings (Sept. 26, 2013) at 10.

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Furthermore, Bettys agreed to the offender score at the time of his guilty plea and is precluded from contesting that scoring now.

Affirmed.

Trickey, J

WE CONCUR:

Schindler, J

Cox, J.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

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John Edward Bettys
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CASE #: 71418-0-I
State of Washington, Respondent v. John Edward Bettys, Appellant
Skagit County, Cause No. 10-1-00159-9

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Affirmed."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

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In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Honorable David R. Needy

APPENDIX B

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

STATE OF WASHINGTON, Respondent, v. JOHN EDWARD BETTYS, Appellant.	)	No. 71418-0-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, John Edwards Bettys, has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 6th day of February, 2015.

FOR THE COURT:

Trickey, J

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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February 6, 2015

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CASE #: 71418-0-I
State of Washington, Respondent v. John Edward Bettys, Appellant
Skagit County No. 10-1-00159-9

Counsel:

Enclosed please find a copy of the order denying motion for reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

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In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Hon. David R. Needy

APPENDIX C

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

In the Matter of the Personal Restraint of: JOHN BETTYS, Petitioner.	)	No. 50285-9-I ORDER GRANTING PERSONAL RESTRAINT PETITION IN PART

In 1993, John Bettys was charged with two counts of first degree rape of a child for incidents that allegedly occurred "on or about January 1, 1990 – February 18, 1993." He pleaded guilty and was sentenced to 185 months of total confinement. He has now filed this personal restraint petition challenging the calculations of both his offender score and earned early release credits. The State concedes that Bettys' offender score was miscalculated in light of State v. Smith, 144 Wn.2d 665, 30 P.3d 1245 (2001) and State v. Cruz, 139 Wn.2d 186, 985 P.2d 38 (1999) and that the matter must be remanded to superior court for resentencing. We agree and grant the personal restraint petition in part.

Bettys contends that the Department of Corrections (DOC) improperly calculated his earned early release credit because former RCW 9.94A.150, which imposes a ceiling on the amount of early release credit inmates can earn while imprisoned, was amended during his charging period. Prior to July 1, 1990, inmates like Bettys were entitled to earn early release time up to one-third of their sentence. Former RCW 9.94A.150(1) (1989). Where a class A felony sex offense was committed on or after July 1, 1990, however, "the aggregate earned early release time may not exceed fifteen percent of the sentence." former RCW 9.94A.150(1) (1990).

Bettys appears to argue the DOC retroactively applied the amended statute in violation of the due process and ex post facto clauses. While it is true that the law in effect

at the time a criminal offense is committed controls disposition of the case, In re Hartzell, 108 Wn. App. 934, 944, 33 P.3d 1096 (2001), Bettys pleaded guilty, and, in so doing, admitted he committed the offenses between January 1, 1990 and February 18, 1993. This necessarily constituted an admission of criminal acts after July 1, 1990, the effective date of the 1990 amendment. See In re Crabtree, 141 Wn.2d 577, 585, 9 P.3d 814 (2000). Moreover, other evidence clearly establishes that Bettys raped the two child victims after July 1, 1990. There is an affidavit from Detective Coapstick dated April 30, 1993, in which the detective states the rape victims accused Bettys of having oral sex with them on an ongoing basis for "several years." According to the detective, Bettys also admitted during an interview that he had had sex with one of the child victims for "about 2 years" and the other for "about 1 year." Under the circumstances, Bettys has not shown that he was prejudiced by the fact six months of the charging period elapsed before the effective date of the amendment. Because the 1990 amendment applies here, Bettys is entitled to earn early release time for only 15 percent of his sentence. There was no constitutional error.

Bettys contends the sentencing court erred when it included several of Bettys' prior convictions in the calculation of his offender score. The State concedes that Bettys' 1988 juvenile adjudication for indecent liberties should not have been included in his offender score because he was not yet 15 years old when the offense was committed and that "Bettys is entitled to be re-sentenced without the Indecent Liberties being included for three points in his offender score." Given the holdings in Cruz and Smith, we agree that

the inclusion of Bettys' juvenile adjudication for indecent liberties in calculating his offender score was error.

Bettys makes various other challenges regarding the calculation of his offender score. We decline to reach the merits of these issues. Because this case must be remanded to the trial court for resentencing, the parties, if appropriate and necessary, may raise those other offender score issues on remand.

Now, therefore, it is hereby

ORDERED that this personal restraint petition is partially granted. It is further

ORDERED that the matter is remanded to Skagit County Superior Court for immediate resentencing.

Done this 25th day of November, 2002.

Cox, ACJ

Schindler, J

Baker, J

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

In the Matter of the Personal Restraint of:	No. 50285-9-I
JOHN BETTYS,	CERTIFICATE OF FINALITY
	Skagit County
Petitioner.	Superior Court No. 93-1-00180-0

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Skagit County.

This is to certify that the other of the Court of Appeals of the State of Washington, Division I, filed on November 25, 2002, became final on June 24, 2003.

c: John E. Bettys
Skagit County Prosecuting Attorney

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 24th day of June, 2003.

Richard D. Johnson
Court Administrator/Clerk of the Court of Appeals, State of Washington Division I.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

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November 25, 2002

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John E. Bettys
Stafford Creek C.C.
711306
191 Constantine Way
Aberdeen, WA. 98520

CASE #: 50285-9-I
Personal Restraint Petition Of: John E. Bettys

Counsel:

Enclosed please find a copy of the order entered by this court in the above case today.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

bte

enclosure

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 67111-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
JOHN EDWARD BETTYS,	)	
	)	
Appellant.	)	FILED: March 11, 2013

GROSSE, J. — In the consolidated cases of State v. Gresham and State v. Scherner, our state Supreme Court held that RCW 10.58.090, allowing admission of evidence of prior sex offenses in a sex offense prosecution, is unconstitutional.[1] Thus, the trial court's admission of the defendant's prior sex offenses under this statute was error. And when, as here, the trial court also properly excluded the prior offense under ER 404(b) and the untainted evidence of guilt was not overwhelming, admission of the prior offense amounts to reversible error. Accordingly, we reverse.

FACTS

M.F. is the son of Andree King.[2] M.F. was placed in foster care when he was seven months old and returned to Andree when he was four years old. In the meantime, Andree married Daniel King, with whom she had two more children, W.K. and T.K. When M.F. was returned to Andree, the family lived briefly on 17th Street in Anacortes and then moved to the home of Andree's grandmother, Deanne Thomas, on Stevenson Road, sometime in 2009.

---

[1] 173 Wn.2d 405, 432, 269 P.3d 207 (2012).
[2] To avoid confusion, Andree King will be referred to by her first name.

Thomas' close friend, Sylvia Bettys,[3] lived about a mile away in a house on Padilla Heights Road. Her son, John Bettys, was King's uncle and lived in a trailer on the property with his wife Marissa and their child Harley. Also living on the property in a separate trailer was Bettys' nephew, Michael, also known as "Bacca."

Bettys was a registered sex offender, having pleaded guilty to two counts of first degree child rape in 1993. These charges involved Bettys' sexual abuse of King and Bacca when they were both children. According to Bacca, Bettys was eleven when he began sexually abusing him and continued to abuse him over several years, beginning when Bacca was between five and seven years old until he was twelve. According to Bacca, Bettys similarly abused King and the abuse began with touching over the clothes and progressed to mutual oral sex. In 1993, King, who was seven years old at the time, disclosed the abuse to a detective. The detective contacted Bettys, who was eighteen years old at the time, and Bettys confessed to engaging in oral sex with both Bacca and King.

Andree was aware of Bettys' prior sex offenses but her family frequently spent time at the Bettys' property. M.F. spent the night with Bettys and his wife in their trailer on five occasions. Andree also arranged to have Bettys drive M.F. to school. Thomas and Andree's mother, Laurie Ferrell, were uneasy with the family's involvement with the Bettys and cautioned Andree about allowing M.F. to be alone with Bettys.

In July 2009, M.F. was staying at Sylvia's house. But he was apparently being watched by Bettys and Marissa, as Sylvia had become too ill to care for the children. Bettys' sister, Kathy Tjeerdsma, who was a nurse, came to the house twice a day to

[3] To avoid confusion, Sylvia Bettys will be referred to by her first name.

care for Sylvia and also expressed concern to Ferrell about M.F. being left alone with Bettys.

On July 9, 2009, Ferrell brought her mother, Thomas, home from the hospital after surgery around 2:00 in the afternoon. Andree, King, and M.F. were at Thomas' house at the time. At some point, Bettys arrived at the house with Bacca, and M.F. went outside to greet them. Ferrell went to bring M.F. back inside the house and when she picked up M.F. to bring him inside, M.F. grabbed her crotch and started laughing. When Ferrell brought him in and told him that it was not okay for him to touch her privates, he went into a rage, yelling and throwing things. He then ran outside and Ferrell went out after him. Ferrell then began throwing a ball around with him and tried to get him to talk to her.

M.F. eventually told Ferrell that Bettys "poked" him in the penis. Ferrell asked if he wanted to talk to his mom or dad but he said he only wanted to talk to "Grandpa Kurt," who was Ferrell's partner. M.F. then told Kurt and she and Kurt went to Andree and King and told them what M.F. said. Andree and King yelled at M.F. and told him he was a liar and was going to go to jail if he lied. King questioned him about the details and M.F. said it happened at Grandma Sylvia's house. King and Andree then took M.F. directly to the police department to speak with a detective.

The case was referred to Detective Michael Hansen, who arranged for a child interview of M.F. at the Mount Vernon Child Advocacy Center on July 16, 2009. A child interview specialist interviewed M.F. and he disclosed that Bettys had touched him in his genital area two times and that Bettys told him not to tell anyone. M.F. said it happened in the living room at his Grandma Sylvia's house when she was in the

hospital.

Detective Hansen also interviewed Bettys and he denied the allegations. He described his relationship with M.F. as distant and denied having any physical contact with him. He claimed he was never alone with M.F. and that his family always made sure there was another adult around when M.F. was around him.

Bettys was also interviewed later that day by Glen Hutchings, assistant chief of the Swinomish Tribal Police Department. During this interview, Bettys claimed it was the first time he had heard of the allegations. Hutchings asked if the touching could have occurred in a playful, inadvertent, or accidental way, but Bettys denied that any touching occurred. Bettys admitted to one occasion when M.F. had spent the night and wet the bed. Bettys said he drew a bath for M.F. but gave him privacy in the bathroom while he bathed and dressed. Hutchings then asked if Bettys had ever touched M.F.'s penis over the clothing, had touched his groin area, or had ever touched M.F. for sexual purposes, and Bettys replied that he had not done any of those things. When Hutchings told Bettys he did not believe he was being candid, Bettys eventually admitted to an incident when M.F. was misbehaving while they were watching television with King when Bettys put his hands on M.F.'s upper thighs and held him down in a time out. He further admitted to wrestling and tickling him on his knees, upper thighs, and under his arms, and that M.F. hugged him once after a fishing trip. Bettys also admitted that he still had a drive and desire for children.

The State charged Bettys with two counts of first degree child molestation. M.F. was seven years old at the time of trial. He testified that he had been at Bettys' house and received rides to school from Bettys. M.F. said that Bettys touched him in his

privates and identified that area on a diagram of the body. He also identified two pictures he had drawn showing that Bettys had touched him. He testified that Bettys touched him with his hand and that the touching occurred inside Bettys' house.

The jury also heard evidence of Bettys' prior child rape convictions involving King and Bacca. The trial court admitted this evidence under RCW 10.58.090 but ruled that it was not admissible under ER 404(b). The jury found Bettys guilty of one count of first degree child molestation, but acquitted him on the second count. The trial court sentenced him as a persistent offender and imposed a life sentence. Bettys appeals.

ANALYSIS

Bettys contends that the trial court erred by admitting evidence of his prior sex offense under RCW 10.58.090. In State v. Gresham, the Supreme Court determined that RCW 10.58.090 violates the separation of powers doctrine and is therefore unconstitutional.[4] Accordingly, the trial court erred by admitting Bettys' prior sex offenses under this statute.

Bettys further contends that the trial court properly excluded his prior sex offenses under ER 404(b), but even if it was admissible under ER 404(b), the lack of an instruction that it could not be considered as propensity evidence was error. We agree.

A trial court's ruling to exclude evidence is reviewed for an abuse of discretion.[5] For evidence of prior bad acts to be properly admitted under ER 404(b) as evidence of a common scheme or plan, the evidence must be "'(1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more

[4] 173 Wn.2d at 432.
[5] State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

probative than prejudicial.'"[6] Evidence of such a common scheme or plan "'must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and prior misconduct are the individual manifestations.'"[7] Here, the trial court ruled the evidence should be excluded under ER 404(b), concluding that "the only real purpose would be to show that -- acted in conformity therewith." While Bettys' prior convictions arguably could be considered part of a common plan to molest young boys, we cannot say that the trial court's ruling to exclude them was an abuse of discretion, given the potential for extreme prejudice in a sex case when the only other evidence is child hearsay.[8]

But even if the prior offenses were admissible under ER 404(b), the jury's consideration of that evidence was error absent a proper limiting instruction. If the prior offenses were admitted under ER 404(b), Bettys was entitled to a limiting instruction that told the jury for what purpose it may properly consider the prior misconduct evidence and that the evidence may not be used as a basis to conclude that he has a particular character and has acted in conformity with that character.[9] No such instruction was given here to limit the jury's consideration of that evidence. Rather, the instruction that was given relating to its admission under RCW 10.58.090 simply allowed the jury to consider his prior sex offense.

---

[6] State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (quoting State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995)).
[7] DeVincentis, 150 Wn.3d at 19 (quoting Lough, 125 Wn.2d at 860).
[8] See State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982)(recognizing that "an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest").
[9] Gresham, 173 Wn.2d at 423-24; Foxhoven, 161 Wn.2d at 175.

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Thus, we turn to the harmless error analysis, which requires us to determine whether "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'"[10] In Gresham, the court held that the admission of a prior sex offense was not harmless, concluding there was a reasonable probability that absent the "highly prejudicial evidence" of Gresham's prior sex offense, the outcome of trial would have been different.[11] Without the erroneously admitted evidence of a prior sex offense, the only remaining evidence in that case was the child victim's testimony about the abuse and witnesses' corroboration of the defendant's opportunity to commit the alleged acts.

Likewise here, we cannot say that the admission of Bettys' prior child rape convictions, in conjunction with an instruction allowing the jury to consider the evidence for propensity purposes, was harmless. As in Gresham, absent evidence of the highly prejudicial evidence of the prior convictions, there is a reasonable probability that the outcome of the trial would have been different. The evidence of guilt presented at trial hinged on witness credibility. Bettys denied the allegations and the only direct evidence of his guilt was the testimony of a young child victim and his statements to other adults. While such evidence was sufficient to support Bettys' conviction, we cannot say that this highly prejudicial evidence of his prior sex offenses did not materially affect the jury's verdict. Indeed, in closing argument, the State emphasized the significance of Bettys' prior convictions, arguing that he "has a temptation for younger boys," that "[t]his has happened before in the past" when he abused his two nephews, and that this is

[10] Gresham, 173 Wn.2d at 433 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).
[11] Gresham, 173 Wn.2d at 433.

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something he clearly has "an ongoing problem with."[12] Because the trial court's admission of evidence of the prior child rape convictions under RCW 10.58.090 was not harmless, we reverse. Accordingly, we need not reach the remaining issues raised in Bettys' Statement of Additional Grounds.[13]

WE CONCUR:

COX, J.

[12]The strength of the State's evidence is further undermined by the fact that the jury acquitted on one of the two charged counts even when considering the erroneously admitted evidence of the prior convictions.

[13] Because we reverse Betty's conviction, his pending motions in this court seeking further relief are moot.

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

STATE OF WASHINGTON, Respondent, v. JOHN EDWARD BETTYS, Appellant.	)	No. 67111-1-I MANDATE Skagit County Superior Court No. 10-1-00159-9 ***Court Action Required***

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for Skagit County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on March 11, 2013, became the decision terminating review of this court in the above entitled case on May 3, 2013. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

c: Andrew Peter Zinner - NBK
John Edward Bettys
Erik Pedersen
Hon. David R. Needy

Court Action Required: The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the opinion.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 3rd day of May, 2013.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals, State of Washington, Division I.

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RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
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March 11, 2013

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CASE #: 67111-1-I
State of Washington, Respondent v. John Edward Bettys, Petitioner
Skagit County, Cause No. 10-1-00159-9

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"Accordingly, we reverse."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

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Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Honorable David R. Needy

APPENDIX E

A F F I D A V I T

STATE OF WASHINGTON)
)ss AFFIDAVIT OF JOHN E. BETTYS
COUNTY OF PIERCE)

After first being duly sworn on oath, I depose and say:

1. I am over the age of 18 years of age, and am competent to be a witness in this action.

2. That I represented "pro se" in Skagit County Superior Court for the hearing held April 8, 2015 in cause 10-1-00159-9.

3. That present was Attorney General Deputy "Ronda Larson" for the Department of Corrections and Skagit Prosecutor Deputy "Erik Pedersen" for the State of Washington.

4. That the Honorable David R. Needy, Judge presided and ruled.

5. That neither "Ronda Larson", Nor "Erik Pedersen" could locate a CrR 7.8 motion filed in the record for the court's actions on December 17, 2013 modifying a correct final judgment.

6. That modification of correct final judgment and sentence is prohibited under the United States constitution's Fifth Amendment clause double jeopardy.

7. That case-law prohibited such modification of a correct and valid final judgment in Washington State under the State V. Hardesty, 129 Wn.2d 315, 915 P.2d 1080 (1996).

8. That Federal case-law prohibited such modification of the correct and valid final judgment under the United States V. DiFranscesco, 449 U.S. 117, 101 S.Ct. 426 (1980).

9. That Trial Court abuses discretion when its decisions are manifestly unreasonable or exercised on untenable grounds on an erroneous view of the law under State V. Lord, 161 Wn.2d 276, 165 P.3d 1251 (2007), and its progeny.

10. That during the April 8, 2015 hearing the Honorable David R. Needy, Judge established the court acted without CrR 7.8 or any other form of motion filed.

11. That the court lacked authority to act on its own, without a motion presenting a legal error presented by the parties.

12. That the law allows dismissal of criminal prosecutions with prejudice for governmental mismanagement, whereby such need not be of an evil or dishonest nature, simple mismanagement is enough to warrant extraordinary remedy of dismissal.

13. That the Department of Corrections is not a party to criminal prosecution #10-1-00159-9, as admitted by "Ronda Larson".

14. That "Ronda Larson", Attorney General is not a party to this criminal prosecution #10-1-00159-9, as Washington State was represented by and through Skagit Prosecutor "Erik Pedersen" at all times relevant to this action December 17, 2013.

15. That the modification increased the confinement term of the original correct judgment & sentence by more than one day.

16. That nothing in the original judgment and sentence allowed the court to re-sentence the defendant at a later date, and the judgment & sentence was valid when modified.

DATED This 16th day of April, 2015.

Respectfully Submitted,

John Bettys

John E. Bettys, pro se
P.O. Box 88600
Steilacoom, WA 98388

SUBSCRIBED AND SWORN to before me this 16th day of April, 2015.

AMY L. MOSLEY NOTARY PUBLIC COMMISSION EXPIRES 12-05-18 STATE OF WASHINGTON

Amy L. Mosley

NOTARY PUBLIC in and for Washington State

Residing at: Pierce County Wahsington

My Commission Expires: 12/05/18

APPENDIX F

SUPERIOR COURT OF WASHINGTON
COUNTY OF SKAGIT

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2014 JUL 10 AM 9:19

STATE OF WASHINGTON,
Plaintiff,

vs.

CAUSE NO. 10-1-00159-9

John E. Bettys
Defendant

ORDER RE:
[ ] HEARING DATES (Clerk's Action Required)
[ ] QUASHING WARRANT (Sheriff's Action Required)
[ ] BAIL (Sheriff's Action Required)
[X] OTHER:

The Court, being fully advised and good cause having been shown, Now, Therefore, ORDERS:

[ ] **HEARING DATES:** This matter is continued to the dates below. [ ] by agreement of the parties (signed by defendant) [ ] by motion of defendant/state. The defendant's presence is required for:

OMNIBUS: _____ 9:00 a.m. **STATUS:** _____ 9:00 a.m.

3.5/3.6 HEARING: _____ 9:30 a.m. **REVIEW:** _____ 9:00 a.m.

TRIAL CONFIRMATION: _____ 1:30 p.m. **OTHER:** _____ 9:00 a.m.

TRIAL: _____ 9:00 a.m. (See Waiver Below If Applicable)

TIME FOR TRIAL: _____ (30 days after trial pursuant to continuance under CrR 3.3)

SENTENCING: _____ 9:00 a.m. (See Waiver Below If Applicable)

[ ] Presentence Investigation required. [ ] Defendant is in custody [ ] Defendant's Address:

_____

[ ] **WARRANTS:** Outstanding warrants in this cause are quashed. The next hearing date is as noted above.

[ ] **BAIL:** Bail is set at $ _____

[X] **OTHER:** Defendant's motion to be placed in treatment at the Department of Corrections is denied.

Dated: July 10, 2014.

Dave Needy
Judge of the above-titled Court

WAIVERS BY DEFENDANT

[ ] **SPEEDY TRIAL:** The undersigned, having been advised by my Attorney of Record that I have the right to be brought to trial within 60/90 days of the commencement date, hereby requests that trial in this matter be reset. I am aware of and wish to waive my right to speedy trial by resetting a commencement date of: _____ resulting in a new time for trial date as provided in CrR 3.3 of: _____ (60/90 days after commencement date).

[ ] **SENTENCING:** The undersigned, having been advised of my right to be sentenced within 40 court days from the date of the guilty plea or conviction, and being aware of, hereby waive the right to speedy sentencing pursuant to RCW 9.94A.500. I acknowledge this waiver is my personal request and I am not prejudiced by this continuance.

At D.O.C. Present telephonically
Defendant

Attorney for Defendant

Prosecuting Attorney
Erik Anderson

Original: Clerk's Office Canary Copy - Defendant Pink Copy - Attorney for Defendant Goldenrod Copy – Prosecuting Attorney
PA-8

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SUPERIOR COURT OF WASHINGTON
COUNTY OF SKAGIT

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2014 SEP 24 AM 11:18

STATE OF WASHINGTON,
Plaintiff,

vs.

CAUSE NO. 10-1-00159-9

John E Betts,
Defendant

ORDER RE:
[ ] HEARING DATES (Clerk's Action Required)
[ ] QUASHING WARRANT (Sheriff's Action Required)
[ ] BAIL (Sheriff's Action Required)
[X] OTHER:

The Court, being fully advised and good cause having been shown, Now, Therefore, ORDERS:

[ ] **HEARING DATES:** This matter is continued to the dates below. [ ] by agreement of the parties (signed by defendant) [ ] by motion of defendant/state. The defendant's presence is required for:

OMNIBUS: _____ 9:00 a.m. **STATUS:** _____ 9:00 a.m.

3.5/3.6 HEARING: _____ 9:30 a.m. **REVIEW:** _____ 9:00 a.m.

TRIAL CONFIRMATION: _____ 1:30 p.m. **OTHER:** _____ 9:00 a.m.

TRIAL: _____ 9:00 a.m. (See Waiver Below If Applicable)

TIME FOR TRIAL: _____ (30 days after trial pursuant to continuance under CrR 3.3)

SENTENCING: _____ 9:00 a.m. (See Waiver Below If Applicable)

[ ] Presentence Investigation required. [ ] Defendant is in custody [ ] Defendant's Address:

[ ] **WARRANTS:** Outstanding warrants in this cause are quashed. The next hearing date is as noted above.

[ ] **BAIL:** Bail is set at $ _____

[X] **OTHER:** Defendant's motion for contempt is denied.

Dated: September 24, 2014

Judge of the above-titled Court

WAIVERS BY DEFENDANT

[ ] **SPEEDY TRIAL:** The undersigned, having been advised by my Attorney of Record that I have the right to be brought to trial within 60/90 days of the commencement date, hereby requests that trial in this matter be reset. I am aware of and wish to waive my right to speedy trial by resetting a commencement date of: _____ resulting in a new time for trial date as provided in CrR 3.3 of: _____ (60/90 days after commencement date).

[ ] **SENTENCING:** The undersigned, having been advised of my right to be sentenced within 40 court days from the date of the guilty plea or conviction, and being aware of, hereby waive the right to speedy sentencing pursuant to RCW 9.94A.500. I acknowledge this waiver is my personal request and I am not prejudiced by this continuance.

A.t R.D.C present
Defendant
Via Courtcall

Attorney for Defendant

2015
Prosecuting Attorney
Erik Pedersen

Original: Clerk's Office Canary Copy - Defendant Pink Copy - Attorney for Defendant Goldenrod Copy – Prosecuting Attorney
PA-8

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APPENDIX G

Approved by the Governor April 15, 2005.
Filed in Office of Secretary of State April 15, 2005.

CHAPTER 68

[Senate Bill 5477]
SENTENCING REFORM ACT

AN ACT Relating to sentencing outside the standard sentence range; amending RCW 9.94A.530 and 9.94A.535; adding a new section to chapter 9.94A RCW; creating new sections; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. **Sec. 1.** The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in *Blakely v. Washington,* 542 U.S. ... (2004). In that case, the United States supreme court held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances. The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances. The legislature does not intend to alter how mitigating facts are to be determined under the sentencing reform act, and thus intends that mitigating facts will be found by the sentencing court by a preponderance of the evidence.

While the legislature intends to bring the sentencing reform act into compliance as previously indicated, the legislature recognizes the need to restore the judicial discretion that has been limited as a result of the *Blakely* decision.

Sec. 2. RCW 9.94A.530 and 2002 c 290 s 18 are each amended to read as follows:

(1) The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range (see RCW 9.94A.510, (Table 1) and RCW 9.94A.517, (Table 3)). The additional time for deadly weapon findings or for ((~~those offenses enumerated~~)) other adjustments as specified in RCW 9.94A.533((~~(4) that were committed in a state correctional facility or county jail~~)) shall be added to the entire standard sentence range. The court may impose any sentence within the range that it deems appropriate. All standard sentence ranges are expressed in terms of total confinement.

(2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to section 4 of this act. Acknowledgement includes not objecting to information stated in the presentence reports. Where

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the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in section 4 of this act.

(3) In determining any sentence above the standard sentence range, the court shall follow the procedures set forth in section 4 of this act. Facts that establish the elements of a more serious crime or additional crimes may not be used to go outside the standard sentence range except upon stipulation or when specifically provided for in RCW 9.94A.535(2) (d), (e), (g), and (h).

Sec. 3. RCW 9.94A.535 and 2003 c 267 s 4 are each amended to read as follows:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of section 4 of this act.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence ((~~unless it is imposed on an offender sentenced under RCW 9.94A.712. An exceptional sentence imposed on an offender sentenced under RCW 9.94A.712 shall be to a minimum term set by the court and a maximum term equal to the statutory maximum sentence for the offense of conviction under chapter 9A.20 RCW~~)).

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

((~~The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.~~))

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

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(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered By A Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in section 4 of this act.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance ((~~due to extreme youth, advanced age, disability, or ill health~~)).

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

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(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) ((~~The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.~~

~~(j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.~~

~~(k)~~)) The offense resulted in the pregnancy of a child victim of rape.

(((~~(l)~~))) (j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

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(((~~m~~))) (k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(((~~n~~))) (l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

NEW SECTION. **Sec. 4.** A new section is added to chapter 9.94A RCW to read as follows:

(1) At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(2) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

(3) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a

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separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

(4) If the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

(5) If the jury finds, unanimously and beyond a reasonable doubt, one or more of the facts alleged by the state in support of an aggravated sentence, the court may sentence the offender pursuant to RCW 9.94A.535 to a term of confinement up to the maximum allowed under RCW 9A.20.021 for the underlying conviction if it finds, considering the purposes of this chapter, that the facts found are substantial and compelling reasons justifying an exceptional sentence.

NEW SECTION. **Sec. 5.** (1) The sentencing guidelines commission shall review the sentencing reform act as it relates to the sentencing grid, all provisions providing for exceptional sentences both above and below the standard sentencing ranges, and judicial discretion in sentencing. As part of its review, the commission shall:

(a) Study the relevant provisions of the sentencing reform act, including the provisions in this act;

(b) Consider how to restore the judicial discretion which has been limited as a result of the *Blakely* decision;

(c) Consider the use of advisory sentencing guidelines for all or any group of crimes;

(d) Draft proposed legislation that seeks to address the limitations placed on judicial discretion in sentencing as a result of the *Blakely* decision; and

(e) Determine the fiscal impact of any proposed legislation.

(2) The commission shall submit its findings and proposed legislation to the legislature no later than December 1, 2005.

NEW SECTION. **Sec. 6.** 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. 7.** This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately.

Passed by the Senate April 14, 2005.

Passed by the House April 12, 2005.

Approved by the Governor April 15, 2005.

Filed in Office of Secretary of State April 15, 2005.

CP 457-464

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APPENDIX H

SKAGIT COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, v. JOHN E. BETTYS, Defendant.	NO. 10-1-00159-9 SUPPLEMENTAL SENTENCING REPORT

SENTENCING COURT: Judge David Needy

SENTENCING DATE: November 26, 2013, 9:30 a.m.

CHARGES: Child Molestation in the Third Degree

OFFENDER SCORE: We have been provided with the State's calculations of Mr. Betty's offender score, which they list as 9+ for the CM3. We agree the statement is correct and complete.

I. DEFENSE RECOMENDATIONS

1. Sixty months for the CM3. This is an agreed recommendation and it is the statutory maximum, and minimum, for Mr. Betty's offender score of 9+.
2. Credit for time served time in custody, both county jail and state prison since February 20, 2010;
3. Waive all non-mandatory fines, costs, and fees;

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4. Sex Offender Treatment.

5. Order for Immediate Release.

II. STANDANRD RANGE

On September 13, 2013, John Bettys pled guilty of one count of Child Molestation in the Third Degree. The range for this offense is 60 months in custody.

III. BASIS FOR RECOMMENDATION

John Bettys is a 39 year old man before the Court being sentenced on this charge. He has been in custody in county jails and in state prisons since February 20, 2010 on this case. That places him at just over 45 months in custody, calculated, as are all sentences, from the time an individual is book into custody on a case, not from the time of sentencing. Mr. Bettys was originally found guilty at a jury trial on May 11, 2011, of one count Child Molestation in the First Degree, and being found not guilty on a second count of the same. He was sentenced to Life in Prison as a Second Strike Sex Offender. The conviction was appealed, overturned, and remanded for a new trial due to errors under RCW 10.58.090. Mr. Bettys was re-charged, and a plea agreement was reached, with a plea being entered on September 13, 2013, as indicated above, to a lesser charges.

Mr. Bettys offense falls within the Indeterminate Sentencing Review Board (ISRB). As an ISRB offense the statutory maximum sentence of 60 months must be imposed. Mr. Bettys is eligible to receive good time credit for his time in custody. However, because the offense is an ISRB offense, the awarding of good time is not mandatory but is discretionary on the part of the ISRB. In the event that Mr. Bettys does receive good time credit and is released from custody prior to the 60 month maximum term, then the remainder of his sentence is mandatorily converted to Community Custody.

A. The court should affirmatively order that Mr Bettys participate in sex offender treatment as part of any period of his sentence served in community custody.

Under the current sentencing guidelines, the court could impose conditions of release, including attendance in a sex offender treatment program as part of an ISRB sentence. Mr. Bettys offense was committed in December 1, 2008 – July 15, 2009, preceding the modification

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of the SRA in August 2010, permitting the imposition of affirmative conditions. Under the sentencing guidelines in place in July 2009, the court would have lacked the power to mandate affirmative conditions of release, and instead was limited to mandating that the accused follow recommendations of treatment providers and community custody officers.

Mr. Bettys nevertheless believes the court can and should mandate his participation in a Sex Offender Treatment Program (SOTP) as part of his sentence for any time served in Community Custody. The court's power to mandate the sentence when not explicitly mandated in the guidelines stems from RCW 9.94A.535 which permits the court to vary from the guidelines in exceptional cases. RCW 9.94A.535 lists a series of suggested basis for deviation, both upwards and downward, from the standard guidelines. However, it explicitly provides that this list is not exclusive and is illustrative only, and that other situations may be applicable. In our case, Mr. Bettys meets this criterion. As the court is aware, due to miscalculations in his offender scorer necessitating release prior to the start and completion to SOTP in custody, Mr. Bettys did not receive sex offender treatment in conjunction with his previous offenses for which he was sentenced in 2002. In this present case, due to the time already spent in pre-trial confinement, there is again insufficient time for Mr. Bettys to enroll or complete in-custody SOTP. The only possibility for Mr. Bettys to receive sex offender treatment is while in community custody. Mr. Bettys mandatory receipt of sex offender treatment is clearly in his and the community's best interest, justifying an exceptional sentence under RCW 9.94A.535.

This court has the power under RCW 9.94A.535 to award mandatory participation in treatment as part of community custody. *In re Postsentence Review of Smith*, 139 Wn. App. 600, 603 (Wash. Ct. App. 2007), the trial court imposed a sentence tailored to Smith's particular case, which is precisely the type of action that several Washington Courts courts agreed was intended by the SRA's exceptional sentence provisions. Smith cited as an example that in *State v. Bernhard*, 108 Wn.2d 527, 741 P.2d 1 (1987), *overruled in part on other grounds by State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989), the trial court sentenced the defendant to an in-patient drug treatment facility rather than a work-release facility as recommended by the State. The State appealed the sentence, arguing that the trial court could not sentence the defendant to

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participate in treatment as part of a standard-range community supervision sentence, and the Washington Supreme Court agreed. But the court went on to examine the Sentencing Reform Act of 1981's (SRA), chapter 9.94A RCW, statutory language and legislative history to determine whether the trial court had authority to sentence the defendant to treatment as an exceptional community supervision condition. The court concluded that the legislature intended that the SRA's exceptional sentence provision was intended to authorize courts to tailor the sentence—as to both the length and the type of punishment imposed—to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid. Therefore, the court concluded that the SRA authorized the trial court's exceptional sentence outside the standard range of community supervision conditions. *See* RCW 9.94A.535, (stating that "A sentence outside the standard sentence range shall be a determinate sentence."); and *Smith*, at 604.

Conversion of Mr. Bettys sentence from an indeterminate sentence to a determinate sentence of 60 month confinement makes Mr. Bettys eligible for immediate release into community custody rather than having to have his release vetted by the ISRB. A determinate sentence in this case is in the public and Mr. Bettys interest. Mr. Bettys has completed a sexual deviancy evaluation which concluded that he is an excellent candidate for treatment. Unfortunately, Mr. Bettys will be unable to complete SOTP while in custody as he only has 14 - 15 months of time left to serve on a 60 month sentence, and therefore does not have the required 18 months remaining in custody required for commencement of SOTP while at DOC.

Upon release from custody, Mr. Bettys should be ordered to immediately enroll in a SOTP and comply with the requirements of the program. Mr. Bettys has identified a program locally which he can attend. He is eligible to enroll immediately, thus maximizing the SOTP time he is compelled to do, and providing for more safeguards to the community. The evaluation identified Mr. Bettys and his condition as treatable, and Mr. Bettys is amenable to treatment. Any delay in his release will jeopardize his ability to receive SOTP in Community Custody.

Mr. Bettys has a release plan set in place. His sister, Kathy, has arranged for him to live on her property and had set up independent living for him in a trailer. Although Mr. Bettys will

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only be eligible for community custody for 14 – 15 months, he has a strong motivation to to complete SOTP beyond what the court may order. Mr. Bettys has a young son with whom he has established a relationship with while he has been in custody. He would like to keep up his contact with his son once released. In order to do this, Mr. Bettys understands that not only will his contact need to be supervised, but also that he will need to complete the requisite SOTP treatment in order for him to continue with visitation. Accordingly, Mr. Bettys requests the court order him to obtain and complete SOTP treatment during community custody and that the court find that such order makes his sentence determinate.

B. Appendix F

The defense would request alternative language, corrections, and language being stricken on Appendix F, Additional Conditions of Sentence. This is outlined after having received the State's memo indicating deletions and amendments to Appendix F datd November 25. Item 1 should read have no new criminal law violations. Obey all laws is too vague. Item 4 is too onerous to have to receive approval from SOTP provider, CPS (who is not even involved), and the CC Officer in order to have visits with his son, which he has already been doing up to this point. Item 7 and 8 are not workable, as Mr. Bettys is currently married and has a child. The prohibition in 7 and 8 effectively prohibit him from seeing/being with his wife and child, neither of whom are his crime victims in this case. Item 10 should only read that he should start SOTP. He will be unable to complete it in the statutory maximum amount of time left for the crime for which he plead. Item 13 – a urinalysis is not testing for anything that is remotely crime related and should not be ordered.[1] Item 17 RCW 9.94A.120(13) appears to have been repealed. Item 18 should be stricken, even with the correction to the correct county. Referring to a document that was declared invalid is improper.

[1] Generally, as part of any sentence, the sentencing judge may impose and enforce crime-related prohibitions and affirmative conditions. RCW 9.94A.505(8). A crime-related prohibition is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted ... ." RCW 9.94A.030(13). Crime-related prohibitions may extend for a period of time not to exceed the statutory maximum for the defendant's crime. *State v. Armendariz*, 160 Wn.2d 106, 118-19, 156 P.3d 201 (2007)." *State v. Cayenne*, 165 Wn.2d 10 (2008).

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IV. CONCLUSION

Mr. Bettys asks the Court to follow the agreed recommendation of 60 months with credit for time served since incarceration on February 20, 2010, order him to attend and complete the SOTP while on community custody, making this a determinate sentence, and have the court sign an order for immediate release, placing him in Community Custody/Supervision for the designated time after release to complete sex offender treatment. Mr. Bettys asks the court to consider the similarity in the 2002 re-sentencing on his prior offenses which prevented him from having treatment while in custody or under DOC supervision, and would encourage the court to allow for the maximum amount of treatment possible this time while under DOC supervision.

Based on his economic situation, Mr. Bettys requests that this Court find that he is indigent and waive all non-mandatory financial assessments pursuant to *State v. Hayes*, 56 Wn. App. 451 (1989, and *State v. Earls*, 51 Wn. App. 192 (1988).

Dated this 25th day of November, 2013.

/s/ Catherine McDonlad
Catherine McDonald, WSBA # 24002
Charles Swift, WSBA # 41671
Counsel for John E. Bettys

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APPENDIX I

YUILLE & DAYLEN
PSYCHOLOGICAL CONSULTANTS

Ψ

Ganges P.O. Box 600
Salt Spring Island, British Columbia, V8K 2W2
Canada
Tel: (250) 537-2061 Fax: (250) 537-2062

May 10, 2010

Re: State v Bettys

Reasons for Report

Ms. Catherine McDonald, attorney for the accused, requested that I examine a set of materials and provide an opinion on the interview of the complainant in this case.

Materials Reviewed

In preparation for this report I reviewed the following materials:

1. A copy of the affidavit of probable cause;
2. A DVD and a transcript of an interview of the complainant (7/16/09);
3. A copy of the Anacortes Polis report;

Before I provide my evaluation of the allegations in this case, I offer some background information relevant to cases of this type. The next section provides an outline of the general principles that should guide an investigative interview of a child. The subsequent section outlines some general principles dealing with children's memory and statement credibility.

General Considerations when Interviewing Children

An investigative interview with a child requires special skill and training. Children are particularly susceptible to the effects of leading questions and to

suggestion, an interviewer must be trained to employ an appropriate form of questioning with children. In addition, the interviewer must have knowledge of the memory, language and expressive abilities of children of different ages. The greatest problem for police officers that do this type of interview has been the lack of availability of appropriate training. Perhaps the biggest problem for social workers, medical doctors and psychologists who conduct such interviews is that they have been trained as clinicians rather than as investigators. As a consequence, the use of leading questions in a clinical style interview often characterizes their interviews of children. The clinical style is not appropriate for an investigative interview. It is important to emphasize that a person cannot function as both therapist and investigator in the same case. The following discussion provides an outline of the factors that must be considered in conducting a proper investigative interview with a child.

Our awareness of the problem of sexual abuse has grown rapidly in the past fifteen years. One consequence of this rapid change is that many professionals have been faced with the task of interviewing children without sufficient training. Recently government agencies and professional organizations have been working to develop standardized training procedures for those who have the responsibility of interviewing children. The results of these efforts have been some emerging standards with respect to how the investigative interview of the child must be conducted.

As a researcher and practitioner in the area of victim and witness interviews I have been involved in the development of interview standards. The procedure I have developed, called the Step-Wise Interview, attempts to maximize the information obtained from the child while minimizing the contamination of the child's memory. Training in the Step-Wise Interview has been provided to professionals in every province in Canada. The Step-Wise Interview has been adopted as the standard for interviewing in England and Wales. The procedure is also employed in a number of states in the U.S.A. (e.g., Colorado, New York, Pennsylvania, Texas and Wisconsin) and has been adopted for investigations by the U.S. army.

The Step-Wise Interview has been developed to avoid the following problems frequently found in interviews with children:

1) Interviewers too often use leading questions, to which children are particularly susceptible;
2) Interviewers do not allow children to take their time and to describe events in their own words;
3) Interviewers are usually not trained investigators, and, as a consequence, they do not obtain enough information to validate the child's account;
4) Interviewers often have only one hypothesis in the interview setting and this hypothesis "blinds" the interviewer to obtaining all the relevant information from the child;

5) Interviewers may use language, which is inappropriate for children (particularly with preschool age children).

The Step-Wise Interview employs open-ended questions, avoids leading the child, allows the child to set the pace of the interview and to describe events in his or her own words, and attempts to obtain as much information as possible to evaluate alternative hypotheses about the child's allegations. During the course of the interview the susceptibility of the child to suggestion and to leading questions is checked. The procedures employed in the interview are adjusted to fit the needs of children of different ages.

An essential component of the interview is some form of recording. The preference is to have the interview recorded on videotape; however, if video equipment is not available an audiotape will suffice. Recording the interview is essential to determine the effectiveness of the interview technique. Also, it is only possible to evaluate the value of the interview if a verbatim record is available. Recording also should reduce the number of times a child has to be interviewed.

The Step-Wise Interview has been designed to provide a consistent framework for obtaining the child's evidence throughout the investigative process. Thus, the same interview technique can be employed in the investigative interview, in preparing the child for court and in questioning the child in court.

A revised version of the interview called The Step-Wise Guidelines: The New Generation was developed toward the end of 2008 (see Yuille, J.C., Cooper, & H.F. Herve (in press) The Step-Wise Guidelines for child interviews: The new generation. In M. Casonato & Pfafflin (Eds.), Handbook of pedosexuality and forensic science).

<u>My Qualifications</u>

I am Professor Emeritus in the Department of Psychology, University of British Columbia. I have been conducting research in the general area of human memory for over 40 years. This work has included a number of studies on children's memory. My research has been supported by grants from the National Science and Engineering Research Council of Canada, the Social Sciences and Humanities Research Council of Canada, the Ministry of Justice of Canada, the Solicitor General of Canada, the Ministry of Social Services and Housing of British Columbia, the Ministry of the Attorney General of British Columbia and NATO. During the past 30 years my work has focused on the role of memory in the forensic context. I have published more than 110 articles and chapters and eight books and monographs. I have given or co-authored more than 210 conference presentations and invited addresses.

I have provided training to police, child protection workers, prosecutors and judges in the Step-Wise Interview and the SA procedures. I have conducted more than 170 such workshops. I have interviewed and/or assessed children's evidence in more than 1000 cases of alleged sexual or physical abuse, some of which involved multiple victims. I am a registered psychologist with the College of Psychologists of British Columbia (registration number 753).

I have testified as an expert in all levels of family, civil and criminal court and in provincial and royal commissions. I have been qualified as an expert in courts in Newfoundland, Nova Scotia, Quebec, Ontario, Saskatchewan, Alberta, British Columbia and the Yukon Territory. I have also testified in several states in the United States (e.g., Florida, Illinois, New York, Oregon, and Washington).

An Evaluation of the Interview of Micah Ferrell-Cichester

The opinions offered in this report are based on my understanding of the relevant psychological literature, my professional training and experiences, and the information available to me at this time (listed above). Because I have not personally met with the complainant, I have not had the advantage of observing non-verbal cues and behavioral signs that might inform my opinion. Also, I have not had an opportunity to put my own questions to the complainant. The reader should be aware of these constraints on my opinion. I reserve the right to alter the opinions offered in this report upon the receipt and consideration of any new, relevant data that may later become available.

On July 12, 2009, Laurie Ferrell, mother of Micah Ferrell-Cichester (DOB 3/24/04), reported that her son had grabbed her 'crotch' area. When asked about this the boy reportedly said that his uncle, the accused, had touched him in that spot a long time ago. This was reported to the police and resulted in an interview of the boy. Apparently the recording apparatus failed during that interview and a second interview was conducted on July 16, 2009. This report focuses on the latter interview.

The interview began with some rapport building questions. No attempt was made by the interviewer to informally assess the child. Rapport building was followed by a review of the interview rules, including dealing with truth and lies. The latter phase of the interview was done using cards depicting children telling the truth and lying. The interviewer used her tone of voice to communicate the 'correct' answers to the child. Consequently, this was not an objective assessment of the child's understanding of truth and lies.

The child was very reluctant to talk about the 'secret' reason that he was there. Eventually, he said that John had touched him two times. He said that the accused touched him on the outside of his clothing in the 'crotch\ area. He described the touching as warm and soft. The interview ended with the interviewer doing some informal cognitive assessment using crayons.

[redacted] **In particular, the interviewer generally avoided leading nod suggestive questions.** [redacted] **The** [redacted]

[redacted]

John C. Yuille, Ph.D., R. Psych.

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September 29, 2010

Skagit County Clerk's Office
Skagit County Superior Court
205 – W. Kincaid, Rm 103
Mount Vernon, WA 98273

Re: State v. John Bettys 10-1-00159-9

Hearing date: October 1, 2010, 1:30 p.m.

Dear Judge Needy:

On April 2, 2010, the court authorized funds at public expense for Dr. John Yuille to do a forensic evaluation of the police reports, child's forensic interview, and legal filings in the above case to assist in clarifying possible defenses in this case. Dr. Yuille's report was completed on May 6, 2010. A copy of his report is attached to this letter.

In the hearing scheduled for October 1, 2010, the defense and State have submitted the child's forensic interview as part of the evidence to be considered in the Knapstad Motion. The State has also provided a copy of the interview as part of their evidence in the Child Hearsay motion. The defense is providing the Court with a copy of Dr. Yuille's evaluation of the forensic interview as supplemental information for the Court to consider in review of the forensic interview.

This letter and report have been filed with the Skagit County Clerk's Office, and a copy of this letter has been mailed to the Skagit County Prosecutor's Office. The State was provided a copy of this report by Dr. Yuille on June 3, 2010. It has not been re-submitted to the Prosecutor with this correspondence.

Sincerely,

Catherine McDonald

Catherine McDonald
Attorney for John Bettys

CP 447-456

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APPENDIX J

WAC 388-15-009
What is child abuse or neglect?

Child abuse or neglect means the injury, sexual abuse, or sexual exploitation of a child by any person under circumstances which indicate that the child's health, welfare, or safety is harmed, or the negligent treatment or maltreatment of a child by a person responsible for or providing care to the child. An abused child is a child who has been subjected to child abuse or neglect as defined in this section.

(1) Physical abuse means the nonaccidental infliction of physical injury or physical mistreatment on a child. Physical abuse includes, but is not limited to, such actions as:

(a) Throwing, kicking, burning, or cutting a child;

(b) Striking a child with a closed fist;

(c) Shaking a child under age three;

(d) Interfering with a child's breathing;

(e) Threatening a child with a deadly weapon;

(f) Doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks or which is injurious to the child's health, welfare or safety.

(2) Physical discipline of a child, including the reasonable use of corporal punishment, is not considered abuse when it is reasonable and moderate and is inflicted by a parent or guardian for the purposes of restraining or correcting the child. The age, size, and condition of the child, and the location of any inflicted injury shall be considered in determining whether the bodily harm is reasonable or moderate. Other factors may include the developmental level of the child and the nature of the child's misconduct. A parent's belief that it is necessary to punish a child does not justify or permit the use of excessive, immoderate or unreasonable force against the child.

(3) Sexual abuse means committing or allowing to be committed any sexual offense against a child as defined in the criminal code. The intentional touching, either directly or through the clothing, of the sexual or other intimate parts of a child or allowing, permitting, compelling, encouraging, aiding, or otherwise causing a child to engage in touching the sexual or other intimate parts of another for the purpose of gratifying the sexual desire of the person touching the child, the child, or a third party. A parent or guardian of a child, a person authorized by the parent or guardian to provide childcare for the child, or a person providing medically recognized services for the child, may touch a child in the sexual or other intimate parts for the purposes of providing hygiene, child care, and medical treatment or diagnosis.

(4) Sexual exploitation includes, but is not limited to, such actions as allowing, permitting, compelling, encouraging, aiding, or otherwise causing a child to engage in:

(a) Prostitution;

(b) Sexually explicit, obscene or pornographic activity to be photographed, filmed, or electronically reproduced or transmitted; or

(c) Sexually explicit, obscene or pornographic activity as part of a live performance, or for the benefit or sexual gratification of another person.

(5) Negligent treatment or maltreatment means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, on the part of a child's parent, legal custodian, guardian, or caregiver that shows a serious disregard of the consequences to the child of such magnitude that it creates a clear and present danger to the child's health, welfare, or safety. A child does not have to suffer actual damage or physical or emotional harm to be in circumstances which create a clear and present danger to the child's health, welfare, or safety. Negligent treatment or maltreatment includes, but is not limited, to:

(a) Failure to provide adequate food, shelter, clothing, supervision, or health care necessary for a child's health, welfare, or safety. Poverty and/or homelessness do not constitute negligent treatment or maltreatment in and of themselves;

(b) Actions, failures to act, or omissions that result in injury to or which create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child; or

(c) The cumulative effects of a pattern of conduct, behavior or inaction by a parent or guardian in providing for the physical, emotional and developmental needs of a child's, or the effects of chronic failure on the part of a parent or guardian to perform basic parental functions, obligations, and duties,

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when the result is to cause injury or create a substantial risk of injury to the physical, emotional, and/or cognitive development of a child.

[Statutory Authority: RCW 74.08.090, 74.04.050, 74.13.031, chapter 26.44 RCW, and 2005 c 512. WSR 07-14-011, § 388-15-009, filed 6/22/07, effective 7/23/07. Statutory Authority: RCW 74.13.031, 74.04.050, and chapter 26.44 RCW. WSR 02-15-098 and 02-17-045, § 388-15-009, filed 7/16/02 and 8/14/02, effective 2/10/03.]