99869-8

Supreme Court

of the State of Washington

Micheal Hudson, Petitioner v State of Washington, Respondent	No 53280-8-II Motion for Discretionary Review (Treated as a Petition for Review)

A Petitioner, Micheal Hudson, asks this court to accept review of parts of the decision designated in Part B of this motion.

B Petitioner's Statement of Additional Grounds entered a claim that his plea deal was broken by the trial court prosecutor and judge, asking for the remedy to withdraw his plea deal. The Court of Appeals of the State of Washington, Division Two denied the ground on the 6th of April, 2021. On April 22, 2021, Petitioner filed a motion for reconsideration in the same court. The motion was denied on the 18th of May, 2021. A copy of the decisions can be found in the Appendix at pages A-1 through A-14.

C As mentioned, the Petitioner raised the ground that his plea agreement was broken and required the opportunity to withdraw the plea. See SAG ground one at A-15. Either it was misunderstood, as it was written by a person not educated in law, or the appellate court decided to rule

not on the what issue was raised, but what issues they knew they could easily defeat, leaving the main proponent of the ground unanswered. Petitioner presents this as probable error because a question of constitutional dimension was raised and went unanswered, altering established precedent and limiting the freedom that the Petitioner has to act on those rights.

C-2 Petitioner asks the court three simple questions:

① Are plea agreements contracts in nature and measured by contractual standards? See United States v Schuman, 127 F3d at 817.

② If an accused enters a plea of guilty upon the basis of a promise made by an official representing the prosecution, and the promise is unequivocal, is he the entitled to withdraw his plea if the promise is unfulfilled? See, e.g., Hilliard v Beto.

③ Is it not, then, that when these issues are raised to an appellate court, established by precedent of our Nation's highest court, that they should be answered as to not violate a citizen's constitutional rights?

D On October 10th, 2018, Petitioner entered a plea of guilty in his criminal case, Clark County No. 17-1-01732-9, with the promise made by the Prosecuting Attorney, Colin Hayes, that the Petitioner will ask for the low end of the sentencing range, 240 months, and the prosecution would ask for 288 months,

dropping the charges to those pled to, and the removal of any modifiers or enhancements. See pages A-27, A-47, and A-51. It was also understood that the judge did not have to follow these guidelines and may go up to 318 months, unless an exceptional sentence is given following the laws of the State. On the 18th of March, 2019, Petition was indeed sentenced exceptionally, however, as properly reversed by the Court of Appeals, A-1, A-4 through A-8.

D2 With respect to the Prosecutor, Celia Hayes, the prosecution did clearly state at sentencing that the State sought 288 months. There is two issues, however, Petitioner wishes to draw the court's attention to in regards to the claim that the prosecution did not truly hold up his portion of the agreement. At page A-46, during sentencing, the Prosecutor gave his recommendation of 288 months, then the floor was turned over to the maternal grandmother of the alleged victims to read her victim impact statement. At page A-49, after the damning statement of a woman with clearly no sympathy for evidence or the accused, the prosecutor continued his argument with the momentum of the impact statement to sway the sentencing judge with emotional banter rather than the facts carrying the case. These comments were the same elements used by the trial judge to elicit an exceptional sentence outside of his statutory authority. Petitioner's final note is that, if holding the position of 288 months, why did

the prosecution willingly prepare, and endorse, the Findings of Fact and Conclusions of Law Regarding Exceptional Sentences? See Appendix pages A-39 through A-41. It appears to the Petitioner, based on these findings and that mentioned in his Motion for Reconsideration, A-61 through A-64, that the Prosecutor tried playing a parlor trick, showing the crowd one story while performing another.

D3 "The trial judge's review of a plea agreement is not a forum for consideration of the factual basis of the abandoned charges. Any determination as to the defendant's guilt or innocence is restricted to the specific charge to which the defendant has agreed to plead guilty. In accepting the plea to the lesser offense, the judge is not free to consider conviction or acquittal on the more serious offense. In the context of a plea hearing, the latter charge is not before him." United States v Barker. The Court of Appeals correctly ruled on the issue of the exceptional sentence, however, as an entity of the State, and with respect to this argument, the trial judge broke the agreement that the Petitioner had with the State, by and through an official of the prosecution, by exceeding his statutory authority. It should be evident that the trial judge dismissed Petitioner's rights to due process by making statement and allegations that were not supported by the pleading docket, nor tried by a jury. See Appendix pages A-42 through A-60.

p4 Plea agreements are contracts in nature, and are measured by contractual standards. United States v. Schuman. Just as with other forms of contracts, a negotiated guilty plea is a "bargained for quid pro quo." United States v. Sandoval-Lopez. The defendant performs his side of the bargain by entering a guilty plea. The government is then required to perform its duty, whether dismissing charges, recommending sentences, or remaining silent. If the court accepts the agreement and the government's promise is performed, then the agreement is complete and the defendant gets the benefit of the bargain. However, if the court rejects the government's proposed promise, then the agreement is terminated and the defendant has the right to back out of the plea. This is analogous to a binding contractual duty extinguished by the nonoccurrence of a condition subsequent. United States v. Hyde. See also J Calamari and J Perillo, Law of Contracts, section 11-7, p 441 (3d Ed. 1987). The Supreme Court has specifically addressed this situation in Santobello v New York, directing that when the government has made a plea agreement and then breaches its terms, the remedy is to either allow the defendant to withdraw the guilty plea or to require specific performance.

6 Review should be accepted by this court to reverse the error in which the Court of Appeals ruled on adverse arguments and not the constitutional matter that the ground stood on, as well as applying the proper

standard and precedent that guides this claim. Petitioner asks this court to apply Rule 13.5 (2) towards their consideration as the probable error of the appellate court was not, in any way, negligent or malicious, but failed to answer and correct the constitutional error irregardless.

If review is granted by this court, Petitioner is requesting relief by way of withdrawing his guilty plea and pleading anew. As this case, on the ground of an invalid exceptional sentence, is to be remanded for resentencing, if this court required a specific performance, such as that in Santobello, by transferring the case for re-sentencing to a judge who was untainted by the government's conduct, and directed the sentencing court to follow the plea agreement, the Petitioner would consider himself made whole.

In health,

Micheal Hudson,

Petitioner

6/8/2021

Authorities Cited:

Appendix Contents

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Filed
Washington State
Court of Appeals
Division Two

April 6, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL SAMUEL HUDSON, JR., aka MICHEAL SAMUEL HUDSON, JR., Appellant.	No. 53280-8-II UNPUBLISHED OPINION

GLASGOW, J.—Michael Samuel Hudson Jr. pleaded guilty to five counts of first degree child rape, four counts of sexual exploitation of a minor, and one count of first degree dealing in depictions of a minor engaged in sexually explicit conduct. He committed all of these crimes against his daughter and son. Hudson appeals the exceptional sentence that the trial court imposed for counts one through five for first degree child rape. Hudson also appeals a condition of community custody that prohibits him from possessing alcohol. Hudson raises additional arguments in a statement of additional grounds for review (SAG).

We hold that the trial court erred by relying on some statutory aggravating factors that must be found by a jury and some nonstatutory aggravating factors when it imposed exceptional upward sentences for counts one through five. In addition, we hold that the alcohol-related community custody condition was proper because Hudson initially stipulated to the condition and the condition is permitted by statute. None of the arguments in Hudson's SAG undermines the validity of his

guilty plea. We remand for resentencing because the exceptional sentence on counts one through five was improper, but we affirm in all other respects.

FACTS

Between March 1, 2012 and August 5, 2017, Hudson raped his daughter who was less than 12 years old on four separate occasions, and he raped his son who was less than 12 years old on one occasion. During this time period, Hudson photographed his daughter engaging in sexually explicit conduct on four separate occasions. Hudson distributed the images of his daughter.

Hudson was initially charged with seven counts of first degree child rape, two counts of first degree child molestation, five counts of first degree possession of depictions of a minor engaged in sexually explicit conduct, and five counts of sexual exploitation of a minor. The State expressed its intent to seek exceptional sentences on all counts because if Hudson were convicted on all counts, the high offender score would mean certain counts would go unpunished. In exchange for reduced charges, Hudson ultimately pleaded guilty to ten counts, which included five counts of first degree child rape, four counts of sexual exploitation of a minor, and one count of first degree dealing in depictions of a minor engaged in sexually explicit conduct.

In the statement of the defendant on plea of guilty, Hudson outlined the underlying facts supporting each count. The parties stipulated that Hudson would be subject to the indeterminate sentencing scheme for certain sex offenses under RCW 9.94A.507. Hudson acknowledged that the trial court could impose an exceptional sentence outside the standard range.

The minimum sentence standard range for counts one through five was between 240 and 318 months. The statutory maximum term was life imprisonment. In a pretrial settlement agreement attached to the statement on plea of guilty, the parties stipulated that for counts one

through five, the State would argue for 288 months for each count, a minimum sentence within the standard range, while Hudson would argue for 240 months for each count. For counts six through ten, the parties agreed to the top of the minimum sentence standard range. The parties stipulated that all counts should run concurrently.

The parties also attached a list of "Stipulated Conditions of Sentence and of Community Custody" that included a condition that Hudson not possess or consume alcohol without prior approval and that he shall not possess or consume any controlled substances without a lawful prescription. Clerk's Papers (CP) at 24 (capitalization omitted). Hudson stipulated to these conditions "as well as any additional conditions suggested by the [Department of Corrections] Pre-Sentence Investigator as being conditions of community custody and conditions of the sentence." CP at 22 (emphasis omitted). Hudson also stipulated that all the conditions were "'crime-related'" under RCW 9.94A.703(3). *Id.*

The pre-sentence investigation submitted by the Department recommended a prohibition on Hudson's possession or consumption of alcohol, marijuana, and any nonprescribed controlled substances. For sentencing, the Department recommended confinement within the standard range.

At sentencing, on counts one through five for first degree rape of a child, the trial court imposed an exceptional upward sentence and ordered a minimum term of 365 months for each count, with a maximum of life. On counts six through nine, the trial court ordered a term of confinement of 120 months. On count ten, the trial court ordered a term of 116 months. All sentences were to be served concurrently. The trial court imposed lifetime community custody for counts one through five. One condition of community custody prohibited Hudson from possessing or consuming alcohol without prior approval from the Department and all treatment providers.

The trial court adopted findings of fact and conclusions of law to justify the exceptional sentence. The trial court included eight aggravating circumstances in its findings of fact. The first five circumstances aligned with provisions under RCW 9.94A.535(3), while the last three were nonstatutory. The three nonstatutory aggravators were: (1) all of the crimes "had a lasting and severe negative impact on the mental health of the victims," (2) "[t]he breadth of sexual abuse toward[] the victims in [counts one through nine] was pervasive," and (3) Hudson "continued acts of criminal sexual behavior toward[] the victims in [counts one through nine] after [he] became aware of a police investigation . . . about whether he had committed sexual abuse against his children." CP at 61. The trial court noted that it "would impose the same sentence if only one of the grounds . . . [was] valid." *Id.*

Defense counsel objected to the trial court's findings of fact, conclusions of law, and exceptional sentence, noting that "[n]one of the aggravating factors found by the [c]ourt were included in the information, that my client [pleaded] guilty only to the crime and without any aggravators and that he did not waive his right to a jury trial with regard to any of the aggravators." Verbatim Report of Proceedings (Mar. 18, 2019) at 69.

Hudson appeals his sentence and the alcohol-related community custody condition. Hudson also filed a SAG.

ANALYSIS

I. SENTENCING

Hudson argues, and the State concedes, that the trial court erred when it relied on five aggravating factors in imposing an exceptional sentence because those factors require jury findings

under RCW 9.94A.535(3). We accept the State's concession. Next, Hudson asserts that the trial court cannot use nonstatutory factors to impose an exceptional sentence. We agree.

A. Statutory Background on Exceptional Sentences

RCW 9.94A.535 provides that the trial court can impose "a sentence outside the standard sentence range for an offense if it finds . . . 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 RCW 9.94A.537." In turn, RCW 9.94A.537(3) provides that "[t]he facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt," unless the defendant stipulates to the existence of the aggravating factor or waives the jury right and allows a court to make the finding necessary to support the factor.

In addition, the legislature distinguished between mitigating and aggravating factors. RCW 9.94A.535(1) provides that 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 legislature included a list of mitigating circumstances for the court's consideration, noting that the list is "illustrative only" and "not intended to be exclusive reasons for exceptional sentences." RCW 9.94A.535(1). For aggravating circumstances, the legislature further differentiated between those that can be found by a judge and those that must be found by a jury. There are only four instances where a trial court judge can independently impose an aggravated exceptional sentence without a jury, all of which rely on stipulation, the defendant's criminal history, or the defendant's offender score. RCW 9.94A.535(2). RCW 9.94A.535(3) provides, "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," and all of those factors must be considered by a jury.

On appeal we review de novo the trial court's reason to depart from the standard sentence range. *State v. Cham*, 165 Wn. App. 438, 449-50, 267 P.3d 528 (2011). RCW 9.94A.535 provides that "[i]f 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)." To reverse a sentence outside the standard range, this court must conclude that "the reasons supplied by the sentencing court are not supported by the record which was before the judge[,] that those reasons do not justify a sentence outside the standard sentence range for that offense," or that "the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4). Here, Hudson argues that the reasons given are not valid bases for an exceptional sentence absent jury findings.

B. The Trial Court Erred in Imposing an Exceptional Sentence

The trial court relied on five factors listed in RCW 9.94A.535(3), a section that expressly requires jury findings. At Hudson's sentencing hearing, no jury played a part in the trial court's findings of fact. We accept the State's concession that reliance on these factors was improper.

For the last three aggravating factors, Hudson argues that the trial court cannot rely on factors that do not appear in RCW 9.94A.535 to impose an exceptional sentence. Hudson is correct. While the list of mitigating factors to be considered by a trial court in imposing an exceptional sentence downward is merely "illustrative" and not exclusive, RCW 9.94A.535(1), the list of aggravating factors is exclusive, RCW 9.94A.535(2), (3). There is an expressly exclusive list of aggravating factors for a jury to determine and there is a list of only four aggravating factors that

a trial court may impose without jury findings, none of which was the basis for Hudson's exceptional sentence. The plain statutory language precludes a trial court from making up additional, nonstatutory aggravating factors.

The State relies on *State v. Fowler*, 145 Wn.2d 400, 38 P.3d 335 (2002), for the proposition that a judge may use nonstatutory factors to impose an exceptional sentence above the standard range. But Fowler sought an exceptional sentence *below* the standard range based on the presence of three statutory mitigating factors. *Fowler*, 145 Wn.2d at 403. The trial court imposed a sentence below the standard range, but relied upon mitigating factors that were not listed in the statute. *Id.* at 404-05. While the Washington Supreme Court reversed the exceptional sentence in *Fowler*, the court noted that the list of statutory mitigating factors is not exclusive. *Id.* at 405. Here, the trial court imposed a sentence above the standard range, not below.

Next, the State relies on *In re Postsentence Petition of Smith*, 139 Wn. App. 600, 603, 161 P.3d 483 (2007), to suggest that the legislative intent of Washington's Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, was for judges to have broad discretion to impose exceptional sentences tailored to individual cases. But the *Smith* court also imposed an exceptional sentence of confinement *below* the standard range, citing a mitigating factor. *Id.* at 601.[1]

Neither *Fowler* nor *Smith* establishes that nonstatutory aggravating, rather than mitigating, factors may be used to impose an exceptional sentence above the standard range.

We hold that the last three factors the trial court relied on were invalid because they were outside of the exclusive list of aggravators that the legislature allowed a judge to find. Because all

[1] *Smith* also addressed the length of the community custody term, but that is not an issue in this case. 139 Wn. App. at 602-04.

of the eight factors the trial court relied on were invalid, Hudson's exceptional sentence is also invalid.

II. COMMUNITY CUSTODY CONDITION

Hudson argues that because there was no evidence that alcohol was a factor for his charged offenses, the condition of community custody prohibiting him from possessing alcohol is improper as it is not a "[c]rime-related prohibition" under RCW 9.94A.030(10). We disagree.

The prohibition on the possession or consumption of alcohol was one of the conditions that Hudson agreed to comply with under the stipulated conditions of sentence and of community custody attached to Hudson's pretrial settlement agreement. Hudson also stipulated that all imposed community custody conditions were crime-related under RCW 9.94A.703(3). Thus, Hudson may not challenge the alcohol-related community custody condition on appeal because he stipulated to the condition as part of his plea.

But even if Hudson had not stipulated to the condition, the alcohol-related community custody condition is valid. A trial court may only impose community custody conditions authorized by statute. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008). Appellate courts in Washington review a trial court's decision to impose community custody conditions for an abuse of discretion. *State v. Johnson*, 12 Wn. App. 2d 201, 213, 460 P.3d 1091, *review granted*, 196 Wn.2d 1001 (2020). An abuse of discretion occurs when the imposition of a condition is manifestly unreasonable. *State v. Hai Minh Nguyen*, 191 Wn.2d 671, 678, 425 P.3d 847 (2018).

The trial court's discretionary community custody conditions include ordering an offender to "[r]efrain from possessing or consuming alcohol." RCW 9.94A.703(3)(e). A separate provision allows a court to order a defendant to "[c]omply with any crime-related prohibitions." RCW

9.94A.703(3)(f). A "crime-related prohibition" is defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). The plain language of the statute does not require the restriction on alcohol possession or consumption to be crime-related.

In *State v. Jones*, this court held that a trial court "may order an offender not to consume alcohol regardless of whether alcohol contributed to the crime." 118 Wn. App. 199, 202, 76 P.3d 258 (2003). Jones argued that the trial court erred in imposing a community custody condition prohibiting him from consuming alcohol because there was no evidence that alcohol contributed to his offense. *Id.* at 204. This court noted that because the legislature's 1988 amendments to the SRA separated community custody conditions involving crime-related prohibitions from those prohibiting the offender from consuming alcohol, the legislature "manifested its intent that a trial court be permitted to prohibit the consumption of alcohol regardless of whether alcohol had contributed to the offense." *Id.* at 206.

Under the plain language of the statute, there is no requirement that the restriction on alcohol use and possession be crime-related. RCW 9.94A.703(3)(e). The trial court did not abuse its discretion in imposing the challenged community custody condition.

III. Statement of Additional Grounds for Review

Hudson's SAG raises three additional claims that he argues require withdrawal of his guilty plea and remand for a corrected sentence. None of his claims merits relief.

A. Plea Bargaining

1. Threats, intimidation, and coercion

Hudson claims that his guilty plea is invalid because his plea agreement was obtained via threats, intimidation, and coercion. Hudson specifically asserts that the prosecutor threatened to add more charges if the plea deal was not accepted and intimidated Hudson because he was being held in the Clark County Jail. Hudson requests withdrawal of his guilty plea.

A prosecutor's discretion in plea bargaining is not "'unfettered,'" and prosecutors may not exercise their discretion in a manner that violates due process. *State v. Moen*, 150 Wn.2d 221, 227, 76 P.3d 721 (2003) (quoting *Wayte v. United States*, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985)). But otherwise, prosecutors are vested with broad discretion when determining whether to charge a crime or enter into a plea bargain. *Moen*, 150 Wn.2d at 227.

Hudson does not cite to any case that concludes that either a prosecutor's threat to bring more charges or the general jail environment coerces a defendant to such a degree that due process is violated. We hold that this claim is meritless because the prosecutor was within their discretion to indicate that Hudson could face additional charges should he decline the plea deal. Moreover, Hudson noted in his signed statement on plea of guilty that he made the plea freely and voluntarily, and that no one threatened him in order for him to plead guilty. When the trial court asked at Hudson's plea hearing whether he made the plea freely and voluntarily, Hudson responded that he did and that no one had threatened to harm him. Hudson may not withdraw his guilty plea on this basis.

2. Ineffective assistance of counsel

Next, Hudson argues that his counsel provided ineffective assistance in facilitating his signing of the plea agreement despite the coercive prosecutor. Hudson claims that, but for his counsel's errors, he would not have signed the plea agreement, rendering a different outcome for his case.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Ineffective assistance of counsel is a two-pronged inquiry. *Grier*, 171 Wn.2d at 32. To prevail, Hudson must show that his counsel's performance was deficient and that counsel's deficient performance prejudiced him. *Id.* at 32-33. A failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Hudson has not demonstrated that his counsel's performance was deficient. Hudson initially faced 19 counts, including 7 counts of first degree child rape. The plea reduced the number of counts to 10. Defense counsel's role in Hudson's plea agreement, whatever it may have been, can be viewed as a legitimate strategy to get Hudson fewer charges and a reduced sentence.

B. Same Criminal Conduct

Hudson argues that counts one through four and ten amount to the same criminal conduct. From his understanding, the above counts stem from one incident when he forced his son and daughter to have sexual intercourse in order to get permission to go swimming at the local pool. In addition, Hudson argues that counts six through nine represent the same criminal conduct. Hudson raises these arguments for the first time on appeal.

Under RCW 9.94A.589(1)(a), "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct[,] then those current offenses shall be counted as one crime." "'Same criminal conduct,' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The defendant bears the burden to establish each element to determine whether the offenses stemmed from the same criminal conduct. *State v. Hatt*, 11 Wn. App. 2d 113, 142, 452 P.3d 577 (2019), *review denied*, 195 Wn.2d 1011, *cert. denied*, 141 S. Ct. 345 (2020).

We hold that Hudson's same criminal conduct claim is meritless. Counts one through four explicitly detail first degree rape of a child, each on an occasion separate and distinct from the other counts, with the date range for the sexual abuse occurring between March 1, 2012 and August 5, 2017. In Hudson's signed statement on plea of guilty, he indicated that counts one through four represented "separate and distinct" offenses committed against his daughter. CP at 16. Similarly, Hudson indicated in his statement that counts six through nine represented "separate and distinct" offenses committed against his daughter. CP at 17.

At Hudson's plea hearing, the trial court questioned whether counts one through five involved separate and distinct occasions, to which Hudson responded that they did. At the same hearing, Hudson admitted that counts six through nine involved four separate occasions where Hudson permitted his daughter to engage in sexually explicit conduct that would be photographed. While Hudson may have possessed the same criminal intent for the counts committed against his daughter, he admitted that the counts he pleaded guilty to were based on separate and distinct occasions. Thus, he has failed to show any of his convictions involve the same criminal conduct.

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CONCLUSION

We remand for resentencing because the exceptional sentence on counts one through five was improper, but we affirm in all other respects.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Sutton, A.C.J.

Maxa, J.

A-14

Filed
Washington State
Court of Appeals
Division Two
May 18, 2021

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

STATE OF WASHINGTON, Respondent, v. MICHAEL SAMUEL HUDSON, JR., aka MICHEAL SAMUEL HUDSON, JR., Appellant.	No. 53280-8-II ORDER DENYING MOTION FOR RECONSIDERATION

The unpublished opinion in this matter was filed April 6, 2021. Appellant filed a motion for reconsideration on April 22, 2021. The court having reviewed the documents and files, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Panel: Jj. Maxa, Sutton, Glasgow

FOR THE COURT:

Glasgow, ACJ

Glasgow, A.C.J.

Additional Ground 1:

Plea agreements are contracts in nature, and are measured by contractual standards. US v Schuman, 127 F 3d 815, 817 (9th Cir 1997). Just as with other forms of contracts, a negotiated guilty plea is a "bargained for quid pro quo." US v Sandoval-Lopez, 122 F 3d 797, 800 (9th Cir 1997). The defendant performs his side of the bargain by entering a guilty plea. The government is then required to perform its duty, whether dismissing charges, recommending sentences, or remaining silent. If the court accepts the agreement and the governments promise is performed, then the agreement is complete and the defendant gets the benefit of the bargain. However, if the court rejects the government's proposed promise, then the agreement is terminated and the defendant has the right to back out of the plea. This is analogous to a binding contractual duty extinguished by the nonoccurrence of a condition subsequent. US v Hyde, 520 US 670, 117 S Ct 1630, 1634, 137 L Ed 2d 935 (1997). See also, J Calamari and J Perillo, Law of Contracts, section 11-7, p 441 (3rd Ed, 1987).

The Supreme Court has specifically addressed this situation in Santobello v New York, 404 US 257, 262, 92 S Ct 495, 499, 30 L Ed 2d 427 (1971) directing that when the government has made a plea agreement and then breaches its terms, the remedy is to either allow the defendant to withdraw the guilty plea or to require specific performance. The Supreme Court remanded Santobello back to the State for determination of the issue of whether or not the defendant could be made whole by resentencing before the same judge, or if justice could better be served by transferring the case for resentencing to a judge who was untainted by the government's conduct.

For the argument above, Appellant asks court to allow

the withdrawl of his guilty plea and be remanded to a judge who has not shown bias against the accused.

To further support the argument of an invalid plea deal, a coereced guilty plea is open to collateral attack. Fontaine v US, 411 US 213, 215 (1973).

Coercian is defined by Black's Law Dictionary, 10th Ed, as "compulsion of a free agent by, physical, moral, or economic force or threat of physical force." Coercian intended to restrict another's freedom of action by threatening to commit a criminal act against that person; threatening to accuse that person of having committed a criminal act; threatening to expose a secret that either would subject the victim to hatred, contempt, or ridicule or would impair the victim's credit or goodwill, or taking or withholding official action or causing an official to take or withhold action is 'criminal coercian'.

With the use of intimidation of Appellant's surroundings while detained in Clark County Jail, the prosecutor used threats, through the defendant's own defense attorney, that if the plea deal was not accepted, the prosecutor would add more charges against defendant. These veiled threats violate the very definition of coercian.

In Strickland v Washington, 466 US 668 (1984), the Supreme Court created a standard for measuring effective assistance of counsel as a two-part test. First, did the counsel perform below an objective standard of reasonableness? As stated above, the defense attorney assisted in the signing of a plea agreement using coercian of the prosecutor. This created a violation against the defendant under 42 USCS § 1983 and § 1985. Every member, under the BAR Association, should have such a basic grasp to understand when they are committing a criminal act. Second, because of that failure it created a reasonable probability that, but

for the errors, the outcome would have been different. If Appellant was not wrongfully intimidated, threatened or coerced, his Seventh Amendment right to trial by jury would have been upheld and no plea agreement would have signed.

COURT OF APPEALS, DIVISION II
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	CAUSE NO. 17-1-01732-9
	)	
Plaintiff,	)	CoA NO. 53280-8-III
	)	
v.	)	
	)	
MICHAEL HUDSON,	)	TRANSCRIPT OF PROCEEDINGS
	)	
Defendant.	)	
	)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE BERNARD VELJACIC

October 10, 2018

Clark County, Washington

APPEARANCES:

For the Plaintiff: COLIN HAYES
Deputy Prosecuting Attorney
*
*

For the Defendant: EDWARD DUNKERLY
Attorney at Law
*
*

Transcription Service: Amy M. Brittingham
2210 Maryhill Street SE
East Wenatchee, WA 98802
(509) 594-2196

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

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(October 10, 2018, 2:24:03 p.m.)

THE COURT: Mr. Hudson, right?

MR. HUDSON: Yes, sir.

THE COURT: Michael Samuel Hudson, Jr.?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay, you are thirty-two years of age, completed the twelfth grade and receiving social security, is that right?

MR. HUDSON: Yes, sir.

THE COURT: Do you read and write the English language, sir?

MR. HUDSON: Yes, sir.

THE COURT: Okay, you've had your attorney read through this statement on plea of guilty with you?

MR. HUDSON: Yes, sir.

THE COURT: Is this your signature on page twelve of the document here at the bottom?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay, do you have any questions about the document before we start through it?

MR. HUDSON: No, Your Honor.

THE COURT: I have a fourth amended information here in the file. Is this one that you have reviewed? Have you see that?

MR. HUDSON: Yes, Your Honor.

THE COURT: Do you understand the elements of what you're charged with or would you like me to formally read the document for you?

MR. HUDSON: I understand, Your Honor.

THE COURT: Thank you. You are charged with rape of a child in the first degree Counts 1 through 5, Counts 6 through 9, sexual exploitation of a minor. Those are each domestic violence charges. Count 10, dealing in depictions of a minor engaged in sexually explicit conduct in the first degree and again, you understand those elements. So, I won't go through the specifics.

You have a series of important rights you give up when you plead guilty. Okay, they're as follows. The right to a speedy and public trial by an impartial jury in the County where the crime was allegedly committed. The right to remain silent before and during trial and the right to refuse to testify against yourself. The right at trial to hear and question the witnesses who testify against you, the right at trial to testify and have witnesses testify for you. These witnesses can be made to appear at no expense to you. You have the right to be presumed innocent unless the State proves the charge beyond a reasonable doubt or you enter a plea of guilty. And, you have the right to appeal a finding of guilt after a trial. Do you understand those rights, sir?

MR. HUDSON: Yes, Your Honor.

THE COURT: You know you're giving them up today by pleading guilty?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay, once you plead guilty, your right to appeal is limited. You also have a series of other consequences, one of which is incarceration. Your --

MR. DUNKERLY: He's waiving his right to an appeal --

THE COURT: Okay, --

MR. DUNKERLY: -- and collateral attack.

THE COURT: -- I see.

MR. DUNKERLY: I don't know -- I don't know how that impacts the proceeding. I'm just making sure that was clear that he knows that.

THE COURT: Okay, it says here your offender score is a twenty-seven, is that correct?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay and that's based on, I imagine, multipliers as well as you don't seem --

MR. DOWNS: Just the nine -- just the counts he's charged with.

THE COURT: Just the counts he's charged with. Okay, so you're presumed to know what your criminal history is. It says in the declaration of criminal history prepared by the State and your counsel has just indicated, no felony

convictions. You're presumed to know if you do have some stuff and we -- we -- we are proceeding as if that's all true. Sometimes people aren't very forthcoming with the Court, so if there's something I have to give this warning. If there is something out in the world in another jurisdiction perhaps that is criminal history that would count as a felony here in Washington or if you commit felonies between now and sentencing, those are a basis on which the State can bring you back in, add those felony points to your offender score and resentence you.

Now, it's not gonna make your standard range go up, because you're already beyond nine points. But, do you understand your plea of guilty today is binding on you, regardless of whether the State brings in new points or not, do you understand?

MR. HUDSON: Yes.

THE COURT: Okay, so based on that score of twenty-seven, your standard range on Counts 1 through 5 is two hundred and forty to three hundred and eighteen months community custody for life. The maximum term is life imprisonment and fifty thousand dollars per charge. Do you understand that?

MR. HUDSON: Yes, Your Honor.

THE COURT: Counts 6 through 9 on that twenty-seven offender score, your standard range maxes out at one

hundred and twenty months, which is ten years, you run into the statutory maximum for the charge. Do you understand that?

MR. HUDSON: Yes, Your Honor.

THE COURT: And also on those Counts, 6 through 9, you're looking at thirty-six months of community custody, the maximum, as indicated, is ten years or a hundred and twenty months and twenty thousand dollars. Do you understand that?

MR. HUDSON: Yes, Your Honor.

THE COURT: Count 10 your standard range is eight-seven to a hundred and sixteen months, thirty-six months community custody. Also, the maximum there is ten years and twenty thousand dollars. Do you understand all that?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay, very good. Your legal financial obligations on this case one of those is mandatory, five hundred dollar victim's compensation fund assessment. There are others. We'll get more to that at sentencing or Judge Stahnke will, it's a Class A going back to Department 1 for sentencing. In any event, do you understand legal financial obligations are part of this plea?

MR. HUDSON: Yes, Your Honor.

THE COURT: So, do you understand this is a --

the Court at the time of sentencing will be imposing a maximum term of confinement consisting with the statutory maximum sentence of the offense and a minimum term of confinement either within the standard range for the offense or outside the standard range if an exceptional sentence is appropriate. The minimum term of confinement that is imposed may be increased by the indeterminate sentence review board if the board determines by a preponderance of the evidence that it is more likely than not that you will commit sex offenses if released from custody.

In addition to the period of confinement, you will be sentenced to community custody for any period of time you are released from total confinement before the expiration of the maximum sentence. In other words, never, because it's life as a maximum on Count 1 through 5.

During the period of community custody, you will be under the supervision of the state Department of Corrections and will have restrictions and requirements placed upon you which may include electronic monitoring and you may be required to participate in a rehabilitative program. Do you understand that?

MR. HUDSON: Yes, Your Honor.

THE COURT: Failure to abide by those conditions means that the State can bring you back in, DOC can revoke earned early release, put you back in prison, give you

sanctions amounting to confinement. Do you understand that?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay, okay and moreover, the -- this is a -- this includes rape of a child in the first degree and so it does occur after March 20, 2006. The minimum term shall be either the maximum, essentially, what I've just read to you, but either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater, is that true on 1 through 5? Twenty-five years or --

MR. HAYES: That's only if there's --

THE COURT: Rape in the first degree --

MR. HAYES: I'm certain if it's found to be predatory with an aggravator --

THE COURT: Okay, not the case here?

MR. HAYES: Correct, with enhancement, correct there's a number of enhancements that that's speaking to.

THE COURT: Okay and do any of -- does that apply at all then to any of these?

MR. HAYES: It does not.

THE COURT: Thank you. So, the prosecution is making recommendation as set out in the attached offer letter and I'm getting there. Well, counsel, just help me out why don't you?

MR. HAYES: As to the offer?

THE COURT: The recommendation.

MR. HAYES: So, in a nutshell on Counts 1 through 5, defense may argue for the bottom of the range, which is two hundred and forty months. On those same Counts, 1 through 5, the State's gonna argue for two hundred and eighty-eight months, *i.e.* twenty-four years on those counts. The parties agree to the top of the range on Counts 6 through 10. All counts to run concurrently. Defendant is not free to ask for SOSA and does not qualify.

THE COURT: So, there's other aspects, thank you, counsel, there are other aspects to this offer that are more fully set out in the attached offer letter. Do you understand the offer and the recommendation?

MR. HUDSON: Yes, Your Honor.

THE COURT: I don't have to follow anyone's recommendation at the sentencing or rather, the sentencing Judge, Judge Stahnke, does not have to follow anyone's recommendation as to sentence. He must impose a sentence within the standard range unless he finds substantial and compelling reasons not to and moreover jury findings, stipulated facts, unpunished crimes to go above the standard range to go below it he would need mitigating circumstances. No one's going to be asking for an exceptional here, so you understand that if there's an exceptional then you have the right to appeal that exceptional sentence?

MR. HUDSON: Yes, Your Honor.

THE COURT: You or the State.

MR. HUDSON: Yes.

THE COURT: If the Judge stays within the standard range, which is up to life, then you don't have a -- no one has a basis to appeal that, do you understand?

MR. HUDSON: Yes, Your Honor.

THE COURT: So, really what we're talking about is I think a fairly rare circumstance. If you're not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States. You may not possess, own or have under your control, any firearm or ammunition unless those rights are restored by Washington State and federal courts. Do you understand?

MR. HUDSON: Yes, Your Honor.

THE COURT: Do you have a concealed pistol license?

MR. HUDSON: I do not, Your Honor.

THE COURT: Okay, you will be ineligible to vote until that right is restored in a manner provided by law. Government assistance may be suspended during any period of confinement. You will be required to register where you reside, study or work. The specific registration requirements are described in the offender registration

attachment. You will be required to have a biological sample collected for purposes of DNA identification analysis unless it is established that you've already done that, which based on the fact that you have no prior felonies, that's not the case. That carries a one hundred dollar DNA collection fee. You'll be required to undergo testing for human immune deficiency virus. Do you understand all that, sir?

MR. HUDSON: Yes, Your Honor.

THE COURT: Do you have any questions of me at this time?

MR. HUDSON: No, Your Honor.

THE COURT: Okay and as indicated in your statement on plea of guilty and in the charging documents, this offense is a most serious offense or a strike. If you have at least two prior convictions for most serious offenses, whether in this state, in federal court or elsewhere, the offense for which you are charged here is a mandatory sentence with life imprisonment without the possibility of parole. In addition, this is a rape in the first degree, rape of a child in the first degree, rather, and -- and so if you were to have any one prior conviction for one of those offenses or rape of a child in the first degree or any other strike in federal court, this state or elsewhere, the offense for which you are charged carries a maximum sentence of life imprisonment without the possibility

of parole. So, that's a two strike rule on that. Do you understand that?

MR. HUDSON: Yes, Your Honor.

THE COURT: This is a crime of domestic violence and so the Court may -- I may order you to pay a domestic violence assessment of up to a hundred and fifteen dollars. Also, if I find a chemical or if the sentencing judge finds that you have a chemical dependency, which has contributed to the offenses, the Judge may order you to participate in rehabilitative programs while you're on supervision or in the institution. Do you understand that?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay, any questions?

MR. HUDSON: No, Your Honor.

THE COURT: With all that in mind, and after discussing the case with Mr. Dunkerly, how do you plead to Count --

MR. DUNKERLY: Mr. Downs is his attorney.

THE COURT: Mr. Downs is his attorney. Thank you, Mr. Dunkerly is standing in. After discussing the case with Mr. Downs and reviewing your rights and the statement on plea of guilty, how do you plea to Count 1, rape of a child in the first degree domestic violence?

MR. HUDSON: Guilty, Your Honor.

THE COURT: Count 2, rape of a child in the

first degree domestic violence?

MR. HUDSON: Guilty, Your Honor.

THE COURT: Count 3, rape of a child in the first degree domestic violence?

MR. HUDSON: Guilty, Your Honor.

THE COURT: County 4, rape of a child in the first degree domestic violence?

MR. HUDSON: Guilty, Your Honor.

THE COURT: Count 5, rape of a child int eh first degree domestic violence?

MR. HUDSON: Guilty, Your Honor.

THE COURT: Count 6, sexual exploitation of a minor domestic violence?

MR. HUDSON: Guilty, Your Honor.

THE COURT: Count 7, sexual exploitation of a minor domestic violence?

MR. HUDSON: Guilty, Your Honor.

THE COURT: Count 8, sexual exploitation of a minor domestic violence?

MR. HUDSON: Guilty, Your Honor.

THE COURT: Count 9, sexual exploitation of a minor domestic violence?

MR. HUDSON: Guilty, Your Honor.

THE COURT: Count 10, dealing with depictions -- dealing in depictions of a minor engaged in sexual explicit

conduct in the first degree?

MR. HUDSON: Guilty, Your Honor.

THE COURT: Do you make this plea freely and voluntarily?

MR. HUDSON: Yes, Your Honor.

THE COURT: Has anyone threatened to harm you or to harm anyone else to cause you to make this plea?

MR. HUDSON: No, Your Honor.

THE COURT: Has anyone made promises of any kind to cause you to make this plea except as set forth in this statement, which includes the offer?

MR. HUDSON: No, Your Honor.

THE COURT: What'd you do that makes you guilty of these crimes?

MR. HUDSON: What's that, Your Honor?

THE COURT: What did you do that makes you guilty of these crimes?

MR. HUDSON: I committed what has been written in the statement, Your Honor.

THE COURT: Okay, well --

MR. DUNKERLY: I'll summarize it. As to Counts 1 through 5 on five separate and distinct occasions on or between March 1, 2012 and August 5, 2017, in Clark County, Washington, you had sexual intercourse with a person who was less than twelve years old, not married to you when you were

at least twenty-four months older than the victim and that the offense was committed against a family or household member defined by the law, your daughter, C.J.H.

THE COURT: True statement, sir?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay and that is your statement?

MR. HUDSON: Yes, Your Honor.

MR. HAYES: And that is as to Counts 1 through 4 it is his daughter, C.H.S., to Count 5 it's against his son, M.H.

MR. DUNKERLY: Oh, sorry, I missed that, sorry.

THE COURT: Okay and so Count 5 regards your son, M.S.H., is that correct?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay. Count 6? Okay as to Counts 6, 7, 8 and 9.

MR. DUNKERLY: As to Counts 6 through 9 on four separate and distinct occasions on or between March 1, 2012 and August 5, 2017, in Clark County, Washington, being a parent having custody or control of a minor, you permitted the minor to engage in sexually explicit conduct knowing the conduct would be photographed or part of a live performance and the offense was committed against a family or household member, daughter C --

MR. HUDSON: C.H.

MR. DUNKERLY: C.J.H.

THE COURT: Yes.

MR. HUDSON: Correct.

MR. DUNKERLY: Okay, your daughter is C.J.H., is that correct?

MR. HUDSON: Yes, Your Honor.

MR. DUNKERLY: And as to Count 10 on or between August 9, 2014 and August 5, 2017, in Clark County, Washington, you knowingly disseminated, that means distributed in some fashion, a visual matter that depicted a minor engaged in an act of sexually explicit conduct as defined by -- they got the statute as defined by law and that was your daughter, C.J.H, correct?

MR. HUDSON: It is.

THE COURT: That's all in Clark County, Washington?

MR. HUDSON: Yes, Your Honor.

THE COURT: Alright.

MR. HAYES: We'd also ask, Your Honor, to go over the waiver that's attached to the offer form attached to the plea statement regarding his waiver of right to appeal and collateral attack.

MR. DUNKERLY: Well, if he's waived his right to appeal on collateral attack, why do you have to go over it because he's waiving that too?

THE COURT: I know, there's dispute I suppose.

MR. HAYES: There is a spot for the Judge to certify that he's gone over it with him.

THE COURT: Yes and I -- I do see that. Sir, you have -- you're waiving your, well, by pleading guilty, you're waiving a whole bunch of this anyway, but as to the sentence, you're also waiving things as to the sentence. Specifically, you would have a right to appeal the conviction, judgments or sentence outside the standard range. A notice of appeal must be filed within thirty days of the entry of judgment and if requested, the Superior Court Clerk will supply a notice of appeal form and file it upon completion by the defendant. You have the right -- you're waiving the right to collaterally attack the conviction and/or the judgment by filing any petition and motion for collateral attack, including, but not limited to, motions to vacate withdraw -- vacate or withdraw your guilty plea or otherwise seek relief from judgment pursuant to criminal rule 4.2 or 7.8, as well as the filing of a personal restraint petition within one year of the judgment becoming final.

Also, you're waiving the right to have counsel appointed to represent you on appeal if you are unable to pay the costs and the right to have portions of the trial record necessary for review transcribed at public expense for an appeal if you are unable to pay the cost. Do you understand

all that?

MR. HUDSON: Yes, Your Honor.

THE COURT: Do you recognize by entering this waiver, which you've signed, that is your signature on there?

MR. HUDSON: Yes, Your Honor.

THE COURT: That by entering this waiver your plea of guilty and judgment will be final. If you attempt to appeal or otherwise collaterally attack these convictions and/or the judgment, any court receiving such appeal or collateral attack will likely dismiss the appeal motion or collateral attack motion without reaching the merits of the claims unless that court finds that this waiver or your guilty plea were not voluntarily, knowingly and intelligently made. Do you understand that?

MR. HUDSON: Yes, Your Honor.

MR. DUNKERLY: It's done. When the judge sentences you, this, it's done.

MR. HUDSON: I understand.

MR. DUNKERLY: Okay.

THE COURT: Okay, I find he's knowingly and intelligently waived his right to appeal. Probably not sure well, anyway.

MR. DUNKERLY: Everything.

THE COURT: Yeah.

MR. DUNKERLY: It'd be everything.

THE COURT: Okay, I do find the defendant's plea of guilty to be knowingly, intelligently and voluntarily made. He understands the charges and the consequences of the plea. There's a factual basis for the plea, the defendant is guilty as charged. Sentencing date forty-five out for Department 1, thirty to forty-five.

THE CLERK: The 14th plea docket at 1:30.

THE COURT: So ordered. November 14th, thirty-five days. Close enough.

MR. HAYES: Can we --

THE COURT: 1:30.

MR. HAYES: I'm gonna be -- is there anything else? I'm on vacation from November 8th to November 28th. Is there anything within forty court days that works for Department 1 in that time period?

THE COURT: Three week vacation, counsel. Well, forty-five is -- forty-five days bumps over to the 26th, Mr. Dunkerly?

MR. DUNKERLY: I -- it's Mr. Downs' case. I am just -- I had -- I'm here for this or to call it ready if it didn't go through. That was it.

THE COURT: Any other Department 1 cases, dates, I apologize after the 28th of November?

THE CLERK: The 30th at 9:00 a.m.

MR. HAYES: It's forty court days, not just

forty days.

THE COURT: Understood. The 30th, I was referencing the PSI.

MR. HAYES: Oh, got it.

THE COURT: What'd you say, 30th at 9:00 a.m.?

THE CLERK: Mm-hmm.

THE COURT: 30th at 9:00 a.m. Okay, Department 1 plea docket and where we go from there.

MR. DUNKERLY: He's got some more papers to sign, right?

THE COURT: I'm rescinding the no -- the pretrial sexual assault protection order, two of them, and issuing another -- a post-conviction sexual assault protection order. You cannot possess firearms, sir, do you understand?

MR. HUDSON: Yes, Your Honor.

THE COURT: Okay, alright.

(CASE ADJOURNED)

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FILED
MAR 18 2019 2:53
Scott G. Weaver, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, vs. MICHEAL SAMUEL HUDSON JR., Defendant.	NO. 17-1-01732-9 FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING EXCEPTIONAL SENTENCE

On February 20, 2019, a sentencing hearing was held in this Court before the Honorable Daniel Stahnke. The Defendant was present with his attorney of record, Renee Alsept. Senior Deputy Prosecuting Attorney Colin P. Hayes represented the State. The Court considered the testimony and evidence presented during the child hearsay hearing conducted on July 18, 2018, July 20, 2018, and July 27, 2018; the undisputed facts contained in the DOC presentence investigation; the facts admitted by the Defendant pursuant to his guilty plea; the statements of the Defendant during his allocution at the sentencing hearing; and the arguments of counsel at sentencing. The Court imposes upon the defendant an exceptional minimum sentence above the standard range on Counts 1, 2, 3, 4, and 5 based upon the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1.1 The Court incorporates the findings of fact contained in the RCW 9A.44.120 Decision filed on August 2, 2018.

1.2 The Court incorporates its oral factual findings made during the sentencing hearing on February 20, 2019.

1.3 The exceptional sentence is justified by the following aggravating circumstances found by this Court:

(a) As the father of both victims charged in Counts 1-9, the defendant used his position of trust or confidence to facilitate the commission of the crimes charged in Counts 1-9 under RCW 9.94A.535(3)(n).

(b) Due to the ages of the victims in Counts 1-9, the defendant knew or should have known that the victims of Counts 1-9 were particularly vulnerable or incapable of resistance under RCW 9.94A.535(3)(b).

(c) The defendant's conduct during the commission of Counts 1-9 manifested deliberate cruelty to the victims under RCW 9.94A.535(3)(a).

(d) The offenses in Counts 1-9 were part of an ongoing pattern of sexual abuse of the same victims under the age of eighteen years manifested by multiple incidents over a prolonged period of time under RCW 9.94A.535(3)(g).

(e) The offenses in Counts 1-9 involved domestic violence, as defined in RCW 10.99.020, and were part of an ongoing pattern of psychological, physical, or sexual abuse of the victims manifested by multiple incidents over a prolonged period of time under RCW 9.94A.535(3)(h)(i).

(f) The crimes committed in Counts 1-9 had a lasting and severe negative impact on the mental health of the victims.

(g) The breadth of sexual abuse towards the victims in Counts 1-9 was pervasive.

(h) The defendant continued acts of criminal sexual behavior towards the victims in Counts 1-9 after the defendant became aware of a police investigation of the defendant about whether he had committed sexual abuse against his children; the defendant was interviewed by police during that police investigation.

The grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the same sentence if only one of the grounds listed in the preceding paragraph is valid.

II. CONCLUSIONS OF LAW

2.1 The court has jurisdiction over the Defendant and the subject matter of this action.

2.2 There are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535 on Count(s) 1, 2, 3, 4, and 5.

2.3 For indeterminate sentences under RCW 9.94A.507, a trial court does not violate *Blakely v. Washington* or the Sixth Amendment by imposing an exceptional minimum sentence based on judicial fact-finding. *State v. Clarke*, 156 Wn.2d 880, 886–94, 134 P.3d 188, 190–94 (2006) (*Blakely* does not apply to an exceptional minimum sentence imposed under former RCW 9.94A.712 that does not exceed the maximum sentence imposed; the Sixth Amendment does not bar judicial fact-finding related to a minimum sentence that

Clark County Prosecuting Attorney
1013 Franklin St. / P.O. Box 5000
Vancouver, WA 98666-5000
(360) 397-2261 / FAX: (360) 397-2230

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does not exceed the relevant statutory maximum); *State v. Mehlhaff*, 158 Wn.2d 363, 366–68, 143 P.3d 824, 825–26 (2006) (exceptional minimum sentences under the indeterminate sentencing scheme of former RCW 9.94A.712 does not violate *Blakely* where the exceptional minimum sentence does not exceed the statutory maximum and substantial and compelling reasons exist for imposing an exceptional sentence).

Entered this 18 day of March, 2019.

Superior Court Judge Daniel Stahnke

Approved as to form:

Sr. Deputy Prosecuting Attorney
Colin P. Hayes, WSBA# 35387

Approved as to form only:

Object - Signed in Form Only

Attorney for Defendant
Renee Alsept, WSBA#

Clark County Prosecuting Attorney
1013 Franklin St. / P.O. Box 5000
Vancouver, WA 98666-5000
(360) 397-2261 / FAX: (360) 397-2230

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COURT OF APPEALS, DIVISION II
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	CAUSE NO. 17-1-01732-9
	)	
Plaintiff,	)	CoA NO. 53280-8-III
	)	
v.	)	
	)	
MICHAEL HUDSON,	)	TRANSCRIPT OF PROCEEDINGS
	)	
Defendant.	)	
	)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE DANIEL STAHNKE

February 20, 2019

Clark County, Washington

APPEARANCES:

For the Plaintiff: COLIN HAYES
Deputy Prosecuting Attorney
*
*

For the Defendant: RENEE ALSEPT
Attorney at Law
*
*

Transcription Service: Amy M. Brittingham
2210 Maryhill Street SE
East Wenatchee, WA 98802
(509) 594-2196

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

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(February 20, 2019, 3:21 p.m.)

MR. HAYES: Number two on the docket, Michael Hudson. This is Mr. Hudson, Your Honor, here for sentencing. One correction to the offender score I did want to make, the PSI notes his score is a thirty-six. I think the offer sheet that was attached to his guilty plea statement and potentially the guilty plea statement as well might have also listed it at thirty-six. It's actually twenty-seven. It doesn't change any of the ranges or change any of the recommendation, but I did want to put that clarification on the record so everyone is on the same page and perhaps the Court could just verify with the defendant that it doesn't change anything about his decision to have pled guilty.

THE COURT: So, do you want to do a memorandum so there's something in the court record.

MR. HAYES: I can -- I'll put that on the memo.

THE COURT: Reflecting that.

MS. ALSEPT: He was -- he told me --

THE COURT: You acknowledge that?

MS. ALSEPT: Yes, he told me prior to us coming up he let me know that and I -- it doesn't -- it's a lower number, so if it were the other way around I suppose that might be a different situation, but it's a lower number and it does not impact the case in any way.

THE COURT: Okay, it doesn't give grounds to -- it

doesn't give any grounds to revoke any kind of plea deal because he filed a motion to revoke his plea deal.

MS. ALSEPT: That -- he had done that, but he withdrew that. That had to do with something completely different. It had nothing to do with that and this in no way impacts that.

THE COURT: So, he withdrew that motion to --

MS. ALSEPT: Oh, absolutely.

THE COURT: -- revoke his plea?

MS. ALSEPT: Yes.

THE COURT: Okay and that's statement of defendant on plea of guilty that was entered October 10th and it says twenty-seven on his offender score in the plea deal.

MR. HAYES: Okay.

THE COURT: Thirty -- I don't know what the number was underneath it, but it was all scratched out and twenty-seven -- twenty-seven was included on the plea statement.

MS. ALSEPT: Yes and I was not the attorney of record at that time, so we acknowledge that it is the twenty-seven.

THE COURT: Okay. Go ahead, State.

MR. HAYES: So, Your Honor, this is some -- partially agreed and partially not agreed recommendation to the Court. First, with -- the agreement allows the State to argue for two hundred and eighty-eight months on Counts 1 through 5.

Defense is free to ask for two hundred and forty months on those same counts, which would be the bottom of the range. The parties are otherwise agreed to the top of the range on the remaining Counts 6 through 10, which, you know, 6, 7, 8, 9 would be a hundred and twenty months and it would be a hundred and sixteen months on Count 10.

So, first regarding community custody, the agreement of the parties is that all the conditions of Appendix A would be incorporated as conditions of community custody along with anything else recommended by DOC in the PSI. The only thing included in the PSI recommendation that weren't included in Appendix A were anger management evaluation, domestic violence evaluation and restriction on marijuana use. So, pursuant to the terms of our deal I have incorporated those into the conditions that we're proposing to the Court. Otherwise, I wouldn't be attaching Appendix F, the PSI appendix as well as cause it just duplicates conditions that would have already been contained in Appendix A.

So, for community custody there would be zero on Counts 6, 7, 8 and 9 as we have to reduce it to not go over the statutory maximum and there'd be four months of community custody on Count 10. It'd be lifetime community custody on Counts 1 through 5.

So, turning then to the argument about how much time should be imposed. This was an agreement that the parties

litigated at length, took into account victims having to come in to testify and that sort of thing, but the State absolutely is asking for two hundred and eighty-eight months. The State does not believe he should get anything less than that given the conduct in question here. And lest I forget, the mother is here, but does not wish to add anything beyond what was already included in her victim impact statement. The grandmother does wish to read her victim impact statement to the Court.

THE COURT: Bring her up. Come up grandma. Hi, state your name please.

MS. OGREN: Pam Ogren.

THE COURT: Thank you, ma'am.

MS. OGREN: Your Honor, my ex son-in-law, Michael Samuel Hudson, should be sentenced to prison for the remainder of his life. He should never be able to destroy another child's personality like he has done to his children. A father is supposed to protect and care for his children with his life, not exploit them for her perverted depraved gratification or sell their photos on the world wide web for other disgusting human beings to view for their gross pleasure.

At a young age, his youngest was the most loving child you would ever want to meet. Always wanting to snuggle, sit on nana's lap, however, around the age of three

I noticed a distinctive change in his behavior. He turned into an angry, disobedient child. As his grandmother, I failed to realize the reason for these changes. Currently he has some very serious bouts of uncontrollable, combative and argumentative behavior. He also verbalizes that he wishes he were dead. I cannot imagine the horrors this precious nine year old has been subjected to by the sexual abuse from his father, which would cause him to not want to live.

In my humble opinion, this child needs extensive, possibly inhouse therapy to overcome the actions his father has done to him. This child may never lead a normal, productive life because of what his father has admitted to doing to him.

While his daughter has not exhibited the same degree of the rage we have seen in her brother, she is also a very difficult child to deal with at times. Her father taught her to lie by omission and she has learned to be secretive and sneaky. I believe this trait will only cause problems for her in the future. And, being the older sibling, I believe her memories will be more vivid and will be with her forever causing shame and disgrace that she may never outgrow. This man is a monster without remorse for what he's put these children through. Why should he ever be allowed to walk freely in this world like a regular human being while his children will forever bear the scars this

father has burdened them with.

Thank you for allowing me a bit of input in this process. I'm the maternal grandmother of these dear children.

THE COURT: Thank you very much for being here. I appreciate that. Anybody else want to make a statement?

MR. HAYES: I believe that was -- I believe that was it, Your Honor.

THE COURT: Okay.

MR. HAYES: Sherry, was that it?

UNKNOWN: Yes.

MR. HAYES: That was all of it, Your Honor.

THE COURT: Okay.

MR. HAYES: So, returning to State's argument, the State is asking for two hundred and eighty-eight months. It has been quite some time, but if Your Honor can recall the child hearsay hearing we had, I think that -- that in conjunction with the victim impact statements you've already been given for sentencing, really painted the picture of the effects this has had on the kids, behavioral issues they're having. They are never gonna be the same obviously and whether they can get back on a good track is -- is very questionable at this point in time. There's a tremendous abuse of trust. Anytime the parent is the perpetrator in this cases, that is arguably the worst type of trust abuse that

can occur. The parent being the person who's supposed to guide, love and keep those people safe for their lifetime. It's just quite a -- it does quite a number on a child when it's the parent who's the one who's perpetrating.

So, two hundred and eighty-eight months is very reasonable and that's what the State is asking the Court to impose. The Court's already entered the sexual assault protection orders.

I would also add that as indicated in the PSI, the images that were shared online of the older victim have been already popped up in hundreds in cases that were reported to the National Center for Missing and Exploited Children. Yeah, I mean I'm sure the number is probably higher now than it was when the PSI writer got it, but it was something over three hundred.

THE COURT: So, that can never be purged?

MR. HAYES: Correct. Once you put those in circulation, there's no way to pull that back. So, they're out there in the world and they continue to pop up in law enforcement cases. That's another reason why the State is asking for two hundred and eighty-eight months versus the bottom of the range.

THE COURT: Counsel?

MS. ALSEPT: Yes, Your Honor. So, this is a case where my client, he pled guilty after the childcare sane

hearing and prior to a ruling by this Court and based on what I've learned from him and the prior attorney, he made a decision after that hearing that he was interested in pleading and I know that they worked out an agreeable term, you know, with this four year difference that the Court can essentially choose between twenty years and twenty-four years and we could say in the terms of months, but basically it comes down to whether he'll serve twenty years or twenty-four years. And, even if the Court were to have him serve twenty years or twenty-four years, you know, whichever the number is, he will be on community supervision for the rest of his life. And so, so this does impact him for the rest of his life. Community -- the Department of Corrections supervision is not easy. I mean that's -- they will keep a close watch on him. he will be required to do polygraph tests, you know, basically any time they ever have any concerns about him. He will be registering. So, he will never, even after a twenty or twenty-four year period, he will never basically walk and walk as a normal person.

So, I do think it's important for the Court to -- well, obviously the Court knows that, but maybe people in the public don't realize quite the level that a lifetime supervision and what that means and we are asking the Court, I know that you've had an opportunity to read the presentence report that I left for Your Honor, so I won't be repeating

any of that. But, I do think it's important to know that, you know, that there was a point in time where my client had no criminal history and everything occurred at a point in time, you know, after he basically had spent six years and two tours and returned a broken person. And, you know, he has never received the help that he needed and has gone in and out of cycles that he's continuing to remain in.

So, we would ask the Court to consider allowing him to serve twenty years and then spend the rest of his life on community supervision for these crimes that he has taken full responsibility for.

THE COURT: What do you want to say about sentencing? I got a lot to say, but I'll give you the first chance.

MR. HUDSON: Your Honor, honestly no matter what the time range you give me is, I'm going to use that time to take advantage of the programs that is offered in the prisons to make myself a better person and hopefully make a positive impact on people's lives there and when I get out, if I get out.

THE COURT: Do you disagree with my instincts and my belief that the kids are being victimized even as of today by these images out there on the -- the depraved world of child porn?

MR. HUDSON: I don't disagree.

THE COURT: I mean do you think that's -- they're gonna be victimized probably into perpetuity, right?

MR. HUDSON: Yes, sir.

THE COURT: What was your thought process on that or you just didn't give it any?

MR. HUDSON: I didn't think about it, Your Honor.

THE COURT: The other thing that, you know, we were all there at the 9A.44. There was no question that there were spotlights on you back in 2014 when you did your interview with the detectives about your involvement in child pornography and yet, these occurrences with your children happened in 2017 and 2018. You were already under a spotlight. Yet, you not only continued your behavior, you magnified it. It got worse and worse and worse. I can't imagine a world where you would be safe to be out in it with access to children and with access to -- to the internet the way it is. I don't get it. I don't get it. There's probably nothing you could say that would (indiscernible) get it either.

I think this case deserves an exceptional sentence, is what I think. I have to make some findings in order to do that. Some specific findings in order to do that so it can not be viewed by the Court of Appeals as an excessive sentence and then, the question always comes down, what is excessive in these kinds of cases where we have victims,

children, small children. Let's ignore for the fact that during the time that you were abusing them, you subjected them to some of the most horrific kinds of abuses other than physical complete beatings of children. Your forced your son and your daughter to have sex for your pleasure at a very small age with the threat that they couldn't go swimming if they didn't have sex. The thought of you getting emotionally aroused or sexually aroused from that kind of behavior makes me ill. It makes me sick to my stomach. The deliberate cruelty you expressed and that's one of the findings I'm going to issue on an exceptional sentence in this case, the deliberate cruelty that you exposed your children to is just unbearable. Just hard to imagine what they're gonna go through then, now and into the future. I hope they survive emotionally and mentally from the abuse that you -- you laid on them.

They were particularly vulnerable. That's another finding of fact that I'm gonna make here. It doesn't need to be pled. I don't need to have a jury find these kinds of things. It's some of those facts that I can take from the 9A.44 and I can take from the presentence investigation and the probable cause statement. A lot of it comes from the 9A.44 where I got to see your children in person on the witness stand and see the torment that they were going through. It affects you. It should have affected you and I

suspect that's what your attorney was saying after the 9A.44 you decided that maybe you should fix something and take a plea.

I'm a little troubled by the statement that you've accepted responsibility because shortly thereafter when I was getting ready to sentence you, you wanted to withdraw your plea and not take responsibility. That didn't go through and I don't know why it didn't go through cause I wasn't the plea Judge.

MR. HUDSON: Your Honor --

MS. ALSEPT: That had to do with a misunderstanding about a document and once I explained that to him, that's why he withdrew that.

THE COURT: Okay, I wasn't involved in that.

MS. ALSEPT: Yeah, so --

THE COURT: Probably rightfully so.

MS. ALSEPT: So, that had and once I explained that to him, we -- that's why we withdrew it.

THE COURT: Okay, I was a little surprised when I read that in your --

MS. ALSEPT: Yeah, no that --

THE COURT: Defense statement that he was taking responsibility, cause it didn't appear like --

MS. ALSEPT: No, no and yeah, no the -- it was a document that the prosecutor, for a short time, had people

signing and he didn't understand it fully because it was not a document that had been gone over with him when he did the plea.

THE COURT: So, in essence, what I think turned out from the 9A.44 is that you saw like I saw that your kids were believable. I think going into the 9A.44 you thought well, maybe they won't testify, maybe they won't do something. I don't know what you were thinking at the time, but we've got deliberate cruelty of these two small children. We've got that they were particularly vulnerable victims cause you were the caregiver for these children at the time. What troubles me a great deal also and this is one of the findings that I'm making is that the ongoing effects of this depraved behavior by you will affect these children forever. The images from a pedophile/monster who put these on the internet are available to all the other monsters out there to view. So, every day, every click of the computer, your kids are revictimized by something that you did and it's -- it's disturbing.

Counsel tell me if I got the numbers right, but I'm gonna sentence you to three hundred and sixty-five months. I do find exceptional sentence reasons on the record clearly. I decline to accept the two hundred and forty or two hundred and eighty-eight recommendation from the prosecutor. The high end of the standard range is three hundred and eighteen

months. I find that to be willfully insufficient to punish you for the behavior that you've exhibited here in this case.

You are under community custody for a lifetime on Counts 1 through 5. The other cause numbers, counsel, if you want to go through each and every one of them.

MR. HAYES: Did Your Honor want to set over for entry of specific findings?

MS. ALSEPT: Yes, could we do that because I will be filing an appeal at this point. We were not going to be filing an appeal, so I had not prepared any of the paperwork, but based on an exceptional sentence up --

THE COURT: Yes.

MS. ALSEPT: -- we will be filing an appeal.

THE COURT: I suspect you would. I think it's expected. We'll see what the Court of Appeals thinks of my findings. You can incorporate some of the things that I've -- send me a copy of it so I can review it before you present it to me in Court, the exceptional sentence findings. I might have some modifications to that.

MR. HAYES: So, just Your Honor was finding vulnerable, deliberate cruelty, lasting effects on victim. I believe those are the ones I caught.

THE COURT: Those were the three main ones and just the breath, the length and the width of the abuse is pervasive. I don't believe we need to necessarily, but you

have the right to appeal the conviction. You have a right to appeal the sentence outside of the standard range. Unless notice of appeal is filed within thirty days after the entry of the judgment or order appealed from, the right to appeal is irrevocably waived. The Superior Court Clerk will, if requested by the defendant appearing without counsel, supply a notice of appeal form and file it upon completion by the defendant. You have the right, if you are unable to pay the costs thereof to have counsel appointed and portions of the trial record necessary for review of assigned errors, transcribed at public expense for an appeal. Any petition or motion for collateral attack on this judgment and sentence, including, but not limited to any personal restraint petition, state *habeas corpus* petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed with one year of the final judgment in this matter except as provided for in 10.73.100, 10.73.090 and your attorney has already indicated that she will be filing an appeal on this.

MS. ALSEPT: I'll just have it ready at the next hearing so that we're ready to go from there.

THE COURT: Let's come back on March 18th at 1:30 for presentation of the judgment and sentence and findings on the exceptional sentence.

MR. HAYES: And for clarity of the paperwork,

was that three hundred and sixty-five months as to each of Counts 1 through 5 or just one of them?

THE COURT: All of them.

MR. HAYES: Okay.

THE COURT: They were all the same three hundred and eighteen is the standard range and they were just a different victim and different times. Let me look at the -- Count 1 was C.J.H. and that was March 1, 2012 through August 5, 2017. Another finding in there that I didn't mention was that the historical review of his -- his criminal behavior was noted in an interview with, I can't remember if it was VPD Jensen or who it was, but it was -- he had an interview with law enforcement about -- about images and there was a Longview person involved in that too and because of that 2014 interview with law enforcement, he was under a particular microscope and yet, the behaviors continued three, four years after becoming under the microscope, which gives me grave concern about whether or not you will ever be a repentant and reformed or rehabilitated child molester.

So, at least the four things and then I'll review it when you get it drafted, at least the four things, the historical review of his criminal behavior, deliberate cruelty, particularly vulnerable victims, ongoing offense -- ongoing effects of the depraved behavior, images on the web for perpetuity as far as all of us know. I just don't know

how long it will ever take to get those pictures of those little kids off. I suppose that -- okie doke, we'll see you on March 18th.

MS. ALSEPT: Okay.

(CASE ADJOURNED)

A-61

State of Washington

Court of Appeals, District 2

Micheal Hudson, case no. 53280-8-II

Appellant

v Motion for

State of Washington, Reconsideration

Defendant

Appellant, Micheal Hudson, respectfully submits to this court a Motion for Reconsideration following the guidelines of RAP Rule 12.4.

Appellant presents that the court viewed his SAG ground one incorrectly. The court made its determination of the ground following supporting evidence and not that of the core issue raised.

Behind the ruling of Santobello v New York, 404 US 257, 92 S Ct 495, 30 L Ed 2d 427 (1971), Appellant put forth that the state did not uphold its side of the agreement. "To determine whether the plea agreement was violated, we first determine 'what the parties to the plea bargain reasonably understood to

be the terms of agreement." US v Arnett, 628 F2d 1162, 1164 (9th cir 1979). It was understood to Appellant that the charges would be condensed and run concurrently, no enhancements would be attached to any charge, that the defense would be allowed to encourage the low end of the sentencing range and the prosecutor would recommend a sentence in the middle of the sentencing range. The prosecutor, at sentencing and after Appellant already upheld his portion of the agreement, did make the proper recommendation, however, after the judge began a rant unsupported by the plea agreement and issued a sentence outside of the sentencing range, the prosecutor did not firmly hold his position on the agreed upon contract. The prosecutor instead began feeding the judge paperwork and making comments that left the position stated in the agreement.

"The trial judge's review of a plea agreement is not a forum for consideration of the factual basis of the abandoned charges. Any determination as to the defendant's guilt or innocence is restricted to the specific charge to which the defendant has agreed to

plead guilty. In accepting the plea to the lesser offense, the judge is not free to consider conviction or acquittal on the more serious offense. In the context of a plea hearing, the latter charge is not before him. See Klobuchir v Pennsylvania, 639 F2d 966, 102 S Ct 566, 70 L Ed 2d 474 (1981); Hawk, 610 F2d at 477." US v Barker, 681 F2d 589 (9th cir 1982). The court has properly ruled on the issue of the exceptional sentence, but, in light of this ground, the judge, as an entity of the state, failed to uphold the plea agreement by exiting the sentencing range.

"It is well established that if an accused enters a plea of guilty upon the basis of a promise made by an official representing the prosecution, and the promise is unequivocal, then he is entitled to withdraw his plea if the promise is unfulfilled. See, e.g., Hilliard v Beto, 465 F2d 829 (5th cir 1972); cf Santobello v New York, 404 US 257, 92 S Ct 495, 30 L Ed 2d 427 (1971). Accordingly, [Appellant] is entitled to an evidentiary hearing for the determination of the truth or falsity of the allegation as to the alleged promise. If the allegation is true, then he is entitled to plea anew in the state court. Macon v Craven, 457 F2d 342

(9th cir 1972)." Schoultz v Hacker, 469 F2d 681 (9th cir 1972).

As the court failed to review my argument of a 'breached plea agreement', where the appellant is bringing to the attention of the court the prosecutor's complicit actions promoting breach of the agreed upon plea by the judge, Appellant asks the court to reconsider its decision and review this ground with an evidentiary hearing.

In Health,

Micheal Hudson, Appellant

22 April, 2021

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served a copy of this foregoing instrument upon the clerk of this court, via properly addressed U.S. mail, with first class postage prepaid affixed thereto, by placing into the internal mailing system as made available to inmates for legal mail, at the state correctional institution, Coyote Ridge Correction Center. The Petitioner further requests that a copy of this motion be forwarded to all interested parties via the CM/ECF system, as he is detained, indigent, and has no other means.

Done this 9 day of June, 2021.

Respectfully submitted,

Micheal Hudson

Micheal Hudson 411651
G/GB20-30 Veterans Pod
Coyote Ridge Correction Center
1301 N. Ephrata Ave.
Connell, WA 99326

INMATE

June 09, 2021 - 8:30 AM

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Appellate Court Case Number:	53280-8
Appellate Court Case Title:	State of Washington, Respondent v. Michael Hudson, Appellant
Superior Court Case Number:	17-1-01732-9

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