

**NO. 67262-2-1**

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**CLIFFORD LAND,**  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

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**RESPONDENT’S BRIEF**

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SKAGIT COUNTY PROSECUTING ATTORNEY  
RICHARD A. WEYRICH, PROSECUTOR

By: ROSEMARY KAHOLOKULA, WSBA#25026  
Chief Criminal Deputy Prosecuting Attorney  
Office Identification #91059

Courthouse Annex  
605 South Third  
Mount Vernon, WA 98273  
Ph: (360) 336-9460

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## TABLE OF CONTENTS

I.	<u>SUMMARY OF ARGUMENT</u>	1
II.	<u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	3
III.	<u>STATEMENT OF CASE</u>	
	1. <u>Procedural History</u>	5
	2. <u>Substantive Facts</u>	6
IV.	<u>ARGUMENT</u>	8
	A. RAPE OF A CHILD IN THE THIRD DEGREE AND CHILD MOLESTATION IN THE THIRD DEGREE ARE NOT THE “SAME OFFENSE”. THEREFORE, THE JURY DID NOT HAVE TO FIND THAT THE CONDUCT FOR EACH WERE “SEPARATE AND DISTINCT” ACTS. EVEN IF THEY WERE THE “SAME OFFENSE”, A REVIEW OF THE RECORD AS A WHOLE DEMONSTRATES THERE WAS NO ACTUAL DOUBLE JEOPARDY VIOLATION.	8
	1. <u>Because rape of a child and child molestation are not the “same offense”, double jeopardy concerns are not implicated.</u>	8
	2. <u>Automatic vacation is not the remedy for a <i>potential</i> double jeopardy violation.</u>	10

- B. THE TRIAL COURT SENTENCED THE APPELLANT TO A DEFINATE TERM OF IMPRISONMENT, FOLLOWED BY A TERM OF COMMUNITY CUSTODY, “CAPPED BY THE STATUTORY MAXIMUM”. THIS SENTENCE DOES NOT EXCEED THE STATUTORY MAXIMUM AND THE TRIAL COURT DID NOT EXCEED ITS STATUTORY AUTHORITY, IMPOSE AN INDEFINATE TERM, NOR VIOLATE THE SEPARATION OF POWERS DOCTRINE. 15
- C. THE STATE AGREES TO VACATION OF THE CONDITION OF COMMUNITY CUSTODY REQUIRING PAYMENT OF RESTITUTION. 23
- D. THE STATE AGREES TO VACATION OF THE CONDITIONS OF COMMUNITY CUSTODY FORBIDDING THE DEFENDANT FROM ACCESSING OR POSSESSING (1) PORNOGRAPHY AS DEFINED BY HIS COMMUNITY CORRECTIONS OFFICER AND (2) “SEXUAL STIMULUS MATERIALS.” 23
- E. WHILE THE DEFNDANT’S CONDITION TO NOT POSSESS ITEMS TO ATTRACT CHILDREN IS VAGUE, THE CONDITION TO NOT POSSESS DRUG PARAPHERNALIA IS NOT VAGUE AND IS AN APPROPRIATE MONITORING TOOL. 23
1. The prohibition on the possession of drug paraphernalia is not unconstitutionally

	<u>vague and is an appropriate DOC monitoring tool.</u>	24
	a. <u>The prohibition is not unconstitutionally vague.</u>	24
	b. <u>The prohibition is an appropriate</u>	
	c. <u>monitoring tool.</u>	26
	2. <u>The prohibition on the possession of “an item designed or used to entertain, attract, or lure children” can be vacated.</u>	27
F.	THE PLETHYSMOGRAPH EXAMINATION IS A VALID CONDITION OF COMMUNITY CUSTODY WHEN ORDERED IN CONJUNCTION WITH SEXUAL DEVIANCY TREATMENT.	27
V.	CONCLUSION	30

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>In re Brooks</u> , 166 Wn.2d 664, 211 P.3d 1023 (2009)	16,17,18,19,20,22
<u>In re Detention of Campbell</u> , 139 Wn.2d 341, 986 P.2d 771 (1999)	28
<u>In re Personal Restraint of Fletcher</u> , 13 Wn.2d 42, 776 P.2d 114 (1989)	9
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008)	23,24,25
<u>State v. Castro</u> , 141 Wn.App. 485, 170 P.3d 78 (2007)	28,29
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 542 (1999)	28 n.10
<u>State v. Franklin</u> , 172 Wn.2d 831, 263 P.3d 585 (2011)	19,20,21,22
<u>State v. French</u> , 157 Wn.2d 593, 141 P.3d 54 (2006)	10
<u>State v. Hayes</u> , 81 Wn.App. 425, 914 P.2d 788 (1996), <u>rev. denied</u> 130 Wn.2d 1013 (1996)	9,11,12
<u>State v. Julian</u> , 102 Wn.App. 296, 9 P.3d 851 (2000), <u>rev. denied</u> 143 Wn.2d 1003 (2001)	24,27
<u>State v. Jones</u> , 118 Wn.App. 199, 76 P.3d 258 (2003)	24

<u>State v. Jones,</u> 71 Wn.App. 798, 863 P.2d 85 (1993), <u>rev. denied</u> 124 Wn.2d 1018, 863 P.2d 85 (1994)	9,10
<u>State v. Kier,</u> 164 Wn.2d 798, 194 P.3d 212 (2008)	9
<u>State v. Lucas,</u> 56 Wn.App. 236, 783 P.2d 1221 (1989), <u>rev. denied</u> 114 Wn.2d 1009, 790 P.2d 167 (1990)	28
<u>State v. Mutch,</u> 171 Wn.2d 646, 254 P.3d 803 (2011)	9,11,12
<u>State v. Noltie,</u> 116 Wn.2d 831, 809 P.2d 190 (1991)	9,11,12
<u>State v. Olson,</u> 164 Wn.App. 187, 262 P.3d 828 (2011)	28
<u>State v. Paine,</u> 69 Wn.App. 873, 850 P.2d 1369, <u>rev. denied</u> , 122 Wn.2d 1024, 866 P.2d 39 (1993)	24
<u>State v. Parris,</u> 163 Wn.App. 110, 259 P.3d 331 (2011), <u>rev. denied</u> 173 Wn.2d 1008, 268 P.3d 942 (2012)	28
<u>State v. Riles,</u> 135 Wn.2d 326, 957 P.2d 655 (1998), <u>abrogated in part, State v. Valencia,</u> 169 Wn.2d 782, 239 P.3d 1059 (2010)	28,29,30
<u>State v. Simms,</u> 10 Wn.App. 75, 516 P.2d 1088 (1973), <u>rev. denied</u> 83 Wn.2d 1007 (1974)	28
<u>State v. Valencia,</u> 169 Wn.2d 782, 239 P.3d 1059 (2010)	24,25,26

State v. Vant,  
145 Wn.App. 592, 186 P.3d 1149 (2008) 27

State v. Vladovic,  
99 Wn.2d 413, 662 P.2d 853 (1983) 9

State v. Wallmuller,  
164 Wn.App. 890, 265 P.3d 940 (2011) 12

### CONSTITUTION

U.S. Const. amend. 5 9

WA Const. art. 1 sec. 9 9

### RULES, STATUTES AND OTHERS

Laws 2009, ch.375, sec. 9 21

RCW 9A.20.021 19

RCW 9.94A.030 18

RCW 9.94A.701 16,19,20,21,16

RCW 9.94A.715 16

RAP 2.5 28 n.1

I. SUMMARY OF ARGUMENT

The appellant, Clifford Land was convicted of Child Molestation in the Second Degree as to CG, Child Molestation in the Third Degree as to RL, and Rape of a Child in the Third Degree and Child Molestation in the Third Degree as to SH. He was sentenced to a term of incarceration and community custody on each “capped at the statutory maximum.” The conditions of his community custody include payment of restitution, a prohibition on the possession of pornography, items of sexual stimulation, drug paraphernalia, and items to attract children, and a requirement to undergo plethysmograph testing as directed by his community corrections officer.

Land claims the convictions of rape and molestation as to SH violate the double jeopardy prohibition. He claims the sentence on each conviction exceeds the statutory maximum and is an indefinite term of community custody which improperly designates sentencing authority to the Department of Corrections. Finally, he claims that the above referenced conditions of community custody are variously not authorized by the SRA, unconstitutionally vague, an improper delegation of authority to the community corrections officer, not crime related, not related to rehabilitation, and/or constitute an unconstitutional infringement on his privacy and liberty interests.

The State responds that the rape and molestation charges are not the “same offense” for double jeopardy purposes.

The sentence imposed is capped by the statutory maximum and therefore does not exceed the statutory maximum. The Department of Correction’s ministerial determination of when the community custody period ends based on the determinate term set forth by the court “as capped by the statutory maximum” does not constitute an improper designation of sentencing authority to the Department.

The State, without conceding error, would agree to a vacation of condition 3<sup>1</sup> of the community custody order. The State concedes error as to that portion of condition 7<sup>2</sup> complained of by the appellant, as to condition 8<sup>3</sup>, and as to condition 9<sup>4</sup>. As to condition 14<sup>5</sup>, the prohibition on the possession of drug paraphernalia is not vague and is related to the monitoring function of the Department of Corrections. As to the plethysmograph condition, plethysmograph testing incident to treatment is a valid condition which the court can impose.

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<sup>1</sup> “Pay the costs of crime-related counseling and medical treatment required by for all victims.”

<sup>2</sup> “Do not possess, access, or view pornographic materials, as defined by the sex offender therapist and/or community corrections officer.”

<sup>3</sup> “Do not possess sexual stimulus material for your particular deviancy as defined by a community corrections officer and therapist except as provided for therapeutic reasons.”

<sup>4</sup> “Do not possess any item designated or used to entertain, attract or lure children.”

<sup>5</sup> “Do not possess drug paraphernalia.”

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Rape of a Child in the Third Degree and Child Molestation in the Third Degree are not the “same offense.” Was the prohibition against double jeopardy violated when the appellant was convicted of both crimes? (Assignment of Error 1.)
- B. Where the appellant was convicted of two separate crimes, was it error to fail to instruct the jury that the conduct for each must be based on separate and distinct conduct? Even if they were the “same offense” for double jeopardy purposes, where a review of the entire record shows that the information, testimony, argument, and instruction all make manifestly apparent that the jury must find separate conduct for each crime, was the double jeopardy provision actually violated? (Assignment of Error 2.)
- C. The trial court sentenced the appellant to a definite term of imprisonment, followed by a definite term of community custody, “capped by the statutory maximum” for each crime of conviction. Did the trial court exceed its statutory authority, impose an indefinite term of community custody, and /or

violate the separate of powers doctrine? (Assignments of Error 3, 4.)

- D. The State agrees to vacate the community custody condition requiring restitution because no restitution has been requested or ordered and the statutory deadline to impose restitution has passed. (Assignment of Error 5.)
- E. The State concedes that the prohibition on pornographic materials (line one of condition seven) is unconstitutionally vague. (Assignment of Error 6.)
- F. The State concedes that the prohibition on “sexual stimulus material” is unconstitutionally vague. (Assignment of Error 7.)
- G. The appellant was ordered to not possess “drug paraphernalia”. Given the placement of the condition in the order and that there is a statutory definition for “drug paraphernalia,” is the term unconstitutionally vague? Where the condition is a monitoring tool, was the condition validly ordered? (Assignment of Error 8.)
- H. The State concedes that the prohibition on possessing items to attract or entertain children is unconstitutionally vague. (Assignment of Error 9.)

I. The appellant was ordered to participate in sexual deviancy treatment. To facilitate treatment, he was required to participate, “as directed by your community corrections officer”, plethysmograph examinations. Was this a valid condition of community custody for a convicted sex offender?  
(Assignment of Error 10.)

III. STATEMENT OF CASE

1. Procedural History

On January 24, 2011, the appellant, Clifford Carl Land, was charged by Second Amended Information with multiple counts of child molestation and child rape charges involving three different victims, including Counts IX, Rape of a Child in the Third Degree as to S.E.E.H. (hereinafter “SH), and X, Child Molestation in the Third Degree as to SH. CP 44-47. Both counts allege the same time period of December 31, 2008, through August 12, 2010.

On February 22, 2011, Land was convicted of Counts I, VII, IX and X of the Second Amended Information. CP 92, 98, 100, 101. Land was sentenced to a term of confinement of 116 months as to Count I (Child Molestation in the Second Degree as to victim C.N.G.), 60 months as to Count VII (Child Molestation in the Third Degree as to victim R.D.L.) and 60 months each as to Counts IX and X. CP 128-140. All

counts were ordered to run concurrently. Land was also sentenced to 36 months of community custody as to those counts “as capped by the statutory maximum.” CP 132. He filed a timely notice of appeal on June 2, 2011. CP 141-142.

2. Substantive Facts (as to Counts IX and X)

SH and RL had been close friends for about two years prior to the trial. RP 223-224. SH would frequently go to RL’s house. RP 223. The girls would spend the night at each other’s houses. RP 224. The last time that SH spent the night at RL’s house was August of 2010. RP 224. At that time, she had been staying at the house for a couple of weeks. RP 226.

When SH would spend the night at RL’s house, most of those times RL’s father, Clifford Land, would do something of a sexual nature to SH. RP 227-228, 250-251, 252. Land would touch SH’s breasts and her “lower part.” RP 251. He would touch her over and under her clothing. RP 251. He would sometimes lift up her shirt. RP 251. It would usually happen in RL’s room. RP 251.

Land touched SH’s breasts many times. RP 252. Sometimes he would kiss her while touching her breasts. RP 252.

Land touched SH’s “vaginal area”. RP 252-253. He also kissed her a couple of times on the “lower half”. RP 252. A couple of times he put cream on a rash that she had in her private area. RP 252. More than

one of those times involving cream, Land put his finger inside of SH. RP 253. There were also times not involving the cream, where Land put his fingers inside of SH. RP 253.

SH did not want to testify against Land at trial; she felt like he was more of a father to her than her own. RP 257, 285. She initially did not report the abuse to the police. RP 260. She was upset when she found out that RL had reported abuse because “I didn’t want to be a part or involved in this case.” RP 263. SH was upset that RL, who had also initially not reported any abuse, decided to finally report the sexual abuse. RP 264. SH ultimately reported the sexual abuse of herself and what she witnessed happening to RL. RP 278 She testified at trial that her parents were not pressuring her to talk to CPS or to change her story from nondisclosure to disclosure. RP 275, 287. SH testified that she had previously told the defense attorney, in response to his question “What made you decide to change your story after you talked to us that prior day” (referring to a defense interview that occurred prior to SH’s disclosure of abuse), that “[i]t just basically started with my parents, kind of, they were kind of pressuring me to, like, well, is there anything else you want to say?” RP 283.

SH ultimately disclosed the sexual abuse of herself to law enforcement and counts IX and X of the Information were charged. RP 278.

IV. ARGUMENT

A. RAPE OF A CHILD IN THE THIRD DEGREE AND CHILD MOLESTATION IN THE THIRD DEGREE ARE NOT THE “SAME OFFENSE”. THEREFORE, THE JURY DID NOT HAVE TO FIND THAT THE CONDUCT FOR EACH WERE “SEPARATE AND DISTINCT” ACTS. EVEN IF THEY WERE THE “SAME OFFENSE”, A REVIEW OF THE RECORD AS A WHOLE DEMONSTRATES THERE WAS NO ACTUAL DOUBLE JEOPARDY VIOLATION.

Land argues that as a result of faulty jury instructions, the defendant’s constitutional protection against double jeopardy may have been violated and that the remedy is vacation of the child molestation conviction in Count X.

1. Because rape of a child and child molestation are not the “same offense”, double jeopardy concerns are not implicated.

Because child rape and child molestation are not the “same offense” and because double jeopardy is therefore not implicated, the jury instructions were not required to specify that the acts that form the basis for counts IX and X were separate and distinct from each other.

The federal and state constitutional guaranty against double jeopardy protects a defendant against multiple punishments for the “same

offense.” State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011); State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008); State v. Noltie, 116 Wn.2d 831, 848, 809 P.2d 190 (1991); State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983); State v. Hayes, 81 Wn. App. 425, 439, 914 P.2d 788, rev. denied, 130 Wn.2d 1013 (1996); U.S. Const. amend.5, and Const. art. 1 sec. 9. The double jeopardy clause does not prohibit separate punishment for different offenses. In re Personal Restraint of Fletcher, 13 Wn.2d 42, 46-47, 776 P.2d 114 (1989). Offenses committed during a single incident are not necessarily the same offense. Vladovic, 99 Wn.2d at 423.

“Two offenses are considered to be the ‘same offense’ for double jeopardy purposes if the offenses are the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.” State v. Jones, 71 Wn.App. 798, 824-825, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018, 863 P.2d 85 (1994), citing In re Fletcher, 113 Wn.2d at 47 (quoting Vladovic, 99 Wn.2d at 423).

Child molestation is not the “same offense” as rape of a child for purposes of double jeopardy. Jones, 71 Wn.App. at 825. This is because

“molestation requires that the offender act for the purpose of sexual gratification, an element not included in first degree rape of a child, and first degree rape of a child requires that penetration or oral/genital contact occur, an element not required in child molestation. Each offense requires the State to prove an element that the other does not, and therefore the offenses are not the ‘same offense’ for double jeopardy purposes.” Jones, 71 Wn. App. at 825. See also State v. French, 157 Wn.2d 593, 610-611, 141 P.3d 54 (2006) (affirming that the two crimes of molestation and rape are separate and can be charged and punished separately).

Here, even if the jury were to have relied on the exact same incident to convict the defendant of the child rape as well as the child molestation charges, because the offenses are not the same, they can constitutionally be charged and punished separately.

2. Automatic vacation is not the remedy for a *potential* double jeopardy violation.

Even if rape and molestation were the “same offense” for double jeopardy purposes, and even if the jury instructions should have included the language that the act for the one was an act “separate and distinct” from the act for the other, the remedy is not automatic vacation of the molestation charge. It is an *actual* double jeopardy violation, not merely a

*potential* violation, that mandates vacation of the potentially redundant conviction.

“[F]lawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant *potentially* received multiple punishments for the same offense.” Mutch, 171 Wn.2d at 664 (emphasis in original).

In order to determine whether there was an *actual* double jeopardy violation, the Court looks to the record as a whole. “In reviewing allegations of double jeopardy, an appellate court may review the entire record to establish what was before the court.” Noltie, 116 Wn.2d at 848-849 (citation omitted). In reviewing the entire record, the Court looks at the information, instructions, testimony and jury argument. Noltie, 116 Wn.2d at 849. “No double jeopardy violation results when the information, instructions, testimony, and argument clearly demonstrate that the State was no seeking to impose multiple punishments for the same offense.” Hayes, 81 Wn. App. at 440. Recently the Court in Mutch followed its precedent in Noltie in holding, again, that “an appellate court may review the entire record to establish what was before the court” in reviewing double jeopardy claims. Mutch, 171 Wn.2d at 664, quoting Noltie, 116 Wn.2d at 848-849.

different evidence to support each count. Therefore, the double jeopardy claim failed. Hayes, 81 Wn. App. at 440.

Here, the Information charged two separate crimes, Rape of a Child for the one count, and Child Molestation for the other. The Information reflects the different elements for each count. There are clearly delineated as separate offenses.

The testimony was that there were types of contact that would constitute rape, i.e. that Land put his finger inside of SH on several occasions, and other types that would constitute molestation, i.e. that Land touched SH's breasts and "vaginal area" with his hands and fingers RP 252-253.

Land argues on appeal that "[s]ome of the touching SH described, such as her assertion that Mr.Land kissed her 'on the lower half,' could have constituted either child molestation or rape of a child." Br. of Appellant at 19-20. The respondent disputes this. The "lower half" could be anything from an ankle, knee, or thigh to the actual sexual organ of the child. If the State were trying to prove a Rape of a Child beyond a reasonable doubt based on testimony that the child was kissed on the "lower half", we would not even meeting the burden of going to the jury after resting our case in chief. In fact, there is a clear delineation among

the acts of touching with fingers and hands that constitute molestation, and the act of penetration that constitutes the rape.

The prosecutor's argument to the jury makes clear that that the State was not seeking multiple punishments for one offense. The prosecutor discussed each of the ten counts by type of offense; he first discussed the Rape of a Child counts (three as to RL and one as to SH). RP 366. He discussed the requirements of convicting for rape which includes "sexual intercourse." The prosecutor relied on the penetration portion of the definition of sexual intercourse as the rape related to SH<sup>6</sup>. RP 367.

The prosecutor then moved on to the child molestation counts. RP 367. He addressed the counts as related to CG, RL and then SH. As to SH, the prosecutor said the basis for the molestation count was the touching of her breasts as well as the "sexual contact of her vaginal region until the point of actual penetration"<sup>7</sup>. RP 368. "So Sarah herself provided you the evidence about what occurred, that there were these acts of sexual contact by the defendant of grouping [sic] her, that during the course of him putting some type of cream on her that he actually penetrated and put his finger inside her vagina." RP 379.

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<sup>6</sup> "And here that is the method in which he committed sexual intercourse to [SH], by penetrating her with his fingers."

<sup>7</sup> Thus excluding actual penetration as the basis for the molestation charge.

Both the defense attorney and the prosecutor argued to the jury, repeatedly, that each count needed to be considered, and decided, separately. RP 405, 406, 407, 415.

The trial court's instructions to the jury included the unanimity instruction, CP 67, and that a separate crime was charged in each count and must be considered separately, CP 66. The instructions advised the jury of the definition of molestation versus rape. CP 68, 69 72, 73, 75, 77, 80, 82. Each of the ten counts had its own "to convict" instruction. CP 71, 74, 76, 78, 79, 81, 83, 87, 88, 89.

Under either standard of review identified in Mutch, in reviewing the entire record, it was manifestly apparent to the jury that the State was not seeking multiple punishments for one offense. There was no actual double jeopardy violation.

**B. THE TRIAL COURT SENTENCED THE APPELLANT TO A DEFINATE TERM OF IMPRISONMENT, FOLLOWED BY A TERM OF COMMUNITY CUSTODY, "CAPPED BY THE STATUTORY MAXIMUM". THIS SENTENCE DOES NOT EXCEED THE STATUTORY MAXIMUM AND THE TRIAL COURT DID NOT EXCEED ITS STATUTORY AUTHORITY, IMPOSE AN INDEFINATE TERM, NOR VIOLATE THE SEPARATION OF POWERS DOCTRINE.**

Land argues that the sentence imposed exceeded the statutory maximum. Land then argues that the term of community supervision is indeterminate and constitutes an improper designation of sentencing authority to the Department of Corrections (DOC). Land argues that the

term of community custody should be vacated and the case remanded for the trial court to set “with exactitude” the length of community custody.

Land was sentenced to a term of confinement of 116 months as to Count I, 60 months as to Count VII, and 60 months each as to Counts IX and X. He was also sentenced to 36 months of community custody as to all counts “as capped by the statutory maximum.”

The statutory maximum is 120 months for Count I, and 60 months for Counts VII, IX, and X. The statutorily required community custody term for each of these counts is 36 months. RCW 9.94A.701(1)(a).

Prior to 2009, former RCW 9.94A.715 and RCW 9.94A.701 provided for a variable term of community custody. The trial court was required to sentence the offender to the statutory community custody range “or up to the period of earned release . . ., whichever is longer.” Former 9.94A.715(1).

In In re Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), prior to the 2009 changes, the defendant was sentenced to a term of incarceration that was the statutory maximum for the crime and was sentenced to the statutory range of community custody. The sentencing court further ordered, “The total of the term of incarceration and the term of community custody for each counts I, II, and III shall not exceed the statutory maximum of 120 months.” In re Brooks, 166 Wn.2d at 664, n. 1. Brooks

appealed, arguing that “a sentencing court may not take into account the possibility of early release when it imposes the terms of the sentence” and that when there is a potential that the term of confinement combined with community placement may exceed the statutory maximum, the trial court must reduce the amount of confinement or community custody. In re Brooks, 166 Wn.2d at 668.

The Court rejected this argument. The Court noted that:

while a sentencing court is required to impose a determinate sentence that does not exceed the statutory maximum, the community custody provisions of the SRA make it impossible to determine with any certainty how much community custody a defendant will actually be required to serve until well after the court imposes the sentence.

In re Brooks, 166 Wn.2d at 671.

The Court held that where the combination of imprisonment and community custody ordered by the court was specifically capped by the statutory maximum, the sentence did not exceed the statutory maximum.

In re Brooks, 166 Wn. 2d at 673.

The Brooks Court next addressed whether such a sentence was “indeterminate”. A determinate sentence is:

a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community custody, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. The fact that an offender through earned release can

reduce the actual period of confinement shall not affect the classification of the sentence as a determinate sentence.

RCW 9.94A.030(18). Brooks rejected the argument that because a sentence “does not state with any certainty how many years, months, or days he will remain in both confinement and community custody” that this means the sentence is indeterminate. Brooks noted that RCW 9.94A.030 (21) (currently RCW 9.94A.030(18)) “specifically states that a sentence is not rendered indeterminate by the fact that a defendant may earn early release credits.” In re Brooks, 166 Wn.2d at 673. Brooks further pointed out that “ the exact amount of time to be served can almost never be determined when the sentence is imposed by the court. The only thing that can be determined at the time of sentencing is the maximum amount of time an offender will serve in confinement and the maximum amount of time the offender may serve in totality.” Brooks, 166 Wn.2d at 674.

Finally, the Brooks Court put to bed the notion that a sentence such as the one at issue here constituted an impermissible delegation of sentencing authority to the DOC:

While the DOC was left the responsibility of ensuring Brooks did not serve more than 120 months of confinement and community custody, this responsibility stemmed from both the requirements of the SRA and the sentence that the court *imposed*. Here the court imposed a sentence that had both a defined range and a determinate maximum. It is the SRA itself that gave courts the power to impose sentences and the DOC the responsibility to set

the amount of community custody to be served within that sentence. We hold that Brooks's sentence is not indeterminate.

In re Brooks, 166 Wn. 2d at 674.

In 2009, subsequent to the Brooks sentence which was later affirmed by the Washington Supreme Court, the legislature amended the community custody statute by requiring a fixed term of community custody, instead of a range. State v. Franklin, 172 Wn.2d 831, 836, 263 P.3d 585 (2011); RCW 9.94A.701. The legislature also enacted what is now RCW 9.94A.701(9) which states “[t]he term of community custody specified by this section shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.”

The defendant in State v. Franklin, *supra*, was originally sentenced in February, 2008, to a term of confinement that exceeded the statutory maximum and to no community custody, although community custody was required by statute. Franklin, 172 Wn.2d at 834. The trial court rectified these errors in June 2008 by reducing the term of confinement to the statutory maximum and adding a term of community custody. In September, 2008, the trial court again modified the sentence to “ensure that the time the defendant spends in confinement and on community

custody does not exceed the statutory maximum.” Franklin, 172 Wn.2d at

834. The Court did this by ordering:

On [] Count I, the defendant is sentenced to 9 to 18 months community custody or for the entire period of earned early release awarded under RCW 9.94A.728, *whichever is longer*. On Count I, the total amount of incarceration and community custody shall not exceed 60 months.

On Count III, the defendant is sentenced to 9 to 12 months community custody or for the entire period of earned release awarded under RCW 9.94A.728, *whichever is longer*. On Count III, the total amount of incarceration and community custody shall not exceed 120 months.

Franklin, 172 Wn.2d at 834 (emphasis in original).

Franklin argued “that the amendments to RCW 9.94A.701(1)-(3) requiring trial courts to set fixed terms of community custody preclude a trial court from delegating responsibility to DOC to ensure compliance with statutory maximums. Instead, Franklin contends, under the plain meaning of RCW 9.94A.701(9), only the trial court may reduce his terms of community custody” and in his particular case the trial court was required to therefore reduce the terms of community custody to zero.

Franklin, 172 Wn.2d at 836.

The Court first noted that the Franklin sentence was clearly correct under Brooks. Franklin, 172 Wn.2d at 837. The Court then determined that the 2009 amendments applied retroactively to Franklin. Franklin, 172 Wn.2d at 839. The Court finally held that RCW 9.94A.701(9) did not

operate to require a trial court to resentence any pre-amendment defendant to a determinate community custody range. Franklin, 172 Wn.2d at 840. Rather, that section specifically charged the DOC with “bringing preamendment sentences into compliance with the amendments.”<sup>8</sup>

The Court went on to discuss how the new scheme would work with Franklin’s sentence:

Franklin is subject to fixed terms of 12 months of community custody for both counts I and III. In addition, Franklin’s total sentence is still subject to the *Brooks* notation in his original sentence. Thus, if Franklin were to serve the full terms of confinement for counts I and III, he would not serve additional terms of community custody, but if her were subject to early release, he would serve up to 12 months of community custody for each of these offenses. *See* RCW 9.94A.729(5)(a) (allowing the DOC to transfer offenders to community custody in lieu of earned release)<sup>9</sup>. In light of the possibility that Franklin will not serve the full term of confinement, the DOC need not eliminate his term of community custody at the outset, but rather, may wait until Franklin is released from confinement and then, if necessary, adjust the term of community confinement to ensure that the total remains within the statutory maximum.”

Franklin, 172 Wn.2d at 841-842.

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<sup>8</sup> “The department of corrections shall recalculate the term of community custody and reset the date that community custody will end for each offender currently in confinement or serving a term of community custody for a crime specified in RCW 9.94A.701. That recalculation shall not extend a term of community custody beyond that to which an offender is currently subject.” LAWS of 2009, ch. 375, sec. 9.

<sup>9</sup> This is no longer the case.

The Franklin Court also held that the legislative directive for the DOC to set an end of term date for community custody was “purely a ministerial function.” Franklin, 172 Wn.2d at 843.

In sum, read together, Brooks and Franklin stand for the propositions that a court’s order capping the combination of imprisonment and community at the statutory maximum is not an “excessive sentence”; DOC’s determination of the actual end of community custody based on the court’s order, capped by the statutory maximum, is a ministerial function and is not an improper delegation of sentencing authority. While Franklin dealt specifically with DOC’s acting in context of retroactive application of the new legislation regarding community custody, there is nothing in the decision that would lead to the conclusion that where the trial court is operating under the current legislation, the Brooks notation is not a permissible order ensuring that the sentence does not exceed the maximum and that the DOC cannot adjust the term of community custody, if necessary, to ensure the statutory maximum is not exceeded. Indeed, there will be many occasions where the only way for the trial court to fully comply with the statute requiring a standard range sentence, and requiring a term of community custody, and requiring that those two together not exceed the statutory maximum, is to note, as it did here, that the sentence is capped by the statutory maximum.

C. THE STATE AGREES TO VACATION OF THE  
CONDITION OF COMMUNITY CUSTODY REQUIRING  
PAYMENT OF RESTITUTION.

Since no restitution has been requested, and the statutory time period for making such a request has passed, without conceding error, the State would be in agreement with vacating this condition of community custody.

D. THE STATE AGREES TO VACATION OF THE  
CONDITIONS OF COMMUNITY CUSTODY  
FORBIDDING THE DEFENDANT FROM ACCESSING OR  
POSSESSING (1) PORNOGRAPHY AS DEFINED BY HIS  
COMMUNITY CORRECTIONS OFFICER AND (2)  
SEXUAL STIMULUS MATERIALS.”

The State concedes error as to the first sentence of condition 7 and the entirety of condition 8 based on State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008).

E. WHILE THE DEFENDANT’S CONDITION TO NOT  
POSSESS ITEMS TO ATTRACT CHILDREN IS VAGUE,  
THE CONDITION TO NOT POSSESS DRUG  
PARAPHERNALIA IS NOT VAGUE AND IS AN  
APPROPRIATE MONITORING TOOL.

Land argues that conditions 9 and 14 the community custody order should be stricken for vagueness. Land did not object to these conditions at sentencing, and did not make a motion to the sentencing court to vacate

the conditions, but raises them for the first time on appeal. Land claims the conditions are unconstitutionally vague and are not crime-related.

Although the appellant failed to object below, “[t]he right to challenge the condition is not waived . . .” State v. Julian, 102 Wn.App. 296, 304, 9 P.3d 851 (2000), rev. denied, 143 Wn.2d 1003 (2001), citing State v. Paine, 69 Wn. App. 873, 850 P.2d 1369, rev. denied, 122 Wn.2d 1024, 866 P.2d 39 (1993). “A sentence imposed without statutory authority can be addressed for the first time on appeal, and this court has both the power and the duty to grant relief when necessary.” State v. Julian, 102 Wn. App. at 304. In accord, Bahl, 164 Wn.2d at 745; State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Furthermore, the issue is ripe for review. State v. Bahl, supra; State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

1. The prohibition on the possession of drug paraphernalia is not unconstitutionally vague and is an appropriate DOC monitoring tool.

a. The prohibition is not unconstitutionally vague.

“A community custody condition ‘is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.’”

Valencia, 169 Wn.2d at 793, quoting from the decision in the court below.

The Valencia Supreme Court, in reviewing the appellate court’s finding

that the term “paraphernalia that can be used for the ingestion or processing of controlled substances .. .” is not vague, pointed out that the appellate court came to its conclusion “by misreading the plain language of the condition, erroneously stating that the condition prohibits the petitioners from possessing ‘drug paraphernalia’” when, in fact, the prohibition was “any paraphernalia. Valencia, 169 Wn.2d at 794. The Supreme Court also commented negatively on the “breadth of potential violations”; “Because the condition might potentially encompass a wide range of everyday items, it ‘does not provide ascertainable standards of guilt to protect against arbitrary enforcement.’” Valencia, 169 Wn.2d at 794.

The court in Bahl, in finding that the condition that Bahl not visit “establishments whose primary business pertains to sexually explicit or erotic material” was not vague, noted that:

The challenged terms are used in connection with a prohibition on frequenting businesses, i.e., those in the business of “sexually explicit” and “erotic” materials. Terms must be considered in the context in which used.

Bahl, 164 Wn.2d at 688. The Court further noted that the term “sexually explicit” was defined by statute. “While we do not decide whether this definition alone would be sufficient notice (given that Mr. Bahl was not convicted under this statute), it bolsters our conclusion that ‘sexually

explicit,' in the context used, is not unconstitutionally vague.” Bahl, 164 Wn.2d at 760.

Valencia is distinguishable from the case at bar because the condition there prohibited only “paraphernalia” which “can be used for the ingestion or processing of controlled substances.” Here, in contrast, the condition prohibits, specifically, “drug paraphernalia.” “Drug paraphernalia” is defined by statute. Furthermore, its placement in the court’s order immediately follows the prohibition on possession and consumption of controlled substances.

Here, the prohibition was specifically on drug paraphernalia, an easily understood, statutorily defined term and the condition immediately followed the condition prohibiting illegal drug use. The condition is not unconstitutionally vague.

b. The prohibition is an appropriate monitoring tool.

As to the claim that the prohibition on possession of drug paraphernalia is not crime-related, the State responds that this prohibition should be classified as a monitoring tool.

The immediately preceding condition in the trial court’s order is that the appellant not possess or consume controlled substances. The appellant concedes that this is a lawful condition of community custody.

Courts are permitted to impose conditions that act as monitoring tools for other lawful conditions. Julian, supra; State v. Vant, 145 Wn.App. 592, 186 P.3d 1149 (2008).

Here, the prohibition on the possession of drug paraphernalia helps to ensure compliance with the condition that the appellant not possess or consume controlled substances.

2. The prohibition on the possession of “an item designed or used to entertain, attract, or lure children” can be vacated.

The State concedes that the condition is unconstitutionally vague.

F. THE PLETHSMOGRAPH EXAMINATION IS A VALID CONDITION OF COMMUNITY CUSTODY WHEN ORDERED IN CONJUNCTION WITH SEXUAL DEVIANCY TREATMENT.

Land argues that the plethysmograph community custody condition should be stricken. Br. of Appellant at 49. Land appears to acknowledge that the condition would be valid if ordered as part of crime-related treatment or counseling, but argues that because the condition here may be at the direction of the community custody officer, that it was not ordered incident to a treatment purpose. Land did not object to this condition at sentencing, and did not make a motion to the sentencing court

to vacate the condition, but raises it for the first time on appeal<sup>10</sup>. Land claims constitutional violations of his privacy and liberty interests.

It is well-accepted that probationers and parolees (and, thus, those on community custody) have a diminished right to privacy and liberty. State v. Parris, 163 Wn. App. 110, 117, 259 P.3d 331 (2011), rev. denied, 173 Wn.2d 1008, 268 P.3d 942 (2012), citing, State v. Lucas, 56 Wn. App. 236, 783 P.2d 121 (1989), rev. denied, 114 Wn.2d 1009, 790 P.2d 167 (1990) and State v. Simms, 10 Wn. App. 75, 516 P.2d 1088 (1973), rev. denied, 83 Wn.2d 1007 (1972). Furthermore, “[c]onvicted sex offenders in Washington also have a reduced expectation of privacy because of the ‘public’s interest in public safety’ and in the effective operation of government.” Parris, 163 Wn. App. at 118, citing In re Det. of Campbell, 139 Wn.2d 341, 986 P.2d 771 (1999). See also State v. Olson, 164 Wn. App. 187, 262 P.3d 828 (2011).

The defendants in both State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998) (abrogated in part by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010)) and State v. Castro, 141 Wn. App. 485, 170 P.3d 78 (2007), challenged the trial court’s order, as part of their community custody conditions, to “[s]ubmit to polygraph and plethysmograph testing

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<sup>10</sup> RAP 2.5(a) provides that the appellate court may refuse to address a claim not first raised in the trial court. However a challenge to an illegal or erroneous sentence may be raised for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 542 (1999).

upon the request of [his] therapist and/or Community Corrections Officer”. Castro, 141 Wn. App. at 493, Riles, 135 Wn.2d at 337.

The Supreme Court in Riles noted that “[p]lethysmograph testing is regarded as an effective method for diagnosing and treating sex offenders.” Riley, 135 Wn.2d at 343-344 (footnotes omitted). The Court held that requiring plethysmograph testing incident to treatment is a valid condition which a court can impose if the treatment would reasonably rely on such testing as an assessment measure. However, such testing cannot be ordered in the absence of a condition of crime-related treatment. Riley, 135 Wn.2d at 345

Castro, supra, reiterated the Riley holding that plethysmograph testing can properly be ordered incident to crime related treatment. Castro, 141 Wn. App. at 494.

The language of the condition approved in both Riley and Castro was that the testing could be directed by either the treatment provider or the community corrections officer or both. The only difference between the language there and that here is that only the community corrections officer is referenced. However, it is clear when reading this condition in conjunction with the condition requiring treatment, that, together, they are intended to ensure that Land gets treatment while on community custody. It is absurd to imagine that a corrections officer would direct that a

plethysmograph occur for any reason other than a treatment-related reason. However, if that were to happen, Land could seek relief at the trial court if he believed that the community corrections officer were acting unreasonably.

If the Court determines that the condition was erroneously imposed, the remedy should not be to strike the condition but to remand to the trial court to revise the condition to require plethysmograph testing only at the direction of his sexual deviancy treatment provider. Riles, 135 Wn.2d at 345 (“We conclude that requiring plethysmograph testing . . . incident to [the defendant’s] treatment is a valid condition which a court is authorized to impose.”).

V. CONCLUSION

Because rape and molestation are not the same offense, neither conviction should be vacated.

The trial court properly sentenced the appellant except that the State agrees to the vacation of conditions 3, 7 (first sentence only), 8, and 9.

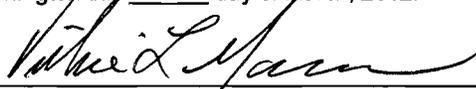
Respectfully submitted this 29th day of March, 2012.

  
ROSEMARY H. KAHOLOKULA, #25026  
Attorney for Respondent

DECLARATION OF DELIVERY

I, Vickie L. Maurer, declare as follows:

I sent for delivery by;  United States Postal Service;  ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Elaine L. Winters, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 29 day of March, 2012.



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VICKIE L. MAURER, DECLARANT