

No. 68158-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY KINZLE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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LINDSAY CALKINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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Other Sources

- The Journal of the Washington State Constitutional
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A. INTRODUCTION

This case is about a two-minute interaction between Jeffrey Kinzle and Lucia Naranjo-Mora. While Ms. Naranjo-Mora was working at a convenience store, Mr. Kinzle and a friend went into the store and asked Ms. Naranjo-Mora to show them where an item was. As she walked to the item, Mr. Kinzle touched her buttocks. Shortly thereafter, when she went to find another item, Mr. Kinzle approached her from behind, grabbed her, and pulled on her clothing. He kissed her neck and rubbed himself against her. She struggled against him and yelled, breaking free. He immediately ran out of the store.

The State charged Mr. Kinzle with indecent liberties by forcible compulsion. Before trial, he wrote to the judge, explaining that his attorney had refused to investigate certain evidence and that he believed he would not receive an effective defense if she continued to represent him. At the hearings on the motion to substitute counsel, his attorney told the judge that there was a “severe” communication breakdown, and Mr. Kinzle expressed several times his concern that his trial would not be fair because of their inability to cooperate. The judge denied the

motion. The prosecutor then made a motion to clarify the conflict of interest between Mr. Kinzle and his attorney, pleading with the court to assign new counsel. He also described Mr. Kinzle's threats against prison guards, the President, and his attorney. This motion was also denied.

Mr. Kinzle was convicted and sentenced to 102 months to life in prison. The single conviction, which subjects him to the indeterminate sentencing scheme, ensures that he will be either confined or under community custody for the rest of his life.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Kinzle's right to counsel under Article I, § 22 of the Washington Constitution and Sixth Amendment to the United States Constitution when it denied Mr. Kinzle's motion for substitute counsel.

2. The trial court erred in proceeding to trial without ordering a competency hearing, in violation of RCW 10.77.060.

3. There was insufficient evidence to convict Mr. Kinzle of indecent liberties by forcible compulsion.

4. The prosecutor committed flagrant misconduct.

5. Mr. Kinzle's lifetime sentence is unconstitutional under Article I, § 14 of the Washington Constitution because it is cruel.

6. Mr. Kinzle's lifetime sentence is cruel and unusual in violation of the Eighth Amendment to the United States Constitution.

7. Because they are not authorized by the Sentencing Reform Act (SRA), the community custody conditions requiring Mr. Kinzle to avoid relationships with women with minor children, avoid controlled substances, not possess computers, and subject computers to searches were imposed in error.

8. The court erred in imposing the community custody condition prohibiting Mr. Kinzle from possessing sexual stimulus material for his particular deviancy, because the condition is unconstitutionally vague as applied.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington Constitution guarantee an accused person the right to effective assistance of counsel. Counsel cannot be effective when communication completely breaks down between a defendant and his attorney.

Here, Mr. Kinzle made a motion for substitute counsel, and both he and his attorney told the judge multiple times that they were unable to cooperate. In addition, the prosecutor filed a motion providing more extensive information about the deeply entrenched conflict of interest between Mr. Kinzle and his lawyer. Did the trial judge violate Mr. Kinzle's constitutional right to counsel by denying his substitution motion?

2. Upon any indication that a defendant may be incompetent to stand trial, a judge is required by RCW 10.77.060 to stop proceedings and order a competency hearing. Here, the trial judge knew that Mr. Kinzle had a history of mental health issues, and had made threats against the President and against his attorney. Did the court err by proceeding to trial without first holding a hearing to ensure that Mr. Kinzle was competent?

3. As defined in the statute and interpreted in the caselaw, forcible compulsion requires evidence that a defendant overcame a victim's resistance with force greater than that required to effect the offensive touching. In this case, the evidence showed that Mr. Kinzle embraced Ms. Naranjo-Mora

from behind and rubbed against her; when she struggled and yelled, he immediately ran away. Was there insufficient evidence to prove beyond a reasonable doubt that Mr. Kinzle used force to overcome resistance to his touching?

4. A prosecutor commits flagrant misconduct when he uses tactics that have been condemned as improper by Washington courts. Here, the prosecutor argued repeatedly that Mr. Kinzle's crime could have been worse, that the State could have charged rape if more happened, and that Ms. Naranjo-Mora was lucky that she got away when she did, when there was no evidence presented that Mr. Kinzle ever intended or committed any greater crime. Washington courts have consistently prohibited arguing facts not in evidence and using inflammatory argument. Were the prosecutor's remarks flagrant misconduct?

5. Misconduct is prejudicial where there was limited evidence of the elements the misconduct bolstered. In this case, there was scant evidence that Mr. Kinzle used forcible compulsion during his encounter with Ms. Naranjo-Mora. Were

the prosecutor's arguments that it "could have been a lot worse" prejudicial to Mr. Kinzle?

6. A sentence is cruel in violation of Article I, § 14

Washington Constitution when it is grossly disproportionate to the crime committed under a four-factor test that analyzes (1) the nature of the crime, (2) the legislative purpose behind the sentence, (3) the sentence the defendant would receive for the same crime in other jurisdictions, and (4) the sentence the defendant would receive for other similar crimes in Washington. Here, the sentence Mr. Kinzle received, which entails a lifetime sentence of either confinement or supervision in addition to 102 months of guaranteed confinement, is harsher than he would receive in the 18 other states that have similar statutes to Washington's forcible compulsion statute. It is harsher than that imposed for crimes against children and crimes that result in death. Mr. Kinzle's offense lasted for 2 minutes or less and caused no physical injury. Is Mr. Kinzle's sentence cruel under Article I, § 14?

7. The Eighth Amendment to the United States

Constitution prohibits punishment that is excessive. The test for

excessive punishment takes into account society's feelings about the appropriateness of the sentence and the proportionality of the sentence to the crime. In this case, legislatures in 18 states with statutes comparable to Washington for indecent liberties by forcible compulsion—all but Washington—have decided that a lifetime sentence is inappropriate for the offense. In addition, the victim in this case was not physically injured, and there was no evidence that Mr. Kinzle intended or committed more than embracing her, rubbing against her, and pulling on her clothing. For this offense, he may be in prison for the rest of his life. Is Mr. Kinzle's sentence cruel and unusual under the Eighth Amendment?

8. The court may only impose sentencing conditions authorized by the SRA, which mandates that conditions be crime-related or reasonably related to rehabilitation or public safety. In this case, the court imposed conditions prohibiting Mr. Kinzle from dating women with minor children; from possessing computers, and from using controlled substances. In addition, the court required Mr. Kinzle to subject any computer he used to searches. There was no evidence presented that minors,

controlled substances, or computers were involved in Mr. Kinzle's offense. Are these conditions unauthorized because they are not crime-related or related to rehabilitation or public safety?

9. A community custody condition is unconstitutionally vague when it does not give a defendant sufficient notice of prohibited behavior. In State v. Bahl, the Washington Supreme Court held that it was unconstitutionally vague to impose a condition prohibiting a defendant from possessing sexual stimulus material for his particular deviancy when the deviancy had not been diagnosed or identified in the record. Here, the same condition was imposed, and no specific deviancy was identified in the record. Should the condition be struck as unconstitutionally vague?

D. STATEMENT OF THE CASE¹

1. The day of the incident

Nathan Wood and Mr. Kinzle were roommates. 11/1/11 RP 98. On March 13, 2011, Mr. Wood and Mr. Kinzle went to a convenience store to buy food. Id. at 99–100. Both men had been drinking. Id. at 120. Lucia Naranjo-Mora was working as a clerk at the store. Id. at 19. Mr. Kinzle asked Ms. Naranjo-Mora where he could find the jalapeño peppers. Id. at 101. Mr. Kinzle and Mr. Wood walked behind Ms. Naranjo-Mora as she led him to the canned food area. 11/1/11 RP 20. Mr. Kinzle reached out and touched Ms. Naranjo-Mora's buttocks. Id. Mr. Kinzle then took a can of jalapeño peppers and took it to the counter to pay. Id. at 24.

Mr. Kinzle then went to the back of the store to stand with Mr. Wood. Id. at 26. Mr. Wood approached the register and

¹ The record consists of seven volumes, referred to herein as:

7/22/11 RP	-	Motion for New Counsel, July 22, 2011
7/29/11 RP	-	Motion for New Counsel (con't), July 29, 2011
8/25/11 RP	-	Motion re Conflict of Interest, August 25, 2011
10/31/11 RP	-	Trial - Volume 1, October 31, 2011
11/1/11 RP	-	Trial - Volume 2, November 1, 2011
11/2/11 RP	-	Trial - Volume 3, November 2, 2011
12/5/11 RP	-	Sentencing, December 5, 2011

asked Ms. Naranjo-Mora to show him where the chipotle peppers were. Id. at 27–28. She agreed. 11/1/11 RP 28. When Ms. Naranjo-Mora got back to the canned food area, she was approached from behind and Mr. Kinzle grabbed and held Ms. Naranjo-Mora. He kissed her and pulled her clothing, and rubbed himself against her. Id. at 29. She pushed him away and told him to let her go. Id. at 32. The incident was over quickly. See Id. at 93. Ms. Naranjo-Mora broke free, and ran outside of the store. Id. at 39. Mr. Kinzle also ran out of the store. 11/1/11 RP 40.

A passerby offered to call the police. Id. at 109. Mr. Wood recounted the incident and informed the police of Mr. Kinzle's address. Id. at 112–13. The police officers arrested Mr. Kinzle and took him back to the store for a show-up identification. Id. at 113–14. Ms. Naranjo-Mora could not identify Mr. Kinzle as the man who had grabbed her. Id. at 89.

2. Pre-trial motions

Prior to the trial, Mr. Kinzle made a motion for new counsel. See CP 308–10. At the hearing on that motion, Mr. Kinzle explained that he felt that his attorney, Cassie

Trueblood, was not willing to investigate potential evidence in his case, was withholding information from him, and was attempting to “strong arm” him into taking a deal. 7/22/11 RP 3–4; CP 309–10. He expressed that he did not believe that Ms. Trueblood would provide effective assistance to him at a trial. 7/22/11 RP 4–5; CP 310. Mr. Kinzle alerted the court that he had a history of mental health issues. 7/22/11 RP 3. He also told the judge multiple times that he believed that he would not receive a fair trial if he continued with Ms. Trueblood as his attorney. Id. at 3, 9.

Ms. Trueblood told the court that there was a “pretty severe breakdown in communication” between herself and her client. Id. at 5. She explained that the situation was getting “worse and worse and worse every time to the point now where [Mr. Kinzle] basically refuses to address me at all.” Id. While Ms. Trueblood had been working hard on the case and was competent to handle the trial, she said:

I do think that Mr. Kinzle is facing a severe amount of jeopardy, and given that, he should have an attorney that he trusts and is willing to communicate with, and that’s not the relationship we have at this point . . . I

think he has no trust in me and also no willingness to communicate with me . . . he's unwilling to talk to me. So I don't know how we can continue a relationship from here.

Id. at 5–6.

The judge told Mr. Kinzle and Ms. Trueblood to take a week to try to reestablish communication. 7/22/11 RP 11. At the continuation of the hearing the following week, Ms. Trueblood explained that they were still having trouble communicating. 7/29/11 RP 2. Mr. Kinzle said that he was in the same place he was before. Id. He reported there was a problem with Ms. Trueblood, that she was “refusing to bring in certain evidence,” and had “an almost strong-arm manner towards taking a deal instead of going to trial.” 7/29/11 RP 3. Mr. Kinzle said:

She has a couple letters that I sent her of other people that would be of value to [my case]. There's also other pieces of evidence, background that I'm told isn't worth considering. But like I said, I appreciate the ability to speak, sir, but I don't feel that there's really much point to it. The judge made it pretty much plain that they won't let Ms. Trueblood withdraw. I have no right, being as I can't afford my own attorney.

7/29/11 RP 4–5. Ms. Trueblood then described the progress that her office had made in investigating the case and conducting interviews. Id. at 4. The judge told Mr. Kinzle:

Well, you have the right to representation that can represent your interests, and if it becomes such an extent that you folks aren't communicating and stuff like that then we can make some moves. But it sounds to me like her office is investigating all your witnesses in this matter, you guys have the ability to talk at least at this point. There may be some differences getting ready for trial tactics and whatnot, but that's not a reason to switch horses in midstream.

Id. at 5. The judge denied Mr. Kinzle's motion for new counsel.

Id.

On August 11, over two months before trial began, the prosecutor made a "motion to clarify potential conflict of interest." CP 304–07. In that motion, the prosecutor explained that multiple jail inmates had stated that Mr. Kinzle had made multiple threats to blow up government buildings, and had threatened to kill the President and police officers. CP 304–05. They reported that Mr. Kinzle had threatened to blow up Ms. Trueblood's car and smash her head into a wall. CP 305. The prosecutor asked the judge to either replace Ms. Trueblood or to

obtain a written waiver of conflict from Mr. Kinzle, purportedly in order to prevent Mr. Kinzle from claiming on appeal that he was subject to ineffective assistance or a conflict of interest. CP 304, 306. At the motion hearing, Ms. Trueblood again stated that she had been preparing for trial and was ready to represent Mr. Kinzle. 8/25/11 RP 3. The judge stated, "Ms. Trueblood believes she can adequately represent him, and I've heard nothing to the contrary, and off you go." Id. at 4. Ms. Trueblood remained Mr. Kinzle's attorney throughout the trial.

3. Closing argument

Mr. Kinzle was charged with and tried for indecent liberties by forcible compulsion. CP 314. During closing argument, the prosecutor told the jury:

Could have been a lot worse if she didn't get away. That's what I told you yesterday morning. . . . We're not here accusing the defendant of rape, but we could have been had she not got away. We're not alleging some assault with serious injury. That could have happened too.

What I said yesterday morning is it was fortunate that she got away and it wasn't actually worse than it was . . . it could have been worse crimes . . . fortunately that's not what happened.

11/2/11 RP 36. The jury convicted Mr. Kinzle. CP 278.

4. Sentencing

The court imposed a sentence of 102 months to life. CP 20, 23. Among others, the judge imposed the following conditions of community custody, which Mr. Kinzle would be subject to for life, if released:

8. Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.

10. Do not date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer.

15. Do not possess or consume controlled substances unless you have a legally issued prescription.

16. Do not associate with known users or sellers of illegal drugs.

17. Do not possess drug paraphernalia.

23. You must subject to searches or inspections of any computer equipment to which you have regular access.

24. You may not possess or maintain access to a computer, unless specifically authorized by your supervising Community Corrections

Officer. You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices or receivers, CD/DVD burners, or any device to store or reproduce digital media or images.

CP 33–34. Ms. Trueblood objected to conditions 15, 17, 23 & 24.

12/5/11 RP 8–9. At the sentencing hearing, the judge stated that the conditions:

[A]re relevant to the crime including the provisions about drinking and substance abuse treatment if that should be indicated.

Obviously sexual deviancy treatment, if that's indicated, would entail issues about computer use. So I've left a few of those conditions.

12/5/11 RP 12–13.

E. ARGUMENT

Mr. Kinzle's trial violated his constitutional right to counsel because the court compelled him to proceed with an attorney after communication had broken down; because the judge failed to order a competency hearing after having substantial reason to doubt Mr. Kinzle's competence; and because the prosecutor committed flagrant misconduct. In

addition, there was insufficient evidence of forcible compulsion, and Mr. Kinzle's resulting sentence, with a maximum term of life, is cruel and unusual. Finally, the judge improperly imposed community custody conditions that were not crime-related and were unconstitutional. Mr. Kinzle's conviction and sentence should be reversed.

1. THE JUDGE IMPROPERLY DENIED
MR. KINZLE'S MOTION FOR
SUBSTITUTE COUNSEL IN SPITE OF
AN IRRECONCILABLE CONFLICT
BETWEEN MR. KINZLE AND HIS
ATTORNEY.

a. The federal and state constitutions guarantee the effective assistance of counsel in a criminal case. A defendant's right to counsel is protected by Article I, § 22 of the Washington Constitution and the Sixth Amendment to the Constitution of the United States.² Const. art. I § 22; U.S. Const. amends. VI; XIV; see United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); State v. Holley, 75 Wn. App. 191, 197 n. 2, 876 P.2 973 (1994). This guarantee does

² The Sixth Amendment provides that the accused will have the right "to have Assistance of Counsel for his defense." Article I, § 22 states, "in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

not ensure that a defendant will have a good relationship with his attorney, but rather, ensures that the defendant will have the representation of “an effective advocate.” Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

An effective advocate is one who can communicate with her client. At all stages in the trial process, a defendant must be able to “provide needed information to his lawyer and to participate in the making of decisions on his own behalf.” Riggins v. Nevada, 504 U.S. 127, 144, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992). Thus, when a criminal defendant no longer trusts his attorney, and has a legitimate reason, a trial court’s refusal to remove the attorney constructively denies the defendant effective counsel. Daniels v. Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005). This is the case even where the breakdown in communication is caused solely by the defendant’s refusal to speak to his attorney, unless the defendant demonstrates “unreasonable contumacy.” Id. (quoting Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970)).

In the test for whether a defendant should have been provided substitute counsel, competency is not the question: the right to counsel is violated when the defendant is compelled to proceed with an attorney with whom he has an irreconcilable conflict, even if the attorney is competent. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002); Brown, 424 F.2d at 1170. To determine whether the denial of a motion to substitute counsel was improper, the Washington Supreme Court has adopted a three-part test from the Ninth Circuit. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (citing the test outlined in United States v. Moore, 159 F.3d 1154, 1158–59 (9th Cir. 1998)). The factors are “(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion.” Id.

b. Mr. Kinzle and his attorney could not communicate, and Mr. Kinzle was denied effective assistance of counsel. Under the three-part test adopted in Stenson, the trial court’s denial of Mr. Kinzle’s motion for substitute counsel was improper.

i. The conflict was longstanding and irreconcilable.

Mr. Kinzle and Ms. Trueblood had an ongoing, intractable

conflict; instead of inquiring into that conflict, the court questioned whether Ms. Trueblood was competent. That was an improper inquiry, and the conflict between Mr. Kinzle and Ms. Trueblood persisted through the trial. See CP 273–76 (Letter from Mr. Kinzle to court, written after his conviction but before sentencing, detailing the evidence that Ms. Trueblood had failed to investigate, and stating that she had deliberately sabotaged his case because of a conflict of interest with him).

The first part of the test, the extent of the conflict, is focused on the nature of the relationship between the attorney and defendant, the degree of cooperation or communication between them, and whether concrete arguments or threats had arisen over the representation. In Nguyen, for example, the defendant asked the court to substitute counsel at the start of trial. 262 F.3d at 1000. He stated that his attorney was rude to him, almost never talked to him, and was not helping in his case. Id. The attorney confirmed that Mr. Nguyen “[would] not talk to [him],” but said that he was prepared to go to trial. Id. at 1000–01. The appellate court held that the trial judge had abused his discretion in denying a continuance to substitute

counsel in part because there had been a “complete breakdown in the attorney-client relationship.” Id. at 1004. As a result, “Nguyen could not confer with his counsel about trial strategy or additional evidence, or even receive explanations of the proceedings. In essence, he was ‘left to fend for himself,’ in violation of his Sixth Amendment right to counsel.” Id. (quoting United States v. Gonzalez, 113 F.3d 1026, 1029 (9th Cir. 1997)); see also Brown, 424 F.2d 1169 (improper to “force” Brown into a trial with an attorney “with whom he would not cooperate, and with whom he would not, in any manner whatsoever, communicate . . . the attorney was understandably deprived of the power to present any adequate defense in Brown's behalf.”).

The facts are remarkably similar here. Mr. Kinzle told the court that he believed that Ms. Trueblood was not investigating helpful evidence, and was not going to provide him with effective representation. 7/22/11 RP 3–5; CP 10. Ms. Trueblood said that as a result, Mr. Kinzle “basically refuse[d] to address [her] at all.” 7/22/11 RP 5. The trial judge in Nguyen told the attorney to “Do the best you can;” likewise here, the judge told Ms. Trueblood and Mr. Kinzle to take “a week to sort of work this

out.” Nguyen, 262 F.3d 1001; 7/22/11 RP 12. They never did. See 7/29/11 RP 2, 3; RP 304–07 (State’s motion to clarify the conflict of interest between Ms. Trueblood and Mr. Kinzle, made nearly a month after the court’s denial of Mr. Kinzle’s motion to substitute counsel).

In addition, the relationship had deteriorated to the point where Mr. Kinzle had made physical threats against Ms. Trueblood, stating that she was “refusing to bring in certain evidence,” and believing “she works for the same fucking people that are trying to give me life [in prison].” See 7/29/11 RP 3; CP 305. In United States v. Williams, the Ninth Circuit held that it was error to deny a motion to substitute counsel when the defendant and his attorney “were at serious odds and had been for some time,” and their relationship was marked by “quarrels . . . threats, and counter-threats.” 594 F.2d 1258, 1259–60 (9th Cir. 1979). Here, there was an irreconcilable conflict between Mr. Kinzle and Ms. Trueblood that amounted to a total breakdown in communications. See Moore, 159 F.3d at 1160.

ii. The judge’s hasty inquiry was inadequate because it focused primarily on trial counsel’s competence.

Furthermore, the court's investigation into the extent of the conflict between Ms. Trueblood and Mr. Kinzle was inadequate, for two reasons: first, the inquiry was focused on Ms. Trueblood's competency, rather than on her ability to communicate with her client; and second, because both hearings on the motion to substitute counsel were perfunctory and free from meaningful discussion about Mr. Kinzle's concerns. In Nguyen, the trial judge responded to the defendant's request for new counsel by stating repeatedly that he already had an experienced attorney who would provide fair representation, and that the attorney was "doing a good job as far as I'm concerned." 262 F.3d at 1000–01. Reversing the trial court, the Ninth Circuit explained that the judge "focused exclusively on the attorney's competence and refused to consider the relationship between Nguyen and his attorney. Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense." Id. at 1003.

This is what happened here. In response to Mr. Kinzle's concerns that Ms. Trueblood was not adequately representing him, the prosecutor argued, "it sounds like he just doesn't hear

what he wants to hear, or she doesn't tell him what he wants to hear so he's complaining." 7/22/11 RP 7. The judge then told Mr. Kinzle, "what it sounds to me is like you are not hearing what you want to hear. For someone to present a defense for you, you actually have to have a defense." Id. at 12. The court heard many assertions from Ms. Trueblood about the work and investigation that she had done on the case, but also acknowledged that Mr. Kinzle did not have any trust in her or willingness to communicate with her. Id. at 5–6. The trial judge told Mr. Kinzle, "you have no choice in the matter, you don't get to pick and choose. You've been appointed competent counsel." 7/29/11 RP 4. The judge asked Ms. Trueblood what discovery she had done and what remained, and she responded, indicating that progress had been made. Id. at 5.

The judge told Mr. Kinzle, "Well, you have the right to representation that can represent your interests . . . But it sounds to me like her office is investigating all your witnesses in this matter, you guys have the ability to talk at least at this point." 7/29/11 RP 5. Finally, after receiving a motion from the State detailing the threats that Mr. Kinzle had made against

Ms. Trueblood, the court heard evidence from Ms. Trueblood that she was still prepared to represent Mr. Kinzle at trial. 8/25/11 RP 3. The prosecutor then asked the judge if he wanted to inquire of Mr. Kinzle. Id. at 4. The judge said “I don’t. No. Ms. Trueblood believes she can adequately represent him, and I’ve heard nothing to the contrary, and off you go.” Id. The hearing ended. Id.

Here, the judge was focused on Ms. Trueblood’s preparation and competency, and not on the conflict between herself and Mr. Kinzle. See Nguyen, 262 F.3d at 1003. In such cases, “The problem arises because the court did not . . . take the necessary time and conduct such necessary inquiry as might have eased [the defendant’s] dissatisfaction, distrust, and concern.” Brown, 424 F.2d at 1170. Moreover, the trial court “asked [Mr. Kinzle] and his attorney only a few cursory questions, did not question them privately, and did not interview any witnesses.” Nguyen, 262 F.3d at 1005. As a result, Mr. Kinzle proceeded to trial without being able to assist in his own defense, and he was constructively denied effective assistance of counsel.

iii. The motion, made well before trial began, was timely. Mr. Kinzle made his motion more than three months before trial began. This was adequate time to appoint new counsel, and his motion was timely. See Moore, 159 F.3d at 1159, 1161 (motions timely when made one month and then two weeks before trial); United States v. D'Amore, 56 F.3d 1202, 1204–05 (9th Cir. 1005) (motion on eve of trial timely when defendant had attempted to contact court ten days prior).

Mr. Kinzle's conflict with Ms. Trueblood was deep and irreconcilable. The court's inquiry into the nature of the conflict was inadequate, and Mr. Kinzle's request for new counsel was timely. The trial court denied Mr. Kinzle his constitutional right to counsel by denying his motion to substitute counsel and compelling him to go to trial with an attorney with whom he had a severe breakdown in communication. See Nguyen, 262 F.3d at 1005. The error is structural, requiring reversal. State v. Heddrick, 166 Wn.2d 898, 910 n. 9, 215 P.3d 201 (2009) (citing Bell v. Cone, 535 U.S. 685, 696 n. 3, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)).

II. THE TRIAL COURT VIOLATED
VIOLATED WASHINGTON STATUTES
AND THE CONSTITUTION BY NOT
ORDERING A COMPETENCY HEARING.

a. As soon as a court has reason to doubt a defendant's competency, trial may not proceed. Both statutory and constitutional law prohibit the trial of an incompetent individual. Drope v. Missouri, 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982); RCW 10.77.050. The federal standard for competency is whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational [and] factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

In Washington, protections for defendants are even greater. In re the Personal Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). Competency to stand trial is based on (1) whether the accused is capable of properly understanding the nature of the proceedings against him and (2) whether he is

capable of rationally assisting his legal counsel in the defense of his cause. RCW 10.77.010(15). The law states, “[N]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050.

A court must make a competency determination if it has reason to doubt the defendant’s competence to stand trial. Godinez v. Moran, 509 U.S. 389, 391, 402 n.13, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); Drope, 420 U.S. at 178–80. “The factors a trial judge may consider in determining whether or not to order a formal inquiry into the competence of an accused include the ‘defendant’s appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.’” Fleming, 142 Wn.2d at 863 (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)). Where there is a substantial question of doubt regarding whether a defendant is competent to stand trial, Washington courts have held that due process requires the court to stop or enjoin proceedings and conduct a competency

hearing. Fleming, 142 Wn.2d at 863; State v. Hicks, 41 Wn. App. 303, 308, 704 P.2d 1206 (1985).

The procedures for handling a defendant with questionable competency are outlined in RCW 10.77. They are mandatory. See Wicklund, 96 Wn.2d at 805. After a party or the court raises doubts as to the defendant's competency, the court must order an evaluation of the defendant by proper experts. RCW 10.77.060. Upon completion of the evaluation, the court must then determine the individual's competency to stand trial, plead guilty, or proceed pro se. Fleming, 142 Wn.2d at 863.

b. The trial court, which had several reasons to question Mr. Kinzle's competency before trial, erred by not stopping the proceedings and ordering an evaluation. There are no definitive signs that require a competency hearing, and much discretion rests with the trial judge. City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985); State v. O'Neal, 23 Wn. App. 899, 902, 600 P.2d 570 (1979). Still, where there are clear indications that a defendant is not behaving rationally, he is not competent to stand trial and the law requires that he undergo an evaluation. See RCW 10.77.060. For example, in State v.

Marshall, the defendant suffered from paranoia and auditory hallucinations. 144 Wn.2d 266, 271, 29 P.3d 192 (2001). The court held that it was error not to either allow him to withdraw a guilty plea or conduct a competency hearing. Id. at 281–82. One indication from counsel that a defendant may not be competent is enough to require a court to order a competency hearing. State v. Madsen, 168 Wn.2d 496, 509–10, 229 Wn.2d 714 (2010).

In this case, the judge had substantial evidence before trial of Mr. Kinzle’s questionable competency. At the first hearing on the motion to substitute counsel, Mr. Kinzle told the judge he had a problematic “mental health history.” 7/22/11 RP 3. The prosecutor informed the judge that Mr. Kinzle had threatened to blow up government buildings and kill the President of the United States. CP 304–05. Based on this evidence, the court had a duty to stop proceedings and order a

competency hearing before the start of trial.³ See RCW 10.77.060; Madsen, 168 Wn.2d at 509–10.

c. The court’s failure to inquire into Mr. Kinzle’s competence requires reversal of his conviction. Mr. Kinzle was denied due process when the court did not order a competency evaluation after witnessing reasons to doubt his competency. His conviction should be reversed. See Fleming, 142 Wn.2d at 863–64; State v. Anene, 149 Wn. App. 944, 956, 205 P.3d 992 (2009).

III. THERE WAS INSUFFICIENT EVIDENCE THAT MR. KINZLE USED FORCIBLE COMPULSION.

a. “Forcible compulsion” in the statute and caselaw requires actual evidence that a defendant used force to overcome resistance to touching. The test for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found all elements of the offense beyond a reasonable doubt. State v. Green, 94

³ Brent Vannoy, an inmate, testified that Mr. Kinzle “said that he’d act crazy and stuff for the court so they thought he was looney and get away with what he did.” 11/2/11 RP 21. Regardless of veracity, this testimony occurred after the judge had significant reason to doubt Mr. Kinzle’s competency.

Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction based on insufficient evidence violates due process. In re Martinez, 171 Wn.2d 354, 369, 256 P.3d 277 (2011) (citing Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Forcible compulsion is defined as

physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

RCW 9A.44.010(6). This Court has examined the statute several times on sufficiency challenges, and has consistently held that in the absence of a threat, there must be evidence that force was used to successfully overcome resistance to the offensive touching.

In State v. Ritola, the defendant and a camp counselor played video games one night in a gymnasium. 63 Wn. App. 252, 253, 817 P.2d 1390 (1991). Ritola, who was next to the counselor, reached out and grabbed her right breast. Id. He squeezed it, and then “instantaneously” removed his hand. Id. Ritola was charged with indecent liberties by forcible compulsion, and the court convicted him. Id. The court found that the counselor had

not had enough time to resist before the touching was completed, but that the resistance was “implied,” and so therefore there was evidence of forcible compulsion. Id.

This Court reversed, explaining that there was force in the traditional sense involved in every act of sexual touching, because force is what puts a body or object in motion. Ritola, 63 Wn. App. at 254. Accordingly, the Legislature defined forcible compulsion as something more than the ordinary force needed to achieve sexual contact. Id. The court then explained that there was not evidence in the record of forcible compulsion in that case, because while Ritola used the force necessary to touch the counselor’s breast, he had not used any force to overcome resistance by the counselor. Id. at 255. There would have needed to be an inference that “the force used by Ritola was directed at overcoming resistance, or that such force was more than that needed to accomplish sexual touching.” Id. at 256–27.

In contrast, in State v. McKnight, this Court held that there was sufficient evidence of forcible compulsion when two juveniles were kissing on the living room couch, and the victim told the defendant to stop. 54 Wn. App. 521, 522, 774 P.2d 532

(1989). In spite of her protestations, McKnight pushed her down onto the couch and began to pull on her clothes. Id. at 523. She told him again to stop, but he continued. Id. He then took off his pants and had intercourse with her, in spite of the fact that she told him it hurt. Id. The court held that although the victim's resistance was vocal, and not physical, the force that McKnight used occurred during and after the force, and was more than the force needed for ordinary sexual contact. Id. at 527–28; see also In re Detention of Moore, 167 Wn.2d 113, 116, 216 P.3d 1015 (2009) (conviction for attempted rape by forcible compulsion where defendant pushed victim into a wall after she started to scream and held a weapon against her); State v. Nysta, ____ Wn. App. ____, 275 P.3d 1162, 1172 (May 7, 2012) (forcible compulsion existed when defendant hit victim repeatedly in the head when she tried to move away); In re Detention of Alsteen, 159 Wn. App. 93, 96, 244 P.3d 991 (2010) (rape by forcible compulsion conviction for forcing victim at knifepoint to perform oral sex); compare Moore, 167 Wn.2d at 117 (defendant had been acquitted of indecent liberties by forcible compulsion although admitting to grabbing a woman from behind, pressing his body

against hers, and thrusting his hips against her buttocks to mimic sexual intercourse).

b. The testimony, which showed that Mr. Kinzle ran immediately after Ms. Naranjo-Mora resisted his embrace, was insufficient for the jury to find forcible compulsion beyond a reasonable doubt.⁴ Here, there was not enough evidence of forcible compulsion because Mr. Kinzle made no threat to Ms. Naranjo-Mora, and because both her testimony and that of Mr. Wood show that the encounter between Mr. Kinzle and Ms. Naranjo-Mora ended as soon as she began to resist. Mr. Wood stated that after Mr. Kinzle and Ms. Naranjo-Mora went to the other side of the store, Mr. Wood began looking for an item.

11/1/11 RP 106. The prosecutor asked:

Q: What do you remember happening next?

A: I heard a scream, and I went around, and he ran.

⁴ There were two contacts between Mr. Kinzle and Ms. Naranjo-Mora: the first, when he touched her buttocks, and second, when he embraced her from behind. 11/1/11 RP 20, 34. The prosecutor conceded that there was not evidence of forcible compulsion for the buttocks touching; thus the State was constrained to prove that the temporary embrace was "forcible compulsion." See 11/2/11 RP 36, 40.

Id. at 107. Mr. Wood had been walking toward Ms. Naranjo-Mora when he heard the scream. Id. at 108. The prosecutor asked:

Q: Did you see them together at all?

A: No. We ran.

Id. at 108; see also Id. at 118 (Q (by Mr. Kinzle's attorney: And you indicated that after you heard the scream, Jeff left the store? A: Yes. He ran.)).

Ms. Naranjo-Mora testified, "When he got next—close to me, he grab me, and he was behind me grabbing me. And at that moment, I tried—I resist, but I turn around and I—ended up facing face-to-face." 11/1/11 RP at 35. When asked how the contact ended, she said, "Because I push him away as much as I could. I tried to push him back." Id. at 38. The prosecutor asked:

Q: I asked if you were using a normal voice or whispering or speaking—yelling?

A: I was yelling.

Q: Were you able to break free?

A: Yes.

Q: What did you do when you got free?

A: I broke free, and then I run outside the store asking for help.

Id. at 39.

This evidence shows that the following happened in short succession: Mr. Kinzle grabbed Ms. Naranjo-Mora, she pushed him away, she screamed, and he ran. Id. at 107, 35. This set of facts is much closer to Ritola than McKnight: the contact was short, and after resistance began, Mr. Kinzle stopped. In McKnight, in contrast, the forced sexual contact happened *after* resistance from the victim. 54 Wn. App. at 523, 527–28. The evidence in the record was not enough to permit a rational trier of fact to find that Mr. Kinzle used force to overcome resistance beyond a reasonable doubt. See Green, 94 Wn.2d at 221.

Furthermore, the forcible compulsion element raises the crime of indecent liberties from a class B to a class A felony. See RCW 9A.44.100(2)(a), (b). The forcible compulsion element also subjects a defendant charged with indecent liberties to the indeterminate sentencing scheme. See RCW 9.94A.507(1)(a)(i). In light of the heightened jeopardy associated with the forcible compulsion component of the crime, the burden of proof must be

strictly applied. See United States v. August, 86 F.3d 151, 154 (9th Cir. 1996) (“Additionally, since a defendant's sentence depends in large part upon the amount of drugs attributable to his conduct, and approximation is by definition imprecise, the district court must err on the side of caution in choosing between two equally plausible estimates.”). Here, there was not sufficient evidence to sustain the forcible compulsion element, and Mr. Kinzle’s conviction should be reversed. 63 Wn. App. at 256–57.

IV. THE PROSECUTOR COMMITTED
FLAGRANT MISCONDUCT BY
USING INFLAMMATORY ARGUMENT
AND ARGUING FACTS NOT IN
EVIDENCE.

The prosecutor compensated for the State’s lack of evidence of forcible compulsion by using inflammatory, prejudicial argument during closing. This was misconduct. A defendant claiming misconduct must show improper comments and prejudice. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Where there was no objection below, a defendant must show that the conduct was so flagrant and ill-intentioned that the prejudice could not have been cured by an instruction to

the jury. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

Here, the prosecutor improperly argued facts not in evidence when he stated:

We're not here accusing the defendant of rape, but we could have been had she not got away. We're not alleging some assault with serious injury. That could have happened too.

What I said yesterday morning is it was fortunate that she got away and it wasn't actually worse than it was . . . it could have been worse crimes . . . fortunately that's not what happened.

11/2/11 RP 36. "Comments calculated to encourage the jury to render a verdict based on facts not in evidence is improper." In re Detention of Bergen, 146 Wn. App. 515, 535, 195 P.3d 529 (2008) (citing State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), cert. denied, 551 U.S. 1137, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007)). That is what happened here: there was no evidence presented that Mr. Kinzle intended to rape Ms. Naranjo-Mora. There was no evidence presented that he intended to injure her, or to commit any "worse crimes." Thus, rather than arguing facts based on the record, the prosecutor

was making an argument that was calculated to inflame the jury and urge them to convict based on their fear of what could have happened.

This misconduct was repeated; the prosecutor noted that he also “said yesterday” that “it was fortunate . . . it wasn’t actually worse than it was.” 11/2/11 RP 36. The prosecutor was not responding to any argument or theory put forth by the defense. C.f. Weber, 159 Wn.2d at 278–79; see 11/2/11 RP 51–56 (defense argument focused on credibility of victim and mistaken identity). Rather, the patently improper argument encouraged the jury to convict based on emotion, rather than fact. See State v. Jones, 144 Wn. App. 284, 297, 183 P.3d 307 (2008) (argument “wholly improper” when prosecutor stated that defendant was “dangerous” and a threat to a witness and his family, and that the witness had not testified out of fear of the defendant).

In addition to being improper, the prosecutor’s argument was flagrant and highly prejudicial. Arguing facts not in evidence is a technique that is well-established as misconduct in Washington courts. See, e.g., Weber, 159 Wn.2d at 276; Jones, 144 Wn. App. at 293–94. As this Court has explained, when a

prosecutor makes improper comments well after court opinions have disallowed them, the conduct is flagrant and ill-intentioned. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (“We note that this improper argument was made over two years after the opinion in [State v.] Casteneda-Perez, [61 Wn. App. 354, 362–63, 810 P.2d 74 (1991)]. We therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial.”).

In a case over 25 years old, this Court held that a prosecutor's reading an anonymous rape victim's poem during closing argument was an example of improper argument of facts not in evidence and appealing to the passions of the jury. See State v. Clafin, 38 Wn. App. 847, 849–51, 690 P.2d 1186 (1984). The court explained, “In such an emotionally charged trial, the use of . . . vivid and highly inflammatory imagery . . . was nothing but an appeal to the jury's passion and prejudice.” Id. at 850. Thus, it “was so prejudicial that no curative instruction would have sufficed to erase the prejudice it was bound to engender in the minds of the jurors.” Id. at 851. This case is similar: the tactics the prosecutor used were clearly improper

under settled law. They were also highly inflammatory. The prosecutor's conduct was flagrant and ill-intentioned. See Fleming, 83 Wn. App. at 214; Clafin, 38 Wn. App. at 851.

Furthermore, the prosecutor's argument was prejudicial. Based on the evidence presented, the State would have difficulty proving that Mr. Kinzle had used forcible compulsion. See Supra § E.III. The State needed an extra push from inflammatory argument to be able to convict Mr. Kinzle; the argument the prosecutor used allowed the jury to overlook the facts and convict Mr. Kinzle based on the belief that he was more dangerous than the evidence showed. See Fleming, 83 Wn. App. at 215 ("trained and experienced prosecutors presumably do not risk appellate reversal of a . . . conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case."). Based on the scant evidence presented of forcible compulsion, an essential element of the charged offense, the prosecutor's repeated argument that it could have been "worse," including "rape" and "serious injury," was prejudicial. See 11/2/11 RP 36; supra § E.III; State v. Reed, 102 Wn.2d 140, 147-8, 684 P.2d 699 (1984).

Mr. Kinzle's conviction should be reversed. Fleming, 83 Wn.

App. at 216.

V. MR. KINZLE'S INDETERMINATE SENTENCE, WHICH SUBJECTS HIM TO LIFETIME CONFINEMENT OR SUPERVISION, IS UNCONSTITUTIONAL.

Mr. Kinzle's conviction for indecent liberties by forcible compulsion subjects him to sentencing under RCW 9.94A.507, the "sentencing of sex offenders" statute. See RCW 9.94A.507(1)(a)(i). Under the statute, a sentencing judge is compelled to impose a maximum term that is the maximum sentence for that offense. RCW 9.94A.507(3)(b). The maximum term for indecent liberties by forcible compulsion, a Class A felony, is life. See RCW 9A.44.100(2)(b); RCW 9A.20.021(1)(a). The minimum term is to be within the standard sentence range; for Mr. Kinzle, the minimum term is 102 months. See RCW 9.94A.507(c)(i); CP 22.

After the minimum term passes and until the end of the maximum term—the end of Mr. Kinzle's natural life—he is subject to review by the Indeterminate Sentencing Review Board. RCW 9.94A.507(6)(a). Beginning shortly before the end of

Mr. Kinzle's minimum sentence, the Board will review evidence of evaluations and will release Mr. Kinzle unless it finds by a preponderance of the evidence that it is "more likely than not" that Mr. Kinzle will reoffend. RCW 9.95.420(3). If it makes such a finding, the Board will establish a new minimum term, and the process begins again. Id. If the Board decides to release Mr. Kinzle, he will be subject to community custody under the Department of Corrections and subject to the authority of the Board until the expiration of the maximum sentence, or until the end of his life. RCW 9.94A.507(5), (6)(b); CP 22.

Mr. Kinzle received this life sentence for an incident in which no one was raped and no one was seriously injured, and which lasted two minutes or less. 11/1/11 RP 93. Subject to the sentencing of sex offenders statute, Mr. Kinzle will either be in prison or subject to Department of Corrections (DOC) supervision for the rest of his life. RCW 9.94A.507(5), (6). This sentence is cruel under Article I, section 14 of the Washington Constitution, and cruel and unusual under the Eighth Amendment to the United States Constitution. See Const. art. I, § 14; U.S. Const. amend. VIII.

a. Mr. Kinzle's sentence of lifetime confinement or supervision is cruel under the state constitution. Article I, section 14 of the Washington Constitution states, "excessive bail shall not be required, excessive fines, imposed, nor cruel punishment inflicted." While Washington framers initially considered language identical to the Eighth Amendment's prohibition on "cruel" and "unusual" punishment, they decided that "cruel" best embodied their intent. State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980) (citing The Journal of the Washington State Constitutional Convention: 1889 501–02 (B. Rosenow ed. 1962)); Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution, A Reference Guide 28 (2002). Washington courts have held that, based on the difference in purpose and language, Article I, section 14 is more protective of individuals than the Eighth Amendment.⁵ State v. Roberts, 142 Wn.2d 471, 505–06, 14 P.3d 713 (2000); State v. Thorne, 129 Wn.2d 736, 772–73, 921 P.2d 514 (1996) (abrogated on other

⁵ Because it is an established principle that Article I, section 14 is interpreted independently of the Eighth Amendment, no Gunwall analysis is necessary. Roberts, 142 Wn.2d at 505 n. 11; State v. Gunwall, 106 Wn.2d 54, 61–62, 720 P.2d 808 (1986).

grounds by Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)); see Fain, 94 Wn.2d at 393.

Article I, section 14 is concerned with sentences that are grossly disproportionate to the crime committed. State v. Morin, 100 Wn. App. 25, 29, 995 P.2d 113, rev. denied, 142 Wn.2d 1010, 16 P.3d 1264 (2000). To determine whether a sentence is grossly disproportionate to the crime, Washington courts apply the factors articulated in Fain: (1) the nature of the crime; (2) the legislative purpose behind the sentence; (3) the sentence the defendant would receive for the same crime in other jurisdictions; and (4) the sentence the defendant would receive for other similar crimes in Washington. Morin, 100 Wn. App. at 29 (citing Fain, 94 Wn.2d at 397).

i. Mr. Kinzle's crime was relatively innocuous.

When considering the first Fain factor, courts look to whether a crime was violent and whether it was against a person or property. State v. Gimarelli, 105 Wn. App. 370, 381, 20 P.3d 430 (2001). "Courts should also consider the actual facts of the case." Id. (citing Morin, 100 Wn. App. at 31). Looking strictly to the statute, indecent liberties by forcible compulsion is a crime

against a person, and it is classified as a “10” on a 16-point scale of seriousness. RCW 9A.44.100(1)(a); RCW 9.94A.515.

But reviewing the actual facts of this case shows that this crime is less serious than many other violent offenses, and among the least serious of convictions for indecent liberties by forcible compulsion. Here, the encounter lasted less than two minutes, Mr. Kinzle did not have a weapon, he did not threaten Ms. Naranjo-Mora, and she was not injured. See 11/1/11 RP 29, 39, 40, 93. Ms. Naranjo-Mora was also an adult, and was not of diminished capacity. See CP 311 (Showing that Ms. Naranjo-Mora was 25 years old at the time of the incident). In Gimarelli, this Court explained that a life sentence was not cruel where the defendant had sneaked into the room of an 11-year-old girl, put his hand on her stomach below her navel and down the side of her body. 105 Wn. App. 373. The young girl pushed him away four times, and four times he persisted. Id. He was tried and convicted for attempted first degree child molestation. Id.

In State v. Flores, this Court upheld a life sentence for two counts of first-degree child molestation, where the defendant had rubbed the genital area of an eight-year-old child.

114 Wn. App. 218, 220–21, 225, 56 P.3d 622 (2001); see also Morin, 100 Wn. App. at 26, 34 (life sentence not unconstitutional where defendant pulled down the pants of 95-year-old blind woman, covered her mouth to keep her quiet, and touched her genitals).

Here, in contrast, when Ms. Naranjo-Mora resisted, Mr. Kinzle broke the embrace and fled. See 11/1/11 RP 39, 108. The degree of violence against a person in this case is not like State v. Rivers, where the defendant threatened a victim with a gun, struggled with the victim over a bank bag before taking it, and then when confronted, told the victim, “I’ll blow your head off. It is not worth your life.” 129 Wn.2d 697, 701, 921 P.2d 495 (1996). Rivers was convicted of robbery in the second degree, and was sentenced to life. Id. at 703. The court explained that the crime was serious because it “involved a threat of violence toward another person.” Id. at 713. There was no such threat of violence here—certainly no death threat—and no weapon. Applying the first Fain factor to the facts of this case and comparing them to offenses in the caselaw, Mr. Kinzle’s indeterminate sentence is disproportionate to the crime.

ii. Mr. Kinzle's harsh sentence is incompatible with legislative intent. The second Fain factor is the legislative purpose behind the sentence. The purposes of the Sentencing Reform Act, which contains the sentencing of sex offenders statute, are set out in RCW 9.94A.010. They are:

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses;
- (4) Protect the public;
- (5) Offer the offender an opportunity to improve himself or herself;
- (6) Make frugal use of the state's and local governments' resources; and
- (7) Reduce the risk of reoffending by offenders in the community.

As outlined above, the very first goal of the Legislature—to ensure that punishment is proportionate to the seriousness of the offense—is subverted by Mr. Kinzle's sentence, which assigns a lifetime of monitoring for a single act of offensive

touching. Moreover, in Rivers, Flores, Gimarelli, and Morin, the life sentences were imposed based on predicate offenses under the Persistent Offender Accountability Act, the “three strikes” and “two strikes” law. See Rivers, 129 Wn.2d at 712; Flores, 114 Wn. App. at 225; Gimarelli, 105 Wn. App. at 382; Morin, 100 Wn. App. at 30; RCW 9.94A.030(37); RCW 9.94A.570. Here, Mr. Kinzle is subject to a sentence of life in prison or under supervision for a first offense. See RCW 9.94A.507(1)(a)(i).

Comparing these cases shows that goal (2), promoting respect for the law with “just” punishment, is also not served by a lifetime sentence based on the facts of Mr. Kinzle’s offense. Factor (3) is discussed as part of the third and fourth Fain factors, and also shows that the legislative purpose is not served by Mr. Kinzle’s lifetime sentence. Infra § E.V.a.iii; E.V.a.iv. Given the lack of serious harm to Ms. Naranjo-Mora, with due regard for her emotional trauma, a sentence of supervision for *life* cannot be necessary to protect the public from Mr. Kinzle under goals (4) and (7), especially given that he will spend the next 102 months in prison, kept entirely apart from the public. Accordingly, a lifetime of confinement or supervision for Mr.

Kinzle's offense is certainly not a frugal use of the state's resources. Mr. Kinzle's sentence does not comport with the legislative purposes behind the sentencing act, and the second Fain factor weighs against constitutionality.

iii. Mr. Kinzle's lifetime sentence is harsher than he would receive in the majority of jurisdictions in the United States. The third Fain factor compares Mr. Kinzle's sentence to what he would have received in other jurisdictions. Morin, 100 Wn. App. at 31–32. Whether determinate or indeterminate, the primary difference between Washington's classification of Mr. Kinzle's offense and that of other states is its statutory maximum (and therefore mandatory maximum under RCW 9.94A.507(1)(a)(3)(b)) of life. See RCW 9A.20.021(1)(a); RCW 9A.44.100(2)(b). For ease of comparison, Washington's indecent liberties by forcible compulsion statute reads as follows:

- (1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:
 - (a) By forcible compulsion.

RCW 9A.44.100. Forcible compulsion is defined as:

physical force which overcomes resistance, or a

threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

RCW 9A.44.010(6). In most states, the equivalent crime is classified as a Class B or Class C felony (or something lower), and their corresponding statutory maximums are much lower.⁶

See Ala.Code 1975 § 13A-6-66 & Ala.Code 1975 § 13A-5-6 (Alabama);⁷ Ann.Cal.Penal Code § 243.4 (California);⁸ CGSA § 53a-72a & CGSA § 53a-35a (Connecticut);⁹ DC ST § 22-3004

⁶ The states not listed in this survey did not have an offense directly comparable to Washington's indecent liberties by forcible compulsion.

⁷ Ala.Code 1975 § 13A-6-66. Sexual abuse in the first degree. (a) A person commits the crime of sexual abuse in the first degree if: (1) He subjects another person to sexual contact by forcible compulsion . . . (b) Sexual abuse in the first degree is a Class C felony. Ala.Code 1975 § 13A-5-6 - Sentences of imprisonment for felonies. (a) Sentences for felonies shall be for a definite term of imprisonment . . . within the following limitations: (3) For a Class C felony, not more than 10 years or less than 1 year and 1 day.

⁸ West's Ann.Cal.Penal Code § 243.4. Sexual battery (a) Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000); or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars (\$10,000).

⁹ CGSA § 53a-72a. Sexual assault in the third degree: Class D or C felony. (a) A person is guilty of sexual assault in the third degree when such person (1) compels another person to submit to sexual contact (A) by the use of force against such other person or a third person, or (B) by the threat of use of force against such other person or against a third person, which reasonably causes such other person to fear physical injury to himself or

(District of Columbia);¹⁰ HRS § 707-733 & HRS § 701-107

(Hawaii);¹¹ IC § 35-42-4-8 & IC § 35-50-2-7 (Indiana);¹² ICA §

709.5 & ICA § 902.3 (Iowa);¹³ KRS § 510.110 & KRS § 532.060;¹⁴

herself or a third person . . . b) Sexual assault in the third degree is a class D felony (statute was abrogated on other grounds by State v. John M., 894 A.2d 376 (Conn. App. 2006)). CGSA § 53a-35a. Imprisonment for felony (8) for a class D felony, a term not less than one year nor more than five years.

¹⁰ DC ST § 22-3004. Third degree sexual abuse.

A person shall be imprisoned for not more than 10 years and may be fined in an amount not to exceed \$100,000, if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.

¹¹ HRS § 707-733. Sexual assault in the fourth degree (1) A person commits the offense of sexual assault in the fourth degree if: (a) The person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion . . . (2) Sexual assault in the fourth degree is a misdemeanor. §701-107 Grades and classes of offenses. (3) A crime is a misdemeanor if it is so designated in this Code or in a statute other than this Code enacted subsequent thereto, or if it is defined in a statute other than this Code which provides for a term of imprisonment the maximum of which is one year.

¹² IC 35-42-4-8. Sexual battery Sec. 8. (a) A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is: (1) compelled to submit to the touching by force or the imminent threat of force . . . commits sexual battery, a Class D felony. IC 35-50-2-7 Class D felony. Sec. 7. (a) A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years. In addition, the person may be fined not more than ten thousand dollars (\$10,000).

¹³ ICA § 709.5. Sexual abuse in the third degree. A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances: 1. The act is done by force or against the will of the other person . . . Sexual abuse in the third degree is a class "C" felony. ICA § 902.9. Maximum sentence for felons. 4. A class "C" felon, not an habitual offender, shall be confined for no more than ten years, and in addition shall be sentenced to a fine of at least one thousand dollars but not more than ten thousand dollars.

¹⁴ KRS § 510.110 Sexual abuse in the first degree. (1) A person is guilty of sexual abuse in the first degree when: (a) He or she subjects another

17-A MRSA § 255-A & 17-A MRSA § 1252 (Maine);¹⁵ MCLA
750.520e (Michigan);¹⁶ MSA § 609.345 (Minnesota);¹⁷ NCGSA §
14-27.5A (North Carolina);¹⁸ OH RC § 2907.05 & OH RC §
2929.14 (Ohio);¹⁹ ORS § 163.427 & ORS § 161.605 (Oregon);²⁰ 18

person to sexual contact by forcible compulsion . . . (2) Sexual abuse in the first degree is a Class D felony, KRS § 532.060 Sentence of imprisonment for felony. (d) For a Class D felony, not less than one (1) year nor more than five (5) years.

¹⁵ 17-A MRSA § 255-A. Unlawful sexual contact. 1. A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact and: O. The other person submits as a result of compulsion. Violation of this paragraph is a Class C crime. 17-A MRSA § 1252. Imprisonment for crimes other than murder. 2. The court shall set the term of imprisonment as follows: C. In the case of a Class C crime, the court shall set a definite period not to exceed 5 years;

¹⁶ MCLA 750.520e. (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist: (b) Force or coercion is used to accomplish the sexual contact . . . (2) Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$500.00, or both.

¹⁷ MSA § 609.345. Criminal sexual conduct in the fourth degree. Subdivision 1. Crime defined. A person who engages in sexual contact with another person is guilty of criminal sexual conduct in the fourth degree if any of the following circumstances exists: (c) the actor uses force or coercion to accomplish the sexual contact; Subd. 2. Penalty . . . a person convicted under subdivision 1 may be sentenced to imprisonment for not more than ten years or to a payment of a fine of not more than \$20,000, or both.

¹⁸ NCGSA § 14-27.5A. Sexual battery. (a) A person is guilty of sexual battery if the person, for the purpose of sexual arousal, sexual gratification, or sexual abuse, engages in sexual contact with another person: (1) By force and against the will of the other person . . . (b) Any person who commits the offense defined in this section is guilty of a Class A1 misdemeanor.

¹⁹ OH RC § 2907.05 Gross sexual imposition. (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies: (1) The offender purposely compels the other person, or one of the other persons, to submit by force or threat of force. (C) Whoever violates this section is guilty of gross sexual imposition. (1) Except as

Pa.CSA § 3126 (Pennsylvania);²¹ RI Gen.Laws 1956, § 11-37-4 & RI Gen.Laws 1956 § 11-37-5 (Rhode Island);²² TCA § 39-13-505 & TCA § 40-35-111 (Tennessee);²³ W. Va. Code § 61-8B-7 (West Virginia).²⁴

otherwise provided in this section, gross sexual imposition committed in violation of division (A)(1) . . . of this section is a felony of the fourth degree. OH RC § 2929.14 Prison terms. (4) For a felony of the fourth degree, the prison term shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

²⁰ ORS § 163.427. Sexual abuse in the first degree. (1) A person commits the crime of sexual abuse in the first degree when that person:(a) Subjects another person to sexual contact and: (B) The victim is subjected to forcible compulsion by the actor. ORS § 161.605 Maximum prison terms for felonies. The maximum term of an indeterminate sentence of imprisonment for a felony is as follows: (2) For a Class B felony, 10 years.

²¹ 18 Pa.CSA § 3126. Indecent assault. (a) Offense defined.--A person is guilty of indecent assault if the person has indecent contact with the complainant, causes the complainant to have indecent contact with the person or intentionally causes the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the person or the complainant and (2) the person does so by forcible compulsion (b) Grading. --Indecent assault shall be graded as follows: (2) An offense under subsection (a)(2), (3), (4), (5) or (6) is a misdemeanor of the first degree.

²² RI Gen.Laws 1956, § 11-37-4. Second degree sexual assault. A person is guilty of a second degree sexual assault if he or she engages in sexual contact with another person and if any of the following circumstances exist: (2) The accused uses force or coercion. RI Gen.Laws 1956, § 11-37-5. Penalty for second degree sexual assault. Every person who shall commit sexual assault in the second degree shall be imprisoned for not less than three (3) years and not more than fifteen (15) years.

²³ TCA § 39-13-505. Sexual battery (a) Sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances: (1) Force or coercion is used to accomplish the act. (c) Sexual battery is a Class E felony.

TCA § 40-35-111. Authorized sentences; prison terms or fines.

(5) Class E felony, not less than one (1) year nor more than six (6) years.

²⁴ W. Va. Code § 61-8B-7. Sexual abuse in the first degree. (a) A person is guilty of sexual abuse in the first degree when: (1) Such person subjects another person to sexual contact without their consent, and the lack

Reviewing these statutes and their maximum punishments shows that Washington is the true outlier—its classification of indecent liberties by forcible compulsion as a Class A felony with a statutory maximum of life is far out of line with the rest of the jurisdictions that have an equivalent offense. Under the third Fain factor, the fact that every jurisdiction with an equivalent offense provides a much lower maximum sentence is another consideration weighing against constitutionality. See Fain, 94 Wn.2d at 400.

iv. Mr. Kinzle is punished more harshly than other offenders who committed more serious crimes in Washington.

The fourth Fain factor is “the punishment imposed for other offenders in the same jurisdiction.” Morin, 100 Wn. App. at 33. Indecent liberties by forcible compulsion is a “10” out of “16” on the seriousness-level chart. See RCW 9.94A.515, Table 2. Along with an offender’s criminal history, seriousness level forms the

of consent results from forcible compulsion . . . (b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one year nor more than five years.

basis for an offender's sentence. See RCW 9.94A.510, Table 1. Mr. Kinzle's crime, which included embracing a woman from behind and pulling on her clothes for less than two minutes, is ranked in the same seriousness level as Child Molestation in the First Degree (RCW 9A.44.083); Kidnapping in the First Degree (RCW 9A.44.020); and Leading Organized Crime (RCW 9A.82.060(1)(a)). RCW 9.94A.515, Table 2. His crime is ranked as more serious than Hit and Run causing Death (RCW 46.52.020(4)(a)—seriousness level 9); Assault of a Child in the Second Degree (RCW 9A.36.130—seriousness level 9); Commercial Sexual Abuse of a Minor (RCW 9.68A.100—seriousness level 8); Manslaughter in the Second Degree (RCW 9A.32.070—seriousness level 8); Dealing in Depictions of Minor Engaged in Sexually Explicit Conduct in the First Degree (RCW 9.68A.050(1)—seriousness level 7); and Drive-by Shooting (RCW 9A.36.045—seriousness level 7). RCW 9.94A.515, Table 2.

Mr. Kinzle is punished more harshly than offenders who molested or assaulted children; his sentence is mandated to be higher than that of those whose crime results in death. Moreover, those who engage in drive-by shooting, manslaughter,

and hit and run, for example, are not subject to the lifetime confinement or supervision of RCW 9.94A.507. The fourth Fain factor weighs against constitutionality. See Fain, 94 Wn.2d at 401.

While no one factor is dispositive, Gimarelli, 105 Wn. App. at 381, where all four Fain factors show that a sentence is “entirely disproportionate to the seriousness of [the] crime[]” it cannot stand under the Washington constitution. Fain, 94 Wn.2d at 402. Mr. Kinzle’s lifetime sentence is cruel, and it should be reversed. Id. at 402–03; Const. art. I, § 14.

b. Mr. Kinzle’s sentence of lifetime confinement or supervision is cruel and unusual under the federal constitution. The Eighth Amendment provides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Amendment bars punishments that are “barbaric,” but also those that are “excessive” in relation to the crime committed.²⁵ Coker v. Georgia, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 98 (1977). A punishment is excessive if

it “(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.” Id. (citing Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)).

To determine whether a sentence is grossly disproportionate to the severity of a crime, the Court attempts to stay in line with the “evolving standards of decency that mark the progress of a maturing society,” which in turn is determined by “an assessment of contemporary values concerning the infliction of a challenged sanction.” State v. Campbell, 103 Wn.2d 1, 31, 691 P.2d 929 (1984) (quoting Trop v. Dulles, 356 U.S. 89, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630 (1958) and Gregg, 428 U.S. at 172–73, respectively). The Court also conducts a proportionality analysis by looking directly to a comparison between the seriousness of the crime and the severity of the punishment. See Campbell, 103 Wn.2d at 31.

²⁵ The Eighth amendment’s protections apply to the States through the Fourteenth Amendment. See Robinson v. California, 370 U.S. 660, 667, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

Here, research shows that the 18 states that have statutes highly similar to RCW 9A.44.100(1)(a)—indecent liberties by forcible compulsion—choose to punish it less harshly; three classify it as a misdemeanor, with its maximum penalty accordingly much lower. See supra § E.V.a.iii; HRS § 707-733; MCLA 750.520e; NCGSA § 14-27.5A. This evidence shows that much of society, through its legislatures, feels that a lifetime sentence should not be authorized for crimes like Mr. Kinzle’s. This “weighs very heavily” against accepting Mr. Kinzle’s sentence of lifetime imprisonment or supervision as a constitutional punishment for his offense. See Coker, 433 U.S. at 592, 595–96 (noting that Georgia was the only jurisdiction authorizing the death penalty for rape of an adult woman, and ultimately rejecting the sentence as excessive).

Applying a direct proportionality analysis, the U.S. Supreme Court compares the harm to the victim from the offense to the impact on the defendant from the sentence. See Enmund v. Florida, 458 U.S. 782, 798–801, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982); Coker, 433 U.S. at 597–600. In Weems v. United States, dating back more than a century, the Court held

that a sentence of fifteen years of hard labor for falsifying a public document was not proportional to the offense, and thus was cruel and unusual. 217 U.S. 349, 367, 381, 30 S. Ct. 544, 54 L. Ed. 2d 793 (1910). Even the gravest impact to the victim—death—may not be enough to justify an unduly harsh sentence where the defendant is insufficiently culpable. For instance, in Enmund, the Court reversed a death sentence for a defendant convicted of felony murder as an accomplice. 458 U.S. at 788, 801. The Court explained that although Enmund had been present at the scene and had been waiting to help robbers escape when the killings happened—and that robbery was a “serious crime deserving serious punishment”—it was not “so grievous an affront to humanity” that the death penalty was merited. Id. at 783–85, 797 (quoting Gregg, 428 U.S. at 184) (internal quotation marks omitted).

Likewise here, there was not evidence presented that Mr. Kinzle intended or committed anything more than embracing Ms. Naranjo-Mora from behind and rubbing against her. This is an offense that merits punishment by the State. But it is not an offense that merits punishment for a lifetime. Mr. Kinzle’s

indeterminate sentence is cruel and unusual, and should be reversed. U.S. Const. amend. VIII; see Coker, 433 U.S. at 592, 600.

V. THE JUDGE ERRED IN IMPOSING
THE COMMUNITY CUSTODY
CONDITIONS RELATED TO CHILDREN,
CONTROLLED SUBSTANCES, COMPUTERS,
AND MATERIALS FOR MR. KINZLE'S
"PARTICULAR DEVIANCY."

There was no evidence presented that Mr. Kinzle's crime in any way involved minor children, controlled substances, or the use of computers. Nonetheless, the trial court imposed the following conditions of community custody:

10. Do not date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer.
15. Do not possess or consume controlled substances unless you have a legally issued prescription.
16. Do not associate with known users or sellers of illegal drugs.
17. Do not possess drug paraphernalia.
23. You must subject to searches or inspections of any computer equipment to which you have regular access.

24. You may not possess or maintain access to a computer, unless specifically authorized by your supervising Community Corrections Officer. You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices or receivers, CD/DVD burners, or any device to store or reproduce digital media or images.

CP 33–34.

a. These conditions violate the Sentencing Reform Act because they are neither crime-related nor reasonably related to Mr. Kinzle’s rehabilitation. Following a felony conviction, a judge must impose a sentence authorized by the Sentencing Reform Act (SRA). RCW 9.94A.505; In re Postentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court may impose a sentence only as authorized by statute). The sentencing court must comply with the sentencing statutes in effect at the time the defendant committed the offense, or March 13, 2011 in this case. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004); see 11/1/11 RP 99–100. The statutes at issue here have not changed since that date.

The court is constrained by statute to impose certain mandatory conditions of community custody, and is limited by the same statute to imposing discretionary conditions that are “crime-related” or “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” See RCW 9.94A.703(1), (3)(c), (3)(d), (3)(f). The State bears the burden to show that a community custody condition is authorized under the statute. See State v. McCorkle, 137 Wn.2d 490, 495–96, 973 P.2d 461 (1999); State v. Ford, 137 Wn.2d 472, 480–81, 973 P.2d 452 (1999).

Here, there was some evidence that Mr. Kinzle was under the influence of alcohol at the time of the offense. See 11/1/11 RP 120. But there was no evidence presented that Mr. Kinzle was under the influence of controlled substances. Thus, conditions 15-17, which prohibit Mr. Kinzle from consuming controlled substances, associating with known users or sellers of illegal drugs, or possessing drug paraphernalia are neither crime related nor reasonably related to the circumstances of the offense, risk of reoffending, or community safety. See RCW 9.94A.703(3)(c), (d), (f); State v. Jones, 118 Wn. App. 199, 208,

210, 76 P.3d 258 (2003). The same is true for condition 10, prohibiting Mr. Kinzle from having relationships with women who have minor children, and conditions 23 and 24, which require Mr. Kinzle to subject his computer to searches and require authorization from a community corrections officer before Mr. Kinzle may possess or maintain access to a computer or computer accessories. See CP 34. These conditions are not authorized by the SRA, and they should be stricken. Jones, 188 Wn. App. at 208–212; State v. Julian, 102 Wn. App. 296, 305–06, 9 P.3d 851 (2000), rev. denied, 143 Wn.2d 1003 (2001) (condition prohibiting alcohol not related to crime of child molestation where no evidence that alcohol contributed to the offense).

b. The condition prohibiting Mr. Kinzle from possessing “sexual stimulus material for [his] particular deviancy” is unconstitutionally vague under *State v. Bahl*. Mr. Kinzle was also ordered:

8. Do not possess or control sexual stimulus material for your particular deviancy as defined by the supervising Community Corrections Officer and therapist except as provided for therapeutic purposes.

CP 33. This is the exact language of the condition held unconstitutionally vague in State v. Bahl, when “no deviancy ha[d] been diagnosed, and th[e] record d[id] not show that any deviancy ha[d] yet been identified.” 164 Wn.2d 739, 761, 193 P.3d 678 (2008). Such is the case here: no deviancy was diagnosed or identified in the record, giving Mr. Kinzle no notice of what materials would be prohibited. As applied to Mr. Kinzle, community custody condition 8 is unconstitutionally vague. Id.; Const. art. I § 3; U.S. Const. amend. XIV. The condition should be struck. See Bahl, 164 Wn.2d at 762.

F. CONCLUSION

Mr. Kinzle’s conviction should be reversed because the trial judge compelled him to proceed to trial with an attorney with whom he had an intractable conflict; because the judge did not order a competency hearing despite evidence of incompetency; because there was insufficient evidence of forcible compulsion; and because the prosecutor committed flagrant misconduct.

Mr. Kinzle’s indeterminate sentence should also be reversed because it is unconstitutionally cruel and unusual. In

addition, several conditions of community custody should be struck because they are not crime-related, reasonably related to rehabilitation or community safety, or specific enough to comport with due process.

For the foregoing reasons, Mr. Kinzle respectfully requests that this Court reverse his conviction and his sentence.

DATED this 27th day of June, 2012.

Respectfully submitted,



LINDSAY CALKINS - No. 44127
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	
)	NO. 68158-3-I
)	
JEFFREY KINZLE,)	
)	
Appellant-Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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3000 ROCKEFELLER
EVERETT, WA 98201 | (X)
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HAND DELIVERY
_____ |
| [X] | JEFFREY KINZLE
BKG #280077
SNOHOMISH COUNTY JAIL
3025 OAKES ST
EVERETT, WA 98201 | (X)
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X _____ 