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DIVISION II

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No. 37267-3-II  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY   
DEPUTY

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STATE OF WASHINGTON,  
Respondent,

v.

JACK T. HYDER,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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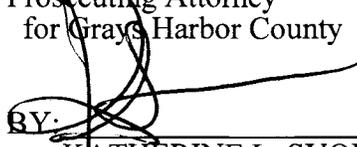
THE HONORABLE F. MARK McCAULEY, JUDGE

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BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

### **Procedural History**

The State agrees with the defendant's presentation of the procedural history in this case. Appellant's Brief 12-13.

### **Factual History<sup>1</sup>**

Evelyn Hyder was born to Jack and Judy Hyder on December 28, 1984 at Fort Rucker, Alabama. The family moved to Ocean Shores, Washington in approximately January of 1993. Evelyn was the oldest girl out of eleven children, two of whom passed away prior to the beginning of this case. The children were all home schooled by their parents. 11/1/07 RP at 44-48, 11/5/07 RP at 113 and 116, 11/7/07 RP at 27-28, 30.

The children were also active in church and had music lessons. For the most part, the children were kept at home and isolated from other people. The children were expected to complete daily chores, and their father, the defendant, was the only one who worked outside the home.

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The factual history of this case occupies numerous volumes. The State has attempted to offer a brief presentation of the facts salient to the two convictions. The Appellant's arguments are essentially legal in nature and render further recitation unnecessary for review.

The defendant was a veterinarian and maintained his own practice.

11/1/07 RP at 48-53, 11/5/07 RP at 188-119, 11/7/07 RP at 35-37.

The defendant was a strict disciplinarian and could be physically violent when he was angry. The defendant would beat the children with a belt for small infractions like a pillow being too flat on a bed. The beatings would result in the children having welts and bruises up and down their bodies. 11/1/07 RP at 70-71, 11/7/07 RP at 52.

When Evelyn was about 11 years old, the defendant began coming into her room at night and taking her into his library. In the library was a guest bed and the defendant would lay on the bed with Evelyn. The defendant would be naked underneath his robe and would make Evelyn stroke his penis. The defendant would also put his mouth on her breasts and bite them. 11/1/07 RP at 54-57.

This sexual contact occurred a lot and then tapered off. When Evelyn turned 13 the sexual contact began happening again. The defendant would kiss, push and play with Evelyn's breasts until they were sore. He also touched inside her vagina and rubbed his naked body against hers. 11/1/07 RP at 65-66. When Evelyn was 15, there was an occurrence when the defendant "started with the kissing the breasts and touching inside [Evelyn's] vagina, having [her] massage his penis" when he picked her up and put her on his lap so they were facing each other. The defendant rubbed his penis against Evelyn's genitals and she could feel the head of his penis against her vagina. 11/1/07 RP at 67.

Evelyn's siblings observed contact they believed was inappropriate between her and the defendant. This contact included walking in on the defendant kissing Evelyn repeatedly up and down her neck. Evelyn's brother Luke also heard kissing for approximately eight minutes and when he walked into the defendant's office he saw the defendant kissing Evelyn. Evelyn's sister Rosey also observed the defendant sliding his hand up Evelyn's shirt and rubbing Evelyn's breasts. 11/5/07 RP at 122-125, 11/7/07 RP at 49.

The defendant told Evelyn that she would ruin the family if she told anyone. 11/1/07 RP at 72. Evelyn finally confided in a priest who, not realizing she was home schooled, told her to tell a teacher. Evelyn spoke to her teacher, the defendant, and he told her that was good enough. When she was 17, Evelyn confided in another priest who told her that telling anyone else would ruin her family. 11/1/07 RP at 82.

Finally at his going away party, Evelyn was able to tell her brother Luke what was happening. Luke confronted the defendant, who became angry and told Evelyn it was her fault. 11/1/07 RP at 85. The next day Evelyn's mother left to take Luke to West Point, the defendant drove them to the airport in Seattle. Evelyn felt vulnerable because she was going to be left at home with the defendant who was furious at her. While the defendant drove to the airport, Evelyn called her aunt, Donna D'Angelo, in New York and confided in her about the molestation. 11/1/07 RP at 86-87.

**The Lack of *In Camera* Review of the CPS Records is Harmless Error.**

On September 15, 2006, the defendant filed a motion titled “Motion for Production of Child Protective Services Files.” CP at 5. This motion requested the complete Child Protective Services (CPS) file. On November 21, 2006, this motion was addressed by the trial court.<sup>2</sup> The court stated that it was uncomfortable with deciding what might be pertinent to the defense and was inclined to let defense counsel review the records in full. 11/21/06 RP at 46. This procedure was agreed to by the parties, and the State requested that the State and defense counsel review them together because the State wanted access to “things that are relevant to the state that should also be released.” 11/21/06 RP at 47. On November 27, 2006, the parties appeared before the court as the State had discovered “a notation that the defendant made an admission to...a treatment provider.” 11/27/09 RP at 49.

The defendant now complains that by the trial court releasing all CPS records he was prejudiced because “[t]he result was to disclose evidence damaging to the defense which otherwise would have remained confidential within the records.” Appellant’s Brief at 28. However, the defendant requested these records and joined in with the court’s recommendation that they be fully released. The defendant tries to make

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The trial was set to begin on November 28, 2006. 11/13/06 RP at 34.

his situation analogous to *Pennsylvania v. Ritchie*; however, the defendant in that case was not given access to any records by the trial court.

The defendant in *Pennsylvania v. Ritchie* was charged with various sexual offenses against his minor daughter and the matter was referred to the Children and Youth Services (CYS).<sup>3</sup> During pretrial discovery, the defendant served CYS with a subpoena, seeking access to the records related to the immediate charges, as well as certain earlier records compiled when CYS investigated a separate report that respondent's children were being abused. CYS refused to comply with the subpoena, claiming that the records were privileged under a Pennsylvania statute which provides that all CYS records must be kept confidential, subject to specified exceptions. *Pennsylvania v. Ritchie*, 480 U.S. 39, 39, 107 S.Ct. 989, 991 (1987).

At an in-chambers hearing in the trial court, the defendant argued that he was entitled to the information because the CYS file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence. Although the trial judge did not examine the entire CYS file, he refused to order disclosure. *Pennsylvania v. Ritchie* at 39. The Pennsylvania Supreme Court held that, by denying access to the CYS file,

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CYS is a protective service agency established by Pennsylvania to investigate cases of suspected child mistreatment and neglect. *Pennsylvania v. Ritchie*, 480 U.S. 39, 39, 107 S.Ct. 989, 991 (1987).

the trial court order had violated both the Confrontation and the Compulsory Process Clauses of the Sixth Amendment, and that the conviction must be vacated and the case remanded to determine if a new trial was necessary. The court concluded that defense counsel was entitled to review the entire file for any useful evidence. *Id.*

The United States Supreme court found that the Pennsylvania had erred in this ruling, and found that both parties interests in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review. *Pennsylvania v. Ritchie* at 60. However, the Court didn't find that full disclosure of the files was prejudicial to the defendant, but to the State.

To allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child-abuse information. If the CYS records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent. It therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected. Recognizing this, the Commonwealth-like all other States (footnote omitted)-has made a commendable effort to assure victims and witnesses that they may speak to the CYS counselors without fear of general disclosure. The Commonwealth's purpose would be frustrated if this confidential material had to be disclosed upon demand to a defendant charged with criminal child abuse, simply because a trial court may not recognize exculpatory

evidence. Neither precedent nor common sense requires such a result.

*Pennsylvania v. Ritchie* at 60-61.

The State agrees that the trial court here should have conducted an *in camera* review of the records requested. However, any error was harmless. Unlike *Ritchie*, where the defendant was denied any meaningful review of the CYS files, the defendant here was given all of the records he requested. These were not records belonging to the defendant, and he has no standing to complain of their release, particularly at his own request.

Further, the information discovered by the State was information that law enforcement should have been provided in any case. Washington law mandates that if a CPS investigation “reveals that a crime against a child may have been committed, the department shall notify the appropriate law enforcement agency.” RCW 74.13.031.

### **Law Enforcement Obtaining a Search Warrant is Not an Abuse of Process**

The defendant argues that it was an abuse of process for the defendant’s medical records to be obtained by search warrant rather than by other statutory procedures. Appellant’s Brief at 29-35. The defendant goes on to cite cases, such as *State v. White*, in which the court found an abuse of process when the State served a subpoena duces tecum without filing the subpoena with the court or serving it on the defendant and

counsel. Appellant's Brief at 35. However, the defendant does not provide any authority that supports his position that obtaining a search warrant is an abuse of process.

Criminal Rule 2.3 allows a search warrant to issue for "evidence of a crime" upon a showing of probable cause for the issuance of the warrant. CrR 2.3(b)(1) and (c). The defendant does not argue that the search warrant itself was defective, only that other available processes should have been employed. Further, this search warrant was not applied for by the prosecutor, but by the investigating officer. The detective in this case properly applied for and received a warrant for the defendant's counseling records. There is nothing in the rule that precludes the detective from continuing his investigation even though charges have been filed.

The defendant suffered no prejudice through this process. The defendant complains that he was not given notice of the records being sought. However, the defendant does not contend that if this information had been sought via other means that he would have been able to preclude the State from obtaining it. Also, the defendant still had the opportunity to move to suppress the evidence prior to trial.

**The testimony of Trudy Hoy and Ron Yunck was properly admitted.**

"The Legislature has addressed the need to foster an atmosphere where therapy can succeed." *State v. Warner*, 125 Wash.2d 876, 892, 889 P.2d 479 (1995). To enable this, the legislature has provided certain

statutory privileges, allowing communications to be kept confidential and immune from compulsory disclosure. However, “[a]nother statutory provision creates a clear exception...RCW 26.44.030 contains a mandatory reporting provision for cases of child abuse that trumps the statutory privilege.” *State v. Warner*, 125 Wash.2d at 892.

“[I]t is evident that, in its recent enactments, the legislature has attached greater importance to the reporting of incidents of child abuse and the prosecution of perpetrators than to counseling and treatment of persons whose mental or emotional problems cause them to inflict such abuse.” *State v. Warner* at 892, citing *State v. Fagalde*, 85 Wash.2d 730, 736, 539 P.2d 86 (1975). “Since the legislature has spoken on this issue, and has indicated that the policy objective of having child abuse reported is more important than fostering confidentiality in the treatment of the abusers, it is not the court’s role to question that legislative judgment.” *Id.* at 892.

In *Warner*, the respondent plead guilty to one count of Rape of a Child in the First Degree. *Id.* at 880. As part of his disposition, the respondent was ordered to “be placed in most intensive [sic] sex offender treatment program available” while in custody of the Juvenile Rehabilitation Administration. *Id.* at 880. While attending this treatment program, the respondent admitted to a number of additional victims, that led to additional criminal charges. *Id.* at 880-881. For the reasons discussed above, the court held that the respondent’s statements to his psychologist were admissible.

The holding in *Warner* was upheld in *State v. Ackerman*, where the defendant contended that admitting statements he made to his sex offender treatment provider violated counselor-patient privilege. *State v. Ackerman*, 90 Wash.App. 477, 486, 953 P.2d 816 (1998). The *Ackerman* court stated “privileges are generally disfavored in criminal cases, especially those involving child sex abuse.” *State v. Ackerman*, 90 Wash. App. at 487; *Warner* at 892.

In this case, the defendant sought an evaluation and sex offender treatment from Trudy Hoy of his own volition. During his time with Ms. Hoy, the defendant made admissions to her regarding sexual contact with one of the victims. Ms. Hoy is a mandatory reporter under RCW 26.44.030. Her duty to report abuse trumped any privilege that might exist and her testimony was properly admitted.

The State also admitted admissions made by the defendant to Ron Yunck. Mr. Yunck is that polygrapher that tested the defendant as part of his evaluation with Ms. Hoy. “[I]t is the results of polygraph examinations, not statements made during the examination, which are inadmissible.” *State v. Rupe*, 101 Wash.2d 664, 677, 683 P.2d 571 (1984); *See Wyrick v. Fields*, 459 U.S. 42, 103 S.Ct. 394, 396, 74 L.Ed.2d 214 (1982). Therefore, for the reasons pertaining to Ms. Hoy, the testimony of Mr. Yunck was also properly admitted.

### **The Jury Was Properly Seated**

The defendant argues that he should receive a new trial based on his claim that a juror, who was unsworn for voir dire, was seated on the jury and participated in deliberations. Appellant's Brief at 47-51. In Washington there is no statute requiring it; however, "an oath should be administered to prospective jurors before their voir dire examination. The limits and extent of this examination are within the discretion of the trial court, and it has considerable latitude in this regard." *State v. Tharp*, 42 Wash.2d 494, 499, 256 P.2d 482 (1953).

In *Tharp*, the trial began on a Monday and defense counsel "knew of the probable omission of the voir dire oath not later than, and possibly before, the adjournment of court on Tuesday. The trial continued for two days after this discovery. Defendant's counsel did not direct the court's attention to the claimed omission or make any motion or objection in regard to it until after the verdict was received." *State v. Tharp*, 41 Wash.2d at 499.

The Court upheld the verdict based on the following:

Being a matter of procedure, the omission of the voir dire oath was, at most, a trial error. If he intended to rely upon it on appeal, defendant should have urged it to the trial court as soon as he discovered it...[d]efendant's failure to submit it to the trial court timely, bars our consideration of it as a possible error. Otherwise, he could take advantage of any error which he, in fact, invited by permitting it to inhere in his trial unchallenged until after the verdict.

*State v. Tharp*, 42 Wash.2d at 501.

First, the defendant fails to prove that the juror in question, number 25, was not sworn in prior to voir dire. The record before the Court indicates that she was. At the conclusion of introductory statements the Court asked “Do we have additional jurors?” and the Clerk replied “25. She has been sworn in.” 10/31/07 RP at 11. There is no evidence offered by the defendant to indicate that this didn’t happen.

In any event, the defendant and defense counsel were aware that juror 25 came in after the judge had begun his remarks. Any objection to juror 25 should have been made at that time, and the defendant has waived his objection by his silence. Even though the defendant has exhausted his peremptory challenges, there was an alternate that was excused at the end of testimony that could have been seated in juror 25's place, if the defendant had raised this issue in a timely fashion. 11/15/07 RP at 131.

**Trial Court’s Failure to Enter Written Findings Supporting  
Exceptional Sentence**

The State concedes that the trial court’s failure to enter findings as required by RCW 9.94A.535 was error. However, the *State v. McCrorey*<sup>4</sup> line of cases cited by the defendant has clearly been abrogated by *State v. Head* and its progeny.

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*State v. McCrorey*, 70 Wn.App. 103, 851 P.2d 1234 (1993).

In *Head*, the Supreme Court held “that the failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions.” *State v. Head*, 136 Wash.2d 619, 624, 964 P.2d 1187, 1190 (1998). Therefore, the State asks the Court to remand for entry of written findings and conclusions pursuant to RCW 9.94A.535 in this case.

The Court did “note the possibility that reversal may be appropriate where a defendant can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. For example, a defendant might be able to show prejudice resulting from the lack of written findings and conclusions where there is strong indication that findings ultimately entered have been "tailored" to meet issues raised on appeal. The burden of proving any such prejudice will be on the defendant.” *State v. Head*, 136 Wash.2d at 624-625 *see Cf. State v. Royal*, 122 Wash.2d 413, 423, 858 P.2d 259 (1993) (burden of proving prejudice resulting from late entry of written findings and conclusions on defendant; concerning JuCr 7.11(d)). However, the Court also noted that “[t]his kind of prejudice could be shown only, of course, after remand and the entry of findings.” *Head* at 625 at n. 3.

Therefore, the defendant cannot show any such prejudice at this time to warrant a dismissal, and the case should be remanded for entry of findings.

### **Sentencing Issue Under *State v. Linerud***

The statutory maximum sentence for Child Molestation in the Second Degree is 120 months and the statutory maximum for Incest in the Second Degree is 60 months. RCW 9A.44.086(2), 9A.64.020(2)(b), RCW 9A.20.020(b) and (c). An offender's total punishment, including imprisonment and community custody, may not exceed the statutory maximum for the offense. RCW 9.94A.505(5). Prior to *State v. Linerud*, the Court of Appeals had ruled that , where a trial court sentences an offender to terms of confinement and community custody that may exceed the statutory maximum, the judgment and sentence should set forth the statutory maximum and clarify that the combined terms cannot exceed that maximum. *State v. Sloan*, 121 Wn.App. 220, 221, 87 P.3d 1214 (2004). *See also State v. Vant*, 145 Wn.App. 592, 605-07, 186 P.3d 1149 (2008) (adopting the *Sloan* analysis).

However, Division I recently held in *State v. Linerud*, 147 Wn.App. 944, 197 P.3d 1224 (2008) that when the combination of confinement and community custody exceeds the maximum sentence, the sentence is indeterminate and must be remanded for imposition of a determinate sentence not exceeding the statutory maximum. This is true even if the judgment and sentence recites that the total sentence shall not exceed the statutory maximum. *State v. Linerud*, 147 Wn.App. at 949-51. Division I noted that “[i]f the trial court wants to impose the maximum terms of confinement and community custody, it may do so under the

second option in RCW 9.94A.715(1), which permits it to impose a term of community custody equal to the earned early release time.” Order Den. Mot. for Recons. And Amending Op. at 1, *Linerud*, No. 60769-3-I (Wash.Ct.App. Mar. 20, 2009), *amendment to be published at Linerud*, 147 Wn.App. at 950 at n. 17.

In this case, the trial court used its discretion to impose such a community custody period. In Section 4.6 of the judgment and sentence is states:

**[X] COMMUNITY CUSTODY** is ordered as follows:  
Count 6 for a range from 36 to 48 months; with confinement not to exceed statutory maximum.  
Count 7 for a range from 36 to 48 months; with confinement not to exceed statutory maximum.  
**or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered.**  
CP at 35-48 (emphasis added).

This second section orders the community custody authorized by RCW 9.94A.715 and complies with the new requirements of *Linerud*. This sentence is not an indeterminate sentence and should be upheld.

**The Court Had the Authority to Impose Community Custody In Excess of That Permitted By Law in Effect at the Time of the Offense**

Because the jury found aggravating factors and the trial court imposed an exceptional sentence per RCW 9.94A.535, the court was not bound by the guidelines governing community custody and was free to impose an exceptional term of community custody.

### **The Exceptional Sentence Was Properly Imposed by the Trial Court**

In this case, the State alleged aggravating factors pursuant to RCW 9.94A.535. CP at 10-11. These were submitted to jury pursuant to the procedure of RCW 9.94A.537. The jury unanimously agreed that these aggravating factors existed as to both convictions. CP 28 and 29. Because of this, the court was allowed to sentence the defendant up to the statutory maximum, if the court found that the facts found are “substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.537(6). The defendant erroneously argues that RCW 9.94A.537 requires that the jury find the factors “substantial and compelling.” Appellant’s Brief at 67. The jury is merely the finder of fact and is not to be concerned with any punishment that may follow their determination of the facts. WPIC 1.02 and 1.04. It is well within the trial courts discretion to impose punishment within the guidelines provided by the law.

The State concurs with the defendant that sentences above the standard range must be based on some fact not already inherent in the crime of conviction. *State v. Ferguson*, 142 Wn.2d 631, 644-49, 15 P.3d 1271 (2001). In this case, the aggravating factors found are clearly separate from the elements required to prove the charged offenses. The defendant was convicted of Child Molestation in the Second Degree (Count 6) and Incest in the Second Degree (Count 7). CP 26 and 27.

In order to convict the defendant of Child Molestation in the Second Degree, the jury was instructed they must find the following elements beyond a reasonable doubt:

- (1) That on or about or between December 28, 1996, to December 27, 1998, the defendant had sexual contact with E.A.H.;
- (2) That E.A.H. was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That E.A.H. was at least thirty-six months younger than the defendant; and
- (4) That this act occurred in Grays Harbor County, Washington.

CP at 12-20.

In order to convict the defendant of Incest in the Second Degree, the jury was instructed they must find the following elements beyond a reasonable doubt:

- (1) That on or about or between December 28, 1998, to December 27, 2002, the defendant engaged in sexual contact with E.A.H.;
- (2) That the defendant was related to E.A.H. either legitimately or illegitimately as a descendant of either the whole or the half blood;
- (3) That at the time, the defendant knew the person with whom he was having sexual contact was so related to him; and
- (4) That any of these acts occurred in Grays Harbor

County, Washington.  
CP at 12-20.

The aggravating factors alleged as to each count were that:

The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(3)(g)

The defendant used his position of trust to facilitate the commission of the current offenses. RCW 9.94A.535(3)(n)

CP at 10-11.

The defendant tries to bootstrap the two verdicts together, alleging that because they found the defendant guilty of two counts then “by definition, to convict the defendant the jury had to have found he committed “multiple” (at least two) separate acts of sexual contact against the same person...” Appellant’s Brief at 59. But the law requires that the aggravating factor is not inherent to the elements of the crimes of conviction, not that the jury cannot consider more than one charged crime in determining and aggravating factor. Also, just because the jury found the defendant guilty of two counts does not necessarily mean that they would find two incidents to be enough to warrant the “offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time” as required by the Special Verdict Form.

In order to find the aggravating factor of RCW 9.94A.535, an ongoing pattern of sexual abuse, there obviously must be multiple incidents that could be charged separately. It is up to the discretion of the court whether or not this is a “substantial and compelling” reason to sentence outside the standard range. Neither crime, on their elements

alone, requires the State to prove that the sexual contact occurred more than just once.

The aggravating factor of 9.94A.535(3)(g) allows the court to sentence an offender differently if his crime was part of a prolonged pattern of abuse, versus an offender who engaged in sexual contact with a victim on one occasion.

The defendant also argues that the familial relationship required to prove Incest in the Second Degree precludes a finding that the defendant used his position of trust to facilitate the crime. Appellant's Brief at 61. However, having a familial tie that would meet the element required by the Incest statute is not the same as using a position of trust. Incest could be proven against a father that had never met his child before the day he knowingly had sexual contact with them. Not every person with a familial tie occupies a position of trust in a victim's life.

The judge properly used the facts found by the jury to support an exceptional sentence in this case. The defendant states that the judge improperly relied on other factors in sentencing the defendant, but the record does not support that contention. At sentencing the judge stated "[i]n fact, if [the jury] would have found him guilty of some of the other counts, there would have certainly been substantial evidence to warrant the guilty finding, but I can't take that into consideration, and I won't because I will follow the findings of the jury...I find there are substantial and

compelling reasons to exceed the standard range sentences regarding both counts.” 1/8/2008 RP at 126.

The concern the trial court expressed for the victim and the effect the defendant’s crimes will have on her is part and parcel of the aggravating factors found by the jury, and it gives ground for the judge to find the “substantial and compelling” reasons required by the statute. Obviously the court should consider the impact on the victim when considering what type of sentence to impose. If the defendant used a position of trust to facilitate his crimes and committed them multiple times over a prolonged period of time and there was little or no adverse impact on the victim, then maybe those facts would not be “substantial and compelling.”

In this case, the jury properly found the aggravating factors that the trial court properly employed to impose an exceptional sentence.

**The Military Conviction Was Properly Counted in the Offender Score**

“[O]ut-of-state convictions are to be classified ‘according to the comparable offense definitions and sentences provided by Washington law.’” *State v. DeVincentis*, 112 Wash.App. 152, 163, 47 P.3d 606 (2002); *citing* former RCW 9.94A.360(3)(1999). “The purpose of the comparability analysis is to ensure that defendants with equivalent prior convictions are treated the same way regardless of whether those prior convictions were incurred in Washington or elsewhere.” *State v.*

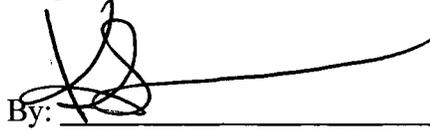
*DeVincentis*, 112 Wash.App. 152, 163-4; *see State v. Weiland*, 66 Wash.App. 29, 34, 831 P.2d 749 (1992).

The trial court properly admitted the exhibits offered by the State and ruled the prior conviction comparable to a Washington State felony. In a sentencing hearing, the Rules of Evidence need not apply. However, the certified documents offered are self-authenticating under 902(a) and (d) as they are public documents under seal and also certified copies. The “General Court-Martial Order” is the equivalent of a judgment and sentence. This document clearly states that the defendant plead guilty to “Specification 2” which involved penetrating the vaginal lips of a minor under 16 on or about July 12, 1985. This document also contains the sentence imposed for this crime, 12 months confinement and dismissal from the service.

This crime is clearly equivalent to a sex offense in Washington. The defendant’s date of birth is November 29, 1959, so he would have been 25 years old at the time of the offense. 11/1/07 RP at 47. The acts described in the General Court-Martial Order would have been a statutory rape if charged under Washington law at the same time. This information, along with the additional documents gave sufficient information to prove identity of the defendant.

Further, the trial court specifically found that it would have imposed the same exceptional sentence regardless of the offender score. CP at 35-48.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be 'Katherine L. SvoBoda', written over a horizontal line.

By: \_\_\_\_\_  
KATHERINE L. SVOBODA  
Deputy Prosecuting Attorney  
WSBA #34097

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY E  
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 37267-3-II

v.

**DECLARATION OF MAILING**

JACK T. HYDER,

Appellant.

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 10<sup>th</sup> day of June, 2009, I mailed a copy of the BRIEF OF

RESPONDENT to Lenell R. Nussbaum; Attorney at Law; Market Place One, Suite 330; 2003 Western Avenue; Seattle, WA 98121-2161, and Jack T. Hyder 312617; MCC Twin Rivers Correction Center; P. O. Box 888; Monroe, WA 98272, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 10<sup>th</sup> day of June, 2009, at Montesano, Washington.

Barbara Chapman