

NO. 44528-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

KAREN LOFGREN,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

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BRIEF OF APPELLANT

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## TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Introduction and Issues Related to Assignments of Error</u> ....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. <u>Procedural Facts</u> .....	2
2. <u>Defense Theory</u> .....	6
3. <u>State’s Theory</u> .....	10
4. <u>Sentence and Oral Ruling</u> .....	11
C. <u>ARGUMENT</u> .....	14
THE ORDERS PROHIBITING CONTACT WITH LOFGREN’S DAUGHTERS ARE CONSTITUTIONALLY AND STATUTORILY INVALID. ....	14
a. <u>A Sentencing Court has Limited Authority to Prohibit     Contact Between a Mother and Her Daughters.</u> ....	14
b. <u>No-Contact Orders are Unlawful Unless the State     Shows, and the Sentencing Court Finds, the Restriction     is Reasonably Necessary to Further a Compelling State     Interest.</u> .....	16
c. <u>The State Failed to Show a Minimal Nexus, Let Alone     a Compelling State Interest.</u> .....	22
d. <u>The Sentencing Court’s Stated Reasons Do Not     Satisfy or Change the Analysis.</u> .....	23
e. <u>The Lifetime Duration is Erroneous and Violates     Due Process.</u> .....	25

**TABLE OF CONTENTS (CONT'D)**

	Page
f. <u>Family Court is the Proper Place to Make These Determinations</u> .....	28
D. <u>CONCLUSION</u> .....	32

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Becker</u> 87 Wn.2d 470, 553 P.2d 1339 (1976).....	27
<u>In re Custody of Smith</u> 137 Wn.2d 1, 969 P.2d 21 (1998) <u>aff'd sub nom. Troxel v. Granville</u> 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).....	14, 26
<u>In re Dependency of J.B.S.</u> 123 Wn.2d 1, 863 P.2d 1344 (1993).....	26
<u>In re Dependency of O.J.</u> 88 Wn. App. 690, 947 P.2d 252 (1997) <u>rev. denied</u> , 135 Wn.2d 1002 (1998).....	27
<u>In re McDowell</u> 167 Wn. App. 1016, 2012 WL 899254 (3/19/12) .....	28
<u>In re Rainey</u> 168 Wn.2d 367, 229 P.3d 686 (2010).....	15, 19, 20, 21, 22, 25, 26
<u>In re Ross</u> 45 Wn.2d 654, 277 P.2d 335 (1954).....	29
<u>In re Welfare of B.D.F.</u> 126 Wn. App. 562, 109 P.3d 464 (2005).....	27
<u>In re Welfare of R.S.G.</u> 172 Wn. App. 230, 289 P.3d 708 (2012).....	25
<u>Metcalf v. State, Dept. of Motor Vehicles</u> 11 Wn. App. 819, 525 P.2d 819 (1974).....	30
<u>Nirk v. City of Kent Civil Serv. Comm'n</u> 30 Wn. App. 214, 633 P.2d 118 (1981).....	29

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Ancira</u> 107 Wn. Ap. 650, 27 P.3d 1246 (2001)15, 17-19, 22, 23, 27, 28, 32	
<u>State v. Aquiningoc</u> 173 Wn. App. 1005, 2013 WL 312476 (1/28/13) .....	28
<u>State v. Arreola</u> ___ Wn.2d ___, 290 P.3d 983 (2012) .....	28
<u>State v. Barron</u> 124 Wn. App. 1009, 2004 WL 2526674 (11/8/04) .....	28
<u>State v. Bazan</u> 152 Wn. App. 1031, 2009 WL 3083626 (9/28/09) .....	28
<u>State v. Berg</u> 147 Wn. App. 923, 198 P.3d 529 (2008).....	19, 21, 22
<u>State v. Corbett</u> 158 Wn. App. 576, 242 P.3d 52 (2010).....	21, 22
<u>State v. Jones</u> 154 Wn. App. 1017, 2010 WL 264998 (1/25/10) .....	28
<u>State v. Letourneau</u> 100 Wn. App. 424, 997 P.2d 436 (2000)...	15, 16, 22, 23, 28, 31, 32
<u>State v. Lord</u> 161 Wn.2d 276, 165 P.3d 1251 (2007) .....	16
<u>State v. Lott</u> 133 Wn. App. 1016, 2006 WL 1587797 (6/12/06) .....	28
<u>State v. Mutch</u> 171 Wn.2d 646, 254 P.3d 803 (2011) .....	19
<u>State v. Pollard</u> 66 Wn. App. 779, 834 P.2d 51 (1992).....	29

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Riles</u> 135 Wn.2d 326, 957 P.2d 655 (1998).....	22
<u>State v. Sanford</u> 128 Wn. App. 280, 115 P.3d 368 (2005).....	17, 19, 32
<u>State v. San-Jose</u> ___ Wn. App. ___, 2013 WL 3228614 (6/24/13) .....	28
<u>State v. Varnell</u> 162 Wn.2d 165, 170 P.3d 24 (2007).....	24
<u>State v. Warren</u> 165 Wn.2d 17, 195 P.3d 940 (2008).....	15, 19, 21, 22, 23

**RULES, STATUTES AND OTHER AUTHORITIES**

GR 14.1.....	28
RCW 7.69.030.....	29
RCW 9.94A.030 .....	15
RCW 9.94A.500 .....	29
RCW 9.94A.505 .....	14
RCW 9.94A.595 .....	24
RCW 9.94A.703 .....	15, 24
RCW 9A.28.030 .....	24
RCW 13.34.020.....	26
RCW 13.34.100.....	27
RCW 13.34.105.....	27

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 13.34.180.....	27
RCW 13.34.190.....	27
RCW 26.09.....	24
Sentencing Reform Act .....	24, 31
U.S. Const. amend. XIV .....	14, 26
Wash. Const. art. 1, § 3 .....	26
Wash. Const. art. 1, § 35 .....	29

A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in imposing no contact with appellant's two minor daughters as a lifetime sentencing condition. CP 429.

2. The sentencing court erred in entering two lifetime orders prohibiting appellant's contact with her daughters. CP 420-22.

Introduction and Issues Related to Assignments of Error

Parents have fundamental rights and sentencing courts thus have limited authority to impose no-contact orders that prohibit a mother's contact with her daughters. Numerous Washington courts have vacated sentencing orders prohibiting a parent's contact with minor children where the state failed to show the orders were reasonably necessary to serve a compelling state interest.

Appellant was accused and pled guilty to soliciting an undercover police detective to murder her then-husband. No one was killed or in true danger, and her daughters were not victims of the offense. At the time of sentencing, dissolution and custody proceedings were pending in family court.

1. Did the sentencing court err when it entered no-contact orders without first identifying a compelling state interest, and without

finding the orders were reasonably necessary to serve that compelling state interest?

2. Has this Court repeatedly stated that sentencing courts should not enter orders like these where family courts are better-positioned to: (a) provide due process and a fair hearing for all parties, (b) consider broader information from disinterested sources like guardians ad litem, and (c) give meaningful consideration to what constitutes the best interests of the children?

3. Assuming arguendo that any contact restrictions might be justifiable, is the lifetime contact prohibition clearly erroneous?

B. STATEMENT OF THE CASE

1. Procedural Facts

On February 24, 2012, the Pierce County prosecutor charged appellant Karen Lofgren with solicitation to commit the first degree murder of her then-husband, Todd Hardin. CP 1-2. The state alleged the solicitation occurred between January 1 and February 24, 2012. CP 9. On December 7, 2012, Lofgren pleaded guilty to the amended charge of solicitation to commit second degree murder. CP 9-19.

Many facts were undisputed. Lofgren was a highly regarded nurse in Tacoma. She had nursed Hardin back to health from a serious injury in 2000 that nearly crushed his leg and left him

bedridden and needing multiple surgeries. She took many hours to change his dressings and help him with therapy. They later married. CP 177, 208, 226-27, 237-38, 249, 259.

After significant difficulties with Lofgren's fertility issues, the couple had two daughters, C.H. and R.H. CP 176, 195, 209, 230, 253, 259, 401, 411, 417. At the time of sentencing in January 2013, the girls were 6 and 9 years old. CP 420, 422.

The marital relationship deteriorated and Lofgren filed for divorce in 2010. For a brief period in early 2011 they attempted to reconcile, but Hardin filed a second dissolution petition in 2011 in Pierce County cause number 11-3-02193-9. CP 197, 259, 408. The divorce proceedings were lengthy, with numerous contested motions and declarations generating a substantial court file. CP 409.

During 2011 and 2012, Lofgren met with an acquaintance, Darrell Burgess, to help her move some of Hardin's furniture and to bid a paint job before putting the house on the market. Burgess's brother Michael had been a long-time friend and co-worker of Lofgren's, but had passed away a few years before. The parties disputed whether Burgess or Lofgren initiated the discussions that resulted in the charged offense. CP 22-33, 68-73, 94-95, 109, 138, 258-70, 414-17; RP 45-47.

Burgess met Hardin when he agreed to supervise Hardin's "walk-through" of the family home during the dissolution proceedings. CP 72-73, 414. When Hardin went beyond the scope of the court order and started going through Lofgren's things, Burgess called 911. CP 101. Burgess claimed Hardin bumped into him and Burgess said, "Todd, you don't want to fuck with me. Don't bump into me again." CP 109. Burgess said Hardin later proposed they "go out and have beers together." CP 25, 109. Although Burgess said he never again spoke with Hardin, phone records showed Hardin and Burgess had called each other. CP 73-75, 104-05, 109, 162-63.

The defense theorized that Burgess initially suggested to Lofgren the idea to kill Hardin. Burgess was on parole after serving more than seven years in federal prison for a rape conviction. Lofgren did not take him seriously, but as the divorce proceedings continued and wore her down, in her frustration she unwittingly encouraged Burgess. Burgess' initial conversations with Lofgren were not recorded. CP 22-26, 60, 70-71, 76-88, 118, 125, 285-86, 318, 414-17.

In early 2012, Burgess told Lofgren the process could not be stopped. He said he had made arrangements with "mafia" people in Texas and California to do this, and they would come after Lofgren

and her daughters if she backed out or called the police. CP 82-86, 116, 122, 127, 131, 136, 153, 269, 274, 415-17. About the same time, Hardin was telling others that he was going to make sure Lofgren ended up "in Purdy." CP 25, 159, 414-15.

In January, Burgess went to his probation officer, who then contacted Pierce County detectives. CP 3-4, 94-97. Police secured a warrant to record several of Burgess's phone conversations with Lofgren: two on February 17, 2012, (CP 273-77, 279-82, 314-17), one on February 20 (CP 144-48, 350-53), and one on February 21 (CP 356-61), and phone calls and an in-person meeting with Lofgren on February 18 (CP 144-44, 148-54, 284-312), and phone calls and an in-person meeting with Burgess and Detective Shaviri on February 21 (CP 264, 363-96). The recording from the final meeting shows that Lofgren still had substantial doubts about wanting to know about or proceed with Burgess's plan. CP 97-100, 102, 377-84.

Because Lofgren pled guilty to the amended charge, the disputed facts were never tried. CP 11-19. The parties offered substantially different views of many facts in their sentencing memoranda and supporting documentation. CP 22-170 (defense sentencing memo and attachments), CP 172-257 (49 letters supporting leniency), CP 258-396 (state's sentencing memo and

attachments); CP 397-405 (four additional letters supporting leniency); CP 407-17 (two additional letters supporting leniency); CP 457-72 (seven letters submitted to support Hardin's perspective, filed 1/23/13).

## 2. Defense Theory

The defense theorized Lofgren reluctantly agreed with Burgess's suggestion to kill Hardin after she had become emotionally and physically exhausted by Hardin's actions in the dissolution proceeding. Substantial facts support the conclusion that Lofgren acted with the desire to protect her daughters. CP 39, 121, 123, 135, 156-57, 238-39, 389, 399, 401, 408; RP 45-47.

In an outpouring of support, more than 50 people wrote letters requesting a lenient sentence. The writers included, inter alia, Lofgren's family, co-workers, church members, her daughters' teachers, people who served with Lofgren as volunteers to provide medical aid in Albania and Kosovo during the war in the 1990s, and others who similarly volunteered services to medical teams providing care in India and Burma. They consistently described Lofgren as generous, caring, compassionate, an excellent nurse, and always available to help others in need. CP 172-257, 397-405, 407-17.

Those who had seen Lofgren with her two daughters uniformly praised her as an excellent and loving mother. The girls were her highest priority. CP 176-77, 180, 187, 189-90, 191, 193, 195-97, 199, 206-07, 209-10, 212, 217, 219-20, 231-35, 243, 245, 248-49, 399, 401; RP 33, 37, 43. She would work night shifts to maximize her available time with the girls during the day. CP 206, 238, 400. Many people asked the court to ensure the girls would be allowed to have contact with their mother and their material relatives. CP 178, 187, 190, 198-202, 216, 218, 242, 244-46, 400-02, 409.

In contrast, Hardin was routinely described as verbally abusive, angry, and unpredictably volatile, particularly to Lofgren but also to others. He drank regularly, behaved poorly in public situations, and was unable to mask his anger. CP 174-79, 191, 193, 199-200, 208, 210, 212-13, 217, 219-22, 239, 243, 400-01. After the dissolution proceedings resumed, he went out of his way to confront and corner various neighbors, church members, and school personnel to defame Lofgren, paint her in a bad light, isolate her, and reveal confidential medical information including information about Lofgren's infertility issues. CP 158-60, 177-78, 191-92, 197-99, 200, 203, 209, 219, 221-23, 410-11. Although Lofgren had sought help from the Crystal Judson center to seek and enforce protection orders, he frequently

violated the orders entered in the dissolution case. CP 36-54, 138, 177, 236, 259, 400-01, 410-12, 414; RP 21.

He initially was aloof with the girls, with no interest in feeding them, changing their diapers, or bathing them. CP 192, 195, 214-16, 219, 221.<sup>1</sup> Few had seen him to have any interest in parenting before the dissolution proceedings, but he told Lofgren he would take the girls if she divorced him. CP 192, 195-98, 207, 209, 215, 219, 227, 235, 398, 410; RP 37, 43-44, 47-48.

Lofgren sought counseling and therapy to help process the impending divorce. Hardin opposed her therapy efforts. CP 196, 398, 401. Hardin's efforts to isolate Lofgren and maximize conflict took their toll; during late 2011 and early 2012, Lofgren was described as exhausted, frail, despondent, and a shell of her former self. CP 178, 182, 192, 197, 199-201, 206-07, 212-13, 217-20, 222-23, 231, 235, 238-39, 241, 252, 400-01, 410, 413-17; RP 46-47.

Jeffrey Robinson, Lofgren's dissolution attorney from Gig Harbor, also wrote in support. He detailed Lofgren's fear of Hardin and her desire to ensure the girls' safety. Hardin had significant alcohol and anger problems. He continued an affair with another

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<sup>1</sup> "Aloof" is a kind description. Letter writers provided some vivid examples of his behavior. CP 177, 210, 214-15, 221-22.

woman even though he claimed he wanted to reconcile with Lofgren.  
CP 408-09.

In the divorce, Lofgren wanted to ensure the girls were safe but Hardin continued to create conflict. Robinson had practiced 34 years, but Hardin's behavior was at a level he could not remember seeing in his practice. CP 409.

Robinson confirmed what the other supporters showed: many people were willing to swear under oath that Lofgren was a wonderful mother. Unlike Hardin, many had firsthand knowledge of her hands-on parenting. Robinson concluded with his belief that Lofgren "is a good person with a huge heart and boundless love for [her daughters]." CP 409.

Lofgren's 8-page letter confirmed these facts and included firsthand accounts of Hardin's verbal and emotional abuse. She believed the girls should not grow up in such an unhealthy environment. Despite her efforts to seek a divorce and protection orders, Hardin stopped working and relentlessly devoted his time to attacking Lofgren in the community, isolating her from her support system, using her love for the girls as leverage against her, and violating restraining orders. She also explained how Burgess's suggested idea continued to snowball out of her control. She

nonetheless apologized for what she had ultimately agreed to do to escape this cycle of abuse. CP 410-17; RP 45-48. Numerous letter-writers confirmed how remorseful she was. CP 176, 201, 213, 227, 231, 236, 240, 417.

Defense counsel asked the court to impose an exceptional sentence below the standard range. CP 22-33; RP 34-43. Counsel also argued that an order prohibiting contact with the girls was not appropriate because Lofgren was trying to protect her daughters. RP 43-44.

### 3. State's Theory

The state recommended a sentence at the top of the standard range. The state opposed any finding that Lofgren was under duress, that Hardin initiated or provoked the offense, or that Lofgren lacked predisposition to commit the offense. CP 266-67; RP 18-31. The state relied in large part on transcripts from the last few conversations between Burgess and Lofgren.<sup>2</sup> Lofgren was arrested February 23, 2012. CP 4, 260-65; RP 21-29.

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<sup>2</sup> The recorded conversations occurred between February 17 and 21, 2012. CP 114-54, 273-396.

The state argued that the pretrial no-contact order should be continued as a sentence condition,<sup>3</sup> but identified no compelling reason for doing so. CP 270; RP 29, 31.

Hardin also spoke at sentencing. He claimed “my daughters” were also the victims of this crime, because they would have had “to live the rest of their lives without the father they love.” RP 13. He said they would “never be safe” and felt that Lofgren would “always be a danger to us[.]” RP 13. He said “[m]y life is dedicated to protecting my children, but I need the Court’s help.” RP 16. Contrary to the descriptions of others who had seen Lofgren with her daughters, Hardin claimed he was concerned that Lofgren might “do something unthinkable to my children in a vindictive attempt to get to me[.]” RP 17. He concluded, “I beg you to keep the no-contact order in place so that my children and I will, at least, have a chance at some sort of a normal life.” RP 18.

#### 4. Sentence and Oral Ruling

The court imposed the high end of 165 months in prison and directed no contact with Hardin for life. A sentence condition

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<sup>3</sup> Lofgren had been released on bail pending trial. One of the conditions of pretrial release was that she have no contact with Hardin and her daughters. CP 26, 178, 216; RP 31, 44.

prohibited Lofgren from contacting her two daughters for the lifetime statutory maximum. CP 429. The court also entered separate non-expiring no-contact orders prohibiting Lofgren from contacting her daughters. CP 420-23; RP 53.

The judge explained that, from her perspective as a former divorce attorney for more than 20 years, “[a]crimonious divorces are a dime a dozen.” RP 48. It was “not unusual” for divorce cases to “erupt into violence.” RP 51. The court noted this was “probably the seventh or eighth sentencing I’ve had” where an attempted death or death had occurred during a divorce. The court mentioned what it called “all these excuses” where the offense was “someone else’s” fault. RP 49.

The court noted Hardin and Lofgren were both represented by counsel in their divorce case. RP 48-49. The court surmised that both had hurled accusations back and forth, noting that “control, manipulation, and verbal abuse” are “par for the course in divorce cases.” RP 49-50. The court felt that parents might be able to divorce each other, but still are “stuck dealing with that person until the children, themselves, can make a decision about whether they want to continue to have contact with a parent or not.” RP 50.

Based on that reasoning, the court rejected the defense request for an exceptional sentence below the range. RP 51.

The court then addressed the no-contact order. The court's oral discussion follows in its entirety:

The Court is going to order a no-contact order with the children. I did that in the last case when it was the man sitting there having killed the woman, the mother of his children; so I don't see that I can legitimately say that she is entitled to have custody where she tried to have her children's father killed and would not hold the man accountable. I don't have a double standard here. She tried to have her children's father killed. The burden that would have been placed on those children was immense, if she had managed to succeed in that plan. To lose a parent when you're a small child – I had friends who lost a parent. It is with them forever; and to have to live with the fact that your mother paid someone to kill your father would be a burden that I would place on no child, and she chose that line. She chose to do it. She wasn't isolated. She has a huge support system of friends and family. She had a very good attorney. If she was feeling stressed, he would have set her up in the appropriate counseling. She's an educated woman. This isn't a woman who dropped out of school at 13 or 14 to have children who had no education and no job skills. If I was sitting here, and this was the man, and he tried to have someone kill his wife, he would be looking at the same sentence. There just isn't a double standard here, so no contact with the children. When they're 18, they can decide whether or not they want to have contact with their mother, but that would be their decision when they are adults.

RP 51.

This appeal timely follows.

C. ARGUMENT

THE ORDERS PROHIBITING CONTACT WITH LOFGREN'S DAUGHTERS ARE CONSTITUTIONALLY AND STATUTORILY INVALID.

Parental rights are fundamental rights, protected by the state and federal constitutions, state statutes, and settled case law. By entering non-expiring lifetime no-contact orders prohibiting Lofgren's contact with her daughters, the sentencing court violated these settled principles. The sentencing condition and the separate no-contact orders should be vacated. CP 420-23, 429.

a. A Sentencing Court has Limited Authority to Prohibit Contact Between a Mother and Her Daughters.

A mother has a fundamental right to raise her children without state interference. U.S. Const. amend 14; In re Custody of Smith, 137 Wn.2d 1, 13, 15, 969 P.2d 21 (1998), aff'd sub nom. Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). However, when a parent commits a criminal offense, RCW 9.94A.505(8) allows a sentencing court to "impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter."

"Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean

orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(10). Under RCW 9.94A.703(3)(b), a court has limited discretion to order an offender to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals” as a condition of community custody.

Sentencing courts may prohibit parents from contacting their children only when reasonably necessary to further the state’s compelling interest in preventing harm and protecting children. See e.g., State v. Ancira, 107 Wn. App. 650, 653-54, 27 P.3d 1246 (2001); State v. Letourneau, 100 Wn. App. 424, 437-42, 997 P.2d 436 (2000). “[C]onditions that interfere with fundamental rights must be sensitively imposed,” with “no reasonable alternative way to achieve the State’s interest.” State v. Warren, 165 Wn.2d 17, 32, 35, 195 P.3d 940 (2008); accord In re Rainey, 168 Wn.2d 367, 377, 229 P.3d 686 (2010).

A crime-related prohibition should be vacated if the sentencing court abuses its discretion. Letourneau, 100 Wn. App. at 431. “A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard.” Rainey, 168 Wn.2d

at 375 (citing State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007)).

- b. No-Contact Orders are Unlawful Unless the State Shows, and the Sentencing Court Finds, the Restriction is Reasonably Necessary to Further a Compelling State Interest.

Several cases provide useful examples on both sides of the analysis.

In Letourneau, a schoolteacher pled guilty to two counts of child rape for having sex with a 13-year-old male student. When her SSOSA was revoked, the sentencing court entered an order to clarify that “[i]n-person contact with minor children including defendant’s natural children shall be supervised by a responsible adult who is aware of the defendant’s conviction and is approved by the Department of Corrections or this Court.” Id., at 430.

Letourneau challenged the order on appeal. The state argued the order was supported because one expert opined Letourneau posed a danger to her biological children and observed “[m]any sex offenders have offended a victim other than their biological child and later offend their own child of the same or opposite sex.” Letourneau, 100 Wn. App. at 440.

This Court rejected the expert's opinion as insufficient to justify the restriction. Letourneau, 100 Wn. App. at 441-42. It held, "[t]he general observation that many offenders who molest children unrelated to them later molest their own biological children, without more, is an insufficient basis for State interference with fundamental parenting rights." Letourneau, 100 Wn. App. at 442. The no-contact condition was not reasonably necessary to prevent Letourneau from sexually molesting her own children, where there was no "affirmative showing" that she was a pedophile or otherwise posed a danger of molesting her children. Letourneau, 100 Wn. App. at 442.

This Court held the sentencing court abused its limited discretion in imposing the condition and

reverse[d] those portions of the judgment and sentence and subsequent clarifying order that restrict Letourneau from unsupervised in-person contact with her minor biological children following her release from total confinement.

Letourneau, at 444.

This Court reached similar conclusions in Ancira and Sanford. In Ancira, a court order prohibited Ancira's contact with his wife. Nonetheless, they saw each other at a party, spoke for a while, walked away together, and got into an argument. Ancira then drove

off with one of their two children, and would not return the child until his wife agreed to talk with him. Ancira, 107 Wn. App. at 652.

Ancira pled guilty to violating the restraining order. As a sentencing condition, the court entered a new order that also prohibited Ancira's contact with both of his daughters. The court gave these reasons:

Number one, they were present when the last incident occurred. They were upset by it. The history of violence between you and your wife has been conducted before your children. I don't want any further harm to them. Even if they just witnessed it and aren't direct victims of physical violence themselves, it is extremely harmful to children. It is not in their best interest. It does not mean your parents can't see the kids on their own, but you may not have any contact with your wife and kids. You can't call them, drive by, you can't show up at their school. You can't write them letters. You can't ask another person to contact them for you.

Ancira, at 653.

This Court held the trial court abused its discretion, because prohibiting all contact was not reasonably necessary to prevent Ancira's children from witnessing domestic violence. The state failed to show why a no-contact order with his wife would not protect the children from witnessing domestic violence between their parents. Nor did the state justify a total prohibition of indirect contact via mail or telephone. Ancira, at 654-56.

The trial court may have been concerned about Ancira's repeated violations of the no-contact order, but completely prohibiting him from all contact with his children is extreme and unreasonable given the fundamental rights involved.

Id., at 655. See also, State v. Sanford, 128 Wn. App. 280, 289, 115 P.3d 368 (2005) (this Court invalidated order requiring supervised visitation with Sanford's children where there were no allegations that he committed or threatened violence against his children, and it was likely that his children had not witnessed his assault of their mother).

Several other cases show the other side of the coin, illustrating the type of proof the state must provide to justify the prohibition of contact with a parent's minor children. See Rainey and Warren, supra, and State v. Berg, 147 Wn. App. 923, 942, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011).

Rainey, for example, was convicted of harassing his ex-wife and kidnapping his daughter. The jury found he took his daughter to a foreign country with the intent to inflict extreme emotional distress on his ex-wife. Rainey also had a history of violating no-contact orders. At sentencing, the court prohibited Rainey's contact with his daughter and ex-wife for life. Rainey, 168 Wn.2d at 371-73, 376.

On appeal, Rainey argued this violated his fundamental right to parent. But unlike Ancira, Rainey had been convicted of kidnapping his daughter. Given that Rainey's daughter was a victim, the court reasoned the facts required a "more nuanced look" to determine how the no-contact orders served the state's different interests in protecting two different people. Id., at 378-79.

The record showed Rainey had used his daughter in attempts to gain leverage against his ex-wife. While in custody he continued to write manipulative letters to his daughter, blaming his ex-wife for breaking up the family, and he used his daughter as a means to continue harassing his ex-wife. Rainey, at 379-80.

For these reasons, the court concluded a no-contact order of some duration was reasonably necessary to prevent further victimization. But the court also held there was no justification for the lifetime duration. The court therefore struck the order and remanded. Rainey, at 381-82.

Warren was convicted of sexually molesting his two stepdaughters. The sentencing court prohibited Warren's contact with his wife and Warren argued this violated his fundamental right to marriage. The Supreme Court disagreed, because Warren's wife was the mother of his two stepdaughters. He had beaten her and

attempted to induce her not to cooperate with the prosecution, but she still testified against him. Not surprisingly, the court found that protecting her was reasonably related to the crimes against his stepdaughters. Warren, 165 Wn.2d at 33-35;<sup>4</sup> Rainey, 168 Wn.2d at 378.

Berg was convicted of third degree child rape and child molestation, for acts he committed against the 14-year-old daughter of Berg's girlfriend. Berg, at 926-29. The abuse occurred while she was living with Berg, her mother, and their two other children. At sentencing the court entered orders prohibiting Berg's contact with the 14-year-old and his own daughter, as well.<sup>5</sup> On appeal, this Court affirmed, reasoning that Berg had exploited a position of parental influence and trust to abuse one girl, and this order prevented him from doing the same to other potential child victims of the same class. Berg, at 942-44. See also, State v. Corbett, 158 Wn. App. 576, 600-01, 242 P.3d 52 (2010) (Corbett was convicted of four counts of child rape for abusing a stepdaughter when she lived with him. This Court reasoned that the class of victim was "minors he parents" and his

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<sup>4</sup> Also not surprisingly, Warren did not challenge the order prohibiting his contact with his stepdaughters. Warren, 165 Wn.2d at 31-35.

<sup>5</sup> Berg was not prohibited from contact with his son. Berg, at 942.

method of sexual abuse was not gender-specific. For that reason, the trial court did not err in prohibiting Corbett's contact with all of his children, including his sons).

c. The State Failed to Show a Minimal Nexus, Let Alone a Compelling State Interest.

When applied here, these cases show that the trial court erred in prohibiting Lofgren's contact with her daughters.<sup>6</sup>

As in Ancira and Letourneau, no evidence showed that Lofgren's daughters had ever been harmed by her or were in danger of future harm. The facts overwhelmingly show the contrary – Lofgren is a loving and excellent mother trying to protect her daughters.

Unlike Rainey and Warren, the children were not victims of any charged offense. Unlike Berg and Corbett, the girls were not of a similar victim class as Hardin. See also, State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998) (prohibition on contact with minors was not justified where victim was an adult).

The state failed to establish a minimal nexus between this offense and these no-contact orders, let alone a compelling state interest. There was no showing the children needed any physical

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<sup>6</sup> Lofgren does not seek review of the orders prohibiting contact with Hardin. CP 418-19, 429.

protection from Lofgren. The state certainly did not show that prohibition of all contact was reasonably necessary to serve a compelling interest, “reasonably necessary to accomplish the essential needs of the State and public order,” or that there was “no reasonable alternative way to achieve the State's interest.” Warren, 165 Wn.2d at 32, 35. The Letourneau court reversed a far less invasive order despite legitimate (and proved) concerns about how Letourneau’s offense and publicity-seeking behavior were negatively affecting her children.

In short, the state failed to show any of the necessary prerequisites to justify an order prohibiting Lofgren’s contact with her daughters. The orders should be vacated.

d. The Sentencing Court’s Stated Reasons Do Not Satisfy or Change the Analysis.

The sentencing court made no written findings to justify these orders. It therefore is difficult to determine what, if anything, the state might now claim as a compelling interest, because neither the state nor the sentencing court identified one. Cf., CP 270; RP 29, 31, 48-51. “[B]road assertions, standing alone, do not form a sufficient basis for this extreme degree of interference with fundamental parental rights.” Ancira, 107 Wn. App. at 654.

In its oral ruling, the court described a no-contact order it had entered in an earlier case, and explained it would impose these no-contact orders to avoid a “double standard.” RP 51-52. In that case, “the man [was] sitting there, having killed the woman, the mother of his children[.]” RP 51. The court said it could not “see that I can legitimately say that she is entitled to have custody where she tried to have her children’s father killed[.]” RP 51 (emphasis added).

The first problem with the court’s reasoning is that it confuses “custody” with “contact.” RP 51. A family court decides custody questions. The SRA limits a sentencing court’s authority to contact questions. Cf., RCW Chapter 26.09, with RCW 9.94A.703(3)(b).<sup>7</sup>

The second problem is that the different offenses are not even roughly equivalent. The father killed their child’s mother, whereas this conviction was for solicitation. Although solicitation may be a step toward a similar result, the legislature and the courts still distinguish between a failed inchoate offense and a completed offense. See generally, RCW 9A.28.030(1); RCW 9.94A.595; State v. Varnell, 162 Wn.2d 165, 169-71, 170 P.3d 24 (2007) (an inchoate solicitation to kill more than one person is one offense, unlike multiple completed

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<sup>7</sup> See also, section f, infra.

offenses). For these two reasons, much of the sentencing court's justification is inapposite.

Although the court later recognized this offense was not completed, it still erred. It reasoned if a man "tried to have someone kill his wife, he would be looking at the same sentence. There just isn't a double standard here, so no contact with the children." RP 52. An abstract concern about "double standards" might be laudable in some circumstances, but the court still did not apply the correct legal standard. This court's desire to avoid a "double standard" based on an easily distinguishable case is not a compelling state interest, nor are lifetime no-contact orders necessary to further such an interest.

For these reasons, the no-contact orders should be reversed. Rainey, 168 Wn.2d at 375 (a court abuses its discretion when "it applies the wrong legal standard"); In re Welfare of R.S.G., 172 Wn. App. 230, 243, 250, 289 P.3d 708 (2012) (a reviewing court owes no deference when the trial court fails to apply the correct legal standard).

e. The Lifetime Duration is Erroneous and Violates Due Process.

Even if no-contact orders of any duration may be justified, lifetime prohibitions are more "draconian" than an order for a lesser

time. Rainey, 168 Wn.2d at 381. As in Rainey, the state made no effort to justify the lifetime duration of these orders, nor did the trial court find a legitimate justification.<sup>8</sup> Reversal is required. Rainey, at 381-82.

In effect, the trial court's orders amount to the state's expedited termination of parental rights without notice or due process. As noted above, parental rights are fundamental rights protected by due process. Smith, 137 Wn.2d at 13, 15; U.S. Const. amend. 14; Const. art. 1, § 3. In dependency matters, the state's mandate is to nurture the family unit and to keep it intact unless a child's right to conditions of basic nurture, health, or safety is jeopardized. RCW 13.34.020; In re Dependency of J.B.S., 123 Wn.2d 1, 8-9, 863 P.2d 1344 (1993). Even where a parent has been convicted of a qualifying serious offense against another parent, the state may not terminate parental rights unless it first initiates dependency proceedings and provides notice, a meaningful opportunity to be heard, and establishes that

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<sup>8</sup> The court's discussion of the order's length was confused. The written sentencing condition prohibits contact for life (CP 429), but the oral ruling appears to assume the children could decide whether to have contact when they turned 18. RP 52; cf. Rainey, at 382 n.5 (noting similar trial court confusion; holding that the judgment and sentence did not contain conditional language and the lifetime order was erroneous).

“[s]uch an order is in the best interests of the child.” RCW 13.34.190(1)(b); 13.34.190(1)(a)(iv); 13.34.180(3)(c). The “best interests” question requires meaningful consideration,<sup>9</sup> and termination should not occur before the court appoints and considers the report of a guardian ad litem or court appointed special advocate (CASA). RCW 13.34.100(1); 13.34.105; In re Dependency of O.J., 88 Wn. App. 690, 694-96, 947 P.2d 252 (1997), rev. denied, 135 Wn.2d 1002 (1998) .

Because none of this occurred here, the trial court’s orders violate due process. See, Ancira, at 655-56 (recognizing that sentencing courts are ill-equipped to provide due process to a parent facing no-contact orders with minor children). For these reasons as well, the orders should be vacated.

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<sup>9</sup> The courts have recognized that “best interests” requires flexible consideration of broad evidence. In re Becker, 87 Wn.2d 470, 477, 553 P.2d 1339 (1976); In re Welfare of B.D.F., 126 Wn. App. 562, 574, 109 P.3d 464 (2005).

f. Family Court is the Proper Place to Make These Determinations.<sup>10</sup>

In response, the state may concede error. Washington's unpublished decisional law is littered with reversals of similar orders following state concessions that this Court accepted.<sup>11</sup>

If the state does not concede, it may point to Hardin's dramatic entreaty at sentencing. Hardin made the effort to taint Lofgren's

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<sup>10</sup> As the state recognized, a dissolution petition was pending at the time of sentencing. CP 259. However, the sentencing court's erroneous no-contact orders had the unfortunate effect of short-circuiting the family court's consideration of this issue. With this brief, Lofgren's counsel is filing a motion to stay the no-contact orders pending appeal. That motion appends a copy of the parenting plan entered April 24, 2013, which incorporates the criminal no-contact orders until those orders are terminated.

<sup>11</sup> Most of the cases cite Letourneau and Ancira. See, e.g., State v. San-Jose, \_\_ Wn. App. \_\_\_, 2013 WL 3228614 (6/24/13); State v. Aquiningoc, 173 Wn. App. 1005, 2013 WL 312476 (1/28/13); In re McDowell, 167 Wn. App. 1016, 2012 WL 899254 (3/19/12); State v. Jones, 154 Wn. App. 1017, 2010 WL 264998 (1/25/10); State v. Bazan, 152 Wn. App. 1031, 2009 WL 3083626, \*3 (9/28/09); State v. Lott, 133 Wn. App. 1016, 2006 WL 1587797 \*3 (6/12/06); State v. Barron, 124 Wn. App. 1009, 2004 WL 2526674 (11/8/04). Lofgren's counsel does not cite these unpublished decisions as legal "authority" or for precedential value, but rather for their factual example. See GR 14.1(a); State v. Arreola, 176 Wn.2d 284, 297 n.1, 290 P.3d 983, 990 (2012).

parenting, and went so far as to try to rhetorically stretch the children into victims of this inchoate offense. RP 12-18.<sup>12</sup>

But Hardin did not make his statements under oath or while subject to cross-examination. The record does not show the sentencing court found his claims credible, nor that it relied on his unsworn assertions. Even if such a finding had been made, it would receive no deference because sworn testimony is a hallmark of due process. Without it, credibility findings cannot be upheld and reviewing courts cannot fairly fulfill their function.<sup>13</sup>

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<sup>12</sup> Hardin's parents and his sisters also drafted letters, which were filed under the misnomer of "victim impact statements [sic]." CP 457 ("Victim Impact Statements for 1/25/13 Sentencing"). Relevant provisions use the singular article, not plural, and do not envision multiple victim impact statements in a case with a single surviving victim. See Const. art. 1, § 35 ("a victim of a crime charged as a felony . . . has the right to . . . make a statement at sentencing"); RCW 7.69.030(13) (allowing a crime victim to submit "a victim impact statement, or report"); RCW 9.94A.500(1) (sentencing court "shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.") (emphasis added).

<sup>13</sup> See, e.g., In re Ross, 45 Wn.2d 654, 655-56, 277 P.2d 335 (1954) (parental rights deprivation proceedings); State v. Pollard, 66 Wn. App. 779, 787 n.4, 834 P.2d 51 (1992) ("minimal requirements of due process may well require sworn testimony" to support criminal restitution); Nirk v. City of Kent Civil Serv. Comm'n, 30 Wn. App. 214, 218, 633 P.2d 118 (1981) (civil service proceedings); Metcalf v. State,

There is equally no doubt that the defense offered a very different perspective of Hardin as a father and husband, from a wide array of reputable sources. But no matter how abusive a husband and poor a father Hardin may have been, there was no fair opportunity at sentencing for the defense to show those facts to a judge who had an interest in hearing them. RP 48-50.

Hardin may well have been the kind of calculating and abusive spouse who would lay it on extra thick at his ex-wife's sentencing to take strategic advantage of this last opportunity to get as much as he could from the sentencing judge. As defense counsel mentioned, Hardin's attorney in the civil case had tried to seek this same result. That Hardin would remain so motivated at Lofgren's sentencing would be no surprise. RP 43-44; CP 164-65.

The sentencing court properly noted that "control, manipulation, verbal abuse . . . is very par for the course in divorce cases." RP 49-50. But the court still erred by failing to recognize that no sentencing court is well-positioned to fairly consider and resolve these competing claims.

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Dept. of Motor Vehicles, 11 Wn. App. 819, 821, 525 P.2d 819 (1974) (no presumption of credibility absent sworn statement).

The Letourneau court faced a similar situation. The sentencing court had imposed minimal contact restrictions even though dissolution and custody proceedings were pending in family court. Despite expert reports showing legitimate concerns about the effect on Letourneau's children of her offense and publicity-seeking behavior, the sentencing court still went too far by restricting her visitation rights. The Letourneau court reasoned that criminal courts may enter protective conditions, but

[i]t is the business of the family and juvenile courts to address the best interests of minor children with respect to most other kinds of harm that could arise during visitation with a parent who has been convicted of a crime, including psychological harm that might arise from that parent's communications with the children regarding the crime. To that end, the family and juvenile courts have authority to appoint guardians ad litem to investigate the best interests of minor children and those courts have broad discretion to tailor orders that address the needs of children in ways that sentencing courts in criminal proceedings cannot. Sentencing courts in criminal proceedings must necessarily operate within the limitations on court discretion contained in the SRA. Here, the SSOSA evaluators and the sentencing court were understandably concerned about the welfare of Letourneau's biological children, given the bizarre circumstances of Letourneau's crimes and her attendant notoriety. But the sentencing court erred to the extent that it attempted to address those particular concerns under the auspices of the SRA.

Letourneau, at 443-44. See also, Ancira, 107 Wn. App. at 656-57 (concluding “[t]his matter is best resolved by the family court in the dissolution proceeding”); Sanford, 128 Wn. App. at 289 (“the criminal sentencing court is not the proper forum to address these legitimate concerns other than on a transitory basis”, quoting Ancira).

In short, the proper place for these questions to be heard is the forum that can fairly do so – the family court. Sentencing courts lack the resources to make informed and fair determinations as to which parent’s claims are truthful, and what amount of parental contact is in the children’s best interests. The sentencing court erred in failing to follow these cases.

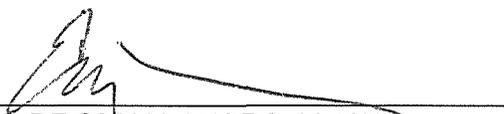
D. CONCLUSION

For all these reasons, this Court should vacate the orders and sentencing condition that prohibit Lofgren’s contact with her daughters. CP 420-22, 429.

DATED this 17<sup>th</sup> day of July, 2013.

Respectfully Submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 44528-0-II
	)	
KAREN LOFGREN,	)	
	)	
Appellant.	)	

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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17<sup>TH</sup> DAY OF JULY 2013, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] KAREN LOFGREN  
DOC NO. 363716  
WASHINGTON CORRECTIONS CENTER FOR WOMEN  
9601 BUJACICH ROAD NW  
GIG HARBOR, WA 98332

SIGNED IN SEATTLE WASHINGTON, THIS 17<sup>TH</sup> DAY OF JULY 2013.

X Patrick Mayovsky

# NIELSEN, BROMAN & KOCH, PLLC

July 17, 2013 - 1:48 PM

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