FILED

JUL 27 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 28543-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

RESPONDENT,

v.

ERNEST JAMES SORRELL

APPELLANT.

# RESPONDENT'S BRIEF

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PROSECUTING ATTORNEY
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Attorney for Respondent

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## ASSIGNMENTS OF ERROR

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## I. STATEMENT OF THE CASE

Respondent adopts appellant's statement of the case.

## II. ARGUMENT

1. Appellant's convictions for child molestation in the third degree and incest do not violate the double jeopardy clause, as they rely upon independent elements, and were encompassed for the purpose of sentencing.

Appellant is incorrect in his assertion that the evidence required to support each of his molestation charges was also sufficient to support each of his incest charges. While each has a component of sexual contact, one relies upon the age of the victim, while the other relies upon the relationship between the parties. Using a *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), analysis, it is apparent that "each provision requires proof of a fact which the other does not." *Blockburger* 284 U.S. at 304. Proving that Mr. Sorrell had had sexual contact with his daughter would not have necessarily proven that he

had sexual contact with an individual "who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim." (RCW 9A.44.089). Likewise, proving the latter would not have necessarily proven that Mr. Sorrell's sexual contact was "with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood." (RCW 9A.64.020).

*State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995), is a Washington case almost directly on point. The defendant in *Calle* was convicted of both first degree incest and second degree rape based on a single act of intercourse with his minor stepchild and sentenced to concurrent sentences. In the *Calle* case, the court looked to the legislative intent to punish both types of criminal behaviors, that is forcible rape and intercourse with a person known to be a relative. Clearly that would also be applicable here, where the legislature seeks to punish sexual contact with those unable to consent, as well as sexual contact with those whom the perpetrator knows to be related to him and where consent is absolutely irrelevant.

Additionally appellant can show no detriment as the trial court found that the multiple offenses encompassed the same criminal conduct and counted each molestation and incest charge as one offense for sentencing purposes. Cases cited by appellant are inapposite as they punish offenders for both predicate and completed crimes consecutively, or impose consecutive sentences for crimes which encompass. Neither of these scenarios apply to Mr. Sorrell's circumstances.

Because it is clear that the legislature intended to prohibit sexual contact with two very distinctive classes of individuals, those who cannot consent, and those to whom the perpetrator is related, and because the appellant's convictions were encompassed by the trial court, Mr. Sorrell's convictions for both child molestation in the 3rd degree and incest involving the same victim should stand.

2. The court did not impose a term of community custody which exceeded the statutory maximum, and so did not exceed its authority.

Mr. Sorrell was sentenced to an exceptional sentence of sixty months on each of his two encompassing convictions to be served concurrently. That is, he received sixty months on one count of molestation and incest, and sixty months on the other counts of molestation and incest, with both terms to be served concurrently. The court stated that sixty months was the statutory maximum it could impose and that that maximum was a combination of both prison time and community custody. RP 08/18/09 12. Further realizing that the appellant may receive good time credit while in the prison system, the court imposed sixty months "followed by so much of a range of community custody as is limited by the earned early release time." *Ibid.* Thus, the court imposed a sentence that had both a defined range and a determinate maximum. *In the Matter of the Personal Restraint of Jeffrey Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009), the Court found that while a sentencing court is required to impose a determinate sentence that does not exceed the statutory maximum, the community custody provisions of the Sentencing Reform Act, make it impossible to determine with any certainty how much community custody a defendant will actually be required to serve until well after the court imposes the sentence. In the instant case, by linking

the amount of community custody directly to the amount of Mr. Sorrell's earned release, the amount of community custody will complete, but not exceed, the statutory maximum sentence of sixty months.

## III. CONCLUSION

The appellant's double jeopardy argument must fail. The proof of each charge does not prove the other, and the trial court properly encompassed the molestation and incest charges for sentencing purposes. Furthermore, the trial court did not exceed its statutory authority by imposing and articulating community custody in an amount equal to the appellant's earned release limited by the statutory maximum sentence. For the foregoing reasons, the State would respectfully request that the appellant's convictions and sentence be upheld.

Submitted this 26th day of July, 2010.

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