

NO. 62682-5-I

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

REC'D

In re the Personal Restraint Petition Of:

JUL 16 2010

REYNALDO DELGADO,

King County Prosecutor
Appellate Unit

Petitioner

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

The Honorable Paris Kallas, Judge

PETITIONER'S OPENING BRIEF

DAVID B. KOCH
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STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

The jury instructions on child rape subjected Delgado to double jeopardy.

Issues Pertaining to Assignment of Error

1. Delgado was convicted on two counts of child rape. The jury instructions did not require that jurors base each conviction on a separate and distinct act, exposing him to multiple punishments for one offense and violating double jeopardy. Must one of the convictions be vacated?

2. Delgado raised this same claim in his direct appeal. Although he was correct and should have prevailed, this Court mistakenly rejected his claim (granting relief to another appellant one month later on precisely the same claim). Assuming Delgado cannot prevail because of the more rigorous standards applicable to Personal Restraint Petitions, should this Court find that he was effectively denied his right to appeal this issue and reinstate the direct appeal standard of review?

B. STATEMENT OF THE CASE

1. Charges and Trial Evidence

The King County Prosecutor's Office charged Reynaldo Delgado with two counts of child rape and one count of child

molestation. All three charges named Delgado's daughter, Z.D., as the victim and alleged that the crimes occurred between August 1, 2002 and August 31, 2004. See Information (attached as appendix A).

This Court discussed in detail the evidence from Delgado's trial in its opinion from his direct appeal. In summary, Z.D. described multiple acts of intercourse with her father. These acts included genital to genital contact, oral to genital contact, and oral to anal contact. According to Z.D., this occurred at two different homes and in her father's van. Z.D., who was between five and seven years old when the abuse allegedly occurred, was unable to specify how often it occurred or precisely when it occurred. See State v. Delgado, Slip Op. at 2-4 (filed July 23, 2007) (attached as appendix B).

2. Jury Instructions

Neither of the "to convict" instructions for the rape charges contained distinguishing information concerning the time of the crime or a specific act. Rather, both instructions required the State to prove:

- (1) That during a period of time intervening between August 1, 2002 and August 31, 2004, the defendant had sexual intercourse with Z.D.;
- (2) That Z.D. was less than twelve years old at the

time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than Z.D.; and

(4) That the acts occurred in the State of Washington.

See Jury Instructions 13 and 14.¹ Nowhere do these instructions, or any other instructions, indicate the jury's verdict had to be based on an act "separate and distinct" from its verdict on the other count.

A jury convicted Delgado on both counts of child rape and the trial court entered judgment on both counts. See Verdict Forms (attached as appendix C); Judgment (attached as appendix D).

3. Appeal and Personal Restraint Petition

Delgado appealed to this Court. Among his claims, Delgado argued that the trial court's failure to instruct jurors that each rape conviction had to be based on a separate and distinct act violated double jeopardy guarantees. This Court rejected the claim, reasoning that the instruction designed to ensure juror unanimity, the instruction telling jurors their verdict on one count should not control their verdict on another, and the prosecutor's closing argument

¹ The State attached a complete copy of the court's jury instructions to its "Response to Personal Restraint Petition," filed in this Court in May 2009.

sufficed to alert jurors they should not base the two rape convictions on the same act. See Appendix B, at 7.

Delgado subsequently filed a Personal Restraint Petition. Citing State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), and State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008), this Court appointed counsel and ordered briefing on Delgado's double jeopardy claim. See Order of Referral.

C. ARGUMENT

INADEQUATE JURY INSTRUCTIONS VIOLATED
DELGADO'S RIGHT TO BE FREE FROM DOUBLE
JEOPARDY BECAUSE THEY EXPOSED HIM TO
MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE.

The trial court was required to clearly instruct the jury that it could not convict Delgado more than once on the basis of a single act. The instructions given failed to do so. One of his two convictions for child rape must be vacated.

"The right to be free from double jeopardy . . . is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." Borsheim, 140 Wn. App. at 366; Wash. Const. art. I, § 9; U.S. Const. amend. V. A defendant's right to be free from double jeopardy is violated if instructions do

not make it manifestly apparent to the jury that the State is not seeking to impose multiple punishments for the same offense. Berg, 147 Wn. App. at 931.

This Court reviews challenges to jury instructions de novo, within the context of the instructions as a whole. Berg, 147 Wn. App. at 931. "Jury instructions must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." Borsheim, 140 Wn. App. at 366 (citation and internal quotation marks omitted). The jury instructions in Delgado's case do not satisfy this standard.

Borsheim and Berg – both of which were decided after Delgado's direct appeal – control the outcome here.

In Borsheim, this Court held that where multiple counts of sexual abuse are alleged to have occurred within the same charging period, an instruction that the jury must find "separate and distinct" acts for convictions on each count is required. Borsheim, 140 Wn. App. at 367-368. In the absence of such an instruction, a defendant is exposed to multiple punishments for the same offense in violation of his right to be free from double jeopardy. Id. at 364, 366-67. The Borsheim court vacated three of the defendant's four child rape convictions for this instructional omission. Id. at 371.

In Berg, this Court followed Borsheim in vacating a child molestation conviction based on the same omission in the jury instructions. Berg, 147 Wn. App. at 937, 944. Recently, Division Two followed Borsheim and Berg, vacating three of the defendant's four child rape convictions based on a similar error. State v. Carter, ___ Wn. App. ___, ___ P.3d ___ (filed 6/29/2010).

Barr's case is the same as Borsheim and Berg in dispositive respects. As in those cases, multiple crimes were alleged to have occurred within the same charging period. Borsheim, 140 Wn. App. at 367; Berg, 147 Wn. App. at 934. Neither the single "to convict" instruction in Borsheim nor the multiple "to convict" instructions in Berg – or any other instructions in those cases – specified each count was based on an act separate and distinct from that charged in another count, thereby exposing each defendant to multiple punishments for the same crime, based on the same act. Borsheim 140 Wn. App. at 367; Berg, 147 Wn. App. at 935. Similarly, the instructions in Delgado's case are missing this critical language.

Berg and Borsheim distinguished State v. Ellis, a Division Two case, which rejected an argument that jury instructions allowed jurors to use the same underlying act to convict the defendant on more than one count. Berg, 147 Wn. App. at 933 (citing State v. Ellis, 71

Wn. App. 400, 859 P.2d 632 (1993)). Ellis was distinguishable because the trial court in that case gave separate "to convict" instructions for each count, the instruction for one of two identically charged counts explicitly stated that the act underlying that count had to have occurred "on a day other than [the other count]," and the two other identically charged counts alleged that the charged act occurred during a different time period. Berg, 147 Wn. App. at 933-936 (quoting Ellis, 71 Wn. App. at 401-02).

Although the court provided a separate "to convict" instruction for each count in Delgado's case, this was also true in Berg. Berg, 147 Wn. App. at 934. The more salient fact is that none of the instructions indicated each count had to involve a different act and both charged counts involved the identical time period. In contrast to Ellis, it was therefore critical that jurors be instructed they must base their verdicts on "separate and distinct acts for each count."

Delgado's jury did receive a unanimity instruction. That instruction provides:

There are allegations that the defendant committed acts of sexual abuse of a child on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the

acts have been proved beyond a reasonable doubt.

Jury instruction 8. But this did not cure the problem. The trial court in Borsheim gave a similar unanimity instruction. See Borsheim, 140 Wn. App. at 364. Although this instruction adequately informed jurors that they had to be unanimous on the act that formed the basis for any given count, the instruction failed to protect against double jeopardy. Id. at 367, 369.

In Ellis, the trial court gave a unanimity instruction stating "you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count." Ellis, 71 Wn. App. at 406 (emphasis added). The Borsheim unanimity instruction did not "convey the need to base each charged count on a 'separate and distinct' underlying event" because it did not contain the "for each count" language used in Ellis. Borsheim 140 Wn. App. at 367. Nor did the instruction used at Delgado's trial.

A unanimity instruction in Berg likewise failed to protect the defendant from double jeopardy:

The State alleges that the defendant committed acts of child molestation in the third degree on multiple occasions. To convict the defendant on any count of child molestation in the third degree, one particular act of child molestation in the third degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved

beyond a reasonable doubt. You need not unanimously agree that the defendant committed all the acts of child molestation in the third degree.

Berg, 147 Wn. App. at 934-935 (emphasis added).

The State in Berg argued this unanimity instruction adequately protected Berg from double jeopardy because it contained the "on any count" language. Id. at 936. This Court rejected the State's argument because, unlike in Ellis, Berg's "to convict" instructions did not contain language distinguishing the counts. Id. at 16-17. Delgado's "to convict" instructions likewise fail to distinguish the counts and his convictions are not saved by the unanimity language.

Delgado's jury also was instructed, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." Jury instruction 7 (attached as appendix E). But this did not prevent a double jeopardy violation, either. The juries in Borsheim and Berg received similar instructions. See Borsheim 140 Wn. App. at 364; Berg, 147 Wn. App. at 935. Even read with the jury instructions as a whole, this is still insufficient to guard against double jeopardy because it fails to adequately inform the jury that each crime requires proof of a different act. Borsheim 140 Wn. App.

at 367; Berg, 147 Wn. App. at 935-936.

In rejecting Delgado's double jeopardy claim in his direct appeal, this Court relied heavily on the fact "the State clearly elected two separate acts of rape, vaginal and oral penetration, as the criminal acts associated with the two counts during its closing argument."² Appendix A, at 7. The State relies on this same "election" in arguing that Delgado is not entitled to relief now. See State's Supplemental Response to Personal Restraint Petition, at 11.

But "[t]he jury should not have to obtain its instruction on the law from arguments of counsel." Id. (quoting State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995)). "Rather, it is the judge's 'province alone to instruct the jury on relevant legal standards.'" Id. at 935-936 (quoting State v. Clausung, 147 Wn.2d 620, 628, 56 P.3d 550 (2002)).

Moreover, this Court rejected a similar argument in Berg,

² In fact, the prosecutor never told jurors they *must* base each count on a different act. Rather, he told jurors that intercourse can involve contact between sexual organs or contact between a sexual organ and a mouth. He then provided an example of each based on Z.D.'s claims and said, "there's two counts and there's each type of rape kind of being committed, so we know that there are two counts of rape of a child that have been proven." RP (11/28/05) at 76-77. At best, the prosecutor offered one possible path to conviction.

where the State contended the defendant was adequately protected from double jeopardy because the prosecution presented evidence of separate acts to support both charges and told jurors during closing that they had to agree on two particular acts. Berg, 147 Wn. App. at 935. This Court rejected the argument because the double jeopardy violation resulted from omitted language in the instructions, not the State's proof or the prosecutor's arguments. Id. Evidence or argument presented at trial cannot remedy a double jeopardy violation caused by deficient instructions. Id.

The Washington Supreme Court rejected a similar argument in State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008). Kier was convicted on one count of second degree assault and one count of first degree robbery involving two potential victims. Kier, 164 Wn.2d at 803. If the jury treated the same individual as the victim for both charges, the convictions violated double jeopardy. If, however, jurors based each conviction on a different victim, there was no violation. Id. at 805.

Although the jury instructions did not require jurors to base each conviction on a different victim, in closing argument the prosecutor clearly identified separate victims and acts for each count. Id. at 813. On appeal, the State argued that this "election"

prevented a double jeopardy violation. The Supreme Court disagreed, noting that jurors are instructed to base their verdicts on the evidence and instructions rather than the arguments of counsel. *Id.* As in *Kier*, the prosecutor's closing argument in Delgado's case could not prevent a double jeopardy violation where neither the charge, the evidence, nor the jury instructions required jurors to base each conviction on a separate and distinct act of rape.

Because Delgado's double jeopardy challenge is now before this Court by way of Personal Restraint Petition, his case raises the question of the proper standard of review. Under any standard, however, he prevails.

Generally, when a petitioner alleges constitutional error, he must establish by a preponderance of the evidence that the error resulted in actual and substantial prejudice. *In re Brett*, 142 Wn.2d 868, 874, 16 P.3d 601 (2001). Moreover, an error that is per se prejudicial on direct review is not *necessarily* per se prejudicial on collateral review. However, "[t]he petitioner's burden to establish actual and substantial prejudice may be waived where the error gives rise to a conclusive presumption of prejudice." *In re Personal Restraint of St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992); accord *In re Personal Restraint of Orange*, 152 Wn.2d 795, 804,

100 P.3d 291 (2004). Notably, a double jeopardy violation is such an error. In re Personal Restraint of Borrero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (“If, as Borrero contends, he was unconstitutionally punished for two offenses in violation of double jeopardy principles, prejudice is established.”), cert. denied, 552 U.S. 1154 (2008).

For the reasons already discussed, Delgado has demonstrated a double jeopardy violation. The jury instructions permitted two rape convictions based on the same act. The error occurs in the jury instructions regardless of what the prosecutor might say. Berg, 147 Wn. App. at 935. Thus, prejudice is established.

However, even if Delgado were required to demonstrate something more, he can do so. The State relies heavily on the fact the trial deputy told jurors during closing argument that they could base each rape charge on a different act. See State’s Supplemental Response To Personal Restraint Petition, at 11. But, as discussed above, Berg and Kier make clear that such arguments do not fix faulty jury instructions and jurors were under no obligation to follow the prosecutor’s suggested path to conviction. Jurors were expressly told to disregard any argument

not supported by the jury instructions. See Jury instruction 1. In light of the instructions, jurors were free to – and most likely did – choose the path of least resistance and simply based both convictions on one act of rape.

Finally, should this Court decide that the standards for collateral review would preclude relief, under the unusual circumstances of this case Delgado asks this Court to apply the standards for direct appeal. He made the identical double jeopardy argument in his direct appeal and it would be unfair to subject him to a different standard now.

The Washington Constitution grants the right to appeal in all criminal cases. Const. art. 1, § 22 (amend. 10); State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). This right is guaranteed as a matter of due process. In re Personal Restraint of Frampton, 45 Wn. App. 554, 726 P.2d 486 (1986). And when the right is violated, this Court will reinstate the direct appeal to allow use of its more favorable standards. See Frampton, 45 Wn. App. at 558-563 (reinstating appeal where appellate counsel ineffective for failing to raise issues challenging defendant's conviction).

Reinstatement is not limited to ineffective assistance of appellate counsel. In In re Woods, 154 Wn.2d 400, 410, 114 P.3d

607 (2005), the Supreme Court chose to apply direct review standards to issues raised in a PRP where the verbatim report of proceedings had been incomplete for direct review.

This Court should do the same for Delgado. He timely filed his appeal, challenged his rape convictions on double jeopardy grounds, and argued that one of the two convictions must be vacated because the trial court failed to instruct jurors that each conviction must be based on a separate and distinct act. His argument was factually and legally correct. Yet, he was denied relief because this Court made a mistake. Thirty five days later – beyond the time for a motion for reconsideration – this Court issued its opinion in Borsheim, which indicates Delgado should have prevailed.

The more demanding standard for PRPs is “necessary to preserve the societal interest in finality, economy, and integrity of the trial process. It also recognizes that the petitioner has had an opportunity to obtain judicial review by appeal.” Woods, 154 Wn.2d at 409. These interests are not in jeopardy when a defendant properly raises a constitutional claim on direct appeal, the reviewing court mistakenly rejects that claim, and the reviewing court is provided an opportunity to correct its mistake in a PRP.

There is no compelling reason *not* to apply the direct appeal standard to Mr. Delgado's double jeopardy claim.

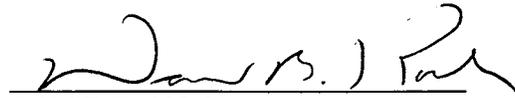
D. CONCLUSION

The court's failure to instruct jurors that each conviction must be based on a "separate and distinct act" resulted in a violation of double jeopardy. One of Delgado's two rape convictions must be vacated on this ground.

DATED this 16th day of July, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Petitioner

APPENDIX A

1 That the defendant REYNALDO DELGADO in King County, Washington during a
2 period of time intervening between August 1, 2002 through August 31, 2004, being at least 24
3 months older than Z.D. (dob 8/1/97), had sexual intercourse with Z.D. (dob 8/1/97), who was
4 less than 12 years old and was not married to the defendant;

5 Contrary to RCW 9A.44.073, and against the peace and dignity of the State of
6 Washington.

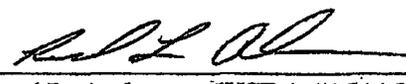
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COUNT III

6 And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse REYNALDO
7 DELGADO of the crime of **Child Molestation in the First Degree - Domestic Violence**, a
8 crime of the same or similar character and based on the same conduct as another crime charged
9 herein, which crimes were part of a common scheme or plan and which crimes were so closely
10 connected in respect to time, place and occasion that it would be difficult to separate proof of one
11 charge from proof of the other, committed as follows:

12 That the defendant REYNALDO DELGADO in King County, Washington during a
13 period of time intervening between August 1, 2002 through August 31, 2004, being at least 36
14 months older than Z.D. (dob 8/1/97), had sexual contact for the purpose of sexual gratification
15 with Z.D. (dob 8/1/97), who was less than 12 years old and was not married to the defendant;

16 Contrary to RCW 9A.44.083, and against the peace and dignity of the State of
17 Washington.

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19
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23
NORM MALENG
Prosecuting Attorney

By: 
Richard L. Anderson, WSBA #25115
Senior Deputy Prosecuting Attorney

04-1-13920-8KNT

ORIGINAL

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE:

That Michael W. Bertucci is a Detective with the Federal Way Police Department and has reviewed the investigation conducted in Federal Way Police Department Case Number 04-8054; and that there is probable cause to believe that Reynaldo Delgado, committed the crime of **Rape of a Child 1st Degree 9A.44.073**. This belief is predicated on the following facts and circumstances:

On 06/01/04 the victim's adult cousins, Adriana Coronilla-Delgado and Maria Coronilla, contacted CPS and filed a report. They stated that their younger cousin, Z.D. (d.o.b. 8/1/93), was possibly being sexually assaulted by her father Reynaldo Delgado. They had noticed red marks around Z.D.'s nipples. They also reported that Z.D. had recently had some type of vaginal irritation and her father refused to take her to the doctor. CPS caseworker Naomi Aina was assigned the case and went to the child's school to interview the child. Aina interviewed the child and stated in her initial report that the child made no disclosures of sexual abuse and the case was closed.

On 08/28/04 the adult cousin (Maria Coronilla) and the victims new stepmother Erica Albarado brought the children into Highline Hospital to have the children examined. While at that Hospital Z.D. made several disclosures about sexual abuse by the father to the hospital staff. The children were referred to Harborview Medical Center for a physical examination. There was also some concern by the cousin and stepmother that the younger child (G.D. (4/5/99)) may also have been sexually assaulted. Both children were examined by Dr. Wiester with the Harborview Sexual Assault Center. After conducting the exams of both girls Dr. Wiester concluded, "Based on the information available to this examiner at this time, this child gives a history consistent with child sexual abuse and physical abuse, and has a genital examination which is concerning for possibly healed vaginal penetrating trauma".

On 09/24/04 both girls were taken to the Regional Justice Center in Kent to meet with Ashley Wilske (child interview specialist). Z.D. was the first child to be interviewed by Wilske. She made several disclosures to include saying that her father wanted to have a baby with her and that he sucks on her neck and leaves marks. She said that she had asked her father about the marks and he told her that her sister put the marks on her neck. The child when talking would refer to her father's penis as, "the thing that he goes to the bathroom with". Wilske asked her what he did with the thing that he goes to the bathroom with. Z.D. replied that he puts it where she went to the bathroom and stated that he has done it more then once. She also stated the he had done that to her when she was six years old and made her bleed. Z.D. said that her mother (Erica) would ask her father why he would do that to her and he would hit her all the time (Erica). She also stated that she saw her father do the same thing to her sister (put it in her pee place). When asked where, as in location that her father would do this to her she said that he would do it to her in their apartment in Federal Way. The child also said the her father would also make her lick the part that he goes pee with. When asked how many times she just replied "many". During the interview she also disclosed that her father makes her get on her sister and he would take both of their pants off. Wilske then began to ask Z.D. about when her father makes her and her sister get on top of each other and started drawing stick figures. She was asking her where each person was laying and she would draw and show the diagram to Z.D. It should be noted that the letters

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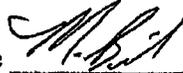
on the diagram are as follows Z=Z.D , G=G.D , R=Reynaldo, E=Erica. indicated the she and her sister would lay on top of each other and her father would lay behind her and would "lick me where I go poop". He would also tell her to lick her sister where she went to the bathroom.

Wilske attempted to conduct an inter view with G.D. but the child was too young and was not very articulate.

Both interviews were recorded on DVD. The originals were kept by Wilske and I took copies of each interview and booked them into evidence.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 27th day of October 2004, at Federal Way, Washington.

Signature of Assigned Detective



Michael W. Bertucci

APPENDIX B

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

FILED

2009 MAY 23 PM 1:39

STATE OF WASHINGTON,)	No. 57859-6-I	COURT CLERK SEATTLE, WA.
)		
Respondent,	)	MANDATE
)		
v.	)	King County
)		
REYNALDO DELGADO,	)	Superior Court No. 04-1-13920-8.KNT
)		
Appellant.)		
)		

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on July 23, 2007, became the decision terminating review of this court in the above entitled case on May 21, 2008. An order denying a petition for review was entered in the Supreme Court on April 30, 2008. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

Pursuant to RAP 14.4 costs in the amount of \$4,796.59 are to be taxed against judgment debtor REYNALDO DELGADO as follows: costs in the amount of \$4,639.05 are awarded in favor of judgment creditor WASHINGTON OFFICE OF PUBLIC DEFENSE, INDIGENT DEFENSE FUND and costs in the amount of \$157.54 are awarded in favor of judgment creditor KING COUNTY PROSECUTOR'S OFFICE.

c: Nancy Collins
Lee Yates
Hon. Paris Kallas
Indeterminate Sentencing Review Board



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 21st day of May, 2008.

A handwritten signature in black ink, appearing to read "Richard D. Johnson", written over a horizontal line.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
	)	No. 57859-6-I
Respondent,)	
	)	DIVISION ONE
v.)	
)	
REYNALDO DELGADO,	)	UNPUBLISHED OPINION
)	
Appellant.	)	FILED: July 23, 2007
_____)	

PER CURIAM – Reynaldo Delgado challenges his conviction on the ground that the court failed to instruct the jury that each count was to be based on a different criminal act and thus violated his right to a unanimous verdict. He also challenges the constitutionality of RCW 43.43.754, arguing that it violates his rights under the Fourth Amendment and article I, section 7 of the Washington State Constitution. When read as a whole, the jury instructions in this case correctly directed the jury that it must unanimously agree on the criminal act that constituted the charged crime and that its verdict on one count should not control any other count. And in State v. Surge,¹ the Washington Supreme Court recently rejected Delgado’s arguments about the constitutionality of RCW 43.43.754. We affirm.

¹ 160 Wn.2d 65, 156 P.3d 208 (2007).

FACTS

Reynaldo Delgado was found guilty of two counts of rape of a child in the first degree and one count of child molestation in the first degree based on acts that involved Delgado's young daughter Z.D., whom he sexually abused between August 2002 and August 2004. Z.D. was born on August 1, 1997; she was eight years old when she testified at her father's trial in November 2005.

At trial, Z.D. testified about several incidents of sexual abuse by her father at the homes of Adrianna Coronilla-Delgado and Maria Coronilla-Delgado, Delgado's nieces, and in Delgado's van. She testified that her father would tell her that he wanted to have a baby with her, and she described having intercourse and oral sex with him on many occasions. She said her father made her and her sister, G.D., remove their clothes and get on top of each other, and that he made red marks on her neck by sucking on her.

Maria testified that she noticed red marks on Z.D.'s neck. She said that Z.D. told her that Delgado had sucked on her neck and told her to say that her sister had bitten her. Z.D. told Maria it was not true, but she was afraid to tell on him. When Maria asked Delgado what happened, Delgado told her that G.D. had bitten Z.D. G.D. also told Maria this was not true. Adrianna said she also saw red marks that looked like hickeys on Z.D.'s neck while Z.D. was living with Maria and later when Delgado was living with her. When Delgado was in Alaska, Adrianna called him to discuss taking Z.D. to the hospital. She was complaining of abdominal pain and burning and scratching in her vaginal area. Delgado told her that Z.D. would sometimes become irritated and to wait and see if it went away before taking her to the doctor. School authorities contacted Adrianna about Z.D.'s unusual behavior and hickeys that they

noticed on Z.D.'s body. Z.D. disclosed the sexual abuse to Maria and Adrianna, and they took her to Highline Hospital. Both Z.D. and G.D. were later placed in foster care.

Dr. Susan O'Brien examined Z.D. at Highline Hospital on August 28, 2004. Dr. O'Brien testified that Z.D. told her Delgado took off his clothes and climbed on top of her. Z.D. said, "I have a hole down there" which her father made and pointed to her private area. She also told Dr. O'Brien that Delgado bit her in that area. Dr. O'Brien said that Z.D. made these statements spontaneously and not in response to questioning. During her examination of Z.D., Dr. O'Brien noted scarring consistent with penetrating trauma and sexual intercourse. She reported her findings to the sexual assault clinic at Harborview Hospital.

On August 30, 2004, Dr. Rebecca Wiester examined Z.D. at Harborview Hospital. Z.D. told Dr. Wiester that her father climbed on top of her, gave her red marks on her neck, and described having sexual intercourse with him. Z.D. said this would sometimes take place in Delgado's car, and Delgado told her he wanted to have a baby with her. Z.D. said her father told her not to tell anyone that he touched her where she "went pee." Dr. Wiester's examination found that Z.D. had an abnormal hymen that was consistent with healed vaginal penetrating trauma which could have come from a penis.

Ashley Wilske, a child interview specialist with the King County Prosecutor's Office, interviewed Z.D. on September 24, 2004. A DVD of this interview was admitted at trial, played in court, and submitted to the jury. In it, Z.D. described numerous incidents of oral and vaginal intercourse with Delgado and occasions when her father had made her and her sister remove their clothes and get on top of one another. Z.D.

also said that Delgado took her to his van to have sex with her and made red marks on her neck by sucking on her.

Discussions between counsel about the jury instructions were conducted off the record. On the record, the court stated that Delgado's only exception to the instructions was a different reasonable doubt instruction and that neither party believed knowledge needed to be defined for the jury. When the court asked Delgado's counsel whether there were any exceptions to the instructions, Delgado's counsel said no. The court gave these instructions:

No. 7

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

No. 8

There are allegations that the defendant committed acts of sexual abuse of a child on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

....

No. 13

To convict the defendant of the crime of rape of a child in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during a period of time intervening between August 1, 2002 and August 31, 2004, the defendant had sexual intercourse with Z.D.;
- (2) That Z.D. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least twenty-four months older than Z.D.; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

No. 14

To convict the defendant of the crime of rape of a child in the first degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 1, 2002 and August 31, 2004, the defendant had sexual intercourse with Z.D.;

(2) That Z.D. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than Z.D.; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count II.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count II.

The jury found Delgado guilty as charged.

DISCUSSION

I. Jury Unanimity

Delgado challenges his conviction on the ground that the jury instructions violated his right to a unanimous verdict and to be free from double jeopardy because they did not explain the unanimity requirement or direct the jury to base a conviction on each count on a different criminal act. Because the jury heard about numerous incidents of alleged sexual contact between Z.D. and her father from August 1, 2002 through August 31, 2004, Delgado contends that the jury could have disagreed upon which instances were proven beyond a reasonable doubt and based its verdict upon the

same single act for each count. While the prosecutor highlighted certain events during closing argument, he argues this does not cure the problem because the jury must base its verdict on all of the evidence produced at trial and is instructed not to rely on closing arguments as evidence or a statement of the law.

The State asserts that the jury instructions, when read as a whole, correctly instructed the jury about the unanimity requirement and Instruction 8 is a correct statement of the law under State v. Petrich.² It also argues that Delgado's double jeopardy claim fails because the prosecutor told the jury during closing arguments that each count was distinct, one based on rape by vaginal penetration and the other based on oral penetration. The prosecutor asked the jury to return a guilty verdict based on each of these two forms of intercourse.

Jury instructions are reviewed de novo and construed as a whole.³ They are sufficient if they allow the parties to argue their theories of the case and, when taken as a whole, do not mislead the jury and properly inform it of the law to be applied.⁴ In Washington, a defendant may be convicted only when a unanimous jury concludes that he has committed the criminal act charged in the information.⁵ In cases where the evidence could support more than one criminal act which could form the basis for conviction on a single count, either the State must tell the jury which acts to rely on in its

² 101 Wn.2d 566, 683 P.2d 173 (1984).

³ State v. Hunt, 128 Wn. App. 535, 538, 116 P.3d 450 (2005) (citing State v. Woods, 143 Wn.2d 561, 590, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001)), review denied, 160 Wn.2d 1001 (2007).

⁴ Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995) (citing Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 36, 864 P.2d 921 (1993); Farm Crop Energy, Inc. v. Old Nat'l Bank, 109 Wn.2d 923, 933, 750 P.2d 231 (1988)).

⁵ State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)).

deliberations or the court must give a Petrich instruction explaining that the jury must unanimously agree on a specific criminal act to find guilt.⁶ Both were done here.

Here, Instructions 7 and 8 told the jury that it must “unanimously agree as to which act or acts have been proved beyond a reasonable doubt” and correctly told the jury that its “verdict on one count should not control [the] verdict on any other count.” These instructions protected Delgado’s right to jury unanimity and instructed the jury to decide each count separately. The court could properly instruct the jury to consider the criminal acts that took place between August 2002 and August 2004 for both rape counts, rather than identify a specific act that occurred during that period without violating Delgado’s right to be free from double jeopardy because its Petrich instruction told the jury it had to unanimously agree on specific acts to support each count. In addition, the State clearly elected two separate acts of rape, vaginal and oral penetration, as the criminal acts associated with the two counts during its closing arguments. The trial court did not violate Delgado’s right to a fair trial or to be free from double jeopardy.⁷

II. DNA Evidence

Delgado challenges the constitutionality of RCW 43.43.754, arguing that the collection and analysis of DNA (deoxyribonucleic acid) samples constitutes an unreasonable search subject to the warrant requirement of the Fourth Amendment and violates article I, section 7 of the Washington State Constitution. Delgado’s argument on this issue fails because the Washington State Supreme Court upheld the statute in

⁶ Id. (citing Petrich, 101 Wn.2d at 573; citing State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911)).

⁷ See State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003).

State v. Surge, holding that it did not violate article I, section 7 of the Washington Constitution or the Fourth Amendment.⁸

CONCLUSION

We affirm.

For the Court:

Azid, J.

Becker, J.

Edenborn, J.

⁸ 160 Wn.2d 65 (2007).

APPENDIX C

FILED
KING COUNTY, WASHINGTON
NOV 29 2005
SUPERIOR COURT CLERK
BY KELLI C. NORTHROP
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
	)	No. 04-1-13920-8 KNT
Plaintiff,)	
	)	VERDICT FORM A
vs.)	
)	
REYNALDO DELGADO)	
)	
Defendant.)	

We, the jury, find the defendant REYNALDO DELGADO
guilty (write in not guilty or guilty) of the crime
of Rape of a Child in the First Degree as charged in Count I.

Bay A. Northrop
Foreperson

FILED
KING COUNTY, WASHINGTON
NOV 29 2005
SUPERIOR COURT CLERK
BY KELLI C. NORTHROP
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
	)	No. 04-1-13920-8 KNT
Plaintiff,)	
	)	VERDICT FORM B
vs.)	
)	
REYNALDO DELGADO)	
)	
Defendant.)	

We, the jury, find the defendant REYNALDO DELGADO guilty (write in not guilty or guilty) of the crime of Rape of a Child in the First Degree as charged in Count II.

Ray A. Battle
Foreperson

FILED
KING COUNTY, WASHINGTON
NOV 29 2005
SUPERIOR COURT CLERK
BY KELLI C. NORTHROP,
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
	)	No. 04-1-13920-8 KNT
Plaintiff,)	
	)	VERDICT FORM C
vs.)	
)	
REYNALDO DELGADO)	
)	
Defendant.)	

We, the jury, find the defendant REYNALDO DELGADO guilty (write in not guilty or guilty) of the crime of Child Molestation in the First Degree as charged in Count III.

Ben A. B. Alt
Foreperson

APPENDIX D

FILED

06 FEB 17 PM 4:47

KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

FAX HIM ✓

PRESENTING STATEMENT & INFORMATION ATTACHED
CERTIFIED COPY TO COUNTY JAIL
FEB 17 2006

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,	)	No. 04-1-13920-8 KNT
)	
Vs.	)	JUDGMENT AND SENTENCE
	)	FELONY
REYNALDO DELGADO)	
)	
Defendant,)	

I. HEARING

I.1 The defendant, the defendant's lawyer, TONY SAVAGE, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: _____

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 11/29/2005 by jury verdict of:

Count No.: I Crime: RAPE OF A CHILD IN THE FIRST DEGREE - DOMESTIC VIOLENCE
 RCW 9A.44.073 Crime Code: 01065
 Date of Crime: 08/01/2002 - 08/31/2004 Incident No. _____

Count No.: II Crime: RAPE OF A CHILD IN THE FIRST DEGREE - DOMESTIC VIOLENCE
 RCW 9A.44.073 Crime Code: 01065
 Date of Crime: 08/01/2002 - 08/31/2004 Incident No. _____

Count No.: III Crime: CHLD MOLESTATION IN THE FIRST DEGREE - DOMESTIC VIOLENCE
 RCW 9A.44.083 Crime Code: 01071
 Date of Crime: 08/01/2002 - 08/31/2004 Incident No. _____

Count No.: _____ Crime: _____
 RCW _____ Crime Code: _____
 Date of Crime: _____ Incident No. _____

[] Additional current offenses are attached in Appendix A

8

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a firearm in count(s) _____ RCW 9.94A.510(3).
- (b) While armed with a deadly weapon other than a firearm in count(s) _____ RCW 9.94A.510(4).
- (c) With a sexual motivation in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A. offense committed in a protected zone in count(s) _____ RCW 69.50.435.
- (e) Vehicular homicide Violent traffic offense DUI Reckless Disregard.
- (f) Vehicular homicide by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g) Non-parental kidnapping or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h) Domestic violence offense as defined in RCW 10.99.020 for count(s) _____.
- (i) Current offenses encompassing the same criminal conduct in this cause are count(s) _____ RCW 9.94A.589(1)(a).

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

- Criminal history is attached in Appendix B.
- One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	6	XII			162 TO 216 MONTHS	LIFE AND/OR \$50,000
Count II	6	XII			162 TO 216 MONTHS	LIFE AND/OR \$50,000
Count III	6	X			98 TO 130 MONTHS	LIFE AND/OR \$50,000
Count						

Additional current offense sentencing data is attached in Appendix C.

2.5 **EXCEPTIONAL SENTENCE (RCW 9.94A.535):**

Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in Appendix D. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
- Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.
- Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
- Date to be set.
- Defendant waives presence at future restitution hearing(s).
- Restitution is not ordered.

✓ Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs; Court costs are waived; (RCW 9.94A.030, 10.01.160)
- (b) \$100 DNA collection fee; DNA fee waived (RCW 43.43:754)(crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs; Recoupment is waived (RCW 9.94A.030);
- (d) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA; VUCSA fine waived (RCW 69.50.430);
- (e) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived; (RCW 9.94A.030)
- (f) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (g) \$ _____, Incarceration costs; Incarceration costs waived (RCW 9.94A.760(2));
- (h) \$ _____, Other costs for: _____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 500 + *restitution of any*. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied. Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

Court Clerk's trust fees are waived.

Interest is waived except with respect to restitution.

4.4 The defendant, having been convicted of a **FELONY SEX OFFENSE**, is sentenced to the following:

(a) **DETERMINATE SENTENCE** : Defendant is sentenced to a term of confinement in the custody of the
 King County *Jail* King County *Work/Education Release* (subject to conditions of conduct ordered
this date) *Department of Corrections*, as follows, commencing: immediately;
 Date: _____ by _____ a.m. / p.m.

_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____;
_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____;
_____ months/days on count _____; _____ months/days on count _____; _____ months/days on count _____.

ALTERNATIVE CONVERSION - RCW 9.94A.680 (LESS THAN ONE YEAR ONLY):

_____ days of total confinement are hereby converted to:
 _____ days of partial confinement to be served subject to the requirements of the King County Jail.
 _____ days/hours community service under the supervision of the Department of Corrections to be
completed as follows: on a schedule established by the defendant's Community Corrections Officer;

 Alternative conversion was not used because: Defendant's criminal history, Defendant's
failure to appear, Other: _____

CONFINEMENT LESS THAN ONE YEAR : COMMUNITY **SUPERVISION**, for crimes
committed before 7-1-2000, **CUSTODY**, for crimes committed on or after 7-1-2000, is ordered
pursuant to RCW 9.94A.545 for a period of 12 months. The defendant shall report to the Department of
Corrections within 72 hours of this date or of his/her release if now in custody, shall comply with all the
rules, regulations and conditions of the Department for supervision of offenders (RCW 9.94A.720); shall
comply with all affirmative acts required to monitor compliance; and shall otherwise comply with terms set
forth in this sentence.

APPENDIX _____: Additional Conditions are attached and incorporated herein.

COMMUNITY PLACEMENT / CONFINEMENT OVER ONE YEAR: pursuant to RCW
9.94A.700, for qualifying crimes committed before 6-6-1996, is ordered for _____ months or for
the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months
for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12
months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against
person defined in RCW 9.94A.440 not otherwise described above.]

APPENDIX H: Community Placement conditions are attached and incorporated herein.

COMMUNITY CUSTODY / CONFINEMENT OVER ONE YEAR: pursuant to RCW 9.94A.710
for any **SEX OFFENSE** committed after 6-6-96 but before 7-1-2000, is ordered for a period of **36**
months or for the period of earned early release awarded under RCW 9.94A.728 whichever is longer.

APPENDIX H: Community Custody conditions are attached and incorporated herein.

COMMUNITY CUSTODY / CONFINEMENT OVER ONE YEAR: pursuant to RCW 9.94A.715
for qualifying crimes (non RCW 9.94A.712 offenses) committed after 6-30-2000 is ordered for the
following established range:

- Sex Offense, RCW 9.94A.030(38) - 36 to 48 months
- Serious Violent Offense, RCW 9.94A.030(37) - 24 to 48 months
- Violent Offense, RCW 9.94A.030(45) - 18 to 36 months
- Crime Against Person, RCW 9.94A.411 - 9 to 18 months
- Felony Violation of RCW 69.50/52 - 9 to 12 months

or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer.
Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant
to RCW 9.94A.737.

APPENDIX H: Community Custody conditions are attached and incorporated herein.

(b) INDETERMINATE SENTENCE - QUALIFYING SEX OFFENSES occurring after 9/1/01:

The Court having found that the defendant is subject to sentencing under RCW 9.94A.712, the defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: immediately, [] (Date): _____ by _____ m.

Count I : Minimum Term: 216 months/~~days~~; Maximum Term: life years/life;

Count II : Minimum Term: 216 months/~~days~~; Maximum Term: life years/life;

Count III : Minimum Term: 130 months/~~days~~; Maximum Term: life years/life;

Count _____ : Minimum Term: _____ months/days; Maximum Term: _____ years/life.

COMMUNITY CUSTODY - pursuant to RCW 9.94A.712 for qualifying SEX OFFENSES committed on or after September 1, 2001, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence as set forth above. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.713, 9.94A.737.

APPENDIX H: Community Custody conditions are attached and incorporated herein.

4.5 ADDITIONAL CONDITIONS OF SENTENCE

The above terms for counts I, II, III are consecutive concurrent.

The above terms shall run [] CONSECUTIVE [] CONCURRENT to cause No.(s) _____

The above terms shall run CONSECUTIVE [] CONCURRENT to any previously imposed sentence not referred to in this order.

[] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98.)

[] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is 216 months.

Credit is given for 420 days served [] days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A.505(6). [] Jail term is satisfied - defendant shall be released under this cause.

4.4 4.6 NO CONTACT: For the maximum term of life years, defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: Z.P.G.D. Maria Conilla - Delgado, Adriano Conilla - Delgado
 Any minors without supervision of a responsible adult who has knowledge of this conviction.

✓ 4.7 DNA TESTING: The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

✓ [X] HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

✓ 4.8 SEX OFFENDER REGISTRATION: The defendant shall register as a sex offender as ordered in APPENDIX J.

4.9 [] ARMED CRIME COMPLIANCE, RCW 9.94A.475,.480. The State's plea/sentencing agreement is [] attached [] as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: February 17, 2006

Paris K. Kallas
JUDGE
Print Name: JUDGE PARIS K. KALLAS

Presented by: [Signature]
Deputy Prosecuting Attorney, WSBA# 16223
Print Name: _____

Approved as to form: [Signature]
Attorney for Defendant, WSBA# 2208
Print Name: ANTHONY SAUSAGE

FINGERPRINTS



BEST IMAGE POSSIBLE

Right Hand
Fingerprints of:

Reynaldo Delgado

Defendant's Signature:

Reynaldo Delgado

Defendant's Address:

470 Department of
Corrections, Olympia, Wa.

Dated: 2-17-06

Paris K. Kallas
JUDGE, KING COUNTY SUPERIOR COURT
PARIS K. KALLAS

Attested by:

Barbara Miner, Superior Court Clerk

By:

[Signature]
Deputy Clerk

CERTIFICATE

I, _____,
Clerk of this Court, certify that the
above is a true copy of the Judgment
and Sentence in this action on record
in my office.
DATED: _____

CLERK

By: _____
Deputy Clerk

OFFENDER IDENTIFICATION

S.I.D. No. _____
Date of Birth: 5/7/61
Sex: M
Race: H

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,	)	No. 04-1-13920-8 KNT
)	
vs.	)	APPENDIX G
	)	ORDER FOR BIOLOGICAL TESTING
REYNALDO DELGADO	)	AND COUNSELING
)	
Defendant,)	
)	

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: February 17, 2006

Manisk-Koll
JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
Plaintiff,)	
	)	No. 04-1-13920-8 KNT
v.)	
	)	APPENDIX H
	)	COMMUNITY CUSTODY
DELGADO, Reynaldo)	
Defendant,)	
)	

The Court having found the defendant guilty of offense(s) qualifying for community custody, it is further ordered as set forth below.

4.5 Community Custody: Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after 1 July 1990 to community custody for three years or up to the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2) whichever is longer and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community custody.

Community Custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

(a) Defendant shall comply with the following conditions during the term of community custody:

- (1) Report to and be available for contact with the assigned community corrections officer as directed;
- (2) Work at Department of Corrections-approved education, employment, and/or community service;
- (3) Not consume controlled substances except pursuant to lawfully issued prescriptions;
- (4) While in community custody not unlawfully possess controlled substances;
- (5) Pay community custody fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location; and
- (7) Do not own, use or possess firearms or ammunitions.

The following conditions listed under 4.5(a) are hereby waived by the court: _____

(b) Defendant shall comply with the following other conditions during the term of community custody:

- (8) Do not have direct or indirect contact with Zuley Delgado and Genevive Delgado.
- (9) Within 30 days of being placed on supervision, complete a sexual deviancy evaluation with a therapist approved by your Community Corrections Officer and follow all treatment recommendations.
- (10) Do not initiate or prolong physical contact with children for any reason.
- (11) Avoid places where minors are known to congregate without the specific permission of the Community Corrections Officer.
- (12) Inform the Community Corrections Officer of any romantic relationships to verify there are no victim-age children involved, and that the adult is aware of your conviction history and conditions of supervision.
- (13) Have no contact with the victim or any minor-age children without the prior approval of your Community Corrections Officer.
- (14) Hold no position of authority or trust involving children.
- (15) Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.
- (16) Do not attend X-rated movies, peep shows or adult bookstores without the prior approval of your sexual deviancy treatment specialist or Community Corrections Officer.

- (17) If directed by your sexual deviancy treatment specialist or Community Corrections Officer, obtain a mental health evaluation from a qualified provider and complete all treatment recommendations.
- (18) If directed by your sexual deviancy treatment specialist or Community Corrections Officer, undergo an evaluation regarding substance abuse at your expense and follow any recommended treatment as a result of that evaluation.
- (19) Do not use or possess illegal or controlled substances without the written prescription of a licensed physician and to verify compliance, submit to testing and reasonable searches of your person, residence and vehicle.
- (20) Do not purchase, possess, or use alcohol (beverage or medicinal), and submit to testing and reasonable searches of your person, residence, property and vehicle by the Community Corrections Officer to monitor compliance.
- (21) Do not change residence without the prior approval of your Community Corrections Officer.
- (22) Obey all laws.
- (23) Maintain Community Corrections Officer approved employment and notify your employer regarding your history of sexual deviancy and rules and regulations regarding children and legal status.
- (24) Pay for counseling costs for victims and their families.
- (25) Within 30 days of sentencing, submit to DNA and HIV testing as required by law.
- (26) Do not change therapist without prior approval of your Community Corrections Officer and treatment therapist.
- (27) Do not access the Internet without the prior approval of your supervising Community Corrections Officer and sex offender treatment provider.
- (28) Abide by any additional conditions imposed by the Washington State Department of Corrections.

Date:

FEB 17, 2006Panick-Kelly

JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
Reynaldo Delgado)
Defendant,)

No. 04-1-13920-8 KWT
APPENDIX J
JUDGMENT AND SENTENCE
SEX OFFENDER NOTICE OF
REGISTRATION REQUIREMENTS

SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with the sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move, work, carry on a vocation, or attend school out of Washington State, you must send written notice within 10 days of establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state, to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 48 hours, excluding weekends and holidays, after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you registered on a weekly basis. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff may require the person to list the locations where the person has stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

Copy Received:
Reynaldo Delgado
Defendant Date

Jonis K-Kolle
JUDGE

APPENDIX J
Rev. 11/03 Distribution:
Original/White - Clerk
Yellow - Defendant
Pink - King County Jail

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

In re the Personal Restraint Petition of:)

REYNALDO DELGADO,)

Petitioner.)

COA NO. 62682-5-1

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 16TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITIONER'S OPENING BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] REYNALDO DELGADO
DOC NO. 889357
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF JULY, 2010.

x Patrick Mayovsky

FILED
COURT OF APPEALS DIVISION #1
STATE OF WASHINGTON
2010 JUL 16 PM 4:01