NO. 39600-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER L. RICE,

Petitioner.

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

The Honorable, D. Gary Steiner, Judge

ADDITIONAL GROUNDS OF APPELLANT

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CERTIFICATE OF SERVICE
I certify that I mailed
1 copies of SAG
to R. Griffith, J. Lobsinz
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1/13/10
Date Signed

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Fowler
145 Wash.2d 400 (2002)

State v. Freitag
74 WA.App 133, 140-41, 873 P.2d 548 (1994)

State v. Gaines
121 WA.App 687, 90 P.3d 1095 (2004)

State v. Ginn
117 P.3d 1155, 128 WA.App 872, review denied 139 P.3d 349,
157 Wash.2d 1010 (2006)

State v. Gore
143 Wash.2d at 315-16 (2001)

State v. Grayson
154 Wash.2d 333, 342 (2005)

State v. Grewe
117 Wash.2d at 214, 59 WA.App 150 (1990)

State v. Ha'mim
132 Wash.2d 834, 842-43, 940 P.2d 633 (1997)

State v. Harmon
750 P.2d 664, 50 WA.App 755 (1988)

State v. Hartley
705 P.2d 821, 41 WA.App 669 review denied 104 Wash.2d 1028 (1985)

State v. Hunter
9 P.3d 872, 102 WA.App 630, review denied 21 P.3d 1150,
142 Wash.2d 1026 (2001)

State v. Kinneman
84 P.3d 882, 120 WA.App 806, review denied 922 P.2d 97,
129 Wash.2d 1032 (1996)

State v. Law
38 P.3d 374, 110 WA.App 36 (2002)

State v. Letourneau
100 WA.App 424, 997 P.2d 436 (2000)

State v. McCormick
141 WA.App 256 (2007)

State v. McCune
873 P.2d 575, 74 WA.App 395 (1994)

State v. Murray
116 P.3d 1072, 128 WA.App 36 (2005)

State v. Nelson
108 Wash.2d 491, 740 P.2d 909 (1995)

State v. Nordby
106 Wash.2d 514, 518 (1996)

State v. Partee
141 WA.APp 355 (2007)

State v. Pascal
108 Wash.2d 125, 736 P.2d 1065 (1987)

State v. Perez
847 P.2d 532, 69 WA.App 133, review denied 863 P.2d 74,
122 Wash.2d 1015 (1993)

State v. Pryor
115 Wash.2d 445, 799 P.2d 244 (1990)

State v. Ramirez
140 WA.App 278 (2007)

State v. Ramirez-Dominguez
140 WA.App 233 (2007)

State v. Smith
139 WA.App 599 (2007)

State v. Stark
832 P.2d 109, 66 WA.App 423 (1992)

State v. Strauss
119 Wash.2d 401, 414, 832 P.2d 78 (1992)

State v. Tierney
872 P.2d 1145, 74 WA.App 346, certiorari denied 115 S.Ct. 1149,
513 U.S. 1172, 130 L.Ed.2d 1107 (1994)

FEDERAL CASES

Apprendi v. New Jersey
1417 L.Ed.2d 435 (2000)

Barkus v. Illinois
359 U.S. 121, 151-55, 2 L.Ed.2d 684, 706, 79 S.Ct. 676

Benton v. Maryland
395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1960)

Blakely v. Washington
159 L.Ed.2d at 403 (2004)

Green v. United States
355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 615 (1957)

Joint Anti-Fascist Refugee Committee v. McGrath
341 U.S. 123, 162, 95 L.Ed 817, 71 S.Ct. 95 (1951)

North Carolina v. Pearce
395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969)

Pennsylvania ex rel Sullivan v. Ashe
302 U.S. 51, 61, 58 S.Ct. 59, 82 L.Ed 43 (1937)

Williams v. People of the State of New York
337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed 1337 (1949)

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125 F.3d 687 appeal after remand, 156 F.3d 1239

Commonwealth of the Northern Marina Islands v. Mendiola
976 F.2d at 475

United States v. Constantine
263 F.3d 1122, 1127 (10th Cir. 2001)

United States v. Dallman
533 F.3d 755

United States v. Dickey
924 F.2d 836, 838 (9th Cir. 1991)

United States v. Dixon
509 U.S. 688, 125 L.Ed.2d 556, 567, 113 A.Xr. 2849

United States v. Fairless
975 F.2d 664 (9th Cir. 1992)

United States v. Fernandez
65 Fed. Appx. 144

United States v. Green
105 F.3d 1321 (9th Cir. 1997)

United States v. Lam
20 F.3d 999 (9th Cir. 1994)

United States v. Nagra
147 F.3d 875

United States v. Pierson
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234 F.3d 464 (9th Cir. 2000)

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(citing Mathhews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893
47 L.Ed.2d 18 (1976))

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RCW 9.94A.390

RCW 9.94A.505

RCW 9.94A.515

RCW 9.94A.525(1)

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Washington Sentencing Guidelines Manual

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U.S.S.G.

18 U.S.C.A.

ASSIGNMENTS OF ERROR

1. The trial court erred in imposing a sentence of life in prison with a mandatory minimum of 25 years under the mandatory provisions of RCW 9.94A.835, RCW 9.94A.836, and RCW 9.94A.837, which limited the court's discretion and did not allow for individualized justice.

2. The trial court erred in imposing a sentence of life in prison with a mandatory minimum of 25 years under the mandatory provisions of RCW 9.94A.835, RCW 9.94A.836, and RCW 9.94A.837, which does not follow several key purposes established by the Sentencing Reform Act of 1981.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Do the mandatory charging and sentencing provisions of RCW 9.94A.835, 9.94A.836 and 9.94A.837 limit the court's discretion and thereby eliminate individualized justice?

2. Do the mandatory charging and sentencing provisions of RCW 9.94A.835, 9.94A.836, and 9.94A.837 conflict with several of the key purposes established by the Sentencing Reform Act such as proportionality of punishment, punishment commensurate with similar offenses, and promoting respect for the law?

STATEMENT OF THE CASE

The trial court, the Honorable D. Gary Steiner, found appellant Jennifer Rice guilty, after stipulated bench trial,

of Kidnapping in the First Degree commited with sexual motivation where the victim was under fifteen years of age; Child Molestation in the First Degree where the offense was predatory; and Rape of a Child in the Third Degree. Ms. Rice waived the right to challenge the sufficiency of evidence if the court found her guilty, however she reserved her right to challenge the constitutionality of the special allegations listed in RCWs 9.94A.835, 9.94A.836, and 9.94A.837.

On July 24, 2009 the court entered judgement and sentence against Ms. Rice sentencing her to a sentence of life in prison with a mandatory minimum of 25 years within the standard range for the convictions and special allegation enhancements.

SUMMARY OF ARGUMENT

Judgement and sentencing should be individualized in order to fulfill the goals of punishment. The Sentencing Reform Act makes the criminal justice system accountable to the public by developing a system for sentencing of felony offenders which structures, but does not eliminate, discretionary decisons and to: (1) ensure that the punishment for the criminal offense is proportionate to the seriousness of the offense and the offender's criminal history, (2) promote respect for the law by providing punishment that is just, (3) be commensurate with the punishment imposed on others committing similar offenses, (4) protect the public, (5) offer the offender the opportunity to improve him or

herself, (6) make frugal use of the state and local government resources, and (7) reduce the risk of reoffending by offenders in the community. [1999 c 196 § 1; 1981 c 137 § 1].

The sentencing court may consider factors other than those enumerated in the SRA so long as they are consistent with the purposes of the Sentencing Reform Act and are supported by the evidence. Individual allowences must be made when appropriate. District courts must utilize the guidelines, along with sentencing goals, when fashioning a sentence. When the government deprives a person of life, liberty, or property it must act in a fair manner. A key element of the fundamental fairness doctrine is its focus on the factual setting of the individual case. For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. The discretion of the courts is needed to investigate and consider more than just the acts by which the crime was committed and take into account the circumstances of the offense along with the character and propensities of the offender in order to provide punishment that is just.

ARGUMENT

(1) **Enhancements and special allegations limit the court's discretion to impose a sentence promoting individualized justice.**

The prosecuting attorney represents a sovereign whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice. It is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial. Commonwealth of the Northern Marina Islands v. Mendiola, 976 F.2d at 475. The prosecutor is given broad discretion when it comes to charging and prosecuting offenders. One of the reasons given to justify this broad discretion is the equitable objective of **individualized justice.** R. Pound, Criminal Justice in America 67 (1930). The judiciary historically has shown an extraordinary deference to the prosecutor's decision making function. Some courts have explicitly stated that they are without any power to remedy a prosecutor's arbitrary charging decisions. Due to the charging decision of my prosecutor and the addition of several enhancements the court had minimal discretion, virtually no discretion, in handing down my sentence. See Court Transcripts, July 24, 2009, page 2, lines 12 - 15, and lines 23 - 25. Due to special allegations and sentencing enhancements under RCWs 9.94A.835, .836, and .837 I received a life sentence with a mandatory minimum of 25 years.

This combination of prosecutorial discretion and judicial passivity can be dangerous. A prosecutor's power to invoke or deny punishment at his discretion is the power to control and destroy peoples lives. A prosecutor enjoys tremendous discretion in deciding which persons to charge with a crime.

According to the Prosecutorial Misconduct Second Ed. § 7:23, **a court must individualize sentencing to fulfill the goals of punishment.** Williams v. People of the State of N.Y., 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed 1337 (1949). In the district court's determination of a sentence, the Sentencing Guidelines are the starting point and the initial benchmark; the district court should then consider the statutory sentencing factors to decide if they support the sentence suggested by the parties. A district court may not presume that the Sentencing Guidelines range is reasonable, but must make an individualized determination based on facts. 18 U.S.C.A. § 3553(a); U.S.S.G. § 1B1.1 et seq., U.S. v. Rivera, 527 F.3d 891, certiorari denied 129 S.Ct. 654, 172 L.Ed.2d 631.

Section 7:23 of the Prosecutorial Misconduct Second Ed. goes on to say that courts may properly consider a guilty plea as a sign of rehabilitation when imposing a sentence (page 315). Defendant was entitled to third point under Sentencing Guidelines for acceptance of responsibility after disctrict court determined that his early cooperation and truthful statements warranted a two-level decrease for acceptance and responsibility. C.A.9. (Wash.) 2003. U.S.S.G.

§3E1.1(a,b); 18 U.S.C.A.; U.S. v. Fernandez, 65 Fed. Appx. 144. Upon questioning by detectives I offered a complete confession, accepted responsibility for my crime, and cooperated fully with the investigation. Later I admitted guilt while stipulating to the facts stated by the prosecution during sentencing. However, none of this was taken into consideration when the court imposed my sentence of life in prison with a mandatory minimum of 25 years. In fact, there were several factors that should have been considered during sentencing in order to individualize my punishment. Some of these factors are also factors that are legitimately considered by the court in awarding individualized sentences that depart downward, such as: lack of police contacts, lack of criminal history, aberrant behavior, lack of predisposition to commit crime, family support and a low risk to reoffend. State v. Ha'mim, 132 Wash.2d 834, 842-43, 940 P.2d 633 (1997); State v. Nelson, 108 Wash.2d 491, 740 P.2d 835 (1987); State v. Baucham, 76 WA.App. 749, 887 P.2d 909 (1995); State v. Freitag, 74 WA.App. 133, 140-41, 873 P.2d 548 (1994), 121 Wash.2d 141 (1994); U.S. v. Rojas-Millan, 234 F.3d 464, (9th Cir. 2000); U.S. v. Green, 105 F.3d 1321 (9th Cir. 1997).

Every offender is entitled to ask the trial court to consider a sentence below the standard range and have the alternative actually considered. State v. Grayson, 154 Wash. 2d 333, 342 (2005). Just as the prosecuting attorney has the discretion to determine the number and severity of charges to

bring against a defendant, the sentencing court has the discretion to determine whether the circumstances warrant an exceptional sentence downward. District courts have statutory authority to depart from the Sentencing Guidelines in those cases in which the court finds aggravating or mitigating circumstances of a kind or to a degree, not adequately taken into consideration by the sentencing commission. 18 U.S.C.A. § 3553(b); U.S.S.G. § 5K2.0, p.s., 18 U.S.C.A., U.S. v. Cuevas-Gomez, 61 F.3d 749. A convicted offender may be sentenced below the standard range if the trial court finds substantial and compelling reasons to justify an exceptional sentence downward and enters appropriate findings of fact and conclusions of law in support thereof. RCW 9.94A.505; State v. Alexander, 125 Wash.2d 717, 722; 888 P.2d 1169 (2002); State v. Ginn, 117 P.3d 1155, 128 WA.App. 872, review denied 139 P.3d 349, 157 Wash.2d 1010. Once substantial and compelling factors exist to support an exceptional sentence, the length of the sentence is left to the discretion of the sentencing court. RCW 9.94A.210(4); State v. Stark, 832 P.2d 109, 66 WA.App. 423.

Under RCW 9.94A.535, a convicted offender may be sentenced below the standard range if there are substantial and compelling reasons to justify the departure **and** those reasons are consistent with the purposes of the Sentencing Reform Act of 1981. The mitigating factors of RCW 9.94A.535(1) for justifying a sentence below the standard range are illustrat-

ive only; they are not exclusive. A sentencing court may consider other factors so long as they are consistent with the purposes of the Sentencing Reform Act, and are supported by the evidence. Reasons for exceptional sentences are legally adequate only if they are consistent with the purposes of the Sentencing Reform Act, such as to ensure that punishment for the criminal offense is proportionate to the seriousness of the offense and the offender's criminal history. RCW 9.94A.010, 9.94A.120(2); State v. Gaines, 859 P.2d 36, 122 Wash.2d 502. The purposes of the Sentencing Reform Act are not in and of themselves mitigating circumstances; rather they may provide support for the imposition of an exceptional sentence once a mitigating circumstance has been identified by the trial court. RCW 9.94A.010; State v. Kinneman, 84 P.3d 882, 120 WA.App. 806, review denied 922 P.2d 97, 129 Wash.2d 1032.

The purposes of the Sentencing Reform Act include: (1) ensuring proportionality of punishment to the seriousness of the offense and the offender's criminal history, (2) just punishment, (3) ensuring punishment is commensurate with that imposed on others committing similar offenses, (4) protecting the public, (5) offering the offender an opportunity to improve him or herself, (6) making frugal use of the state and local government resources, and (7) reducing the risk of reoffending by offenders in the community. RCW 9.94A.010.

When approaching sentencing there are several factors

that must be considered in order to individualize sentencing and thereby fulfill the goals of punishment. Three factors that I would like to draw attention to are: (1) lack of a predisposition to commit crime, (2) aberrant behavior, and (3) a low risk to reoffend. Reasons for imposing exceptional sentences less than the standard range must include factors other than those considered in computing the presumptive range for the offense. State v. Estell, 115 Wash.2d 350 (1990). As a general rule lack of criminal history is already encompassed in the sentencing guidelines. State v. Pascal, 108 Wash.2d 125, 736 P.2d 1065 (1987). The only exception to this is a lack of criminal history may be considered "in combination with the finding that the defendant was induced to commit the crime or **lacked a predisposition to commit the crime**". State v. Ha'mim, 132 Wash.2d 834, 842-43, 940 P.2d 633 (1997); State v. Nelson, 108 Wash.2d 491, 740 P.2d 835 (1987); State v. Baucham, 76 WA.App. 749, 887 P.2d 909 (1995); RCW 9.94A.390.

An exceptional sentence below the standard range can be based on the defendant's lack of predisposition to commit the crime. Among the factors that may distinguish a defendant from other defendants with no criminal history are: a complete absence of police contacts, cooperation with the investigating authorities, and lack of sophistication in planning the crime. Additionally, in State v. Baucham, the defendant's confession confirmed lack of predisposition.

The Supreme Court has held that the sentencing court may consider the fact that a defendant not only has a zero offender score, but also a complete absence of police contacts, an item not already accounted for under the Sentencing Reform Act of 1981. State v. Nelson, 108 Wash.2d 491. Again citing Baucham, 76 WA.App. 749, the defendant's otherwise law-abiding life illustrated that she was not predisposed to commit the offense. The trial court in this case found that lack of predisposition by itself warranted an exceptional sentence below the standard range. Similarly in State v. Freitag, 127 Wash.2d 141, the Court of Appeals affirmed and held that Freitag's "complete lack of any police contacts whatsoever" justified a departure downward from the standard sentencing range. State v. Freitag, 74 WA.App. 133, 140-41, 873 P.2d 548 (1994). Here, the trial court, after viewing the defendant's history and demeanor, and the facts of the case, determined that a downward exceptional sentence was justified based on: (a) Freitag's complete lack of any criminal history and police contacts (beyond that counted by the Sentencing Reform Act), (b) her contributions to society, (c) her ability to better herself through community service, and (d) her lack of threat to reoffend. All of these are legitimate considerations under the Sentencing Reform Act and therefore justify a departure downward. The Court of Appeals in affirming the trial court, properly recognized that a lack of criminal history does tend to show lack of

predisposition to commit crime and is the logical corollary to this court's cases which have allowed departures upward for uncounted offenses.

The Honorable Barbara A. Madsen, Justice of the Supreme Court of Washington, wrote the dissenting opinion in State v. Freitag, 127 Wash.2d 141, and State v. Fowler, 145 Wash.2d 400, which was supported by Justices Johnson, Sanders, Chambers, and Utter. In her opinion she states: "It is this court which has consistently disregarded personal factors justifying departures downward despite the Sentencing Reform Act's clear intent to the contrary, and it is this court which has, in contrast, broadly construed the Sentencing Reform Act to ardently uphold innumerable contortions used to justify departures upward. See John M. Junder, Guidelines Sentencing: The Washington Experience, 25 U.C. Davis L. Rev. 715, 742-49 (1992). Citing the discretion left to judges under the Sentencing Reform Act as its justification, this court has scrupulously developed common law regarding reasons for departures upward and has sustained a host of aggravating circumstances. Yet when examining departures downward, this court has not undertaken its duty to create common law with the same vigor, nor has it respected the discretion of trial judges to the same degree. One is left with the nagging question of why upward departures are different than those downward. The Legislature provided for mitigators and departures downward, yet this court consistently finds neither to

be justified, effectively depriving trial courts of the discretion downward that the Legislature intended. RCW 9.94A. 120, 9.94A.390. In designing the standard range for sentencing the Legislature intended merely to account for the "typical" crime. Washington Sentencing Guidelines Commission, Implementation Manual, at I-36, 37 (1994); Washington Sentencing Guidelines Commission, Report to the Legislature 18 (1993). Implicit in this reasoning is the fact that some crimes would be less serious than typical and some would be more serious. Therefore departing downward is just as justified as departing upward. See ABA Standards for Criminal Justice: Sentencing, std. 18-2.6, at 34-36 (erd ed. 1994) std. 18-3.2 at 45-49." In Justice Madsen's view and that of many other courts, there are legitimate bases for sentences imposed below the standard range.

Discretion of the sentencing court is key in achieving individualized justice. The enhancements and special allegations imposed upon the court during my sentencing severely limited the courts discretion. The Sentencing Reform Act of 1981 calls for structured discretionary sentencing, but it has not abolished discretion. RCW 9.94A.010. The act has multiple goals beside punishment of the offender, including proportionate sentencing, promoting respect for the law by providing just punishment, and providing the opportunity for the offender to improve him or herself.

As mentioned above, Federal courts agree that a lack of

criminal history alone is not a basis for a downward sentence under the federal scheme. They conclude, however, that **"aberrational behavior"** is not equivalent to a lack of criminal history. Zecevic v. United States Parole Commission, 163 F.3d 731, 735 (2nd Cir. 1998); United States v. Rojas-Millan, 234 F.3d 464, 475 n. 7 (9th Cir. 2000); United States v. Constantine, 263 F.3d 1122, 1127 (10th Cir. 2001). Departures for aberrant behavior are for mitigating circumstances "not adequately taken into consideration by the sentencing commission". U.S. v. Green, 105 F.3d 1321, 1323 (9th Cir. 1997). There are several factors the court may consider when assessing whether behavior is aberrant. (1) If the conviction is for a first offense. U.S. v. Lam, 20 F.3d 999, 1003-004 (9th Cir. 1994); U.S. v. Dickey, 924 F.2d 836, 838 (9th Cir. 1991). (2) If the offense involved a significant amount of planning or reflection, (3) the motivation for the undertaking of the unlawful scheme, and (4) whether this was a one time event or part of a regular pattern. U.S. v. Green, 105 F.3d 1321, 1323 (9th Cir. 1997); U.S. v. Pierson, 121 F.3d 560, 564-65 (9th Cir. 1997). If a district court finds a "convergence" of these or similar factors demonstrating the defendant's actions constitute a single act of aberrant behavior a downward departure is justified. U.S. v. Fairless, 975 F.2d 664, 667 (9th Cir. 1992); U.S. v. Dickey, 924 F.2d 836, 838 (9th Cir. 1991). Many courts have held that aberrant behavior justifies a downward departure under

federal sentencing guidelines, based on the comment in the introduction of the Guidelines Manual to the effect that the guidelines do not deal with single acts of aberrant behavior. Sentencing Guidelines Manual ch. 1, pt. A, ¶ 4.

All of the federal circuits have recognized aberrational behavior as a factor that may, in the appropriate case, justify an exceptional sentence downward. Elizabeth Williams, Annotation, Downward Departure from United States Sentencing Guidelines - U.S.S.G. §§ 1A1.1 et. seq. Based on Aberrant Behavior, 164 A.L.R. Fed 61 § 2,3 2000. A split developed in the circuits however as to what constitutes aberrational behavior. Some courts concluded that "a spontaneous and seemingly thoughtless act, rather than one which was the result of substantial planning" was a single act of aberrant behavior. Others applied a totality of circumstances approach, considering a number of factors including: (a) the singular nature of the act, (b) psychological disorders that the defendant was suffering at the time, (c) extreme pressures operating on the defendant such as that of losing a job, (d) expressions from family and friends of shock at the defendant's behavior, (e) the defendant's motivations for committing the act, (f) the pecuniary gain derived from the offense, (g) the defendant's efforts to mitigate the effects of the act, (h) the defendant's employment history, and (i) the support of the defendant's family.

Likewise, in U.S. v. Working, the court found that in

evaluating whether a defendant's behavior falls under the spectrum of aberrant behavior, justifying a downward departure from relevant sentencing guidelines, the district court may consider a convergence of factors including: (1) the singular nature of the criminal act, (2) spontaneity and lack of planning, (3) the defendant's criminal record, (4) psychological disorders from which the defendant was suffering, (5) extreme pressures under which the defendant was operating, (6) letters from friends and family expressing shock at the defendant's behavior, and (7) the defendant's motivation for committing the crime. U.S.S.G. Ch. 1, Pt. A, introl, 4(b), 18 U.S.C.A.; U.S. v. Working, 224 F.3d 1093.

In the context of justification for a downward departure from the relevant Sentencing Guidelines, **"aberrant conduct" is conduct that represents a short-lived departure from an otherwise law-abiding life.** As justification for a downward departure under Sentencing Guidelines, aberrant behavior is best assessed in the context of the defendant's day-to-day life, rather than solely with reference to the particular crime committed. U.S.S.G. § 5K2.0, p.s., 18 U.S.C.A.; U.S. v. Working, 224 F.3d 1093.

In U.S. v. Takai, 941 F.2d 738 (9th Cir. 1991), the U.S. Court of Appeals determined that there was aberrant behavior where defendants, who were otherwise admirable law-abiding people, engaged in criminal acts. The conduct extended over a number of days, but the court found that the

defendant's actions were self-contradictory, naive, unreflective, and somewhat government induced.

In U.S. v. Fairless, 975 F.2d 664 (9th Cir. 1992), the United States Court of Appeals similarly determined that the commission of an armed bank robbery constituted aberrant behavior. Despite the inherent danger of a crime where people were forced to the ground at gun-point, the court determined it was a sufficiently spontaneous first offense, that the defendant suffered from manic depression, the gun was unloaded, that the defendant was under extreme personal pressure, and that the acts were out of character. Id. at 667-68. They concluded that the offense indicated a combination of factors, some of which were already taken into account by the Guidelines, which amounted to a single act of aberrant behavior. Id. at 668-69. The district court determined that Fairless's conduct constituted "aberrant behavior" based on a "convergence of factors": (1) the robbery was Fairless's first criminal offense, (2) Fairless suffered from manic depression, (3) the fact that he committed the robbery with an unloaded gun indicated that Fairless was suicidal, (4) Fairless was under extreme pressure from a combination of circumstances, including the fact that he had recently lost his job, and (5) the court had received numerous letters from Fairless's family and friends stating that the robbery was a "complete shock" and out of character. Except perhaps the finding that Fairless was suicidal, the district court's

findings are adequately supported by the record. The district court did not abuse its discretion in determining, based on the totality of the circumstances, that the robbery was a single act of aberrant behavior.

In November of 2000, the Federal Sentencing Commission added section 5K2.20 to the guidelines, defining "aberrant behavior" as a single criminal occurrence or single criminal transaction that (a) was committed without significant planning, (b) was of limited duration, and (c) represents a marked deviation by the defendant from an otherwise law-abding life. United States Sentencing Commission Guidelines Manual § 5K2.20 cmt. 1 (2000). The commission directed that in deciding whether to depart from the guideline sentences on the basis of aberrant behavior, a court could consider the defendant's "(a) mental and emotional conditions, (b) employment record, (c) record of prior good works, (d) motivation for committing the offense, and (e) efforts to mitigate the effects of the offense." Guidelines Manual, supra § 5K2.20 cmt. 2. Due to the nature of the special allegations in my case there was no allowance for any of the above considerations related to aberrant behavior, thereby depriving the court of the discretion to individualize my punishment.

Regardless of whether aberrant behavior justifies a downward sentence in this case, the court should recognize that some crimes represent the truly unusual behavior of

individuals who are generally nonviolent, law-abiding citizens committing crimes under unusual circumstances. Similar to the federal approach this court should hold that a trial court may, in its discretion, impose an exceptional sentence downward based upon aberrant behavior.

Finally, I would argue that a **low risk of reoffending** should be considered when seeking individualized justice allowing for a downward departure from the standard sentencing range. In the past this court has accepted the premise that future dangerousness is an appropriate nonstatutory aggravating factor under certain circumstances involving offenders convicted of sex offenses. State v. Strauss, 119 Wash.2d 401, 414, 832 P.2d 78 (1992); State v. Pryor, 115 Wash.2d 445, 799 P.2d 244 (1990). If future dangerousness can justify an upward sentence, albeit in limited cases, why should a low risk of reoffending be rejected as a mitigating factor? At least two goals of the Sentencing Reform Act favor allowing for sentencing discretion to impose a downward sentence where there is a low risk of reoffending: (a) the promotion of respect for the law by provision of just punishment, and (b) making frugal use of the State's resources. Moreover, contrary to the majority's analysis, the goal of protecting the public is well served by permitting such a discretion because an individual with a low risk of reoffending does not pose the same risk as other offenders.

Judgement and sentencing should be individualized in order to fulfill the goals of punishment. The Sentencing Reform Act makes the criminal justice system accountable to the public by developing a system for sentencing of felony offenders which structures, but does not eliminate, discretionary decisions and to: (1) ensure that the punishment for the criminal offense is proportionate to the seriousness of the offense and the offender's criminal history, (2) to promote respect for the law by providing punishment that is just, (3) be commensurate with the punishment imposed on others committing similar offenses, (4) protect the public, (5) offer the offender the opportunity to improve him or herself, (6) make frugal use of the state and local government resources, and (7) reduce the risk of reoffending by offenders in the community. [1999 c 196 § 1; 1981 c 137 §1].

While punishment is indeed a goal of the SRA, the Legislature clearly intended that each of these goals be equally important since it did not rank it's purposes in level of importance. Justice Madsen believes this court has lost track of the balance that the Sentencing Reform Act was intended to create and, in so doing, has eliminated the discretion that was to be left to trial judges who sentence downward as well as upward. To date, this court has not provided a sound reason for why trial courts' discretion downward should be any less than that upward, but its precedent

implies this is so.

The Sentencing Reform Act did not eliminate judicial discretion to fashion individualized sentences when the facts of a particular case demand it. RCW 9.94A.010; State v. Perez, 847 P.2d 532, 69 WA.App. 133, review denied 863 P.2d 74, 122 Wash.2d 1015. Indeed one of the purposes of the SRA is to structure discretionary sentencing as well as to provide for consistency in sentencing. RCW 9.94A.010; State v. Hunter, 9 P.3d 872, 102 WA.App 630, review denied 21 P.3d 1150, 142 Wash.2d 1026. This discretion is also available when considering exceptional sentences outside of the standard sentencing range.

The legislative intent of the Sentencing Reform Act's exceptional provision was to authorize courts to tailor the sentence, as to both the length and the type of punishment imposed, and to the facts of the case, recognizing that not all individual cases fit the predetermined structuring grid. RCW 9.94A.535; State v. Davis, 192 P.3d 29, 146 WA.App 179. The sentencing court may consider factors other than those enumerated in the SRA so long as they are consistent with the purposes of the SRA and are supported by evidence. Individual allowences must be made when appropriate. District courts must utilize the Guidelines, **along with** sentencing goals, when fashioning a sentence. U.S. v. Bolanos-Hernandez, 492 F.3d 1140, certiorari denied 128 S.Ct. 731, 169 L.Ed.2d 570.

(2) **A sentence of life in prison with a mandatory minimum of 25 years, as outlined by special allegations in RCWs 9.94A.835, .836, and .837 is in conflict with several dey goals of the Sentencing Reform Act.**

(a) Ensure the punishment for the criminal offense is proportionate to the seriousness of the offense and the offender's criminal history.

While the Sentencing Reform Act aims to esnure proportionality this is difficult to achieve when the sentencing grid is manipulated to achieve a desired sentence range. Following the intent of the legislature, when establishing the sentencing grid, I should be classified as an offender with no criminal history. Therefore, I would be given an offender score of zero. Due to adjustments and reclassification this is not the case. Should my case be remanded for resentencing I will be sentenced as if I have a significant criminal recrod. This should not be. According to the first goal of the Sentencing Reform Act my sentence should be proportionate to the seriousness of the offense as well as my criminal history. While my current sentence conflicts with this goal due to mandatory sentencing provisions in RCWs 9.94A.835, .836, and .837, I also fear that the calculation of my offender score upon resentencing will also violate the intent of the legislature and purposes of the SRA.

The sentencing grid accounts for the seriousness of each crime by assigning a seriousness level of I - XVI. Based upon the seriousness level of the crime and the

offender's criminal history the offender is sentenced within the standard sentencing range. The standard sentencing range is a legislative determination of the applicable punishment range for the crime as ordinarily committed. RCW 9.94A.505; State v. Gaines, 121 WA.App 687, 90 P.3d 1095. It takes into account the particular offense and the extent and nature of the offender's criminal history, including the seriousness of any **prior** offenses and whether or not they were violent in nature. RCW 9.94A.040(2)(a), RCW 9.94A.030; State v. Hartley, 705 P.2d 821, 41 WA.App 669, review denied 104 Wash.2d 1028. It goes without saying that lack of criminal history would result in a lower standard sentencing range. Unfortunately the way in which my offender score will be calculated upon resentencing completely disregards my lack of criminal history and negates facts taken into consideration when the seriousness levels were assigned to each offense. The offense of conviction determines the offense seriousness level. RCW 9.94A.515 provides a comprehensive list of each crime within their seriousness level. According to this list my crime of conviction is classified as a seriousness level X. For a first time offender, that is someone with no criminal history, that places me in the grid under a sentencing range of 51 - 68 months. However, due to enhancements and special allegations I received a sentence of life with mandatory minimum of 25 years. This sentence in no way supports the proportionality goals of the

Sentencing Reform Act.

There is a possibility that my case will be remanded for resentencing in the future. At that time I believe several individual factors should be considered as well as how my offender score will be calculated. As an offender with no prior convictions it stands to reason that I be scored with zero offender points. However, it is the prosecutor's desire that I be resentenced with 9 points, counting current convictions as criminal history. I belive this not only defies the Legislature's intent in establishing the sentencing grid and respective ranges, but also contradicts the SRA's goal of proportionate punishment.

When computing an offender score consideraton is given to the seriousness level of the crime of conviction and the offender's criminal history. RCW 9.94A.525(1) defines **prior** convictions as those existing **before the date of sentencing** for the offense for which the offender score is being computed. . Convictions entered or sentenced on the **same date** as the conviction for which the offender score is being computed are deemed **"other current offenses"** within the meaning of RCW 9.94A.589. Rules for scoring prior convictions are contained in RCW 9.94A.525. It should be noted that the scoring rules for some offenses are calculated differently, depending on the category of the offense. For example, if the present conviction is a serious violent offense three points would be given for any **prior** convictions

that are classified as serious violent convictions. However, in the conviction of a sex offense, other **current** sex offenses count as three points, just as if they were **prior** offenses.

Why this discrepency? Why are sex offenses singled out and given more severe sentences when all other violent and serious offenses are only considered for sentencing purposes if they are **prior** convictions and the current conviction is an offense in teh same category or of the same magnitude?

The sentencing commission mandate from the Legislature was to consider both the seriousness of the crime **and** the nature and extent of criminal history. The commission decided to emphasize the current offense in establishing standard range sentences, but also to give weight to a persons **past** convictions, including the pattern of those convictions. Components used to compute the standard range sentence are the defendant's criminal history and the seriousness of the offense. State v. Burkins, 973 P.2d 15, 94 WA.App 677, review denied 989 P.2d 1142, 138 Wash.2d 1014. "Real facts" doctrine reflects the principle that a sentence should be based on only the actual crime of which the defendand has been convicted, his or her criminal history, and the circumstances surrounding the crime. RCW 9.94A.370(2); State v. Tierney, 872 P.2d 1145, 74 WA.App 346, certiorari denied, 115 S.Ct. 1149, 513 U.S. 1172, 130 L.Ed.2d 1107.

Counting **current** offenses that are sex offenses as prior offenses does not follow the Legislature's intent. Their focus was to increase punishment for **repeat** offenders, especially those who have a pattern of violent or serious violent offenses.

Following the Legislature's intent the sentencing commission decided that the weighting of **prior** offenses should vary depending on the present offense. Thus, a criminal history with serious violent crime convictions counts most heavily when the current offense is also a serious violent offense. Likewise, previous convictions for violent offenses count more heavily when the current offense is violent. Prior burglary offenses count more heavily when the current offense is burglary and so on. Adult Sentencing Guideline Manual 2008, II-139. Given the Legislature's emphasis on sanctions for violent crimes, the commission decided that **repeat** violent offenders needed to be identified and dealt with severely. As a result of this identification of repeat violent offenders the grid places an accelerated emphasis on criminal history. A.S.G.M. II-139, 2008.

Counting **current** sex offenses as if they are **prior or repeat** offenses in order to deal with current offenses more severely seems to be a violation of equal protection, double counting, and may also count as double jeopardy. By counting current offenses as prior convictions the sentencing court effectively discounts the defendant's lack of criminal

history and assigns a much higher penalty, as if they are truly repeat offenders. The sentencing guidelines have already established sex offenses as more serious offenses by placing them at the higher end of the vertical axis of the sentencing grid, thereby accounting for the seriousness of the offense. To include extra punishment, by counting current offenses as prior offenses in order to raise the offender score and justify a harsher punishment, the court negates the Legislature's intent to punish repeat offenders and effectively discredits the system established by the sentencing commission when they developed the sentencing grid, in which they originally weighed each offense and assigned an appropriate seriousness level. Repeating the use of a factor previously accounted for in the offense level is considered "double counting". U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A., U.S. v. Nagra, 147F.3d 875. Impermissible double counting occurs if a sentencing guideline provision is used to increase punishment on account of harm already fully accounted for. U.S. v. Calozza, 125 F.3d 687, appeal after remand 156 F.3d 1239. A court is not required to render a precise, formulaic analysis of the relationship between factors relied upon for departure and their appearance in the Sentencing Guidelines; it is sufficient that the district court avoids "double counting" i.e., repeating the use of a factor previously accounted for in the offense level or other departure factors. U.S. v. Bell, 303 F.3d

1187, habeas corpus denied 2008 WL 450367.

Perhaps a comparison could be made between exceptional sentences and these increased offender scores. Counting current offenses multiple times in order to increase punishment is contrary to previous rulings regarding exceptional sentences and the provisions made for determining criminal history and same criminal conduct.

Could we not apply rules such as those found in Apprendi and Blakely in order to determine appropriate sentencing ranges for offenders? Apprendi v. New Jersey, 1417 L.Ed.2d 435 (2000); Blakely v. Washington, 159 L.Ed.2d at 403 (2004). The Washington Supreme Court has explained that "a reason offered to justify an exceptional sentence can be considered only if it takes into account factors **other than** those which are used in computing the standard range sentence." State v. Gore, 143 Wash.2d at 315-16; State v. Collicott, 827 P.2d 263, 118 Wash.2d 649; State v. Calvert, 903 P.2d 1003, 79 WA.App 569; State v. McCune, 873 P.2d 575, 74 WA.App. 395; State v. Harmon, 750 P.2d 664, 50 WA.App 755. Following this line of thought the offender score would be computed or elevated only by considering factors not included or considered when developing the sentencing guidelines and standard sentencing range. This includes the seriousness level of each offense. The Adult Sentencing Guidelines Manual clearly states that the sentencing grid was indeed developed with the seriousness of each offense considered. Therefore, the

seriousness of each offense has already been accounted for in the development of the standard range.

As stated in numerous cases regarding exceptional sentences, a reason offered to justify an exceptional sentence is sufficient only if it takes into account factors other than those which are necessarily considered in computing the presumptive range for the offense. State v. Barnes, 117 Wash.2d at 706; State v. Dunaway, 109 Wash.2d 207, 218, 743 P.2d 1237, 749 P.2d 160 (1987); State v. Nordby, 106 Wash.2d 514, 518; State v. Armstrong, 106 Wash.2d 547, 550-51, 723 P.2d 1111 (1986). An element of the charged offense may not be used to justify an exceptional sentence. RCW 9.94A.390; State v. Ferguson, 15 P.3d 1271, 142 Wash.2d 631, as amended and reconsideration denied. Likewise, a factor which has already been taken into account by the Legislature in determining the elements of the mandatory minimum sentence under the SRA can not also be used by the Board of Prison Terms and Paroles as a basis for a durational departure from the minimum. Matter of Myers, 714 P.2d 303, 105 Wash.2d 257.

Criminal history is already taken into account in computing offender scores for sentencing purposes, and therefore may not be considered in imposing a sentence outside the presumptive range. State v. Bartlett, 907 P.2d 1196, 128 Wash.2d 323. It does not seem too far of a stretch to apply this rule in determining offender scores as both

exceptional sentences and offender scores determine the degree of punishment and length of sentence for each offender. In State v. Grewe, 117 Wash.2d at 214 the Court of Appeals concluded that abuse of a position of trust may not be properly considered as an aggravating factor for indecent liberties convictions because it was already taken into consideration in establishing the standard sentence range. Grewe, 59 WA.App at 150. This is similarly stated in Criminal Law § 84: Under the criminal law of the State of Washington, a reason offered to justify an exceptional sentence could be considered only if the reason took into account factors other than those used in computing the standard range sentence for the offense. Shouldn't this also apply to the seriousness levels established by the Legislature?

The Fifth Amendment guarantee against double jeopardy protects against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969); U.S. v. Dixon, 509 U.S. 688, 125 L.Ed.2d 556, 567, 113 A.Xr. 2849; Green v. U.S., 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 615 (1957); Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1960). By counting **current** sexual offenses as **prior** offenses the sentencing guidelines are essentially not only doubling, but tripling, the punishment received for a current first offense. The court in Pearce held that "the ban on double jeopardy has

its roots deep in the history of occidental jurisprudence. Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization". Barkus v. Illinois, 359 U.S. 121, 151-155, 3 L.Ed.2d 684, 706, 79 S.Ct. 676; North Carolina v. Pearce, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969).

(b) The second goal of the SRA is to promote respect for the law by providing punishment that is just.

When the government deprives a person of life, liberty, or property it must act in a fair manner. U.S. v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (citing Mathhews v. Eldridge, 424 U.S. 319, 335 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). "Due process...seeks a very general objective - to achieve 'respect enforced by law for that feeling of just treatment which has evolved through centuries of Anglo-American constitutional history and civilization.'" Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 162, 95 L.Ed 817, 71 S.Ct. 95 (1951) (Frankfurter, J., concurring). A key element of the fundamental fairness doctrine is its focus on the factual setting of the individual case. In Pennsylvania ex rel Sullivan v. Ashe, 302 U.S. 51, 61, 58 S.Ct. 59, 82 L.Ed. 43 (1937) the court noted: For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account

the circumstances of the offense together with the character and propensities of the offender. His or her past my be taken to indicate his or her present purposes and tendencies and significantly suggest the period of restraint and the kind of discipline that ought to be imposed upon him.

The district court may not presume that the guidelines sentencing range is reasonable, and each guidelines sentencing factor should not be given more or less weight than any other. Rather, each factor is only one factor among the sentencing factors that are to be taken into account in arriving at an appropriate sentence. 18 U.S.C.A. § 3553(a), U.S. v. Dallman, 533 F.3d 755. Presumptive standard ranges of sentencing guidelines reflect legislative judgement as to how best to structure the sentencing system. RCW 9.94A. 210(4), State v. Amo, 882 P.2d 1188, 76 WA.App 129. However, the discretion of the courts is needed to investigate and consider more than just the acts by which the crime was committed and take into account the circumstances of the offense along with the character and propensities of the offender in order to provide punishment that is just. My previous argument for individualized justice applies here as well.

(c) Be commensurate with the punishment imposed on others committing similar offenses.

According to RCW 9.94A.340 the sentencing guidelines and prosecuting standards apply equally to offenders in all

parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant. The prosecutor, through control of the precise charge, controls the punishment, thereby marching the sentencing system directly away from, not toward, one important guideline goal: rough uniformity of punishment for those who engage in roughly the same criminal conduct. In the process of governining impartially the prosecutor has the duty to charge and prosecute defendants in a fair and consistent manner.

The goal of Washington's Sentencing system, which is based on determinate sentencing and eliminates parole and probation, is to ensure that **offenders who commit similar crimes and have similar criminal histories receive equivalent sentences.** Adult Sentencing Guidelines 2008, I-vii.

The determinate sentencing system assures uniformity, but at intolerable costs. Simple determinate sentencing systems impose identical punishments on people who commit their crimes in very different ways. When dramatically different conduct ends up being punished the same way, an injustice has taken place. Simple determinate sentencing has the virtue of treating cases alike but it simultaneously fails to treat different cases differently. Some commentators have leveled this charge at the sentencing guidelines systems themselves. See, e.g., Schulhofer, Assessing the Federal Sentencing Process: The Problem is Uniform-

ity, no Disparity, 29 Am. Crim. L. Rev. 833, 847 (1992) (arguing that the most important problem under the sentencing guidelines system is not too much disparity but rather excessive uniformity and arguing for adjustments, including elimination of mandatory minimums, to make the guidelines more responsive to relevant differences).

Due to special allegations and enhancements found in RCWs 9.94A.835, .836, and .837 not only were individual facts and circumstances not considered, but my resulting sentence of life imprisonment with a mandatory minimum of 25 years was in no way commensurate with the punishment imposed on others committing similar offenses. The Sentencing Reform Act was created to ensure that sentences are commensurate with the punishment imposed on others committing similar offenses. RCW 9.94A.010(3); State v. Law, 38 P.3d 374, 110 WA.App 36.

Letourneau, a female teacher, was charged with two counts of second degree rape of a child. This is classified as a seriousness level XI offense. In 1997 Letourneau pleaded guilty to her charges and received SSOSA, supending her standard range sentence of 89 months. After brief confinement in jail Letourneau re-offended within two weeks of her release. Upon having her SSOSA revoked Letourneau was then sent to Washington Corrections Center for Women to serve the remainder of her 89 month sentence. State v. Letourneau, 100 WA.App. 424, 997 P.2d 436 (2000).

Despite my offense being classified as a less serious offense according to the sentencing grid, I was unable to apply for SSOSA or other sentencing alternatives. This was a surprise given other far more egregious cases that I have discovered received SSOSA. State v. Ramirez, 140 WA.App 278 (2007) (first degree rape of a child, SSOSA later revoked after numerous violations); State v. Partee, 141 WA. App 355 (2007) (second degree rape of a child, second degree molestation of a child, SSOSA later revoked due to violations); State v. McCormick, 141 WA.App 256 (2007) (first degree rape of a child, SSOSA later revoked due to violations). While my sources for research are limited due to confinement I was able to find other cases outlining similar offenses that received sentences far less than mine. State v. Smith, 139 WA.App 599 (2007) (exceptional sentence of six months for rape of a child in the first degree); Ramirez-Dominguez, 140 WA.App 233 (2007) (68 months for child molestation in the first degree and kidnapping in the first degree); State v. Castro, 141 WA.App 485 (2007) (18 months for second degree child molestation).

There are several other cases available on the internet involving teqchers committing sexual offenses. Some of these cases include: Debra Lafave, a middle school teacher in Tampa, Florida, charged with having oral sex and intercourse with a male student on campus in 2004. Although Lafave could have received decades behind bars, she will

serve 3 years under house arrest and 7 years probation. Kristi Oakes, a teacher in Sevierville, Tennessee, accused of repeatedly having sex with a 16 year old biology student. Oakes faced up to two years in prison if convicted. Gary Hoff, a choir instructor in Orforville, Wisconsin, sentenced to three years probation after he pleaded no contest to disorderly conduct and fourth degree sexual assault of a male student in 2004. Hoff was not charged in connection to other allegations from former students dating back to 1993. Despite pleading no contest to procurring alcohol for another minor three months prior to his arrest in 2004, where upon Hoff was ordered to pay $243 fine, Hoff was only sentenced to three years probation. Gregory Pathiakis, a male teacher in Brockton, Massachusetts, received five years probation after pleading guilty to rape of a child, enticement of a child under 16, five counts of possession of child pornography, and one count of distributing harmful materials to a child. Pathiakis was arrested in January 2004 after a 15 year old boy told authorities at Middleboro High School that the teacher raped him December 23, 2003.

Jennifer Rice, a teacher in Tacoma, Washington, received a sentence of life imprisonment with a mandatory minimum of 25 years for the conviction of kidnapping, first degree child molestation and rape of a child in the third degree. In no way is my sentence commensurate with similar cases of offenders committing similar offenses.

(d) Protect the public, (e) offer the offender the opportunity to improve him or herself, and (f) make frugal use of state and local government resources.

The Sentencing Reform Act was designed to provide proportionate punishment, protect the public, and provide rehabilitation. The presumptive ranges established for each crime represent Legislature's judgement as to how best to accomodate those interests. RCW 9.94A.010 et seq., 9.94A.120 (2); State v. Allert, 815 P.2d 752, 117 Wash.2d 156.

Protecting the public is a very worthwhile goal however, there is a substantial difference between protecting the public from an offender who is a high risk repeat offender versus an individual who is not predisposed to commit a crime and/or is a very low risk to reoffend. I have been evaluated by several certified sex offender treatment providers who deem me to be very amenable to treatment and an extremely low risk to reoffend. Per my evaluation I was deemed "an excellent candidate for SSOSA outpatient therapy". With this therapeutic assistance, there is an extremely low risk of recidivism, close to zero. My evaluator went on to say "when Ms. Rice's past history is taken into consideration, she appears to be an ideal candidate for outpatient treatment services and does not need to be committed to the Washington State Department of Corrections for a long-term prison sentence. Ms. Rice does not present a risk to the community and has learned many valuable lessons through her arrest and incarceration. She is quite committed to making

important changes in her life." Taken from page four of the report prepared by Kevin B. McGovern, Ph.D., Licensed Psychologist, Certified Sex Offender Treatment Provider, Associate Clinical Professor of Psychiatry, Oregon Health and Sciences University.

My evaluation by Allen Traywick, Ph.D., also supports my argument regarding aberrant behavior and speaks toward my amenibility toward treatment. On page 27 of Dr. Traywick's report he states: "the professional literature and practicing clinicians often note that persons who sexually offend against children do so under circumstances in which external/internal stressors become overwhelming and under such conditions they regress to a state of development similar to that of their victims. Once again, it is noted that at the time of offending the client (Rice) was having marital problems, there were financial pressures, she felt excluded from other support systems, she was not doing particularly well on the job, and there was increased use of alcohol." Dr. Traywick further noted that "(Rice) was not without the ability to engage in the process of introspection and it is likely that she is therapeutically accessible...she will be a willing participant as is the case with her husband who wants the best for the family." Both of these evaluations speak to the nature of the circumstances surrounding my offense and my amenability to treatment as well as low risk to reoffend.

The second goal mentioned in this section, offering the offender the opportunity for improvement, is in no way furthered by the imposition of my current sentence. I am an educated, responsible individual who other than this current offense lived a law-abiding life and contributed positively to the community in which I lived. Despite my current situation I do have much to offer, especially in the way of personal relatonships with my husband and children. Realistically, a sentence of life or 25 years does not afford me an opportunity for improvement, especially in a system where resources are very limited and appropriate treatment groups are simply unavailable. Due to the length of my sentence I am not eligible for many of the classes and programs offered here at the Washington Corrections Center for Women. DOC prefers that offenders who are nearing the end of their confinement be involved in such opportunities. Needless to say, my sentence puts me at the bottom of the list for programs such as anger and stress management as well as Tacoma Community College courses including drafting and technical design. I have repeatedly taken the initiative to find an appropriate treatment group, including attending weekly "volunteer" sex offender treatment group, however I do not find that these groups are adequate for those individuals who truly seek to be rehabilitated and restore their relationships with family, friends, and the community. Unfortunately WCCW does not have a treatment program in place for

sex offenders at this time and there does not seem to be anything coming in the near future. I have been told that when a group does become available I will be a low priority due to the length of my sentence. All in all there is nothing about my imposed sentence that affords me the opportunity to improve myself or reach my goals. I believe outside treatment, as suggested by Dr. McGovern, is a much more appropriate and accessible option.

Lastly, the Sentencing Reform Act of 1981 was designed to not only protect the public and meet the need for offender improvement, but also to make frugal use of the state's resources. RCW 9.94A.010. State v. Murray, 116 P.3d 1072, 128 WA.App 36. During these times of economic hardship I believe the state would be better served by allowing me to return to my family with any appropriate limitations imposed by the court instead of spending approximately $40,000.00 per year to cover the cost of my incarceration. These funds do not seem to be wisely spent when you consider that I am not a risk to the community and I have a large support system in place to help me adjust to resuming an appropriate, law-abiding life outside of prison.

(g) Reduce the risk of reoffending by offenders in the community.

Harsh punishments do send the message that there are severe consequences for breaking the law. However, due to the enhancements and special allegations associated with my

judgement and sentence this deterent far exceeds the goal intended by the SRA. From the beginning of this ordeal I have accepted responsibility for my actions and made it my goal to be restored to my family. As stated previously, according to the evaluations performed by Dr. McGovern and Dr. Traywick, I am not considered a high risk to reoffend. In fact I am an extremely low risk to reoffend. The actions associated with my criminal conduct do not represent who I am as an individual. My behavior during that time was completely out of character and was precipitated by a variety of circumstances including external stressors. I do not pose a risk to the community, therefore this goal is also met by adjusting my sentence to reflect the other purposes of the SRA including proportionality to offender's criminal history and seriousness level of the offense, punishment that is commensurate with that of similar offenses, and promotion of respect for the law by imposing a sentence that is just.

CONCLUSION

In State v. Ameline, 118 WA.App 132 (2003), the court held: a trial judge is not constitutionally precluded from imposing a new sentence, whether greater or less than the original sentence in light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct,and mental and moral prop-

ensities". Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. North Carolina v. Pearce, 23 L.Ed.2d 656, 395 U.S. at 723 quoting Williams v. New York, 337 U.S. 241, 245, 69 S.Ct. 1079, 93 L.Ed 1337 (1949).

Based upon the purposes of the Sentencing Reform Act, evaluations by experienced professionals, and the need for individualized justice, I am respectfully requesting that the court remand my case for resentencing without the special allegations and enhancements. Upon resentencing I would request that the court address the issue of my potentially elevated offender score which contradicts the Legislature's intent and does not accomplish any of the purposes set out in the development of the Sentencing Reform Act. It is my hope that the court will investigate and consider more than just the act by which the crime was committed and take into account the circumstances of the offense along with my character and propensities in order to provide punishment that is just in light of my criminal history, day-to-day life, low risk to reoffend, and the goals of the SRA (proportionality of sentencing, commensurate with similar offenses, and offender improvement) in order to promote respect for the law and a sense of individualized justice.

January 5, 2010

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Jennifer L. Rice
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Dear Ms. Griffith:

Thank you for your response to my initial "argument" for additional grounds. I appreciate your input. I think you are right, the mitigating factor "willing participant" is a sensitive area, and although I was thinking about using that argument in light of the charges involving Rigo, it is probably better to just leave it out. That said, I have removed that section.

I tried to format my "additional grounds" in a way that presents two arguments... (1) RCW 9.94A.835, .836, and .837 limiting the courts discretion, therefore not allowing for individualized justice, and (2) The above mentioned RCWs contradicting the purposes of the SRA, including proportionality of sentence.

I think my argument may be a little wordy but the editing/revision process here is very difficult with typewriters, I wish I had access to a computer/word processor. Hopefully I have made some good points.

Thank you for your assistance. Please keep me updated as to what happens next in the appeal process. I appreciate all of the communication we have had up to this point. Thank you. Please feel free to communicate with my father or husband as well should you feel the need to do so.

Sincerely,

Jennifer L. Rice

P.S. Due to the cost of copying and mailing here from WCCW I have sent one copy to my father and he will be forwarding my additional grounds to the Court of Appeals as well as providing you with a copy.

David C. Ponzoha
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