Supreme Court No. 90462-6
COA No. 69924-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONNIE W. DURRETT,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Donnie W. Durrett requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Durrett, No. 69924-5-I, filed June 2, 2014. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. In State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012), this Court held RCW 9.94A.701(9) requires a sentencing court to impose a fixed term of community custody that, together with the standard range sentence, does not exceed the statutory maximum. Boyd held that when a sentence that violates RCW 9.94A.701(9) is reversed on appeal, the trial court has discretion on remand to resentence the offender. Here, the Court of Appeals held that the trial court did *not* have discretion to resentence Mr. Durrett after his sentence was reversed for violating RCW 9.94A.701(9). The Court of Appeals' opinion is inconsistent with Boyd, with one published Court of Appeals opinion, and with numerous unpublished Court of Appeals opinions. Should this Court grant review to resolve this conflict and clarify the standard that applies to determine when a court has discretion to resentence after a sentence is reversed on appeal? RAP 13.4(b)(1), (2), (4).

2. Numerous decisions from this Court and the Court of Appeals hold that an offender is entitled to "resentencing" whenever a sentencing error corrected on appeal "directly relates" to the length of the sentence. Here, the sentencing court imposed an erroneous term of community custody yet after that error was corrected on appeal, the court did not resentence Mr. Durrett. The Court of Appeals affirmed, holding Mr. Durrett was not entitled to resentencing because the trial court's action was "merely ministerial." Does an erroneous term of community custody that is corrected on appeal "directly relate" to the length of the sentence, requiring resentencing? Does the Court of Appeals' opinion conflict with this body of case law, warranting review? RAP 13.4(b)(1), (2).

3. In State v. Broadaway, 133 Wn.2d 118, 942 P.2d 363 (1997), this Court held that when a sentencing court imposes an erroneous term of community custody based on its mistaken view about what the law requires, the offender is entitled to be resentenced. Here, the sentencing court imposed an erroneous indeterminate term of community custody based on its mistaken belief about what the law required. Yet after the Court of Appeals reversed the erroneous sentence, the trial court did not resentence Mr. Durrett. Does the Court

of Appeals' opinion affirming the trial court violate Broadaway, warranting review? RAP 13.4(b)(1).

C. STATEMENT OF THE CASE

In 2007, Donnie Durrett was tried and convicted of two counts of failure to register as a sex offender. CP 6-7, 14. At sentencing, the trial court imposed a low-end standard range sentence of 43 months for each count, to be served concurrently. CP 17-18. The court also imposed 36 to 48 months of community custody and included the following notation on the judgment and sentence: "The total term of incarceration and community custody cannot exceed a combined term of 60 months."[1] CP 17.

Mr. Durrett appealed, arguing that (1) his two convictions for failure to register based on the same "unit of prosecution" violated his constitutional right to be free from double jeopardy, and (2) the trial court violated the Sentencing Reform Act (SRA) by failing to impose a fixed term of community custody. The Court of Appeals agreed with both arguments. CP 26. The court vacated one of the convictions and remanded to the trial court "for resentencing on a single count of failure

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[1] The statutory maximum sentence for failure to register as a sex offender is 60 months. Former RCW 9A.44.130(11)(a) (2006); RCW 9A.20.021(1)(c).

to register and entry of a sentence consistent with Linerud." CP 36 (citing State v. Linerud, 147 Wn. App. 944, 197 P.3d 1224 (2008) (holding sentence that included variable term of community custody with notation requiring the Department of Corrections (DOC) to calculate sentence to ensure it did not exceed statutory maximum was indeterminate sentence in violation of SRA), overruled by In re Pers. Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), superseded by Laws 2009, ch. 375, § 5, as recognized in State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012)).

Meanwhile, Mr. Durrett served the entire incarceration portion of his sentence. See 10/21/11RP 3-4 (deputy prosecutor asserts that Mr. Durrett was released in September 2009 and, as of October 2011, had only about two months left of community custody).

A resentencing hearing was held October 21, 2011. Mr. Durrett was present and represented by counsel. 10/21/11RP 2. The court imposed 43 months confinement on a single count of failure to register. CP 38, 41. Again, the court did not impose a fixed term of community custody but instead imposed a variable term as indicated by the following notation entered on the judgment and sentence: "The total

term of incarceration and community custody cannot exceed a combined term of 60 months." CP 42.

Mr. Durrett appealed his 2007 judgment and sentence for the second time. Again, he argued that the trial court erred by failing to impose a fixed term of community custody. Once more, the Court of Appeals agreed. CP 182-84. The Court "remand[ed] to the trial court to enter a term of community custody consistent with RCW 9.94A.701(9)." CP 182 (citing State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012) (holding trial court, not DOC, has obligation to reduce term of community custody to avoid sentence in excess of statutory maximum)).

On December 11, 2012, the trial court amended the judgment and sentence and imposed a new term of community custody without holding a hearing and without affording Mr. Durrett an opportunity to be present or be represented by counsel. CP 198.

Mr. Durrett appealed once more, arguing that his constitutional rights to be present and be represented by counsel were violated because the trial court imposed a new term of community custody without holding a resentencing hearing. He argued that the sentencing court had discretion on remand either to maintain the standard range

sentence originally imposed, 43 months, and add a fixed term of 17 months of community custody, or to impose a new standard range sentence of up to 57 months, and a fixed term of community custody that, together with the standard range sentence, did not exceed 60 months. Reply Brief at 1-2. Mr. Durrett pointed out that he had already served more than 43 months in prison on this cause number. He could not receive credit for that extra time against his term of community custody. AOB at 19 (citing State v. Jones, 172 Wn.2d 236, 243-44, 257 P.3d 616 (2011)). Therefore, he would have benefited from receiving a higher standard range sentence than was originally imposed, so that he would spend less time on community custody. He should have had a hearing at which he could be present, represented by counsel, and advocate for the sentence he wanted and the trial court had discretion to impose.

With little analysis and without addressing these arguments, the Court of Appeals affirmed. The court concluded that the trial court's imposition of a new term of community custody on remand was "merely ministerial" because the court did not have discretion but was "compelled" to impose the sentence that it did. Therefore, the court held, Mr. Durrett did not have a right to resentencing. Slip Op. at 5-6.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' conclusion that the trial court did not have discretion to reconsider Mr. Durrett's sentence on remand is contrary to State v. Boyd and reflects confusion—which should be addressed by this Court—about when an offender is entitled to resentencing after a sentence is reversed on appeal

In State v. Boyd, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012), this Court held that RCW 9.94A.701(9) requires the sentencing court to impose a fixed term of community custody that, together with the standard range sentence, does not exceed the statutory maximum. Boyd held that, when a sentence that violates RCW 9.94A.701(9) is reversed on appeal, the trial court has discretion on remand to reconsider the sentence. The Court reversed Boyd's illegal sentence and "remand[ed] to the trial court to either amend the community custody term or *resentence Boyd . . . consistent with RCW 9.94A.701(9).*" Boyd, 174 Wn.2d at 473 (emphasis added).

Thus, the remedy imposed in Boyd granted discretion to the trial court to resentence Boyd in light of the corrected, fixed term of community custody. Boyd reflects the view that the trial court may wish to reconsider the length of the standard range sentence when it is

determined that the term of community custody originally imposed was erroneous.[2]

In one published opinion that is consistent with Boyd but directly conflicts with the opinion in this case, Division One held that the remedy for a Boyd error is resentencing. See State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782 (2013) (remanding "for resentencing to comply with Boyd and RCW 9.94A.701(9)").

Most of the unpublished opinions in which the Court of Appeals reversed a sentence for Boyd error are consistent with Land and Boyd and inconsistent with the opinion in this case.[3] In most of those cases, the Court of Appeals recognized that the trial court had discretion on remand to reconsider the length of the standard range sentence. See, e.g., State v. Jackson, No. 69812-8-I, 2014 WL 2796532, at * 5 (June 16, 2014) ("we remand to the trial court either to amend the community custody term or to resentence Jackson on the attempted assault conviction consistent with RCW 9.94A.701(9)"); State v. Oberg, No.

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[2] Of course, the trial court would not have discretion to reconsider the length of the standard range sentence if, due to the defendant's offender score, the low end of the standard range is equivalent to the statutory maximum.

[3] These unpublished Court of Appeals opinions are cited not as authority but to demonstrate the conflict that exists among the Court of Appeals opinions in regard to the issue raised in this case.

43472-5-II, 2014 WL 1852417, at *4 (May 6, 2014) (remanding for resentencing); State v. Urquijo, No. 44205-1-II, 2014 WL 1852610, at *2 (May 6, 2014) ("The remedy for a violation of RCW 9.94A.701(9) is remand to the trial court to amend the community custody term or to resentence); State v. Real, No. 43622-1-II, 2014 WL 265471, at *1 (Jan. 22, 2014) ("We accept the State's concession, reverse the trial court's sentence, and remand for imposition of a proper sentence that does not exceed 120 months."); State v. Sommer, No. 68958-4-I, 2014 WL 117285, at *3 (Jan. 13, 2014) ("We accept the concession and remand for the trial court to either amend the community custody term or resentence Sommer consistent with RCW 9.94A.701(9)."); State v. Pierce, No. 42701-0-II, 2013 WL 6096131, at *4 (Nov. 19, 2013) ("We . . . remand to the trial court to either amend the term of community custody or resentence Pierce consistently within the statutory maximum for a class C felony); State v. Richey, No. 43032-1-II, 2013 WL 6097878, at *4 (Nov. 19, 2013) (remanding for resentencing under Boyd); State v. Meadows, No. 43020-7-II, 2013 WL 5592961, at *3 (Oct. 8, 2013) (same); State v. Derouen, No. 70349-8-I, 2013 WL 3946786, at *6 (July 29, 2013) (same); State v. Bonbright, No. 42091-1-II, at *3 (Apr. 16, 2013) (remanding to trial court either to amend

community custody term or resentence Bonbright); State v. Bascomb, No. 68576-7-I, 2013 WL 616933, at *1 (Feb. 19, 2013) ("we remand to the trial court to either amend the community custody term or resentence Bascomb consistent with RCW 9.94A.701(9)); State v. Plush, No. 42526-2-II, 2012 WL 6212624, at *1 (Dec. 11, 2012) ("We accept the State's concession and remand for resentencing under Boyd"); State v. Jones, No. 40834-1-II, 2012 WL 5397955, at *1 (Nov. 6, 2012) ("we remand to the trial court either to amend Jones' community custody term or to resentence him on the drug possession conviction consistent with RCW 9.94A.701(9)"); In re Pers. Restraint of Green, 170 Wn. App. 328, 283 P.3d 606 (2012) (remanding either to amend community custody term or resentence Green); State v. Mitchell, No. 65447-1-I, 2012 WL 4354815, at *1 (Sept. 24, 2012) (remanding to trial court to either amend term of community custody or resentence consistent with RCW 9.94A.701(9)); State v. Karlow, No. 64374-6-I, 2011 WL 4012312, at *4 (Sept. 12, 2011), as amended (Aug. 6, 2012) ("Under State v. Boyd, 174 Wn.2d 470, 275 P.3d 32 (2012), we must remand for the court 'to either amend the community custody term or resentence . . . consistent with RCW 9.94A.701(9).'"); State v. Doss, No. 67058-1-I, 2012 WL 2377816, at *1 (June 25, 2012)

("We remand to the trial court either to amend the community custody term or resentence Doss consistent with RCW 9.94A.701(9.

In only a small percentage of the unpublished opinions has the Court of Appeals remanded solely for correction of the community custody term without explicitly stating that the trial court had discretion to resentence. See State v. Jones, No. 41638-7-II, 2013 WL 1489460, at *14 (Apr. 9, 2013) ("Accordingly, we remand to the trial court to strike the offending language in Jones's judgment and sentence and to issue a corrected judgment and sentence consistent with RCW 9.94A.701(2)."); State v. Jones, No. 67127-8-I, 2013 WL 815933, at *4 (Mar. 4, 2013) ("We affirm the conviction on all counts, but remand for correction of the community custody term in the judgment and sentence"); State v. Sheehan, No. 29857-4-III, 2012 WL 4017775, at *6 (Sept. 13, 2012) (remanding to trial court to "clarify" length of confinement and/or community custody).

The Court of Appeals opinion in this case is contrary to Boyd and Land. It is also contrary to the vast majority of unpublished Court of Appeals opinions to address the remedy for a Boyd error. Those cases explicitly recognize that a trial court has discretion to reconsider

the length of the sentence when the term of community custody is reversed for violating RCW 9.94A.701(9).

The Court of Appeals held in this case that the trial court's decision to amend the term of community custody on remand was "merely ministerial" because the court did not have discretion to reconsider the length of the standard range sentence. Slip Op. at 5-6. That conclusion is plainly contrary to Boyd and Land and warrants review by this Court. RAP 13.4(b)(1), (2). The result is that Mr. Durrett was unfairly denied an opportunity to advocate for a different sentence. The disparity among the Court of Appeals opinions demonstrates the need for clarity. This Court should grant review and clarify the standard that applies to determine when a court has discretion to resentence after a sentence is reversed on appeal. RAP 13.4(b)(4).

2. The Court of Appeals' opinion violated the long-standing rule, founded on constitutional principles, that an offender has a right to a resentencing hearing at which he may be present, represented by counsel, whenever the sentencing error corrected on appeal "directly relates" to the length of the sentence

The constitutional right to be present extends to any stage of the criminal proceedings where the defendant's "substantial rights might be

affected." State v. Walker, 13 Wn. App. 545, 557, 536 P.2d 657 (1975); see also Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934) (defendant must "be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge"); Const. art. I, § 22; U.S. Const. amend. XIV.

The constitutional right to be present applies at any resentencing proceeding where the court has discretion to determine the length of the new sentence. State v. Davenport, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007).

A criminal defendant also has a constitutional right to the assistance of counsel at every "critical stage" of the proceedings. Const. art. I, § 22; U.S. Const. amend. VI; State v. Heddrick, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). A critical stage is "one in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." Heddrick, 166 Wn.2d at 910 (internal quotation marks and citation omitted).

Sentencing is a "critical stage" at which the constitutional right to counsel applies. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d

90 (2005); Gardner v. Florida, 430 U.S. 348, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). The right to counsel applies whenever the trial court considers any matter in connection with the defendant's sentence, which includes resentencing. State v. Rupe, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

An offender is entitled to "resentencing" whenever a sentence is reversed on appeal if the error is "directly related" to the length of the sentence. For instance, when a trial court imposes an exceptional sentence but miscalculates the offender score, resulting in an incorrect standard range, the offender is entitled to resentencing because the exceptional sentence is "directly related to a correct determination of the standard range." State v. Collicott, 118 Wn.2d 649, 660, 827 P.2d 263 (1992). A trial court cannot properly determine whether an exceptional sentence is justified, and what length of sentence to impose, if the offender score is not correctly calculated. Id.; see also, e.g., State v. Rowland, 160 Wn. App. 316, 334, 249 P.3d 635 (2011), aff'd, 174 Wn.2d 150, 272 P.3d 242 (2012) ("When a sentencing court incorrectly calculates the standard range before imposing an exceptional sentence, remand for resentencing is the remedy unless the

record clearly indicates the sentencing court would have imposed the same sentence anyway.").

This basic principle applies to other kinds of sentencing errors that result in the reversal of a sentence on appeal. If the error is indivisible from the length of the sentence originally imposed, in that the trial court determined the length while having in mind an erroneous assumption about what the law required, the offender is entitled to be resentenced. E.g., State v. Kilgore, 167 Wn.2d 28, 41, 216 P.3d 393 (2009) (trial court had authority to revisit Kilgore's exceptional sentence on remand even though standard range sentence did not change after two counts were reversed on appeal); State v. Harrison, 148 Wn.2d 550, 559, 61 P.3d 1104 (2003) (after sentence reversed due to prosecution's breach of plea agreement, trial court had authority on remand to reconsider exceptional sentence "because the original sentencing was tainted by the State's breach"); State v. Broadaway, 133 Wn.2d 118, 135-36, 942 P.2d 363 (1997) (trial court had authority to reconsider standard-range sentence on remand after sentence reversed because it did not provide for required one-year term of community placement; court must have correct term of community placement in mind because "in many cases it will assist the trial court in assessing

the overall sentence"); Brooks v. Rhay, 92 Wn.2d 876, 877-78, 602 P.2d 356 (1979) (sentence reversed after trial court erroneously ordered sentence to run concurrently with previously imposed sentence; trial court had authority on remand to reconsider length of sentence because "sentence is indivisible in that the court set sentences upon the assumption they would be served concurrently"); State v. Hibdon, 140 Wn. App. 534, 539, 166 P.3d 826 (2007) (trial court had authority on remand to reconsider standard range sentence after sentence reversed on appeal due to court's failure to impose required term of community placement).

This case is controlled by these authorities because in most cases, a sentencing court's error in failing to impose a fixed term of community custody is "directly related" to the determination of how much prison time to impose.[4] See Collicott, 118 Wn.2d at 660. A trial court on remand may well desire to reconsider the length of the standard range sentence in light of the statute's requirement that a fixed term of community custody be imposed. In many cases, the fixed term

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[4] Again, in those cases in which the standard range sentence is equivalent to the statutory maximum, the court would have no discretion on remand to reconsider the length of the standard range sentence if the sentence were reversed on appeal due to an erroneous term of community custody.

of community custody required will be less than what the trial court originally contemplated. In some cases, the court may wish to reduce the prison term, thereby imposing a maximum term of community custody, in order to ensure that the offender spends as much time as possible under supervision in the community. In other cases, the court may wish to increase the prison term in order to make up for the reduced time the offender will be spending on community custody.

In sum, the Court of Appeals' opinion holding that Mr. Durrett was not entitled to resentencing conflicts with long-standing authority from this Court and the Court of Appeals because the error on appeal was "directly" related to the length of his sentence. Mr. Durrett was erroneously denied his constitutional right to a hearing at which he could be present, represented by counsel, and advocate for a different sentence. To redress this constitutional violation and ensure the integrity and consistency of the case law, this Court should grant review. RAP 13.4(b)(1), (2).

3. The Court of Appeals' opinion conflicts with State v. Broadaway

In State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997), this Court held resentencing was warranted after Broadaway's sentence was reversed on appeal due to an error in imposing

community custody. The sentencing court had believed the required term was two years when in fact it was one year. Id. at 122.

Here, like in Broadaway, the trial court was mistaken about the period of community custody required by law. The court believed the law required a variable term of 36 to 48 months of community custody when in fact the law required a fixed term of between 3 and 17 months of community custody. The correct term is significantly different from what the court originally believed was authorized. Thus, under Broadaway, resentencing was warranted. The Court of Appeals' opinion to the contrary directly conflicts with Broadaway. This Court should grant review and reverse. RAP 13.4(b)(1).

E. CONCLUSION

The Court of Appeals opinion conflicts with decisions from this Court and the Court of Appeals and violated Mr. Durrett's constitutional rights. This Court should grant review, reverse the Court of Appeals, and remand for a resentencing hearing at which Mr. Durrett may be present, represented by counsel.

Respectfully submitted this 2nd day of July, 2014.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DONNIE W. DURRETT, Appellant.	)	No. 69924-5-I DIVISION ONE UNPUBLISHED OPINION FILED: June 2, 2014

APPELWICK, J. — Durrett alleges that the trial court violated his right to be present and right to counsel by setting his community custody term without Durrett or his attorney present. His sentence had been remanded solely for entry of a community custody period consistent with RCW 9.94A.701(9). This does not require an exercise of discretion triggering a right to be present. We affirm.

FACTS

Donnie Durrett was convicted of failure to register as a sex offender.[1] He was sentenced to 43 months in the custody of the Department of Corrections (DOC). The trial court also imposed community custody for the statutory range of 36 to 48 months. The court included a notation stating that "[t]he total term of incarceration and community custody cannot exceed a combined term of 60 months."

[1] Durrett was originally convicted of two counts of failure to register as a sex offender. This court ultimately reversed one of his convictions as a violation of double jeopardy. State v. Durrett, 150 Wn. App. 402, 404, 208 P.3d 1174 (2009). This appeal arises from the sentence associated with the remaining conviction.

Durrett appealed, arguing that the trial court erred in imposing a sentence that exceeded the statutory maximum of 60 months. State v. Durrett, 150 Wn. App. 402, 411-12, 208 P.3d 1174 (2009). The State countered that Durrett's sentence was valid, because the court's notation restricted the total term to 60 months. Id. at 412. This court concluded that the sentence was indeterminate and therefore invalid. Id. We remanded for entry of a fixed sentence. See id. at 413.

On remand, the trial court again sentenced Durrett to 43 months in custody. It also again imposed community custody. This time, the court struck the reference to the statutory 36 month term and noted once more that "[t]he total term of incarceration and community custody cannot exceed a combined term of 60 months."

Durrett appealed a second time, arguing that the court failed to enter a fixed term of community custody as directed. State v. Durrett, noted at 170 Wn. App. 1018, 2012 WL 3815085, at *2. The State conceded error and acknowledged that Durrett's term of community custody must be limited to 17 months so as not to exceed the statutory maximum. We accepted the State's concession and remanded "solely for entry of a community custody period consistent with RCW 9.94A.701(9).[2] The trial court's resentencing decision is otherwise affirmed." Id.

On the second remand, the trial court entered an order amending the judgment and sentence as to the term of community custody only. It did not hold a hearing or consider argument from Durrett. It struck the language that "[t]he total term of

[2] "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021." RCW 9.94A.701(9).

incarceration and community custody cannot exceed a combined term of 60 months" and ordered that the total term of community custody was 17 months.

Durrett again appeals.

DISCUSSION

I. Right to Be Present and Right to Counsel

Durrett argues that that the trial court erred in amending the judgment and sentence without him or his attorney present. He contends that this violated his right to be present and right to counsel. The State counters that the trial court's action was merely ministerial and thus triggered no constitutional protections.

Criminal defendants have the right to appear and defend themselves in person or by counsel. WASH. CONST. art. I, § 22; see also U.S. CONST. amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law."). The constitutional right to be present extends to every "critical stage" of the proceedings. State v. Heddrick, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). A critical stage is one in which the outcome of the case is substantially affected. See id. at 910. This includes sentencing. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). The right to be present also applies at resentencing, if the court has discretion to determine the length of the new sentence. See State v. Davenport, 140 Wn. App. 925, 932, 167 P.3d 1221 (2007). But, where the court merely makes a ministerial correction, the right to be present does not apply. State v. Ramos, 171 Wn.2d 46, 48, 246 P.3d 811 (2011).

In Ramos, the appellant argued that the term of his community placement was too vague. Id. at 48. The Court of Appeals remanded for correction of his sentence to state

the specific length of community placement. Id. at 49. It further directed the trial court to specify the "'special terms'" of the placement. Id. The Supreme Court found that this required the trial court to exercise discretion. Id. It reasoned that, had the Court of Appeals merely directed the trial court to state the specific term of community placement, there would have been no exercise of discretion, because the term was dictated by statute. Id. But, the trial court has discretion over special terms, and the Court of Appeals necessarily required it to exercise that discretion. Id. Ramos thus had the right to be present at resentencing. Id.

The State contends that here, unlike in Ramos, this court's mandate did not allow the trial court to exercise discretion when it entered the order amending Durrett's judgment and sentence. The State emphasizes that we remanded "solely for entry of a community custody period consistent with RCW 9.94A.701(9)." Durrett, 2012 WL 3815085, at *2 (emphasis added).

RCW 9.94A.701 was enacted in 2008. LAWS OF 2008, ch. 231, § 7 Durrett failed to register as a sex offender from December 2006 to January 2007. His conduct predates the statute.

Nonetheless, we agree with the State that the trial court lacked discretion on remand. Durrett was convicted under former RCW 9A.44.130 (2006). The statutory scheme at the time provided that, if an offender failed to register under former RCW 9A.44.130, "the court shall impose a term of community custody under [former] RCW 9.94A.715 [(2006)]." Former RCW 9.94A.545(2) (2006). That section in turn mandated

that, when the court sentenced a person to DOC custody for a sex offense,[3] it must also sentence that person to community custody for the range established under former RCW 9.94A.850 (2005) or up to the period of earned release, whichever was longer. Former RCW 9.94A.715(1).

The statutory community custody range for a sex offense was 36 to 48 months. Former WAC 437-20-010 (2005). This range, combined with Durrett's 43 months of DOC custody, exceeded the statutory maximum of 60 months. Accordingly, the trial court was compelled to reduce Durrett's community custody term. Former RCW 9.94A.715(1) directed the court to impose "whichever is longer" of the possible community custody terms. This was restrictive language. It required the court to impose a community custody term that, in conjunction with his DOC custody, met the statutory maximum. When the court amended Durrett's judgment and sentence, its action was thus merely ministerial.

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[3] In his first statement of additional grounds, Durrett argues that failure to register as a sex offender was not a sex offense under RCW 9A.44.130. He cites to former RCW 9.94A.030(42)(a)(i) (2006), which defined "sex offense" as a "felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11)." Former RCW 9A.44.130(11) established the penalty for failing to register as a sex offender.

While Durrett is technically correct, his argument fails under State v. Castillo, 144 Wn. App. 584, 183 P.3d 355 (2008) and State v. Albright, 144 Wn. App. 566, 183 P.3d 1094 (2008). These cases recognize that a clerical error was to blame for the exclusion of failure to register as a sex offender from the definition of "sex offense." Castillo, 144 Wn. App. at 591-92; Albright, 144 Wn. App. at 571. Former RCW 9A.44.130 (2005) exempted failure to register as a kidnapper from the definition of "sex offense." LAWS OF 2005, ch. 380, § 1. In 2006, the legislature added a new section to the statute and renumbered the subsequent provisions. LAWS OF 2006, ch. 129, § 2. However, the legislature failed to amend RCW 9.94A.030, to accurately cross-reference those provisions. The Castillo and Albright courts treated the new definition as an oversight and interpreted the statute as preserving its original meaning. Castillo, 144 Wn. App. at 591; Albright, 144 Wn. App. at 571.

We find that the trial court did not exercise discretion when it amended Durrett's judgment and sentence on remand. Therefore, Durrett's right to be present and right to counsel did not apply.

II. Statements of Additional Grounds

Durrett also raises multiple statements of additional grounds (SAGs). He alleges that the court's failure to hold a hearing violated his right to a report of proceedings under RAP 9.1. That rule pertains to the composition of the record on appellate review. It sets forth procedural requirements that parties must meet. It does not provide rights to parties or mandate oral proceedings at the trial court level. We find no merit in Durrett's argument.

Durrett further asserts that the court and the prosecutor committed fraudulent misrepresentation. First, Durrett maintains that his judgment and sentence fraudulently implies that he was present for all stages of sentencing. The parties do not dispute that neither Durrett nor his attorney was present for entry of the order amending his judgment and sentence. And, while Durrett's judgment and sentence on first remand correctly states that he and his attorney were present, the order entered on second remand makes no such representation.

Durrett also argues that the prosecutor committed fraudulent misrepresentation and misconduct by stating that the court was performing a ministerial task and presenting the order amending his judgment and sentence. As discussed above in section I, the court's actions on remand were proper. The prosecutor's actions were thereby proper as well. Moreover, Durrett references documents that are attached to his SAG but not

designated in the record. We cannot consider matters outside the record on a direct appeal. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition.")

We affirm.

Appelwick, J.

WE CONCUR:

Jan, J.

Dwyer, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69924-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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☒ petitioner

☐ Attorney for other party

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Date: July 2, 2014