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COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

vs.

SCOTT CHRISTOPHER SMITH,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it accepted his guilty plea because the defendant did not knowingly, intelligently and voluntarily enter it.

2. The trial court abused it's discretion when it refused the defendant's request for sentencing under the sex offender special sentencing alternative.

3. The trial court erred when it imposed community custody conditions not authorized by the legislature.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it accepts a guilty plea that the defendant did not knowingly, intelligently and voluntarily enter?

2. Is it an abuse of discretion for a trial court to refuse to sentence under the sex offender special sentencing alternative based upon untenable grounds and when that decision is manifestly unreasonable?

3. Does a trial court err if it imposes community custody conditions not authorized by the legislature?

STATEMENT OF THE CASE

By amended information filed February 24, 2006, the Clark County Prosecutor charged the defendant Scott Christopher Smith with one count of first degree rape of a child, one count of first degree molestation of a child, and one count of third degree assault of a child. CP 16-17. All three counts alleged that the defendant committed the offenses between "November 11, 2003 and August 7, 2006" against "D.R.S. and S.D.B." The information did not state the statutory maximums for each offense. *Id.* Upon the filing of this amended information the defendant entered a written statement of defendant on plea of guilty to each count under a plea bargain that allowed him to seek sentencing under the sex offender special sentencing alternative (SOSSA). CP 18-36. The statement of defendant on plea of guilty listed the standard ranges for each offense as 129 to 171 months, 72 to 96 months, and 4 to 12 months respectively. CP 20. It also listed the statutory maximum sentences for Count I and Count II as 20 years in prison and a $50,000.00 each. *Id.*[1]

During the colloquy on the guilty plea the court did not inform the defendant that the statutory maximum for the first two counts was actually

[1]Although the guilty plea form incorrectly state the statutory maximums for the first two counts, it did correctly state that the defendant was subject to community custody for "life" in each offense.

life in prison as opposed to 20 years as stated in the guilty plea form. RP 8.[2] Rather, the court repeated the error and then emphasized that while the community custody range was life and statutory maximum was 20 years in prison, not life. *Id.* The court's words were as follows:

> Your standard sentencing range as to the rape of a child is 129 to 171 months, with a community custody range of life in prison. The maximum term is twenty years and/or $50,000.
>
> As to the child molestation, your standard range is 72 to 96 months, with up to a life in prison. The maximum term is twenty years and/or $50,000. And the life in prison was a community custody range, I'm sorry.

RP 8.

At the end of the colloquy the court accepted the defendant's guilty plea and ordered the Department of Corrections to prepare a pre-sentence investigation report (PSI). RP 17-21. Almost three months later the court called the case for sentencing. RP 24. At that time the defendant presented a psycho-sexual evaluation to the court indicating that he was amenable to community based treatment under the SOSSA option. CP 101-147. The state opposed this option, arguing for a sentence within the standard range as recommended in the PSI. RP 32-34. Based primarily upon its finding that the defendant was a "pedophile" and its apparent policy to refuse SOSSA

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[2]The record in this case includes two volumes of continuously numbered verbatim reports from the guilty plea hearing and the sentencing hearing in this case.

sentences to "pedophiles" the court denied the defendant's request and refused to use the SOSSA option. RP 63-63. The court's own words on this point were as follows:

> This is what I get when I do that same analysis in your case. If I look at what the treatment provided has put in their recommendations, he makes the following comment.
>
> > "The examinee presents as a marginal candidate for immediate outpatient sexual offender treatment. The examinee's guarded prognosis . ."
>
> Its like he's holding back on me.
>
> > "Mr. Smith's characteristics suggest ample evidence of pedophilia."
>
> And that usually is enough for me to go, Okay, this guy isn't a good likely candidate under the standards that the statute puts out.

RP 63-63.

In addition when refusing to employ the SOSSA option the court did not even mention, let alone consider, the wishes of victims in this case. RP 63-67. These desires were expressed by the mothers of the victims who requested that the defendant receive treatment. RP 29-33. After refusing to employ the SOSSA option the court sentenced the defendant to life in prison on count one with a minimum mandatory term of 171 months, life in prison on count two with a minimum mandatory term of 96 months, and 12 months on count three with all sentenced to run concurrently. CP 79. The court also imposed community custody for life upon a number of conditions,

including the following among others:

- ☒ If the offense was committed on or after July 24, 2005, you may not reside within eight hundred eighty (880) feet of the facilities and grounds of a public or private school. RCW 9.94A.030.

- ☒ . . . The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.

5. You shall not possess, use or own firearms, ammunition or deadly weapons. Your community Corrections Officer shall determine what those deadly weapons are.

11. You shall attend and successfully complete all inpatient and/or outpatient phases of any treatment program established by your Community Corrections Officer and/or treatment facility, if available.

18. You shall not associate with people known to be on probation, parole, or community placement.

CP 80, 81, 98, 99, 100.

The court imposed condition 11 in spite of the fact that it had the option of finding the defendant chemically dependant but did not enter this finding. CP This is found on page two of the judgment and sentence where the court failed to mark the paragraph that states:

- ☐ The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

CP 75 (emphasis in original).

After imposition of sentence in this case the defendant filed timely notice of appeal. CP 148.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ACCEPTED HIS GUILTY PLEA BECAUSE THE DEFENDANT DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTER IT.

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Personal Restraint of Stoudmire,* 145 Wn.2d 258, 36 P.3d 1005 (2001). Guilty pleas that are entered without a statement of the consequences of the sentence are not "knowingly" made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

Failure to inform a defendant of direct sentencing consequences upon a plea of guilty is also governed by court rule. Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a "manifest injustice." A plea that is not knowingly, voluntarily and intelligently entered produces a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505

(1991). Finally, since pleas which are not knowingly, voluntarily, and intelligently entered violate a defendant's right to due process, they may be challenged for the first time on appeal. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991 (2000).

For example, in *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), the state originally charged the defendant with first degree kidnaping, first degree rape, and second degree assault. The defendant later agreed to plead guilty to a single charge of Second Degree Rape upon the state's agreement to recommend a low end sentence upon a range that both the state and the defense miscalculated at 86 to 114 months. In fact, at sentencing the court and the attorneys determined that the defendant's correct standard range was from 95 to 125 months. Although the state recommended the low end of the standard range, the court imposed an exceptional sentence of 136 months based upon a finding of intentional cruelty. The defendant thereafter appealed, arguing that his plea was not voluntarily, knowingly, and intelligently made, based upon the error in calculating his standard range.

On appeal, the Court of Appeals affirmed, finding that since the defendant did not move to withdraw his guilty plea at the time of sentencing when the correct standard range was determined, he waived his right to object to the acceptance of his plea. On further review, the Washington Supreme Court reversed, finding that (1) a claim that a plea was not voluntarily made

constituted a claim of constitutional magnitude that could be raised for the first time on appeal, (2) that the record did not support a conclusion that the defendant waived his right to claim his plea was involuntarily, and (3) a plea entered upon a mistaken calculation of the standard range is not knowingly and voluntarily made. The court stated the following on the final two holdings:

> Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence. Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. The defendant's choice of remedy does not control, however, if there are compelling reasons not to allow that remedy. Walsh has chosen to withdraw his plea. The State has not argued it would be prejudiced by withdrawal of the plea.
>
> The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

State v. Walsh, 143 Wn.2d at 8-9. *See also State v. Kissee*, 88 Wn.App. 817, 947 P.2d 262 (1997) (mistaken belief that the defendant qualifies for a SOSSA sentence is a basis upon which to withdraw a guilty plea).

In the case at bar, the statement of defendant on plea of guilty erroneously informs the defendant that he was facing a maximum term of 20 years in prison one each of the first two counts. In fact, under the two listed criminal statutes and RCW 9.94A.712, the defendant was actually facing a

mandatory sentence of life in prison with a minimum mandatory sentence to serve before consideration for release. In fact, RCW 9.94A.712 states as follows:

> (3) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

RCW 9.94A.712(3).

Under this subsection, a defendant convicted of a Class A felony receives a life sentence with a minimum mandatory term to serve before the Indeterminate Review Sentence Board may consider the person for release. That release, once granted, is always subject to revocation in the future. Although the "minimum term" the court is required to impose must be somewhere within the "standard sentence range" that the court would have used to calculate the defendant's determinate sentence had RCW 9.94A.712 not applied, the "minimum term" is not a determinate "standard range sentence." Rather, the "minimum term" and the "maximum term" constitute an indeterminate sentence, such as those used prior to the enactment of the Sentencing Reform Act. The decision in *State v. Monroe*, 125 Wn. App. 435, 109 P.2d 449 (2005), addresses this distinction.

In *Monroe*, *supra*, the defendant pled guilty to two counts of first

degree rape, one count of first degree burglary with sexual motivation, five counts of first degree kidnaping, and one count of second degree assault. Sentencing under RCW 9.94A.712 applied to both rape charges and the burglary with sexual motivation. In return for the plea, the state agreed to recommend a minimum mandatory term of 511 months on the first three counts, which was the top end of what would have been the standard range had RCW 9.94A.712 not applied. In spite of this recommendation, the court sentenced the defendant to life on each count with a minimum mandatory term of 651 months based upon its finding that the defendant acted with deliberate cruelty upon particularly vulnerable victims and that he acted with a high level of sophistication and planning. The defendant thereafter appealed, arguing that imposition of a minimum mandatory term in excess of the possible top end of the standard range violated his Sixth Amendment rights as set out in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which was decided after he was sentenced.

The state presented two arguments in response to the defendant's claims: (1) that *Blakely* did not apply to setting the minimum mandatory sentence under the indeterminate sentencing scheme found in RCW 9.94A.712, and (2) if *Blakely* did apply to the setting of the minimum mandatory sentence under RCW 9.94A.712, the trial court did not err because the defendant stipulated to the court's consideration of the probable cause

statement and discovery which in turn supported the factual findings the court made in support of the minimum mandatory sentence in excess of the standard range. The court addressed the second argument first and held that the defendant could not be held to a waiver of the rights recognized in *Blakely* because his sentence predated the *Blakely* decision.

The court then went on to address the state's first argument that *Blakely* did not apply to the indeterminate sentencing scheme found in RCW 9.94A.712. All three judges agreed that *Blakely* did not apply to setting the maximum term of confinement because "all facts necessary to support the mandatory maximum term of life were proved by [the defendant's] knowing and voluntary plea and waiver of his right to a jury trial." *State v. Monroe*, 126 Wn.App. at 445. Two of the judges agreed (for different reasons) that *Blakely* did apply to setting a minimum mandatory term that exceeded the available standard range. Judge Bridgewater disagreed, based upon the difference between "determinate" standard range sentences under the Sentencing Reform Act and "indeterminate" sentences under RCW 9.94A.712. Judge Bridgewater stated:

> RCW 9.94A.712 employs a different sentencing structure from the SRA "determinate sentences." The SRA sets determinate sentences for offenses, using criminal histories and certain additors (permissible consecutive sentences for multiple convictions) to arrive at the standard ranges for the offenses. RCW 9.94A.510, .589. Other factors may add to the potential "period of confinement" (e.g., firearm possession) and then, of course, there is the potential for additional

> time to be added to the potential period of confinement for aggravating factors (discretionary exceptional sentences based upon prior convictions and exceptional sentences based upon factors that must be proved beyond a reasonable doubt or admitted by the defendant). RCW 9.94A.535, .602. Although the period of confinement can be reduced by "earned release," the sentence is a "determinate sentence" under the SRA--once the defendant has served the maximum of the determinate sentence, his obligation cannot be extended to the maximum possible under the statute he violated.

State v. Monroe, 125 Wn. App. at 444 (footnote omitted).

After explaining the principles of "determinate sentencing," Judge Bridgewater went on to examine RCW 9.94A.712 and explain why it constituted an "indeterminate" sentence. The court explained:

> RCW 9.94A.712 is distinctly different. First, it concerns a set of crimes that are sexual in nature--*e.g.*, rape in the first or second degree, rape of a child in the first or second degree, etc., and certain crimes that occur with sexual motivation, e.g., murder, kidnaping, assault, etc. RCW 9.94A.712(1)(a)(i)-(ii). For these crimes, the sentencing court is without discretion and there is no sentencing under any grid in the SRA for establishing the maximum sentence imposed. The sentencing court must sentence to the maximum under the particular statute. Here, no fact increased the maximum imposed by the court, and the threshold for Blakely simply is not met. RCW 9.94A.712(3) mandates only that a minimum term be set by the court using the standard range or exceeding the standard range under RCW 9.94A.535. For this reason, Blakely is not implicated.
>
> In effect, RCW 9.94A.712 changes the sentencing structure to one which is "indeterminate"; this is why the Indeterminate Sentence Review Board (ISRB) is referenced. RCW 9.94A.712(5), (6). Once a defendant is sentenced under RCW 9.94A.712, he or she is subject to the authority of the ISRB up to his or her life term. RCW 9.94A.712(5); RCW 9.95.420(3).

State v. Monroe, 125 Wn.App. at 455-456.

For the purposes of the argument herein, the decision in *Monroe* explains that both the maximum sentence imposed and the minimum mandatory sentence constitute an indeterminate sentencing scheme. That is to say, completion of the minimum mandatory sentence under RCW 9.94A.712 only grants a defendant initial eligibility for release, it does not guarantee release. Similarly, once release is granted, it is subject to revocation for the lifetime of the defendant.

The distinction between determinate and indeterminate sentencing as explained by Judge Bridgewater illustrates why the Statement of Defendant on plea of guilty in this place and the guilty plea colloquy failed to properly inform the defendant of the direct consequences of his plea. In the plea form the defendant's attorney used, paragraph 6(a) tells the defendant that he is facing a "standard range sentence" of 67 to 89 months in prison. Specifically, section 6(a) states:

> (a) Each crime with which I am charged carries a maximum sentence, a fine, and a STANDARD SENTENCE RANGE as follows:

CP 20 (capitals in original).

A table then immediately follows this statement which states that the defendant's "OFFENDER SCORE" is four points, and that both his "STANDARD RANGE ACTUAL CONFINEMENT (not including enhancement)" and "TOTAL ACTUAL CONFINEMENT (standard range

including enhancement)" were 129 to 171 months, 72 to 96 months, and 4 to 12 months respectively. CP 20 (capitals in original). By using the term "standard range" three times, the statement of defendant on plea of guilty misleads the defendant into believing that his guilty plea subjects him to a determinate sentence that will not be under 129 months but will not exceed 171 months. In addition, the statement of defendant on plea of guilty also misleads the defendant into believing that the most he could ever serve for the first two counts is 20 years in prison, not life. The court exacerbated this latter error when it not only failed to see the error, but repeated it to the defendant during the colloquy. Although the prosecutor was present for the colloquy he and the defense attorney stood mute as the court compounded the defense attorney's error in misstating the statutory maximums for the first two counts.

Paragraph 6(f) of the guilty plea also erroneously informs the defendant of the effects of pleading guilty to a sex offense punishable under RCW 9.94A.712 because it states that "the judge will impose a maximum term of confinement consisting of the statutory maximum sentence of the offense . . ." Given the error in paragraph 6(a) and the court's failure to recognize this error during the colloquy, paragraph 6(f) had the effect of reinforcing to the defendant that the maximum term he was facing was 20 years in prison, not life. This error affected the most direct of all

circumstances: the maximum time the defendant was facing. Thus, this error entitles the defendant to withdraw his guilty plea.

II. THE TRIAL COURT ABUSED IT'S DISCRETION WHEN IT REFUSED HIS REQUEST FOR SENTENCING UNDER THE SEX OFFENDER SPECIAL SENTENCING ALTERNATIVE.

The decision whether or not to grant a SOSSA sentence lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Onefrey*, 119 Wn.2d 572, 574, 835 P.2d 213 (1992). An abuse of discretion occurs if the court refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis. *State v. Khanteechit*, 101 Wn.App. 137, 5 P.3d 727 (2000). It also occurs when the court when the court bases its decision on clearly untenable or manifestly unreasonable grounds, or when no reasonable person would take the view adopted by the trial court. *State v. Jamison*, 105 Wn.App. 572, 20 P.3d 101 (2001). As the following explains, in the case at bar the trial court did abuse its discretion when it denied the defendant's request for sentencing under the SOSSA option because the court's decision was based upon an impermissible basis.

Subsection 2 of RCW 9.94A.670 sets the eligibility requirements for offenders seeking a sentence under the SOSSA option. It states:

> (2) An offender is eligible for the special sex offender sentencing alternative if:

> (a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense. If the conviction results from a guilty plea, the offender must, as part of his or her plea of guilty, voluntarily and affirmatively admit he or she committed all of the elements of the crime to which the offender is pleading guilty. This alternative is not available to offenders who plead guilty to the offense charged under *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and *State v. Newton*, 87 Wash.2d 363, 552 P.2d 682 (1976);
>
> (b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state;
>
> (c) The offender has no prior adult convictions for a violent offense that was committed within five years of the date the current offense was committed;
>
> (d) The offense did not result in substantial bodily harm to the victim;
>
> (e) The offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime; and
>
> (f) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years.

RCW 9.94A.670.

If an offender meets these requirements, he or she must then submit to a psycho-sexual evaluation to determine amenability to treatment. Once this report is completed it is submitted to the court along with DOC's pre-sentence investigation report. The court then exercises its discretion within the framework of RCW 9.94A.670(4) in determining whether or not to impose a SOSSA sentence. This subsection states:

> (4) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. ***The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section.*** If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment. If the court determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.712, a minimum term of sentence, within the standard sentence range.

RCW 9.94A.670(4) (emphasis added).

As the plain language of this subsection states, in exercising its discretion the court must give great weight to the wishes of the victim or victims in the case. Thus, in failing to even consider the wishes of the victims in a case, let alone give great weight to their opinions, a court abuses its discretion in deciding whether or not to give a SOSSA sentence. This is precisely what the court did in the case at bar. The court did not even consider the victims' desires concerning treatment for the defendant, let alone give "great weight" to it. Thus, the trial court abused its discretion and the defendant is entitled to a new sentencing hearing.

In this case the court also based its decision to deny SOSSA on an

untenable and manifestly unreasonable basis. This occurred when the court stated that it would not impose a SOSSA sentence because the treatment provider believed the defendant was a pedophile. The court stated:

> This is what I get when I do that same analysis in your case. If I look at what the treatment provided has put in their recommendations, he makes the following comment.
>
> > "The examinee presents as a marginal candidate for immediate outpatient sexual offender treatment. The examinee's guarded prognosis . ."
>
> Its like he's holding back on me.
>
> > "Mr. Smith's characteristics suggest ample evidence of pedophilia."
>
> And that usually is enough for me to go, Okay, this guy isn't a good likely candidate under the standards that the statute puts out.

RP 63-63.

In the case at bar the defendant pled guilty to first degree rape of a child and first degree molestation of a child. Under the latter offense the defendant admitted that he had sexual contact with a child under the age of twelve years. "Sexual contact" in this context is defined under RCW 9A.44.010 as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." Thus, any plea of guilty to this offense constitutes an admission that the defendant had sexual desire for a prepubescent child. This is itself the definition of a "pedophilia": "a "sexual perversion in which children are the

preferred sexual object." *See* Webster's New Collegiate Dictionary (1977), page 845. Thus, when the court stated that it would not employ the SOSSA option for "pedophiles" the court was stating that it would not consider the SOSSA option for any person convicted of first degree molestation of a child. This basis for denying a SOSSA sentence is untenable and manifestly unreasonable. Thus, the defendant is entitled to a new sentencing hearing.

III. THE TRIAL COURT ERRED WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.

In Washington the establishment of penalties for crimes is solely a legislative function. *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar the defendant argues that the trial court exceeded its statutory authority when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out this argument.

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty

to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant's crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes in RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were "reasonably related" to the defendant's commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar the defendant was found guilty of two sex offenses and one assault. These first two crimes are subject to sentencing under RCW

9.94A.712, which states:

> (1) An offender who is not a persistent offender shall be sentenced under this section if the offender:
>
> (a) Is convicted of:
>
> (i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

RCW 9.94A.712(1).

The imposition of community custody conditions for persons sentenced under RCW 9.94A.712 is governed under subjection 6 of that statute, which states as follows:

> (6)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.
>
> (b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435.

RCW 9.94A.712.

As the plain language of this statutes specifies, a trial court has authority to impose those conditions of community custody enumerated in RCW 9.94A.700(4)-(5). Subsection 4 of RCW 9.94A.700 states:

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

RCW 9.94A.700(4).

Section (5) of this same statute provides the trial court with authority to impose further conditions. It states:

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

> (e) The offender shall comply with any crime-related prohibitions.

RCW 9.94A.700(5).

Under these provisions no causal link need be established between the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the "circumstances" of the crime if it is "an accompanying or accessory fact." Black's Law Dictionary 259 (8th ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) ("sentences imposed without statutory authority can be addressed for the first time on appeal"). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). In the case at bar the trial court imposed the following conditions among others:

> ☒ If the offense was committed on or after July 24, 2005, you may not reside within eight hundred eighty (880) feet of the facilities and grounds of a public or private school. RCW 9.94A.030.
>
> ☒ . . . The defendant shall notify his/her community corrections officer on the next working day when a controlled substance or legend drug has been medically prescribed.

CP 80, 81.

The court also imposed the following conditions as part of "Appendix F" attached to the judgment and sentence.

> 5. You shall not possess, use or own firearms, ammunition or deadly weapons. Your community Corrections Officer shall determine what those deadly weapons are.
>
> 11. You shall attend and successfully complete all inpatient and/or outpatient phases of any treatment program established by your Community Corrections Officer and/or treatment facility, if available.
>
> 18. You shall not associate with people known to be on probation, parole, or community placement.

CP 98, 99, 100.

The first condition mentioned above is problematic because the time range in the information (November 11, 2003, to August 7, 2005) overlapped the July 24, 2005 implementation date by 14 days. Since the court did not specify the dates upon which the defendant committed the offenses to which he pled guilty, the defendant and the Department of Corrections are left to speculate whether or not this condition applies. The defense argues that it does not because the state failed to prove that it applies to the offenses here at issue. As a result it should be stricken from the judgment and sentence, lest the DOC order the defendant to comply with it since there is a 14 day overlap.

Under RCW 9.94A.700(4)(c) the court does have authority to prohibit a defendant from possessing or consuming controlled substances "except

pursuant to lawfully issued prescriptions." However there is nothing in this section that allows the court to require that the defendant notify the department upon receiving a valid prescription for a controlled substance. As a result the trial court erred when it imposed this condition. Similarly, while the court does have authority to prohibit a defendant from possessing firearms it does not have the authority to prohibit a defendant from possessing "deadly weapons." Indeed, this term is so ambiguous as to give the defendant's probation officer blanket authority to prevent the defendant from possessing a steak knife, a bottle of bleach, a motor vehicle, or a razor blade just to name a few items that can qualify as "deadly weapons" depending upon how they are used. The trial court did not have authority to impose this condition.

The condition requiring inpatient and outpatient substance abuse treatment is also erroneous because it is not related to the offense the defendant committed in any way. Indeed the court itself failed to enter any finding that the defendant had a substance abuse problem. This is found on page two of the judgment and sentence where the court failed to mark the paragraph that states:

> ☐ The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A.607.

CP 75.

Absent entry of this finding the trial court exceeded its authority to

enter the condition of community custody noted herein.

Finally the last condition mentioned above as part of Appendix F is in error because it conflicts with the following conditions also imposed by the court:

> ☐ Defendant shall not initiate or permit communication or contact with persons known to him/her to be convicted felons, or presently on probation, community supervision/community custody or parole for any offense, juvenile or adult, except immediate family or as authorized by his/her community corrections officer for treatment/housing purposes.

CP 81.

The "Appendix F" flat prohibition from association with felons is also a "Catch-22"[3] because the defendant will have to violate it to comply with the requirement that he follow a treatment regime which necessarily includes group therapy sessions with persons similarly situated to himself. Thus, the trial court erred when it imposed the last mentioned condition in "Appendix F." As a result this court should remand the defendant's case with instructions to strike the community custody conditions mention herein.

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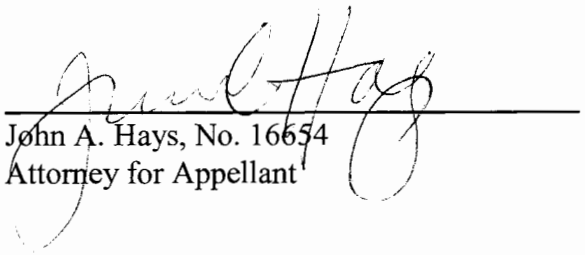
[3]The term "Catch-22" means "a situation in which a desired outcome or solution is impossible to attain because of a set of inherently illogical rules or conditions." *American Heritage Dictionary of the English Language, 4th Edition* (2000). It comes from Joseph Heller's classic novel "Catch22" in which a World War II bombardier pretends to be insane so that he will be grounded, only to find that his desire to grounded to avoid death proves his sanity, thereby preventing him from being grounded.

CONCLUSION

The defendant is entitled to withdraw his guilty plea because defense counsel and the court failed to inform him of the direct consequences of entering that plea. In the alternative, the defendant is entitled to a new sentencing hearing based upon the trial court's manifest abuse of discretion in refusing to sentence under the SOSSA option.

DATED this 27th day of December, 2006.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9.94A.670

(1) Unless the context clearly requires otherwise, the definitions in this subsection apply to this section only.

(a) "Sex offender treatment provider" or "treatment provider" means a certified sex offender treatment provider or a certified affiliate sex offender treatment provider as defined in RCW 18.155.020.

(b) "Substantial bodily harm" means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any body part or organ, or that causes a fracture of any body part or organ.

(c) "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. "Victim" also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

(2) An offender is eligible for the special sex offender sentencing alternative if:

(a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense. If the conviction results from a guilty plea, the offender must, as part of his or her plea of guilty, voluntarily and affirmatively admit he or she committed all of the elements of the crime to which the offender is pleading guilty. This alternative is not available to offenders who plead guilty to the offense charged under North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) and State v. Newton, 87 Wash.2d 363, 552 P.2d 682 (1976);

(b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state;

(c) The offender has no prior adult convictions for a violent offense that was committed within five years of the date the current offense was committed;

(d) The offense did not result in substantial bodily harm to the victim;

(e) The offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime; and

(f) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years.

(3) If the court finds the offender is eligible for this alternative, the court, on its own motion or the motion of the state or the offender, may order an examination to determine whether the offender is amenable to treatment.

(a) The report of the examination shall include at a minimum the following:

(i) The offender's version of the facts and the official version of the facts;

(ii) The offender's offense history;

(iii) An assessment of problems in addition to alleged deviant behaviors;

(iv) The offender's social and employment situation; and

(v) Other evaluation measures used.

The report shall set forth the sources of the examiner's information.

(b) The examiner shall assess and report regarding the offender's amenability to treatment and relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum:

(i) Frequency and type of contact between offender and therapist;

(ii) Specific issues to be addressed in the treatment and description of planned treatment modalities;

(iii) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;

(iv) Anticipated length of treatment; and

(v) Recommended crime-related prohibitions and affirmative conditions, which must include, to the extent known, an identification of specific activities or behaviors that are precursors to the offender's offense cycle, including, but not limited to, activities or behaviors such as viewing or listening to pornography or use of alcohol or controlled substances.

(c) The court on its own motion may order, or on a motion by the state shall order, a second examination regarding the offender's amenability to treatment. The examiner shall be selected by the party making the motion. The offender shall pay the cost of any second examination ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost.

(4) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative, consider whether the alternative is too lenient in light of the extent and circumstances of the offense, consider whether the offender has victims in addition to the victim of the offense, consider whether the offender is amenable to treatment, consider the risk the offender would present to the community, to the victim, or to persons of similar age and circumstances as the victim, and consider the victim's opinion whether the offender should receive a treatment disposition under this section. The court shall give great weight to the victim's opinion whether the offender should receive a treatment disposition under this section. If the sentence imposed is contrary to the victim's opinion, the court shall enter written findings stating its reasons for imposing the treatment disposition. The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment. If the court determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.712, a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension:

(a) The court shall order the offender to serve a term of confinement of up to twelve months or the maximum term within the standard range, whichever is less. The court may order the offender to serve a term of confinement greater than twelve months or the maximum term within the standard range based on the presence of an aggravating circumstance listed

in RCW 9.94A.535 (3). In no case shall the term of confinement exceed the statutory maximum sentence for the offense. The court may order the offender to serve all or part of his or her term of confinement in partial confinement. An offender sentenced to a term of confinement under this subsection is not eligible for earned release under RCW 9.92.151 or 9.94A.728.

(b) The court shall place the offender on community custody for the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.712, or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.

(c) The court shall order treatment for any period up to five years in duration. The court, in its discretion, shall order outpatient sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court. If any party or the court objects to a proposed change, the offender shall not change providers or conditions without court approval after a hearing.

(d) As conditions of the suspended sentence, the court shall impose specific prohibitions and affirmative conditions relating to the known precursor activities or behaviors identified in the proposed treatment plan under subsection (3)(b)(v) of this section or identified in an annual review under subsection (7)(b) of this section.

(5) As conditions of the suspended sentence, the court may impose one or more of the following:

(a) Crime-related prohibitions;

(b) Require the offender to devote time to a specific employment or occupation;

(c) Require the offender to remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(d) Require the offender to report as directed to the court and a community corrections officer;

(e) Require the offender to pay all court-ordered legal financial obligations as provided in RCW 9.94A.030;

(f) Require the offender to perform community restitution work; or

(g) Require the offender to reimburse the victim for the cost of any counseling required as a result of the offender's crime.

(6) At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment.

(7)(a) The sex offender treatment provider shall submit quarterly reports on the offender's progress in treatment to the court and the parties. The report shall reference the treatment plan and include at a minimum the following: Dates of attendance, offender's compliance with requirements, treatment activities, the offender's relative progress in treatment, and any other material specified by the court at sentencing.

(b) The court shall conduct a hearing on the offender's progress in treatment at least once a year. At least fourteen days prior to the hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding the offender's supervision and treatment. At the hearing, the court may modify conditions of community custody including, but not limited to, crime-related prohibitions and affirmative conditions relating to activities and behaviors identified as part of, or relating to precursor activities and behaviors in, the offender's offense cycle or revoke the suspended sentence.

(8) At least fourteen days prior to the treatment termination hearing, notice of the hearing shall be given to the victim. The victim shall be given the opportunity to make statements to the court regarding the offender's supervision and treatment. Prior to the treatment termination hearing, the treatment provider and community corrections officer shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community custody conditions. The court may order an evaluation regarding the advisability of

termination from treatment by a sex offender treatment provider who may not be the same person who treated the offender under subsection (4) of this section or any person who employs, is employed by, or shares profits with the person who treated the offender under subsection (4) of this section unless the court has entered written findings that such evaluation is in the best interest of the victim and that a successful evaluation of the offender would otherwise be impractical. The offender shall pay the cost of the evaluation. At the treatment termination hearing the court may: (a) Modify conditions of community custody, and either (b) terminate treatment, or (c) extend treatment in two-year increments for up to the remaining period of community custody.

(9)(a) If a violation of conditions other than a second violation of the prohibitions or affirmative conditions relating to precursor behaviors or activities imposed under subsection (4)(d) or (7)(b) of this section occurs during community custody, the department shall either impose sanctions as provided for in RCW 9.94A.737(2)(a) or refer the violation to the court and recommend revocation of the suspended sentence as provided for in subsections (6) and (8) of this section.

(b) If a second violation of the prohibitions or affirmative conditions relating to precursor behaviors or activities imposed under subsection (4)(d) or (7)(b) of this section occurs during community custody, the department shall refer the violation to the court and recommend revocation of the suspended sentence as provided in subsection (10) of this section.

(10) The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.

(11) The offender's sex offender treatment provider may not be the same person who examined the offender under subsection (3) of this section or any person who employs, is employed by, or shares profits with the person who examined the offender under subsection (3) of this section, unless the court has entered written findings that such treatment is in the best interests of the victim and that successful treatment of the offender would otherwise be impractical. Examinations and treatment ordered pursuant to this subsection shall only be conducted by certified sex offender treatment

providers or certified affiliate sex offender treatment providers under chapter 18.155 RCW unless the court finds that:

(a) The offender has already moved to another state or plans to move to another state for reasons other than circumventing the certification requirements; or

(b)(i) No certified sex offender treatment providers or certified affiliate sex offender treatment providers are available for treatment within a reasonable geographical distance of the offender's home; and

(ii) The evaluation and treatment plan comply with this section and the rules adopted by the department of health.

(12) If the offender is less than eighteen years of age when the charge is filed, the state shall pay for the cost of initial evaluation and treatment.

RCW 9.94A.700

When a court sentences an offender to a term of total confinement in the custody of the department for any of the offenses specified in this section, the court shall also sentence the offender to a term of community placement as provided in this section. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community placement imposed under this section.

(1) The court shall order a one-year term of community placement for the following:

(a) A sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990; or

(b) An offense committed on or after July 1, 1988, but before July 25, 1999, that is:

(i) Assault in the second degree;

(ii) Assault of a child in the second degree;

(iii) A crime against persons where it is determined in accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a deadly weapon at the time of commission; or

(iv) A felony offense under chapter 69.50 or 69.52 RCW not sentenced under RCW 9.94A.660.

(2) The court shall sentence the offender to a term of community placement of two years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer, for:

(a) An offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, including those sex offenses also included in other offense categories;

(b) A serious violent offense other than a sex offense committed on or after July 1, 1990, but before July 1, 2000; or

(c) A vehicular homicide or vehicular assault committed on or after

July 1, 1990, but before July 1, 2000.

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(4) Unless a condition is waived by the court, the terms of any community placement imposed under this section shall include the following conditions:

(a) The offender shall report to and be available for contact with the assigned community corrections officer as directed;

(b) The offender shall work at department-approved education, employment, or community restitution, or any combination thereof;

(c) The offender shall not possess or consume controlled substances except pursuant to lawfully issued prescriptions;

(d) The offender shall pay supervision fees as determined by the department; and

(e) The residence location and living arrangements shall be subject to the prior approval of the department during the period of community placement.

(5) As a part of any terms of community placement imposed under this section, the court may also order one or more of the following special conditions:

(a) The offender shall remain within, or outside of, a specified geographical boundary;

(b) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) The offender shall participate in crime-related treatment or counseling services;

(d) The offender shall not consume alcohol; or

(e) The offender shall comply with any crime-related prohibitions.

(6) An offender convicted of a felony sex offense against a minor victim after June 6, 1996, shall comply with any terms and conditions of community placement imposed by the department relating to contact between the sex offender and a minor victim or a child of similar age or circumstance as a previous victim.

(7) Prior to or during community placement, upon recommendation of the department, the sentencing court may remove or modify any conditions of community placement so as not to be more restrictive.

RCW 9.94A.712

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a); committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(32)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435.

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **SCOTT C. SMITH,** **Appellant,**	**CLARK CO. NO: 05-1-01866-6** **APPEAL NO: 35058-1-II** **AFFIDAVIT OF MAILING**

STATE OF WASHINGTON)
) **vs.**
COUNTY OF CLARK)

CATHY RUSSELL, being duly sworn on oath, states that on the **27TH day of DECEMBER, 2006**, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

ARTHUR CURTIS CLARK COUNTY PROSECUTING ATTORNEY 1200 FRANKLIN ST. VANCOUVER, WA 98668	SCOTT C. SMITH #892011 WA STATE PENITENTIARY P.O. BOX 520 WALLA WALLA, WA 99362

and that said envelope contained the following:

1. BRIEF OF APPELLANT
2. AFFIDAVIT OF MAILING

DATED this 27TH day of DECEMBER, 2006.

Cathy Russell
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 27th day of DECEMBER, 2006.

JONNA BAKER
COMMISSION EXPIRES
NOTARY
PUBLIC
OCT. 24, 2009
STATE OF WASHINGTON

NOTARY PUBLIC in and for the
State of Washington,
Residing at: LONGVIEW/KELSO
Commission expires: 10-24-09

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