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A. ASSIGNMENTS OF ERROR

1. The statutory "county of origin" requirement under RCW 72.09.270(8) is not retroactive and was wrongly applied to Schenck's term of community placement.

2. Retroactive application of the "county of origin" requirement under RCW 72.09.270(8) violates the ex post facto clauses of the United States Constitution and Washington Constitution.

3. The court erred in relying upon an inapplicable and unconstitutional requirement attached to community placement in concluding appellant violated a condition of that placement.

4. The court erred in concluding appellant violated a condition of his community placement and in imposing sanction for that violation. CP 48-49.

5. The court erred in declining to address appellant's challenge to the "county of origin" requirement on purported lack of "jurisdiction" grounds.

6. The court erred in denying appellant's motion for temporarily restraining the Department of Corrections from enforcing the "county of origin" requirement on purported lack of "jurisdiction" grounds.

Issues Pertaining to Assignments Of Error

1. RCW 72.09.270(8) requires offenders released to community placement be returned to their "county of origin," which means the county of the offender's first felony conviction. Appellant committed a crime that carried a community placement term before the county of origin requirement took effect. Does this statute operate prospectively only, rendering it inapplicable to appellant?

2. Does the imposition of the county of origin requirement as part of appellant's release plan violate the constitutional prohibition against ex post facto laws?

3. Did the court err in declining to address appellant's challenge to the applicability of the county of origin requirement, resulting in the erroneous finding that appellant violated a condition of his community placement?

B. STATEMENT OF THE CASE

In 2002, William Schenck, III was convicted of solicitation to commit first degree murder based on events occurring between April 20 and May 4, 2000. CP 7. Schenck received an exceptional sentence downward of 120 months confinement. CP 8-9, 11. In addition, the court imposed 24 months of community placement. CP 11; see former RCW 9.94A.120(9)(b) (Laws of 1999 Ch. 324 § 2).

One community placement condition required Schenck to "report and be available for contact with the assigned community corrections officer as directed" and "perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC." CP 11. The judgment and sentence further stated "The residence location and living arrangements are subject to the prior approval of DOC while in community placement[.]" CP 11. The court did not impose the condition of requiring Schenck to remain within or outside a specified geographical boundary. CP 11.

On direct appeal, the Court of Appeals affirmed conviction and the trial court's exceptional sentence downward. State v. Schenck, 119 Wn. App. 1037, Not Reported in P.3d (2003).

In 2008, Schenck sought various forms of relief in a personal restraint petition (PRP), including an order "declaring that the county-of-origin community placement requirement does not apply to him." App. A at 1. The county of origin requirement found at RCW 72.09.270(8) took effect in 2007 and required his preapproved residence address to be located in the county where his first felony offense occurred. App. A at 1; RCW 72.09.270(8). Schenck's first felony offense occurred in Thurston County. CP 8. Schenck argued the county of origin requirement did not apply to him because it became law after his conviction and that applying

the statute to persons who committed offenses prior to its enactment violates ex post facto constitutional protections. App. A at 2-3.

The acting chief judge denied relief and dismissed the PRP under RAP 16.11(b). App. A. at 4. The dismissal order declined to review Schenck's "county of origin" claim on the ground that it was not yet ripe — he had not yet submitted a release address to the Department of Corrections (DOC). App. A at 3 (citing State v. Ziegenfuss, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) ("[U]nconstitutionality of a law is not ripe for review unless the person seeking review is harmed by the part of the law alleged to be unconstitutional."). The chief judge also declined to review the claim because Schenck could not show prejudice at this juncture. App. A at 3 (citing In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990) (petitioner must show that the alleged error caused actual and substantial prejudice)).

In November 2009, a Supreme Court commissioner denied review of the dismissal of Schenck's PRP, determining Schenck had not yet been adversely affected by application of the county of origin requirement under RCW 72.09.270(8). App. B at 2. The commissioner also concluded Schenck could not show an ex post facto violation on the ground that requiring the residence to be in a particular county did not increase the quantum of punishment for the crime. App. B at 2.

Schenck served his entire 120 month sentence in confinement. CP

4. Upon release in May 2010, the DOC placed him in Olympia. CP 4.

The Cowlitz County prosecuting attorney subsequently filed a petition alleging Schenck violated a condition of his sentence. CP 28-31. The first alleged violation stated "Failing to report in person as directed by his supervising Community Corrections Officer since 5-10-10." CP 29.<sup>1</sup>

Acting pro se, Schenck moved for an order temporarily restraining the DOC from enforcing the "county of origin" requirement and other geographic restrictions on him as part of his community placement. 1RP<sup>2</sup> 6, 8, 16. Schenck argued he was not subject to the county of origin or other residence restriction requirements because he had already "maxed out" in terms of release date. 1RP 8-10, 16.

Schenck pointed out he had not been in Thurston County in two decades. 1RP 6. He lacked resources in Thurston County to obtain housing and take care of his medical and other essential needs. 1RP 6-8, 29-30. He was homeless in Olympia. 1RP 7-8. He had a home in Cowlitz County. 1RP 6, 8, 29.

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<sup>1</sup> The petition alleged two other violations: failing to make himself available for urinalysis testing since 5-7-10 and failing to perform affirmative acts to monitor compliance while supervision by not registering as a sex offender in Thurston County. CP 29.

<sup>2</sup> The verbatim report of proceedings is referenced as follows: 1RP - 5/18/10, 5/21/10, 5/28/10; 2RP - 6/2/10, 7/14/10, 10/28/10, 11/2/10, 11/29/10.

Schenck maintained the DOC had not helped him. 1RP 9. The extent to which DOC tried to help Schenck was in dispute. 1RP 30. But the Cowlitz County community corrections officer (CCO) agreed Schenck's claims regarding having resources in Cowlitz County were "absolutely true." 1RP 38.

DOC counsel claimed "his county of origin condition is not ex post facto as applied to him as the State Supreme Court already decided in 2009 when he litigated the county of origin issue in his PRP so that has already been dealt with and there's no need to revisit it here." 1RP 11. DOC counsel also maintained the judgment and sentence subjected Schenck's residence to prior approval of the DOC. 1RP 11. Counsel represented the DOC declined to find an "exception" to the county of origin rule because of victim safety concerns in Cowlitz County. 1RP 12.

The Cowlitz County CCO told the court "With us, it's a jurisdictional thing about the county of jurisdiction, county of origin being where he's supposed to be. When he left without an authorized travel permit from the assigned CCO which is CCO [Boone], that is where his violations began." 1RP 38-39.

Having read the previous Court of Appeals "opinion," the Honorable James E. Warne ruled he did not have "jurisdiction" to decide the "county of origin" issue. 1RP 23. Judge Warne said the DOC has

jurisdiction and that the DOC could direct where Schenck is to reside. 1RP 23-24. Judge Warne dismissed Schenck's petition for a restraining order because he did not have "jurisdiction." 1RP 31. Judge Warne agreed with the prosecutor that the issue could be raised in the Court of Appeals as a personal restraint petition. 1RP 25, 28-29.

A hearing subsequently took place on whether Schenck violated a condition of his community placement. 2RP 6-82. The prosecutor said "The issue here is Mr. Schenck is under community placement and is required by law to reside in the county of origin, which is Thurston County in this case. He has completely absconded from that." 2RP 9-10.

Thurston County CCO Boone testified one of the supervision conditions was that Schenck needed to remain in the geographical area as determined by the DOC, i.e., Thurston County. 2RP 13-15. That determination was based on the "county of origin" requirement. 2RP 15. On cross examination, the CCO acknowledged the geographical restriction was not part of the judgment and sentence. 2RP 21-22.

Schenck was adamant he did not need to comply with that condition and that the DOC could not tell him where to live. 2RP 15, 25. Sheila Lewallen, a "community victim liaison" with the DOC, informed Schenck that he would be released into his county of origin. 2RP 27-30. Schenck resisted being returned to his county of origin and did not

cooperate with the re-entry plan process. 2RP 28-30, 60-62. According to Lewallen and Boone, the DOC would have had a better chance of setting up resources in Thurston County if Schenck had been cooperative. 2RP 31, 60-61.

Following release from confinement, Schenck reported to the Thurston County CCO on May 5 through 7. 2RP 16. He did not report to that CCO after May 7, having previously expressed a strong interest in release back to Cowlitz County. 2RP 16-17.

CCO Boone testified "our directive" was that the county of origin statute applied to Schenck. 2RP 24-25. The DOC was convinced the county of origin statute applied to Schenck. 2RP 30-31.

Schenck testified he wanted to return to Cowlitz County because he had resources there. 2RP 34. The DOC took all of his money except for \$140 when he was released from prison and brought to Thurston County. 2RP 35-36. He tried to secure housing vouchers in Thurston County. 2RP 64-65. He denied not cooperating with the DOC. 2RP 36, 42, 51.

Schenck stayed at the Salvation Army on his first night of release. 2RP 36. He was unable to stay at the Salvation Army the second night because it was full and he was turned away when a background check showed he was a registered sex offender. 2RP 36-38. Schenck slept

outside the DOC office the second night. 2RP 38. He made the decision to return to Cowlitz County after being turned away from the Salvation Army. 2RP 40. He obtained a residence in Cowlitz County. 2RP 40-41. He was reporting to the DOC in that county. 2RP 42-44. Schenck testified the DOC in Cowlitz County approved his residence there. 2RP 45.<sup>3</sup> He acknowledged Boone and Lewallen told him he needed to be in Thurston County, the "county of origin." 2RP 50-51. He did not report to the Thurston County DOC office after May 7. 2RP 58.

The State argued the evidence clearly showed Schenck violated his judgment and sentence because "He was informed on May 5th, 2010 before he was released that he was not to leave Thurston County given that that was determined to be his county of origin. . . . And, Mr. Schenck, on the stand today, admitted that he ignored that request." 2RP 68. The State further argued that the issue of whether post-release supervision applied to Schenck had already been previously addressed, the court had no "jurisdiction" to hear the argument, and that Schenck was required to file a personal restraint petition to be heard on the matter. 2RP 71, 75.

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<sup>3</sup> Schenck later agreed on cross examination the DOC had not given him permission to reside in Cowlitz County. 2RP 55. Although unclear, the context suggests he was referring to the Thurston County CCO or those involved in the release plan. 2RP 54-55, 57.

Defense counsel argued the sentencing conditions at issue did not legally apply to Schenck and there he could not be found to have violated them. 2RP 72-73. Counsel had filed a CrR 7.8(b) motion raising that argument. CP 3-44, 45-47.

The Honorable James Stonier, presiding over the violation hearing, agreed the "legal issue of post-release conditions is not before me. It is a subject of a PRP. We are only here on the allegation, court notice of violation." 2RP 75-76.

Based on the violation report and related testimony, the court found Schenck violated the requirement or condition of his sentence in failing to report to the DOC as ordered. CP 48-49. The court imposed 20 days of confinement as the penalty for the violation.<sup>4</sup> CP 49. This appeal follows. CP 50.

C. ARGUMENT

1. RCW 72.09.270(8) DOES NOT APPLY TO SCHENCK'S TERM OF COMMUNITY PLACEMENT BECAUSE IT IS NOT RETROACTIVE.

RCW 72.09.270(8) presumptively mandates offenders be returned to the county in which their first felony occurred. Upon release, the DOC

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<sup>4</sup> The court declined to treat lack of urinalysis as a separate violation and ruled Schenck did not violate the registration requirement. 2RP 76-77. The court subsequently entered an amended order striking the requirement that Schenck report to a specific DOC office. CP 51.

required Schenck to remain in Thurston County and report to his community corrections officer there due to the "county of origin" requirement. IRP 38-39; 2RP 24-25, 30-31. According to the DOC, Schenck is obligated to comply with that requirement as part of his community placement and was therefore required to report to the Thurston County CCO. Id.

RCW 72.09.270(8), however, operates prospectively. It does not apply retroactively to cover Schenck's term of community placement. RCW 72.09.270(8) cannot be applied to him. The DOC's execution of Schenck's community placement term incorporating the county of origin requirement is therefore without legal basis.

RCW 72.09.270(1) generally directs the DOC to develop an individual reentry plan for every offender.<sup>5</sup> The early release plan is part of a comprehensive system of corrections for convicted law violators

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<sup>5</sup> RCW 72.09.015(15) defines "individual reentry plan" as "the plan to prepare an offender for release into the community. It should be developed collaboratively between the department and the offender and based on an assessment of the offender using a standardized and comprehensive tool to identify the offender's risks and needs. The individual reentry plan describes actions that should occur to prepare individual offenders for release from prison or jail, specifies the supervision and services they will experience in the community, and describes an offender's eventual discharge to aftercare upon successful completion of supervision. An individual reentry plan is updated throughout the period of an offender's incarceration and supervision to be relevant to the offender's current needs and risks."

intended to accomplish a number of objectives, one of which is to "punish the offender for violating the laws of the state of Washington." RCW 72.09.010(2). Among other things, the individual reentry plan "specifies the supervision . . . they will experience in the community." RCW 72.09.015(15).

RCW 72.09.270(8)(a) provides:

In determining the county of discharge for an offender released to community custody,<sup>6</sup> the department may not approve a residence location that is not in the offender's county of origin unless it is determined by the department that the offender's return to his or her county of origin would be inappropriate considering any court-ordered condition of the offender's sentence, victim safety concerns, negative influences on the offender in the community, or the location of family or other sponsoring persons or organizations that will support the offender.

The offender's "county of origin" means the county of the offender's first felony conviction in Washington. RCW 72.09.270(8)(c).

"Prospective application of criminal statutes generally means application to offenses committed on or after the effective date of the statute." State v. Humphrey, 139 Wn.2d 53, 55, 983 P.2d 1118 (1999). Where an offender is punished for violating a condition of community supervision, such punishment is attributed to the prior conviction, not to

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<sup>6</sup> RCW 72.09.015(3) provides "'Community custody' has the same meaning as that provided in RCW 9.94A.030 and also includes community placement and community supervision as defined in RCW 9.94B.020."

the violation. State v. Madsen, 153 Wn. App. 471, 480, 228 P.3d 24 (2009). A statute used to exact punishment for violation of community supervision operates retroactively if the underlying criminal offense occurred before the statutory enactment. Madsen, 153 Wn. App. at 480.

The "county of origin" rule is being applied retroactively to Schenck. His offense occurred in 2000. CP 7. RCW 72.09.270 was not enacted until 2007, yet it is being applied to Schenck as part of his supervision requirements. Laws of 2007, ch. 483 § 203 (eff. July 22, 2007).

"As a general proposition, courts disfavor retroactivity." Densley v. Dep't of Retirement Systems, 162 Wn.2d 210, 223, 173 P.3d 885 (2007). "It is a fundamental rule of statutory construction that a statute is presumed to operate prospectively and ought not to be construed to operate retrospectively in the absence of language clearly indicating such a legislative intent." Johnston v. Beneficial Management Corp. of America, 85 Wn.2d 637, 641, 538 P.2d 510 (1975) (quoting Earle v. Froedtert Grain & Malting Co., 197 Wn. 341, 344, 85 P.2d 264, 265 (1938)).

"Where a retroactive application is not expressly provided for in a statute, as here, generally it should not be judicially implied." Miebach v. Colasurdo, 102 Wn.2d 170, 180, 685 P.2d 1074 (1984). The presumption in favor of prospectively can only be overcome if (1) the Legislature

explicitly provides for retroactivity; (2) an amendment is "curative;" or (3) the statute is "remedial." Densley, 162 Wn.2d at 223.

Here, the Legislature did not explicitly provide RCW 72.09.270(8) should be applied retroactively. The Legislature certainly knows how to expressly declare retroactivity. See RCW 9.94A.728 (Laws of 2002, ch. 50 § 3) ("This act applies to all offenders with community placement or community custody terms currently incarcerated either before, on, or after March 14, 2002."). RCW 72.09.270 contains no express intent to apply the statute retroactively to those who committed offenses before its effective date.

RCW 72.09.270(1) generally states "The department of corrections shall develop an individual reentry plan as defined in RCW 72.09.015 for every offender who is committed to the jurisdiction of the department[.]" RCW 72.09.270 does not, however, specify that the DOC shall develop such a plan for every offender who committed a crime and *was* committed to DOC jurisdiction before the statute took effect. At most, the statute is ambiguous regarding legislative intent on retroactivity. As a result, it must be presumed to operate prospectively. Humphrey, 139 Wn.2d at 60.

There is no statutory amendment at issue and so the curative exception is inapplicable. RCW 72.09.270 was a new provision that took

effect long after Schenck committed the offense at issue. Laws of 2007, ch. 483 § 203.

Finally, the statute cannot be deemed remedial. A statute is remedial when it "relates to practice, procedure or remedies." Humphrey, 139 Wn.2d at 62. A remedial statute will generally be applied retroactively, unless it affects a substantive or vested right. Densley, 162 Wn.2d at 224. In deciding whether the an amendment is remedial or substantive, "we look to the effect, not the form of the law." Humphrey, 139 Wn.2d at 63. When a statute appears to create a new legal liability, the amendment will not be deemed remedial and will not be applied retroactively. Id.

Here, the effect of the "county of origin" provision under RCW 72.09.270(8) creates a new legal liability. When Schenck committed the underlying offense, there was no county of origin requirement attaching to his term of community placement. Application of that requirement as part of his community placement subjects Schenck to punishment for failing to comply with any condition premised on that requirement.

Any sentence imposed under the Sentencing Reform Act "shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. The county of origin requirement is the functional equivalent of a sentencing condition imposed on Schenck.

See In re Pers. Restraint of Capello, 106 Wn. App. 576, 584, 24 P.3d 1074 (2001) (no meaningful distinction between a preapproved residence requirement imposed as a condition of community placement by the trial court under former RCW 9.94A.120, and the same requirement imposed by DOC as part of its policy for administering the community custody program under former RCW 9.94A.150). It has wrongly been incorporated into his community placement.

If a sentencing condition is unauthorized, the court does not have the authority to sanction based on a violation of the condition. State v. Raines, 83 Wn. App. 312, 316, 922 P.2d 100 (1996). Similarly, if the underlying basis for the reporting violation (noncompliance with the county of origin requirement) is inapplicable because it does not operate retroactively, then the court cannot lawfully sanction Schenck for a violation premised on that noncompliance. The court erred in finding Schenck violated a condition of his community placement that is predicated on a "county of origin" requirement that does not legally apply to Schenck.

2. THE COUNTY OF ORIGIN REQUIREMENT VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS.

If RCW 72.09.270(8) applies retroactively, then application of the county of origin requirement in that statute violates the constitutional

prohibition against ex post facto laws. U.S. Const. art. 1, § 10, cl. 1<sup>7</sup>;  
Wash. Const. art. 1, § 23.<sup>8</sup>

The ex post facto clauses of the United States and Washington constitutions forbid the State from enacting laws that impose punishment for an act that was not punishable when committed or increase the quantum of punishment annexed to the crime when it was committed. In re Pers. Restraint of Powell, 117 Wn.2d 175, 184, 814 P.2d 635 (1991). A law violates the ex post facto clauses if it inflicts a greater punishment than the law annexed to the crime when the crime was committed. State v. Ward, 123 Wn.2d 488, 497, 869 P.2d 1062 (1994) (citing Calder v. Bull, 3 U.S. 386, 390, 1 L. Ed. 684 (1798)).

In other words, a law violates the ex post facto clause if it is: (1) substantive, as opposed to merely procedural; (2) retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it. Powell, 117 Wn.2d at 185 (citing Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

The three criteria are met here. A law is substantive as opposed to procedural when it is "criminal" or "punitive." Forster v. Pierce County,

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<sup>7</sup> "No State shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." U.S. Const. art. I, § 10, cl. 1.

<sup>8</sup> "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Wash. Const. art. I, § 23.

99 Wn. App. 168, 180, 991 P.2d 687 (2000). The county of origin requirement under RCW 72.09.270(8) is substantive because of its punitive component.

The Legislature implemented the early release plan system to accomplish several objectives, one of which is to "ensure the public safety." RCW 72.09.010(1); see also Laws of 2007, ch. 483 § 201 ("Individual reentry plans are intended to be a tool for the department of corrections to identify the needs of an offender."). But another objective is to "punish the offender for violating the laws of the state of Washington." RCW 72.09.010(2).

The imposition of community placement with its attendant conditions is indisputably a form of punishment. Community placement is the intense monitoring of an offender in the community. In re Pers. Restraint of Crowder, 97 Wn. App. 598, 600, 985 P.2d 944 (1999). It is designed to keep an offender under control through compliance with specified conditions. Madsen, 153 Wn. App. at 480. A term of community placement constitutes punishment because it "imposes significant restrictions on a defendant's constitutional freedoms." State v. Shultz, 138 Wn.2d 638, 645, 980 P.2d 1265 (1999) (quoting State v. Ross, 129 Wn.2d 279, 286, 916 P.2d 405 (1996)).

Moreover, the failure to comply with a condition of community placement subjects the offender to burdensome sanctions and serious loss of liberty. See RCW 9.94B.040(3)(a) and (c) (court may impose 60 days confinement for each violation or impose any number of sanctions for failure to comply with sentence condition). Schenck was confined for 20 days as a result of the community placement violation.

The "county of origin" requirement also punishes Schenck by preventing him from accessing housing and other basic resources in the county where those resources exist. 1RP 38; 2RP 34. He had a home in Cowlitz County. 1RP 6, 8, 29; 2RP 40-41. Schenck was rendered homeless in Thurston County, his "county of origin" where he had not lived in two decades. 1RP 6-8; 2RP 34, 36-38. Even if the Legislature expressly intended the county of origin requirement to be merely procedural as opposed punitive, the inquiry "does not end with the Legislature's stated purpose." Ward, 123 Wn.2d at 499. The statute must still be examined to determine if its actual punitive effect negates the Legislature's regulatory intent. Id. The effect of the county of origin requirement is punitive.

Turning to the second factor, the statute is being applied retrospectively for ex post facto purposes. It was enacted after Schenck committed his crime and was applied to him. Powell, 117 Wn.2d at 185.

A new legal consequence, in the form of an additional burden attaching to community placement, is being applied to an act completed before the effective date of the law's enactment. State v. Pillatos, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007); State v. Hylton, 154 Wn. App. 945, 957, 226 P.3d 246 (2010). "Every statute which creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Humphrey, 139 Wn.2d at 61.

Finally, whether a law is "disadvantageous" turns solely on whether the law alters the standard of punishment that existed under prior law. Ward, 123 Wn.2d at 498. The new law is disadvantageous because it restricts Schenck's residence options in a way that did not exist before. While Schenck's residence location was subject to the DOC's prior approval during the period of community placement, RCW 72.09.270(8) subsequently constricted the DOC's discretionary authority in that matter. The DOC believed it was bound by RCW 72.09.270(8) to require Schenck to be in Thurston County and report to his Thurston County CCO. 2RP 24-25, 30-31.

Powell is instructive. That case involved an ex post facto challenge to a law requiring the setting of a minimum sentence that roughly conformed to Sentencing Reform Act of 1981 criteria. Powell,

117 Wn.2d at 179. The Court agreed the standard of punishment under the new law altered the nature of the parole decision: "A process which was once entirely encompassed within the discretion of the Board and prison superintendent has been transformed into one which sharply circumscribes the Board's discretion and entirely eliminates that of the superintendent." Id. at 188-89.<sup>9</sup>

The same rationale applies here. The DOC's determination of an offender's residence location was not previously circumscribed by the county of origin requirement. The DOC was not previously bound by that requirement, but it ordered Schenk to remain in Thurston County upon release due to that requirement. 2RP 24-25, 30-31.

In Schultz, the Court declined to find an ex post facto violation where the effect of the 1997 amendment on Schultz's restitution order did "not increase the severity of any restrictions on his constitutional freedoms" associated with his community placement term. Schultz, 138 Wn.2d at 645. In contrast, the county of origin requirement at issue here increased the severity of his community placement restrictions by limiting

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<sup>9</sup> The Court went on to apply a balancing test to determine whether the law, despite altering the standard of punishment, was ultimately "disadvantageous." Powell, 117 Wn.2d at 189. The Court has since clarified "the sole determination of whether a law is 'disadvantageous' is whether the law alters the standard of punishment which existed under prior law." Ward, 123 Wn.2d at 498.

where Schenck could live in a way that did not exist at the time he committed the offense.

"Ex post facto problems are avoided when a defendant is subject to the penalty in place the day the crime was committed. After the fact, the State may not increase the punishment." Pillatos, 159 Wn.2d at 475. RCW 72.09.270(8) cannot be applied to Schenck without violating the constitutional prohibition against ex post facto laws because the retrospective county of origin requirement attaching to his community supervision is additional punishment.

3. THE LEGAL ISSUE OF WHETHER THE COUNTY OF ORIGIN REQUIREMENT MAY LEGALLY BE APPLIED TO SCHENCK IS PROPERLY BEFORE THIS COURT AND SHOULD BE ADDRESSED ON ITS MERITS.

At times during the proceedings below, the county prosecutor and DOC counsel asserted Schenck's challenge should not be heard because the Court of Appeals had dismissed his previous PRP raising the issue and the Supreme Court had denied review. 1RP 11, 18-19; 2RP 70-71, 75. In so doing, they appeared to invoke either a collateral estoppel or "law of the case" argument.

Neither doctrine bars relief. The doctrine of collateral estoppel, also called issue preclusion, prevents relitigation of an issue after a party has had a full and fair opportunity to litigate on that issue. Nielson v.

Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 262, 956 P.2d 312 (1998). For collateral estoppel to apply, the prior adjudication must have ended in a final judgment on the merits. Nielson, 135 Wn.2d at 262-63. No court has ever decided the county of origin issue on its merits. The Court of Appeals declined to review the issue when given the opportunity in Schenck's previous personal restraint petition. And there is no authority for the proposition that a Supreme Court commissioner's ruling denying discretionary review constitutes a decision on the merits of an issue. Cf. Ollie v. Highland School Dist. No. 203, 50 Wn. App. 639, 641, 749 P.2d 757 (1988) ("Generally, denial of discretionary review does not preclude later review."). Collateral estoppel does not apply.

Under the law of the case doctrine, the parties, the trial court, and the appellate courts are bound by the holdings of the court on a prior appeal until such time as they are authoritatively overruled. State v. Worl, 129 Wn.2d 416, 424-25, 918 P.2d 905 (1996). The law of the case doctrine does not apply when the issue has never been adjudicated on its merits. State v. Elmore, 154 Wn. App. 885, 897, 228 P.3d 760 (2010). Here, no court has ever held the county of origin statute operates retroactively or that it does not violate the constitutional prohibition against ex post facto laws. No court has ever decided the county of origin issue on its merits. Schenck requests that this Court do so.

Judge Warne claimed the superior court did not have "jurisdiction" to decide the "county of origin" issue as part of Schenck's motion for preliminary injunction. 1RP 23-24, 31. DOC counsel seemed to suggest the DOC, not the court, had jurisdiction to decide whether the county of origin requirement should be applied to Schenck. 1RP 12. Judge Warne ultimately agreed a challenge to the county of origin requirement must be raised in the Court of Appeals as a personal restraint petition: "The rules of appeal, 16.5, personal restraint petitions are to be filed in the Court of [A]ppeals. So your issue is to be filed in the Court of Appeals. I do not have jurisdiction. . . . You have to go to the Court of Appeals." 1RP 25, 28-29.

When the violation matter came before Judge Stonier, the State again argued Schenck's challenge to post-release supervision was not before the court due to lack of jurisdiction and that Schenck needed to file a PRP to be heard on the matter. 2RP 71, 75. Judge Stonier agreed the "legal issue of post-release conditions is not before me. It is a subject of a PRP. We are only here on the allegation, court notice of violation." 2RP 75-76.

The superior court was mistaken that it lacked jurisdiction to adjudicate Schenck's challenge to the county of origin requirement. Judge

Warne therefore erred in dismissing Schenck's motion for a restraining order on jurisdictional grounds.

"A tribunal lacks subject matter jurisdiction when it attempts to decide a *type of controversy* over which it has no authority to adjudicate." Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (quoting Restatement (Second) of Judgments § 11 (1982)). The superior court's subject matter jurisdiction derives from the state constitution. Diversified Wood Recycling, Inc. v. Johnson, \_\_ Wn. App. \_\_, 251 P.3d 293, 296 (2011). Article IV, section 6 of the Washington Constitution provides "The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."

Neither the county prosecutor, nor the DOC, nor the superior court pointed to any authority showing the legal issue of whether a statute applies to an offender on supervision resides exclusively in some other court. Judge Warne cited RAP 16.5 for the proposition that a personal restraint petition must be brought in the Court of Appeals. 1RP 29. But the superior court unquestionably had jurisdiction to adjudicate the type of post-conviction challenge advanced by Schenck. "The Supreme Court, Court of Appeals and superior court have concurrent jurisdiction in habeas corpus proceedings wherein postconviction relief is sought." Madsen, 153

Wn. App. at 475 (citing Toliver v. Olsen, 109 Wn.2d 607, 609, 746 P.2d 809 (1988)). "A motion in the trial court under CrR 7.8(b) is the functional equivalent of a personal restraint petition in the Court of Appeals." Madsen, 153 Wn. App. at 475. The superior court, the county prosecutor and DOC counsel all misled Schenck in claiming his only avenue of relief was to file a personal restraint petition in the Court of Appeals.

Moreover, as argued, the issue of whether the county of origin requirement could lawfully be applied to Schenck is inextricably bound up with whether a condition of community placement was violated. The violation is premised on the applicability of that requirement. The DOC pursued the violation because of its directive to apply the county of origin requirement on Schenck. 1RP 38-39; 2RP 24-25, 30-31. The prosecutor represented "The issue here is Mr. Schenck is under community placement and is required by law to reside in the county of origin, which is Thurston County in this case. He has completely absconded from that." 2RP 9-10. In contending Schenck violated a condition of his community placement, the prosecutor argued, "He was informed on May 5th, 2010 before he was released that he was not to leave Thurston County given that that was determined to be his county of origin. . . . And, Mr. Schenck, on the stand today, admitted that he ignored that request." 2RP 68.

The violation proceedings are based on the unlawful premise that the county of origin requirement applies to Schenck's community placement. The superior court therefore had a duty to decide the issue before deciding whether sanction for violating community placement could lawfully be imposed. Raines, 83 Wn. App. at 316.

That being said, whether the superior court should have adjudicated Schenck's county of origin challenge does not control what should happen on this appeal. Schenck is now in the Court of Appeals. He has brought his challenge with him. This Court has the authority to determine whether a matter is properly before it, and to perform all acts necessary or appropriate to secure the fair and orderly review of a case." RAP 7.3. This Court may also "reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." RAP 12.2. Finally, this Court has authority to waive the rules of appellate procedure when necessary to "serve the ends of justice." RAP 1.2(c).

Requiring Schenck to raise the issue in a personal restraint petition, at this juncture would be senseless and unfair. Schenck has struggled mightily to get a court to hear his argument on the merits. His previous PRP challenge to the county of origin requirement, considered when

Schenck had not yet been released, was dismissed as not yet ripe.<sup>10</sup> His motion for a temporary restraining order based on the inapplicability of this requirement was dismissed for lack of jurisdiction. Schenck anticipated the issue and tried to get it resolved before he was punished for violating his community placement.

Schenck is now harmed by the imposition of the county of origin requirement upon him. The record, meanwhile, is complete. This is a legal issue requiring no further factual development. Requiring Schenck to pursue the matter through a personal restraint petition when it can be disposed of in this direct appeal would be wasteful use of scarce judicial resources.

D. CONCLUSION

Schenck requests this Court to address the "county of origin" argument on its merits, conclude that this requirement does not apply to

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<sup>10</sup> It may be noted the chief judge of the Court of Appeals, in dismissing Schenck's previous petition, wrongly declined to review the "county of origin" challenge on the ground that Schenck could not show actual and substantial prejudice. App. A at 3. That standard does not apply where a PRP challenges a decision from which the offender has had no previous or alternative avenue for obtaining judicial review. In re Pers. Restraint of Stewart, 115 Wn. App. 319, 331, 75 P.3d 521 (2003). Such a PRP is evaluated under RAP 16.4, which only requires the petitioner to show unlawful restraint to obtain relief. Stewart, 115 Wn. App. 319, 331-32, 75 P.3d 521 (2003).

Schenck's term of community placement, and vacate the community placement violation.

DATED this 10<sup>th</sup> day of June 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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CASEY GRANNIS  
WSBA No. 37301  
Office ID No. 91051  
Attorneys for Appellant

## APPENDIX A

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

**DIVISION II**

FILED  
COURT OF APPEALS  
09 JUN 17 PM 2:24  
STATE OF WASHINGTON  
BY  DEPUTY

In re the  
Personal Restraint Petition of  
  
WILLIAM N. SCHNECK,  
  
Petitioner.

No. 38438-8-II

ORDER DISMISSING PETITION

William N. Schneck seeks relief from personal restraint imposed following his 2002 conviction of solicitation to commit first degree murder.<sup>1</sup> He seeks an order (1) waiving his pre-approved address requirement from his community placement conditions; (2) striking his community placement requirement; (3) changing the length of his community placement; (4) declaring that the county-of-origin community placement requirement does not apply to him; and (5) ordering the Department to release him on his ERD date.

None of these claims has merit and thus this court dismisses this petition. When Schneck committed his offense in April-May 2000, former RCW 9.94A.120(9)(b)

<sup>1</sup> Schneck filed this petition in superior court as a motion to waive the pre-approved address requirement or, alternatively, to strike his community placement requirement. The superior court transferred the motion to this court for consideration as a personal restraint petition. CrR 7.8(c)(2).

(1999), required the trial court to impose community placement if the offender was convicted of a serious violent offense:

(b) When the court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense committed on or after July 1, 1990, but before June 6, 1996, or a serious violent offense, vehicular homicide, or vehicular assault, committed on or after July 1, 1990, but before July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community placement for two years or up to the period of earned release in accordance with RCW 9.94A.150 (1) and (2), whichever is longer.

At that time, solicitation to commit first-degree murder was an enumerated offense:

(34) "Serious violent offense" is a subcategory of violent offense and means:

(a)(i) Murder in the first degree;

...

(ix) An attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

Former RCW 9.94A.030(34)(a) (1999).

Petitioner argues that the sentencing court has discretion to waive his pre-approved address condition of community placement. But a pre-approved address has been a court-imposed requirement since 1992 and a statutory mandate since 2002. Laws of 1992, ch. 75, § 2; RCW 9.94A.728(c)(2). Petitioner presents no good reason for waiving this requirement in his case. The trial court properly imposed a two-year requirement and DOC has no authority to waive a pre-approved address as a condition of community placement.

Petitioner argues that ESSB 6157 does not apply to him because it became law after his conviction. This bill requires the Department to release a prisoner only to his "county of origin" unless the petitioner establishes that specified exceptions apply. A prisoner's "county of origin" is the county in which the prisoner committed his first

felony in Washington State. RCW 72.09.270(8)(a)-(c). He argues that to apply this statute to persons committing offenses prior to its enactment creates a bill of attainder and violates ex post facto constitutional protections.

We cannot review these claims because petitioner has not submitted a release address to the Department and thus his claims of constitutional violations are not ripe. *State v. Ziegenfuss*, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) (“[U]nconstitutionality of a law is not ripe for review unless the person seeking review is harmed by that the part of the law alleged to be unconstitutional.”) (citing *State v. Langland*, 42 Wn. App. 287, 292, 711 P.2d 1039 (1985); see also *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (constitutionality of VPA payment not ripe for review at sentencing, but only at “point of enforced collection”); *State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d 42 (1992) (issue of costs not ripe for review when costs imposed, but only when State attempts to collect)). Nor can petitioner show prejudice. *In re Pers. Restraint Petition of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990) (petitioner must show that the alleged error caused actual and substantial prejudice).

Finally, petitioner argues that the Department is denying him due process protections by refusing to release him into the community even though he has passed his earned early release date. He relies on *Carver v. Lehman*, 550 F.3d 883 (9th Cir. 2008), but the 9th Circuit has withdrawn that opinion and issued a new decision in which it holds:

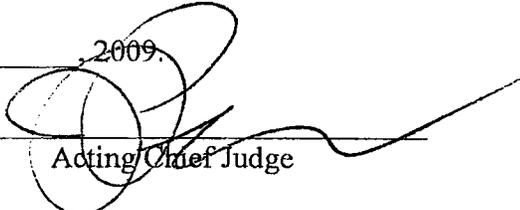
This case presents the question whether a Washington state law providing for convicted sex offenders’ early release into community custody creates a liberty interest that is protected under the Due Process Clause of the Fourteenth Amendment. We hold that it does not. We therefore affirm the decision of the district court denying Carver relief in this civil rights action.

*Carver v. Lehman*, 558 F.3d 869, 871 (9th Cir. 2009). Petitioner fails to show that the Department's refusal to release him into the community violates his due process rights.

None of petitioner's claims for relief has merit. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 17<sup>th</sup> day of June, 2009.

  
Acting Chief Judge

cc: William N. Schneck  
Cowlitz County Clerk  
County Cause No(s). 00-1-00414-9  
Michelle Shaffer  
Department of Corrections  
Ronda D. Larson

## APPENDIX B

RECEIVED

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ATTORNEY GENERAL'S OFFICE  
CORRECTIONS DIVISION

BY RONALD H. SPENTER

09 NOV - 3 PM 1:45

FILED  
SUPREME COURT  
OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of  
WILLIAM N. SCHENCK,  
Petitioner.

NO. 83313-3

RULING DENYING REVIEW

William Schenck is currently incarcerated on a 2002 conviction for solicitation to commit first degree murder. In September 2008 Mr. Schenck filed a motion in superior court to strike the community placement term from his judgment and sentence or waive the requirement that he have a preapproved residence address before being released into community placement. The court transferred the motion to Division Two of the Court of Appeals for treatment as a personal restraint petition, and the acting chief judge of that court dismissed the petition. Mr. Schenck now seeks this court's discretionary review. RAP 16.14(c).

To obtain this court's review, Mr. Schenck must show that the acting chief judge's decision conflicts with a decision of this court or with another Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). He does not make this showing. He mainly challenges the application to him of a 2007 statute that requires his preapproved residence address to be located in his "county of origin" except in specified circumstances. RCW 72.09.270(8)(a). Mr. Schenck argues that this statute does not apply "retroactively" to him, and that if it does it violates

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EXHIBIT 2

constitutional ex post facto principles. Although Mr. Schenck purportedly remains in prison beyond his earned early release date, the acting chief judge found this claim unripe because Mr. Schenck has not submitted a proposed residence address to the Department of Corrections. In disputing this determination, Mr. Schenk claims that prison officials have told him that he is not eligible for any exception to the requirement that he be released to his county of origin (Thurston County). But Mr. Schenck does not dispute that he has yet to submit a proposed residence address in any county. He evidently wishes to be released in Cowlitz County, but having proposed no specific residence, and having received no rejection of a specific residence, he has not been adversely affected by application of RCW 72.09.270(8).

And in any event, Mr. Schenck does not show that applying the statute to him would violate ex post facto principles. Those principles prohibit increasing the punishment for a crime after its commission. *In re Pers. Restraint of Forbis*, 150 Wn.2d 91, 96, 74 P.3d 1189 (2003). As a serious violent offender, Mr. Schenck has never been entitled to early release into community custody, but could only become eligible for early release according to a program developed by the Department of Corrections. Former RCW 9.94A.150(2) (1999). *See In re Pers. Restraint of Mattson*, \_\_\_ Wn.2d \_\_\_, 214 P.3d 141, 146 (2009) (current codification of statute creates no expectation of release into community custody and establishes no liberty interest in community custody). And preapproval of Mr. Schenck's residence address has always been a condition of his release into community placement. Former RCW 9.94A.120(9)(b)(v) (1999). Requiring the residence to be in a particular county does not increase the quantum of punishment for the crime.

Mr. Schenck also appears to continue to argue, as he did below, that his crime did not require community placement. But his crime was a "serious violent offense." Former RCW 9.94A.030(34)(a)(i), (ix) (1999) (solicitation to commit first

degree murder). It therefore required community placement. Former RCW 9.94A.120(9)(b) (1999).

In sum, Mr. Schenck fails to show that the acting chief judge's decision merits this court's review. The motion for discretionary review is denied.



COMMISSIONER

November 3, 2009

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 41401-5-II
	)	
WILLIAM SCHENCK, III,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10<sup>TH</sup> DAY OF JUNE, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SUSAN BAUR  
HALL OF JUSTICE  
COWLITZ COUNTY PROSECUTOR'S OFFICE  
312 SW 1<sup>ST</sup> AVENUE  
KELSO, WA 98626
  
- [X] WILLIAM SCHENCK, III  
DOC NO. 983718  
WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

JUN 10 2011 11:00 AM  
BY [unclear]  
[unclear]

**SIGNED** IN SEATTLE WASHINGTON, THIS 10<sup>TH</sup> DAY OF JUNE, 2011.

x *Patrick Mayovsky*