

NO. 41461-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NEIL GRENNING, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 02-1-01106-5

BRIEF OF RESPONDENT

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2. Has defendant failed to show that the *Gunwall* factors support a conclusion that the state constitution provides for a greater role for juries in sentencing than the federal constitution - particularly when the Supreme Court has previously rejected such a claim?

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Under the Supreme Court's decision in *State v. Vance*, did the trial court have the authority to impose consecutive sentences under former RCW 9.94A.535 based upon the court's finding that the application of the multiple offense policy would result in several of defendant's crimes going unpunished?

2. Has defendant failed to show that the *Gunwall* factors support a conclusion that the state constitution provides for a greater role for juries in sentencing than the federal constitution - particularly when the Supreme Court has previously rejected such a claim?

3. Has defendant failed to show that his due process rights were violated by the lack of pre-trial notice that the prosecution would be seeking an exceptional sentence based upon the "free crimes" aggravator when the sentencing statutes put him on general notice of such a consequence and he received express notice prior to the sentencing hearing?

4. Should this court remand for correction of some of the terms of community custody that appear to be imposed under former RCW 9.94A.712 when the record does not establish that

any of defendant's crimes occurred after the effective date of that statute?

B. STATEMENT OF THE CASE.

This is the second time this case has been before this court. The procedural history of this case spans a time of frequent changes in the law regarding whether the "free crimes" aggravator had to be submitted to the jury or whether it could be found by the judge, which is an issue in the current appeal. Consequently, the State will reference the changes in the law when recounting the procedural history.

In June of 2004, a jury found appellant, Neil Grenning ("defendant"), guilty of 16 counts of first degree child rape, 2 counts of attempted first degree child rape, 6 counts of first degree child molestation, 26 counts of sexual exploitation of a minor, 20 counts of possession of depictions of minors engaged in sexually explicit conduct with sexual motivation ("child pornography") each with a sexual motivation finding, and assault of a child in the second degree with a sexual motivation finding. CP 61-87. Defendant had no prior criminal history. *Id.* After the verdicts were returned, the State notified defendant of its intention to seek an exceptional sentence at the sentencing hearing. CP 34. It filed a sentencing memorandum a month and a half prior to the sentencing hearing indicating the basis for its recommendation. CP 345-357.

At his first sentencing hearing in October, 2004, the trial court found his offender score to be 99 and the presumptive sentence for all 51 counts to be 240 -318 months, which is the range for first degree child rape with an offender score of “9 or more,” as none of his offenses were serious violent offenses and the sentences on all counts would have run concurrently. CP 40-60. The court imposed an exceptional sentence of 1404 months by running some of the standard range sentences consecutive to others based upon the following reasons: (1) the multiple offense policy would result in a sentence that is clearly too lenient in light of the purposes of the Sentencing Reform Act; (2) the defendant’s conduct was more egregious than the typical case, distinguishing his crimes from other cases in the same category; (3) the jury found the defendant committed the crimes of second degree assault of a child and possession of child pornography with sexual motivation. CP 40-60, 61-87. In imposing an exceptional sentence based on “free crimes,” the trial court relied upon the 2004 decision in *State v. VanBuren*, 123 Wn. App. 634, 98 P.3d 1235 (2004), *vacated and remanded*, 154 Wn.2d 1032, 119 P.3d 852 (2005), *on remand*, 136 Wn. App. 577, 150 P.3d 587 (2007), for the proposition that the “free crimes” determination could be made by the trial court without running afoul of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). CP 40-60.

On the first direct appeal, defendant argued that his consecutive sentences, imposed under former RCW 9.94A.589(1)(a), violated *Blakely*.

By this time, the Washington Supreme Court had issued its decision in *In re Personal Restraint of VanDelft*, 158 Wn.2d 731, 147 P.3d 573 (2006), which effectively overruled the decision in *VanBuren* upon which the trial court had relied. See *State v. Grenning*, 142 Wn. App. 518, 544, 174 P.3d 706 (2008). The Court of Appeals upheld the exceptional sentence on another basis, finding that the trial court had authority under RCW 9.94A.712 and *State v. Clarke*, 156 Wn.2d 880, 892, 134 P.3d 188 (2006), to engage in judicial fact finding that would increase a defendant's minimum term. *Id.* While it upheld the exceptional minimum term, the Court of Appeals vacated defendant's twenty convictions for possessing child pornography due to a discovery violation. *Id.* The State sought and was granted review on the reversal of the pornography convictions. On review, the Supreme Court upheld the decision of the Court of Appeals and remanded to the trial court for proceedings consistent with the court's decision. CP 118-159.

Back in the superior court, the State opted not to retry the defendant on the child pornography charges but to simply re-sentence him on the 51 counts that had been upheld on appeal. 10/8/10 RP 2-3. Newly appointed defense counsel asked for a continuance to familiarize himself with the case. 10/8/10 RP 3-6. At that point, the prosecutor reiterated the State's intention to ask for an exceptional sentence. 10/8/10 RP 8. The court granted a short continuance to allow defense counsel to prepare. 10/8/10 RP 6-8.

The re-sentencing hearing was held on October 26, 2010, five months after the Supreme Court issued its decision in *State v. Vance*, 168 Wn.2d 754, 230 P.3d 1055 (2010), overruling the decision in *VanDelft* in light of the United States Supreme Court decision in *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009). 10/26/10 RP 1. Although the appellate courts had vacated twenty counts of child pornography, the sentencing court found that his revised offender score had been reduced by only three points - from 99 to 96.¹ CP 88-89, 171-200. The offender score was not disputed at the re-sentencing hearing. 10/26/10 RP 5-10.

The prosecutor pointed out that only a small portion of the prior sentence had been attributable to the child pornography convictions and that the appellate courts had not reversed the prior imposition of the exceptional sentence; she argued that the reasons for the exceptional sentence still existed –particularly that a standard range sentence would result in the defendant receiving no punishment for many of his crimes. 10/26/10 RP 2-5. The prosecutor suggested that the court should impose an exceptional sentence that was twelve months less than the previous sentence as that had been the amount of punishment defendant had received on the vacated twenty counts of child pornography. *Id.* The

¹ It would appear that the first sentencing court treated these convictions as being the same criminal conduct.

defense asked the court to impose a standard range sentence of 318 months. 10/26/10 RP 10.

The court adopted the State's recommendation and imposed an exceptional sentence of 1392 months. 10/26/10 RP 13; CP 171-200. The court cited to the defendant's high offender score and his multiple current offenses resulting in "free crimes" and the jury's finding of sexual motivation on the second degree assault of a child conviction as aggravating factors. 10/26/10 RP 14. The court also noted that the case had been up on appeal and that no court had found the previous exceptional sentence to be unwarranted. 10/26/10 RP 13-14. The 1,392 month sentence is achieved by segregating the 51 convictions into groups of convictions that are of the same crime committed against the same victim, i.e., all fifteen first degree child rapes against R.W. are one group, the two first degree child rapes against B.H are another, the four counts of first degree child molestation against R.W. are a third group, etc. The court imposed a high end standard range sentence on each crime within a particular group and ran all sentences within a group concurrently. The court then imposed an exceptional sentence by ordering the sentences on each group of crimes to be served consecutively to the sentences imposed on all other groups of crimes. CP 40-60, 88-89.

When it came to entering findings of fact and conclusions of law, the court did not enter new findings. Rather –at the prosecutor's

suggestion- the court entered an order “modifying” the findings that had been entered back in 2004 after the first sentencing hearing. CP 88-89.

From entry of this judgment defendant filed a timely notice of appeal. CP 201-231.

C. ARGUMENT.

1. THE TRIAL COURT HAD THE AUTHORITY TO IMPOSE CONSECUTIVE SENTENCES BASED UPON ITS FINDING THAT THE MULTIPLE OFFENSE POLICY WOULD RESULT IN DEFENDANT RECEIVING NO PUNISHMENT ON SEVERAL CRIMES AS WELL AS ON THE JURY’S FINDING OF SEXUAL MOTIVATION ON ONE COUNT.

When a court is sentencing on multiple current offenses, the Sentencing Reform Act (“SRA”) dictates that the sentences on the current offenses will run concurrently, except that sentences on two or more serious violent offenses, arising from separate and distinct criminal conduct, will run consecutively. RCW 9.94A.589. When the sentences are presumptively concurrent, a court may impose consecutive sentences only under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a).

A trial court has the authority to impose an exceptional sentence “if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. RCW 9.94A.535 contains three subsections:

subsection (1) concerns mitigating factors that might justify a sentence below the standard range (which is not relevant here); subsection (2) concerns aggravating factors based on facts considered by the court that could justify a sentence above the standard range; subsection (3) concerns aggravating factors based on facts considered by the jury, such as a finding of sexual motivation, that could justify a sentence above the standard range. Included in the second subsection is what is commonly referred to the “free-crimes” aggravator, which reads:

(2) Aggravating Circumstances—Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

....

(c) The defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.

RCW 9.94A.535. In order to comply with the United State’s Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the Legislature amended the SRA to require that “[f]acts supporting aggravated sentences, *other than the fact of a prior conviction*, shall be determined pursuant to the provisions of RCW 9.94A.537.” RCW 9.94A.535² (emphasis added).

² This language was added by Laws of 2005, ch. 68, §1, 2 (eff. 4/15/2005).

The “free crimes” aggravator flows from the jury’s finding a defendant guilty of multiple counts that, in conjunction with the defendant’s high offender score, results in some of the current offenses going unpunished. *State v. Alvarado*, 164 Wn.2d 556, 566-69, 192 P.3d 345 (2008). But other than determining a defendant’s guilt on the substantive offenses there are no other “facts” that a jury must find for an exceptional sentence to be imposed for this reason. *Alvarado*, 164 Wn.2d at 568; *see also State v. Edvalds*, 157 Wn. App. 517, 534, 237 P.3d 368 (2010). The determination involves an objective assessment of the current number of offenses and the sentencing grid to form a legal conclusion as to whether an offender’s presumptive sentence is identical to that which would be imposed if the offender had committed fewer current offenses; if the answer is affirmative, then the court has determined that some crimes are going unpunished and an exceptional sentence may be imposed. *Alvarado*, 164 Wn.2d at 349-350. The *Alvarado* decision found that the 2005 amendments to RCW 9.94A.535 did not violate a defendant’s Sixth Amendment right to a jury trial even though it allowed the trial court to determine whether the “free crimes” aggravator was applicable.

While the question of whether the 2005 version of the “free crimes” aggravating factor in RCW 9.94A.535 passed constitutional muster under *Blakely* had a relatively direct journey through the appellate courts, the same cannot be said of the journey that the predecessor statute took. The former language of RCW 9.94A.535 permitted an exceptional

sentence when the “operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is *clearly too lenient* in light of the purpose of this chapter, as expressed in RCW 9.94A.010.” *See Alvarado*, 164 Wn.2d at 563, quoting former RCW 9.94A.535(2)(i) (emphasis added); *see* Appendix A for text of former RCW 9.94A.535. In 2004, Division II of the Court of Appeals held that the sentencing court could make a determination of “free crimes” under the former (pre 2005) version of RCW 9.94A.535 without running afoul of *Blakely*. *State v. VanBuren*, 123 Wn. App. 634, 98 P.3d 1235 (2004), *vacated and remanded*, 154 Wn.2d 1032, 119 P.3d 852 (2005), *on remand*, 136 Wn. App. 577, 150 P.3d 587 (2007). The Washington Supreme Court effectively overruled this decision when it found that the that former RCW 9.94A.535(2)(i)’s “clearly too lenient” language failed the *Blakely* standard. *State v. Hughes*, 154 Wn.2d 118, 137-40, 110 P.3d 192 (2005) (abrogated on other grounds regarding harmless error by *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). In 2006, the Supreme Court expressly held that an exceptional sentence imposed under former RCW 9.94A.535(2)(i)’s “clearly too lenient” language violated a defendant’s Sixth Amendment jury trial right. *In re Personal Restraint of VanDelft*, 158 Wn.2d 731, 733-34, 147 P.3d 573 (2006). Then in 2010, after the United States Supreme Court issued the decision in *Oregon v. Ice*, 555 U.S. 160, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), the Washington Supreme Court overruled the decision in *VanDelft*

and held that even under the former version of RCW 9.94A.535(2)(i), a sentencing judge does not run afoul of the Sixth Amendment by finding facts necessary to impose consecutive, rather than concurrent, sentences for discrete crimes. *State v. Vance*, 168 Wn.2d 754, 762-63, 230 P.3d 1055 (2010).³

Vance controls in the instant case. Here the trial court could find that the jury conviction of defendant of 51 crimes would result in a standard range sentence where he received no additional punishment for the majority of his offenses. Defendant committed fifteen counts of first degree rape against R.W. Each of these offenses would count as three points in his offender score when scored as other current offenses. RCW

³ The procedural history of *Vance* bears important similarities to the history of the case now before the court as both cases were affected by changes in the law. In July, 2003, a jury convicted Vance of three counts of child molestation in the first degree, two counts of child molestation in the second degree, and three counts of communication with a minor for immoral purposes, and was sentenced as a persistent offender to life imprisonment without the possibility of early release. *State v. Vance*, 142 Wn. App. 398, 402, 174 P.3d 697 (2008), *reversed*, 168 Wn.2d 754, 230 P.3d 1055 (2010). On appeal, the Court of Appeals vacated the sentence and remanded for re-sentencing. *Id.* Back in the trial court in October, 2004, after remand, the trial court found that imposition of concurrent sentences would result in a “clearly too lenient” presumptive sentence, so the court imposed an exceptional sentence in that it ran the three standard ranges sentences on the child molestation in the first degree convictions consecutively. *Id.* at 403. Again, Vance appealed arguing that the trial judge’s imposition of consecutive sentences violated his Sixth Amendment right to a jury trial. The Court of Appeals affirmed the consecutive sentences so Vance sought discretionary review; the Supreme Court granted and remanded to the Court of Appeals for reconsideration in light of a the recent decision *In re Personal Restraint of VanDelft*, 158 Wn.2d 731, 147 P.3d 573 (2006). See *State v. Vance*, 159 Wn.2d 1011, 152 P.3d 1032 (2007). On remand, the Court of Appeals reversed the exceptional sentence and the State sought discretionary review. *State v. Vance*, 142 Wn. App. 398, 174 P.3d 697 (2008), *review granted*, 165 Wn.2d 1036, 205 P.3d 131 (2009). The Supreme Court affirmed the exceptional sentence finding that the United States Supreme Court decision in *Oregon v. Ice* “squarely overrules” its decision in *Van Delft. Vance*, 168 Wn.2d at 762

9.94A.525 (“if the present conviction is for a sex offense...count three points for each ...prior sex offense.”). When scoring one count of child rape, the crime with the highest seriousness level with the concomitant highest standard range, it would take only three other current sex offenses for defendant to have an offender score of “9.” After that defendant would receive no additional punishment under a standard range sentence for his remaining forty seven convictions comprised of 12 counts of first degree child rape, 2 counts of attempted first degree child rape, 6 counts of first degree child molestation, 26 counts of sexual exploitation of a minor, and one count of assault of a child in the degree with sexual motivation. The trial court in this case could properly assess the impact of the multiple offense policy based upon the jury’s verdicts and resulting standard ranges under SRA, no further jury determination or fact finding was needed. Clearly receiving the same punishment for fifty one convictions that an offender would receive if he had committed just four offenses does not promote respect for the law by providing punishment that is just. RCW 9.94A.010. Under *Vance*, the trial court had the authority under former RCW 9.94A.535 to impose an exceptional sentence consisting of consecutive sentences without the necessity of a jury finding that the presumptive sentence was “clearly too lenient.” The trial court relied upon *State v. VanBuren* for its authority to make the findings necessary for an exceptional sentence under the “free crimes” aggravator; eventually,

the Washington Supreme Court in *Vance* reached the same conclusion as the *VanBuren* court.

Defendant argues that there are several legal impediments –such as lack of notice and a more a protective state constitution - that should preclude application of the “free crimes” provision of former RCW 9.94A.535 to his case. He does not, however, make any argument that the facts of his case do not bring him squarely within the type of case that the “free crimes” aggravator was designed to address. He does not argue that he is receiving punishment for all of his crimes under the presumptive standard range of 318 months. He does not argue that the court’s finding of this aggravating factor was not justified by the facts of his case.

As argued above, the sentencing court did have the authority to find the existence of the “free crimes” aggravator and used it to impose consecutive sentences. Additionally the sentencing court had one jury found aggravating factor – the finding of sexual motivation on the assault- upon which to base an exceptional sentence. The exceptional sentence was based upon proper factors and should be upheld.

2. THE *GUNWALL* FACTORS DO NOT SUPPORT A CONCLUSION THAT THE STATE CONSTITUTION PROVIDES FOR A GREATER ROLE FOR JURIES IN SENTENCING THAN THE FEDERAL CONSTITUTION DOES.

In the instant case, defendant seems to recognize the controlling nature of the *Vance* decision, but argues that it should not control because

it was decided on Sixth Amendment grounds and the Washington constitution provides greater protection of the right to a jury trial than the federal constitution. Defendant also seems to recognize that this court cannot overrule the *Vance* decision but presents a *Gunwall*⁴ argument to preserve it for review. See Brief of Appellant at p. 34. The State disputes that a *Gunwall* analysis shows that the state constitution provides greater protections of the right to a jury trial on sentencing issues.

It should also be noted that this claim is essentially challenging the constitutionality of RCW 9.94A.535 under the state constitution. Statutes are presumed constitutional. *State v. Sullivan*, 143 Wn.2d 162, 180, 19 P.3d 1012 (2001). A party challenging a statute must demonstrate its unconstitutionality beyond a reasonable doubt. *Lakeview Blvd. Condo Ass'n v. Apartment Sales Corp.*, 144 Wn.2d 570, 577, 29 P.3d 1249 (2001). A “court will not declare [a statute] void unless its invalidity is so apparent as to leave no reasonable doubt upon the subject...” *Sofie v. Fireboard Corp.*, 112 Wn.2d 636, 643, n. 3, 771 P.2d 711 (1989) (quoting *State v. Ide*, 35 Wash. 576, 77 P. 961 (1904)).

Before an independent interpretation under the state constitution is appropriate the six neutral criteria set forth in *State v. Gunwall*, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986), must be addressed. Those factors are: (1) textual language, (2) differences between the texts, (3)

⁴ *State v. Gunwall*, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986)

constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. 106 Wn.2d at 58A court will depart from federal constitutional precedent only if these six criteria indicate a basis for independent state protection. *Id.* at 61. Even if these factors point to greater protection under the Washington Constitution, the court must still determine the extent of that protection. *State v. Smith*, 150 Wn.2d 135, 149, 75 P.3d 934 (2003).

The Washington Constitution addresses the right to jury in two sections. Art. 1, § 21 provides:

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Art. 1, § 21.

The right to jury in criminal prosecutions is specifically addressed in art. I, § 22, which provides in pertinent part:

In criminal prosecutions the accused shall have the right to...have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed...

Art. 1, § 22 (amend. 10)(emphasis added).

There is no provision in the federal constitution comparable to art. I, § 21. Thus, Washington's constitutional right to jury has, on occasion, been interpreted more broadly than the federal right. *City of Pasco v.*

Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982) (petty offenses must be tried to jury).

But the court has also found that the state constitution was not more protective of the right to jury trial on matters having to do with sentencing. *State v. Smith*, 150 Wn.2d 135, 151, 75 P.3d 934 (2003). In *Smith*, the court was asked to examine whether the broader protections of the state constitution required a jury determination as to the existence of prior convictions in a persistent offender case. In looking at the *Gunwall* factors, the court found that Washington law had abolished the jury's role in sentencing by statute before the state constitution was adopted in 1889. *Smith*, 150 Wn.2d at 154. A territorial statute vested the sentencing discretion with the judge not the jury

When the defendant is found guilty, the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted.

Laws of 1866, § 239, in *Statutes of the Territory of Washington* 102 (1866). In addressing the scope of the jury trial rights protected in the state constitution the court found:

Historical evidence clearly demonstrates that in Washington in 1889, juries had no authority over sentencing, thus making it unlikely that the drafters of the state constitution meant to constitutionally protect such a right in article I, sections 21 and 22.

Smith, at 156. After examining all the *Gunwall* factors the court held that while the state constitution “generally offers broader protection of the jury

trial right than does the federal constitution, a historical analysis of Washington law at the time of the adoption of our state constitution indicates that juries did not then determine sentences.”

Defendant has failed to show that why his claim- which also concerns the right to a jury trial on a sentencing issue – commands a different result from that found in *Smith*. He has failed to demonstrate that the Washington constitution does offer greater protections to jury determination of sentencing factors and has failed to show any unconstitutionality of the applicable statutes.

3. DEFENDANT HAD SUFFICIENT NOTICE OF THE STATE’S INTENTION TO SEEK AN EXCEPTIONAL SENTENCE TO SATISFY DUE PROCESS.

The essentials of procedural due process comprise notice of the charges and a reasonable chance to defend against them. See *Bonneville v. Pierce County*, 148 Wn. App. 500, 515, 202 P.3d 309 (2008). The State due process clause affords the same protection as its federal counterpart. *State v. Manussier*, 129 Wn.2d 652, 679-80, 921 P.2d 473 (1996).

When the legislature amended the SRA in response to *Blakely*, it enacted a notice provision, now found in RCW 9.94A.537(1):

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

Laws of 2005, ch. 68, § 4. Prior to this enactment, there had been no general provision in the SRA requiring notice of the intent to seek an exceptional sentence. Appellate courts repeatedly rejected contentions of insufficient notice. *See, e.g., State v. Moro*, 117 Wn. App. 913, 920, 73 P.3d 1029 (2003); *State v. Wood*, 57 Wn. App. 792, 798, 790 P.2d 220 (1990); *State v. Falling*, 50 Wn. App. 47, 50, 747 P.2d 1119 (1987); *State v. Gunther*, 45 Wn. App. 755, 727 P.2d 258 (1986).

In *Gunther*, the State notified the defendant after the trial that it would seek an exceptional sentence. 45 Wn. App. at 757. The Court of Appeals rejected the defendant's claim that his right to due process was violated by the lack of notice:

The reason that a notice requirement was not included is that an exceptional sentence is a possibility in every sentencing under the Sentencing Reform Act. To require that each defendant be given notice of that ever-existent potentiality would be redundant.

. . . The possibility of an exceptional sentence always exists, and notice of that fact is inherent in the statutory provisions which create the possibility.

Gunther, 45 Wn. App. at 758 (quoting D. Boerner, *Sentencing in Washington* § 9.19) (alterations in original opinion). The court continued, “[t]he State is not required to notify a defendant prior to trial that it may seek a sentence beyond the presumptive range. To require the State to commit itself to a sentence recommendation prior to trial makes little

sense. An informed recommendation cannot be made until after trial.”

Gunther, 45 Wn. App. at 758.

In *State v. Edvalds*, 157 Wn. App. 517, 237 P.3d 368 (2010), an offender contended that his exceptional sentence had to be vacated because he had not received pre-trial notice of the State’s intention to ask for an exceptional sentence. Edvalds had been found guilty following a jury trial of two counts of burglary, second degree theft and unlawful possession of a controlled substance. In a separate cause number, he had been charged with several trafficking in stolen property offenses. Just before the sentencing hearing on the burglary case, he pleaded guilty to the trafficking charges and proceeded to a joint sentencing hearing on both cause numbers. The State asked for an exceptional sentence on the trial offenses on the grounds that his multiple current offenses and high offender score resulted in some crimes going unpunished. Edvalds objected, claiming lack of notice, but did not ask for a continuance. The State responded that it could not have given notice earlier because Edvalds had just entered his plea in the trafficking case which created the situation where he would receive no punishment for some of his crimes.

On appeal, the court in *Edvalds* first examined whether pretrial notice was statutorily required. Noting that the “free crimes” aggravator is one based on an offender’s criminal history, it held:

The plain language of RCW 9.94A.537 does not limit its procedural requirements to aggravating factors found by a jury. But, the meaning of the provision must be considered

in the context of the statutory scheme as a whole, including related provisions. *Alvarado*, 164 Wn.2d at 562, 192 P.3d 345. RCW 9.94A.535 specifically excludes prior convictions from the procedural requirements of RCW 9.94A.537. Considering the statutory scheme as a whole, notice is not required by the statutory provisions when the State alleges aggravating factors based on prior criminal history.

Edvalds, 157 Wn. App. at 531. The court further found that the Supreme Court's decision in *State v. Powell*, 167 Wn.2d 672, 676, 223 P.3d 493 (2009), did not require a different result because *Powell* did not address whether notice is required for an aggravating factor based on criminal history under RCW 9.94A.535(2), but only what was required when an exceptional sentence was comprised exclusively of factors that must be found by a jury. *Edvalds*, 157 Wn. App. at 532-33.

After finding no statutory requirement of pretrial notice, the court went on to examine Edvalds' claim that the lack of pretrial notice of a potential exceptional sentence violated his constitutional right to due process. It also rejected this challenge stating that due process requires notice of the charged crimes not of potential sentences based on prior convictions. It noted that "statutes, particularly criminal statutes, operate prospectively to give fair warning that a violation carries specific consequences." *Edvalds*, 157 Wn. App. at 534, citing *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007); *see also Powell*, 167 Wn.2d at 687 (plurality opinion) ("Washington's exceptional sentencing scheme was in place and provided notice of the sentence he could receive."). The

court reasoned that pretrial notice served no purpose when the exceptional sentence was based upon the “free crimes” aggravator as no fact had to be proved to the jury and there was nothing that would impact the trial proceeding. *Edvalds*, 157 Wn.2d at 534. The court also found that to require pretrial notice would be to thwart the purposes of the exceptional sentence statute where the convictions justifying an exceptional sentence might not be known of -or exist - until after trial. Finally, the court found that requiring pretrial notice would preclude a court from imposing an exceptional sentence on its own motion and the legislature had clearly intended to give judges the discretion to impose an exceptional sentence where certain crimes would otherwise go unpunished. 157 Wn. App. at 535.

The conclusion of the *Edvalds* court is consistent with cases addressing the notice requirement for “three strikes” or recidivism-related punishment laws that increase an offender’s sentence –like the free crimes aggravator – based solely on his criminal history. In *Oyler v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), the Court addressed whether procedural due process required notice before trial on an offense that would render a defendant a habitual criminal, and thus eligible for increased punishment. The Court concluded that the determination of whether an offender was a recidivist or a habitual criminal was “‘essentially independent’ of the determination of guilt on the underlying substantive offense.” *Oyler*, 368 U.S. at 452. The Court found no

requirement under procedural due process that a defendant be given notice in advance of trial that he might be subject to the possibility of enhanced sentencing for recidivism following conviction. *Oyler*, 368 U.S. at 452. The Court noted that “[a]ny other rule would place a difficult burden on the imposition of a recidivist penalty” because while “the fact of prior conviction is within the knowledge of the defendant, often this knowledge does not come home to the prosecutor until after the trial.” *Oyler*, 368 U.S. at 452 n.6.

The principles announced in *Oyler* have been applied in numerous notice-related challenges to the federal Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (“ACCA”), which raises the minimum and maximum sentences depending on an offender’s criminal history. *See Custis v. United States*, 511 U.S. 485, 487, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994). In *United States v. Mack*, 229 F.3d 226 (3d Cir. 2000), the court addressed a claim that a defendant was entitled to formal pretrial notice of the government’s intent to seek an enhanced sentence under the ACCA. Mack argued that pretrial knowledge of the applicability of the ACCA was critical in deciding whether to plead guilty or to go to trial. *Mack*, 229 F.3d at 231. Citing *Oyler*, the Court of Appeals concluded that notice was not required to impose an aggravated sentence under the ACCA. *Mack*, 229 F.3d at 231. The court noted that every circuit that has addressed this issue has reached the same conclusion. *Mack*, 229 F.3d at 231.

Washington Supreme Court decisions are in accord with these federal cases. In *State v. Clark*, 129 Wn.2d 805, 811, 920 P.2d 187 (1996), the court addressed the nature of the death penalty notice required by RCW 10.95.040(2), and concluded that the case did not present a constitutional issue as the constitution requires notice of the criminal charges but not of the “penalty exacted for the conviction of the crime.” (citing *State v. Lei*, 59 Wn.2d 1, 3, 395 P.2d 609 (1961)). In *Lei*, the court found no constitutional violation in informing a habitual offender after his conviction of a third felony that the State was seeking the mandatory penalty. The court held that the state constitution does not require the “accused be informed... relative to the penal provisions which may be imposed in the event of a conviction.” *Lei*, 59 Wn.2d at 3; see also *State v. Thorne*, 129 Wn.2d. 736, 779-80, 921 P.2d 514 (1996) (formal notice not required in order to sentence a defendant as a persistent offender).

The principles set forth in the cases above flow from “long-standing and basic principles upon which our legal system depends, that all sane persons are presumed to know the law, and are, in law, held responsible for their free and voluntary acts and deeds.” *State v. Spence*, 81 Wn.2d 788, 792, 506 P.2d 293 (1973), *rev'd on other grounds*, 418 U.S. 405 (1974). Just as ignorance of the law does not provide a legal defense to a crime, a claim of ignorance of the potential penalty for a crime should not provide a means of escape from the imposition of a penalty authorized by the legislature.

In defendant's case, the statutory notice provisions enacted in 2005, and now found in RCW 9.94A.537(1), were not in effect when defendant was tried and first sentenced in 2004. Thus, there can be no statutory violation. It should also be noted that the prosecution provided written notice of its intent to seek an exceptional sentence shortly after the jury returned its verdicts. CP 34. The defendant remained on notice for his re-sentencing hearing after appellate remand. 10/8/10 RP 8. While defendant's counsel objected, on remand, to the lack of notice of an aggravating factor in the charging document, he did not complain that he was surprised by the State's actions and seemed well prepared to argue against the State's request for an exceptional sentence based upon the multiple offense policy and the "free crimes" provision. 10/26/10 RP 5-10. The cases cited above do not support his claim that he has a constitutional right to pre-trial notice that the prosecution will be seeking an enhanced sentence based upon his criminal history. He has failed to show any due process violation.

4. THE PROVISIONS OF FORMER RCW 9.94A.712 ARE NOT APPLICABLE TO DEFENDANT'S CASE AND TERMS OF COMMUNITY CUSTODY THAT APPEAR TO BE IMPOSED UNDER THAT PROVISION SHOULD BE CORRECTED.

Former RCW 9.94A.712 (2001)⁵ (recodified as RCW 9.94A.507 by laws of 2008, ch. 231, §231), established an indeterminate sentencing scheme for sentencing nonpersistent sex offenders. *See* Appendix B for text of former statute. Under former RCW 9.94A.712(3), the trial court had to impose both a minimum and maximum sentence with the maximum sentence being the statutory maximum sentence for the offense. *Id.* Under this scheme, a sentencing court can also order the defendant to serve any time after release from confinement, up to the expiration of the statutory maximum, on community custody. Former RCW 9.94A.712(5) (2001); Appendix B. These provisions apply to crimes committed on or after September 1, 2001. Laws of 2001 2nd sp.s., ch.12, §505.

The information charging defendant with his crimes alleged that they occurred between July 1, 2001 and March 3, 2002. CP 5-33. The “to convict” instructions on defendant’s crimes reiterated this time frame. CP 235-344. The jury was not asked to return a special interrogatory finding that any of these crimes occurred after September 1, 2001. *Id.*

Consequently, the provisions of former RCW 9.94A.712 cannot be applied

⁵ Laws of 2001 2nd sp.s., ch. 12, § 303

to defendant's crimes without running afoul of the prohibitions against ex post facto laws and due process violations. *See State v. Aho*, 137 Wn.2d 736, 742, 975 P.2d 512 (1999).

While the parties are in agreement that former RCW 9.94A.712 is inapplicable, it is far from clear whether the trial court ever imposed a sentence under these provisions. On both judgments, the setting of the term of confinement for each count is determinate and done under RCW 9.94A.589. CP 61-87, 171-200. The court did not set a minimum and maximum term as required by former RCW 9.94A.712. *Id.* When it comes to the setting of the terms of community custody, however, the language in the judgments indicates that it is being imposed under RCW 9.94A.712. *Id.* For the most part⁶, the terms of community custody that are imposed on the rapes and molestations - crimes that would be governed by RCW 9.94A.712 had they occurred after the effective date - are consistent with the terms authorized by RCW 9.94A.712. This is in error. The terms of community custody on the first degree child rapes and attempted rapes and child molestations committed before September 1, 2001 is a term of community custody and not until the expiration of statutory maximum. Former RCW 9.94A.715; *see* Appendix C. The

⁶ No term of community custody is imposed for the child molestation in Count VIII and the term of community custody on the assault conviction with sexual motivation in Count XL is correctly listed as 3-4 years.

judgment should be corrected to properly reflect the correct term of community custody.

Since the case is being remanded, the court could also direct correction of the findings of facts. The State agrees that some findings or portions of some of the findings reflect judicial fact finding in violation of *Blakely*. This does not justify vacation of the exceptional sentence when the sentence is also supported by proper reasons. For example when the court properly imposed an exceptional sentence but failed to enter any findings the Supreme Court remanded for entry of the findings:

The remedy for a trial court's failure to issue findings of fact and conclusions of law is ordinarily remand for entry of the findings, and we remand here for that purpose. The failure to enter findings does not justify vacation of the sentence in a personal restraint proceeding unless it is a fundamental defect which results in a complete miscarriage of justice.

In re Personal Restraint of Breedlove, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). The State submits that even if the objectionable language is excised from the findings that they support the imposition of the exceptional sentence. Corrected findings that excise this objectionable language could be entered on remand.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the exceptional sentence imposed below, but to remand for correction of the

terms of community placement on the counts that incorrectly impose a life term of community custody.

DATED: July 20, 2011

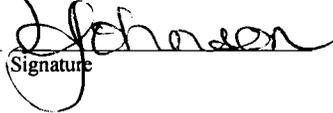
MARK LINDQUIST
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/19/11 
Date Signature

APPENDIX “A”

RCW 9.94A.535

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055. [2002 c 290 § 11.]

RCW 9.94A.535 Departures from the guidelines. The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence unless it is imposed on an offender sentenced under RCW 9.94A.712. An exceptional sentence imposed on an offender sentenced under RCW 9.94A.712 shall be to a minimum term set by the court and a maximum term equal to the statutory maximum sentence for the offense of conviction under chapter 9A.20 RCW.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in *RCW 9.94A.585(4).

A departure from the standards in *RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in *RCW 9.94A.585 (2) through (6).

The following are illustrative factors which the court may consider in the exercise of its discretion to impose an exceptional sentence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(1) Mitigating Circumstances

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of *RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to *RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The operation of the multiple offense policy of *RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(j) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(k) The offense resulted in the pregnancy of a child victim of rape.

(l) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(m) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production. [2002 c 169 § 1; 2001 2nd sp.s. c 12 § 314; 2000 c 28 § 8; 1999 c 330 § 1; 1997 c 52 § 4. Prior: 1996 c 248 § 2; 1996 c 121 § 1; 1995 c 316 § 2; 1990 c 3 § 603; 1989 c 408 § 1; 1987 c 131 § 2; 1986 c 257 § 27; 1984 c 209 § 24; 1983 c 115 § 10. Formerly RCW 9.94A.390.]

NOTES: *Reviser's note: These RCW references have been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

Comment

Standard sentence ranges represent the appropriate sanction for the "typical" case. The judge will consider individual factors when setting the determinate sentence within the standard sentence range. Some cases, however, are exceptional and require departure from the standard sentence range.

Although it was recognized that not all exceptional fact patterns can be anticipated, the Commission determined that a carefully considered nonexclusive list of appropriate justifications for departures from the standard range would be helpful to both the trial and appellate courts. This list is intended as a frame of reference for the court to use in identifying the exceptional case. The list includes examples of mitigating and aggravating factors. As the state has gained more experience with this new sentencing system, additional factors have been added to this list.

One illustrative mitigating factor concerns operation of the multiple offense policy. The Commission was particularly concerned about multiple offenses committed in separate jurisdictions where separate sentencing hearings would occur, thus resulting in a higher presumptive sentence than if the crimes were committed in a single jurisdiction and there was only one hearing. In that instance, if the multiple offense policy results in such comparatively high presumptive sentences, the judge might want to consider departing from the standard sentence range in order to impose a less severe sentence, depending, of course, on the particular set of case facts. There was also concern that the multiple offense policy might sometimes result in a presumptive sentence that is clearly too lenient in light of the purposes of this chapter.

The 1986 amendments provided better enumeration of the aggravating and mitigating factors. In addition, the reference to firearm possession in major VUCSA offenses was removed. The Commission decided that when firearm use was charged, it should be used to set a sentence within the standard range or as part of a sentence enhancement under RCW9.94A.310; if firearm use is not charged, it can influence the sentence only upon the stipulation of both parties under RCW9.94A.370. The other 1986 amendment added the adjective "current" to subsection (2) to make it clear that aggravating factors only apply to the circumstances surrounding the charged offense.

The 1990 Legislature added a finding of sexual motivation as an aggravating factor.

The 1995 Legislature authorized an exceptional sentence above the standard range when a defendant's prior unscored misdemeanor or foreign criminal history results in a presumptive sentence that is clearly too lenient.

The 1996 Legislature added two new statutory aggravating factors: (1) that the offense was violent and the defendant knew the victim was pregnant, and (2) that the offense involved domestic violence and additional circumstances as defined.

The 1997 Legislature authorized an exceptional sentence above the range in cases where a rape resulted in the pregnancy of a child victim.

The 1999 Legislature added a new aggravating factor: the defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

*The Supreme Court reaffirmed in 1999 that an aggravating factor of "future dangerousness" may not be used as a justification to impose an exceptional sentence, unless the offense is a sex offense. See *State v. Halgren*, 137 Wn.2d 340 (1999).*

RCW 9.94A.540 Mandatory minimum terms. (1) The following minimum terms of total confinement are mandatory and shall not be varied or modified under *RCW 9.94A.535:

(a) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years.

(b) An offender convicted of the crime of assault in the first degree or assault of a child in the first degree where the offender used force or means likely to result in death or intended to kill the victim shall be sentenced to a term of total confinement not less than five years.

(c) An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than five years.

(d) An offender convicted of the crime of sexually violent predator escape shall be sentenced to a minimum term of total confinement not less than sixty months.

(2) During such minimum terms of total confinement, no offender subject to the provisions of this section is eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under *RCW 9.94A.728, or any other form of authorized leave of absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (a) In the case of an offender in need of emergency medical treatment; (b) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree; or (c) for an extraordinary medical placement when authorized under *RCW 9.94A.728(4). [2001 2nd sp.s. c 12 § 315; 2000 c 28 § 7. Formerly RCW 9.94A.590.]

NOTES: *Reviser's note: These RCW references have been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

APPENDIX “B”

RCW 9.94A.712

of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release.

(2) Unless a condition is waived by the court, the terms of community custody imposed under this section shall be the same as those provided for in RCW 9.94A.700(4) and may include those provided for in RCW 9.94A.700(5). As part of any sentence that includes a term of community custody imposed under this section, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.

(3) At any time prior to the completion of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of *RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. [2000 c 28 § 24.]

NOTES: *Reviser's note: These RCW references have been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

RCW 9.94A.712 Sentencing of nonpersistent offenders. (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. [2001 2nd sp.s. c 12 § 303.]

NOTES: *Reviser's note: This RCW reference has been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

RCW 9.94A.713 Nonpersistent offenders--Conditions. (1) When an offender is sentenced under RCW 9.94A.712, the department shall assess the offender's risk of recidivism and shall recommend to the board any additional or modified conditions of the offender's community custody based upon the risk to community safety. In addition, the department shall make a recommendation with regard to, and the board may require the offender to participate in, rehabilitative programs, or otherwise perform affirmative conduct, and obey all laws. The board must consider and may impose department-recommended conditions.

(2) The department may not recommend and the board may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions. The board shall notify the offender in writing of any such conditions or modifications.

(3) In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(4) If an offender violates conditions imposed by the court, the department, or the board during community custody, the board or the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.95.435.

(5) By the close of the next business day, after receiving notice of a condition imposed by the board or the department, an offender may request an administrative hearing under rules adopted by the board. The condition shall remain in effect unless the hearing examiner finds that it is not reasonably related to any of the following:

- (a) The crime of conviction;
- (b) The offender's risk of reoffending; or
- (c) The safety of the community.

(6) An offender released by the board under RCW 9.95.420 shall be subject to the supervision of the department until the expiration of the maximum term of the sentence. The department shall monitor the offender's compliance with conditions of community custody imposed by the court, department, or board, and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board shall be subject to the provisions of RCW 9.95.425 through 9.95.440.

(7) If the department finds that an emergency exists requiring the immediate imposition of conditions of release in addition to those set by the board under RCW 9.95.420 and subsection (1) of this section in order to prevent the offender from committing a crime, the department may impose additional conditions. The department may not impose conditions that are contrary to those set by

APPENDIX “C”

RCW 9.94A.715

the board or the court and may not contravene or decrease court-imposed or board-imposed conditions. Conditions imposed under this subsection shall take effect immediately after notice to the offender by personal service, but shall not remain in effect longer than seven working days unless approved by the board under subsection (1) of this section within seven working days. [2001 2nd sp.s. c 12 § 304.]

RCW 9.94A.715 Community custody for specified offenders. (1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under *RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under *RCW 9.94A.850 or up to the period of earned release awarded pursuant to *RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with *RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program.

(2)(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 shall enforce such conditions pursuant to subsection (6) of this section.

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in *RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended

under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of *RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of reoffending; or (c) the safety of the community. [2001 2nd sp.s. c 12 § 302; 2001 c 10 § 5; 2000 c 28 § 25.]

NOTES: *Reviser's note: These RCW references have been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

Comment

The 1997 Legislature also clarified that the Department of Corrections, in monitoring offenders' compliance with conditions of community placement, community supervision, community service, or payment of legal financial obligations, may require them to perform affirmative actions (such as submitting to drug testing or polygraph examination).

The 1999 Legislature, enacting the Offender Accountability Act, modified RCW 9.94A.120 to authorize the imposition of affirmative conditions, both by courts and by the Department of Corrections, on eligible offenders serving a period of community custody, for offenses committed on or after July 1, 2000. Offenders will be supervised according to their risk and will be subject to administrative sanctions by the Department of Corrections. Community custody is required for all sex offenses, all violent offenses, all crimes against persons (defined in RCW 9.94A.440) and all felony drug offenses (except DOSA sentences) committed on or after July 1, 2000, and community custody will replace "community placement" and "community supervision" for offenses committed on or after that date.

RCW 9.94A.720 Supervision of offenders. (1)(a) All offenders sentenced to terms involving community supervision, community restitution, community placement, community custody, or legal financial obligation shall be under the supervision of the department and shall follow explicitly the instructions and conditions of the department. The department may require an offender to perform affirmative acts it deems appropriate to monitor compliance with the conditions of the sentence imposed.

(b) The instructions shall include, at a minimum, reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, notifying the community corrections officer of any change in the offender's address or employment, and paying the supervision fee assessment.