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No: 29857-4-III

Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

JERRY DANIEL SHEEHAN,  
Defendant/Appellant.

APPEAL FROM THE PEND OREILLE COUNTY SUPERIOR COURT  
Honorable Rebecca Baker

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in imposing an exceptional sentence.
2. The absence of a standard guiding the determination of whether "substantial and compelling reasons" support an exceptional sentence violates the Fourteenth Amendment Due Process Clause.
3. The trial court deprived Mr. Sheehan of his right to appeal by failing to set forth the reasons supporting its imposition of a combined confinement/community custody sentence of 420 months.
4. A portion of ¶ 2.4 of the Judgment and Sentence is unsupported by the record.
5. The trial court erred by imposing an exceptional sentence above the statutory maximum.
6. The trial court erred by imposing an indeterminate sentence.
7. The trial court exceeded its authority by extending the length of the requirement to register as a sex offender set by the legislature.
8. The trial court erred in imposing certain conditions of community custody as part of the sentence.

*Issues Pertaining to Assignments of Error*

1. A penal statute which fails to set forth objective guidelines to guard against arbitrary application is vague and violates the Fourteenth

Amendment's Due Process Clause. Neither the SRA nor case law provide an objective framework which a sentencing judge can employ to determine when substantial and compelling reasons exist to support an exceptional sentence. Nor does such a framework exist to guide appellate review of the imposition of an exceptional sentence. Does the absence of objective standards deprive Mr. Sheehan of due process and his right to appeal his exceptional sentence?<sup>1</sup>

2. Does the trial court's failure to explain the basis for the length of the sentence imposed deny Mr. Sheehan his constitutional and statutory right to appeal his exceptional sentence?<sup>2</sup>

3. Where the court's sentence of confinement and/or community custody is indeterminate and exceeds the statutory maximum for each offense, does the sentence violate the Sentencing Reform Act?<sup>3</sup>

4. Does a sentencing court violate due process and exceed its statutory authority by imposing a registration requirement in excess of fifteen years following release from confinement?<sup>4</sup>

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<sup>1</sup> Assignment of Error No. 1, 2.

<sup>2</sup> Assignment of Error No. 1, 3.

<sup>3</sup> Assignment of Error No. 1, 5, 6.

<sup>4</sup> Assignment of Error No. 7, 8.

5. Are the conditions of community custody relating to use or access to any form of pornography unconstitutionally vague?<sup>5</sup>

6. Does the condition of community custody relating to no dating or forming relationships without prior approval exceed the court's sentencing authority and impermissibly infringe upon a defendant's constitutional rights?<sup>6</sup>

7. Does a sentencing court exceed its statutory authority by imposing certain conditions of community custody that are not crime-related?<sup>7</sup>

#### **B. STATEMENT OF THE CASE**

A jury found the defendant, Jerry Daniel Sheehan, guilty as charged of four counts of child molestation<sup>8</sup> and one count of incest<sup>9</sup>. The occurrences took place over a span of four years and involved Mr. Sheehan's step-daughter, E.S., when she was 12 to 16 years old. RP 1561, 1616–32, 1638. Mr. Sheehan sometimes massaged E.S.' head to alleviate her migraines and also her broken arm to reduce scarring. RP 1132–33,

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<sup>5</sup> Assignment of Error No. 8.

<sup>6</sup> Assignment of Error No. 8.

<sup>7</sup> Assignment of Error No. 8.

<sup>8</sup> Counts I and II (child molestation in the second degree) and III and V (child molestation in the third degree). CP 31–34, 36; 236, 238, 240, 242. Upon the State's motion, Count IV (child molestation in the third degree) was dismissed after the close of testimony. RP 2361, 2380–81.

<sup>9</sup> Count VI (incest in the second degree). CP 37, 244.

1136–37, 1579–80, 1582–83. The charged incidents of inappropriate touching took place on the living room couch while E.S.’ mother and brother were not present, and most times while Mr. Sheehan had been drinking beer. CP 1563–65, 1584–86, 1591–93, 1614. During the incidents Mr. Sheehan sometimes told E.S. that she “could trust” him. RP 1612, 1618–23.

The jury found by special verdicts that as to each of the five counts, Mr. Sheehan had used his position of trust to facilitate the commission of the crime. CP 245–49.

Mr. Sheehan had no prior criminal history. CP 292. Based on the current offender score of 9+, the standard range sentence for Counts I and II was 87–116 months each, and the available sentence for Counts III, V and VI was 60 months (statutory maximum) each. CP 292, 303. The five counts were each subject to a period of 36 months community custody.<sup>10</sup>

The court imposed an exceptional sentence. It ordered confinement of ten years for each of counts I and II, confinement of two years on count III, specified that the “remainder of all time [as to counts III, V and VI is] to be spent in community custody”, and additionally

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<sup>10</sup> RCW 9.94A.701(1)(a).

ordered 156 months of community custody as to all counts (I, II, III, V and VI). CP 293–94. The sentences on all counts are to run consecutively. CP 293. The court imposed conditions of community custody, including requirements for mental health and chemical dependency evaluations and treatments, prior approval before dating or forming relationships, and restrictions on pornography and Internet access and usage. CP 320–21 ¶ (b). This appeal followed. CP 289.

### C. ARGUMENT

**1. Because there is no objective definition of what constitutes a “substantial and compelling reason”, the statutes governing the imposition and review of an exceptional sentence deprive Mr. Sheehan of due process and a meaningful review upon appeal.**

The vagueness doctrine of the 14<sup>th</sup> Amendment due process clause rests on two principles. First, penal statutes must provide citizens with fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt so as to protect against arbitrary and subjective enforcement. Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of

arbitrary and discriminatory application." Id. at 108-09. A "statute fails to adequately guard against arbitrary enforcement where it lacks ascertainable or legally fixed standards of application or invites "unfettered latitude" in its application. Smith v. Goguen, 415 U.S. 574, 578, 94 S.Ct. 1242, 15 L.Ed.2d 447 (1973); Giacco v. Pennsylvania, 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The vagueness doctrine is most concerned with ensuring the existence of minimal guidelines to govern enforcement. Kolender v. Lawson, 461 U.S. 352, 358, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983); O'Day v. King County, 109 Wn.2d 796, 810, 749 P.2d 142 (1988).

In addition to due process protections, "In criminal prosecutions the accused shall have ... the right to appeal ... ." Const. art. I, §22; State v. Schoel, 54 Wn.2d 388, 341 P.2d 481 (1959). An individual also has a statutory right to appeal an exceptional sentence. RCW 9.94A.585(2). Mr. Sheehan asserts that because the provisions of the Sentencing Reform Act governing the imposition and appeal of an exceptional sentence are without any meaningful standard governing their application, he is deprived of due process and of his right to appeal

a. The requirement that a sentencing court determine that substantial and compelling reasons exist to warrant an exceptional sentence is wholly subjective. Due Process requires objective guidelines to guard against arbitrary application of penal statutes. *See, Kolender*, 461 U.S. at 358. The provisions of the SRA governing the imposition of an exceptional sentence, particularly RCW 9.94A.535 and RCW 9.94A.537, as applied to Mr. Sheehan, lack any articulable guidelines.

With a few narrow exceptions, RCW 9.94A.537 requires the facts establishing an aggravating factor be found by a jury beyond a reasonable doubt. *See also* RCW 9.94A.535(2) (outlining aggravating factors which may be found by judge); *see also Blakely v. Washington*, 542 U.S. 296, 302 n.5, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (Sixth Amendment requires "every fact which is legally essential to the punishment must be charged in the indictment and proved to a jury."). Where a jury has properly found an aggravating factor exists, RCW 9.94A.535 provides in relevant part:

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. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Prior to Blakely, an aggravating factor was legally sufficient, i.e., substantial and compelling, so long as it was not considered by the legislature in setting the standard range and differentiated the present crime from other crimes of the same category. See State v. Grewe, 117Wn.2d 211,216, 813 P.2d 1238 (1991). But to apply that same analytical framework post-Blakely would either be contrary to the plain language of RCW 9.94A.535 or would presuppose a judicial fact-finding in violation of the Sixth Amendment. Nonetheless, that is the analysis which RCW 9.94A.585(4) still requires. The statute still directs

... the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585(4).

Thus, to comply with the Sixth Amendment, the legislature has required a jury determine the facts necessary to support the exceptional sentence. RCW 9.4A.535(4). At the same time, however, the legislature has maintained the requirement that the trial court determine substantial and compelling reasons exist. Because the trial judge no longer finds the facts upon which to rest an exceptional sentence, the focus of the

substantial and compelling analysis employed by the trial court and reviewed by this Court cannot be a factual one.

Prior to Blakely, the SRA listed 14 nonexclusive aggravating factors and authorized courts to rely upon nonstatutory aggravators. Former RCW 9.94A.535 (2004). Following Blakely the SRA was fundamentally altered to eliminate nonstatutory aggravating factors, and to limit the imposition of exceptional sentences above the standard range to the 35 factors specifically listed.<sup>11</sup> RCW 9.94A.535(3) and (4). Under the former scheme, the analysis of whether there were substantial and compelling reasons existed primarily to ensure that nonstatutory factors were legally sufficient to warrant an exceptional sentence, i.e., not considered by the legislature in setting the standard range. However, in light of the present exclusivity of the statutory aggravating factors, that analysis is no longer meaningful, as the legislature has necessarily made that determination by including a given factor among the 35.

As yet another holdover of the pre-Blakely scheme, if the trial court imposes an exceptional sentence, the court is still required to "set

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<sup>11</sup> Because the imposition of a sentence below the standard range does not implicate the same Sixth Amendment concerns, courts remain free to rely upon nonstatutory mitigating factors.

forth its reasons in written findings of fact and conclusions of law." RCW 9.94A.535. Post-Blakely, it is clear the trial court cannot engage in any judicial fact-finding. Further, the trial judge cannot know what facts the jury ultimately found or relied upon in reaching its verdict. While it is apparent this statute was intended to provide the necessary appellate record (*see* RCW 9.94A.585(4) (directing reviewing court to assess the adequacy of court's stated reasons)), it is not clear now what "fact(s)" the court could find nor what conclusions the court could draw.

Thus, a trial court's determination that substantial and compelling reasons exist is no longer factual, and is no longer necessary to ensure the legal sufficiency of an aggravating factor. But the court is still required to make a finding that substantial and compelling reasons exist. Following the post-Blakely revisions to the SRA, and because of the Sixth Amendment prohibition of judicial fact-finding, there is no definable standard by which a trial court may make that finding.

Here, Mr. Sheehan's challenge to Judge Baker's ruling is not premised on the fact that a different judge might have reached a different conclusion. Rather, the evil is that a different judge would use different standards, because neither the statutes nor the case law provide a standard.

It is this inherent subjectivity in the determination of what the legal standard is that violates due process.

b. The trial court's determination that substantial and compelling reasons exist lacks any objective limitations and is effectively unreviewable. Having excluded the trial judge from either the factual or legal determinations required under the former statute, the present statutory scheme employed by Judge Baker allows a judge unfettered discretion to impose an exceptional sentence once the jury returns a verdict on an aggravator. After divorcing the trial judge from either the factual or legal determination, the SRA nonetheless vests the trial judge with the sole authority to impose an exceptional sentence.

In the end, a trial judge is tasked with determining if substantial and compelling reasons exist but is barred from making either the factual or legal determinations that define that term. This Court's review is limited to determining whether the judge's stated reasons support the imposition of an exceptional sentence, but it is left with no record to review, as the Court has no insight into the jury's deliberations. Moreover, this court has no analytical yardstick by which to measure the correctness of the trial court's decision.

Judge Baker made findings of fact that an exceptional sentence was justified because:

- I. ... The defendant used his position of trust to facilitate the current offenses. [RCW] 9.94A.535(n).
- II. The jury found that the defendant used his position of trust to commit each and every count – I, II, III, V, VI.

...

CP 304. The court concluded:

- I. There are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535.
- II. All count[s] are subject to an exceptional sentence – two class B felonies (maximum 10 years each) and three class C felonies (maximum 5 years each).

CP 304. The judgment and sentence contains the following additional

boilerplate language:

[X] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range<sup>12</sup> and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

CP 292 at ¶ 2.4. The court did not provide any reasons for its conclusion

other than the fact that the jury had returned a special verdict. The court

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<sup>12</sup> Assignment of Error No. 4. There is no support in the record that Mr. Sheehan and the prosecutor stipulated to anything concerning the imposition of the exceptional sentence. The sentence in its entirety mirrors RCW 9.94A.535(2)(a), which sets forth one circumstance where the trial court may impose an aggravated exceptional sentence without a finding of fact by a jury. Because the record does not support a stipulation, the court's "finding" of this circumstance is unsupported and the circumstance cannot serve as an independent basis for imposition of an exceptional sentence.

did not articulate how or why an exceptional sentence was consistent with the purposes of the SRA. The court offered no indication of what it was finding when it concluded substantial and compelling reasons exist. In short, the court offered no record that allows this Court to determine the correctness of the decision or that substantial and compelling reasons exist.

Under the existing substantial and compelling analysis, a jury finding beyond a reasonable doubt of a statutory aggravating factor would always constitute a substantial and compelling reason to impose an exceptional sentence. If that remains the measure either there is nothing for the judge to find, or the statute requires the judge to make a finding of the existence of an aggravating factor. The latter plainly violates the Sixth Amendment, while the former relegates the judge's function to rubberstamping a jury finding.

In a pre-Blakely case, the Supreme Court said

... even though the sentence may be statutorily authorized, when a trial court imposes a sentence which is outside the standard range set by the Legislature, the court must find a substantial and compelling reason to justify the exceptional sentence.

In re the Personal Restraint Petition of Breedlove, 138 Wn.2d 298, 305, 979 P.2d 417 (1999). Thus, the requirement of RCW 9.94A.535 that the trial court determine there are substantial and compelling reasons must be

something other than a mere recognition of the jury's finding and cannot be a judicial finding of fact establishing the aggravator[s].

Additionally, the determination that substantial compelling reasons exists cannot be reduced to a process whereby the jury finding simply grants the judge discretion to sentence as she wishes. First, this result fails to give effect to the independence of those two determinations. Second, the Supreme Court has reaffirmed post-Blakely that the determination that substantial and compelling reasons exist is a legal determination subject to *de novo* review as opposed to a discretionary or factual decision. See State v. Suleiman, 158 Wn.2d 280, 291 n.3, 143, P.3d 795 (2005).

Following Blakely and the substantial revisions of the SRA, there is no longer an objective standard by which a trial or appellate court can determine whether substantial and compelling reasons exist to impose an exceptional sentence. In the absence of an objective standard governing the statute's application to Mr. Sheehan, the statute is unconstitutionally vague as applied to Mr. Sheehan.

c. The lack of an explanation for the length of the sentence imposed denies Mr. Sheehan his constitutional and statutory right to appeal. Article 1, § 22 guarantees the right to appeal "in all cases." The right to appeal is a fundamental right. State v. Garcia-Martinez, 88

Wn. App. 322, 327, 944 P.2d 1104 (1997).

Whenever a court imposes an exceptional sentence, the trial court must set forth the reasons for that decision in written findings of fact. RCW 9.94A.535. An appeal of an exceptional sentence must be "made solely upon the record that was before the sentencing court." RCW 9.94A.585(5). In reviewing an exceptional sentence, an appellate court must determine whether: (1) the reasons are supported by the record and the reasons, as a matter of law, justify the exceptional sentence; and (2) whether the sentence is clearly excessive. RCW 9.94A.585(4). "[F]or action to be clearly excessive, it must be shown to be clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would take." State v. Ritchie, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995) (citing State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986)).

The Ritchie Court concluded the relevant statutes did not require the trial court to set forth the reasons supporting the length of an exceptional sentence. 126 Wn.2d at 395. The Court stated that prior decisions requiring such an explanation were "wholly faulty." Id. at 394-95. Mr. Sheehan does not contend that Ritchie reached the wrong result. Instead, Mr. Sheehan asserts that without a statement of reasons

supporting the length of time, it is impossible for this Court or any other reviewing court to determine if Judge Baker's decision to impose 22 years of confinement followed by 13 years of community custody was based on untenable reasons. Mr. Sheehan merely points out an apparently unforeseen result of the Ritchie decision. The petitioners in Ritchie did not assert they had been denied the right to appeal or would be denied this right unless the Court required trial courts to set forth the reasons supporting the length of a sentence. Neither the petitioners nor the majority addressed the effects of the Court's ruling on the right and ability to appeal. Quite simply, the issue presented here was not before the Court. Thus, Mr. Sheehan is not attempting to challenge Ritchie.

The Supreme Court has also held that in reviewing the imposition of exceptional sentences appellate courts may not compare the case at hand to other cases. State v. Solberg, 122 Wn.2d 688, 703-04, 861 P.2d 460 (1993). The Court reversed the Court of Appeals stating "the comparison to other appellate cases was not the proper way to determine whether an exceptional sentence should be reversed." Id.

In light of Ritchie and Solberg, this Court must review Mr. Sheehan's case in a complete vacuum. Judge Baker stated

... I'll indicate that my decision is that Mr. Sheehan should go to prison for a period of 22 years ... followed by 13 years in

community custody. I can go above the standard range of the community custody and I can go above the standard range of ... incarceration because of the aggravated circumstance finding of abuse of trust that the jury came back with on each and every one of these five counts. So that would be 264 months incarceration followed by 156 months of community custody. ...

RP 2663–664. But the court offered no explanation of why 264 months of confinement followed by 156 months of community custody was appropriate as opposed to concurrent standard range sentences (87 to 116 months) urged by defense counsel<sup>13</sup>, or even the 30 to 35 years of confinement sought by the state<sup>14</sup>. The court apparently engaged in some type of analysis to reach its decision, but the record is devoid of what that was. This Court cannot look to the established case law to determine if the unstated and unknown reasoning of Judge Baker was based on untenable reasons or grounds. Because the question of whether Judge Baker's decision was based on untenable reasons becomes unreviewable, Mr. Sheehan is denied meaningful appellate review.

The four-justice dissent in Ritchie apparently recognized this potential problem, reasoning the majority's decision "insures no meaningful review can ever be had and that no common law principles to

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<sup>13</sup> RP 2653.

<sup>14</sup> RP 2632-633.

structure discretion will ever be developed for departure sentencing." 126 Wn.2d at 404 (Madsen dissenting).

Moreover this Court cannot supplant its subjective reasoning for Judge Baker's. A court abuses its discretion where it relies on untenable grounds or where the resulting sentence "shocks the conscience of the reviewing court." Ritchie, 126 Wn.2d at 396-97 (citing State v. Ross, 71 Wn. App. 556, 571-72, 861 P.2d 473 (1993)). Since a sentencing court need not provide an explanation of the length of sentence imposed, a reviewing court can never know if the length was based upon an untenable ground. Instead, the reviewing court may only ask whether it shocks the conscience, i.e. does it go too far?

Addressing the Washington Supreme Court's cases reviewing the length of sentences imposed, i.e. employing the same abuse of discretion standard, the United States Supreme Court wondered:

Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.

(Italics in original). Blakely, 150 U.S. at 308. The "shocks the conscience" standard is therefore no standard at all. There can be no meaningful review without some standard by which a reviewing court can determine how far is too far.

This Court is left with no standard to judge the reasonableness of the length of Mr. Sheehan's sentence. While Mr. Sheehan can file a notice of appeal and write a brief regarding the length of his sentence, absent some explanation of the basis for the length of the sentence he cannot begin to hope to receive the meaningful appellate review to which he is constitutionally guaranteed. In light of Ritchie, Solberg, and RCW 9.94A.585(5), the length of Mr. Sheehan's sentence is unreviewable and he is denied the right to appeal.

d. This Court must reverse Mr. Sheehan's exceptional sentence.

Because of the absence of standards governing the imposition of Mr. Sheehan's sentence, and his inability to obtain any meaningful review of the imposition of the sentence, this Court must reverse the sentence imposed.

**2. Because the sentence of confinement and/or community custody is indeterminate and exceeds the statutory maximum for each offense, the sentence violates the Sentencing Reform Act.**

Child molestation in the second degree is a class B felony with a statutory maximum sentence of ten years. RCW 9A.44.086(2); RCW 9A.20.021(1)(b). Child molestation in the third degree and Incest in the

second degree are class C felonies with a statutory maximum of five years each. RCW 9A.44.089(2); RCW 9A.64.020(2)(b); RCW 9A.20.021(1)(c).

“Except [for purposes of recovering restitution], a court may not impose a sentence providing for a term of confinement or community supervision or community placement which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” RCW 9.94A.505(5). Moreover, the “term of community custody specified by this section shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.” RCWA 9.94A.701(9).

Under the SRA a sentencing court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime. In re Personal Restraint of Brooks, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009). Where there are multiple crimes, each sentence of confinement and community custody must not exceed the statutory maximum. See State v. Cubias, 155 Wn.2d 549, 554, 120 P.3d 929 (2005) (though the imposition of consecutive sentences increases a defendant’s aggregate term of imprisonment, so long as the

sentence for any single offense does not exceed the statutory maximum for *that* offense, Blakely is not offended).

Here, the judgment and sentence orders confinement of ten years for each of counts I and II (statutory maximum for the class B felonies) and confinement of two years on count III (portion of five year statutory maximum for the class C felony). The court specifies that the “remainder of all time [as to count III, V and VI is] to be spent in community custody.”<sup>15</sup> CP 293. The judgment and sentence further orders 156 months of community custody as to all counts (I, II, III, V and VI). CP 294. The sentences on all counts are to run consecutively. CP 293.

On its face, the sentences for counts I and II (ten years statutory maximum confinement plus an undefined amount of community custody) exceed the statutory maximum for each crime. The sentences for counts I and II exceed the statutory maximum for each crime and must be remanded for resentencing.

One cannot tell as to the sentence for count III (two years confinement plus an undefined amount of community custody) and the sentences for counts V and VI (no confinement plus undefined amounts of community custody) whether the period of confinement/community

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<sup>15</sup> Nowhere in the judgment and sentence does the court define what it means by “remainder of all time”.

custody exceeds the statutory maximum for any one crime. Because the sentence for count III may potentially exceed the statutory maximum of five years for the crime, “the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum.” Brooks, 166 Wn.2d at 675. Because the trial court has imposed no determinate sentence of confinement and/or community custody<sup>16</sup> for counts V and VI—and I, II and III—all counts must be remanded for resentencing.

**3. The sentencing court violated due process and exceeded its statutory authority by imposing a registration requirement in excess of fifteen years following release from confinement.**

Sentencing is a legislative power, not a judicial power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. State v.

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<sup>16</sup> A sentence outside the standard sentence range shall be a determinate sentence. RCW 9.94A.535. A “determinate sentence” means a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community custody, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation. ...”. RCW 9.94A.030(18).

Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). Statutory construction is a question of law and reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980).

Any person convicted of a sex offense must register with the county sheriff. RCW 9A.44.130. A sex offender whose offense was a class B felony must register for at least 15 years after release from confinement. RCW 9A.44.130(1), .140(2)<sup>17</sup>. "Confinement" includes

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<sup>17</sup> RCW 9A.44.140(2) provides as follows: "(2) For a person convicted in this state of a class B felony who does not have one or more prior convictions for a sex offense or kidnapping offense and whose current offense is not listed in RCW 9A.44.142(5), the duty to register shall end fifteen years after the last date of release from confinement, if any, (including full-time residential treatment) pursuant to the conviction, or entry of the judgment and sentence, if the person has spent fifteen consecutive years in the community without being convicted of a disqualifying offense during that time period.

“full-time residential treatment”, but is distinct from any period of community custody. See State v. Gossage, 138 Wn. App. 298, 301, 304-305, 156 P.3d 951 (2007), *rev'd on other grounds by* 165 Wn.2d 1, 195 P.3d 525 (2008).

Here, the court sentenced Mr. Sheehan to 22 years of confinement followed by 13 years of community custody, yielding a total sentence of 35 years. Reasoning that “community custody counts as confinement”, the court ordered that Mr. Sheehan’s obligation to register as a sex offender would not expire until 15 years after the total sentence of 35 years was served. RP 2680–681, CP 299. This is contrary to the plain language of RCW 9A.44.140(2). Provided that upon release from incarceration Mr. Sheehan spends fifteen consecutive years in the community without being convicted of a disqualifying offense, his obligation to register would expire 15 years after he has served 22 years of confinement or after any earlier release date based upon earned good time. The trial court exceeded its authority by extending the length of the registration requirement set by the legislature. The matter must be remanded for resentencing to the statutory length.

**4. The conditions of community custody relating to use or access to any form of pornography are unconstitutionally vague.**

The due process clauses of the federal and state constitutions require that citizens have fair warning of what conduct is illegal. U.S. Const. amend. XIV; Const. art. I, § 3; State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. Id. At 752–53. Additionally, even offenders on community custody retain a constitutional right to free expression. See Procunier v. Martinez, 416 U.S. 396, 408–09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (inmates retain First Amendment right of free expression through use of the mail). When a condition of community custody addresses material protected by the First Amendment, a vague standard may have a chilling effect on the exercise of First Amendment rights. Bahl, 164 Wn.2d at 752. An even stricter standard of definiteness therefore applies when a community custody condition prohibits access to material protected by the First Amendment. Id.

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is

still in prison, since upon his release the conditions will immediately restrict him. Bahl, 164 Wn.2d at 751-52. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. Bahl, 164 Wn.2d at 752.

Here, the trial court imposed two sentencing conditions related to pornography: “That you do not possess, create, use, download, or purchase any form of pornography” and “That you do not access the Internet without first installing software on your computer that prohibits access to pornography ...”. CP 321. Adult pornography is constitutionally protected speech. Bahl, 164 Wn.2d at 757. And the term “pornography” is unconstitutionally vague. Id. at 757–58; State v. Sansone, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005). Thus, a condition of community placement prohibiting an offender from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer” is unconstitutionally vague. Bahl, 164 Wn.2d at 754, 758; *accord* Sansone, 127 Wn. App. at 634, 639–41.

The term “pornography” could include any nude depiction, whether a picture from Playboy Magazine or a photograph of Michelangelo's sculpture of David. *See* Bahl, 164 Wn.2d at 756. Who is to decide what constitutes the “pornography” that will be blocked by

computer software? In this case the person making that determination would be an unknown technology geek living somewhere in the world. The fact that a condition provides that a third party can direct what falls within the definition of “pornography”—either the Community Corrections Officer in Bahl or a software creator, as here—only makes the vagueness problem more apparent, since it virtually acknowledges that on its face the condition does not provide ascertainable standards for enforcement. Bahl, 164 Wn.2d at 758, 193 P.3d 678.

As in Bahl and Sansone, the prohibitions regarding pornography and use of pornography-blocking software are unconstitutionally vague and must be stricken.

**5. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that were not crime-related.**

A trial court’s sentencing authority is limited to that granted by statute. State v. Moen, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996). If a trial court exceeds that authority, its order may be corrected at any time. State v. Paine, 69 Wn. App. 873, 883, 850 P.2d 1369 (1993). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act by imposing an unauthorized community custody condition is an issue

of law reviewed *de novo*. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003). Sentencing conditions are reviewed for abuse of discretion. *See State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993).

RCW 9.94A.703(3)(c) and RCW 9.94A.703(3)(f) authorize the court to require an offender to participate in crime-related treatment or counseling services or to comply with crime-related prohibitions, respectively. A condition is “crime-related” only if it “directly relates to the circumstances of the crime.” RCW 9.94A.030(10).

a. The trial court erred in ordering chemical dependency evaluation and treatment as a condition of community custody. As a condition of community custody, the court ordered Mr. Sheehan to “*undergo mental health and a chemical dependency evaluation and participate in available outpatient mental health treatment as directed and to remain on medications as directed by a mental health professional.*” CP 320 ¶ (b). Court-ordered chemical dependency evaluation and treatment must address an issue that contributed to the offense. State v. Jones, 118 Wn. App. 199, 207–08, 76 P.3d 258 (2003) (addressing former RCW 9.94A.700 and former RCW 9.94A.715, which contained the same operative language as RCW 9.94A.703(3)(c) and (f)).

The record shows Mr. Sheehan drank alcohol, but there is nothing in the record to indicate he used controlled substances or had any form of chemical dependency. Under the Sentencing Reform Act, a substance abuse condition can be imposed only when controlled substances, as opposed to alcohol alone, contribute to the defendant's crime. Jones recognized a difference between controlled substances and alcohol in holding that alcohol counseling was not statutorily authorized when methamphetamines but not alcohol contributed to the offense. Jones, 118 Wn. App. at 202; *see also* State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (distinguishing between "substance abuse" and "alcohol" treatment as a condition of community custody), *disapproved on other grounds*, State v. Valencia, 169 Wn.2d 782, 790–91, 239 P.3d 1059 (2010).

Because the record is devoid of any evidence of chemical abuse or dependency, the broad imposition of "chemical dependency" evaluation and treatment as a condition of community custody was beyond the court's authority. The offending condition must be stricken. Jones, 118 Wn. App. at 207–08, 212.

b. The trial court erred in ordering mental health evaluation and treatment as a condition of community custody. As a further condition of

community custody, the court ordered Mr. Sheehan to “*undergo mental health and a chemical dependency evaluation and participate in available outpatient mental health treatment as directed and to remain on medications as directed by a mental health professional.*” CP 320 ¶ (b).

The court did not comply with the requisite statutory procedures before imposing this condition.

Former RCW 9.94A.505(9)<sup>18</sup> provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94A.505(9) authorizes a trial court to order an offender to submit to mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures.

State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008). A court may therefore not order an offender to participate in mental health

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<sup>18</sup> Laws of 2006 ch. 73 ¶ 6. This was the version in effect at the time of Mr. Sheehan's offenses. This provision is currently codified at RCW 9.94B.080.

treatment as a condition of community custody “unless the court finds, based on a presentence report and an applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime.” Jones, 118 Wn. App. at 202; *accord* State v. Lopez, 142 Wn. App. 341, 353, 174 P.3d 1216 (2007); Brooks, 142 Wn. App. at 850–52.

The court, in sentencing Mr. Sheehan, did not make the statutorily mandated finding that he was a “mentally ill person” as defined by RCW 71.24.025 and that this mental illness influenced the crimes for which he was convicted. The trial court thus erred in imposing the condition pertaining to mental health evaluation and treatment, and the offending condition must be stricken. Jones, 118 Wn. App. at 202; Lopez, 142 Wn. App. at 354.

c. The trial court erred in prohibiting and restricting Internet access as a condition of community custody. As a condition of community custody, the court required that Mr. Sheehan “not access the Internet without first installing software on your computer that prohibits access to pornography. That you do not install any data eliminating material, encryption or hide any software. That you do not enter chat rooms, nor engage in anonymous activity of any kind including sexual activity.” CP

320 ¶ (b). This condition is invalid because it is not directly related to the circumstances of the offenses.

In State v. O’Cain, a condition prohibiting the defendant from accessing the Internet without prior approval from his community custody officer or treatment provider was not crime-related and therefore was stricken on appeal. State v. O’Cain, 144 Wn. App. 772, 773, 184 P.3d 1262 (2008). As in O’Cain, there is no evidence in the record here that the condition restricting Internet access is crime-related. Id. at 775. There is no evidence that Mr. Sheehan accessed the Internet before the offenses or that Internet use contributed in any way to the crime. Id. Nor is this a case where a defendant used the Internet to contact and lure a victim into an illegal sexual encounter. Id.

Mr. Sheehan does not challenge the condition of community custody that he complete sex offender treatment and comply with any recommended treatment. CP 320 ¶ (b). It is conceivable that the Internet restrictions at issue here could facilitate such treatment *if recommended as a condition of treatment* at a future date. At the present time, however, there is no justification for the court’s imposition of this non-crime-related prohibition and the offending condition must be stricken. O’Cain, 144 Wn. App. at 775.

**6. The no dating or forming relationships without prior approval condition exceeds the trial court's sentencing authority and impermissibly infringes upon Mr. Sheehan's constitutional rights.**

a. The condition that Mr. Sheehan not date or form relationships without prior approval is not crime-related. An illegal or erroneous sentencing condition may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 744. Under RCW 9.94A.505(8), the court may "impose and enforce crime-related prohibitions" as part of the judgment and sentence. A crime-related prohibition must be "directly relate[d] to the circumstances of the crime for which the offender has been convicted." Former RCW 9.94A.030(13) (2008); State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

The offenses in this case involved Mr. Sheehan's minor step-daughter and took place within the family home. Mr. Sheehan had been married to the mother for some number of years. RP 1092. There was no dating relationship involved. Nonetheless, the trial court's order prohibits Mr. Sheehan from "dat[ing] or form[ing] relationships without prior approval" from his therapist and community corrections officer. CP 321 ¶ (b). That broad restriction is not crime related. Moreover, in light of the substantial public policy implications of restricting a person's ability to

freely associate, a narrower restriction was available—that without prior approval Mr. Sheehan refrain from dating or forming dating relationships with single parents who have minor children. The broader restriction is not crime related and, as set forth below, violates Mr. Sheehan’s constitutional rights.

b. The condition that Mr. Sheehan not date or form relationships without prior approval violates his right to freedom of association. A more demanding review is required where sentencing conditions interfere with a fundamental constitutional right. Warren, 165 Wn.2d at 32. The Fourteenth Amendment of the United States Constitution provides that no State shall “deprive any person of life, liberty, or property, without due process of law.” The clause includes a substantive component, which provides heightened protection against government interference with certain fundamental rights and liberty interests. Troxell v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The right to move about freely is constitutionally protected by the First Amendment. State v. Riles, 135 Wn.2d 326, 346–47, 957 P.2d 655 (1998). Although a “defendant’s constitutional rights during community placement are subject to the infringements authorized by the SRA,” the defendant’s freedom of association may be restricted only to the extent it is reasonably necessary

to accomplish the essential needs of the state and the public order. Riles, 135 Wn.2d at 350; Warren, 165 Wn.2d at 32.

The trial court's order regarding "dating or forming relationships" would require Mr. Sheehan to obtain advance permission before such innocuous activities as going to the movies with his 65-year-old widowed neighbor, before talking a second time to his fellow passenger on a daily bus ride commute, before attending services a second time at a newly-discovered church, before taking his purchases on a second grocery store visit through the same cashier's line, or even before returning to pick up his repaired car from the out-of-state mechanic after it had broken down on a trip. The condition imposed is far broader than reasonably necessary to accomplish the essential needs of the State and public order.

The victim in this case was a minor child and a member of the family relationship. A more focused condition requiring prior approval before dating or forming dating relationships with single parents who have minor children at home would serve the State's interest in monitoring Mr. Sheehan's relevant activities and his compliance with recommended treatment. As written, however, the condition is overbroad and is not narrowly tailored, and infringes upon Mr. Sheehan's right to freedom of association. Since the infringement is impermissible, the condition should

be stricken.

**D. CONCLUSION**

For the reasons stated, this Court should reverse the exceptional sentence or, in the alternative, remand the matter for resentencing.

Respectfully submitted on November 7, 2011.

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**PROOF OF SERVICE (RAP 18.5(b))**

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on November 7, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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