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DIVISION II

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**COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JACK IRVIN SIMS,**

**Appellant.**

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**SUPPLEMENTAL BRIEF OF APPELLANT**

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## ORDER FOR SUPPLEMENTAL BRIEFING

In the case at bar, the trial court sentenced the defendant on a charge of first degree child molestation to life in prison with a minimum mandatory time of 60 months to serve before first being considered for release, with that sentence suspended under the SOSSA option. CP 65-78. As part of the conditions of the judgment and sentence, the court banished the defendant from Cowlitz County and the City of Castle Rock. CP 55. That order within the judgment and sentence stated:

Other Conditions: Do not reside in Cowlitz County, do not enter Cowlitz County other than to travel from a location outside the county to a destination outside the county. If in Cowlitz County, the defendant shall not leave his transportation. Do not enter the city limits of Castle Rock.

CP 55.

Under paragraph 4.5(d), the court set the term of the suspended sentence, ordering as follows.

- (d) **Suspension of Sentence.** The court suspends execution of this sentence; and places the defendant community custody under the charge of DOC for the length of the suspended sentence, the length of the maximum term sentence under RCW 9.94A.712, or three years, whichever is greater.

CP 54.

Since, in this case, the court sentenced the defendant under RCW 9.94A.712 on a Class A felony with a maximum term of life, the conditions of the suspended sentence, including the banishment order, will run for the

defendant's entire lifetime. CP 54.

The trial court later reiterated the banishment order by entering a separate "Order on Additional Conditions," which state as follows:

The defendant shall not reside in Cowlitz County, not to enter Cowlitz County other than to travel from a location outside the county to a destination outside the county. If in Cowlitz County, the defendant shall not leave his transportation, and shall not enter the city limits of Castle Rock, per the order of the court on APRIL, 24, 2008.

CP 79.

Following imposition of this sentence, the defendant filed timely notice of appeal, arguing that the trial court violated the defendant's right to due process and equal protection under United States Constitution, Fifth and Fourteenth Amendments when it entered this banishment order. *See* Opening Brief of Appellant. The state responded by conceding the error, and inviting this court to either (1) remand the case so the trial court can modify the banishment order, or (2) vacate the SOSSA sentence and remand for a new sentencing hearing. *See* Brief of Appellant. This court's order states:

**IT IS ORDERED** that the appellant Sims shall file a supplemental brief specifically addressing whether, if we vacate the Order On Additional Conditions prohibiting Sims from entering Cowlitz County, we should remand this matter to the trial court for broader resentencing, including reconsideration of the Special Sex Offender Sentencing Alternative under RCW 9.94A.670.

Order for Supplemental Briefing.

The following is the Supplemental Brief of Appellant.

**BRIEF OF APPELLANT - 6**

## ARGUMENT

### I. RESPONDENT'S FAILURE TO CROSS-APPEAL THE TRIAL COURT'S DISCRETIONARY DECISION TO GRANT A SOSSA SENTENCE IN THIS CASE PRECLUDES REVIEW OF THAT DECISION.

Under the RAP 2.4(a), a respondent in an appeal may only seek affirmative relief from those portions of a trial court's final decision that the respondent designates in a timely notice of appeal. Subsection (a) of this rule states as follows:

(a) Generally. The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. *The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.*

RAP 2.4(a) (emphasis added).

For example, in *State v. Aumick*, 73 Wn.App. 379, 869 P.2d 421 (1994), a defendant convicted of first degree burglary and attempted first degree rape appealed those convictions arguing that the trial court had erred when it (1) refused to instruct the jury that fourth degree assault was a lesser included offense to attempted first degree rape, and (2) failed to inform the jury that an attempt is not proven unless the state proves both a criminal

intent as well as the existence of a substantial step toward the completion of a criminal act. In its Brief of Respondent, the state countered both of these arguments. The state also claimed that the trial court had erred when it instructed the jury on voluntary intoxication, even though the state did not file a notice of cross-appeal on this latter issue.

Ultimately, the trial court agreed with the appellant's argument and remanded the case for a new trial. However, under RAP 2.4(a), the court refused to consider the state's argument that the trial court had erred when it gave an instruction on voluntary intoxication because this argument requested affirmative relief for the state without the state first filing a notice of cross-appeal. The court held: "Because the State has failed to file a notice of cross appeal, we need not address whether the court erred in instructing the jury on voluntary intoxication. RAP 2.4(a)." *State v. Aumick*, 73 Wn.App at 385.

In the case at bar, the trial court granted the defendant's request for the imposition of a sentence under the Sex Offender Special Sentencing Option (SOSSA) found in RCW 9.94A.670, a request that the state opposed. Under this statute, the decision whether or not to grant a SSOSA sentence lies within the sound discretion of the trial court. *State v. Onefrey*, 119 Wn.2d 572, 835 P.2d 213 (1992). Similarly, the decision whether or not to revoke a SSOSA sentence or impose a lesser sanction upon proof of a violation also lies within the trial court's discretion. *State v. Daniels*, 73 Wn.App. 734,

737, 871 P.2d 634 (1994). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001). Thus, a court abuses its discretion if it categorically refuses to impose a particular sentence or if it denies a sentencing request on an impermissible basis. *State v. Khanteechit*, 101 Wn.App. 137, 5 P.3d 727 (2000).

For example in *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005), the defendant appealed the trial court's refusal to give a DOSA sentence, arguing that the court had abused its discretion. In this case the court had stated that it believed the legislature had failed to adequately fund DOC's supervision of defendants on DOSA sentences. Thus the court would not consider a sentence under this provision. The Washington Supreme Court agreed and reversed, holding as follows:

Next, we consider whether, as Grayson contends, the trial judge abused his discretion by categorically refusing to consider a DOSA sentence. Again, while trial judges have considerable discretion under the SRA, they are still required to act within its strictures and principles of due process of law. While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. A trial court abuses discretion when "it refuses categorically to impose an exceptional sentence below the standard range under any circumstances." The failure to consider an exceptional sentence is reversible error. Similarly, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal

to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal.

*State v. Grayson*, 154 Wn.2d at 341-342 (citations omitted).

In the case at bar, the decision to grant a SOSSA sentence fell within the sound discretion of the trial court. The state did not appeal this decision and the appellant obviously did not. Rather, appellant in this case merely appealed one of the conditions the trial court imposed as part of community custody and as part of the conditions of the SOSSA sentence. Indeed, a close look at the opening brief of appellant reveals that the defense did not even contest the court's right to impose reasonable conditions concerning his movement. Rather, appellant merely contested the trial court's right under the constitution to enter a general banishment order.

Thus, the only issue properly before this court is the validity of a single condition of the SOSSA sentence and community custody, not the validity of the trial court decision to grant the SOSSA sentence. The state's argument that the trial court has the authority to remand the case to the trial court to more narrowly tailor the banishment order so as to bring it within the limitations that the Fifth and Fourteenth Amendments place on such governmental action is well taken, particularly in the light of the case cited by both appellant and the state. However, the state's further suggestion that this court reverse the trial court's decision to grant a SOSSA sentence is

unmistakenly a request for affirmative relief. Thus, under RAP 2.4(a), this court should not consider this request because the state did not file a notice of cross-appeal to put this issue before the court.

**II. THE REVOCATION OF A SOSSA SENTENCE UPON A DEFENDANT'S SUCCESSFUL CHALLENGE THAT ONE OF THE CONDITIONS OF THE SOSSA SENTENCE WAS UNCONSTITUTIONAL WILL IMPERMISSIBLY CHILL THE RIGHT TO APPEAL, AND WILL IMPERMISSIBLY CHILL THE RIGHT TO SEEK ENFORCEMENT OF THE CONSTITUTIONAL GUARANTEE THE IMPROPER CONDITION VIOLATED.**

A criminal defendant does not have a federal constitutional right to make post-conviction motions or to appeal. *Rheuark v. Shaw*, 628 F.2d 297, 302 (5th Cir.1980), *cert. denied*, 450 U.S. 931, 101 S.Ct. 1392, 67 L.Ed.2d 365 (1981). However, each state is free to create a right to appeal either in its constitution or by statute, and once a state acts to create such a right, the protections afforded under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, have full effect. *In re Frampton*, 45 Wn.App. 554, 726 P.2d 486 (1986). For example, once the state creates the right to appeal a criminal conviction, in order to comport with due process, the state has the duty to provide all portions of the record necessary to prosecute the appeal at state expense. *State v. Rutherford*, 63 Wn.2d 949, 389 P.2d 895 (1964). The state also has the duty to provide appointed counsel to indigent appellants. *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963);

*State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987).

In Washington, a criminal defendant has the right to one appeal in a criminal case under both RAP 2.2 and Washington Constitution, Article 1, § 22. *State v. French*, 157 Wn.2d 593, 141 P.3d 54 (2006). Thus, this right includes the protections of procedural due process. At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision, the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

*In re Messmer*, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)).

The remedy the state seeks in this case upon its admission that the trial court's banishment order violates the defendant's right under United States Constitution, Fifth and Fourteenth Amendments, would have the effect of impinging upon the defendant's constitutional right to appeal his sentence

and his constitutional right to judicial review of sentencing conditions that violate other constitutional guarantees (in this case the right to freedom of movement as found in United States Constitution, Fifth and Fourteenth Amendments). The reason is that the trial court's decision to grant a defendant a SOSSA sentence under RCW 9.94A.670 constitutes a significant benefit to a criminal defendant, particularly a defendant subject to extremely harsh sentencing provision found in RCW 9.94A.712 as was the defendant in the case at bar.

The granting of a SOSSA sentence is such a significant benefit to a defendant that counsel for appellant is unaware of any reported or unreported appellate case in which a defendant contested the trial court decision to grant a SOSSA sentence. This is not unusual as counsel is unaware of any case in which the trial court granted a SOSSA sentence without the defendant having first requested its imposition after having obtained a psycho-sexual evaluation. This is what happened in the case at bar, and under no circumstances does the defendant herein wish this court to grant a new sentencing hearing to reconsider the imposition of the SOSSA sentence. The defendant herein would rather abandon his appeal rather than go to a new sentencing hearing to reconsider the original decision to impose a SOSSA sentence in spite of the fact that the trial court imposed an obviously unconstitutional banishment order.

In fact, were this court to rule that the act of contesting the validity of a particular SOSSA condition permitted the trial court to reconsider the imposition of the SOSSA option, then this ruling would have the effect of eliminating all appeals from the conditions imposed in SOSSA sentence because no rational defendant would ever take the chance of having his or her SOSSA sentence revoked through the successful appeal of an obviously unconstitutional SOSSA condition. Such a decision by this court would give the sentencing judges *carte blanche* to impose any condition the court desired regardless of its constitutional infirmity, knowing that the defendant would never appeal the unconstitutional condition as long as the court stated that but for the authority to impose that condition the court would not have authorized the SOSSA sentence.

For example, a judge contemplating a defendant's SOSSA sentence request might well agree to that option if and only if the defendant submits to surgical sterilization and agrees to not appeal from the imposition of that condition. Similarly, a court might grant a SOSSA request if and only if a defendant agrees to have the words "sex offender" tattooed prominently upon his forehead, and agrees to not appeal from that condition. Each of these conditions (and the agreement to not appeal from them) would violate both the state and federal constitutions. However, few defendants, particularly those faced with a sentence under RCW 9.94A.712, would refuse to submit

to the condition and would then appeal if success in that appeal had the effect of revoking the SOSSA sentence. Thus, the effect of granting the state's request for a new sentencing hearing in which it could again contest the imposition of the SOSSA sentence, based solely upon the defendant's successful appeal from the imposition of an improper sentencing condition would significantly chill a defendant's exercise of the constitutional right to appeal and the right to contest other constitutional violations by the court.

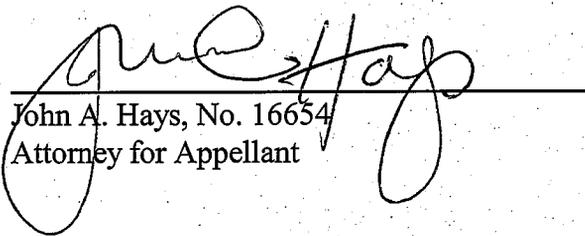
Once again, the validity of this argument is illustrated by the fact that in the case at bar the defendant does not wish to proceed with this appeal, and requests that this court dismiss this appeal, if the result of the appeal will be the vacation of the SOSSA sentence and a remand to the trial court for a new sentencing hearing in which the court is again free to deny the request for the SOSSA. Thus, court should not contemplate taking an action that at once violates RAP 2.5(a), and further punishes the defendant for taking a course of action to vindicate his rights under the state and federal constitution.

## CONCLUSION

This court should vacate the community custody condition that bans the defendant from entering into and living in the City of Castle Rock and Cowlitz County and remand the case to the trial court with instructions to more narrowly tailor that condition to put it within the limitations of the constitution. In the alternative, appellant invites the court to dismiss this appeal.

DATED this 8th day of May, 2009.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

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

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

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

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,  
Respondent

vs.

SIMS, Jack  
Appellant

NO. 07-1-01525-3  
COURT OF APPEALS NO:  
37345-9-II

AFFIDAVIT OF MAILING

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COUNTY OF COWLITZ ) ss.

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JACK SIMS  
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CASTLE ROCK, WA. 98611

and that said envelope contained the following:

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- 2. AFFIDAVIT OF MAILING

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