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NO. 59975.5

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

In Re the Personal Restraint of
GARTH D. SNIVELY,
Petitioner.

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PETITIONER'S BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION

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ASSIGNMENTS OF ERROR

- I. THE JUDGMENT ON THE CHARGE OF INDECENT LIBERTIES IS INVALID ON ITS FACE BECAUSE IT CONTAINS A PROVISION FOR COMMUNITY PLACEMENT WHEN THE LAW DID NOT PERMIT THE IMPOSITION OF SUCH A SENTENCE.
- II. THE GUILTY PLEA TO THE CHARGE OF INDECENT LIBERTIES IS INVALID AND MUST BE WITHDRAWN TO CORRECT A MANIFEST INJUSTICE WHERE PETITIONER WAS INCORRECTLY ADVISED THAT HE WOULD RECEIVE AT LEAST ONE YEAR OF COMMUNITY PLACEMENT AND IN FACT WAS SENTENCED TO TWO YEARS OF COMMUNITY PLACEMENT BUT THE LAW IN EFFECT DURING THE TIME OF THE ALLEGED OFFENSE DID NOT ALLOW THE COURT TO IMPOSE ANY TERM OF COMMUNITY PLACEMENT.
- III. THE GUILTY PLEA TO THE CHARGE OF CHILD MOLESTATION IS INVALID AND MUST BE WITHDRAWN TO CORRECT A MANIFEST INJUSTICE WHERE PETITIONER WAS INCORRECTLY ADVISED THAT HE WOULD RECEIVE ONLY ONE YEAR OF COMMUNITY PLACEMENT WHEN IN FACT THE LAW MANDATED HE BE SENTENCED TO TWO YEARS COMMUNITY PLACEMENT.
- IV. THE INVALID GUILTY PLEAS FOR INDECENT LIBERTIES AND CHILD MOLESTATION THAT WERE USED BY THE STATE AS PREDICATES TO PROVE THE PRIOR CONVICTION ELEMENT OF THE SEXUALLY VIOLENT PREDATOR STATUTE AT A SUBSEQUENT CIVIL COMMITMENT PROCEEDING ALSO RENDER THE JUDGMENT THAT PETITIONER IS A SEXUALLY VIOLENT PREDATOR VOID.
- V. PETITIONER'S DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO PROPERLY ADVISE PETITIONER PRIOR TO THE PLEA THAT THE LAW DID NOT PERMIT IMPOSING ANY COMMUNITY PLACEMENT ON THE INDECENT LIBERTIES CHARGE.

VI. PETITIONER'S DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO PROPERLY ADVISE PETITIONER OF THE MANDATORY TWO YEAR TERM OF COMMUNITY PLACEMENT THAT WOULD BE IMPOSED ON A GUILTY PLEA TO CHILD MOLESTATION, INSTEAD LEADING PETITIONER TO BELIEVE ONLY ONE YEAR OF COMMUNITY PLACEMENT WOULD BE IMPOSED.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where Petitioner was sentenced to two years of community placement when the law at the time of the alleged offense did not allow the court to impose any community placement, is the Judgment and Sentence invalid on its face? (Assignment of Error I).
2. Where Petitioner was inaccurately informed that he would receive a mandatory term of community placement upon his conviction of indecent liberties but in fact the law at the time of the alleged offense prohibited the court from imposing any community placement, did a plea of guilty upon such facts render the plea involuntary and thus invalid under State v. Ross? (Assignment of Error II).
3. Was Petitioner's plea of guilty to child molestation invalid despite the fact that he received the proper two year term of community placement where he was inaccurately advised that he would receive a minimum one year term of community placement prior to the plea, such that the inaccurate information rendered the plea unknowing and therefore invalid under State v. Hurt and State v. Ross? (Assignment of Error III).
4. Where Petitioner's prior convictions were used to prove a predicate element of the sexually violent predator (SVP) statute during a subsequent civil commitment proceeding, does the invalidity of the prior pleas of guilty render the SVP judgment invalid as well? (Assignment of Error IV).
5. Was Petitioner's defense counsel at the time of the prior convictions ineffective for failing to properly advise that the law did not authorize the imposition of any community placement? (Assignments of Error II and V).
6. Was Petitioner's defense counsel at the time of the prior convictions ineffective for failing to properly advise Petitioner that

a plea of guilty to child molestation would result in two years community placement, a full year more than Petitioner was advised he would receive? (Assignments of Error III and VI).

STATEMENT OF THE CASE

1. Nature of Action

Petitioner Garth D. Snively has submitted a Personal Restraint Petition alleging that he is being unlawfully held in custody by the Washington State Department of Corrections pursuant to an Order of Commitment obtained in violation of the United States and Washington Constitutions. RAP 16.4(c). The interests of justice require vacation of Petitioner's underlying convictions as well as the Order of Commitment entered against him on July 17, 2006 after a jury found him to be a sexually violent predator in a proceeding instituted by the State of Washington. He is incarcerated at the Special Commitment Center in Steilacoom, Washington.

2. Statement of Facts

The relevant record is attached as Appendixes I-IX to Declaration of Garth D. Snively in Support of Personal Restraint Petition filed herewith and are incorporated by this reference herein as though fully set forth.

Case 1: Indecent Liberties

On December 20, 1993, Petitioner Snively was charged by information in the Snohomish County Superior Court, No. 93-1-01790-6, with one count of indecent liberties. The information alleged the offense

occurred between July 2, 1984 through 1987. App. II to Dec. of Snively. On December 21, 1993, Petitioner signed a Statement of Defendant on Plea of Guilty and plead guilty as charged. Page 3, paragraph 6(j) of the Statement of Defendant on Plea of Guilty advised Petitioner that:

“...[I]n addition to confinement, the judge will sentence me to community placement for **at least 1 year.**”

App. III to Dec. of Snively (emph. ad.).

On the State’s Sentence Recommendation form signed by the prosecutor and attached to the Statement of Defendant on Plea of Guilty, the box next to “community placement” was checked. (App. III to Dec. of Snively) The length of community placement according to the form stated:

“The defendant shall serve a **one-year term of community placement** subject to the conditions set forth in R.C.W. 9.94A.120(8)(b)... .” (emph. ad.)

Petitioner was represented at the plea hearing by retained counsel John Tario, who also signed the Statement of Defendant on Plea of Guilty. Judge Thomas Wynne accepted Petitioner’s guilty plea to the crime as charged and signed the Statement of Defendant on Plea of Guilty.

At the plea colloquy on December 21, 1993, no mention of either the availability of community placement or the length of such a condition as a part of the sentence was made by either Judge Wynne, the deputy prosecutor present or Petitioner’s defense counsel. See App. IV to Dec. of Snively. Judge Wynne nevertheless accepted the plea.

Sentencing was set over until January 25, 1994 and Petitioner was released on his personal recognizance until that date. At the sentencing hearing, Judge Joseph Thibodeau sentenced Petitioner to 27 months confinement. Judgment and Sentence, App. V to Dec. of Snively. Paragraph 8 of the Judgment and Sentence stated:

“The defendant shall serve a **2 year term of community placement...**” (emph. ad.)

Despite the contradictions regarding the proper length of community placement contained in the Statement of Defendant on Plea of Guilty, the State’s Sentence Recommendation and the Judgment and Sentence, Petitioner was sentenced to two years of community placement for the crime of indecent liberties, occurring July 2, 1984 through 1987.

Case 2: Child Molestation

On October 8, 1993, Petitioner was charged by information in the Snohomish County Superior Court, No. 93-1-01420-6, with two counts of child molestation in the first degree. The information alleged the offenses occurred between July 1, 1990 through May 30, 1993. App. VI to Dec. of Snively. On October 25, 1993, Petitioner signed a Statement of Defendant on Plea of Guilty and plead guilty as charged. Page 3, paragraph 6(j) of the Statement of Defendant on Plea of Guilty advised Petitioner that:

“In addition to confinement, the judge will sentence me to community placement for **at least 1 year.**”

App. VII to Dec. of Snively (emph. ad.).

On the State's Sentence Recommendation form signed by the prosecutor and attached to the Statement of Defendant on Plea of Guilty, the box next to "community placement" was checked. (App. VII to Dec. of Snively) The length of community placement according to the form stated:

"The defendant shall serve a one-year term of community placement subject to the conditions set forth in R.C.W. 9.94A.120(8)(b)... ." (emph. ad.)

Petitioner was represented by retained counsel John Tario, who also signed the Statement of Defendant on Plea of Guilty. At the plea colloquy on October 25, 1993, no mention of the length of community placement was made by either Judge Gerald Knight, the deputy prosecutor or Petitioner's defense counsel. See App. VIII to Dec. of Snively. Judge Knight "accepted the pleas." App. VIII at 6.

Sentencing was set over until January 25, 1994 and consolidated with sentencing on No. 93-1-01790-6. At the sentencing hearing, Judge Joseph Thibodeau sentenced Petitioner to 130 months on each count, the sentences to run concurrently with each other and with the 27 months imposed on the indecent liberties charge. Judgment and Sentence, App. IX to Dec. of Snively. Paragraph 6 of the Judgment and Sentence stated:

"The defendant shall serve a two year term of community placement... ." (emph. ad.)

SVP PROCEEDING

As Petitioner neared April 10, 2003, the earned early release date on his underlying convictions, the Department of Corrections determined that Petitioner was a suitable candidate for referral as a sexually violent predator, and referred the matter to the Attorney General's Office to initiate commitment proceedings. By Petition filed April 23, 2003, the Attorney General alleged Petitioner met the definition of a sexually violent predator under R.C.W. 71.09 *et seq.* and should be involuntarily committed. See App. I to Dec. of Snively. The Petition for involuntary commitment alleged, in relevant part:

“1. Respondent has been convicted of the following sexually violent offense(s)... :

- a) On or about October 25, 1993, in Snohomish County, Washington, the Respondent was convicted of Child Molestation in the 1st Degree, 2 counts;
- b) On or about December 21, 1993, in Snohomish County, Washington, the Respondent was convicted of Indecent Liberties against a Child Under the Age of 14.”

Trial was held on July 10-17, 2006 in the Snohomish County Superior Court, Judge Richard Thorpe, presiding. The jury returned a verdict that the Petitioner was a sexually violent predator. On July 17, 2006, Judge Thorpe signed an Order of Commitment directing Petitioner's continued and indefinite custody. Currently, Petitioner is incarcerated at the Special Commitment Center on McNeil Island in Steilacoom, Washington. Petitioner was represented at the SVP trial by retained counsel, Royce Ferguson. Petitioner timely appealed the Order of

Commitment on July 27, 2006 based on constitutional due process and jurisdictional errors, and that appeal is currently pending before this Court, No. 58574-6-I. Petitioner is represented on appeal and in this Personal Restraint Petition by Tom P. Conom and Derek T. Conom.

PRIOR PRP ON VOLUNTARINESS OF PLEAS

Petitioner previously made a Motion for Relief from Judgment under CrR 7.8(b) in the Snohomish County Superior Court for both cases. The Motion was filed November 16, 2000 and pertains to both of Petitioner's 1994 convictions. On December 4, 2000, the State filed a Response to the Motion for Relief from Judgment and obtained an order from the Snohomish County Superior Court transferring Mr. Snively's motion to the Court of Appeals for consideration as a Personal Restraint Petition. On December 19, 2000, this Court converted the motion to a PRP, Nos. 47918-1-I and No. 47900-8-I. The cases were consolidated on July 2, 2001 under No. 47918-1-I. On May 8, 2002, a Order Dismissing Personal Restraint Petitions was entered. The Order did not reach the merits of the PRP but held only that the motion converted to a PRP was untimely.

TIMELINESS OF PRESENT PRP AND INAPPLICABILITY OF R.C.W. 10.73.140

No decision on the merits was ever made by the Court of Appeals on the prior PRP. The prior PRP has no preclusive effect under R.C.W. 10.73.140 because the present PRP is the first collateral challenge to the convictions as relied on in the SVP proceeding. As a matter of law, the

SVP proceeding “renewed” the function of the underlying convictions for purposes of the timeliness of the present PRP under R.C.W. 10.73.090 and 10.73.100. The relevant time period for filing the current PRP including the challenge to the underlying predicate convictions, commenced on the date of the SVP judgment. In re Paschke, 80 Wn.App. 439, 445, fn.2, 909 P.2d 1328 (1996). Thus, the current PRP is timely and R.C.W. 10.73.140 has no application. In re Brown, 157 Wn.2d 787, 117 P.3d 336 (2005).

As to case 1, the Judgment and Sentence is invalid on its face for imposing community placement at a time when the law did not permit such a sentence, R.C.W. 10.73.090(1), and the sentence imposed was in excess of the court’s jurisdiction, R.C.W. 10.73.100(5); In re Lund, 57 Wn.App. 668, 789 P.2d 325 (1990). As shown in the PRP, the Judgment and Sentence was based on an involuntary plea of guilty which must be withdrawn. Petitioner’s first PRP under the SVP is timely under R.C.W. 10.73.090(1) if filed within one year of the SVP Order of Commitment of July 17, 2006.

As to case 2, as shown in the PRP, the Judgment and Sentence was based on an involuntary plea of guilty which must be withdrawn. Petitioner’s first PRP under the SVP is timely under R.C.W. 10.73.090(1) if filed within one year of the SVP Order of Commitment and not later than July 17, 2007.

STANDARDS OF REVIEW

The standard of review for granting personal restraint petitions

based on constitutional error is whether Petitioner can show actual and substantial prejudice. In re Isadore, 151 Wn.2d 294, 88 P.3d 390, 392 (2004); In re Cook, 114 Wn.2d 802, 792 P.2d 506 (1990); In re Sims, 118 Wn.App. 471, 73 P.3d 398, 400 (2003).

The 2-prong standard of review for ineffective assistance of counsel claims is set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984), followed in Rompilla v. Beard, 125 S.Ct. 2456 (2005):

“First, the defendant must show that counsel’s performance was deficient. ... Second, the defendant must show that the deficient performance prejudiced the defense.”

Once Petitioner establishes the prejudice prong of his ineffective assistance of counsel claim, he thereby also satisfies the PRP prejudice standard. See State v. Horton/In re Horton, 116 Wn. App. 909, 68 P.3d 1145 (2003); Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002).

ARGUMENT

I. THE GUILTY PLEA TO THE CHARGE OF INDECENT LIBERTIES IS INVALID AND MUST BE WITHDRAWN TO CORRECT A MANIFEST INJUSTICE WHERE PETITIONER WAS INCORRECTLY ADVISED THAT HE WOULD RECEIVE AT LEAST ONE YEAR OF COMMUNITY PLACEMENT AND IN FACT WAS SENTENCED TO TWO YEARS OF COMMUNITY PLACEMENT BUT THE LAW IN EFFECT DURING THE TIME OF THE ALLEGED OFFENSE DID NOT ALLOW THE COURT TO IMPOSE ANY TERM OF COMMUNITY PLACEMENT.

A. The Judgment and Sentence is invalid on its face and in excess of the trial court’s jurisdiction.

The Judgment and Sentence (No. 93-1-01790-6) on the indecent

liberties charge is invalid on its face, R.C.W. 10.73.090(1), and the sentence imposed was in excess of the court's jurisdiction, R.C.W. 10.73.100(5). The law in effect at the time of the offense, R.C.W. 9.94A.120 (App. 1) did not authorize a sentencing court to impose any community placement as a condition of sentence but contrary to this lack of statutory authority, the Judgment and Sentence on its face imposes two years of community placement.¹ Under these circumstances, where the Judgment and Sentence is invalid on its face and the sentence imposed in excess of the court's jurisdiction there is no statute of limitations on collateral attack. In re Lund, 57 Wn.App. at 670 ("Since Lund was charged with committing the sex offenses *before* July 1, 1988, it was error to impose a term of community placement as a condition of Lund's determinate sentence." (Court's emph.)); *cf.* In re Reed, 136 Wn.App. 352, 149 P.3d 415, 417 (2006) (quoting In re Hinton, 152 Wn.2d 853, 860, 100 P.3d 801 (2004) ("A petitioner is entitled to relief due to constitutional error if a judgment is facially invalid because it shows conviction for a non-existent crime.")).

Sentencing Law of 1984-1987 Did Not Permit Mandatory Community Placement

Because the information filed against Petitioner alleged an offense date of July 2, 1984 through 1987, the proper sentencing law that should

¹ The State itself, in its Response to Mr. Snively's Personal Restraint Petition, admitted that "community placement should not have been imposed for this crime [at] all." State's Response at 9. (Ct. App. No. 47900-8-I).

have been used to calculate a potential sentence was the version of R.C.W. 9.94A.120² in effect during the years of 1984-1987.

“Community placement” as it exists today did not exist between 1984-1987, the years in which Petitioner was alleged to have committed the offense of indecent liberties. The term first appeared in the law in 1988.³ Before 1988, R.C.W. 9.94A.120 only contemplated “community supervision” but did not even make that mandatory. R.C.W. 9.94A.120(8)(b), the provision cited in the State’s Sentence Recommendation to mandate one year of community placement, did not exist between 1984-1987. R.C.W. 9.94A.120, Laws of 1987, ch. 456, sec. 2. App. 1 to Brief. Section 8(b) came into existence only after July 1, 1988, when the law was changed to provide:

“When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense... committed on or after July 1, 1988, unless a condition is waived by the court, the sentence shall include, in addition to the other terms of the sentence, a one-year term of community placement”

R.C.W. 9.94A.120(8)(b), Laws of 1988, ch. 153, sec. 2, eff. July 1, 1988. App. 2 to Brief.

The law did not contemplate the concept of community placement

² The current version of R.C.W. 9.94A.120 is now codified at R.C.W. 9.94A.505.

³ Laws 1988, ch. 153, sec. 2, effective July 1, 1988. The 1988 version of R.C.W. 9.94A.030(4) defined “Community placement” as “a **one-year** period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned early release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.” (emph. ad)

at the time Petitioner was alleged to have committed indecent liberties, and the law certainly did not mandate any term of community placement, let alone the two years of community placement imposed by the sentencing court on January 27, 1994. In fact, the law did not mandate two years of community placement until years later, in 1990, when R.C.W.

9.94A.120(8)(b) was amended to read:

“When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense... committed on or after July 1, 1990, the court shall in addition to the other terms of the sentence, sentence the offender to community placement for two years... .”

R.C.W. 9.94A.120(8)(b), Laws of 1990, ch. 3, sec. 705, eff. July 1, 1990. App. 3 to Brief.

Under the statutory framework discussed above, the misinformation given to Petitioner becomes glaring. With regard to the Statement of Defendant on Plea of Guilty used, it is clear that the form was crafted for use after 1987. The language of the form uses the term “community placement” which did not exist before 1988. And the form states that “at least 1 year” of community placement is required. Between 1988 and 1990, only one year of mandatory community placement could be imposed. After July 1, 1990, one or two years could be imposed, depending on the nature of the offense. In any event, it is very clear that the wrong form was used and Petitioner was given totally inaccurate information.

Equally inaccurate was the State’s Sentence Recommendation that

specifically stated Petitioner was to receive “1 year” of community placement and even cited R.C.W. 9.94A.120(8)(b) as authority for the imposition of one year. This form was created subsequent to the 1984-1987 charge and similarly conveyed false information to Petitioner. R.C.W. 9.94A.120(8)(b) did not even exist between 1984-1987.

The Judgment and Sentence form used was also inaccurate and thus invalid on its face. The form allows the judge to write in the correct term of mandatory community placement. For offenses committed after July 1, 1990, this term would be two years. For offenses committed between 1984 and 1987, such as the one Petitioner plead guilty to, no community placement could be imposed.

This Court confronted an identical situation in In re Lund. There, Lund was convicted of two counts of indecent liberties alleged to have occurred before July 1, 1988, the effective date of the mandatory one year term of community placement under R.C.W. 9.94A.120(8)(b). The Court of Appeals, in a published opinion, determined that “according to the plain language of the statute, a court **cannot impose a 1-year term of community placement as a condition of the sentence unless the offenses specified in the statute were committed on or after July 1, 1988.**” Lund, 57 Wn.App. at 670 (emph. ad.). Since Lund’s charging date, like Petitioner’s, occurred “**before** July 1, 1988, it was error to impose a term of community placement... .” Id. (Court’s emph.). Lund is directly on point and equally applicable here. In Petitioner’s case, the

charging date was before 1988, the date mandatory community placement became effective. And while Lund erroneously received only one year of community placement, here Petitioner received two years. The error is plain that the law did not allow the sentence imposed on Petitioner here and thus the Judgment is invalid on its face.

B. Petitioner is not time-barred from bringing this PRP and this Court may consider the validity of Petitioner's underlying conviction in circumstances other than those in Part I A.

Generally, a PRP filed more than one year after the judgment becomes final is barred by R.C.W. 10.73.090(1). In re Reed. However, where the judgment and sentence is invalid on its face, the PRP may be brought more than a year after the judgment becomes final. R.C.W. 10.73.090. In addition, the one year deadline to file a PRP does not apply where the sentence imposed was in excess of the court's jurisdiction. R.C.W. 10.73.100(5). In Petitioner's case, both of the above exceptions apply to the current PRP, and it is therefore timely. See Part I A, supra.

In a case where a PRP was considered many years after the date of the original criminal convictions and the convictions were used as predicates to civil commitment under the SVP statute, the Court of Appeals in In re Paschke, 80 Wn.App. 439, 909 P.2d 1328 (1996), held that the PRP was nevertheless timely. Paschke was convicted in 1972 and 1979 of separate sexually violent crimes and was incarcerated on those offenses until 1994, when he was confined as an SVP. Paschke filed a PRP seeking to collaterally attack his prior convictions. While the Court

ultimately denied the PRP on its merits, it specifically held that the PRP was not untimely:

“The State argues Mr. Paschke’s challenge to his prior convictions is untimely, citing R.C.W. 10.73.090(1). Under that statute, ‘[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.’ It would appear Mr. Paschke’s challenge is untimely **only if it is viewed as a challenge to the restraint imposed in those prior convictions. Here, Mr. Paschke is seeking relief from restraint imposed as a result of the finding that he is a sexually violent predator. While that finding was based, in part, on the prior convictions, the one year time limit commences as of the date of the sexual predator finding.”**

In re Paschke, 80 Wn.App. at 445, fn. 2 (emph. ad.).

As in Paschke, here Petitioner challenges the Order of Commitment finding him to be a sexually violent predator. Functionally, the SVP proceeding has the legal effect of “renewing” the use of the predicate underlying convictions and so to the extent the one year period of review is applicable, that period began as of July 17, 2006. Under the analysis of Paschke the deadline for timely filing the PRP is July 17, 2007. Petitioner is well within this time limit. See also, State v. O’Connell, ___ Wn.App. ___, 152 P.3d 349, 354-55 (2007) (“The mandate on this final appeal has not been issued, and Mr. O’Connell’s personal restraint petition challenges the convictions from the trial that is subject of this appeal. Accordingly, his personal restraint petition is timely. R.C.W. 10.73.090(3)(b).”).

The holding in Paschke permits Petitioner to bring this PRP as a

challenge to the Order of Commitment imposed in the SVP proceeding. Because Petitioner's underlying criminal convictions formed the basis for civil commitment as a sexually violent predator, this PRP also allows this Court to consider the validity of those underlying convictions. Brock v. Weston, 31 F.3d 887 (9th Cir. Wash. 1994); Young v. Vaughn, 83 F.3d 72 (3d Cir. 1996), *cert. den.*, Abraham v. Young, 519 U.S. 944 (1996).

Brock involved a federal habeas corpus action of an inmate confined pursuant to a Washington judgment that he was a SVP. Brock was confined as a SVP in 1991 because of a predicate conviction in 1974 for second degree assault. 31 F.3d at 888-89. Brock petitioned the district court for habeas corpus, arguing that his 1974 conviction was based on an "involuntary and uninformed plea agreement." Id. The federal district court dismissed Brock's petition for lack of jurisdiction but the 9th Circuit reversed, holding that the district court "should have liberally construed [the habeas petition] as an attack on his 1974 conviction **in the context of an attack on his commitment under the [SVP] Act.**" 31 F.3d at 890 (Court's emph.). Because "the prior conviction is a necessary predicate to the confinement," the Court held that "**it is even more appropriate for a court to examine an expired conviction** [where that conviction is used as a predicate to confine a person as a SVP]... ." Id. (emph. ad.).

In Young, the Third Circuit Court of Appeals followed the analysis of Brock and held that an inmate could attack the validity of his prior conviction in a habeas petition where that prior conviction was used to

enhance a current sentence. “We hold that Young may attack his 1989 conviction in the context of his challenge to the sentence he is presently serving.” 83 F.3d at 79. The Young court went a step further than Brock when it held that Young could attack the validity of his prior conviction even where the prior conviction only enhanced the current sentence he was serving, but did not act as a predicate for the current sentence. Id. Under the analysis of Brock and Young, this PRP is the appropriate vehicle for challenging Petitioner’s SVP commitment, and through this PRP it is proper to contest the validity of Petitioner’s prior convictions.⁴

C. Petitioner was never informed that the sentencing law in effect at the time of the alleged offense did not allow the imposition of any community placement and therefore the plea was involuntary.

When Petitioner plead guilty to indecent liberties based on an alleged offense date of July 2, 1984 through 1987, he was never correctly advised that he law did not allow the imposition of any community placement and in fact was incorrectly informed on multiple occasions before the plea that he would be required to serve a term of community placement. The misinformation regarding the term of community placement rendered Petitioner’s plea involuntary.

⁴ “The right to petition for postconviction relief is of fundamental constitutional importance. It enables those unlawfully incarcerated to obtain their freedom. Access of prisoners to the courts for the purpose of presenting their complaints should not be denied or obstructed.” State v. Hurt, 107 Wn.App. 816, 27 P.3d 1276, 1281 (2001) (citing Wolff v. McDonnell, 418 U.S. 539, 578 (1974)).

1. Statement of Defendant on Plea of Guilty.

Page 3, paragraph 6(j) of the Statement of Defendant on Plea of Guilty incorrectly informed Petitioner that he would be placed on community placement “for at least 1 year.” App. III to Dec. of Snively. This paragraph also specifically provided for the striking of the paragraph if it was not applicable. The paragraph was not stricken nor initialed by the judge to indicate that it did not apply.

2. State’s Sentence Recommendation.

The State told Petitioner that upon his plea of guilty to the charge of indecent liberties, he “shall serve a one-year term of community placement.” App. III to Dec. of Snively. On the Offender Scoring Sheet attached to the State’s Sentence Recommendation, Part II, sub. C read: “One year of community placement must be served following release from state prison (R.C.W. 9.94A.120(8)).”

3. Plea Colloquy.

At the plea hearing of December 21, 1993, no one raised the issue of community placement. Judge Wynne did not tell Petitioner that he was not subject to mandatory community placement. The Judge did not review the Statement of Defendant on Plea of Guilty with Petitioner paragraph by paragraph – if he had done so, community placement would have been addressed. Nevertheless, Judge Wynne “accept[ed] the plea, finding it [was] made freely and voluntarily, and the defendant **ha[d] full knowledge of the potential consequences**” when this was not true.

4. Judgment and Sentence.

Paragraph 8 of the Judgment and Sentence was checked, and it stated: “The defendant shall serve a **2 year term of community placement...**” The paragraph on the form actually had a blank space where the party preparing the document could write a number, indicating how many years of community placement was to be imposed. Thus, the sentencing afforded yet another opportunity to address the issue of community placement and recognize the error before any sentence was imposed. In any event, Judge Thibodeau signed the Judgment and Sentence and imposed upon Petitioner a sentence of two years community placement.

It is a basic rule of law that a defendant pleading guilty must be sentenced under the sentencing laws in effect on the date the offense was committed. R.C.W. 9.94A.345 (“Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.”); State v. Adams, 119 Wn.App. 373, 82 P.3d 1195 (2003). Here, however, Petitioner not only was misinformed as to the length of mandatory community placement that he could receive – he was in fact sentenced to mandatory community placement when such a condition did not exist in the law at the time of the alleged offense. The misinformation regarding the proper sentence rendered the plea involuntary.

Where Petitioner was misinformed as to the proper term of

community placement, his guilty plea was involuntary and eligible for withdrawal. Even in a situation where the sentencing court *had* lawful authority to impose community placement, see Part II, infra, the plea is involuntary where there is misinformation regarding this direct consequence of a plea. State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996); State v. Miller, 110 Wn.2d 528, 756 P.2d 122 (1988).

The misinformation given to Petitioner regarding the length of community placement – he was told he would receive “at least one year” and “one year,” respectively, and in fact received “two years” of community placement – violated Petitioner’s due process rights under Art. I, sec. 3 of the Washington Constitution as well as federal due process under the 5th and 14th Amendments. Therefore, his plea of guilty to indecent liberties based upon crucial misinformation regarding the sentencing consequences was constitutionally involuntary and must be withdrawn as a manifest injustice. State v. Ross, 129 Wn.2d at 284 (“An involuntary plea produces a manifest injustice to permit withdrawal.”) (cit. omit). The plea must be withdrawn and the conviction vacated.

II. THE GUILTY PLEA TO THE CHARGE OF CHILD MOLESTATION IS INVALID AND MUST BE WITHDRAWN TO CORRECT A MANIFEST INJUSTICE WHERE PETITIONER WAS INCORRECTLY ADVISED THAT HE WOULD RECEIVE ONLY ONE YEAR OF COMMUNITY PLACEMENT WHEN IN FACT THE LAW MANDATED HE BE SENTENCED TO TWO YEARS COMMUNITY PLACEMENT.

Due process requires that any plea of guilty must be made knowingly, intelligently and voluntarily before it passes constitutional

muster. Boykin v. Alabama, 395 U.S. 238 (1969); In re Isadore, 151 Wn.2d at 297-98; State v. Mendoza, 157 Wn.2d 582, 141 P.3d 49 (2006). There must also be “**an affirmative showing** that a defendant entered a guilty plea intelligently and voluntarily.” State v. Ross, 129 Wn.2d at 284 (citing State v. Barton, 93 Wn.2d 301, 304, 609 P.2d 1353 (1980); Boykin v. Alabama) (emph. ad.). Where there is misinformation regarding sentencing consequences, the guilty plea is not made knowingly. State v. Miller, 110 Wn.2d at 528. Criminal Rule 4.2(d) states that a “court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the **consequences of the plea.**” (emph. ad.) And Criminal Rule 4.2(f) permits withdrawal of the plea of guilty “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” “[F]ailure to comply fully with CrR 4.2 requires that the defendant’s guilty plea be set aside and his case remanded so that he may plead anew.” Wood v. Morris, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976).

A defendant bears the burden of proving a manifest injustice, which is defined as injustice that is “obvious, directly observable, overt, not obscure.” State v. Ross, 129 Wn.2d at 283-84 (quoting State v. Saas, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)). An involuntary plea of guilty produces a manifest injustice sufficient to permit withdrawal of the plea. Ross, 129 Wn.2d at 284. See also, State v. Turley, 149 Wn.2d 395, 398-99, 69 P.3d 338 (2003) (quoting State v. Taylor, 83 Wn.2d 594, 598, 521

P.2d 699 (1974) (“A showing that the plea was involuntary **independently** establishes manifest injustice, requiring the trial court to permit a defendant to withdraw the guilty plea.”) (emph. ad.).

Although the law does not require a defendant be notified of every possible consequence of his guilty plea to render it voluntary, he must be informed of all “direct consequences.” State v. Ross, 129 Wn.2d at 284. Mandatory community placement constitutes a direct consequence of a guilty plea, because it produces a “definite, immediate and automatic effect on a defendant’s range of punishment.” Id.; State v. Hurt, 107 Wn.App. 816, 27 P.3d 1276, 1283 (2001), *overruled on other grounds*, In re Carlstad, 150 Wn.2d 583, 80 P.3d 587 (2003). Therefore, the failure to notify a defendant that he will be subject to mandatory community placement if he pleads guilty will render a plea involuntary and invalid. Turley, 149 Wn.2d at 399.

In addition to the requirement that a defendant be made aware of the direct consequences of a plea, a plea is also involuntary in the constitutional sense unless the defendant has adequate notice of the charges as well as adequate “**understanding** of the charges against him.” In re Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987) (emph. ad.). See also, In re Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (“[A] guilty plea cannot be truly voluntary ‘unless the defendant possesses an **understanding of the law** in relation to the facts.’”) (quoting McCarthy v. U.S., 394 U.S. 459, 466 (1969) (emph. ad.)).

In State v. Ross, the defendant moved to withdraw his pleas of guilty to three counts of second degree child rape on the basis that he was never informed that he would be required to serve a mandatory one year community placement sentence, and therefore his pleas were involuntary: 129 Wn.2d at 280. Ross pleaded guilty to crimes alleged to have occurred before July 1, 1990, while the law in effect at the time carried a mandatory one year term of community placement. See Part I, supra for discussion of community placement statute. Ross was sentenced to one year of community placement.

The case “stem[med] from the use of an outdated plea form” that lacked any community placement warning. 129 Wn.2d at 282. Not only did the plea form in Ross lack an explicit warning of community placement, but the trial court did not address the issue of community placement with Ross “during oral colloquy” at the plea hearing. 129 Wn.2d at 283. While the trial court denied the motion to withdraw the pleas, finding that the outdated plea form “substantially complied” with the correct law regarding community placement, the Supreme Court of Washington disagreed and reversed, holding that Ross was entitled to withdraw his involuntary pleas. Id.

The Court framed the issue as whether Ross understood the consequences of his plea. 129 Wn.2d at 284. Since a defendant need only be informed of “direct consequences” of the plea, that is, consequences that “definite[ly], immediate[ly] and largely [have an] automatic effect on

the range of the defendant’s punishment,” the Court proceeded to consider the question of whether mandatory community placement constituted a “direct consequence” of a plea. 129 Wn.2d at 284 (quoting Barton, 93 Wn.2d at 305). Answering that question in the affirmative, the Court held that because “community placement imposes a punishment” and because a defendant “will definitely serve” the community placement, it produces a definite, immediate and automatic effect on the range of punishment. 129 Wn.2d at 284-85.⁵

Holding that the community placement was a direct consequence, the Court next inquired whether Ross received adequate sentencing information to render his plea voluntary. “The State bears the burden of proving the validity of a guilty plea.” Ross, 129 Wn.2d at 287 (quoting Wood v. Morris, 87 Wn.2d at 507). Using sources such as the plea form itself, the transcript of the plea colloquy or clear and convincing extrinsic evidence, “knowledge of the direct consequences of a guilty plea may be satisfied.” Id. (cit. omit).

In Ross, “there [was] no dispute the record lack[ed] any evidence [Ross] was advised of the specific consequence of community placement.” Id. Simply being advised of the maximum sentence allowed by law was

⁵ Ross follows legal precedent dating back over three decades that states “a mandatory minimum term is a direct consequence of a guilty plea of which the accused **must be informed prior to entering his plea.**” Wood v. Morris, 87 Wn.2d at 513 (emph. ad.) (citing state and federal cases holding the same). Expanding on this precedent, Ross holds that mandatory community placement, like a mandatory minimum term of confinement, is also a direct consequence of a plea of guilty.

“insufficient to assure [Ross’s] understanding of the direct consequence of community placement.” Id. Importantly, the Court made note of the fact that Ross “would not have agreed to such a plea” if he would have known of the term of community placement. 129 Wn.2d at 288. Therefore, “without evidence of an explicit explanation of mandatory community placement,” the pleas were involuntary and eligible to be withdrawn. Id.

While Ross dealt with the situation where the plea form entirely lacked a community placement warning, the case of State v. Hurt involved a nearly identical situation to that of Petitioner. In Hurt, a defendant plead guilty to the charge of vehicular homicide. The law in effect at the time of the offense mandated a two year term of community placement. However, on the plea form Hurt was advised that the court would impose community placement “of at least one year.” Hurt, 27 P.3d at 1278. The trial court “made a bench finding that the defendant understood the consequences of the plea” but “did not address the sentencing range [including community placement] at oral colloquy.” 27 P.3d at 1283. The court sentenced Hurt to two years of community placement. Id.

The Court of Appeals held that under these facts, “this results in an involuntary plea as a **matter of law.**” Id. (emph. ad.) The plea form conveyed inaccurate information about the mandatory minimum sentence, and “Mr. Hurt concluded this meant that one year was the minimum.” 27 P.3d at 1282.

The State conceded that “a voluntary guilty plea requires that a

defendant be told about mandatory community placement” and that the form used in Hurt was “old” and inaccurate, but nevertheless argued that Hurt’s plea was voluntary because at least the plea form, unlike the form used in Ross, put Hurt “on notice that he might get two years” of community placement. Id.

The Court of Appeals rejected the State’s argument. “The defendant must be informed of all direct consequences of a guilty plea.” 27 P.3d at 1283 (citing CrR 4.2(d); Wood v. Morris, 87 Wn.2d at 510). “Absent correct information of the consequences, the defendant is incapable of entering a knowing, intelligent, and voluntary plea.” Id. (citing Ross, 129 Wn.2d at 288). The Court of Appeals reversed the trial court’s dismissal of Hurt’s motion to withdraw his plea.

The Washington Supreme Court revisited the issue of community placement and voluntariness of guilty pleas in In re Isadore. In that case, Isadore pleaded guilty to burglary and assault, crimes which carried a mandatory community placement sentence. 151 Wn.2d at 296-97. The prosecutor and defense counsel were unaware that mandatory community placement applied and the prosecutor affirmatively stated to the trial court that no community placement applied. The court did not sentence Isadore to any community placement. Thereafter, the State realized community placement did in fact apply and moved the trial court to amend Isadore’s sentence to include one year of community placement, and the trial court granted the State’s motion. Isadore then filed a PRP in the Court of

Appeals, which denied the petition. The Washington Supreme Court granted review and granted the PRP. 151 Wn.2d at 297.

The Court first considered whether Isadore could bring a proper PRP, since the period for direct appeal had already expired by the time the community placement was added on to his sentence. Holding the PRP was timely, the Court held that since “he has had no previous opportunity for state judicial review... Isadore need only show that he is restrained and that his restraint is unlawful.” 151 Wn.2d at 300.

Reaffirming Ross, the Court began by stating: “we adhere to the analytical framework applied in Ross” 151 Wn.2d at 302. Since mandatory community placement is a direct consequence of a plea, the failure to inform a defendant of such a consequence renders his plea involuntary. In Isadore, however, the State argued that Isadore should not be allowed to withdraw his plea unless he establishes that “the misinformation was material to his decision to plead guilty.” 151 Wn.2d at 301. The Supreme Court unanimously rejected this argument, holding:

“We decline to adopt an analysis that requires the appellate court to inquire into the materiality of mandatory community placement in the defendant’s subjective decision to plead guilty.”

In re Isadore, 151 Wn.2d at 302. See also, State v. Mendoza, 157 Wn.2d 582, 590-91, 141 P.3d 49 (2006) (“We decline to engage in a subjective inquiry into the defendant’s risk calculation and the reasons underlying his or her decision to accept the plea bargain.”).

Thus, the rule of Isadore is that appellate courts must engage in a strictly objective analysis when reviewing the voluntariness of guilty pleas. That analysis consists of reviewing the objective evidence, such as the plea

statement and transcript of the plea colloquy, to determine if the defendant had knowledge of all direct consequences of the plea of guilty. If there was misinformation of such a consequence, then the plea of guilty is involuntary and may be withdrawn, **regardless of how subjectively important or material the misinformation was to the defendant's decision to plead guilty.** If a defendant was misinformed regarding the proper length of a term of mandatory community placement, the plea is involuntary, "regardless of whether the actual sentencing range is lower or higher than anticipated." Mendoza, 157 Wn.2d at 591.

Using the legal framework set forth in Ross and Hurt, it is clear that Petitioner's plea of guilty to child molestation was involuntary. Like Hurt, the Statement of Defendant on Plea of Guilty form used by the Snohomish County Superior Court was inaccurate, in that it advised Petitioner that he would be subject to "at least one year" of community placement, rather than the mandatory two years. Like both Ross and Hurt, neither the prosecutor, defense counsel, or judge recognized the erroneous information given to Petitioner, nor made any attempt to properly advise of the required term of community placement. Like Ross and Hurt, no mention of community placement was made at the plea colloquy. Like Ross and Hurt, the statutorily mandated term of community placement was in fact imposed despite the misinformation (one year in Ross, two years in Hurt and Petitioner's case). Like Ross, "the record lacks any evidence [Petitioner] was advised of the *specific* [two-year] consequence of

community placement.” Ross, 129 Wn.2d at 287 (emph. ad.). Like Hurt, nothing in the record “informed Mr. Hurt that community placement would be at least two years.” 27 P.3d at 1283. And like Ross and Hurt, Petitioner “would not have agreed to plead guilty” had he been properly informed as to the two year term of community placement. See Dec. of Snively at p. 3, para. 15.

The inescapable conclusion, as in Ross and Hurt, is that Petitioner’s pleas of guilty were involuntary. There was no affirmative showing that the pleas were made with full knowledge and an adequate legal understanding of the direct consequences resulting from the pleas. Boykin v. Alabama; State v. Ross; State v. Hurt. Therefore, Petitioner should be allowed to withdraw the pleas of guilty in order to correct the manifest injustice and due process violations resulting from the involuntary pleas. State v. Ross; State v. Hurt; CrR 4.2(f).

III. THE INVALID GUILTY PLEAS FOR INDECENT LIBERTIES AND CHILD MOLESTATION THAT WERE USED BY THE STATE TO PROVE THE PRIOR CONVICTION ELEMENT OF THE SEXUALLY VIOLENT PREDATOR STATUTE AT A SUBSEQUENT CIVIL COMMITMENT PROCEEDING ALSO RENDER THE JUDGMENT THAT PETITIONER WAS A SEXUALLY VIOLENT PREDATOR INVALID.

A. Petitioner is entitled to the remedy of withdrawal of his guilty pleas on the prior convictions.

“If the defendant was not informed that the charge was subject to a mandatory community placement condition, the defendant is entitled to a remedy.” State v. Turley, 149 Wn.2d at 395 (citing State v. Ross, 129

Wn.2d at 288). Similarly, where the proper length of community placement was not accurately conveyed prior to the entry of the plea, the law permits withdrawal. State v. Hurt, 27 P.3d at 1284. The Washington Supreme Court has held that “in such... situation[s], we allow the defendant the choice between two possible remedies.” Turley, 149 Wn.2d at 395.

“[W]e hold that where the... defendant was not informed of the sentencing consequences of the plea, the defendant must be given the initial choice of a remedy to specifically enforce the agreement **or withdraw the plea.**”

State v. Miller, 110 Wn.2d at 536 (emph. ad.) (quoted in Turley, 149 Wn.2d at 395).

The court “must, of course, give considerable weight to [defendant’s] preference [of specific performance or withdrawal].” Hurt, 27 P.3d at 1284. The “defendant’s choice of remedy controls, unless there are compelling reasons not to allow that remedy.” State v. Ross, 129 Wn.2d at 288 (Durham, J. concurring) (citing In re James, 96 Wn.2d 847, 849, 640 P.2d 18 (1982)).

Here, Petitioner was misinformed in both cases as to the direct consequences of the pleas, see Parts I and II, supra, and therefore may elect the remedy of withdrawal of both of those pleas. Petitioner has elected the remedy of withdrawal on both pleas. Personal Restraint Petition at 5.

B. Once the pleas on the prior convictions have been withdrawn, the SVP judgment also becomes invalid.

The SVP statute, R.C.W. 71.09 *et seq.*, declares that in order to

“civilly commit a person [under Washington’s SVP Act], the State must prove beyond a reasonable doubt that the person is a sexually violent predator.” In re Kelley, 133 Wn.App. 289, 135 P.3d 554, 555 (2006).⁶

According to the Petition for involuntary civil commitment filed in Petitioner’s case, the State alleged that “Respondent has been convicted of [two] sexually violent offense(s).” See Petition, App. I to Dec. of Snively. Therefore, because the State relied on both of Petitioner’s prior convictions as predicates for declaring him an SVP and because those convictions were obtained upon unconstitutional pleas of guilty, the SVP judgment is null and void. Since both convictions were predicates of the SVP judgment, vacation as to either or both results in the invalidity of the SVP Order of Commitment.

In State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant was convicted of three counts of first degree rape. At a subsequent trial, the defendant was convicted of first degree murder occurring before the rapes in the first case. The State sought the death penalty and, using the prior rape convictions, the jury imposed a sentence of death. Gregory appealed and the Washington Supreme Court reversed. 147 P.3d at 1248.

Analyzing the effect of the prior rape convictions on the jury’s

⁶ The definition of a “sexually violent predator” under R.C.W. 71.09.020(16) is:

“any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined to a secure facility.”

death penalty deliberations, the Court noted:

“If the rape convictions had not existed at the time of the penalty phase, then the jury would not have considered them when deciding whether sufficient mitigating circumstances existed to avoid the death penalty.”

147 P.3d at 1248.

Because the rape convictions that were overturned directly contributed to the jury’s imposition of the death penalty in the murder case, the death penalty also had to be overturned.

“Because we separately reverse his rape convictions, and evidence of those convictions was presented to the jury in the penalty phase of the aggravated murder trial, we reverse the death sentence.”

147 P.3d at 1257.

Like Gregory, the prior convictions in Petitioner’s case were wrongly used as predicates by the State to take adverse action against Petitioner. Unlike Gregory, however, here the use of Petitioner’s prior convictions was statutorily and constitutionally required to establish his status as an SVP. Without the use of those convictions, he could not be declared an SVP. “With an enhanced sentence, the prior conviction only lengthens the period of confinement; here, the prior conviction is a **necessary predicate to the confinement.**” Brock v. Weston, 31 F.3d at 890 (emph. ad.). See also, Wilson v. Blabon, 402 F.2d 963, 964-65 (9th Cir. 1968) (upholding challenge to confinement as “mentally disordered sex offender” where predicate criminal conviction found unconstitutional).

The use of Petitioner’s invalid prior convictions had an extremely

prejudicial effect on him, since SVP committees can be involuntarily confined for a potentially indefinite length of time. Because those prior convictions of Petitioner are involuntary and invalid, they cannot be used as predicates in the State's action to commit Petitioner as an SVP. As the use of the prior convictions is required to commit a person as a sexually violent predator, it is clear that the Order of Commitment declaring Petitioner a SVP must be declared invalid.

IV. PETITIONER'S DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE PETITIONER THAT THE LAW DID NOT PERMIT THE IMPOSITION OF ANY COMMUNITY PLACEMENT ON THE INDECENT LIBERTIES CHARGE PRIOR TO THE ENTRY OF THE PLEA.

Petitioner was represented on the charge of indecent liberties by retained counsel, John Tario. At the hearing on December 21, 1993, Judge Wynne accepted Petitioner's plea of guilty and Petitioner was subsequently sentenced to 27 months of confinement with an additional two years of community placement. As discussed above, that Judgment was invalid on its face and the plea was involuntary. See Part IA, C. At no time did Mr. Tario inform Petitioner that his plea of guilty could not subject him to any community placement because the law did not authorize the imposition of community placement for crimes occurring between 1984 and 1987. Dec. of Snively, p. 2, para. 8. Therefore, the sentence that was imposed essentially doubled from 27 months to a term of 51 months (the original term plus two years of community placement).

A simple check of the 1987 version of R.C.W. 9.94A.120 by Mr. Tario would have revealed the legal error and allowed it to be corrected before any disposition of the case. Instead, the error cost Petitioner two years of additional punishment by erroneously allowing community placement to be added on to the original sentence imposed. Because of this failure and the failure to properly advise Petitioner, Mr. Tario was constitutionally ineffective.

A claim of error may be raised for the first time on appeal under RAP 2.5(a)(3) if it is a manifest error affecting a constitutional right.⁷ State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Constitutional errors, such as ineffective assistance of counsel, are treated specially under RAP 2.5(a)(3) because they often result in serious injustice to the accused. Id.; State v. Gerdtz, ___ Wn.App. ___, 150 P.3d 627, 630 (2007).

Under Strickland, defense counsel is ineffective where his performance is deficient and that deficient performance prejudices the defendant. 466 U.S. 668; State v. Acevedo, 137 Wn.2d 179, 198, 970 P.2d 299 (1999).

The deficiency of counsel's performance is measured against an "objective standard of reasonableness" ... "under prevailing professional norms." Strickland, 466 U.S. at 688. The Washington courts have stated the test as "whether lawyers of ordinary training would consider the tactics

⁷ Petitioner did not raise a claim of ineffective assistance of counsel in any post-trial proceeding, including the prior PRP.

incompetent.” State v. Henderson, 26 Wn.App. 187, 193, 611 P.2d 1365 (1980) (citing State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978)). Prejudice results where “there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 694).

“Ineffective assistance is a manifest injustice sufficient to support a successful challenge to the voluntariness of a guilty plea.” State v. Hurt, 27 P.3d at 1284 (citing State v. Saas, 118 Wn.2d at 42). “In a plea bargaining context, effective assistance of counsel... requires that counsel actually and substantially assist his... client in deciding whether to plead guilty.” State v. Knotek, 136 Wn.App. 412, 149 P.3d 676, 685 (2006).

Here, it cannot be seriously contended that Mr. Tario “actually and substantially” assisted Petitioner. Had counsel actually assisted Petitioner, he would have advised Petitioner that the court could not impose any community placement at all. Such information would certainly have helped Petitioner make a decision on whether to plead guilty. Instead, Mr. Tario’s performance fell below the objective standard of reasonableness that demands, at minimum, a lawyer understand and be able to explain the legal consequences of a plea to his client. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” RPC 1.1.

The deficient performance prejudiced Petitioner where, but for Mr. Tario's professional failure to properly advise Petitioner, the result of the proceeding certainly would have been different. See Dec. of Snively, p. 2, para. 9 ("Had I been correctly informed that the court had no legal authority to impose any community placement in my sentence I would not have agreed to plead guilty.").

V. PETITIONER'S DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY ADVISE PETITIONER OF THE MANDATORY TWO YEAR TERM OF COMMUNITY PLACEMENT THAT WOULD BE IMPOSED ON A GUILTY PLEA TO CHILD MOLESTATION, INSTEAD LEADING PETITIONER TO BELIEVE ONLY ONE YEAR OF COMMUNITY PLACEMENT WOULD BE IMPOSED.

Petitioner was also represented by Mr. Tario on the child molestation charges and pleas of October 25, 1993. In this case, the law mandated the imposition of two years of community placement. Instead, Petitioner's counsel was ineffective for failing to properly advise Petitioner of the actual term of community placement he faced upon a plea of guilty (two years instead of one).

Petitioner was never told before his sentence was imposed that he was in fact facing two years of mandatory community placement should he plead guilty. At times he was alternately advised of "*at least one year*" and "one year" of community placement but it was not until Judge Thibodeau actually sentenced him to two years of community placement on January 27, 1994 that he was informed of the two year requirement. Apps. VII, IX to Dec. of Snively.

Mr. Tario was constitutionally ineffective under the Strickland test for ineffective assistance. His performance was deficient in failing to properly advise Petitioner he was facing a mandatory two year term of community placement should he plead guilty, contrary to the Statement of Defendant on Plea of Guilty and State's Sentence Recommendation, which indicated only one year of community placement. The misinformation caused Petitioner, like the defendant in State v. Hurt to "conclude[] this meant that one year was the minimum." 27 P.3d at 1282.

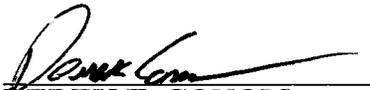
This deficient performance prejudiced Petitioner. The misinformation effectively increased Petitioner's sentence by 12 months more of community placement. But for Mr. Tario's unprofessional error, there is more than a "reasonable probability" that a different result would have occurred. State v. Thomas, 109 Wn.2d at 225-26. See Dec. of Snively, p. 3, para. 15 ("Had I been correctly informed that my guilty plea would result in a sentence that included a term of two years community placement, I would not have agreed to plead guilty.").

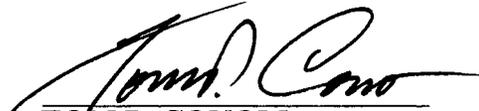
CONCLUSION

For the reasons stated, Garth D. Snively did not knowingly, intelligently and voluntarily enter his guilty pleas. His PRP should be GRANTED, the guilty pleas and the prior criminal convictions WITHDRAWN and VACATED and the SVP judgment REVERSED.

DATED THIS 9TH DAY OF MAY, 2007.

Respectfully Submitted By Attorneys for Petitioner:


DEREK T. CONOM
WSBA No. 36781


TOM P. CONOM
WSBA No. 5581

Note 3

719, amended 105 Wash. 175, 718 P.2d 796, appeal dismissed 107 S.Ct. 310, 93 L.Ed.2d 284.

4. Dismissal of offense

Dismissal of matter following petitioner's successful completion of probation for offense for which petitioner was treated as adult and given deferred sentence for grand larceny, had no effect on enhancement of minimum term imposed following plea bargain for subsequent offense. *Matter of Baca* (1983) 34 Wash.App. 468, 662 P.2d 64.

5. Informants

Where, after defendant pleaded guilty to amended information charging possession of marijuana with intent to manufacture or deliver, and trial court in sentencing relied upon information from unidentified informants, announcing that court had concluded there was good reason to conceal identity of informants, and judge concluded as result of in camera interviews that he was substantially satisfied of accuracy of questioned statements, two informants having been examined under oath and their testimony corroborated officer's testimony, and where substantial evidence established good cause for nondisclosure of informants and defendant was given opportunity to demonstrate that information was inaccurate or incomplete, sentencing due process was satisfied. *State v. Russell* (1982) 31 Wash.App. 646, 644 P.2d 704.

Though trial court relied upon information from unidentified informants, in imposing sentence upon defendant, trial court did not err in declining to request defendant to submit written questions to be submitted to informants by trial

judge. *State v. Russell* (1982) 31 Wash. App. 646, 644 P.2d 704.

6. Burden of proof

Sentencing Reform Act's requirement that existence of prior convictions be proved by preponderance of evidence, rather than beyond reasonable doubt, was proper, as it satisfied liberty interest of convicted defendant protected by minimal due process. *West's RCWA 9.94A.010 et seq. State v. Ammons* (1986) 105 Wash.2d 175, 713 P.2d 719, amended 105 Wash. 175, 718 P.2d 796, appeal dismissed 107 S.Ct. 310, 93 L.Ed.2d 284.

Defendants sentenced as prior offenders under Sentencing Reform Act, *West's RCWA 9.94A.010 et seq.*, were not denied due process by State's failure to make affirmative showing that they were the same persons named in prior convictions, where they were informed of prior convictions being utilized and given opportunity to deny that they were same persons. *State v. Ammons* (1986) 105 Wash.2d 175, 713 P.2d 719, amended 105 Wash. 175, 718 P.2d 796, appeal dismissed 107 S.Ct. 310, 93 L.Ed.2d 284.

7. Juvenile record

Certified copies of juvenile orders of disposition, when no direct allegation was made that defendant was not same person named in those orders, were sufficient to establish existence of prior juvenile convictions for sentencing purposes without requiring state to present additional independent evidence that defendant was same person as person named in orders of disposition. *State v. Randle* (1987) 47 Wash.App. 232, 734 P.2d 51.

9.94A.120. Sentences

When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (5), and (7) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard 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 range shall be a determinate sentence.

(4) 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. An offender convicted of the crime of assault 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. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than three years, and shall not be eligible for furlough, work release or other authorized leave of absence from the correctional facility during such minimum three year term except for the purpose of commitment to an inpatient treatment facility. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section.

(5) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

(a) Devote time to a specific employment or occupation;

(b) Undergo available outpatient treatment for up to two years, or inpatient treatment not to exceed the standard range of confinement for that offense;

(c) Pursue a prescribed, secular course of study or vocational training;

(d) Remain within prescribed geographical boundaries and notify the court or the community corrections officer of any change in the offender's address or employment;

(e) Report as directed to the court and a community corrections officer; or

(f) Pay a fine and/or accomplish some community service work.

(6) If a sentence range has not been established for the defendant's crime, the court shall impose a determinate sentence which may include not more than one year of confinement, community service work, a term of community supervision not to exceed one year, and/or a fine. The court may impose a sentence which provides more than one year of confinement if the court finds,

APPENDIX /

state, request the department of corrections to evaluate whether the offender is amenable to treatment and the department may place the offender in a treatment program within a correctional facility operated by the department.

Except for an offender who has been convicted of a violation of RCW 9A.44.040 or 9A.44.050, if the offender completes the treatment program before the expiration of his term of confinement, the department of corrections may request the court to convert the balance of confinement to community supervision and to place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

- (i) Devote time to a specific employment or occupation;
- (ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer of any change in the offender's address or employment;
- (iii) Report as directed to the court and a community corrections officer;
- (iv) Undergo available outpatient treatment.

If the offender violates any of the terms of his community supervision, the court may order the offender to serve out the balance of his community supervision term in confinement in the custody of the department of corrections.

Nothing in (c) of this subsection shall confer eligibility for such programs for offenders convicted and sentenced for a sexual offense committed prior to July 1, 1987.

(8) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty days of confinement shall be served on consecutive days. Local jail administrators may schedule court-ordered intermittent sentences as space permits.

(9) If a sentence imposed includes a fine or restitution, the sentence shall specify a reasonable manner and time in which the fine or restitution shall be paid. In any sentence under this chapter the court may also require the offender to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary (a) to pay court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required, (b) to make recoupment of the cost of defense attorney's fees if counsel is provided at public expense, (c) to contribute to a county or interlocal drug fund, and (d) to make such other payments as provided by law. All monetary payments

shall be ordered paid by no later than ten years after the date of the judgment of conviction.

(10) Except as provided under RCW 9.94A.140(1), a court may not impose a sentence providing for a term of confinement or community supervision which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

(11) All offenders sentenced to terms involving community supervision, community service, restitution, or fines shall be under the supervision of the secretary of the department of corrections or such person as the secretary may designate and shall follow implicitly the instructions of the secretary including reporting as directed to a community corrections officer, remaining within prescribed geographical boundaries, and notifying the community corrections officer of any change in the offender's address or employment.

(12) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(13) A departure from the standards in RCW 9.94A.400(1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in subsections (2) and (3) of this section, and may be appealed by the defendant or the state as set forth in RCW 9.94A.210(2) through (6).

(14) The court shall order restitution whenever the offender is convicted of a felony that results in injury to any person or damage to or loss of property, whether the offender is sentenced to confinement or placed under community supervision, unless extraordinary circumstances exist that make restitution inappropriate in the court's judgment. The court shall set forth the extraordinary circumstances in the record if it does not order restitution.

(15) As a part of any sentence, the court may impose and enforce an order that relates directly to the circumstances of the crime for which the offender has been convicted, prohibiting the offender from having any contact with other specified individuals or a specific class of individuals for a period not to exceed the maximum allowable sentence for the crime, regardless of the expiration of the offender's term of community supervision.

(16) In any sentence of partial confinement, the court may require the defendant to serve the partial confinement in work release.

Enacted by Laws 1981, ch. 137, § 12, eff. July 1, 1984. Amended by Laws 1982, ch. 192, § 4, eff. April 1, 1982; Laws 1983, ch. 163, § 2, eff. July 1, 1984; Laws 1984, ch. 209, § 6, eff. July 1, 1984; Laws 1986, ch. 257, § 20, eff. July 1, 1986; Laws 1986, ch. 301, § 3, eff. April 4, 1986; Laws 1986, ch. 301, § 4, eff. July 1, 1987. Reenacted and amended by Laws 1987, ch. 402, § 1, eff. July 1, 1987; Laws 1987, ch. 456, § 2.

CHAPTER 152

[Substitute House Bill No. 1419]

CRIMINAL JUSTICE INFORMATION—OFFICE OF FINANCIAL MANAGEMENT
MAY LET CONTRACT FOR COLLECTION AND TRANSMITTAL

AN ACT Relating to criminal justice information; amending RCW 10.98.130; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 13, chapter 17, Laws of 1984 as amended by section 3, chapter 462, Laws of 1987 and RCW 10.98.130 are each amended to read as follows:

Local jails shall report to the office of financial management and that office shall transmit to the department the information on all persons convicted of felonies or incarcerated for noncompliance with a felony sentence who are admitted or released from the jails and shall promptly respond to requests of the department for such data. Information transmitted shall include but not be limited to the state identification number, whether the reason for admission to jail was a felony conviction or noncompliance with a felony sentence, and the dates of the admission and release.

The office of financial management may contract with a state or local governmental agency, or combination thereof, or a private organization for the information collection and transmittal under this section.

NEW SECTION. Sec. 2. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House February 15, 1988.

Passed the Senate March 5, 1988.

Approved by the Governor March 21, 1988.

Filed in Office of Secretary of State March 21, 1988.

CHAPTER 153

[Engrossed Substitute House Bill No. 1424]

COMMUNITY PLACEMENT

AN ACT Relating to community placement; amending RCW 9.94A.150, 72.09.020, 9.94A.170, 9.94A.200, 9.94A.360, and 9.94A.330; reenacting and amending RCW 9.94A.030 and 9.94A.120; adding new sections to chapter 9.94A RCW; adding new sections to chapter 72.09 RCW; creating new sections; prescribing penalties; and providing an effective date.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. Section 3, chapter 137, Laws of 1981 as last amended by section 3, chapter 187, Laws of 1987, by section 1, chapter 456, Laws of 1987,

and by section 1, chapter 458, Laws of 1987 and RCW 9.94A.030 are each reenacted and amended to read as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Commission" means the sentencing guidelines commission.

(2) "Community corrections officer" means an employee of the department who is responsible for carrying out specific duties in supervision of sentenced offenders and monitoring of sentence conditions.

(3) "Community custody" means that portion of an inmate's sentence of confinement in lieu of earned early release time served in the community subject to controls placed on the inmate's movement and activities by the department of corrections.

(4) "Community placement" means a one-year period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned early release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

(5) "Community service" means compulsory service, without compensation, performed for the benefit of the community by the offender.

~~((4))~~ (6) "Community supervision" means a period of time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed pursuant to this chapter by a court. For first-time offenders, the supervision may include crime-related prohibitions and other conditions imposed pursuant to RCW 9.94A.120(5). For purposes of the interstate compact for out-of-state supervision of parolees and probationers, RCW 9.95.270, community supervision is the functional equivalent of probation and should be considered the same as probation by other states.

~~((5))~~ (7) "Confinement" means total or partial confinement as defined in this section.

~~((6))~~ (8) "Conviction" means an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.

~~((7))~~ (9) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.

~~((8))~~ (10) (a) "Criminal history" means the list of a defendant's prior convictions, whether in this state, in federal court, or elsewhere. The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof;

in the first degree, or an attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious violent offense under (a) of this subsection.

~~((22))~~ (25) "Sentence range" means the sentencing court's discretionary range in imposing a nonappealable sentence.

~~((23))~~ (26) "Sex offense" means:

(a) A felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090 or that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; or

(b) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

~~((24))~~ (27) "Total confinement" means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.

~~((25))~~ (28) "Victim" means any person who has sustained physical or financial injury to person or property as a direct result of the crime charged.

~~((26))~~ (29) "Violent offense" means:

(a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, rape in the second degree, kidnapping in the second degree, arson in the second degree, assault in the second degree, extortion in the first degree, robbery in the second degree, vehicular assault, and vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

(b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a violent offense in (a) of this subsection (~~((26)(a) of this section)~~); and

(c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a violent offense under (a) or (b) of this subsection (~~((26)(a) or (b) of this section)~~).

~~((27))~~ (30) "Work release" means a program of partial confinement available to offenders who are employed or engaged as a student in a regular course of study at school. Participation in work release shall be conditioned upon the offender attending work or school at regularly defined hours and abiding by the rules of the work release facility.

Sec. 2. Section 1, chapter 402, Laws of 1987 and section 2, chapter 456, Laws of 1987 and RCW 9.94A.120 are each reenacted and amended to read as follows:

When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (5), and (7) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard 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 range shall be a determinate sentence.

(4) 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. An offender convicted of the crime of assault 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. An offender convicted of the crime of rape in the first degree shall be sentenced to a term of total confinement not less than three years, and shall not be eligible for furlough, work release or other authorized leave of absence from the correctional facility during such minimum three year term except for the purpose of commitment to an inpatient treatment facility. The foregoing minimum terms of total confinement are mandatory and shall not be varied or modified as provided in subsection (2) of this section.

(5) In sentencing a first-time offender the court may waive the imposition of a sentence within the sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses. The sentence may also include up to two years of community supervision, which, in addition to crime-related prohibitions, may include requirements that the offender perform any one or more of the following:

(a) Devote time to a specific employment or occupation;

(b) Undergo available outpatient treatment for up to two years, or inpatient treatment not to exceed the standard range of confinement for that offense;

If the offender violates any of the terms of community supervision, the court may order the offender to serve out the balance of the community supervision term in confinement in the custody of the department of corrections.

After June 30, 1993, this subsection (b) shall cease to have effect.

(c) When an offender commits any felony sexual offense on or after July 1, 1987, and is sentenced to a term of confinement of more than one year but less than six years, the sentencing court may, on its own motion or on the motion of the offender or the state, request the department of corrections to evaluate whether the offender is amenable to treatment and the department may place the offender in a treatment program within a correctional facility operated by the department.

Except for an offender who has been convicted of a violation of RCW 9A.44.040 or 9A.44.050, if the offender completes the treatment program before the expiration of his term of confinement, the department of corrections may request the court to convert the balance of confinement to community supervision and to place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

- (i) Devote time to a specific employment or occupation;
- (ii) Remain within prescribed geographical boundaries and notify the court or the community corrections officer of any change in the offender's address or employment;
- (iii) Report as directed to the court and a community corrections officer;
- (iv) Undergo available outpatient treatment.

If the offender violates any of the terms of his community supervision, the court may order the offender to serve out the balance of his community supervision term in confinement in the custody of the department of corrections.

Nothing in (c) of this subsection shall confer eligibility for such programs for offenders convicted and sentenced for a sexual offense committed prior to July 1, 1987.

(8) (a) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense, a serious violent offense, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, the court shall in addition to the other terms of the sentence, sentence the offender to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release in accordance with RCW

9.94A.150(1). When the court sentences an offender under this section to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of such community custody to which the offender may become eligible, in accordance with RCW 9.94A.150(1). Any period of community custody actually served shall be credited against the community placement portion of the sentence.

(b) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense, a serious violent offense, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, unless a condition is waived by the court, the sentence shall include, in addition to the other terms of the sentence, a one-year term of community placement on the following conditions:

- (i) The offender shall report to and be available for contact with the assigned community corrections officer as directed;
- (ii) The offender shall work at department of corrections-approved education, employment, and/or community service;
- (iii) The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;
- (iv) An offender in community custody shall not unlawfully possess controlled substances; and
- (v) The offender shall pay community placement fees as determined by the department of corrections.

(c) The court may also order any of the following special conditions:

- (i) The offender shall remain within, or outside of, a specified geographical boundary;
 - (ii) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals;
 - (iii) The offender shall participate in crime-related treatment or counseling services;
 - (iv) The offender shall not consume alcohol;
 - (v) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or
 - (vi) The offender shall comply with any crime-related prohibitions.
- (d) Prior to transfer to, or during, community placement, any conditions of community placement may be removed or modified so as not to be more restrictive by the sentencing court, upon recommendation of the department of corrections.

(9) If the court imposes a sentence requiring confinement of thirty days or less, the court may, in its discretion, specify that the sentence be served on consecutive or intermittent days. A sentence requiring more than thirty

NEW SECTION. Sec. 12. The following acts or parts of acts are each repealed:

(1) Section 3, chapter 96, Laws of 1974 ex. sess., section 8, chapter 110, Laws of 1975 1st ex. sess., section 11, chapter 14, Laws of 1977 ex. sess., section 1, chapter 76, Laws of 1979 ex. sess., section 1, chapter 8, Laws of 1980, section 1, chapter 101, Laws of 1984, section 1, chapter 144, Laws of 1985 and RCW 19.27A.010;

(2) Section 3, chapter 144, Laws of 1985, section 1, chapter 204, Laws of 1988 and RCW 19.27A.030; and

(3) Section 4, chapter 144, Laws of 1985, section 2, chapter 204, Laws of 1988 and RCW 19.27A.040.

NEW SECTION. Sec. 13. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 14. Sections 1 through 4, 6, 7, 9, and 10 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect March 1, 1990. Sections 11 and 12 of this act shall take effect January 1, 1991. Section 8 of this act shall take effect July 1, 1991.

Passed the House January 31, 1990.

Passed the Senate January 29, 1990.

Approved by the Governor February 5, 1990.

Filed in Office of Secretary of State February 5, 1990.

CHAPTER 3

[Second Substitute Senate Bill No. 6259]

COMMUNITY PROTECTION ACT

AN ACT Relating to criminal offenders; amending RCW 13.40.205, 10.77.163, 10.77.165, 10.77.210, 71.05.325, 71.05.390, 71.05.420, 71.05.440, 71.05.670, 9.94A.155, 13.50.050, 9.95.140, 10.97.030, 10.97.050, 70.48.100, 43.43.765, 9.92.151, 9.94A.150, 70.48.210, 13.40.020, 13.40.160, 13.40.110, 13.40.210, 43.43.745, 7.68.060, 7.68.070, 7.68.080, 7.68.085, 9.94A.390, 13.40.150, 9.94A.350, 9.94A.120, 9.94A.360, 9.95.009, 9A.44.050, 9A.44.083, 9A.44.076, and 9A.88.010; reenacting and amending RCW 9.94A.030, 9.94A.310, 9.94A.320, 9.94A.400, 18.130.040, 43.43.830, 43.43.832, 43.43.834, and 43.43.838; adding a new section to chapter 4.24 RCW; adding new sections to chapter 9.94A RCW; adding a new section to chapter 9.95 RCW; adding a new section to chapter 74.13 RCW; adding new sections to chapter 9A.44 RCW; adding a new section to chapter 10.01 RCW; adding new sections to chapter 10.77 RCW; adding new sections to chapter 13.40 RCW; adding a new section to chapter 43.43 RCW; adding a new section to chapter 46.20 RCW; adding a new section to chapter 70.48 RCW; adding new sections to chapter 71.05 RCW; adding a new section to chapter 71.06 RCW; adding new sections to chapter 72.09 RCW; adding a new chapter to Title 18 RCW; adding a new chapter to Title 71 RCW; adding a new section to chapter 43.06 RCW; adding a new chapter to Title 43 RCW; adding a new section to chapter 26.44 RCW; creating new sections; prescribing penalties; providing effective dates; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

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PART I

COMMUNITY NOTIFICATION

NEW SECTION. Sec. 101. A new section is added to chapter 13.40 RCW to read as follows:

(1)(a) Except as provided in subsection (2) of this section, at the earliest possible date, and in no event later than ten days before discharge, parole, or any other authorized leave or release, or before transfer to a community residential facility, the secretary shall send written notice of the discharge, parole, authorized leave or release, or transfer of a juvenile found to have committed a violent offense or a sex offense, to the following:

(i) The chief of police of the city, if any, in which the juvenile will reside; and

(ii) The sheriff of the county in which the juvenile will reside.

(b) The same notice as required by (a) of this subsection shall be sent to the following, if such notice has been requested in writing about a specific juvenile:

(i) The victim of the offense for which the juvenile was found to have committed or the victim's next of kin if the crime was a homicide;

(ii) Any witnesses who testified against the juvenile in any court proceedings involving the offense; and

(iii) Any person specified in writing by the prosecuting attorney.

APPENDIX 3

Except for an offender who has been convicted of a violation of RCW 9A.44.040 or 9A.44.050, if the offender completes the treatment program before the expiration of his term of confinement, the department of corrections may request the court to convert the balance of confinement to community supervision and to place conditions on the offender including crime-related prohibitions and requirements that the offender perform any one or more of the following:

(i) Devote time to a specific employment or occupation;

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

(iii) Report as directed to the court and a community corrections officer;

(iv) Undergo available outpatient treatment.

If the offender violates any of the terms of his community supervision, the court may order the offender to serve out the balance of his community supervision term in confinement in the custody of the department of corrections.

Nothing in (c) of this subsection shall confer eligibility for such programs for offenders convicted and sentenced for a ~~((sexual))~~ sex offense committed prior to July 1, 1987. This subsection (c) does not apply to any crime committed after the effective date of this section.

(d) Offenders convicted and sentenced for a sex offense committed prior to July 1, 1987, may, subject to available funds, request an evaluation by the department of corrections to determine whether they are amenable to treatment. If the offender is determined to be amenable to treatment, the offender may request placement in a treatment program within a correctional facility operated by the department. Placement in such treatment program is subject to available funds.

(8) (a) When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense~~(:)~~ or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, the court shall in addition to the other terms of the sentence, sentence the offender to a one-year term of community placement beginning either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.150 (1) and (2). When the court sentences an offender under this ~~((section))~~ subsection to

the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of such community custody to which the offender may become eligible, in accordance with RCW 9.94A.150 (1) and (2). Any period of community custody actually served shall be credited against the community placement portion of the sentence.

~~(b) ((When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense, a serious violent offense, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988;))~~ When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, the court shall in addition to other terms of the sentence, sentence the offender to community placement for two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer. The community placement shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned early release in accordance with RCW 9.94A.150 (1) and (2). When the court sentences an offender under this subsection to the statutory maximum period of confinement then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible, in accordance with RCW 9.94A.150 (1) and (2). Any period of community custody actually served shall be credited against the community placement portion of the sentence. Unless a condition is waived by the court, ~~((the sentence shall include, in addition to the other terms of the sentence, a one-year))~~ the terms of community placement ~~((or))~~ for offenders sentenced pursuant to this section shall include the following conditions:

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

(ii) The offender shall work at department of corrections-approved education, employment, and/or community service;

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

(iv) An offender in community custody shall not unlawfully possess controlled substances; and

(v) The offender shall pay supervision fees as determined by the department of corrections.

(c) The court may also order any of the following special conditions:

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

