

original

NO. 36048-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIK PETTERSON,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 01-1-01509-3

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED July 13, 2007, Port Orchard, WA *[Signature]*
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....6

 A. THE ORDER THAT PURPORTED TO TERMINATE PETTERSON’S COMMUNITY CUSTODY WAS A CLERICAL ERROR DIRECTLY CONTRARY TO THE COURT’S INTENDED RULING AND WAS THEREFORE PROPERLY CORRECTED “AT ANY TIME” UNDER CRR 7.8(A).....6

 B. THE TRIAL COURT WOULD HAVE LACKED AUTHORITY TO COMMUTE PETTERSON’S MANDATORY LIFE TERM OF COMMUNITY CUSTODY FOR FIRST-DEGREE CHILD MOLESTATION EVEN IF IT HAD INTENDED TO, AND THEREFORE, ASSUMING CRR 7.8(B) WERE THE PROPER VEHICLE FOR CORRECTING THE ERROR IN THE WRITTEN ORDER, THE ORDER WOULD HAVE BEEN VOID AND NOT SUBJECT TO THE RULE’S ONE-YEAR STATUTE OF LIMITATIONS.9

 1. Assuming that CrR 7.8 applies, the State agrees that the issue would be whether or not the original order was void..... 10

 2. The trial court lacked authority to commute Petterson’s mandatory term of community custody10

IV. CONCLUSION.....18

TABLE OF AUTHORITIES
CASES

<i>Davis v. Dep't of Licensing,</i> 137 Wn.2d 957, 977 P.2d 554 (1999).....	11
<i>State ex rel. Carroll v. Junker,</i> 79 Wn.2d 12, 482 P.2d 775 (1971).....	9
<i>State v. Bobic,</i> 140 Wn.2d 250, 996 P.2d 610 (2000).....	6
<i>State v. Bright,</i> 129 Wn.2d 257, 916 P.2d 922 (1996).....	10
<i>State v. Calle,</i> 125 Wn.2d 769, 888 P.2d 155 (1995).....	12
<i>State v. Dana,</i> 59 Wn. App. 667, 800 P.2d 836 (1990).....	16
<i>State v. JA,</i> 105 Wn. App. 879, 20 P.3d 487 (2001).....	15-16
<i>State v. Priest,</i> 100 Wn. App. 451, 997 P.2d 452 (2000).....	7
<i>State v. Robinson,</i> 104 Wn. App. 657, 17 P.3d 653.....	9
<i>State v. Shove,</i> 113 Wn.2d 83, 776 P.2d 132 (1989).....	14-15
<i>State v. Snapp,</i> 119 Wn. App. 614, 82 P.3d 252 (2004).....	7-8, 10
<i>Washington Fed'n of State Employees v. State Personnel Bd.,</i> 54 Wn. App. 305, 773 P.2d 421 (1989).....	11

STATUTES AND COURT RULES

Ch. 12, Laws of 2001 (2d spec. sess.).....12

CR 607

RAP 7.2.....7

RCW 9.94A.03015

RCW 9.94A.67012, 14

RCW 9.94A.712 1, 3, 4, 11-12, 14, 16

RCW 9.94A.71311, 14

RCW 9.95.230 13-14

RCW 9.95.420 11, 13-14

MISCELLANEOUS

Black’s Law Dictionary (8th ed.1999).....7

SB 6151, House Bill Report.....13

SB 6151, Senate Substitute Bill Report.....13

SB 6151, Senate Substitute Final Bill Report.....13, 16

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the order that purported to terminate Petterson's community custody was a clerical error directly contrary to the court's intended ruling and was therefore properly corrected "at any time" under CrR 7.8(a)?

2. Whether the trial court would have lacked authority to commute Petterson's mandatory life term of community custody for first-degree child molestation even if it had intended to, and therefore, assuming CRR 7.8(b) were the proper vehicle for correcting the error in the written order, the order would have been void and not subject to the rule's one-year statute of limitations?

II. STATEMENT OF THE CASE

Erik Petterson was charged by information filed in Kitsap County Superior Court with first-degree child molestation (domestic violence). CP 1. The offense was alleged to have occurred in October 2001. *Id.* The standard range for the minimum term for his offense, which was subject to RCW 9.94A.712, was 51 to 68 months, with a maximum term of life. CP 7.

Petterson pled guilty as charged. CP 6. On February 2, 2002, the trial court imposed a Special Sex Offender Sentencing Alternative (SSOSA) sentence based on a minimum term of 68 months, with six months to be

served in incarceration. CP 7. The judgment and sentence specifically provided that Petterson would be placed on community custody for “the length of the maximum term imposed pursuant to RCW 9.94A.712.” CP 8.

On October 4, 2005, the trial court found that Petterson had satisfactorily completed his psychosexual treatment program and terminated the SSOSA treatment portion of his sentence. CP 43, 54.¹ The report of proceedings reflects that in addition to terminating the SSOSA portion of the sentence, the court placed Petterson on community custody. CP 54. Indeed, Petterson himself acknowledged that he would continue to be on community custody:

MS. WALSH:^[2] ... So my request is that -- to terminate -- he has completed successfully the SSOSA, and that *he continues on with the supervision with the Department of Personnel -- Corrections.*

THE COURT: So do any orders need to be entered today?

MS. WALSH: Yes. The completion of SSOSA.

THE COURT: All right. Mr. Petterson, do you wish to add anything?

MR. PETERSON: I don't, Your Honor. I've forwarded the order. It's been signed by Ms. Bradley, as well as by Mr. Fong. It terminates the SSOSA, *but does impose community*

¹ The report of proceedings for October 4, 2005, appears twice in the clerk's papers (and in the Superior Court file), at CP 44 and 50. Although the Index refers to the later-filed copy as “corrected,” the two copies appear identical. The State will reference the later-filed so-called corrected version. The report of proceedings also suggests that elected prosecutor Russell Hauge represented the State at the hearing. This is highly unlikely and probably a typographical error; the Clerk's Minutes indicate Deputy Prosecuting Attorney Dee Boughton appeared on behalf of the State. *See* Supp. CP [Clerk's Minutes 10/4/05].

² Walsh was Petterson's community corrections officer.

custody.

THE COURT: Mr. Fong, do you wish to add anything?

MR. FONG: No. Your Honor.

THE COURT: Congratulations, Mr. Petterson. You've completed the program and hope you continue on.

MR. PETERSON: I appreciated the trust that's been extended and the patience and the opportunity. Thank you.

THE COURT: Good. I'm glad you appreciate it. Thank you. I'm signing the order.

MS. WALSH: Thank you, Your Honor.

THE COURT: Thank you, Ms. Walsh.

(Proceedings concluded at 1:33 p.m.)

CP 53-54 (emphasis supplied). Clearly everyone involved in this proceeding contemplated that Petterson would continue to serve community custody. The clerk's minutes also recited that "defendant has completed terms of SSOSA ready to graduate -- SSOSA termination order signed -- *community custody in place.*" Supp. CP [Clerk's Minutes 10/4/05] (emphasis supplied).

The written order the court signed bore the caption "Order Terminating SSOSA and Imposing Community Custody." CP 43. The order, as printed, also specified that "community custody is hereby *imposed for the remainder of the defendant's life in accordance with RCW 9.94A.712.*" *Id.* For reasons that remain unexplained, however, the italicized portion of the foregoing quote was stricken through, and the word "terminated" was written in by hand. *Id.* The interlineation was not initialed by either the parties or the judge. Nor was it ever mentioned at the hearing at

which the order was entered. CP 50-54. From a notice of violation filed by the Department of Corrections on December 5, 2006, it is apparent that Petterson had continued to submit to DOC supervision since the SSOSA termination order was entered. Supp. CP [Notice of Violation 12/5/06].

On the same date that the violation notice was filed, the State filed a motion to amend the order terminating SSOSA on the grounds that although the SSOSA termination was proper, RCW 9.94A.712 required that Petterson be supervised for life. CP 16-17. The motion noted that the Department of Corrections had in fact been supervising Petterson since the order was entered. CP 17.

At a hearing on that date, the court reappointed the firm that had represented Petterson at the SSOSA termination hearing. CP 65. Petterson entered a denial of the violations, and the matter was set over. CP 64, 66.

On December 7, 2006, the trial court entered an amended order that was identical to the printed portions of the order entered on October 4, 2005, but without the handwritten modifications. Supp. CP [Amended Order of 12/7/06]. It thus provided that Petterson was to be on community custody for life. *Id.*

At a hearing on December 21, Petterson argued that by virtue of the handwritten interlineation on the 2005 order terminating SSOSA, he had not

been on community custody since that time, and thus could not be charged with a violation of his community custody conditions. RP (12/21) 4-5. Petterson also questioned whether his community custody could now be “reinstated.” RP (12/21) 4. The matter was again set over so the issue could be heard before Judge Olson, who had entered the original order terminating SSOSA. RP (12/21) 12. The court also suspended the operation of the amended order that had been entered on December 7. RP (12/21) 13.

The parties thereafter briefed the issue. Both sides focused on whether the 2005 order was “void” and therefore subject to correction “within a reasonable time” pursuant to CrR 7.8(b)(4). CP 80, 151, 155. At the hearing, Judge Olson noted that she was not the one who placed the interlineation on the order, and that the order was “changed without the Court’s permission.” RP (3/9) 5. The court concluded that the order was void and that the State had filed its motion within a reasonable time. RP (3/9) 8, CP 166. The court therefore again entered an amended order that was identical to the original order, but without the interlineation. CP 158.

III. ARGUMENT

A. THE ORDER THAT PURPORTED TO TERMINATE PETTERSON'S COMMUNITY CUSTODY WAS A CLERICAL ERROR DIRECTLY CONTRARY TO THE COURT'S INTENDED RULING AND WAS THEREFORE PROPERLY CORRECTED "AT ANY TIME" UNDER CRR 7.8(A).

Petterson argues that the trial court had inherent authority to commute Petterson's term of community custody. Thus, he argues, the 2005 order purporting to do so was merely a judicial mistake falling under CrR 7.8(b)(1), which would be subject to the rule's one-year statute of limitations. The order was not a judicial mistake, however. A judicial mistake occurs when the trial court makes an erroneous ruling. Here, the trial court never ruled that Petterson's community custody should be revoked. Rather it intended that it be continued. The written order thus merely contained a clerical mistake that was contrary to the court's intended ruling. As a "clerical mistake" it could be corrected "at any time" under CrR 7.8(a).

Although both sides below only addressed whether the order could be corrected under CrR 7.8(b), it is well-settled that this Court may affirm the trial court on any basis supported by the record. *State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610 (2000). Because the record clearly shows that the order could, and should, have been corrected as a clerical error under CrR 7.8(a), this Court may affirm on that basis.

CrR 7.8(a) provides:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. Such mistakes may be so corrected before review is accepted by an appellate court, and thereafter may be corrected pursuant to RAP 7.2(e).

“A clerical mistake is one that when amended would correctly convey the intention of the court based on other evidence.” *State v. Priest*, 100 Wn. App. 451, 455, 997 P.2d 452 (2000); *see also* Black’s Law Dictionary 582, 1375 (8th ed.1999) (scrivener’s errors are clerical errors that are the result of mistake or inadvertence; they are not errors of judicial reasoning or determination).

Whether a clerical error exists under CrR 7.8(a) is determined according to the same test used under CR 60(a), the civil rule governing amendment of judgments. *State v. Snapp*, 119 Wn. App. 614, 626, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004) (*citing Presidential Estates Apartment Assoc. v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). To determine whether an error is clerical or judicial, the Court looks to “whether the judgment, as amended, embodies the trial court’s intention, as expressed in the record at trial.” *Snapp*, 119 Wn. App. at 626 (*quoting Presidential*, 129 Wn.2d at 326). If it does, then the amended order should either correct the language to reflect the court’s intention or add the language

the court inadvertently omitted. *Id.* If it does not, then the error is judicial and the court cannot amend the order. *Id.*

Here, the record at the SSOSA termination hearing shows that the CCO, who was essentially the movant, requested that the court impose community custody. The written order, as drafted and printed by the State, indicated that Petterson would be on community custody. Petterson, in his comments to the court *as he was handing forward the order*, represented to the court that he would be on community custody. The caption of the order specifically recited that it was “imposing community custody.” The clerk’s minutes indicated that Petterson would be on community custody. The trial court in no way indicated that it did not intend to impose community custody. Indeed the judge subsequently commented that the interlineation had been done without her consent. Finally, both DOC and Petterson then proceeded for the next year to act under the assumption that he was on community custody.

Every shred of evidence indicates that the trial court’s original intent was to impose community custody. The interlineation was thus by definition a clerical mistake. As such it was correctable “at any time” under CrR 7.8(a). Because CrR 7.8(a) was the correct vehicle for correcting the order, this Court need not consider whether the order was “void” to affirm the trial court. The trial court’s ruling correcting the clerical mistake in its original

SSOSA termination order should be affirmed.

B. THE TRIAL COURT WOULD HAVE LACKED AUTHORITY TO COMMUTE PETTERSON'S MANDATORY LIFE TERM OF COMMUNITY CUSTODY FOR FIRST-DEGREE CHILD MOLESTATION EVEN IF IT HAD INTENDED TO, AND THEREFORE, ASSUMING CRR 7.8(B) WERE THE PROPER VEHICLE FOR CORRECTING THE ERROR IN THE WRITTEN ORDER, THE ORDER WOULD HAVE BEEN VOID AND NOT SUBJECT TO THE RULE'S ONE-YEAR STATUTE OF LIMITATIONS.

As previously noted, Petterson argues that the trial court had inherent authority to commute Petterson's term of community custody. Thus, he argues, the 2005 order purporting to do so was merely a judicial mistake falling under CrR 7.8(b)(1), which would be subject to the rule's one-year statute of limitations. Petterson fails, however, to cite any relevant authority supporting his contention that trial courts have the authority to commute sentences mandated by the Legislature.

This Court reviews a trial court's decision on a CrR 7.8(b) motion for an abuse of discretion. *State v. Robinson*, 104 Wn. App. 657, 662, 17 P.3d 653, *review denied*, 145 Wn.2d 1002 (2001). A court abuses its discretion only when its decision is manifestly unreasonable or rests on untenable grounds or is exercised for untenable reasons. *See State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court did not abuse

its discretion.

1. Assuming that CrR 7.8 applies, the State agrees that the issue would be whether or not the original order was void.

As noted, the October 2005 order clearly contained a *clerical mistake* that was contrary to the court's intended ruling. If this Court nevertheless believes that the order reflects a *judicial mistake, i.e.*, that the trial court *intended* to commute Petterson's term of community custody when it signed the order, *Snapp*, 119 Wn. App. at 626, then the State would agree that CrR 7.8(b) would apply. The State also generally agrees with Petterson's discussion of the standards governing relief under CrR 7.8(b). Petterson and the State part company, however, on whether the trial court had the authority to commute his mandatory term of community custody. Because the trial court lacked that authority, the order was void and not subject to CrR 7.8(b)'s one-year time limit.³

2. The trial court lacked authority to commute Petterson's mandatory term of community custody.

A lower court's interpretation of a statute is a question of law that is reviewed de novo. *State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996). The rules of statutory interpretation are well established. The Court does not construe an unambiguous statute, because plain words do not require

³ Petterson does not challenge the trial court's ruling that the State brought the motion to correct within a "reasonable time" as required for claims under CrR 7.8(b)(4).

construction. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). A statute is ambiguous only if it is susceptible to more than one meaning or reasonable interpretation. *Washington Fed'n of State Employees v. State Personnel Bd.*, 54 Wn. App. 305, 309, 773 P.2d 421 (1989).

Presumably because the statutory provisions in question are utterly unambiguous, Petterson ignores this prefatory question and wades into an extensive policy argument. The Court should decline to join him.

RCW 9.94A.712(5) could not be more plain:

When a court sentences a person to the custody of the department under this section, the court *shall*, in addition to the other terms of the sentence, *sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.*

If this section were not clear enough, the language is repeated in RCW 9.94A.713(6):

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

Finally, the SSOSA provisions themselves also repeat the requirement:

The court *shall place the offender on community custody for*

the length of the suspended sentence, *the length of the maximum term imposed pursuant to RCW 9.94A.712*, or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.

RCW 9.94A.670(4)(a) (2001).⁴

Petterson does not dispute this statutory language, nor does he point to any statute granting a superior court judge the authority to commute a sentence imposed pursuant to the legislative mandate of RCW 9.94A.712.

Petterson instead argues that the imposition of the statutory maximum term of community custody on all offenders subject to RCW 9.94A.712 will in time overwhelm the Department of Corrections' ability to supervise them and will subject rehabilitated offenders to lifetime supervision despite their rehabilitation. While his predictions could possibly prove correct, these policy questions are not for the superior courts to resolve. It is well settled that the Legislature has the power to define criminal conduct and to assign punishment to it. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995).

Moreover, even were the statute ambiguous, thus permitting Petterson's exploration of legislative intent, the legislative history would compel rejection of his argument. RCW 9.94A.712 & .713 were enacted by ch. 12, Laws of 2001 (2d spec. sess.) § 303 & 304, which originated as SB

⁴ Now codified as RCW 9.94A.670(4)(b).

6151. According to both the Senate and House reports on the bill, the legislators were informed that the statute contemplated precisely the result Petterson decries:

If the person is released, the ISRB must impose conditions of community custody on the person. *The person remains under community custody for the maximum term. DOC must supervise the person in the community.*

SB 6151, Senate Substitute Final Bill Report at 4; *see also* SB 6151, House Bill Report at 8. Moreover, the very complaints he now raises were presented to the Legislature:

Testimony Against: ... The sentencing provisions are a major shift away from the Sentencing Reform Act. The reinvigoration of the ISRB is not a good idea. Lifetime parole is very expensive. This moves too fast and too far.

SB 6151, Senate Substitute Bill Report at 7. The Legislature obviously was not persuaded by this testimony.

Since Petterson can point to no statutory authority granting superior court judges the power to commute SRA sentences, he falls back on the assertion that trial courts have always had the inherent authority to terminate supervision early. He relies, however on statutes and cases under arising under RCW ch. 9.95 and the juvenile justice act. Neither applies here.

As Petterson notes, RCW 9.95.230(2) grants specific authority to terminate probation under that chapter. Petterson, however, was sentenced under the Sentencing Reform Act, RCW ch. 9.94A. Despite certain

similarities between the indeterminate sentencing scheme under RCW ch. 9.95 and sentencing of non-persistent offenders under RCW 9.94A.712, an RCW 9.94A.712 sentence remains an SRA sentence. Although certain provisions of RCW ch. 9.95 apply to offenders sentenced under RCW 9.94A.712, RCW 9.95.230 is not one of them. *See* RCW 9.95.017(2); RCW 9.95.900.

Further, as Petterson notes, the SRA grants the court considerable latitude to modify the *terms* of community custody. There is nothing about that grant of authority that “logic would dictate,” Brief of Appellant at 9, also grants the power commute the entire term of community custody, especially since the statute mandates that it “shall” be imposed, RCW 9.94A.712(5), that it “shall” be served under supervision, RCW 9.94A.713(6), and that the trial court “shall” place the defendant on community custody for the maximum term following completion of SSOSA treatment. RCW 9.94A.670(4)(a) (2001).

To the contrary, the Supreme Court has specifically held that the length of an SRA sentence is not subject to judicial commutation. *State v. Shove*, 113 Wn.2d 83, 776 P.2d 132 (1989). Contrary to Petterson’s current arguments, the Court concluded that the structure of the SRA does not permit “implied” judicial discretion:

We hold that SRA sentences may be modified only if they

meet the requirements of the SRA provisions relating directly to the modification of sentences.

Shove, 113 Wn.2d at 89. Moreover, although the *Shove* court was addressing a modification of a term of incarceration, the Court makes clear that terms of incarceration, as well as terms of community custody under the SRA are part of a unified scheme, *Shove*, 113 Wn.2d at 86 (*quoting* RCW 9.94A.030(12)⁵), and equally subject to very directed judicial discretion:

Nor can authority [to reduce an imposed sentence] be implied from the SRA's general structure or purposes. Indeed, the implication from the SRA's underlying policy that criminal sentences fit the offender and his offense, and from the careful enumeration of the circumstances where early release is appropriate, is to the contrary.

Shove, 113 Wn.2d at

State v. JA, 105 Wn. App. 879, 20 P.3d 487 (2001), is thus also inapposite. First, that case did not involve the trial court's authority to terminate a statutorily-imposed term of probation. Instead, the question was whether a juvenile court had the discretion to determine whether the conditions of a deferred disposition had been met even though the juvenile had had *de minimis* violations of the terms of the deferral. This determination is analogous to whether a SSOSA offender's violation of conditions of the sentence are such as to prevent termination of the treatment (as was done here) or warrant revocation of the suspended sentence.

Implication of discretionary power to make a factual determination of compliance with a legislatively created deferral program is very different from implying a power to commute a legislatively-mandated term of confinement or community custody. *See, e.g., State v. Dana*, 59 Wn. App. 667, 669, 800 P.2d 836 (1990) (distinguishing sentence reduction from a modification that did not alter the sentence).

Moreover, *JA* was interpreting a judge's authority under the Juvenile Justice Act, which has very different aims and purposes than the SRA. Indeed, the case specifically cited to the "purposes of the JJA ... explicitly set forth" in the statute. *JA*, 105 Wn. App. at 885. The Court concluded that "[a]lthough the JJA seeks a balance between the poles of rehabilitation and retribution, the purposes of accountability and punishment are tempered by and at times must give way to the purposes of responding to the needs of the juvenile." Consistent with *Shove*, the Court went on to distinguish the JJA from its adult counterpart in this regard. *JA*, 105 Wn. App. at 886.

Nothing in RCW 9.94A.712 is designed to respond to the needs of sex offenders. To the contrary, this statute was enacted as part of the response to a perceived crisis in the sexually violent predator civil commitment program. *See* SB 6151, Senate Substitute Final Bill Report at 1. The legislative intent

⁵ Presently codified as RCW 9.94A.030(18).

was plainly that those convicted of such offenses be subject to State supervision until the statutory maximum term of punishment for the offense had expired. Nothing in the scheme the Legislature enacted suggests that it intended to give trial judges the authority to release such offenders early. The trial court thus properly determined that the order purporting to terminate Petterson's community custody was void.

IV. CONCLUSION

For the foregoing reasons, the trial court's ruling amending the order of October 2005 to clarify that Petterson remains on community custody for life should be affirmed.

DATED July 13, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal flourish extending to the right.

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