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## A. Assignments of Error

### Assignments of Error

1. Mr. Bump is subject to an unlawful restraint because the Department of Corrections is requiring him to submit a release plan that requires a pre-approved residence location in contravention of his judgment and sentence.

2. The trial court erred by finding it did not have jurisdiction to modify Mr. Bump's community placement conditions.

### Issues Pertaining to Assignments of Error

1. Mr. Bump's Judgment and Sentence requires him to have a pre-approved "living arrangement," but does not require a pre-approved "residence location." Is Mr. Bump subject to an unlawful restraint because the Department of Corrections is requiring him to submit a release plan that requires a pre-approved residence location?

2. Did the trial court err by finding it did not have jurisdiction to modify Mr. Bump's community placement conditions when the statute expressly gives the court that authority?

## B. Statement of Facts

Terry Bump was charged and convicted in 1994 of multiple sex offenses in Kitsap Superior Court. CP, 1, 26.<sup>1</sup> Mr. Bump was sentenced to an exceptional sentence of 232 months. The trial court ordered two years of community placement or the period of earned early release. CP, 28. As part of community placement, the trial court ordered that he “obtain the prior approval of the Department of Corrections regarding the living arrangements if defendant is a sex offender.” CP, 29.

Mr. Bump’s Judgment and Sentence has been the subject of extensive review by this court. (The last decision of this Court referenced one direct appeal and five personal restraint petitions.) This Court has consistently upheld the conviction.

On May 16, 2008, Mr. Bump filed a pro se “Motion for Order of Release from State Custody.” CP, 7. The motion noted that Mr. Bump had not been released on his earned early release date (EERD) because he does not have an approved residence. The motion was denied on the same day. CP, 34. Mr. Bump filed a “Motion to Clarify

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<sup>1</sup> Counsel designated the Judgment and Sentence for transfer to the Court of Appeals as a part of the Clerk’s Papers. The Clerk sent it under a separate cover because it is in the sealed portion of the court file. The J&S is included as an appendix to Mr. Bump’s “Motion for Order of Release from State Custody.” The citations to the record refer to that appendix.

Judgment and Sentence” on June 13, 2008. CP, 38. The motion was denied on July 8, 2008 because, in the opinion of the Superior Court, it did “not have jurisdiction to consider” the motion. CP, 61. Mr. Bump appealed from this order and counsel was appointed.

### C. Argument

#### **1. Mr. Bump is entitled to submit for approval a release plan that does not require a pre-approved residence location.**

Mr. Bump committed his offenses in 1994 and was, therefore, sentenced under former RCW 9.94A.120. The statute, which has since been repealed, read, in pertinent part:

(8) (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 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 terms of community placement 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;

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

*(vi) The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.*

(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; or

(v) 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. (Emphasis added.)

Subsection (8)(b)(iv) was the subject of legislative action in 1992. Prior to 1992, subsection (8)(b)(iv) was part of the optional special conditions of subsection (8)(c). It was moved from the optional special conditions to the mandatory unless waived conditions in 1992. See In re Capello, 106 Wn. App. 576, 24 P.3d 1074 (2001).

In Capello, the Court of Appeals reviewed the history of the statute in the context of a person charged prior to 1992. The trial court had not listed a pre-approved address as one of the optional special conditions of community placement. The Court concluded in that context that the Department of Corrections may not unilaterally require a pre-approved residence location.

Although Capello is distinguishable because Mr. Bump's case occurred after 1992, it does provide the analytical framework for resolving the appeal. RCW 9.94A.120, as it existed in 1994, required the trial court to order prior approval by the Department of "residence location and living arrangements." But the statute also permitted the trial court to waive this requirement.

Mr. Bump's Judgment and Sentence requires him to receive pre-approval of his living arrangements, but not his residence location. Two questions are raised by this provision. First, by requiring pre-approval of the living arrangements without mentioning the residence location, did the trial court waive the latter requirement? Under the doctrine of "expressio unius est exclusio alterius," the decision by the trial court to order a portion of the mandatory community custody condition indicates a desire to waive remainder of the condition. See State v. Swanson, 116 Wn.App. 67, 65 P.3d 343 (2003). Therefore, the trial court waived the pre-approved residence location.

The second question is whether there is a material distinction between a living arrangement and a residence location. This question should also be answered in the affirmative. First, the legislature chose to require the pre-approval of both the living arrangements and residence location, indicating that there is a material distinction. Otherwise, the "and residence location" language would be surplusage. Generally, courts should not construe statutes to render any language superfluous. State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998).

Second, it is conceivable that a person could have a living arrangement amenable to department approval that falls short of an approvable residence location. The Department defines an approvable

address as follows, "A viable release address is an actual location that exists, in which the offender intends to physically reside with the permission of the occupant/owner of the property, that does not place the offender in violation of conditions." DOC 350.200, attachment 4. There are many living arrangements that would not qualify as a viable release address. For instance, a living arrangement under a bridge would allow a person to provide a location away from children and sexually explicit material without also providing the permission of the occupant/owner.<sup>2</sup> It, therefore, violates Mr. Bump's right to seek pre-approval for a living arrangement while also requiring pre-approval for a residence location. The Department should be required to promptly process a proposed living

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<sup>2</sup> In fact, the Department of Corrections recently required just that. In a story from the April 20, 2008 Seattle Times, staff columnist Danny Westneat reported, "David J. Torrence, who assaulted a 16-year-old girl in 1995, had completed his latest prison term (for failing to register as a sex offender.) He had no place to go. So officials gave him a sleeping bag and a rain poncho, then told him to stay under this bridge, 9 p.m. to 6 a.m., until further notice. 'We're not proud of it,' says Mary Rehberg, parole officer for the state Department of Corrections. 'We did it because this is what it has come to. Under a bridge is the best of the options we had left.'"

See  
[seattletimes.nwsourc.com/html/dannywestneat/2004382147\\_danny30.html](http://seattletimes.nwsourc.com/html/dannywestneat/2004382147_danny30.html).

arrangement plan for Mr. Bump without requiring a pre-approved residence location.<sup>3</sup>

**2. The trial court erred by finding it did not have jurisdiction to modify Mr. Bump's community placement conditions.**

In Mr. Bump's trial court pleadings, he consistently complained about the requirement that he show an approved living arrangement. CP, 67. He sought relief in the form of an explanation, saying, "Petitioner moves this Court to explain one sentence in the Judgment and Sentence." CP, 67. The trial court responded that it did not have jurisdiction to consider the motion. In this determination, the trial court erred.

Former RCW 9.94A.120(8)(d) gives the trial court authority to remove or modify community placement conditions upon recommendation of the Department. While the statute requires input from the Department, there is no reason that the motion to remove or modify a condition cannot be brought by a party or even on the court's own motion.

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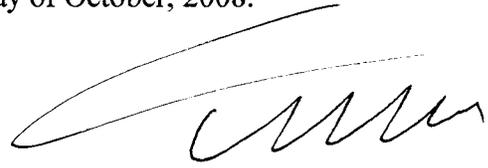
<sup>3</sup> It is arguable that Mr. Bump's motion was erroneously filed in the trial court as a CrR 7.8 motion rather than as a personal restraint petition (PRP). This Court clearly has the authority to order the Department of Corrections to review Mr. Bump's proposed release plan pursuant to its PRP jurisdiction. *In re Dutcher*, 114 Wn. App. 755, 60 P.3d 635(2002) (A decision by the Department that deprives an inmate of earned early release into community custody is an unlawful restraint that may be remedied by a PRP). If necessary, this Court should treat Mr. Bump's appeal as a PRP. Because Mr. Bump is not attacking the underlying conviction, the appeal/PRP is not subject to dismissal as a successive petition.

While a decision by the trial court to decline to remove or modify the “living arrangement” condition would be reviewed for an abuse of discretion, the refusal to even consider the option should be reviewed de novo. If this Court declines to order the Department to consider Mr. Bump’s release plan for an approved living arrangement (but without an approved residence location), then, in the alternative, this Court should remand to the trial court. The trial court would then have authority to remove or modify the community placement condition, or keep the status quo.

#### D. Conclusion

This Court should order the Department of Corrections to process Mr. Bump’s release plan without requiring him to provide a pre-approved residence location. In the alternative, this Court should remand to the trial court for consideration of Mr. Bump’s motion to remove or modify his conditions of community placement pertaining to his living arrangements and residence location.

DATED this 2<sup>nd</sup> day of October, 2008.

A handwritten signature in black ink, consisting of a large, sweeping initial 'T' followed by several loops and a final flourish.

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Thomas E. Weaver, WSBA #22488  
Attorney for Defendant



1 On October 2, 2008, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to  
2 the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-  
3 4683.

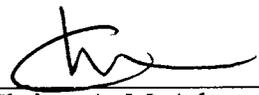
4 On October 2, 2008, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to  
5 Mr. Terry Bump, DOC #729567, Stafford Creek Corrections Center, 191 Constantine Way,  
6 Aberdeen, WA 98520.

7 Dated this 2<sup>nd</sup> day of October, 2008.



8  
9  
10 Thomas E. Weaver  
11 WSBA #22488  
12 Attorney for Defendant

13 SUBSCRIBED AND SWORN to before me this 2<sup>nd</sup> day of October, 2008.



14 Christy A. McAdoo  
15 NOTARY PUBLIC in and for  
16 the State of Washington.  
17 My commission expires: 07/31/2010