

COA NO. 41401-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM SCHENCK, III,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen Warning, Judge  
The Honorable James E. Warne, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COUNTY OF ORIGIN REQUIREMENT VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS.

The State claims Schenck's challenge should not be heard because the Washington Supreme Court's denial of Schenck's motion to modify the commissioner's ruling denying review on his earlier personal restraint petition was an adjudication of its merits. Brief of Respondent (BOR) at 10. The State cites no authority in support of this novel proposition. See State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (courts may assume that, where no authority is cited in support of a proposition, "counsel, after diligent search, has found none."). Denial of discretionary review of a previous personal restraint petition does not equal an adjudication of an issue on its merits so as to preclude later review. In re Pers. Restraint of Adolph, 170 Wn.2d 556, 561, 564-65, 243 P.3d 540 (2010).

The State's elsewhere asserts RCW 72.09.270(8) does not apply retroactively because the triggering event is Schenck's release from prison rather than commission of the underlying crime. BOR at 3-4. That reasoning, however, cannot be squared with State v. Madsen, which held a statute used to exact punishment for violation of community supervision operates retroactively if the underlying criminal offense occurred before

the statutory enactment. State v. Madsen, 153 Wn. App. 471, 479-80, 228 P.3d 24 (2009) (citing Johnson v. United States, 529 U.S. 694, 700-01, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000) ("[s]ince postrevocation penalties relate to the original offense, to sentence [the defendant] to a further term of supervised release under the [1994 statute] would be to apply this section retroactively (and to raise the remaining ex post facto question, whether the application makes him worse off).").

The imposition of community placement under DOC supervision as part of the judgment and sentence triggered the applicability of the "county of origin" requirement. See RCW 72.09.270(8)(a) ("In determining the county of discharge for an offender *released to community custody*, the department may not approve a residence location that is not in the offender's county of origin[.]") (emphasis added). Without community placement, there is no applicable county of origin requirement.

Riley v. New Jersey State Parole Bd., \_\_ A.3d \_\_, 2011 WL 4388170 (N.J. Super. A.D. 2011) is instructive. In Riley, the state argued application of a statute related to monitoring and supervision of sex offenders did not violate ex post facto because the triggering event for its application was not offender's commission of the underlying crime but his later classification as a Tier III sex offender. Riley, 2011 WL 4388170 at \*4. The court rejected that argument, reasoning application of the statute

must be evaluated under ex post facto because the predicate for that later classification was the conviction for the underlying offense. Id. But for the predicate conviction, the offender would not have come under scrutiny for high risk assessment. Id. (citing Johnson, 529 U.S. at 701).

The same rationale applies here. The county of origin requirement is attached to Schenck's community placement, which was imposed as part of the judgment and sentence following conviction. The State acknowledges RCW 72.09.270(8) "dictates to the probationer a specific supervision requirement." BOR at 4. RCW 72.09.270(8) supplies the predicate for imposing punishment on Schenck for violation of his community placement.

The trial court found Schenck violated a condition of his community placement and modified his judgment and sentence accordingly. CP 48. The court was acting pursuant to RCW 9.94B.040. The sanctions levied under RCW 9.94B.040 are modifications of the original judgment and sentence. State v. Nason, 168 Wn.2d 936, 947, 233 P.3d 848 (2010). Criminal sanctions for failure to follow a sentencing condition are "deemed punishment for the original crime" and as additions to the original sentence. Nason, 168 Wn.2d at 947 (quoting State v. Watson, 160 Wn.2d 1, 8-9, 154 P.3d 909 (2007)). The criminal sanction imposed on Schenck must therefore be deemed punishment for his original crime.

"Ex post facto problems are avoided when a defendant is subject to the penalty in place the day the crime was committed. After the fact, the State may not increase the punishment." State v. Pillatos, 159 Wn.2d 459, 475, 150 P.3d 1130 (2007).

The State nonetheless maintains there is no retroactivity because RCW 72.09.270(8) does not dictate a penalty for its violation nor direct the DOC how to proceed in the event of violation. BOR at 3. The State cites no authority that a statute has retroactive effect only where one of those conditions is met.

The State fails to address In re Pers. Restraint of Powell, where the Supreme Court held the standard of punishment under a new law altered the nature of the parole decision for ex post facto purposes: "A process which was once entirely encompassed within the discretion of the Board and prison superintendent has been transformed into one which sharply circumscribes the Board's discretion and entirely eliminates that of the superintendent." In re Pers. Restraint of Powell, 117 Wn.2d 175, 188-89, 814 P.2d 635 (1991).

The State contends there is no ex post facto violation because the DOC always had the authority, as part of Schenck's judgment and sentence, to dictate where Schenck could reside. BOR at 8. In light of Powell, that argument must be rejected. The DOC's determination of an

offender's residence location was not previously circumscribed by the county of origin requirement. The DOC was not previously bound by that requirement, but it ordered Schenck to remain in Thurston County upon release due to that requirement. 2RP 24-25, 30-31. And although the county of origin requirement is not absolute because it provides for exceptions, its application circumscribes the DOC's previous authority over where an offender may reside. RCW 72.09.270(8)(a); DOC Policy 350.200/380.600 Attachment 1 (attached as app. A).

The State claims "a law that imposes new requirements upon an offender" does not violate the Ex Post Facto Clause." BOR at 7-8 (citing In re Pers. Restraint of Forbis, 150 Wn.2d 91, 99-101, 74 P.3d 1189 (2003); Neal v. Shimoda, 131 F.3d 818, 827 (9th Cir. 1997)).

That is an overstatement of the law. The treatment programs at issue in Forbis and Shimoda did not constitute punishment. Forbis, 150 Wn.2d at 100; Neal, 131 F.3d at 827. But community placement, and its attendant conditions, undeniably constitutes punishment. A term of community placement constitutes punishment because it "imposes significant restrictions on a defendant's constitutional freedoms." State v. Shultz, 138 Wn.2d 638, 645, 980 P.2d 1265 (1999) (quoting State v. Ross, 129 Wn.2d 279, 286, 916 P.2d 405 (1996)).

Limitations on Schenck's ability to travel and reside where he will involve affirmative restraints that have historically been regarded as punishment. See Riley, 2011 WL 4388170 at \*8-11 (retroactive application of statute related to monitoring and supervision of sex offenders violated ex post facto where effects of the GPS monitoring program, including restriction on movement, involved an affirmative restraint that had historically been regarded as a punishment). The fact that his liberty has been taken away for noncompliance with this supervision requirement only confirms its punitive effect.

The State's claim that Schenck refused to work with the DOC in setting up housing and basic resources is non-responsive to the legal issues presented by this case. BOR at 8. The State's argument amounts to saying Schenck would not have been punished had he complied with the law imposed on him. Whether a law imposes punishment or avoids an ex post facto violation does not turn on an offender's willingness to comply with that law.

That being said, the trial court did not find Schenck refused to work with DOC in setting up housing and basic resources. Both sides pointed a finger at the other. 1RP 9, 30; 2RP 28-31, 36, 42, 51, 60-62. The trial court did not resolve that factual dispute. 2RP 75-77. Appellate courts do not find facts. State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d

518 (2003); Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009), review denied, 168 Wn.2d 1041 (2010).

B. CONCLUSION

Schenck requests this Court to address the "county of origin" argument on its merits, conclude that this requirement does not lawfully apply to Schenck's term of community placement, and vacate the community placement violation.

DATED this 19<sup>th</sup> day of October 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
\_\_\_\_\_  
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## APPENDIX A

## COUNTY OF ORIGIN

### County of Origin Applicability

- Offenders releasing from Prison after July 22, 2007, who require an Investigation Offender Release Plan (ORP) with an approved address must meet County of Origin eligibility.
  - The ISRB may release offenders under their jurisdiction to locations other than the county of origin.
- Offenders under supervision in the community who were released from Prison on or after July 22, 2007, and wish to transfer from the county of origin to another county must meet one of the exception criteria below.

### Determining and Documenting an Offender's County of Origin - Identified at Reception Diagnostic Centers and Parent Facilities

- The county of origin is the place where the offender received his/her first felony conviction in Washington State, regardless of whether it was served in Prison or the community. This includes juvenile adjudications, but not vacated convictions.
- Staff will use all available reference material to identify the county of origin, including, but not limited to:
  - Previous criminal histories,
  - National Crime Information Center (NCIC),
  - Washington State Criminal Information Center (WASIC),
  - District and Municipal Court Information System (DISCIS),
  - State Identification (SID) Rap Sheets,
  - Offender Management Network Information (OMNI), and
  - Offender Supervision Plan System (OSPS).
- Classification Counselors/Record staff will document first county of conviction in the offender's electronic file.

### Documenting Efforts to Release to County of Origin

- When a Counselor/facility CCO has exhausted efforts to assist the offender in identifying release resources in the county of origin and those efforts have been documented in chronological entries in the offender's electronic file, the Counselor, working with the offender, should identify an alternative ORP to a county of release other than the county of origin. Alternate release plans outside the county of origin will be explored in the following order: section, region, statewide. If no plan exists at those levels, statewide alternatives will be considered. The alternative (i.e., exception) plan for release outside county of origin must provide the offender with resources and must not result in the offender releasing homeless. If all options have been exhausted and no housing resource can be located, the offender will be released homeless in the county of origin, unless there are victim safety concerns in the county of origin which cannot be mitigated as determined after the Community Victim Liaison staffs with the

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Headquarters Victim Services Program Manager. The Community Victim Liaison will document the determination in a Community Concerns chronological entry in the offender's electronic file.

### Process to Request Submission of Offender Release Plan for Release Outside the County of Origin

#### Exceptions per RCW 72.09:

#### 1. A Court Ordered Condition of the Offender's Sentence

The Judgment and Sentence (J&S) prohibits the offender from returning to the county of origin due to geographical restrictions.

- **Guidelines for Counselor/Facility Community Corrections Officer (CCO) -** Specific information related to this restriction must be documented in the ORP in the Comments section and in the chronological record in the offender's electronic file.

#### 2. Victim Safety Issues

There are victim safety concerns in the county of origin which, as determined by the Community Victim Liaison, cannot be mitigated sufficiently to allow residence in the county of origin.

- **Guidelines for Counselor/Facility CCO -** Confirmation must be received from a Community Victim Liaison that there are victim safety issues that prohibit placement of the offender in his/her county of origin. This determination will be made by the Community Victim Liaison in consultation with the Counselor and facility CCO assigned to the case. After staffing with the Headquarters Victim Services Program Manager, the Community Victim Liaison will document the final recommendation(s) in a chrono entry in the offender's electronic file. The following factors will be considered in making the determination and documented by the Community Victim Liaison:
  - Is it likely, based on previous behavior patterns or the offender's current behavior or statements, that harm to specific persons and/or new criminal offenses will occur if the offender is released to the county of origin?
  - Is there a strategy to reduce the specific risk in the county of origin (e.g., geographic restrictions, daily reporting, imposed conditions, treatment or other programming, surveillance) that will likely be effective?
  - Are there reasons to conclude that increased geographic separation between the offender and the person(s) targeted will reduce the risk of harm or new offending behavior?
    - **NOTE:** To identify cases in which there may be victim issues, review the offender's electronic file to determine Community Concerns or Victim Wrap

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Around issues. If issues are indicated, Victim Services Program staff will be contacted to determine if there are specific concerns in the county of origin that cannot be mitigated.

### 3. Negative Influences on the Offender in the Community

Negative influences can include gang membership, crime organizations to which the offender belonged, abusive relationships that had an impact on the offender's criminality, and high profile cases that would impact the offender's ability to establish and maintain lasting pro-social relationships.

- **Guidelines for Counselor/Facility CCO** - When documenting these influences, information gathered from law enforcement agencies, criminal histories, offender interviews, and mental health evaluations must be provided. Justification for this exception will be documented in the ORP to show that the negative influence on the offender would be so pervasive as to override any other pro-social influences available in the county of origin.

### 4. The Location of Family or Other Sponsoring Persons or Organizations Willing to Support the Offender

Documentation should show that there is no family support, sponsoring persons, or agencies in the county of origin, and that there are no victim safety concerns in the proposed alternate county of release.

- **Guidelines for Counselor/Facility CCO** - If the offender has a verified plan outside the county of origin that includes strong family support, employment, and/or support of outside organizations that will assist the offender with successful re-entry, the plan may be submitted without considering resources in the county of origin first.

➤ Examples for this exception include:

- The offender has never lived in the county of origin and has a verified plan in a different county.
  - The first felony conviction occurred long ago or at an early age, and since that time all family and friends have relocated to a different county.
  - There has not been any sustained contact with pro-social contacts in the county of origin and there is a verified plan in a different county.
  - The county of origin has no resources or charitable organizations, there is no family to provide financial support, and releasing to the original county of conviction would result in the offender releasing homeless.
- Efforts made to locate resources will be documented in the ORP, along with information verifying that the proposed sponsor is a person who has provided

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support to the offender (e.g., was on offender's visitor list, how many times s/he visited, the relationship to the offender, etc.).

### Authorization of Exceptions to County of Origin Plan

- **Authorization for Submission** - The Counselor/facility CCO will document the reason for exception in the offender's electronic file. The Counselor/facility CCO will discuss with the offender the exception request and review documentation to ensure all information is included in the chronological record. The Counselor/facility CCO will forward the request to the Associate Superintendent/Field Administrator for authorization to submit a plan not in the county of origin. Authorization to submit the plan will be documented in the Comments section of the ORP along with the justification for the exception for placement.
- **Assignment/Investigate** -
  - **For exceptions based on Court Ordered Conditions or Victim Safety Issues**  
The Assignment Officer will assign the ORP for investigation through the normal process. The CCO will verify that the plan exists through the normal process. Whether the plan is approved or denied, it will be routed through the supervisor to the Field Administrator for final approval/denial.
  - **For offender requesting exception based on Negative Influences on the Offender in the Community and the Location of Family or Other Sponsoring Persons or Organizations Willing to Support the Offender** - The Assignment Officer will forward the ORP to the assignment email box for the county with the alternate plan. The check date for completing the plan development ORP for this type of release will be manually set at 15 days from assignment. The ORP will be assigned for investigation in that county. The assigned CCO will investigate the alternate plan to ensure that it is appropriate. During the investigation, the assigned CCO will verify that the proposed sponsor is an appropriate sponsor, verifying the proposed sponsor's identity if claiming to be a relative, and that there are no known victim safety concerns in the proposed county of release. Whether the CCO approves or denies the plan, it will be forwarded to his/her supervisor for review and then to the Field Administrator. The Field Administrator will evaluate the plan to determine if it meets the criteria for exception.
- **Approval Process** - If, after reviewing the ORP, the Field Administrator supports release outside the county of origin, s/he will approve the plan and notify the Law and Justice Council in the county of release.
- **County of Origin Resolution** - In the event of conflict between the Superintendent and the Field Administrator, the release plan will be forwarded to the Assistant Secretary for Government, Community Relations and Regulatory Compliance for review and resolution.

## COUNTY OF ORIGIN

### Denial/Appeal

- Denial Process
  - If, after reviewing the ORP, the Field Administrator does not support release outside the county of origin, the Field Administrator/designee will contact the Superintendent/designee to:
    - Identify additional information that may be required, or
    - Provide notification that the ORP will be denied.
- Appeal
  - If the Field Administrator denies the ORP, the offender may appeal per DOC 350.200 Offender Transition and Release.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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|                       |   |                    |
|-----------------------|---|--------------------|
| STATE OF WASHINGTON,  | ) |                    |
|                       | ) |                    |
| Respondent,           | ) |                    |
|                       | ) |                    |
| v.                    | ) | COA NO. 41401-5-II |
|                       | ) |                    |
| WILLIAM SCHENCK, III, | ) |                    |
|                       | ) |                    |
| Appellant.            | ) |                    |

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19<sup>TH</sup> DAY OF OCTOBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM SCHENCK, III  
DOC NO. 983718  
MONROE CORRECTIONAL COMPLEX  
P.O. BOX 888  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 19<sup>TH</sup> DAY OF OCTOBER, 2011.

x *Patrick Mayovsky*

# NIELSEN, BROMAN & KOCH, PLLC

## October 19, 2011 - 2:11 PM

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