

COA NO. 42451-7-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 Michael Evans, Judge  
The Honorable James Stonier, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The statutory "county of origin" requirement under RCW 72.09.270(8) is not retroactive and was wrongly applied to appellant's term of community placement.

2. Retroactive application of the "county of origin" requirement under RCW 72.09.270(8) violates the ex post facto clauses of the United States Constitution and Washington Constitution.

3. The court erred in concluding appellant violated conditions of his sentence and in imposing sanctions for those violations because the violations are predicated on the inapplicable and unconstitutional "county of origin" requirement attached to community placement. CP 25-26.

4. The court erred in declining to address appellant's challenge to the "county of origin" requirement on jurisdictional grounds.

5. The court erred in failing to provide sufficiently detailed findings in support of its decision that appellant violated his sentence.

6. Insufficient evidence supports the violation alleged in the January 5, 2011 sentence modification petition that appellant remained in Cowlitz County without permission since January 3, 2011.

Issues Pertaining to Assignments Of Error

1. RCW 72.09.270(8) requires offenders released to community placement be returned to their "county of origin," which

means the county of the offender's first felony conviction. Appellant committed a crime that carried a community placement term before the county of origin requirement took effect. Does this statute operate prospectively only, rendering it inapplicable to appellant?

2. Does the imposition of the county of origin requirement as part of appellant's release plan violate the constitutional prohibition against ex post facto laws?

3. Did the court err in declining to address appellant's challenge to the applicability of the county of origin requirement, resulting in the erroneous finding that appellant violated conditions of his community placement?

4. Due process requires the court to articulate a factual basis for its decision in sentence modification hearings. Did the court violate due process in failing to adhere to this requirement?

5. The sentence modification petition filed January 5, 2011 alleges as violation #2 that appellant remained in Cowlitz County without permission since January 3, 2011. CP 10. Does insufficient evidence support this alleged violation where no evidence was presented in support of it at the evidentiary hearing?

B. STATEMENT OF THE CASE

The present appeal is largely a replay of the appeal currently pending under No. 41401-5-II. William Schenck has again been sanctioned with imprisonment for violating conditions of his community placement stemming from the county of origin requirement under RCW 72.09.270(8).

In 2002, Schenck was convicted of solicitation to commit first degree murder based on events occurring between April 20 and May 4, 2000. App. A at 1. The court imposed an exceptional sentence downward of 120 months confinement and a standard 24 month term of community placement. App. A at 2-3, 5; see former RCW 9.94A.120(9)(b) (Laws of 1999 Ch. 324 § 2).

One community placement condition required Schenck to "report and be available for contact with the assigned community corrections officer as directed" and "perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC." App. A at 5. The judgment and sentence further stated "The residence location and living arrangements are subject to the prior approval of DOC while in community placement[.]" App. A at 5. The court did not impose the condition of requiring Schenck to remain within or outside a specified geographical boundary. App. A at 5.

On direct appeal, the Court of Appeals affirmed conviction and the trial court's exceptional sentence downward. State v. Schenck, 119 Wn. App. 1037, Not Reported in P.3d (2003).

In 2008, Schenck sought various forms of relief in a personal restraint petition (PRP), including an order "declaring that the county-of-origin community placement requirement does not apply to him." App. B at 1. The county of origin requirement found at RCW 72.09.270(8) took effect in 2007 and required his preapproved residence address to be located in the county where his first felony offense occurred. App. B at 1; RCW 72.09.270(8). Schenck's first felony offense occurred in Thurston County. App. A at 2. Schenck argued the county of origin requirement did not apply to him because it became law after his conviction and that applying the statute to persons who committed offenses prior to its enactment violates ex post facto constitutional protections. App. B at 2-3.

The acting chief judge denied relief and dismissed the PRP under RAP 16.11(b). App. B. at 4. The dismissal order declined to review Schenck's "county of origin" claim on the ground that it was not yet ripe — he had not yet submitted a release address to the Department of Corrections (DOC). App. B at 3 (citing State v. Ziegenfuss, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) ("[U]nconstitutionality of a law is not ripe for review unless the person seeking review is harmed by the part of the

law alleged to be unconstitutional." ). The chief judge also declined to review the claim because Schenck could not show prejudice at this juncture. App. B at 3 (citing In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990) (petitioner must show alleged error caused actual and substantial prejudice)).

In November 2009, a Supreme Court commissioner denied review of the dismissal of Schenck's PRP, determining Schenck had not yet been adversely affected by application of the county of origin requirement under RCW 72.09.270(8). App. C at 2. The commissioner also concluded Schenck could not show an ex post facto violation on the ground that requiring the residence to be in a particular county did not increase the quantum of punishment for the crime. App. C at 2. A department of Supreme Court justices denied Schenck's motion to modify the commissioner's ruling. App. D.

The DOC placed Schenck in Olympia upon his release in May 2010. RP 10, 56.<sup>1</sup>

On October 28, 2010, the trial court found Schenck failed to report to the DOC as part of community placement and entered an order of 20

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: RP - 2/17/11, 3/16/11, 3/23/11 and 3/25/11.

days confinement as a sanction. CP 4. Schenck's appeal from that order is currently pending under No. 41401-5-II.

On November 29, 2010, the Cowlitz County prosecutor filed a petition to modify the sentence, alleging Schenck violated the terms of his sentence by (1) failing to report to the DOC in Thurston County as directed since November 22, 2010; (2) leaving Thurston County without permission on or about November 22, 2010; and (3) failing to make himself available for urinalysis testing as directed by his supervising community corrections officer since November 22, 2010. CP 3-7.

On January 5, 2011, the Cowlitz County prosecutor filed another petition to modify the sentence, alleging Schenck violated the terms of his sentence by (1) failing to report to his assigned community corrections officer within 24 hours of release from custody on "1/03/2010;" and (2) remaining in Cowlitz County without permission since "1/03/2010." CP 8-11. The factual allegations proffered in support of those violations in the petition indicate January 3, 2011 rather than January 3, 2010 was meant to be the relevant date. CP 10.

On February 3, 2011, the Cowlitz County prosecutor filed another petition to modify the sentence, alleging Schenck violated the terms of his sentence by (1) failing to report to the assigned community corrections officer as directed in Thurston County since January 10, 2011; (2) failing

to be available for random urinalysis testing since January 10, 2011 in Thurston County; and (3) remaining in Cowlitz County without permission on or about January 21, 2011. CP 21-24.

On February 17, 2011, the Honorable Stephen Warning presided over an evidentiary hearing on the alleged violations. RP 9-37. Community corrections officer (CCO) Jason Fiman of the DOC Office in Thurston County testified he supervised Schenck on his "probation" since November 18, 2010. RP 9-10. On that day, Fiman told Schenck about the requirements of his probation, especially the fact that he could not leave Thurston County. RP 11. Fiman explained Thurston County was Schenck's "county of origin" — the county in which his first felony conviction took place. RP 12.

In support of the three allegations contained in the November 29 petition, Fiman testified Schenck had not reported to the DOC in Thurston County as directed, did not present himself for urinalysis testing, and had left Thurston County without permission since November 22. RP 13-14.

Schenck was placed in custody after he did not report to the Thurston County DOC on November 22. RP 14. He was released from Cowlitz County Jail on December 30. RP 14. In support of the January 5 petition, Fiman testified Schenck failed to report to Fiman within 24 hours of release from custody on December 30. RP 14-16, 32. Fiman offered

no testimony regarding whether Schenck remained in Cowlitz County without permission since January 3, 2011, as alleged in the January 5 petition. RP 14-16.

Schenck reported to Fiman at the Thurston County office on January 10. RP 16. At that time Fiman told Schenck to report back to him on January 14. RP 16. In support of the petition filed February 3, Fiman testified Schenck failed to report to Fiman as directed since January 10 and remained in Cowlitz County without permission on or about January 21, 2011. RP 16-18.

Fiman acknowledged Schenck had reported to the DOC office in Longview. RP 18-19. But he was not reporting to the Thurston County office. RP 19.

Schenck testified he took UA's in Longview. RP 23-24. Schenck wanted to live in Longview because he could afford to live in Thurston County. RP 24. He recently bought a motor home to enable him to report in Thurston County. RP 25, 31. Schenck disagreed with having to report to Thurston County but his primary reason for not residing there was that he could not afford it. RP 25.

On cross-examination, Schenck acknowledged he lived in Cowlitz County and did not have Fiman's approval to do so. RP 28. Fiman told Schenck he had to live in Thurston County. RP 28. Schenck conceded he

traveled to Cowlitz County on November 22. RP 28-29. Schenck said he reported to Fiman and "then I left and I wasn't able to report to him." RP 29.

Schenck further testified he reported to Fiman upon being released from custody on December 30 and that he reported to Fiman again on January 10 in Thurston County. RP 30. He did not report to Fiman on January 14. RP 30. On January 21, Schenck left a phone message for Fiman indicating he had been in Thurston County but went back to Cowlitz County. RP 30.

The prosecutor argued "the testimony agreed upon by Mr. Schenck was upon release in May he was required to live in Thurston County under the County of origin statute that has been authorized by the legislature. He has been notified of his upon release and also by Mr. Fiman upon his previous prelease from this essentially same exact probation violation that he committed back in May and was found as committed in October of last year." RP 33. The prosecutor further argued the DOC "indicated to him that he is required to live in Thurston County, based upon the County of origin, and that he is required to report to Mr. Fiman as directed." RP 34. The prosecutor said it was clear Schenck willfully violated the conditions of his sentence and committed the eight violations alleged in the petitions.

RP 34. Defense counsel asked the court to stay these matters until the Court of Appeals addressed them. RP 35.

Judge Warning described the county of origin statute as a silly law that has "resulted in a ton of really bad situations" and leads to some "fairly dumb circumstances." RP 35. Judge Warning found Schenck willfully committed all the alleged violations but gave him some time to get into compliance. RP 36-37.

The case was set over several times to enable Schenck to comply with the Thurston County residence requirement by showing proof of residency. RP 44-45, 50-51. Schenck bought a motor home that he was in the process of repairing for the purpose of residing in Thurston County. RP 38-40, 48.

At the March 25, 2011 hearing presided over by the Honorable Michael Evans, Schenck failed to show proof of residency in Thurston County. RP 68. The court entered a written order that Schenck willfully violated the requirements or conditions of his sentence in failing to report to the DOC as ordered and imposed 480 days of confinement as the penalty. CP 25-26. This appeal follows. CP 27.

C. ARGUMENT

1. RCW 72.09.270(8) DOES NOT APPLY TO SCHENCK'S TERM OF COMMUNITY PLACEMENT BECAUSE IT IS NOT RETROACTIVE.

RCW 72.09.270(8) presumptively mandates offenders be returned to the county in which their first felony occurred. Upon release, the DOC required Schenck to remain in Thurston County and report to his community corrections officer there due to the "county of origin" requirement. RP 12, 33-34.

RCW 72.09.270(8), however, operates prospectively. It does not apply retroactively to cover Schenck's term of community placement. RCW 72.09.270(8) cannot be applied to him. The DOC's execution of Schenck's community placement term incorporating the county of origin requirement is therefore without legal basis.

RCW 72.09.270(1) generally directs the DOC to develop an individual reentry plan for every offender.<sup>2</sup> The early release plan is part

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<sup>2</sup> RCW 72.09.015(15) defines "individual reentry plan" as "the plan to prepare an offender for release into the community. It should be developed collaboratively between the department and the offender and based on an assessment of the offender using a standardized and comprehensive tool to identify the offender's risks and needs. The individual reentry plan describes actions that should occur to prepare individual offenders for release from prison or jail, specifies the supervision and services they will experience in the community, and describes an offender's eventual discharge to aftercare upon successful completion of supervision. An individual reentry plan is updated

of a comprehensive system of corrections for convicted law violators intended to accomplish a number of objectives, one of which is to "punish the offender for violating the laws of the state of Washington." RCW 72.09.010(2). Among other things, the individual reentry plan "specifies the supervision . . . they will experience in the community." RCW 72.09.015(15).

RCW 72.09.270(8)(a) provides:

In determining the county of discharge for an offender released to community custody,<sup>3</sup> the department may not approve a residence location that is not in the offender's county of origin unless it is determined by the department that the offender's return to his or her county of origin would be inappropriate considering any court-ordered condition of the offender's sentence, victim safety concerns, negative influences on the offender in the community, or the location of family or other sponsoring persons or organizations that will support the offender.

The offender's "county of origin" means the county of the offender's first felony conviction in Washington. RCW 72.09.270(8)(c).

"Prospective application of criminal statutes generally means application to offenses committed on or after the effective date of the statute." State v. Humphrey, 139 Wn.2d 53, 55, 983 P.2d 1118 (1999).

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throughout the period of an offender's incarceration and supervision to be relevant to the offender's current needs and risks."

<sup>3</sup> RCW 72.09.015(3) provides "'Community custody' has the same meaning as that provided in RCW 9.94A.030 and also includes community placement and community supervision as defined in RCW 9.94B.020."

Where an offender is punished for violating a condition of community supervision, such punishment is attributed to the prior conviction, not to the violation. State v. Madsen, 153 Wn. App. 471, 480, 228 P.3d 24 (2009), review denied, 168 Wn.2d 1034, 230 P.3d 1061 (2010). A statute used to exact punishment for violation of community supervision operates retroactively if the underlying criminal offense occurred before the statutory enactment. Madsen, 153 Wn. App. at 480.

The "county of origin" rule is being applied retroactively to Schenck. His offense occurred in 2000. App. A at 1. RCW 72.09.270 was not enacted until 2007, yet it is being applied to Schenck as part of his supervision requirements. Laws of 2007, ch. 483 § 203 (eff. July 22, 2007).

"As a general proposition, courts disfavor retroactivity." Densley v. Dep't of Retirement Systems, 162 Wn.2d 210, 223, 173 P.3d 885 (2007). "It is a fundamental rule of statutory construction that a statute is presumed to operate prospectively and ought not to be construed to operate retrospectively in the absence of language clearly indicating such a legislative intent." Johnston v. Beneficial Management Corp. of America, 85 Wn.2d 637, 641, 538 P.2d 510 (1975) (quoting Earle v. Froedtert Grain & Malting Co., 197 Wn. 341, 344, 85 P.2d 264, 265 (1938)).

"Where a retroactive application is not expressly provided for in a statute, as here, generally it should not be judicially implied." Miebach v. Colasurdo, 102 Wn.2d 170, 180, 685 P.2d 1074 (1984). The presumption in favor of prospectively can only be overcome if (1) the Legislature explicitly provides for retroactivity; (2) an amendment is "curative;" or (3) the statute is "remedial." Densley, 162 Wn.2d at 223.

Here, the Legislature did not explicitly provide RCW 72.09.270(8) should be applied retroactively. The Legislature certainly knows how to expressly declare retroactivity. See RCW 9.94A.728 (Laws of 2002, ch. 50 § 3) ("This act applies to all offenders with community placement or community custody terms currently incarcerated either before, on, or after March 14, 2002."). RCW 72.09.270 contains no express intent to apply the statute retroactively to those who committed offenses before its effective date.

RCW 72.09.270(1) generally states "The department of corrections shall develop an individual reentry plan as defined in RCW 72.09.015 for every offender who is committed to the jurisdiction of the department[.]" RCW 72.09.270 does not, however, specify that the DOC shall develop such a plan for every offender who committed a crime and *was* committed to DOC jurisdiction before the statute took effect. At most, the statute is

ambiguous regarding legislative intent on retroactivity. As a result, it must be presumed to operate prospectively. Humphrey, 139 Wn.2d at 60.

There is no statutory amendment at issue and so the curative exception is inapplicable. RCW 72.09.270 was a new provision that took effect long after Schenck committed the offense at issue. Laws of 2007, ch. 483 § 203.

Finally, the statute cannot be deemed remedial. A statute is remedial when it "relates to practice, procedure or remedies." Humphrey, 139 Wn.2d at 62. A remedial statute will generally be applied retroactively, unless it affects a substantive or vested right. Densley, 162 Wn.2d at 224. In deciding whether the an amendment is remedial or substantive, "we look to the effect, not the form of the law." Humphrey, 139 Wn.2d at 63. When a statute appears to create a new legal liability, the amendment will not be deemed remedial and will not be applied retroactively. Id.

Here, the effect of the "county of origin" provision under RCW 72.09.270(8) creates a new legal liability. When Schenck committed the underlying offense, there was no county of origin requirement attaching to his term of community placement. Application of that requirement as part of his community placement subjects Schenck to punishment for failing to comply with any condition premised on that requirement.

Any sentence imposed under the Sentencing Reform Act "shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. The county of origin requirement is the functional equivalent of a sentencing condition imposed on Schenck. See In re Pers. Restraint of Capello, 106 Wn. App. 576, 584, 24 P.3d 1074 (2001) (no meaningful distinction between a preapproved residence requirement imposed as a condition of community placement by the trial court under former RCW 9.94A.120, and the same requirement imposed by DOC as part of its policy for administering the community custody program under former RCW 9.94A.150). It has wrongly been incorporated into his community placement.

If a sentencing condition is unauthorized, the court does not have the authority to sanction based on a violation of the condition. State v. Raines, 83 Wn. App. 312, 316, 922 P.2d 100 (1996). Similarly, if the underlying basis for the reporting violation (noncompliance with the county of origin requirement) is inapplicable because it does not operate retroactively, then the court cannot lawfully sanction Schenck for a violation premised on that noncompliance. The court erred in finding Schenck violated conditions of his community placement that are predicated on a "county of origin" requirement that does not legally apply to Schenck.

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

If RCW 72.09.270(8) applies to Shenck as a matter of statutory law, then application of the county of origin requirement violates the constitutional prohibition against ex post facto laws. U.S. Const. art. 1, § 10, cl. 1<sup>4</sup>; Wash. Const. art. 1, § 23.<sup>5</sup>

The ex post facto clauses of the United States and Washington constitutions forbid the State from enacting laws that impose punishment for an act that was not punishable when committed or increase the quantum of punishment annexed to the crime when it was committed. In re Pers. Restraint of Powell, 117 Wn.2d 175, 184, 814 P.2d 635 (1991). A law violates the ex post facto clauses if it inflicts a greater punishment than the law annexed to the crime when the crime was committed. State v. Ward, 123 Wn.2d 488, 497, 869 P.2d 1062 (1994) (citing Calder v. Bull, 3 U.S. 386, 390, 1 L. Ed. 684 (1798)).

In other words, a law violates the ex post facto clause if it is: (1) substantive, as opposed to merely procedural; (2) retrospective (applies to events which occurred before its enactment); and (3) disadvantages the

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<sup>4</sup> "No State shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility." U.S. Const. art. I, § 10, cl. 1.

<sup>5</sup> "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Wash. Const. art. I, § 23.

person affected by it. Powell, 117 Wn.2d at 185 (citing Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

The three criteria are met here. A law is substantive as opposed to procedural when it is "criminal" or "punitive." Forster v. Pierce County, 99 Wn. App. 168, 180, 991 P.2d 687, review denied, 141 Wn.2d 1010, 10 P.3d 407 (2000). The county of origin requirement under RCW 72.09.270(8) is substantive because of its punitive component.

The Legislature implemented the early release plan system to accomplish several objectives, one of which is to "ensure the public safety." RCW 72.09.010(1); see also Laws of 2007, ch. 483 § 201 ("Individual reentry plans are intended to be a tool for the department of corrections to identify the needs of an offender."). But another objective is to "punish the offender for violating the laws of the state of Washington." RCW 72.09.010(2).

The imposition of community placement with its attendant conditions is indisputably a form of punishment. Community placement is the intense monitoring of an offender in the community. In re Pers. Restraint of Crowder, 97 Wn. App. 598, 600, 985 P.2d 944 (1999). It is designed to keep an offender under control through compliance with specified conditions. Madsen, 153 Wn. App. at 480. 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)).

Moreover, the failure to comply with a condition of community placement subjects the offender to burdensome sanctions and serious loss of liberty. See RCW 9.94B.040(3)(a) and (c) (court may impose 60 days confinement for each violation or impose any number of sanctions for failure to comply with sentence condition). Schenck was sentenced to 480 days of confinement as a result of the community placement violations.

Even if the Legislature expressly intended the county of origin requirement to be merely procedural as opposed punitive, the inquiry "does not end with the Legislature's stated purpose." Ward, 123 Wn.2d at 499. The statute must still be examined to determine if its actual punitive effect negates the Legislature's regulatory intent. Id. The effect of the county of origin requirement is punitive.

Limitations on Schenck's ability to travel and reside where he will involve affirmative restraints that have historically been regarded as punishment. See Riley v. New Jersey State Parole Bd., 423 N.J. Super. 224, 239-44, 32 A.3d 190 (N.J. Super. A.D. 2011) (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.

Turning to the second factor, the statute is being applied retrospectively for ex post facto purposes. It was enacted after Schenck committed his crime and was applied to him. Powell, 117 Wn.2d at 185. A new legal consequence, in the form of an additional burden attaching to community placement, is being applied to an act completed before the effective date of the law's enactment. State v. Pillatos, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007); State v. Hylton, 154 Wn. App. 945, 957, 226 P.3d 246 (2010). "Every statute which creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Humphrey, 139 Wn.2d at 61.

The triggering event for retroactivity analysis is not Schenck's release from prison but rather the commission of the underlying crime. Madsen held a statute used to exact punishment for violation of community supervision operates retroactively if the underlying criminal offense occurred before the statutory enactment. Madsen, 153 Wn. App. at 479-80 (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 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, 423 N.J. Super. at 232. 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. at 232-34. But for the predicate conviction, the offender would not have come under

scrutiny for high risk assessment. Id. at 233 (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. 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 conditions of his community placement and modified his judgment and sentence accordingly. CP 25-26. 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.

Finally, whether a law is "disadvantageous" for ex post facto purposes turns solely on whether the law alters the standard of punishment that existed under prior law. Ward, 123 Wn.2d at 498. The new law is

disadvantageous because it restricts Schenck's residence and reporting options in a way that did not exist before.

DOC had the authority, as part of Schenck's judgment and sentence, to dictate where Schenck could reside. The existence of that authority does not avoid the ex post facto problem presented in this case. While Schenck's residence location was subject to the DOC's prior approval during the period of community placement, RCW 72.09.270(8) subsequently constricted the DOC's discretionary authority in that matter.

Powell is instructive. That case involved an ex post facto challenge to a law requiring the setting of a minimum sentence that roughly conformed to Sentencing Reform Act of 1981 criteria. Powell, 117 Wn.2d at 179. The Court agreed the standard of punishment under the 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." Id. at 188-89.<sup>6</sup>

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<sup>6</sup> The Court went on to apply a balancing test to determine whether the law, despite altering the standard of punishment, was ultimately "disadvantageous." Powell, 117 Wn.2d at 189. The Court has since clarified "the sole determination of whether a law is 'disadvantageous' is whether the law alters the standard of punishment which existed under prior law." Ward, 123 Wn.2d at 498.

The same rationale applies here. The DOC's determination of an offender's residence and reporting 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. 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. E). DOC's discretionary authority over where to order Schenck to reside is circumscribed by the county of origin requirement in the same kind of way that the parole board's discretionary authority was circumscribed in Powell.

In Schultz, the Court declined to find an ex post facto violation where the effect of the 1997 amendment on Shultz's restitution order did "not increase the severity of any restrictions on his constitutional freedoms" associated with his community placement term. Schultz, 138 Wn.2d at 645. In contrast, the county of origin requirement at issue here increased the severity of his community placement restrictions by limiting where Schenck could live in a way that did not exist at the time he committed the offense.

In re Pers. Restraint of Forbis, 150 Wn.2d 91, 99-101, 74 P.3d 1189 (2003) is also distinguishable. The prison treatment programs at issue in Forbis did not constitute punishment. Forbis, 150 Wn.2d at 100. But community placement, and its attendant conditions that take effect following release from confinement, undeniably constitutes punishment. Community placement constitutes punishment because it "imposes significant restrictions on a defendant's constitutional freedoms." Ross, 129 Wn.2d at 286.

"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." Pillatos, 159 Wn.2d at 475. RCW 72.09.270(8) cannot be applied to Schenck without violating the constitutional prohibition against ex post facto laws because the retrospective county of origin requirement attaching to his community supervision is additional punishment.

3. THE LEGAL ISSUE OF WHETHER THE COUNTY OF ORIGIN REQUIREMENT MAY LEGALLY BE APPLIED TO SCHENCK IS PROPERLY BEFORE THIS COURT AND SHOULD BE ADDRESSED ON ITS MERITS.

The trial prosecutor maintained the superior court did not have jurisdiction to hear Schenck's claims and that Schenck should file a personal restraint petition in the Court of Appeals under RAP 16.5. RP 4-

6. When Schenck raised the county of origin issue at the hearing, Judge Warning responded he did not have the authority to tell the DOC how to supervise him. RP 8-9. The superior court and the prosecutor were mistaken that the superior court lacked jurisdiction to adjudicate Schenck's challenge to the county of origin requirement.

"A tribunal lacks subject matter jurisdiction when it attempts to decide a *type of controversy* over which it has no authority to adjudicate." Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (quoting Restatement (Second) of Judgments § 11 (1982)). The superior court's subject matter jurisdiction derives from the state constitution. Diversified Wood Recycling, Inc. v. Johnson, 161 Wn. App. 859, 866, 251 P.3d 293, review denied, 172 Wn.2d 1025, 268 P.3d 224 (2011). Article IV, section 6 of the Washington Constitution provides "The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court."

Neither the county prosecutor nor the superior court pointed to any authority showing the legal issue of whether a statute applies to an offender on supervision resides exclusively in some other court. The prosecutor cited RAP 16.5 for the proposition that a personal restraint petition must be brought in the Court of Appeals. RP 6. But the superior

court unquestionably had jurisdiction to adjudicate the type of post-conviction challenge advanced by Schenck. "The Supreme Court, Court of Appeals and superior court have concurrent jurisdiction in habeas corpus proceedings wherein postconviction relief is sought." Madsen, 153 Wn. App. at 475 (citing Toliver v. Olsen, 109 Wn.2d 607, 609, 746 P.2d 809 (1988)).

Moreover, the issue of whether the county of origin requirement could lawfully be applied to Schenck is inextricably bound up with whether a condition of community placement was violated. The violation is premised on the applicability of that requirement. The prosecutor recognized this. RP 33-34. The violation proceedings are based on the unlawful premise that the county of origin requirement applies to Schenck's community placement. The superior court therefore had a duty to decide the issue before deciding whether sanction for violating community placement could lawfully be imposed. Raines, 83 Wn. App. at 316.

That being said, whether the superior court should have adjudicated Schenck's county of origin challenge does not control what should happen on this appeal. Schenck is now in the Court of Appeals. He has brought his challenge with him. This Court has the authority to determine whether a matter is properly before it, and to perform all acts

necessary or appropriate to secure the fair and orderly review of a case." RAP 7.3. This Court may also "reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require." RAP 12.2. Finally, this Court has authority to waive the rules of appellate procedure when necessary to "serve the ends of justice." RAP 1.2(c).

Requiring Schenck to raise the issue in a personal restraint petition at this juncture would be senseless and unfair. Schenck has struggled to get a court to hear his argument on the merits. His previous PRP challenge to the county of origin requirement, considered when Schenck had not yet been released, was dismissed as not yet ripe.<sup>7</sup> Schenck anticipated the issue and tried to get it resolved before he was punished for violating his community placement.

Schenck is now harmed by the imposition of the county of origin requirement upon him. Applicability of the county of origin law to

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<sup>7</sup> It may be noted the chief judge of the Court of Appeals, in dismissing Schenck's previous petition, wrongly declined to review the "county of origin" challenge on the ground that Schenck could not show actual and substantial prejudice. App. B at 3. That standard does not apply where a PRP challenges a decision from which the offender has had no previous or alternative avenue for obtaining judicial review. In re Pers. Restraint of Stewart, 115 Wn. App. 319, 331, 75 P.3d 521 (2003). Such a PRP is evaluated under RAP 16.4, which only requires the petitioner to show unlawful restraint to obtain relief. Stewart, 115 Wn. App. 319, 331-32, 75 P.3d 521 (2003).

Schenck is a legal issue requiring no further factual development. Requiring Schenck to pursue the matter through a personal restraint petition when it can be disposed of in this direct appeal would be wasteful use of scarce judicial resources.

The State may claim, as it did in the pending appeal under No. 41401-5-II, that 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. That claim fails. 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).

4. THE COURT VIOLATED DUE PROCESS IN FAILING TO GIVE A FACTUAL BASIS FOR ITS DECISION.

Due process rights attendant to parole revocation hearings also apply to sentence modification hearings. State v. Abd-Rahmaan, 120 Wn. App. 284, 289-90, 84 P.3d 944 (2004) (citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)), rev. on other grounds, 154 Wn.2d 280, 111 P.3d 1157 (2005). An offender's right to due process "requires that judges articulate the factual basis for that decision." State v.

Dahl, 139 Wn.2d 678, 689, 990 P.2d 396 (1999). "Where the trial judge fails to do so, the decision is not amenable to judicial review." Dahl, 139 Wn.2d at 689. The trial court is not required to make written findings of fact but the judge's oral opinion must be sufficiently detailed to provide a sufficient record of the evidence on which the court relied. Id.; State v. Myers, 86 Wn.2d 419, 429, 545 P.2d 538 (1976).

Judge Warning presided over the February 17, 2011 hearing and found Schenck committed all eight alleged violations. RP 36-37. Judge Warning did not enter any written findings. Instead, after hearing the evidence, he stated the county of origin law was silly but that Schenck chose not to comply, "so I am going to find that he willfully violated." RP 36. Judge Warning then set the matter over to another date to give Schenck an opportunity to comply. RP 36. The prosecutor asked, "Your Honor, just for the State's clarification, the court is finding the defendant committed all the allegations?" RP 36. Judge Warning responded, "Yes." RP 37. That is the sum total of Judge Warning's oral opinion.

Judge Evans later entered a written sentence modification order. CP 25-26. The written order indicates the matter was heard on February 17, 2011. CP 25. A box was checked for "The Court considered . . . a violation report dated: 11-24-10; 1-3-11; 1-27-11." CP 25. Judge Warning received testimony at the February 17 hearing, but the box for

"testimony" as something considered was left unchecked in the written order. CP 25. The three violation reports at issue were not entered into evidence at the February 17 hearing and Judge Warning gave absolutely no indication that he relied on them in addition to the live testimony as an evidentiary basis for his decision.

Under the "findings" section of the written order entered by Judge Evans, a box was checked for "The Court finds that: . . . The defendant has violated the requirements or conditions of sentence as follows . . . Failed to report to the Department of Corrections as ordered." CP 25. A box was also checked for "the violation of the requirements or conditions of sentence by the defendant was . . . willful." CP 26.

Neither Judge Warning's oral opinion nor Judge Evans's written findings articulate the factual basis for the decision. This failure violates due process. Dahl, 139 Wn.2d at 689. 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). The trial court must state on the record the evidence it relies upon and its reasons for its decision. State v. Nelson, 103 Wn.2d 760, 767, 697 P.2d 579 (1985).

"The purpose of the requirement of findings and conclusions is to insure the trial judge has dealt fully and properly with all the issues in the

case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his decision when it is made." In re Detention of LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). Schenck requests remand for entry of sufficiently specific factual findings.

5. THE EVIDENCE IS INSUFFICIENT TO SUPPORT ONE OF THE VIOLATIONS FOUND BY THE TRIAL COURT.

The State has the burden of showing noncompliance with a condition of the sentence or supervision by a preponderance of the evidence. RCW 9.94B.040(3)(c); State v. Anderson, 88 Wn. App. 541, 545, 945 P.2d 1147 (1997). Evidence is insufficient unless, viewed in the light most favorable to the State, a rational trier of fact could find noncompliance based on a preponderance of the evidence. See State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (applying beyond a reasonable doubt standard to criminal trial). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences that may be drawn therefrom. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1988).

The sentence modification petition filed January 5, 2011 alleges as violation #2 that Schenck remained in Cowlitz County without permission since January 3, 2011. CP 10. The evidence is insufficient to show

Schenck violated this condition by remaining in Cowlitz County between January 3 and January 5, when the petition was filed. CCO Fiman offered no testimony regarding whether Schenck remained in Cowlitz County without permission since January 3, 2011, as alleged in the January 5 petition. RP 14-16. Schenck offered no testimony to show he violated this condition. RP 23-31. The prosecutor simply skipped over this allegation at the evidentiary hearing.

There must be substantial evidence in the record to support a trial court's finding of fact. State v. Prestegard, 108 Wn. App. 14, 22-23, 28 P.3d 817 (2001); In re Welfare of C.B., 134 Wn. App. 942, 953, 143 P.3d 846 (2006). In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Substantial evidence does not support the court's finding that Schenck committed violation #2 as alleged in the petition filed January 5, 2011. This finding must be vacated due to insufficient evidence.

D. CONCLUSION

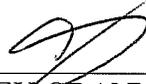
Schenck requests this Court to address the "county of origin" argument on its merits, conclude that this requirement does not apply to Schenck's term of community placement, and vacate the findings on community placement violations. In the event this Court declines to do so,

then the finding that Schenck committed violation #2 as alleged in the petition filed January 5, 2011 must be vacated and the case remanded for entry of specific findings of fact in support of the remaining violations that were found.

DATED this 8th day of March 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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CASEY GRANNIS

WSBA No. 37301

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## APPENDIX A



public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) \_\_\_\_\_. RCW 9.94A, RCW 69.50.401(a), RCW 69.50.440.
- The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.
- The crime charged in Count(s) 2 involve(s) **domestic violence**.
- The offense in Count(s) \_\_\_\_\_ was committed in a county jail or state correctional facility. RCW 9.94A.310(5).
- A special verdict/findings determining aggravating circumstances was returned on Count(s) \_\_\_\_\_, as follows: \_\_\_\_\_ RCW 10.95.020.

Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400):

Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J Adult, Juv.	TYPE OF CRIME V, SV, SO
1 CHILD MOLEST 1°	09/04/91	THURSTON, WA	02/21/91	A	
2 MAL. MISCH. 2°	08/18/97	COWLITZ, WA	03/16/97	A	
3 FELONY STALKING	08/18/97	COWLITZ, WA	03/16/97	A	
4 RES. BURG.	08/18/97	COWLITZ, WA	03/16/97	A	
5					

Additional criminal history is attached in Appendix 2.2.

The defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360.

\* The court finds that these prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360)(6)(a)(ii) and (iii) (Juvenile Offenses and offenses committed prior to July 1, 1986)

The Court finds pursuant to the "same criminal conduct" analysis that the same lettered offenses (as indicated above) count as one offense. RCW 9.94A.360(6)(a)(I)

The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS *	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
1	5	XV	218.25 - 291 MOS.	—	218.25 - 291 mos.	CLASS A

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, See RCW 46.61.520, (JP) Juvenile present.

Additional current offense sentencing data is attached in Appendix 2.3.

2.4  EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence

[ ] above [ ] within [X] below the standard range for Count(s) I. Findings of fact and conclusions of law are attached in Appendix 2.4.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.142):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows \_\_\_\_\_

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [ ] The Court DISMISSES Counts \_\_\_\_\_ [ ] The defendant is found NOT GUILTY of Counts \_\_\_\_\_

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court:

[ ] Based upon the motion of the defendant, the interest of the above financial obligation is waived through the period of incarceration pertaining to this Judgment and Sentence, but will start accruing thereafter.

[ X ] All payments shall be made in accordance with the policies of the clerk and on a schedule established by Cowlitz County Clerk, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 25.00 per month. RCW 9.94A.145.

[ X ] In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145.

[ X ] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

[X] The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

<u>JASS CODE</u>			
RTN/RJN	\$ <u>0</u>	Restitution to:.....	(Name and Address--address may be withheld and provided confidentially to Clerk's Office).
PCV	\$ <u>500.00</u>	Victim assessment	RCW 7.68.035
CRC	\$ <u>460.00</u>	Court costs, including	RCW 9.94A.030, 9.94A.120, 9.94A.145, 10.01.160,
10.46.190		Criminal filing fee \$ <u>110.00</u>	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ _____	SFR/SFS/SFW/WRF
		Jury demand fee \$ <u>100.00</u>	JFR
		Collection Fee \$ <u>100.00</u>	RCC
		Incarceration fee \$ <u>150.00</u>	JLR (NOT LESS THAN 3 DAYS @ \$50 PER DAY)
PUB	\$ <u>639.00</u>	Fees for court appointed attorney	RCW 9.94A.030
WFR	\$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.030
FCM/MTH	\$ _____	Fine RCW 9A.20.021; [ ] VUCSA additional fine deferred due to indigency	RCW 69.50.430
CDF/LDI/PCD NTF/SAD/SDI	\$ _____	Prosecutor's Drug fund of COWLITZ COUNTY	RCW 9.94A.030
CLF	\$ _____	Crime lab fee [ ] deferred due to indigency	RCW 43.43.690
EXT	\$ _____	Extradition costs	RCW 9.94A.120
	\$ _____	Emergency response costs (Veh Assault, Veh Homicide only, \$1000 max.)	RCW 38.52.430
MTH	\$ _____	Meth/Amphetamine Clean up fine, \$3,000. RCW 69.50.440, 69.50.401(a)(1)(ii)	
	\$ <u>*</u>	Urinalysis cost	
	\$ _____	Other costs for: _____	
	\$ <u>1599.00</u>	TOTAL	RCW 9.94A.145

[ ] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.142. A restitution hearing: [ ] shall be set by the prosecutor

[ ] is scheduled for \_\_\_\_\_

[ ] Restitution ordered above shall be paid jointly and severally with:

<u>NAME of other defendant</u>	<u>CAUSE NUMBER</u>	<u>(Amount-\$)</u>

RJN

[ ] The Department of Corrections (DOC) may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010.

[ ] Based upon the motion of the defendant, the interest of the above financial obligation is waived through the period of incarceration pertaining to this Judgment and Sentence, but will start accruing thereafter.

[ ] All payments shall be made in accordance with the policies of the clerk and on a schedule established by DOC, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ \_\_\_\_\_ per month commencing \_\_\_\_\_ . RCW 9.94A.145.

[ ] In addition to the other costs imposed herein, the Court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145.

[ ] The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190.

~~[ ]~~ The financial obligations imposed in this judgment shall <sup>not</sup> bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.2 HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

[ x ] DNA TESTING. The defendant shall have a blood sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.3 The defendant shall not use, own or possess firearms or ammunition while under the supervision of the Department of Corrections RCW 9.94A.120.

[ ] The Firearm, to wit: \_\_\_\_\_ is forfeited to \_\_\_\_\_, a law enforcement agency.

4.4 The defendant shall not have contact with (name, DOB) DIANA HAWLEY dob: 08/20/60, a.k. Diana Miller, including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 34 years (not to exceed the maximum statutory sentence).

~~[ ]~~ Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

The Prosecutor's recommendation was as follows: \_\_\_\_\_

The Prosecutor's agreement upon plea of guilty was as follows: \_\_\_\_\_

**OTHER:**

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

120 months on Count I \_\_\_\_\_ months on Count \_\_\_\_\_  
\_\_\_\_\_ months on Count \_\_\_\_\_ months on Count \_\_\_\_\_  
\_\_\_\_\_ months on Count \_\_\_\_\_ months on Count \_\_\_\_\_

Actual number of months of total confinement ordered is: 120  
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The sentence herein shall run consecutively with the sentence in cause number(s) \_\_\_\_\_

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: \_\_\_\_\_

4.6 COMMUNITY PLACEMENT is ordered as follows: Count I for 24 months;  
Count \_\_\_\_\_ for \_\_\_\_\_ months; Count \_\_\_\_\_ for \_\_\_\_\_ months;

COMMUNITY CUSTODY is ordered as follows:  
Count I for a range from 24 to 48 months;  
Count \_\_\_\_\_ for a range from \_\_\_\_\_ to \_\_\_\_\_ months;  
Count \_\_\_\_\_ for a range from \_\_\_\_\_ to \_\_\_\_\_ months;

or for the period of earned release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense.

Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[X] The defendant shall not consume any alcohol.

[X] Defendant shall have no contact with: Diana Hawley, a.k.a. Diana Miller

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: \_\_\_\_\_

[ ] The defendant shall participate in the following crime-related treatment or counseling services:.....

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: \_\_\_\_\_

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: \_\_\_\_\_

4.7  **WORK ETHIC CAMP.** RCW 9.94A.137, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: \_\_\_\_\_

V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. **You are required to contact the Cowlitz County Collections Deputy, 312 SW First Avenue, Kelso, WA 98626 (360) 414-5532 with any change in address and employment or as directed. Failure to make the required payments or advise of any change in circumstances is a violation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 days in jail.** RCW 9.94A.145 and RCW 9.94A.120(13). Pursuant to RCW 9.94A.142(3), if the crime involves Rape of a Child in the first, second or third degree, and a pregnancy results, the court can impose child support and costs of birth as restitution. The court's jurisdiction extends for up to 25 years.  
 This crime involves a Rape of a Child in which the victim became pregnant. The defendant shall remain under the court's jurisdiction until the defendant has satisfied support obligations under the superior court or administrative order, up to a maximum of twenty-five years following defendant's release from total confinement or twenty-five years subsequent to the entry of the Judgment and Sentence, whichever period is longer.
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Cowlitz County Clerk and/or Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030.
- 5.4 **RESTITUTION HEARING.**  
 Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200.
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

5.7 **Cross off if not applicable:**

~~5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.~~

~~If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.~~

~~If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with that sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must also send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.~~

~~If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.~~

~~Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 14 days~~

## APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FILED  
COURT OF APPEALS  
09 JUN 17 PM 2:24  
STATE OF WASHINGTON  
BY [Signature] CLERK

In re the  
Personal Restraint Petition of  
  
WILLIAM N. SCHNECK,  
  
Petitioner.

No. 38438-8-II

ORDER DISMISSING PETITION

William N. Schneck seeks relief from personal restraint imposed following his 2002 conviction of solicitation to commit first degree murder.<sup>1</sup> He seeks an order (1) waiving his pre-approved address requirement from his community placement conditions; (2) striking his community placement requirement; (3) changing the length of his community placement; (4) declaring that the county-of-origin community placement requirement does not apply to him; and (5) ordering the Department to release him on his ERD date.

None of these claims has merit and thus this court dismisses this petition. When Schneck committed his offense in April-May 2000, former RCW 9.94A.120(9)(b)

<sup>1</sup> Schneck filed this petition in superior court as a motion to waive the pre-approved address requirement or, alternatively, to strike his community placement requirement. The superior court transferred the motion to this court for consideration as a personal restraint petition. CrR 7.8(c)(2).

(1999), required the trial court to impose community placement if the offender was convicted of a serious violent offense:

(b) When the 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, but before June 6, 1996, or a serious violent offense, vehicular homicide, or vehicular assault, committed on or after July 1, 1990, but before July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community placement for two years or up to the period of earned release in accordance with RCW 9.94A.150 (1) and (2), whichever is longer.

At that time, solicitation to commit first-degree murder was an enumerated offense:

(34) "Serious violent offense" is a subcategory of violent offense and means:

(a)(i) Murder in the first degree;

...

(ix) An attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies; or

Former RCW 9.94A.030(34)(a) (1999).

Petitioner argues that the sentencing court has discretion to waive his pre-approved address condition of community placement. But a pre-approved address has been a court-imposed requirement since 1992 and a statutory mandate since 2002. Laws of 1992, ch. 75, § 2; RCW 9.94A.728(c)(2). Petitioner presents no good reason for waiving this requirement in his case. The trial court properly imposed a two-year requirement and DOC has no authority to waive a pre-approved address as a condition of community placement.

Petitioner argues that ESSB 6157 does not apply to him because it became law after his conviction. This bill requires the Department to release a prisoner only to his "county of origin" unless the petitioner establishes that specified exceptions apply. A prisoner's "county of origin" is the county in which the prisoner committed his first

felony in Washington State. RCW 72.09.270(8)(a)-(c). He argues that to apply this statute to persons committing offenses prior to its enactment creates a bill of attainder and violates ex post facto constitutional protections.

We cannot review these claims because petitioner has not submitted a release address to the Department and thus his claims of constitutional violations are not ripe. *State v. Ziegenfuss*, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) (“[U]nconstitutionality of a law is not ripe for review unless the person seeking review is harmed by that the part of the law alleged to be unconstitutional.”) (citing *State v. Langland*, 42 Wn. App. 287, 292, 711 P.2d 1039 (1985); see also *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (constitutionality of VPA payment not ripe for review at sentencing, but only at “point of enforced collection”); *State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d 42 (1992) (issue of costs not ripe for review when costs imposed, but only when State attempts to collect)). Nor can petitioner show prejudice. *In re Pers. Restraint Petition of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990) (petitioner must show that the alleged error caused actual and substantial prejudice).

Finally, petitioner argues that the Department is denying him due process protections by refusing to release him into the community even though he has passed his earned early release date. He relies on *Carver v. Lehman*, 550 F.3d 883 (9th Cir. 2008), but the 9th Circuit has withdrawn that opinion and issued a new decision in which it holds:

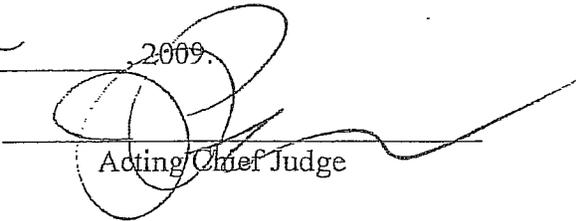
This case presents the question whether a Washington state law providing for convicted sex offenders’ early release into community custody creates a liberty interest that is protected under the Due Process Clause of the Fourteenth Amendment. We hold that it does not. We therefore affirm the decision of the district court denying Carver relief in this civil rights action.

*Carver v. Lehman*, 558 F.3d 869, 871 (9th Cir. 2009). Petitioner fails to show that the Department's refusal to release him into the community violates his due process rights.

None of petitioner's claims for relief has merit. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 17<sup>th</sup> day of June, 2009.

  
\_\_\_\_\_  
Acting Chief Judge

cc: William N. Schneck  
Cowlitz County Clerk  
County Cause No(s). 00-1-00414-9  
Michelle Shaffer  
Department of Corrections  
Ronda D. Larson

## APPENDIX C

RECEIVED

NOV 04 2009

ATTORNEY GENERAL'S OFFICE  
CORRECTIONS DIVISION

FILED  
SUPREME COURT  
09 NOV - 3 PM 1:45  
BY RONALD H. CRPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of  
WILLIAM N. SCHENCK,  
Petitioner.

NO. 83313-3

RULING DENYING REVIEW

William Schenck is currently incarcerated on a 2002 conviction for solicitation to commit first degree murder. In September 2008 Mr. Schenck filed a motion in superior court to strike the community placement term from his judgment and sentence or waive the requirement that he have a preapproved residence address before being released into community placement. The court transferred the motion to Division Two of the Court of Appeals for treatment as a personal restraint petition, and the acting chief judge of that court dismissed the petition. Mr. Schenck now seeks this court's discretionary review: RAP 16.14(c).

To obtain this court's review, Mr. Schenck must show that the acting chief judge's decision conflicts with a decision of this court or with another Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). He does not make this showing. He mainly challenges the application to him of a 2007 statute that requires his preapproved residence address to be located in his "county of origin" except in specified circumstances. RCW 72.09.270(8)(a). Mr. Schenck argues that this statute does not apply "retroactively" to him, and that if it does it violates

constitutional ex post facto principles. Although Mr. Schenck purportedly remains in prison beyond his earned early release date, the acting chief judge found this claim unripe because Mr. Schenck has not submitted a proposed residence address to the Department of Corrections. In disputing this determination, Mr. Schenck claims that prison officials have told him that he is not eligible for any exception to the requirement that he be released to his county of origin (Thurston County). But Mr. Schenck does not dispute that he has yet to submit a proposed residence address in any county. He evidently wishes to be released in Cowlitz County, but having proposed no specific residence, and having received no rejection of a specific residence, he has not been adversely affected by application of RCW 72.09.270(8).

And in any event, Mr. Schenck does not show that applying the statute to him would violate ex post facto principles. Those principles prohibit increasing the punishment for a crime after its commission. *In re Pers. Restraint of Forbis*, 150 Wn.2d 91, 96, 74 P.3d 1189 (2003). As a serious violent offender, Mr. Schenck has never been entitled to early release into community custody, but could only become eligible for early release according to a program developed by the Department of Corrections. Former RCW 9.94A.150(2) (1999). *See In re Pers. Restraint of Mattson*, \_\_\_ Wn.2d \_\_\_, 214 P.3d 141, 146 (2009) (current codification of statute creates no expectation of release into community custody and establishes no liberty interest in community custody). And preapproval of Mr. Schenck's residence address has always been a condition of his release into community placement. Former RCW 9.94A.120(9)(b)(v) (1999). Requiring the residence to be in a particular county does not increase the quantum of punishment for the crime.

Mr. Schenck also appears to continue to argue, as he did below, that his crime did not require community placement. But his crime was a "serious violent offense." Former RCW 9.94A.030(34)(a)(i), (ix) (1999) (solicitation to commit first

degree murder). It therefore required community placement. Former RCW 9.94A.120(9)(b) (1999).

In sum, Mr. Schenck fails to show that the acting chief judge's decision merits this court's review. The motion for discretionary review is denied.



COMMISSIONER

November 3, 2009

## APPENDIX D

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of  
WILLIAM N. SCHENCK,  
Petitioner.

NO. 83313-3

## ORDER

C/A No. 38438-8-II

Department I of the Court, composed of Chief Justice Madsen and Justices C. Johnson, Sanders, Owens and J. Johnson, considered this matter at its March 2, 2010, Motion Calendar and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion to Modify the Commissioner's Ruling is denied.

DATED at Olympia, Washington this 3<sup>rd</sup> day of March, 2010.

For the Court

Madsen, C.J.  
CHIEF JUSTICE

2010 MAR -3 A. 8:48  
CLERK OF COURT  
COURT OF APPEALS  
STATE OF WASHINGTON

## APPENDIX E

## **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

## COUNTY OF ORIGIN

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

## COUNTY OF ORIGIN

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

## COUNTY OF ORIGIN

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. 42451-7-II
	)	
WILLIAM SCHENCK, III,	)	
	)	
Appellant.	)	

---

**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 8<sup>TH</sup> DAY OF MARCH, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **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  
COWLITZ COUNTY CORRECTIONS DEPT.  
1935 1<sup>ST</sup> AVENUE  
LONGVIEW, WA 98632

**SIGNED** IN SEATTLE WASHINGTON, THIS 8<sup>TH</sup> DAY OF MARCH, 2012.

x *Patrick Mayovsky* .

# NIELSEN, BROMAN & KOCH, PLLC

March 08, 2012 - 2:41 PM

## Transmittal Letter

Document Uploaded: 424517-Appellant's Brief.pdf

Case Name: William Schenck

Court of Appeals Case Number: 42451-7

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

Sender Name: Patrick P Mayavsky - Email: [mayovskyp@nwattorney.net](mailto:mayovskyp@nwattorney.net)

A copy of this document has been emailed to the following addresses:

[Sasserm@co.cowlitz.wa.us](mailto:Sasserm@co.cowlitz.wa.us)