**FILED**

DECEMBER 21, 2011
Court of Appeals
Division III
State of Washington

NO. 29909-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

STEVEN WILKINS,

Appellant.

---

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

The Honorable Cameron Mitchell, Judge

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# AMENDED BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. The court erred in finding the Henry report did not contain a favorable recommendation for a Special Sex Offender Sentencing Alternative (SSOSA). CP 57 (Finding of Fact 6).

2. The court erred in concluding the prosecutor was not required to recommend a SSOSA under the terms of the plea agreement. CP 57.

3. Appellant's right to due process was violated when the prosecutor breached the plea agreement by failing to recommend a SSOSA.

4. The court erred in denying appellant's motion to withdraw his guilty plea. 3RP[1] 6.

5. The court misinformed appellant of the consequences of his guilty plea. CP 32-33.

6. The court erred in prohibiting appellant from possessing alcohol as a condition of community custody.

7. The court erred in prohibiting appellant from participating in any activity where he holds a position of authority as a condition of community custody.

8. The condition of community custody prohibiting appellant from possessing pornographic materials is unconstitutionally vague.

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[1] There are three volumes of Verbatim Report of Proceedings referenced as follows: 1RP – March 18, 2011; 2RP - March 30, 2011; 3RP – May 11, 2011.

Issues Pertaining to Assignments of Error

1. Due process requires prosecutors to keep promises made in a plea bargain. Appellant's guilty plea stated the prosecutor would recommend a SSOSA if he received a favorable recommendation. The treatment provider's report found appellant was a candidate, albeit a marginal one, for the SSOSA program. Did the prosecutor breach the plea agreement in failing to recommend a SSOSA?

2. A defendant may withdraw a guilty plea for manifest injustice including an involuntary plea. A plea is involuntary when the defendant is misinformed of direct consequences of the plea such as the maximum term of imprisonment. Appellant's plea agreement correctly set forth the standard range, the statutory maximum, and the indeterminate sentencing permitting his term to be extended up to the statutory maximum of life. However, during the plea colloquy, the court twice assured appellant he was facing no more than ten years and three months in prison. Was appellant's plea involuntary because he was affirmatively misinformed regarding a direct consequence of his plea?

3. Conditions of community custody must be either statutorily authorized or reasonably crime-related. They must be sufficiently definite that persons of average intelligence would understand what is prohibited. Did the court err in prohibiting appellant from possessing alcohol, in

prohibiting appellant from holding any position of authority, and in prohibiting appellant from possessing pornographic materials?

B. STATEMENT OF THE CASE

The Benton County prosecutor charged appellant Steven Wilkins with two counts of first-degree rape of a child. CP 1-2. On October 20, 2010, Wilkins pled guilty to one count of first-degree rape of a child. CP 14.

The statement of defendant on plea of guilty states Wilkins' "Standard Range Actual Confinement" is 93-123 months and the maximum term is life. CP 8. On the following page, the document explains that, under indeterminate sentencing for sex offenses, the judge will impose a minimum term within the standard range that may be increased by the Indeterminate Sentence Review Board. CP 9. Under indeterminate sentencing, the offender is on community custody for the maximum term. CP 9. The prosecutor agreed to recommend a Special Sex Offender Sentencing Alternative (SSOSA), under which all but 12 months of the sentence would be suspended in lieu of treatment and community custody, if Wilkins received a "favorable recommendation." CP 10; RCW 9.94A.670.

During the plea colloquy, the judge twice informed Wilkins his sentence would be a maximum of ten years and three months followed by only 36 months of community custody:

> You have an offender score of zero, a maximum possible sentence of life in prison, and a $50,000 fine, a standard range sentence of 93-123 months in prison, followed by 36 months of community custody.
>
> So do you understand once you enter this plea, Mr. Wilkins, you could be sentenced between 93 to 123 months in prison just based on entry of your plea and for no other reason other than the fact that you have pled guilty to this crime; do you understand that?

CP 32. Following a discussion of the possible SSOSA, the court confirmed, "Okay. And you understand that the sentencing judge does not have to follow that recommendation but could, in fact, put you in prison for up to ten years? . . . Up to 123 months, so ten years plus three months. Do you understand that?" CP 33.

On February 23, 2011, the State moved the court to find that a recommendation for a standard range sentence would not violate the plea agreement. CP 58. The state attached an evaluation by Dr. Michael Henry, completed on September 21, 2010, in which Henry assessed Wilkins' amenability to sex offender treatment under the SSOSA guidelines. CP 60-63. The pre-sentence investigation, filed in November 2010, recommended a standard range sentence and found Wilkins ineligible for a SSOSA because no sexual deviancy evaluation was presented to the Department of Corrections. CP 24. Apparently, the Henry report was solicited by Wilkins' prior attorney and was not disclosed to the State before the plea or to the Department of Corrections before the pre-sentence investigation. 2RP 3.

Henry found Wilkins "clearly minimized his actions with the victim," and "if true, his actions demonstrate a persistent pattern of manipulation and exploitation." CP 62. Henry found Wilkins "verbalized feelings of remorse for his actions," however, his impression was that Wilkins' "level of empathy was low and his feelings of remorse were superficial." CP 62. Henry concluded Wilkins "does not appear to be highly motivated to participate in treatment." CP 63.

Henry ultimately concluded Wilkins was a "marginal candidate for referral to the SSOSA program based on his denial of personal or sexual problems, his low level of empathy, low motivation for treatment, financial problems, and lack of marketable skills." CP 63. Henry stated, "although I have found the SSOSA program to be helpful and beneficial to offenders in the past, unless the client can demonstrate a clear ability to commit to the long-term financial, residential, and employment accountability imperative to the treatment process, he becomes a liability to the community at large." CP 63.

In its motion, the State framed the issue as, "who makes the 'favorable recommendation' referred to in the Statement on Plea of Guilty: a treatment provider, the pre-sentence investigation writer or both?" CP 58. The State argued that because the defense already had Henry's

recommendation at the time of the plea, the agreement must refer to an additional evaluation such as the pre-sentence investigation report. Id.

The second issue the state presented was whether Henry's evaluation was "favorable." CP 70. The State argued it was not because Henry found Wilkins a marginal candidate. Id. The State therefore requested permission to recommend against a SSOSA and for a standard range sentence. Id.

After a hearing on March 18, 2011, the Benton County Superior Court concluded the Henry report was not a "favorable recommendation" and the State could recommend against a SSOSA without breaching the plea agreement. CP 57. At the hearing, the court reasoned, "Dr. Henry makes it clear when someone he thinks is eligible – is a good candidate. Dr. Henry has said he's a marginal candidate and he explained why." 1RP 12.

The court also concluded the recommendation referred to in the plea agreement was probably an evaluation by a sex offender treatment provider, rather than a pre-sentence investigation report by the Department of Corrections. CP 56. It found the pre-sentence investigation report also did not contain a favorable recommendation for a SSOSA. CP 57.

At sentencing on May 11, 2011, Wilkins moved to withdraw his guilty plea because the prosecutor breached the plea agreement by failing to recommend a SSOSA. 3RP 3-5. The court denied this motion based on the previous judge's ruling that the State was not obliged to recommend a

SSOSA because the Henry report was not favorable. 3RP 5. Wilkins also moved for substitution of new counsel, but the court did not rule on this motion. 3RP 3.

The court then moved on to sentencing. The State recommended a minimum sentence at the low end of the standard range, 93 months, with a maximum of life. 3RP 8. Wilkins attorney stated he did not know the facts of the case, but the low end of the standard range seemed fair. 3RP 8. He did not request a SOSSA. 3RP 8. The court imposed a minimum sentence of 93 months with a maximum of life and community custody for life. CP 45. The court subsequently entered an order dismissing count II. CP 55. Notice of appeal was timely filed. CP 54. Pursuant to the Commissioner's order, an amended notice of appeal correcting the date of the judgment and sentence was filed on November 8, 2011. CP 58.

## C. ARGUMENT

### 1. THE PROSECUTOR BREACHED THE PLEA AGREEMENT AND VIOLATED WILKINS' RIGHT TO DUE PROCESS WHEN IT FAILED TO RECOMMEND A SSOSA.

Plea agreements are contracts. State v. Sledge, 133 Wn.2d 828, 838, 947 P.2d 1199 (1997). By entering into a plea agreement, a defendant gives up important constitutional rights. Id. at 839. Therefore, "[d]ue process requires a prosecutor to adhere to the terms of the agreement." Id. (citing,

inter alia, Mabry v. Johnson, 467 U.S. 504, 509, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984) and Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)). Under Wilkins' plea agreement, the prosecutor promised to recommend a SSOSA if Wilkins received a "favorable recommendation." CP 10. The prosecutor reneged on this promise and breached the plea agreement by failing to recommend a SSOSA when the Henry report found Wilkins was a candidate for the program. Based on this due process violation, this Court should reverse Wilkins' conviction and permit him to withdraw his plea as per his request. Sledge, 133 Wn.2d at 836.

This matter is properly before the court on appeal because the defense argued strenuously against the superior court's ruling that the prosecutor could recommend a standard range prison term without violating the plea agreement. 1RP 6-9. Even if this were not sufficient to preserve the issue, the prosecutor's breach of a plea agreement is manifest constitutional error that may be addressed for the first time on appeal. State v. Sanchez, 146 Wn.2d 339, 346, 46 P.3d 774 (2002).

There is no question that the State did not recommend a SSOSA. Whether it thereby breached the plea agreement rests on whether the condition precedent was satisfied. See State v. McInally, 125 Wn. App. 854, 867-68, 106 P.3d 794 (2005) (failure to comply with condition precedent

excuses contract performance). Therefore, the question of the State's obligation to recommend a SSOSA hinges on interpretation of the plea agreement, specifically, what was meant by a "favorable recommendation." CP 10. When facts are not in dispute, the construction of contract terms is a legal question reviewed de novo. Yeats v. Yeats' Estate, 90 Wn.2d 201, 204, 580 P.2d 617 (1978); Lamar Outdoor Advertising v. Harwood, 162 Wn. App. 385, 395, 254 P.3d 208 (2011).

The defense argued an evaluation was a favorable recommendation so long as the evaluator found Wilkins met the basic requirements for the program, specifically, amenability to treatment. 1RP 6-9. The Superior Court apparently adopted the State's interpretation that the term required a finding that the person be a "good" candidate, rather than merely eligible. 1RP 11-12. The court's interpretation is at odds with principles of contract interpretation and should be rejected.

a. A Favorable Recommendation Reasonably Refers to a Finding of Amenability to Treatment.

Contract terms should be construed as an average reasonable person would understand them in the context of the entire agreement. New Hampshire Indem. Co., Inc. v. Budget Rent-A-Car Systems, Inc., 148 Wn.2d 929, 932, 64 P.3d 1239 (2003). Words are generally given their ordinary, dictionary definition unless another definition was clearly intended. Corbray

v. Stevenson, 98 Wn.2d 410, 415, 656 P.2d 473 (1982). Legal terms of art are given their legal meaning under Washington statutes and case law. Polygon Northwest Co. v. American Nat. Fire Ins. Co., 143 Wn. App. 753, 784-85, 189 P.3d 777 (2008).

The dictionary defines "favorable" as "expressing approval," and "indicative of a successful outcome." Webster's Third New International Dictionary 830 (Philip Babcock Gove et al. eds. 1993). But the SSOSA statute does not speak in terms of favorable recommendations, approval, or likely outcomes. Under the statute, the first hurdle to be overcome is eligibility. RCW 9.94A.670(2). An offender is eligible based on his criminal history, the nature of the offense, and the length of the potential sentence. RCW 9.94A.670(2). Once the offender is determined to be eligible, an examination may be ordered to determine if he is "amenable to treatment." RCW 9.94A.670(3). Finally, the court determines whether the offender and the community would benefit from a SSOSA. RCW 9.94A.670(4). Because the court determines statutory eligibility and ultimate benefit, it is logical under this framework to conclude that the "favorable recommendation" referred to in the plea agreement means a certified sex offender treatment provider's determination of amenability to treatment. RCW 9.94A.670. (For this reason, the court should also reject any argument by the State that the "recommendation" the plea agreement

refers to is the Pre-Sentence Investigation report by the Department of Corrections.)

Past practice of the prosecutor who drafted the agreement apparently supports this interpretation as well. 1RP 6. Trade usage and course of dealing may be considered in order to understand the parties' intent, even if the contract term is not per se ambiguous. Puget Sound Financial, L.L.C. v. Unisearch, Inc., 146 Wn.2d 428, 434, 47 P.3d 940 (2002). Wilkins' attorney explained that the course of dealing with the State in the past had been that amenability to treatment was sufficient to trigger the State's duty to recommend a SSOSA. 1RP 6. Interpreting a favorable recommendation to mean a finding of amenability to treatment is consistent with the parties' course of dealing.

This Court should adopt this broader interpretation rather than the narrower view advanced by the State because ambiguous contract language is construed most strictly against the drafter. Lamar Outdoor Advertising v. Harwood, 162 Wn. App. 385, 395, 254 P.3d 208 (2011); Universal/Land Const. Co. v. City of Spokane, 49 Wn. App. 634, 638, 745 P.2d 53 (1987) (citing Guy Stickney, Inc. v. Underwood, 67 Wn.2d 824, 827, 410 P.2d 7 (1966)). A contract provision is ambiguous when its terms may be understood as having more than one meaning. State v. E.A.J., 116 Wn. App. 777, 784, 67 P.3d 518 (2003). The State implicitly admitted this term was

ambiguous because it felt compelled to obtain a judicial determination on whether the Henry evaluation was favorable before proceeding. 1RP 2. The court described it as a "motion to clarify the plea agreement." 1RP 2. Moreover, there are at least two reasonable interpretations of the term "favorable recommendation" as used in the plea agreement. The Superior Court interpreted it to mean a finding that Wilkins was a good candidate for the program. 1RP 12. Wilkins argued it means he must be minimally eligible for the program because he is amenable to treatment. 1RP 6-9. The term is also ambiguous because it does not define who must make the recommendation, the Department of Corrections Pre-Sentence Investigation or the treatment provider. The ambiguous term of a "favorable recommendation" should be construed against the drafter and given the broader interpretation of eligibility or amenability to treatment.

Additionally, the term should be construed as referring to amenability to treatment because adopting the lower court's interpretation would render the term entirely subjective, thereby rendering the State's promise illusory. A promise is illusory when it is so indefinite it cannot be enforced or makes performance entirely discretionary on the part of the promisor. State v. E.A.J., 116 Wn. App. 777, 784, 67 P.3d 518 (2003). The plea agreement appears intended to make the prosecutor's recommendation hinge on a third party assessment. But if the State's promise actually rests

on its own subjective interpretation of whether the recommendation is favorable enough, or good enough, or enthusiastic enough, the promise is illusory. The State has promised to do nothing except what it wants to do. Courts do not interpret contract terms so as to render a promise illusory. Taylor v. Shigaki, 84 Wn. App. 723, 730, 930 P.2d 340 (1997). This Court should not interpret the term "favorable recommendation" as resting on a subjective assessment of the degree to which the evaluator favors participation in the SSOSA program.

Construing the agreement strictly against the State as drafter and to avoid illusory promises, a favorable recommendation means one that finds Wilkins amenable to treatment. This interpretation is also consistent with the parties' prior dealings and with the structure of the SSOSA statute.

b. The Henry Evaluation Was a Favorable Recommendation Because It Found Wilkins Eligible and Amenable to Treatment.

Under this interpretation, the State was required to recommend a SSOSA because the condition precedent of a "favorable recommendation" was met. The prosecutor may not contravene a defendant's reasonable expectations that arise from the agreement. State v. McRae, 96 Wn. App. 298, 305, 979 P.2d 911 (1999). Wilkins had a reasonable expectation that the Henry evaluation was sufficient to require the State to recommend a SSOSA.

The Henry evaluation was "favorable" because it concluded Wilkins was a "marginal candidate" for the SSOSA program. CP 63. The dictionary defines marginal as "close to the lower limit of qualification or acceptability." Webster's Third New International Dictionary 1381 (Philip Babcock Gove et al. eds. 1993). Thus a marginal candidate is qualified or acceptable, even if close to the lower limit. If Wilkins were not amenable to treatment, he would not be a candidate at all. RCW 9.94A.670(3). Therefore, Dr. Henry's finding that he is a marginal candidate reflects an implicit conclusion that he is amenable to treatment. As Wilkins' counsel below pointed out, the minimums wouldn't be the minimums if they weren't good enough. 1RP 8-9. The State breached the plea agreement by refusing to recommend a SSOSA.

The prosecutor's breach of the plea agreement is manifest injustice that permits a choice of remedies: withdrawal of the plea or specific performance. State v. Carreno-Maldonado, 135 Wn. App. 77, 88-89, 143 P.3d 343 (2006). Because the prosecutor breached the plea agreement, the court erred in denying Wilkins' motion to withdraw his guilty plea. Id.; CrR 4.2. This Court should reverse the denial of Wilkins' motion to withdraw his guilty plea or remand for re-sentencing before a different judge if Wilkins elects to hold the State to the specific terms of the

agreement. State v. Van Buren, 101 Wn. App. 206, 218, 2 P.3d 991 (2000).

Alternatively, if this Court concludes there are factual issues regarding the parties' intent that should be resolved via extrinsic evidence, this Court could remand for a formal evidentiary hearing. E.A.J., 116 Wn. App. at 785. When contract interpretation depends upon the credibility of extrinsic evidence or a choice among reasonable inferences from extrinsic evidence, a factual issue exists for the trial court. Id.

2. THE GUILTY PLEA WAS INVALID BECAUSE THE COURT MISINFORMED WILKINS ABOUT HIS MAXIMUM SENTENCE.

The superior court incorrectly told Wilkins he could not be imprisoned for more than 123 months. CP 32-33. This was affirmative misinformation regarding the maximum sentence, a direct consequence of his plea. See Mendoza, 157 Wn.2d at 590 (length of sentence is direct consequence of plea). Because this misinformation was not corrected, Wilkins' plea was not voluntary and he should be permitted to withdraw his plea. CrR 4.2.

Due Process requires a guilty plea be knowing, voluntary, and intelligent. State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). CrR 4.2(d) embodies this standard by providing the trial court "shall not accept a plea of guilty, without first determining that it is made voluntarily,

competently and with an understanding of the nature of the charge and the consequences of the plea." Id.

The colloquy with the court is essential to the knowing and voluntary nature of a plea. State v. Dennis, 45 Wn. App. 893, 898, 728 P.2d 1075 (1986) . The trial court "is required to correctly inform a defendant who pleads guilty as to the maximum sentence." State v. Morley, 134 Wn.2d 588, 621, 952 P.2d 167 (1998). The trial court is not required to orally confirm on the record that a defendant understands the offender score and statutory maximum sentence so long as the court confirms that the defendant has read the plea agreement, conferred with counsel, and understands. State v. Codiga, 162 Wn.2d 912, 924, 175 P.3d 1082 (2008). But this is not a case of mere failure to inquire. In this case the court affirmatively misadvised Wilkins regarding the direct consequences of his plea. CP 32, 33.

The superior court repeatedly assured Wilkins his maximum sentence was ten years and three months with 36 months of community custody. CP 32, 33. The court stated:

> You have an offender score of zero, a maximum possible sentence of life in prison, and a $50,000 fine, a standard range sentence of 93-123 months in prison, followed by 36 months of community custody.
>
> So do you understand once you enter this plea, Mr. Wilkins, you could be sentenced between 93 to 123 months

> in prison just based on entry of your plea and for no other reason other than the fact that you have pled guilty to this crime; do you understand that?

CP 32. Following a discussion of the possible SSOSA, the court confirmed, "Okay. And you understand that the sentencing judge does not have to follow that recommendation but could, in fact, put you in prison for up to ten years? . . . Up to 123 months, so ten years plus three months. Do you understand that?" CP 33.

In reality, Wilkins faced, and in fact received, an indeterminate sentence with a minimum of 93 months that the ISRB can extend up to the maximum of life and community custody life if he is ever released. CP 45. No one corrected the court's statements.

A guilty plea based on misinformation regarding sentencing consequences is not made knowingly. In re Pers. Restraint of Quinn, 154 Wn. App. 816, 835-36, 226 P.3d 208 (2010). Affirmative misinformation, even regarding collateral consequences of a plea, may render a plea involuntary. State v. Stowe, 71 Wn. App. 182, 187–88, 858 P.2d 267 (1993). Because the court misadvised him of the maximum prison term he was facing, Wilkins' plea was involuntary. CP 32-33; Mendoza, 157 Wn.2d at 589-90.

While the written plea agreement arguably sets forth the law regarding the indeterminate sentence, that alone is not dispositive. State v. S.M., 100 Wn. App. 401, 414-15, 996 P. 2d 1111 (2000).

> When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. State v. Smith, 134 Wn.2d 849, 852, 953 P.2d 810 (1998). But a guilty plea is not truly voluntary "'unless the defendant possesses an understanding of the law in relation to the facts.'" In re PRP of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1981) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)).

S.M., 100 Wn. App. at 413-14. In S.M., the attorney delegated to his legal assistant and wife the task of explaining the plea agreement. 100 Wn. App. at 405-06. The legal assistant gave S.M. incorrect information about the elements of the offense, the rights he was foregoing, and the consequences of his plea. 100 Wn. App. at 411. His written statement, supposedly providing the factual basis for the plea, gave no indication he understood penetration was an element of the offense of rape of a child. 100 Wn. App. at 415. On these facts, the court concluded the record did not establish that S.M.'s plea was voluntary and the lower court erred in denying his motion to withdraw his plea. 100 Wn. App. at 415.

Here, while the plea agreement does set forth the law on indeterminate sentencing for those convicted of sex offenses, this is in a separate section from the standard range which is labeled "actual

confinement." CP 8, 9. To the uninitiated, this does not make clear that the Indeterminate Sentence Review Board does not have to approve release at the end of the standard range sentence. It does not make clear that the accused is facing a potential life sentence. This is particularly true because the court, with no correction from either attorney, told Wilkins he could be kept in prison a maximum of ten years and three months. CP 32-33. Under indeterminate sentencing for sex offenses, that is patently false. CP 9; RCW 9.94A.507. Like S.M., Wilkins should be permitted to withdraw his plea because he received patently false information that was crucial to his decision to plead guilty. CP 32-33; Quinn, 154 Wn. App. at 835-36; S.M., 100 Wn. App. at 411.

An accused's misunderstanding of sentencing consequences when pleading guilty constitutes a manifest error affecting a constitutional right. Mendoza, 157 Wn.2d at 589 (quoting State v. Walsh, 143 Wn.2d 1, 7-8, 17 P.3d 591 (2001); RAP 2.5(a)(3)). In Walsh, the Court permitted Walsh to argue his plea was involuntary for the first time on appeal. 143 Wn.2d 1. Between the plea hearing and sentencing, the State discovered Walsh's offender score and standard range were higher than initially thought. Nothing in the record indicated Walsh was advised of this correction before sentencing. Id. at 7. Since Walsh was neither advised of the misunderstanding nor offered a chance to withdraw his plea, the Court found

the plea involuntary and permitted withdrawal. Id. at 9. Similarly, the misinformation Wilkins received was not corrected. Although he did not mention this misinformation in moving to withdraw his plea, it is manifest constitutional error that may be raised for the first time on appeal. Id.

### 3. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING CONDITIONS OF COMMUNITY CUSTODY.

As conditions of his community custody upon release, Wilkins "shall not use or possess any alcohol," "shall not use or possess any pornographic materials," and "shall not participate in activities where he is in a position of authority." CP 52. The prohibitions on alcohol and positions of authority are unauthorized because they are neither crime-related nor specifically authorized by law. The prohibition on pornographic materials is unconstitutionally vague.

#### a. The Law Does Not Authorize the Court to Prohibit Mere Possession of Alcohol When Alcohol Did Not Contribute to the Offense.

Under RCW 9.94A.703, a sentencing court may require an offender to "Refrain from consuming alcohol." RCW 9.94A.703. However, it may not prohibit the mere possession of alcohol unless alcohol is somehow related to the crime. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). The condition of community custody prohibiting Wilkins from

possessing alcohol should be stricken because it exceeds the sentencing court's statutory authority.

Whenever a sentencing court exceeds its statutory authority, its action is void. State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002). Sentencing courts may only impose sentences the Legislature has authorized by statute. Id. Unauthorized conditions of a sentence may be challenged for the first time on appeal. Jones, 118 Wn. App. at 204; see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

RCW 9.94A.703, lists mandatory and waivable conditions of community custody. Among the waivable conditions is a requirement that the offender "Refrain from consuming alcohol." RCW 9.94A.703. The statute also permits other conditions if they are "crime related." RCW 9.94A.703. The court has interpreted the prior version of RCW 9.94A.703 as permitting the court to impose a prohibition on consuming alcohol regardless of whether the crime involved alcohol.[2] Jones, 118 Wn. App. at 207; RCW 9.94A.703 ("As part of any term of community custody, the court may order an offender to: . . . Refrain from consuming alcohol."). However,

[2] Jones considered the Sentencing Reform Act as it existed in 2001. However, like the law in effect currently, the 2001 law permitted the court to impose a condition of community custody that the offender "shall not consume alcohol" without mention of possession. 118 Wn. App. at 206; RCW 9.94A.703.

other alcohol-related conditions, such as treatment, are authorized only if related to the offense. Jones, 118 Wn. App. at 207-08.

Like the Jones court, this court should strike the condition of Wilkins' community custody prohibiting him from possessing alcohol. Id. at 212. The court went beyond what was authorized by statute and imposed a condition prohibiting Wilkins from even possessing alcohol despite the lack of evidence alcohol played any role in his offense. CP 14 Under this condition, Wilkins could be arrested for legal use or possession of alcohol by a member of his household or a guest in his home. The court should reverse this general ban on possession of alcohol because it is unauthorized by statute. Jones, 118 Wn. App. at 212; Phelps, 113 Wn. App. at 354-55.

b. The Law Does Not Authorize the Court to Ban Wilkins from Assuming Any Position of Authority Whatsoever.

Like the ban on possession of alcohol, a ban on holding a position of authority is not expressly authorized by the community custody statutes. RCW 9.94A.703. Therefore, it may not be imposed unless reasonably crime related. Id. (10) "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). Here, Wilkins pleaded guilty to one count of rape

of a child. Yet the condition of his community custody prohibits him from holding any position of authority whatsoever, over children or adults. This could preclude Wilkins from leading a 12-step meeting or a prayer group with other adults. Precluding him from holding any position of authority in any activity, regardless of whether children are involved, is not directly related to the circumstances of his offense. This condition should be stricken.

c. The Community Custody Condition Prohibiting Possession of Pornography Is Unconstitutionally Vague.

Under the due process clause, conditions of community custody are unconstitutionally vague when they do not provide sufficient notice such that an ordinary person would understand what is prohibited or provide ascertainable standard of guilt. State v. Sansone, 127 Wn. App. 630, 638-39, 111 P.3d 1251 (2005). This doctrine provides two important protections. First, it ensures citizens receive fair warning of what conduct they must avoid. Second, it protects from discriminatory, ad hoc, or arbitrary enforcement. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

Unlike statutes, conditions of community custody are not presumed constitutional. State v. Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). Appellate courts review conditions under an abuse of

discretion standard and reverse when the condition is manifestly unreasonable. Id. at 791-92. Unconstitutionally vague conditions are manifestly unreasonable. Id. at 792, 793. A "restriction on accessing or possessing pornographic materials is unconstitutionally vague." State v. Bahl, 164 Wn.2d 739, 758, 193 P.3d 678 (2008). The condition prohibiting Wilkins from possessing pornographic material should be stricken as unconstitutionally vague. Id.

D. CONCLUSION

Wilkins asks this Court to permit him to withdraw his guilty plea because the prosecutor breached the plea agreement and the court affirmatively misinformed him of the sentencing consequences. Alternatively, the case should be remanded for resentencing without the unauthorized and unconstitutional conditions of community custody.

DATED this 20th day of ~~November~~ December, 2011.

Respectfully submitted,

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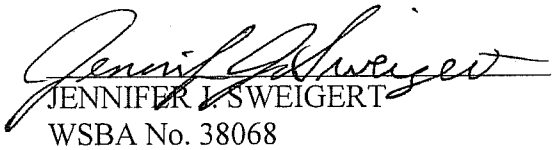

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No. 29909-1-III

Certificate of Service by email

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 20th day of December, 2011, I caused a true and correct copy of the **Amended Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4):

Benton County Prosecuting Attorney
prosecuting@co.benton.wa.us

**Signed** in Seattle, Washington this 20th day of December 2011

x Patrick Mayovsky