

NO. 94439-3

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

ERIK PETTERSON,

Petitioner.

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**SUPPLEMENTAL BRIEF OF THE  
DEPARTMENT OF CORRECTIONS**

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ROBERT W. FERGUSON  
Attorney General

Cassie B. vanRoojen, WSBA #44049  
Mandy L. Rose, WSBA #38506  
Assistant Attorneys General  
Corrections Division; OID #91025  
PO Box 40116  
Olympia WA 98504-0116  
360-586-1445  
CassieV@atg.wa.gov  
MandyR@atg.wa.gov

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## I. INTRODUCTION

Petterson faced a potential sentence of life imprisonment for molesting his 10-year-old stepdaughter. Instead, Petterson served just six months in jail under the Special Sex Offender Sentencing Alternative (SSOSA) statute. In exchange for this lenient sentence, the plain language of the statute mandated that Petterson be supervised for life, subject to conditions imposed by the Department of Corrections. After initially requiring Petterson to comply with this statutory mandate, the superior court erred by relieving Petterson of the requirement to comply with Department-imposed conditions. The superior court recently remedied this error by reinstating the requirement that Petterson comply with such conditions. Petterson appeals from the superior court's recent order that complied with the statutory mandate.

Petterson does not challenge the propriety of any particular condition. Instead, Petterson argues the superior court had authority, outside of the situations specifically enumerated in the statute, to modify and eliminate conditions of supervision, including the mandatory requirement that he obey conditions imposed by the Department. But Petterson's argument contradicts the plain language and intent of the SSOSA statute, and it impairs the Department's proper supervision of SSOSA offenders. This Court should affirm.

## II. ISSUE PRESENTED

The SSOSA statute expressly authorizes the sentencing court to modify conditions in only two situations: during the annual treatment progress hearing and the treatment termination hearing. RCW 9.94A.670(8)(b) and (9)(a). The statute further mandates that the court require the offender to comply with any conditions imposed by the Department. *Id.* Did the superior court correctly determine that it lacked authority to modify conditions of supervision after treatment had already terminated, and that in any event it lacked authority to eliminate the requirement to comply with Department-imposed conditions?

## III. STATEMENT OF THE CASE

The Sentencing Reform Act (SRA) includes a special sentencing alternative for offenders convicted of sex crimes. RCW 9.94A.670. The statute allows the superior court to suspend the sentence of confinement. RCW 9.94A.670(4). In exchange for the suspended sentence, the court must impose a short term of confinement, sex offender treatment, and community custody for a designated period of time. RCW 9.94A.670(5). Where the defendant would have been sentenced under RCW 9.94A.507, the duration of community custody must equal the statutory maximum for the offense. RCW 9.94A.670(5)(b); RCW 9.94A.507(3).

“As conditions of the suspended sentence, the court must . . . require the offender to comply with any conditions imposed by the department under RCW 9.94A.703.” RCW 9.94A.670(5)(b) (formerly 9.94A.670(4)(a) (2001)); *see also* RCW 9.94A.703(1)(b) (“**Mandatory conditions.** As part of any term of community custody, the court shall . . . require the offender to comply with any conditions imposed by the department under RCW 9.94A.704.”). The Department may impose and modify conditions of supervision based upon an assessment of risk. RCW 9.94A.704(2).

The sentencing court has jurisdiction to monitor the offender’s progress during treatment. *See* RCW 9.94A.670(7), (8). The court receives quarterly treatment reports, and conducts at least once a year hearings on the offender’s progress in treatment. RCW 9.94A.670(8). Where an offender has successfully completed treatment within the treatment period, the court will terminate treatment. RCW 9.94A.670(9). Offenders remain on community custody for the duration of the statutory maximum for their offense. RCW 9.94A.670(5)(b). If the offender violates conditions of community custody, the superior court may revoke the suspended sentence and order execution of the original sentence of confinement. RCW 9.94A.670(11); RCW 9.94A.633(2)(d).

In 2001, when Petterson was 32, he molested his 10-year-old step-daughter. CP 6-13; CP 4. After Petterson pleaded guilty to first degree child molestation (domestic violence), the superior court imposed a determinate plus sentence consisting of a minimum term of 68 months, a maximum term of life imprisonment, and community custody for any time Petterson was released prior to expiration of the maximum term. CP 7. Under that original sentence, Petterson faced serving at least 68 months, and a potential lifetime, in prison. Upon completion of the minimum term, the Indeterminate Sentence Review Board could potentially deny release and set a new minimum term. RCW 9.95.420(3). Even upon release from prison, Petterson would serve stringent lifetime supervision under the Community Custody Board. RCW 9.94A.507 (former 9.94A.712 (2001)). The Board would retain jurisdiction and could return Petterson to prison to serve the remaining portion of the sentence. RCW 9.95.435.

Instead of a potential life sentence, Petterson received an alternative sentence under the SSOSA statute. The superior court suspended the original sentence, and imposed six months of confinement plus community custody for the length of the maximum term (*i.e.*, life). CP 7-8. As part of the SSOSA sentence, and in accordance with statutory requirements, the superior court imposed the mandatory requirement that Petterson comply with any conditions imposed by the Department during

the term of community custody. CP 8; *see also* RCW 9.94A.670(5)(b) (former RCW 9.94A.670(4) (2001)). Petterson began his community custody on February 11, 2002. CP 83.

On October 5, 2005, the court found that Petterson had successfully completed sex offender treatment and terminated his treatment pursuant to RCW 9.94A.670(9)(b). CP 14-16. In doing so, the court did not modify any conditions of community custody. *See* CP 14-16. In terminating treatment, however, the court also erroneously terminated both the SSOSA and the term of community custody. CP 14-16. The superior court subsequently corrected this error, and the Court of Appeals affirmed that order. *See* CP 22-24; 35-39.

On May 30, 2008, almost three years after terminating treatment, the superior court entered an order that “suspended” all conditions of community custody except requiring Petterson to obey all laws and to inform the Department of changes in his address or phone number. CP 40. Several years later, the trial court again revisited Petterson’s conditions of community custody, and added two conditions but did not reinstate the standard condition to comply with any conditions imposed by the Department. *See* CP 52-53. Both the 2008 and 2013 orders stated that any party or the Department may move at any time to modify the conditions. CP 87, 88-89.

In 2015, the Department asked the superior court to reinstate the condition to comply with conditions imposed by the Department, arguing that the earlier order erred in eliminating a mandatory condition. CP 57-93. The court agreed and entered an order requiring Petterson to comply with conditions imposed by the Department. CP 142-146.

The Court of Appeals affirmed, holding that the previous orders exceeded the superior court's authority because "nothing in SSOSA provides explicit authority for the superior court to modify the conditions of community custody after the treatment termination hearing." *State v. Petterson*, 198 Wn. App. 673, 682, 394 P.3d 385 (2017). The Court further held "even if the superior court retained some discretion to modify community custody conditions throughout the term of an offender's community custody, it does not have the authority to modify mandatory conditions explicitly required by statute." *Id.* at 684.

Petterson sought review by this Court. In doing so, Petterson expressly disclaimed that he was challenging any particular condition imposed by the Department. Petition at 12. Rather, Petterson contended only that the superior courts retain authority to modify community custody

conditions outside of those situations specifically enumerated in the SSOSA statute. Petition at 1.<sup>1</sup>

#### IV. ARGUMENT

##### A. **The Plain Language and History of the Statute Show the Superior Court Lacked Authority to Modify the Conditions After Treatment had been Terminated**

In enacting the SSOSA statute, the Legislature crafted a system that specifically delineated the responsibilities of the involved parties. This included limiting the sentencing court's authority to modify conditions of community custody to specific circumstances and imposing the mandatory condition that required offenders to comply with conditions imposed by the Department of Corrections. RCW 9.94A.670(8)(b) and (9)(a); RCW 9.94A.670(5)(b). The superior court recognized that it had erred by modifying and eliminating the mandatory condition, and the court appropriately corrected its mistake.

The Court's fundamental purpose in construing statutes is to ascertain and carry out the intent of the Legislature. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, courts give effect to that plain

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<sup>1</sup> Petterson appears to have abandoned his argument that the Department is equitably estopped from remedying the court's erroneous 2008 and 2013 orders, as he did not seek review of this issue in his motion for discretionary review nor address it in his supplemental brief. See RAP 13.7(b) (limiting this Court's review to questions raised in the motion for discretionary review). In any event, Petterson's argument is without merit. See *State v. Petterson*, 198 Wn. App. 673, 678, 394 P.3d 385 (2017) n. 4; Court of Appeals Brief of Respondent Department of Corrections at Section V.B.

meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004).

In 2001, at the time of Petterson's crime and sentencing, the statute permitted modification of community custody conditions only during the treatment termination hearing. Former RCW 9.94A.670(8) (2001).<sup>2</sup>

Specifically, the statute stated in part:

At the treatment termination hearing the court may: (a) modify conditions of community custody, and either (b) terminate treatment, or (c) extend treatment for up to the remaining period of community custody.

Formerly RCW 9.94A.670(8) (2001).

Nowhere else in the 2001 SSOSA statute was a superior court allowed to modify the conditions of community custody. *See* former RCW 9.94A.670 (2001). Thus, beyond the treatment termination hearing, there was no statutory authority for the sentencing court to modify conditions. In fact, where the legislature intended to grant the sentencing court broader supervisory authority over SSOSA offenders, it specifically did so. For example, the superior court retains authority to "revoke the suspended sentence *at any time during the period of community custody.*"

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<sup>2</sup> There have been no substantive changes to the specific provisions at issue here with the exception of allowing modification of conditions at the annual reviews. The Court of Appeals appropriately recognized as much. *State v. Petterson*, 198 Wn. App. 673, 674 n. 1, 394 P.3d 385 (2017). As such, citations herein refer to existing statutes unless specifically identified as former statute. In addition, a copy of former RCW 9.94A.670 (2001) is attached as Appendix A to this brief.

*See* former RCW 9.94A.670(10) (2001); RCW 9.94A.670(11) (emphasis added).

The explicit grant of authority to revoke the suspended sentence, but not to otherwise modify conditions, implies that the court lacks general authority to modify conditions during the term of community custody. Under the canon of construction *maxim expressio unius est exclusio alterius*, when a statute expressly designates the things or classes of things upon which it operates, an inference arises that all things or classes of things omitted were intentionally omitted. *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). Because the Legislature in 2001 authorized the superior court to modify conditions only during the treatment termination hearing, this demonstrated that the court lacked authority to modify conditions at other times during community custody. *See State v. Harkness*, 145 Wn. App 678, 685, 186 P.3d 1182 (2008) (“[T]he existence of express provisions within the SRA for modifying a sentence precluded the implication of others.”) (internal citation omitted). Here, the Legislature demonstrated its intent for the sentencing court to have varying scopes of authority over supervision of SSOSA offenders by explicitly limiting the modification of community custody conditions to the treatment termination hearing, while

allowing revocation of a suspended sentence at any time during the period of community custody.

Subsequent amendments to the SSOSA statute confirm that the legislature intended to limit the court's authority to modify conditions. *See Rozner v. Bellevue*, 116 Wn.2d 342, 347-48, 804 P.2d 24 (1991) (Subsequent amendments of statutes may be considered by the court in determining the precise intent of the Legislature). In 2006 the legislature amended the SSOSA framework to expressly allow one additional circumstance when the court could modify community custody conditions. But even under this subsequent amendment, the sentencing court is limited to modifying conditions of community custody to the treatment termination hearing and the annual treatment progress hearings. *See* RCW 9.94A.670(8)(b) and RCW 9.94A.670(9). This subsequent amendment evinces not only the Legislature's intent to constrain the sentencing court's authority to modify conditions, but the amendment makes clear that, contrary to Petterson's argument, the SSOSA statute in 2001 did not grant the sentencing court authority to modify community custody conditions at any time. For if that were the case, it would be unnecessary to amend the statute to specifically permit the court to modify conditions at the annual treatment hearing. *See Fifteen-O-One Fourth Ave. Ltd., P'ship v. State Dep't of Revenue*, 49 Wn. App. 300, 303, 742 P.2d 747 (1987) ("It is

presumed that the legislature does not indulge in vain and useless acts and that some significant purpose or object is implicit in every legislative enactment.”)

The statute expressly authorizes the court to modify the conditions of community custody only during the annual treatment progress hearings and the treatment termination hearing. RCW 9.94A.670(8), (9). Once the court has terminated treatment, the statute does not authorize the court to further modify conditions of community custody. RCW 9.94A.670. Rather, the statute contemplates that the Department will modify conditions based upon an assessment of risk. RCW 9.94A.670(5)(b); RCW 9.94A.704. Petterson’s arguments to the contrary are unavailing and conflict with the language, structure, and history of RCW 9.94A.670. Therefore, the trial court properly remedied the 2008 trial court’s order improperly modifying community custody conditions beyond the termination treatment hearing.<sup>3</sup>

**B. The SSOSA Statute Requires That Offenders Be Ordered to Follow All Department-Imposed Conditions**

Even if the trial court ignored the statutory language limiting its authority to modify conditions to the treatment termination hearing, it

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<sup>3</sup> Petterson’s argument that the trial court’s modification was proper because his treatment termination hearing lasted three years across six hearings is contradicted by the record. Treatment was terminated on October 4, 2005 and was never reinstated. CP 22-23. Petterson conceded such in his motion to terminate community custody. CP 28. And the order modifying the community custody conditions was entered on September 16, 2015. CP 149-153.

would still be bound by the mandate to require offenders to comply with conditions imposed by the Department. The SSOSA statute is explicit that offenders are required to comply with any conditions imposed by the Department of Corrections:

(5) As conditions of the suspended sentence, the court *must* impose the following:

...  
(b) A term of community custody equal to . . . the length of the maximum term imposed pursuant to RCW 9.94A.507, . . . and *require the offender to comply with any conditions imposed by the department* under RCW 9.94A.703.

RCW 9.94A.670(5)(b) (emphasis added); *see also* former RCW 9.94A.670(4)(a) (2001).

The SSOSA statute requires the sentencing court to order the offender to abide by conditions imposed by the Department during community custody. This is a mandatory statutory requirement as indicated by the use of the term “must.” The word “must” is a synonym of “shall,” which imposes a mandatory requirement. *See State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985) (internal quotations omitted.) Therefore, the superior court was required to impose, and lacked authority to remove, this condition.

This mandate is in contrast to the discretionary conditions listed in RCW 9.94A.670(6), which provides, “As conditions of the suspended sentence, the court *may* impose one or more of the following . . . .”

(emphasis added). Use of the word “may” in a statute along with must or shall “indicates that the Legislature intended the two words to have different meanings: ‘may’ being directory while ‘shall’ being mandatory.” *Bartholomew*, 104 Wn.2d. at 848. The statute allows the court not to impose the discretionary conditions, but requires the court to impose the mandatory conditions.

The statute mandated that the superior court impose the condition that required Petterson to comply with Department imposed conditions during his term of community custody. The court lacked authority to eliminate this mandatory condition and appropriately remedied this error by reinstating this condition in 2015.

**C. The Limitations on the Sentencing Court’s Authority to Modify Conditions of Community Custody is Consistent with the Well-Established Principle that Sentences Cannot be Modified Unless Explicitly Authorized**

Under the SRA, sentencing courts generally lose jurisdiction to the Department of Corrections after entry of final judgment. *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008). A court has no inherent authority and only limited statutory authority to modify a sentence post-judgment. *Harkness*, 145 Wn. App. at 685; *see also, e.g., State v. Murray*, 118 Wn. App. 518, 524, 77 P.3d 1188 (2003) (court was without authority to modify form of partial confinement from work release to home detention).

In *State v. Shove*, the Court held that the SRA permitted modification of sentences only in specific, statutorily delineated circumstances, and that other circumstances could not be implied. *State v. Shove*, 113 Wn.2d 83, 86, 776 P.2d 132 (1989). Here, the legislature clearly delineated the circumstances in which the court could modify conditions of the sentence. RCW 9.94A.670. Following *Shove*, no additional circumstances can be implied. Under *Shove*, the plain language of the SSOSA statute governs and the language expressly allows the modification of community custody conditions only during the annual progress hearing and the treatment termination hearing. RCW 9.94A.670.

Contrary to Petterson's argument, *Shove's* general principle extends to SSOSA sentences. While Petterson is correct that the SSOSA statute provides for the court's ongoing jurisdiction over parts of a SSOSA sentence, this does not make *Shove* inapplicable to SSOSA sentences. Rather, the scope of the court's jurisdiction is specifically enumerated in the statute, making the SSOSA statutory scheme and the Department's argument entirely consistent with *Shove*. Appellate courts have recognized so. *E.g.*, *State v. Ibanez*, 62 Wn. App. 628, 632, 815 P.2d 788 (1991). In *Ibanez*, the court reversed a trial court's imposition of an additional year of community custody for a SSOSA offender. *Id.* In reaching this conclusion, the court relied on *Shove* to hold that while the trial court

retained some jurisdiction, it was limited by express statutory language. *Id.* at 632.

This Court's recent decision in *State v. Bigsby*, \_\_ Wn.2d \_\_\_, 399 P.3d 540 (2017), further supports this principle. In *Bigsby*, this Court considered a trial court's statutory authority to sanction an offender for a sentence violation while on community custody. *Id.* In reaching its conclusion that the trial court did not have statutory authority to sanction Bigsby while he was on Department supervision, the court reviewed the statutes applicable to Bigsby. *Id.* In carefully examining the different statutory schemes to parse out the limits and grants of a trial court's authority, the court's ruling in *Bigsby* reinforces the proposition that absent express statutory authority, trial courts are without authority to modify community custody conditions. In this way, *Bigsby* supports the principle that a trial court's jurisdiction over offenders serving terms of community custody is dependent on the specific statutes. Although the court suggests that the trial court and Department have "concurrent supervisory authority" over community custody in a SSOSA, Bigsby was not serving a SSOSA nor did the court analyze the SSOSA statute. *Bigsby*, 399 P.3d at 543. Like in *Bigsby*, this Court should look to the specific statutory language for both the timing and circumstances where it is

appropriate for trial courts to exercise supervisory and sanctioning authority.

*Shove* and *Bigsby* show the superior court's 2008 order, which eliminated the mandatory condition that Petterson comply with conditions imposed by the Department, lacked authority because the order improperly modified Petterson's sentence absent express statutory authority. This Court should affirm the trial court's subsequent correction of its error.

**D. Petterson's Interpretation Contravenes the SRA's Policies of Finality of Sentences and the Department's Mandate to Safely Supervise Offenders**

Interpreting the SSOSA statute to permit the superior court to modify community custody conditions over Petterson's lifetime would lead to absurd results and contravene the important policies underlying the SRA. Courts avoid construing statutes in a manner that results in "unlikely, absurd, or strained consequences." *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003).

First, allowing superior courts to modify community custody conditions into perpetuity undermines the long-recognized policy of finality of judgments. As recognized in *Shove*, "The claim that the power to set a sentence carries with it the power later to modify that sentence ignores the importance of finality in rendered judgments." *Shove*, 113 Wn.2d at 88. This is so even in light of the SSOSA statute where trial

courts are expressly granted limited authority to oversee the execution of the sentence. This limited authority is the exception to the rule that courts generally are without authority to modify sentences.

Petterson's interpretation also undercuts the Department's ability to supervise offenders based upon an assessed risk to community safety. The Legislature has charged the Department with supervising offenders and imposing conditions on the basis of risk to community safety. *See* RCW 9.94A.704(2)(a); *Bigsby*, 399 P.3d at 543 (noting the "risk-based assessment allows the Department to prioritize and concentrate its limited financial capital and human resources on those offenders it perceived as posing the greatest risk."). The 2008 order eliminating all but two conditions and removing the Department's ability to impose any other conditions during community custody effectively terminated community custody. This result undermines the statutory scheme allowing the Department to impose community custody conditions based on its risk assessment. Without this autonomy, the Department's ability to supervise offenders and manage its resources to maximize community safety is frustrated.

Indeed this flexible, risk-based assessment is precisely the answer to Petterson's and amici's concern regarding changes in life circumstances throughout the term of lifetime community custody. For offenders who

pose a low risk to reoffend, the Department retains the flexibility to reflect such in their community custody conditions so long as the minimum mandatory conditions and court-imposed conditions remain in place. In fact, contrary to Petterson's hypothetical DUI necessitating the sentencing court imposing an alcohol-related condition, this is actually the role of the Department—not the sentencing court—in fulfillment of its statutory mandate to impose conditions based on risk assessment. *See* RCW 9.94A.704(2)(a); *In re Golden*, 172 Wn. App 426, 433, 290 P.3d 168 (2012) (“While the trial court must focus generally on the defendant’s crime, the department focuses on the risks posed by the defendant.”) But if Petterson’s argument is accepted, the Department could be stripped of its ability to react to changing life circumstances.

The Department’s independent authority to impose community custody conditions is also entirely consistent with the statutory prohibition against the Department imposing conditions contravening conditions imposed by the court. *See* RCW 9.94A.704(6). That restriction on the *Department’s* authority to impose conditions in no way grants additional authority to the *trial court* beyond that which is specifically enumerated in the statute. Instead, it allows the Department to exercise its authority under RCW 9.94A.704(2)(a) to impose conditions based on risk assessment, but without contradicting the conditions imposed by the court at the time of

sentencing or when the court is otherwise statutorily authorized to impose or modify conditions.

Finally, Petterson confuses the concepts of judicial involvement with judicial oversight in urging that judicial involvement is necessary to prevent the Department from imposing unconstitutional conditions or imposing conditions that contravene orders of the court. Petition at 10-13. Petterson specifically admits that he is not challenging the imposition of any specific conditions. Petition, at 12. Rather, Petterson globally alleges that without the court's authority to modify community custody conditions, the Department's authority is unchecked, permitting it to supersede express conditions of the trial court and impose unconstitutional conditions. But this argument ignores RCW 9.94A.704(7)(b), which provides for an administrative review process of Department-imposed conditions, and the breadth of case law from personal restraint petitions allowing challenges to the constitutionality of Department-imposed conditions of community custody. *E.g., In re Golden*, 172 Wn. App at 426. Petterson's argument that the superior court must have authority to modify conditions to provide oversight fails because oversight already exists through other judicial channels.

## V. CONCLUSION

Petterson is not entitled to relief because former RCW 9.94A.670 (2001) only allowed modification of community custody conditions at the termination treatment hearing. In addition, the trial court was required to impose the condition that Petterson abide by Department-imposed conditions. The trial court's modification of Petterson's conditions 3 years after the termination treatment hearing to remove the mandatory condition that he obey all conditions imposed by the Department was without authority. Therefore, the trial court properly reinstated the statutorily mandated condition. This Court should affirm.

RESPECTFULLY SUBMITTED this 6th day of October, 2017.

ROBERT W. FERGUSON  
Attorney General

s/ Cassie vanRoojen

CASSIE vanROOJEN, WSBA #44049

MANDY L. ROSE, WSBA #38506

Assistant Attorneys General

Corrections Division OID #91025

PO Box 40116

Olympia WA 98504-0116

(360) 586-1445

CassieV@atg.wa.gov

MandyR@atg.wa.gov

**CERTIFICATE OF SERVICE**

I certify that on the date below I caused to be electronically filed the SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF CORRECTIONS with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

THOMAS E. WEAVER  
LAW OFFICE OF THOMAS E. WEAVER  
P.O. BOX 1056  
BREMERTON, WA 98337

AMY L. MUTH  
LAW OFFICE OF AMY MUTH, PLLC  
1111 THIRD AVENUE, SUITE 2220  
SEATTLE WA 98101

RITA GRIFFITH  
4616 25TH AVENUE NE  
PMB 453  
SEATTLE WA 98105

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 6th day of October, 2017 at Olympia,  
Washington.

s/ Amy Jones \_\_\_\_\_  
AMY JONES  
Legal Assistant  
Corrections Division  
(360) 586-1445  
AmyJ@atg.wa.gov

# **APPENDIX A**

all rules relating to earned release time. An offender who violates any conditions of supervision as defined by the department shall be sanctioned. Sanctions may include, but are not limited to, reclassifying the offender to serve the unexpired term of his or her sentence as ordered by the sentencing court. If an offender is reclassified to serve the unexpired term of his or her sentence, the offender shall be subject to all rules relating to earned release time.

[2001 c 10 § 4; 2000 c 28 § 19.]

NOTES:

**\*Reviser's note:** This RCW reference has been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

**Intent--Effective date--2001 c 10:** See notes following RCW 9.94A.505.

**Technical correction bill--2000 c 28:** See note following RCW 9.94A.015.

**RCW 9.94A.670 Special sex offender sentencing alternative.**

(1) Unless the context clearly requires otherwise, the definitions in this subsection apply to this section only.

(a) "Sex offender treatment provider" or "treatment provider" means a certified sex offender treatment provider as defined in RCW 18.155.020.

(b) "Victim" means any person who has sustained emotional, psychological, physical, or financial injury to person or property as a result of the crime charged. "Victim" also means a parent or guardian of a victim who is a minor child unless the parent or guardian is the perpetrator of the offense.

(2) An offender is eligible for the special sex offender sentencing alternative if:

(a) The offender has been convicted of a sex offense other than a violation of RCW 9A.44.050 or a sex offense that is also a serious violent offense;

(b) The offender has no prior convictions for a sex offense as defined in RCW 9.94A.030 or any other felony sex offenses in this or any other state; and

(c) The offender's standard sentence range for the offense includes the possibility of confinement for less than eleven years.

(3) If the court finds the offender is eligible for this alternative, the court, on its own motion or the motion of the state or the offender, may order an examination to determine whether the offender is amenable to treatment.

(a) The report of the examination shall include at a minimum the following:

(i) The offender's version of the facts and the official version of the facts;

(ii) The offender's offense history;

(iii) An assessment of problems in addition to alleged deviant behaviors;

(iv) The offender's social and employment situation; and

(v) Other evaluation measures used.

The report shall set forth the sources of the examiner's information.

(b) The examiner shall assess and report regarding the offender's amenability to treatment and relative risk to the community. A proposed treatment plan shall be provided and shall include, at a minimum:

(i) Frequency and type of contact between offender and therapist;

(ii) Specific issues to be addressed in the treatment and description of planned treatment modalities;

(iii) Monitoring plans, including any requirements regarding living conditions, lifestyle requirements, and monitoring by family members and others;

(iv) Anticipated length of treatment; and

(v) Recommended crime-related prohibitions.

(c) The court on its own motion may order, or on a motion by the state shall order, a second examination regarding the offender's amenability to treatment. The examiner shall be selected by the party making the motion. The offender shall pay the cost of any second examination ordered unless the court finds the defendant to be indigent in which case the state shall pay the cost.

(4) After receipt of the reports, the court shall consider whether the offender and the community will benefit from use of this alternative and consider the victim's opinion whether the offender should receive a treatment disposition under this section. If the court determines that this alternative is appropriate, the court shall then impose a sentence or, pursuant to RCW 9.94A.712, a minimum term of sentence, within the standard sentence range. If the sentence imposed is less than eleven years of confinement, the court may suspend the execution of the sentence and impose the following conditions of suspension:

(a) The court shall place the offender on community custody for the length of the suspended sentence, the length of the maximum term imposed pursuant to RCW 9.94A.712, or three years, whichever is greater, and require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.

(b) The court shall order treatment for any period up to three years in duration. The court, in its discretion, shall order outpatient sex offender treatment or inpatient sex offender treatment, if available. A community mental health center may not be used for such treatment unless it has an appropriate program designed for sex offender treatment. The offender shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, the community corrections officer, and the court. If any party or the court objects to a proposed change, the offender shall not change providers or conditions without court approval after a hearing.

(5) As conditions of the suspended sentence, the court may impose one or more of the following:

(a) Up to six months of confinement, not to exceed the sentence range of confinement for that offense;

(b) Crime-related prohibitions;

(c) Require the offender to devote time to a specific employment or occupation;

(d) Remain within prescribed geographical boundaries and notify the court or the community corrections officer prior to any change in the offender's address or employment;

(e) Report as directed to the court and a community corrections officer;

(f) Pay all court-ordered legal financial obligations as provided in RCW 9.94A.030;

(g) Perform community service work; or

(h) Reimburse the victim for the cost of any counseling required as a result of the

offender's crime.

(6) At the time of sentencing, the court shall set a treatment termination hearing for three months prior to the anticipated date for completion of treatment.

(7) The sex offender treatment provider shall submit quarterly reports on the offender's progress in treatment to the court and the parties. The report shall reference the treatment plan and include at a minimum the following: Dates of attendance, offender's compliance with requirements, treatment activities, the offender's relative progress in treatment, and any other material specified by the court at sentencing.

(8) Prior to the treatment termination hearing, the treatment provider and community corrections officer shall submit written reports to the court and parties regarding the offender's compliance with treatment and monitoring requirements, and recommendations regarding termination from treatment, including proposed community custody conditions. Either party may request, and the court may order, another evaluation regarding the advisability of termination from treatment. The offender shall pay the cost of any additional evaluation ordered unless the court finds the offender to be indigent in which case the state shall pay the cost. At the treatment termination hearing the court may: (a) Modify conditions of community custody, and either (b) terminate treatment, or (c) extend treatment for up to the remaining period of community custody.

(9) If a violation of conditions occurs during community custody, the department shall either impose sanctions as provided for in \*RCW 9.94A.737(2)(a) or refer the violation to the court and recommend revocation of the suspended sentence as provided for in subsections (6) and (8) of this section.

(10) The court may revoke the suspended sentence at any time during the period of community custody and order execution of the sentence if: (a) The offender violates the conditions of the suspended sentence, or (b) the court finds that the offender is failing to make satisfactory progress in treatment. All confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked.

(11) Examinations and treatment ordered pursuant to this subsection shall only be conducted by sex offender treatment providers certified by the department of health pursuant to chapter 18.155 RCW unless the court finds that:

(a) The offender has already moved to another state or plans to move to another state for reasons other than circumventing the certification requirements; or

(b)(i) No certified providers are available for treatment within a reasonable geographical distance of the offender's home; and

(ii) The evaluation and treatment plan comply with this section and the rules adopted by the department of health.

(12) If the offender is less than eighteen years of age when the charge is filed, the state shall pay for the cost of initial evaluation and treatment.

[2001 2nd sp.s. c 12 § 316; 2000 c 28 § 20.]

NOTES:

\*Reviser's note: This RCW reference has been corrected to reflect the reorganization of chapter 9.94A

RCW by 2001 c 10 § 6.

**Intent--Severability--Effective dates--2001 2nd sp.s. c 12:** See notes following RCW 71.09.250.

**Application--2001 2nd sp.s. c 12 §§ 301-363:** See note following RCW 9.94A.030.

**Technical correction bill--2000 c 28:** See note following RCW 9.94A.015.

### **RCW 9.94A.680 Alternatives to total confinement.**

Alternatives to total confinement are available for offenders with sentences of one year or less. These alternatives include the following sentence conditions that the court may order as substitutes for total confinement:

(1) One day of partial confinement may be substituted for one day of total confinement;

(2) In addition, for offenders convicted of nonviolent offenses only, eight hours of community service may be substituted for one day of total confinement, with a maximum conversion limit of two hundred forty hours or thirty days. Community service hours must be completed within the period of community supervision or a time period specified by the court, which shall not exceed twenty-four months, pursuant to a schedule determined by the department; and

(3) For offenders convicted of nonviolent and nonsex offenses, the court may authorize county jails to convert jail confinement to an available county supervised community option and may require the offender to perform affirmative conduct pursuant to \*RCW 9.94A.607.

For sentences of nonviolent offenders for one year or less, the court shall consider and give priority to available alternatives to total confinement and shall state its reasons in writing on the judgment and sentence form if the alternatives are not used.

[1999 c 197 § 6. Prior: 1988 c 157 § 4; 1988 c 155 § 3; 1984 c 209 § 21; 1983 c 115 § 9. Formerly RCW 9.94A.380.]

#### NOTES:

**\*Reviser's note:** This RCW reference has been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

**Severability--1999 c 197:** See note following RCW 9.94A.030.

**Application--1988 c 157:** See note following RCW 9.94A.030.

**Effective dates--1984 c 209:** See note following RCW 9.94A.030.

### **RCW 9.94A.685 Alien offenders.**

(1) Subject to the limitations of this section, any alien offender committed to the custody of the department under the sentencing reform act of 1981, chapter 9.94A RCW, who has been found by the United States attorney general to be subject to a final order of deportation or exclusion, may be placed on conditional release status and released to the immigration and naturalization service for deportation at any time prior to the expiration of the offender's term of confinement. Conditional release shall continue until the expiration of the statutory maximum sentence provided by law for the crime or crimes of which the offender was convicted. If the offender has multiple current convictions, the statutory maximum sentence allowed by law for each crime shall run concurrently.

(2) No offender may be released under this section unless the secretary or the secretary's designee find [finds] that such release is in the best interests of the state of Washington. Further,

**CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE**

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