

67925.2

67925.2

NO. 67925-2-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

GLENN NORTHROP,

Appellant.

REC'D

NOV 28 2012

King County Prosecutor  
Appellate Unit

---

---

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

The Honorable Marianne Spearman, Judge

---

---

BRIEF OF APPELLANT

---

---

ERIC BROMAN  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Related to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	3
1. <u>Procedural Facts</u> .....	3
2. <u>Hearing on September 26, 2011</u> .....	10
C. <u>ARGUMENT</u> .....	13
1. THE 111- TO 147-MONTH STANDARD RANGE AND 131-MONTH SENTENCE ARE ERRONEOUS. RESENTENCING IS REQUIRED. ....	13
2. THE “PORNOGRAPHY” CONDITION IS UNCONSTITUTIONALLY VAGUE.....	17
3. THE COURT ERRED BY FINDING A VIOLATION OF THE “EMPLOYMENT” CONDITION. ....	19
a. <u>The Condition and the Alleged Violation</u> .....	19
b. <u>Evidence and Admissions</u> .....	20
c. <u>Court’s Findings</u> .....	23
d. <u>“Employment” is Vague as Applied and Cannot             Support This Alleged Violation on These Facts.</u> .....	25
4. THIS COURT SHOULD REMAND TO DETERMINE WHETHER THE TRIAL COURT WOULD REVOKE THE SSOSA ON THE SINGLE VIOLATION.....	30
D. <u>CONCLUSION</u> .....	35

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>In re Postsentence Review of Leach</u> 161 Wn.2d 180, 163 P.3d 782 (2007) .....	14
<u>In re Restraint of Cadwallader</u> 155 Wn.2d 867, 123 P.3d 456 (2005) .....	15
<u>In re Restraint of Goodwin</u> 146 Wn.2d 861, 50 P.3d 618 (2002); .....	14, 16
<u>In re Restraint of Johnson</u> 131 Wn.2d 558, 933 P.2d 1019 (1997) .....	16
<u>re Restraint of Carrier</u> 173 Wn.2d 791, 272 P.3d 209 (2012) .....	14
<u>State v. Abd-Rahmaan</u> 154 Wn.2d 280, 111 P.3d 1157 (2005) .....	31
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008) .....	17, 18, 19, 25, 26
<u>State v. Dahl</u> 139 Wn.2d 678, 990 P.2d 396 (1999) .....	31
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999) .....	16
<u>State v. Gaines</u> 122 Wn.2d 502, 859 P.2d 36 (1993) .....	31
<u>State v. Henshaw</u> 62 Wn. App. 135, 813 P.2d 146 (1991) .....	31
<u>State v. Jacobs</u> 154 Wn.2d 596, 115 P.3d 281 (2005) .....	26

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. McCarty</u> 152 Wn. App. 351, 215 P.3d 1036 (2009).....	33
<u>State v. McCormick</u> 166 Wn.2d 689, 213 P.3d 32 (2009).....	25, 32
<u>State v. Mendoza</u> 165 Wn.2d 913, 205 P.3d 113 (2009).....	14
<u>State v. Miller</u> 159 Wn. App. 911, 247 P.3d 457 (2011).....	32
<u>State v. Parker</u> 132 Wn.2d 182, 937 P.2d 575 (1997).....	14, 16
<u>State v. Partee</u> 141 Wn. App. 355, 170 P.3d 60 (2007).....	31
<u>State v. Rice</u> 174 Wn.2d 884, 279 P.3d 849 (2012).....	16
<u>State v. Sansone</u> 127 Wn. App. 630, 111 P.3d 1251 (2005).....	18, 19, 25, 26
<u>State v. Sims</u> 171 Wn.2d 436, 256 P.3d 285 (2011).....	33
<u>State v. Valencia</u> 169 Wn.2d 782, 239 P.3d 1059 (2010).....	17, 18, 25, 26, 30
<u>State v. Williams</u> 149 Wn.2d 143, 65 P.3d 1214 (2003).....	14
 <b><u>RULES, STATUTES AND OTHER AUTHORITIES</u></b>	
Black's Law Dictionary 545 (7 <sup>th</sup> Ed. 1999).....	27
RAP 9.6.....	12

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 9.68A.100 .....	15
RCW 9.94A .....	13, 15, 16, 26, 28, 29
RCW 9.94A.030 .....	15
RCW 9.94A.345 .....	13
RCW 9.94A.505 (2002) .....	14
RCW 9.94A.510 (2002) .....	14, 15
RCW 9.94A.515 (2002) .....	14, 15
RCW 9.94A.525 (2002) .....	14, 15
RCW 9.94A.535 .....	17
RCW 9.94A.595 (2002) .....	15
RCW 9.94A.700 (2002) .....	26
RCW 9.94A.712 .....	16, 26
RCW 9.94A.7602 (2002) .....	28
RCW 9.94A.7604 (2002) .....	28
RCW 9.94A.7605 (2002) .....	28
RCW 9.94A.7701 (2002) .....	28
RCW 9.94A.7705 (2002) .....	28
RCW 9A.44.076 .....	15
RCW Title 50 .....	28

**TABLE OF AUTHORITIES (CONT'D)**

	Page
Sentencing Reform Act .....	13, 15, 26
U.S. Const. Amend. XIV .....	17
Wash. Const. article I, § 3 .....	17

A. ASSIGNMENTS OF ERROR

1. The sentencing and revocation courts erred in calculating the standard range as 111-147 months, and in imposing a minimum term of 131 months on count I. CP 35, 37, 96.

2. The community custody condition prohibiting appellant from possessing or perusing “pornographic materials” is unconstitutionally vague. CP 39.

3. The revocation court erred in determining that appellant violated a community custody condition requiring Community Custody Officer (CCO)-approved “employment” and notification to “your employer regarding your history of sexual deviancy and rules and regulations regarding children and legal status.” CP 40, 95.

4. The employment condition is unconstitutionally vague as applied to bartered photography and to selling items and photographic assets via a third-party internet commerce website. CP 40, 95.

Issues Related to Assignments of Error

1. The standard range for a completed count I offense would be 111-147 months. But appellant was only convicted of attempt, and the correct range is 75% of that for the completed offense. Should this Court vacate the unlawful sentence and remand

for resentencing within the correct standard range of 83.25 – 110.25 months?

2. As a condition of community custody, the sentencing court prohibited appellant from possessing or perusing pornographic materials unless given prior approval by his CCO or treatment provider. Must this prohibition be stricken as unconstitutionally vague?

3. A community custody condition required appellant to “maintain Community Corrections Officer-approved employment and notify your employer regarding your history of sexual deviancy and rules and regulations regarding children and legal status.” CP 40. The state alleged appellant violated this condition: “Failure to comply with the Judgment and Sentence by Community Corrections Officer approved employment [sic].” CP 85. The court found a violation for “Engaging in non-approved DOC employment by offering to sell nude photos on Etsy website 3/23/11 – 6/27/11.” CP 95.

a. Where no evidence showed that photographers and models had any kind of “employment” relationship, and where an offer to sell an item on a third-party website is not within the definition of “employment,” is the trial court’s finding clearly erroneous?

b. Is the condition unconstitutionally vague as applied to bartered photography and selling photographic assets on the internet? B. STATEMENT OF THE CASE

1. Procedural Facts

On November 14, 2002, the King County prosecutor charged appellant Glenn Northrop with attempted second degree rape of a child, patronizing a juvenile prostitute, and possessing depictions of a minor engaged in sexually explicit conduct. The events leading to the charges occurred November 11, 2002. A police detective and informant set up a meeting where Northrop allegedly agreed to have sex with a fictitious underage girl, in exchange for \$200. CP 1-8, 108. There was no actual victim. CP 113.

In early 2003, Northrop contacted Dr. Bill Lennon, a sexual deviancy therapist, for evaluation. CP 117-60. Dr. Lennon determined Northrop was amenable to treatment and recommended a Special Sexual Offender Sentencing Alternative (SSOSA). CP 160. The Department of Corrections also recommended a SSOSA, as did the prosecution. CP 33, 113-14.

On January 23, 2001, Northrop pled guilty to the three charged counts. CP 9-33. He had no prior criminal history. CP 27.

On March 12, 2004, the court entered judgment. It determined the offender score was 4 points, the seriousness level XI, and the standard range 111-147 months. CP 35. The court sentenced Northrop to what it believed was a mid-range term of 131 months on count I,<sup>1</sup> suspended with SSOSA conditions. The conditions included community custody for life, as well as compliance with a sexual deviancy therapy program. CP 33-43.

Conditions of community custody included the following:

7. Do not possess pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

8. Do not attend X-rated movies, peep shows, or adult book stores without the approval of the sexual deviancy treatment specialist or Community Corrections Officer. . . .

CP 39.

Northrop entered a treatment program with provider William Satoran. CP 180-213; RP 79-89.<sup>2</sup> On September 27, 2007, he

---

<sup>1</sup> Sentences for counts II and III were much shorter and concurrent. CP 37.

<sup>2</sup> This Brief refers to the transcripts as follows: RP – 9/26/11 (violation hearing); 2RP – 10/7/11 (argument and ruling).

successfully completed the treatment program and the court entered an order terminating treatment. CP 47; 212-14.

On June 9, 2009, DOC alleged that Northrop had violated conditions of community custody by changing his residence without prior CCO approval. CP 215-16. The same report noted Northrop was advertising his services as a photographer and had posted website images of nude women who had modeled for him. CP 218. The report asserted DOC's belief that this was "of concern" and "inappropriate," but did not allege it violated existing conditions of community custody. CP 218-19. DOC instead asked the court to "define pornography and impose internet restrictions[.]" CP 219.

On June 18, 2009, the court entered an order directing Northrop to "remove from his website any photographs of humans or solicitations to take nude photographs of women and shall use his legal name on any websites he is involved in." CP 221.

On August 3, 2009, DOC alleged two violations related to the June 18 order. DOC asserted Northrop had not removed all photos and had not adequately identified himself on various websites. CP 223-26.

On August 6, 2009, the court held a hearing and determined any violations were not willful. The court clarified its June 18 order

and directed Northrop: (1) to remove all nude images and solicitations for nude photography from his website including links, (2) to make and demonstrate best efforts to remove all postings Northrop had placed for solicitation of nude photography as well as nude images posted on third party websites, (3) to make continuing efforts to ensure prohibited content is not on the internet and to notify his CCO if he discovered such, and (4) to use his full legal name in any photography-related internet activity. The court also directed Northrop to obtain an updated evaluation from Mr. Satoran. CP 48-49, 237-38.

Satoran completed the updated evaluation/report on November 11, 2009. He recommended additional treatment. CP 232; RP 106.

On December 22, 2009, the court directed Northrop and the CCO to provide Northrop's financial status to Satoran, to determine the projected cost of additional treatment, and to explore the feasibility of funding for additional treatment. The court also directed continuing compliance with the August 6, 2009 order. CP 51.

On January 22, 2010, the court ordered Northrop to reinstate treatment with Satoran and to follow all conditions of supervision and recommendations in Satoran's November 11 report. CP 53, 83, 237. Satoran's report offered his opinion that the nude models and pictures "are considered pornography for [Northrop]" and opined some photos

were “more appropriate to Hustler magazine than for any legitimate photography magazine.” CP 232. Treatment planning would include review for deceitful and secretive behavior. Satoran recommended “no contact with nude models and no photography of adults or minors[.]” CP 83, 232.

On July 28, 2010, Satoran filed a report noting Northrop had reengaged in therapy and was now able to better understand a “cycle” or “pattern” of offending, and was able to recognize and change negative thinking. “If the court releases him from his new treatment obligation, I concur.” CP 240. On August 17, 2010, the court found Northrop in compliance and released him from the supplemental treatment obligation. Northrop otherwise remained on the suspended sentence. CP 55, 243.

In June, 2011, DOC changed Northrop’s CCO. CP 58; RP 19-23, 60-61. The new CCO, Michelle Kaiser, investigated Northrop’s internet activities and discovered more internet postings of concern. RP 23-36.

Kaiser contacted Satoran and asked his opinion about the website. Satoran did not contact Northrop or ask him for any explanation. CP 244; RP 36, 53-55.

Satoran instead wrote the court on June 27, 2011, and offered his opinion that Northrop was "back in his cycle of offense" based on Satoran's assumption that Northrop was again soliciting nude models, photographing them, and not identifying himself as a registered sex offender. CP 244; Ex. 8. Satoran opined that Northrop was not being candid with DOC about his internet postings. He also wrongly asserted that Northrop "was violated for these exact same behaviors in 2009." CP 244.

In response to Satoran's letter, Kaiser prepared a notice of violation dated July 11, 2011. CP 245-50. Kaiser alleged two violations:

[1] Failure to comply with an 8/6/09 Order Modifying Probation by posting photographs of nude women on or about 6/24/11.

[2] Failure to comply with the Judgment and Sentence by possessing pornography on or about 6/28/11.

CP 246, see also CP 58, 85.

The prosecutor then moved to revoke the SSOSA. CP 77-94; RP 6; 2RP 11-16. The supporting memorandum highlighted community custody condition 15, which required Northrop to

Maintain Community Corrections Officer-approved employment and notify your employer regarding your history of sexual deviancy and rules and regulations regarding children and legal status.

CP 40, 81. Based on this condition, the prosecutor alleged a third violation:

Failure to comply with the Judgment and Sentence by Community Corrections Officer approved employment [sic].

CP 85; RP 9-10.

During the supplemental treatment program, Northrop completed a two-page assignment describing what he had learned about his actions and behaviors regarding the Fine Art Nude photography. In that paper he recognized he had chosen “to deceive the DOC by not disclosing my activities to pursue Fine Art Nude Photography prior to engaging in it, therefore not gaining their awareness and approval in advance.” CP 84; Ex. 6.

In a prehearing response, the defense opposed the state’s motion to revoke. The response cited numerous cases for the settled proposition that sentencing conditions must not be vague. In this context, the term “pornography” in community condition 7, was unconstitutionally vague. Violation number 2 therefore failed. CP 60-62, 69, 71.

The defense also contested the state’s theory that online photo sales could be considered “employment.” A better analogy would be

to “selling items on eBay or craigslist or at a garage sale.” CP 65. There was no financial arrangement with any model; instead each model received a disk with photographs for their own portfolios, and Northrop was permitted to sell photos to others. He was not paid by the models for his work. CP 66.

The defense pointed out that all photos had been taken before the last round of treatment and court orders, “with the exception of one model [D.G.]” CP 65, 67; see also RP 33-34, 160-63. D.G. had contacted Northrop, he showed her samples of prior work, she showed ID establishing she was at least 23 years old, and they both signed a release form. The photo shoot was in December, 2010. CP 69-70.

## 2. Hearing on September 26, 2011

The parties presented evidence on September 26, 2011. The state first offered testimony from Kaiser. She had become the CCO in June, 2011. She did a case audit, including her own investigations about internet postings. RP 19-22.

Her search revealed information that led to DOC’s suspicion that Northrop was soliciting nude models and posting nude images on the internet. Kaiser said the former CCO, Juan Hernandez, said Northrop did not admit such posts in April 2011. RP 20-32. However,

Kaiser could not remember if Northrop had continued any offers to photograph other people after the court's August 2009 order. RP 32.

Kaiser admitted she had no evidence showing Northrop solicited any model after August 4, 2009. RP 59-60. She nonetheless considered any posts on the "Model Mayhem" site to be a solicitation for photographic employment. RP 60-62. She did not know if there was any feature on the site where a photographer could show past works without accepting requests for new photo shoots. RP 63. In fact, Northrop's page on the site said he was "currently only accepting limited assignments." RP 65; Ex. 2.

After Kaiser contacted Satoran, Kaiser asked Hernandez (the former CCO) to contact Northrop. When Northrop reported as directed, he was arrested and taken into DOC custody. The CCOs searched his apartment and seized 14 computer disks containing nude images of women. A sample of photos was admitted in exhibit 2, and the disks were admitted in exhibit 3. Other photos were printed out and admitted as part of exhibit 3, with a cover page marked "WARNING: SEXUALLY EXPLICIT." RP 41-47.<sup>3</sup>

---

<sup>3</sup> Because Northrop does not challenge the first violation relating to the posting of nude images, and because the trial court rejected the "pornography" violation, the disks have not been designated for

After seizing the disks and Northrop's cell phone, Kaiser contacted D.G. and confirmed she was photographed by Northrop in December 2010. RP 48-51. The date for the photo shoot marked on the outer disk was 2008, but the "properties" associated with the files showed the files were created on December 29, 2010. RP 52.

Kaiser agreed that the community custody conditions allowed Northrop to sell things without the DOC's permission. RP 54. But because Northrop said he was trying to earn money through photography, she said it sounded to her "like employment." RP 54. To avoid repetition, other evidence relating to the alleged "employment" violation is discussed in argument 3, infra.

At the conclusion of the hearing, the court found Northrop violated the August 6, 2009 order by posting nude photos on the internet on or about June 24, 2011. The court declined to find Northrop violated any prohibition against the possession of "pornography." 2RP 6-8. The court found Northrop violated the "employment" condition by offering to sell nude photos on the Etsy website between March 23 and June 27, 2011. CP 95. The court's

---

review. If the state believes the exhibits are relevant to any appellate issue, it can designate them. RAP 9.6(a).

oral ruling and written revocation order are discussed in more detail in arguments 3 and 4.

The revocation order imposed a 131-month to life indeterminate sentence on count I. It also stated that “[a]ll other terms of the Judgment and Sentence shall remain in full force and effect; including the provision that community custody is imposed with conditions as set forth in Appendix H of the original Judgment and Sentence.” CP 96.

Argument 1 challenges the erroneous 131-month term. Arguments 2 and 3 challenge two of the community custody conditions and the court’s error in enforcing the “employment” condition. Argument 4 shows why this Court should remand to determine whether the trial court would still revoke the SSOSA without considering erroneous information.

C. ARGUMENT

1. THE 111- TO 147-MONTH STANDARD RANGE AND 131-MONTH SENTENCE ARE ERRONEOUS. RESENTENCING IS REQUIRED.

When imposing a sentence under Washington's Sentencing Reform Act (SRA), the court's authority is limited to that granted by statutes in effect at the time the offense was committed. RCW 9.94A.345; In re Restraint of Carrier, 173 Wn.2d 791, 798, 809, 272

P.3d 209 (2012); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Absent exceptional circumstances, a court must impose a sentence within the SRA standard range, as determined by an offender's criminal history and the seriousness of the current offense. RCW 9.94A.505; .510, .515, .525 (2002). An accurate standard range is generally a prerequisite to a lawful sentence, and a miscalculation is reviewed de novo. State v. Parker, 132 Wn.2d 182, 187-88, 937 P.2d 575 (1997).

An erroneous standard range results in an unlawful sentence, which may be challenged for the first time on appeal. Stated another way, the defense cannot agree to a sentence that results from an unlawfully inflated standard range. In re Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002); accord, State v. Mendoza, 165 Wn.2d 913, 927-29, 205 P.3d 113 (2009). It is only when a sentence is within the correct standard range that its length cannot be challenged on appeal. See, State v. Williams, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003) ("As a general rule, the length of a criminal sentence imposed by a superior court is not subject to appellate

review, so long as the punishment falls within the correct standard sentencing range established by the [SRA]”).<sup>4</sup>

Northrop had no prior criminal history and no grounds were alleged or established to support an exceptional sentence. Based on the count II and III current offenses, the count I offender score was 4 points. CP 27, 35.<sup>5</sup>

With a score of 4, and seriousness level of XI,<sup>6</sup> the standard range for a completed count I offense is 111-147 months. RCW 9.94A.510(1) (2002).<sup>7</sup> But Northrop was only convicted of an attempt, and the standard range for an attempted offense is 75% of that for a completed offense. RCW 9.94A.510(2); RCW 9.94A.595 (2002); CP 27.

---

<sup>4</sup> In contrast, the defense may waive offender score challenges based on factual disputes. See, In re Restraint of Cadwallader, 155 Wn.2d 867, 875, 123 P.3d 456 (2005) (discussing the difference between legal and factual issues in the offender score context).

<sup>5</sup> Count I (attempted second degree rape of a child) is considered a “violent sex offense.” CP 27; RCW 9.94A.030(38)(a)(i), (45)(a)(i) (2002); RCW 9A.44.076(2) (2002). Count II (patronizing a juvenile prostitute) is considered a “sex offense” and therefore adds three points to the count I score. CP 27; RCW 9.94A.030(38)(a)(i) (2002); RCW 9.68A.100 (2002); RCW 9.94A.525(16) (2002).

<sup>6</sup> RCW 9.94A.515 (2002).

<sup>7</sup> A highlighted copy of the sentencing grid is attached as appendix A.

The sentencing and DOSA revocation courts erred by failing to reduce the standard range to 75% of the completed offense. CP 35, 37, 96. The correct range is 83.25 – 110.25 months.<sup>8</sup> The remedy for this error is remand to the trial court for imposition of a sentence within the correct standard range. Goodwin, 146 Wn.2d at 877-78; State v. Ford, 137 Wn.2d 472, 485-86, 973 P.2d 452 (1999); Parker, 132 Wn.2d at 189; In re Restraint of Johnson, 131 Wn.2d 558, 569, 933 P.2d 1019 (1997).

It makes no difference that Northrop was sentenced as a non persistent offender to an indeterminate term under RCW 9.94A.712 (2002). The correct standard range is still the starting point for a lawful sentence. That statute required the court to impose a minimum term “within the standard sentence range” and a maximum term of life, unless there were grounds for an exceptional sentence. RCW 9.94A.712(3), (5) (2002);<sup>9</sup> c.f., State v. Rice, 174 Wn.2d 884, 895, 279 P.3d 849 (2012) (statutes enacted after 2002 permit enhanced minimum terms when a special allegation is charged and found). There were no such grounds here, nor did the state seek an

---

<sup>8</sup>  $111 \times .75 = 83.25$ ;  $147 \times .75 = 110.25$ .

<sup>9</sup> A copy of RCW 9.94A.712 (2002) is attached as appendix B.

exceptional minimum term through the required procedures of RCW 9.94A.535.

The standard range is erroneous and the 131-month sentence exceeds the 110.25-month top of the correct range. The sentence should be vacated and the case remanded for resentencing.

2. THE "PORNOGRAPHY" CONDITION IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the trial court ordered Northrop to comply with this condition:

7. Do not possess pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

CP 39. This condition is unlawful.

The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008); State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct must be avoided. Second, it protects from arbitrary, ad hoc or discriminatory enforcement. A prohibition is void

for vagueness if it does not: (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53; Valencia, 169 Wn.2d at 791, 794.

In State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005), this Court held the following condition of community placement was unconstitutionally vague:

[The defendant shall] not possess or peruse pornographic materials unless given prior approval by [his] sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

Sansone, 127 Wn. App. at 634-35.

In Bahl, the Supreme Court held a pre-enforcement challenge to a similar condition was properly raised. Bahl, 164 Wn.2d at 745-52; see also, Valencia, 169 Wn.2d at 786-91. The unlawful condition in Bahl stated, “[d]o not possess or access pornographic materials, as directed by the supervising [CCO].” Id. at 743. The supreme court held the condition was invalid even though it identified a third party who could define what fell within the condition. As did the Sansone court, the Bahl court held this “only makes the vagueness problem

more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.” Bahl, 164 Wn.2d at 758; Sansone, 127 Wn. App. at 639.

Illegal or erroneous sentences may be challenged for the first time on appeal. Bahl, 164 Wn.2d at 744.<sup>10</sup> Because the current condition prohibiting possession or perusal of “pornographic materials” is unconstitutionally vague, the prohibition should be stricken. Sansone, 127 Wn. App. at 642 (remanding for trial court to impose a condition containing the necessary specificity).

3. THE COURT ERRED BY FINDING A VIOLATION OF THE “EMPLOYMENT” CONDITION.

a. The Condition and the Alleged Violation

Community custody condition 15 required Northrop to:

Maintain Community Corrections Officer-approved employment and notify your employer regarding your history of sexual deviancy and rules and regulations regarding children and legal status.

CP 40, 81. The CCO alleged no violation, but the prosecutor alleged:

Failure to comply with the Judgment and Sentence by Community Corrections Officer approved employment [sic].

---

<sup>10</sup> It is questionable whether this issue is truly raised for the first time in Northrop’s appeal, because the defense memorandum raised the vagueness claim in response to the state’s revocation motion. CP 60-62, 69.

CP 85. At the hearing the prosecutor said, "It's the State's position that by offering the photos for sale, the nude images for sale on the internet that he was engaging in non-approved DOC employment." RP 10; see also 204-05. The defense denied the allegation. RP 10; 2RP 17, 21-22; CP 65-66.

b. Evidence and Admissions

At the hearing, the state presented testimony from CCO Kaiser. She first agreed Northrop was allowed to sell items without her permission. RP 54. She then said she thought selling photographs online would be "a type of employment" because "he said he was trying to earn money and earning money sounds like employment." RP 54. She admitted she made no effort to inform Northrop that she considered photo sales to be "employment" until after his arrest. RP 54-55.

Before the conviction, Northrop had completed college and been employed in advertising agencies and large successful companies. In 1989, he moved to Seattle where he had been employed by various start-up tech companies to raise money and write business plans. RP 143-45, 151. He described the financial

and emotional situation that led to the offenses in 2002<sup>11</sup> and his successful treatment efforts after sentencing. RP 146-50.

Northrop described substantial post-conviction efforts to secure employment with various employers. Given the economy and his record, he had difficulty getting interviews. He had applied for more than 300 job openings. The DOC knew all of this. RP 154-57.

Northrop also had an interest in photography since college. He received many positive responses to his style, working with available light. RP 143-44, 160-61. He created the Luce Luna website in late 2007 or early 2008, which was taken down in June of 2009. He started the GAN<sup>12</sup> photography site in late 2009. RP 181-83; CP 81-82. There were four or five categories, including portraits, automotive, nature, and nudes. He informed his CCO about the site, but not the nude section because he “was concerned that it was going to be a red herring” and that the CCO would not approve it. RP 182-83.

He signed up on the Model Mayhem site in the summer of 2007. RP 152. It was a large web photography site for a wide segment of the industry. RP 153. Nudes were allowed, but not a

---

<sup>11</sup> It should be remembered there was no actual victim for the attempted count I offense. CP 1-7.

<sup>12</sup> Glenn Allen Northrop. CP 85.

focus of the site. RP 154. Northrop solicited models for nude photography, stating a preference for slender physiques. RP 184-85.

He was not accused of any unprofessional behavior in any photo shoot. RP 159. Northrop admitted he did not disclose his sex offender status to models. RP 159, 192.

In August 2009, the court directed Northrop to remove all postings, including solicitations for future photo shoots. He removed them within 24 hours. RP 186.

Like any photographer, Northrop considered the photographs as photographic assets. They were not pornography. RP 160, 192-93; 2RP 6-8; CP 65-66.

The court admitted it did not direct Northrop to destroy the disks with photos of models (although Satoran claimed he told Northrop to throw the photos away). They were photographic assets. RP 131-32, 160, 163-64, 188-90; 2RP 6. Northrop admitted nude photos were still posted online as of June 24, 2011. RP 31, 33-35, 58.

He did the photo shoot with D.G. in December 2010 after she contacted him via the Model Mayhem site. He said he was not accepting new work, but she continued to be interested. RP 160-63, 191. Nonetheless, he admitted he knew he was “essentially breaking

the rules that the Court had laid out for [him].” RP 162. He did not solicit the session, or any photography sessions after the court’s prohibition. He posted the photos for sale online because he had no other financial income. RP 168-69.

Northrop also made a copy of all the images for Satoran, and put them on a single disk. When he tried to give them to Satoran, with a standard photography release form to manage the asset, Satoran refused. RP 128-29, 163-64. Satoran said he considered some of the images to be “pornographic.” RP 188

In March or April of 2011, Northrop posted nude photos on the Etsy website in an effort to monetize some of his work. He did not tell his CCO he was posting nude photos, saying he was “desperate” and “they might say no for the wrong reasons.” RP 193-94. He admitted he deceived his CCO. RP 194.

c. Court’s Findings

In the written order, the first violation was identified as “Failure to comply with 8/6/09 order by posting photographs of nude women on or about 6/24/11 on the internet.” CP 95; see also 2RP 4-6. That violation is not challenged in this brief.

The court declined to find any violation of the “pornography” prohibition. 2RP 6-8.

This brief challenges the second violation, referred to as the “employment” violation. The court’s theory to support this violation is not particularly clear.

The written order identifies the violation as “Engaging in non-approved DOC employment by offering to sell nude photos on Etsy website 3/23/11 – 6/27/11.” CP 95. But the written findings expressly incorporate the court’s oral ruling. CP 96. The oral ruling suggests the court found the “employment” violation to be based on “taking photographs” and “advertising or soliciting nude models.” 2RP 29-30. The court wrongly assumed the models paid for the photos and were therefore like Northrop’s “employer.” 2RP 9-10. The court’s oral ruling concluded by stating

I am not concerned so much that he violated my orders and disobeyed the orders, I’m concerned about him continuing to do what he did before. I do not believe that – I believe eventually he will – that you will continue to photograph nude models. I do believe that. That’s my concern and I understand there’s been no offenses in nine years, but I simply can’t take the chance and that’s what it is. It’s a chance. It’s a risk. I just can’t take that risk.

And I’m really sorry Mr. Northrop. I really am, but I am going to revoke your SSOSA.

2RP 30.

Because the court's written and oral ruling do not clarify whether the "employment" violation was based on the act of bartered photography, or the later act of posting the photos online in an effort to sell photographic assets, the following argument addresses both possibilities.

d. "Employment" is Vague as Applied and Cannot Support This Alleged Violation on These Facts.

As shown in argument 2, supra, a vague community custody condition cannot be enforced and should be stricken. Valencia, 169 Wn.2d at 795; Bahl, 164 Wn.2d at 761-62; Sansone, 127 Wn. App. at 643. To avoid vagueness, the condition must (1) define the prohibited conduct such that ordinary people can understand what is prohibited, and (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Valencia, 169 Wn.2d at 791-92; Bahl, 164 Wn.2d at 752-53. While a court has discretion to revoke a SSOSA when the state proves a violation of a reasonably certain condition, no court should find a violation or revoke a SSOSA based on a vague condition. State v. McCormick, 166 Wn.2d 689, 213 P.3d 32 (2009) (SSOSA revocation should be reversed where court abuses its discretion); Valencia, 169 Wn.2d at 791-93 (imposing a vague

condition is a manifestly unreasonable judicial act); Bahl, at 753 (same).

When applied to these acts of bartered photography, or the act of selling photographic assets on the internet, the “employment” condition is unconstitutionally vague.<sup>13</sup> Under either of the revocation court’s theories, the “employment” violation is manifestly unreasonable and erroneous. The condition must be rewritten if the state intends it to prohibit future acts of photography or the future sale of photographic assets. Valencia, at 795; Bahl, at 761-62; Sansone, 127 Wn. App. at 643.

To determine what “employment” means, this Court should view it in the context of community custody conditions. See, State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (undefined terms are viewed in their contexts). The SRA has a detailed system for imposing and enforcing community custody conditions. For this sentence, the authority to impose community custody arises from RCW 9.94A.712(5) and (6) (2002). Those statutes reference RCW 9.94A.700(4) and (5), which list numerous standard conditions, including a requirement to “work at department-approved education,

---

<sup>13</sup> As this is a post-enforcement challenge, there is no question of ripeness.

employment, or community restitution, or any combination thereof.” RCW 9.94A.700(4)(b) (2002). When supervising offenders, the department requires notification of “any change in the offender's address or employment[.]” RCW 9.94A.700(1)(b) (2002). This authority allowed the imposition of the “employment” condition. CP 40.

But the condition does not sweep as broadly as the state claimed. The concept of “employment” requires an “employer.” See e.g., Black’s Law Dictionary 545 (7<sup>th</sup> Ed. 1999) (defining “employment” as “1. The act of employing; the state of being employed. 2. Work for which one has been hired and is being paid by an employer”). “Employer” means “[a] person who controls and directs a worker under an express or implied contract of hire and who pays the worker’s salary or wages.” Id., at 544.

Although Northrop was making good-faith efforts to find employment, his undisputed testimony showed he was not “employed” by an “employer” in any customary sense of either term. RP 155-58, 167; 2RP 24-27. There was no “employment” as envisioned by the SRA or the plain language of condition 15.

This basic definition of “employer” is supported by the SRA’s use of the term. The SRA discusses “employers” in the context of

payroll deductions and wage assignments to assist the collection of LFOs. These statutes impose obligations on employers to respond and collect LFOs when directed by the DOC. See generally, RCW 9.94A.7602, .7604, .7605, .7701, .7705 (2002).

As a factual matter, the state did not establish that the model-photographer relationship resembled anything remotely approaching an employer-employee relationship. Models instead negotiate with a photographer to receive photos for the models' own portfolios. In exchange, photographers receive the rights to later sell the images. This was barter, not employment. 2RP 10-11; CP 65-66; Black's, supra at 144 ("barter" is "[t]he exchange of one commodity for another without the use of money").

Nor would any model reasonably consider herself to be Northrop's "employer" as that term is normally defined. There was no proof that any model paid him to take any photograph or that any "wage" was earned.<sup>14</sup>

---

<sup>14</sup> It seems unlikely the state will argue that any of the women could be considered an "employer" and therefore obligated by the SRA to respond to wage-assignments or payroll deduction notices. And although there are more complicated statutory schemes that deal with concepts of "employment" and "employers" (see generally, RCW Title 50, relating to Unemployment Compensation) it seems equally unlikely the state will argue that any of the women "employed" Northrop and were obligated to make payments into the

For all these reasons, the act of photographing these models was not “employment” and could not violate the “employment” condition. The court’s contrary determination was manifestly unreasonable.

The only remaining question is whether the later act of offering the photographic assets for sale could be considered “employment.” As Kaiser admitted, DOC did not consider the sale of personal belongings or assets to constitute “employment.” RP 54.<sup>15</sup> This no doubt explains why DOC did not allege the violation; the allegation was at most a prosecutorial afterthought. CP 58, 85, 246; RP 7-10.<sup>16</sup> Nor would the sale of such items create an “employer-employee” relationship as envisioned by RCW 9.94A’s wage assignment and payroll deduction provisions.

---

unemployment compensation system. Nor should any court expect a reasonable person to navigate the labyrinth of Title 50 and its case authority to ascertain the meaning of a community custody condition.

<sup>15</sup> Kaiser’s conclusion makes sense. The record also established that Northrop had two storage units of personal belongings. RP 47-48, 63. Selling those assets would not be “employment,” either.

<sup>16</sup> Even then, the violation was vaguely alleged as: “Failure to comply with the Judgment and Sentence by Community Corrections Officer approved employment [sic].” CP 85.

In short, the state sought to stretch this condition beyond its reasonable meaning. The revocation court's broad construction of the term and enforcement on these facts renders the term vague as applied. The court's finding that Northrop violated the "employment" condition is manifestly unreasonable. Valencia, at 793. In order to ensure the state does not wrongly enforce this condition when Northrop is released from confinement and returned to community custody, this Court should address this ripe claim and hold the trial court erred.<sup>17</sup>

4. THIS COURT SHOULD REMAND TO DETERMINE WHETHER THE TRIAL COURT WOULD REVOKE THE SSOSA ON THE SINGLE VIOLATION

In its memorandum and at the hearing, the prosecutor argued that three violations justified revocation. CP 91-94; RP 205. In closing, the state argued the violation of the "pornography" condition also was an important part of the state's position. RP 201.

But contrary to the state's position, the trial court rejected the "pornography" violation (2RP 6-8), and the "employment" violation cannot be affirmed on this record. In short, two of the three alleged violations are not supported.

---

<sup>17</sup> Northrop remains under threat of future DOC action for life. CP 37; cf. Sims, 171 Wn.2d at 443 n.2.

Nonetheless, in its response the state can be expected to argue this Court should not bother to remand the revocation for further consideration by the trial court. That response lacks merit.

In reversing a SSOSA revocation, the Supreme Court has concluded that remand is appropriate where the revocation is “based, at least in part,” on a legally erroneous finding. State v. Dahl, 139 Wn.2d 678, 402-03, 990 P.2d 396 (1999). A court also errs in ordering revocation where it fails to adequately consider other available alternatives. State v. Partee, 141 Wn. App. 355, 361-62, 170 P.3d 60 (2007). Similarly, a sentence modification is invalid and should be reversed to the extent the trial court relies on erroneous reasons. State v. Abd-Rahmaan, 154 Wn.2d 280, 290-91, 111 P.3d 1157 (2005). In the context of exceptional sentence review, remand is appropriate unless the state can show the sentencing court did not place considerable weight on any invalid factor. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993) (remand necessary where sentencing court places considerable weight on invalid factors); State v. Henshaw, 62 Wn. App. 135, 140, 813 P.2d 146 (1991) (same).

When applied here, the principles in these cases support remand. The trial court admitted this was a close decision it struggled to make. 2RP 27-30. Northrop had completed the SSOSA treatment

program and had remained offense-free for nine years. The court found no prior violations of SSOSA or community custody conditions.<sup>18</sup> Northrop would remain on community custody for life, with continued DOC monitoring and judicial supervision. CP 37.<sup>19</sup> And Northrop has since served time in prison pending appeal. These facts provide substantial reason to question whether the trial court would make the same decision on remand in the absence of the above errors.

Nonetheless, anticipating appellate review at the end of the hearing, the prosecutor discussed the preparation of findings. 2RP 30-31. In this context, the prosecutor asked the court whether either violation would justify revocation. The court replied “either one justifies it.” 2RP 30. Next to an asterisk, the prosecutor then wrote “either one of the two violations found justifies the revocation of the suspended sentence.” The court signed the order. CP 96.

---

<sup>18</sup> There was no series of violations like those present in State v. McCormick, 166 Wn.2d 689, 706, 213 P.3d 32 (2009) (noting McCormick’s three prior violations), or State v. Miller, 159 Wn. App. 911, 919-22, 247 P.3d 457 (2011) (noting Miller’s history of multiple violations).

<sup>19</sup> The court clearly relied on the erroneous standard range in its decision, but does not appear to have considered the lifetime term of community custody when it stated its only choice was SSOSA revocation or a 60-day sanction per violation. 2RP 27-28.

This is hardly the type of thoughtful trial court analysis that breeds appellate confidence or deference.

The real question at this point is whether an appellate court should add its rubber-stamp to a trial court's rubber-stamp of state-proposed boilerplate designed to avoid meaningful appellate review. On these facts, the answer should be no.

As the Supreme Court has recognized, the loss of a SSOSA is a "significant consequence" and imposes the greatest punishment the court can impose at that juncture. State v. Sims, 171 Wn.2d 436, 443, 256 P.3d 285 (2011). This is not a decision courts should take lightly.

Furthermore, remand avoidance stems from a concern for judicial efficiency. When it is obvious an error is harmless, and when it is obvious a trial court would take known action on remand, the need for remand may be limited. See e.g., State v. McCarty, 152 Wn. App. 351, 363, 215 P.3d 1036 (2009) (remand should be avoided where it unnecessarily wastes judicial resources).

But here, as shown above, there is little confidence that the errors did not affect the court's revocation. And as established in

argument 1, remand for resentencing will happen anyway.<sup>20</sup> It cannot be avoided. Although the state may still ask this court to blindly affirm the revocation, such an effort to circumvent effective appellate review should fail. If the state can find authority to support this result on similar facts, it should cite that authority.<sup>21</sup>

This Court accordingly should vacate the revocation and remand (1) for resentencing, and (2) to allow the trial court to exercise its discretion with full knowledge that the alleged “employment” violation cannot justify revocation. Whether the court would still revoke the SSOSA is a question the trial court should first answer without the current stain of two legal errors.

---

<sup>20</sup> The state is likely to concede the standard range is erroneous.

<sup>21</sup> Northrop’s counsel has found no case affirming similar boilerplate where remand for resentencing was already required.

D. CONCLUSION

As shown in argument 1, this Court should vacate the sentence and remand for resentencing with a lawful minimum term. As shown in argument 2, this Court should vacate the vague community custody condition 7 and remand for clarification. As shown in argument 3, this Court should reverse the trial court's "employment" violation because it is manifestly unreasonable and renders community custody condition 15 vague as applied. CP 95. As shown in argument 4, this Court should remand the matter to the trial court to determine whether that court would revoke the SSOSA in the absence of the above errors.

DATED this 28<sup>th</sup> day of November, 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



---

ERIC BROMAN, WSBA 18487

OID No. 91051

Attorneys for Appellant

# APPENDIX A

No. 67925-2-1

**RCW 9.94A.510 Table 1—Sentencing grid.**  
 (Effective Until July 1, 2004)

		Offender Score									
		0	1	2	3	4	5	6	7	8	9 or More
<b>Seriousness Level</b>	<b>XVI</b>	Life Sentence Without Parole/Death Penalty									
	<b>XV</b>	23y 4m 240 - 320	24y 4m 250 - 333	25y 4m 261 - 347	26y 4m 271 - 361	27y 4m 281 - 374	28y 4m 291 - 388	30y 4m 312 - 416	32y 10m 338 - 450	36y 370 - 493	40y 411 - 548
	<b>XIV</b>	14y 4m 123 - 220	15y 4m 134 - 234	16y 2m 144 - 244	17y 154 - 254	17y 11m 165 - 265	18y 9m 175 - 275	20y 5m 195 - 295	22y 2m 216 - 316	25y 7m 257 - 357	29y 298 - 397
	<b>XIII</b>	12y 123 - 164	13y 134 - 178	14y 144 - 192	15y 154 - 205	16y 165 - 219	17y 175 - 233	19y 195 - 260	21y 216 - 288	25y 257 - 342	29y 298 - 397
	<b>XII</b>	9y 93 - 123	9y 11m 102 - 136	10y 9m 111 - 147	11y 8m 120 - 160	12y 6m 129 - 171	13y 5m 138 - 184	15y 9m 162 - 216	17y 3m 178 - 236	20y 3m 209 - 277	23y 3m 240 - 318
	<b>XI</b>	7y 6m 78 - 102	8y 4m 86 - 114	9y 2m 95 - 125	9y 11m 102 - 136	10y 9m 111 - 147	11y 7m 120 - 158	14y 2m 146 - 194	15y 5m 159 - 211	17y 11m 185 - 245	20y 5m 210 - 280
	<b>X</b>	5y 51 - 68	5y 6m 57 - 75	6y 62 - 82	6y 6m 67 - 89	7y 72 - 96	7y 6m 77 - 102	9y 6m 98 - 130	10y 6m 108 - 144	12y 6m 129 - 171	14y 6m 149 - 198
	<b>IX</b>	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	5y 51 - 68	5y 6m 57 - 75	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144	12y 6m 129 - 171
	<b>VIII</b>	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	4y 6m 46 - 61	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116	10y 6m 108 - 144
	<b>VII</b>	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 41 - 54	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102	8y 6m 87 - 116
	<b>VI</b>	13m 12+ - 14	18m 15 - 20	2y 21 - 27	2y 6m 26 - 34	3y 31 - 41	3y 6m 36 - 48	4y 6m 46 - 61	5y 6m 57 - 75	6y 6m 67 - 89	7y 6m 77 - 102
	<b>V</b>	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 41 - 54	5y 51 - 68	6y 62 - 82	7y 72 - 96
	<b>IV</b>	6m 3 - 9	9m 6 - 12	13m 12+ - 14	15m 13 - 17	18m 15 - 20	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 2m 53 - 70	6y 2m 63 - 84
	<b>III</b>	2m 1 - 3	5m 3 - 8	8m 4 - 12	11m 9 - 12	14m 12+ - 16	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57	5y 51 - 68
	<b>II</b>	45d 0 - 90 (Days)	4m 2 - 6	6m 3 - 9	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29	3y 2m 33 - 43	4y 2m 43 - 57
	<b>I</b>	30d 0 - 60 (Days)	45d 0 - 90 (Days)	3m 2 - 5	4m 2 - 6	5m 3 - 8	8m 4 - 12	13m 12+ - 14	16m 14 - 18	20m 17 - 22	2y 2m 22 - 29

# APPENDIX B

No. 67925-2-1

of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release.

(2) Unless a condition is waived by the court, the terms of community custody imposed under this section shall be the same as those provided for in RCW 9.94A.700(4) and may include those provided for in RCW 9.94A.700(5). As part of any sentence that includes a term of community custody imposed under this section, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720.

(3) At any time prior to the completion of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of \*RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. [2000 c 28 § 24.]

**NOTES: \*Reviser's note:** These RCW references have been corrected to reflect the reorganization of chapter 9.94A RCW by 2001 c 10 § 6.

**RCW 9.94A.712 Sentencing of nonpersistent offenders.** (1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a); committed on or after September 1, 2001; or

(b) Has a prior conviction for an offense listed in RCW 9.94A.030(32)(b), and is convicted of any sex offense which was committed after September 1, 2001.

For purposes of this subsection (1)(b), failure to register is not a sex offense.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term consisting of the statutory maximum sentence for the offense and a minimum term either within the standard sentence range for the offense, or outside the standard sentence range pursuant to \*RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community

custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a) Unless a condition is waived by the court, the conditions of community custody shall include those provided for in RCW 9.94A.700(4). The conditions may also include those provided for in RCW 9.94A.700(5). The court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community, and the department and the board shall enforce such conditions pursuant to RCW 9.94A.713, 9.95.425, and 9.95.430.

(b) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.94A.713 and 9.95.420 through 9.95.435. [2001 2nd sp.s. c 12 § 303.]

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

**RCW 9.94A.713 Nonpersistent offenders--Conditions.** (1) When an offender is sentenced under RCW 9.94A.712, the department shall assess the offender's risk of recidivism and shall recommend to the board any additional or modified conditions of the offender's community custody based upon the risk to community safety. In addition, the department shall make a recommendation with regard to, and the board may require the offender to participate in, rehabilitative programs, or otherwise perform affirmative conduct, and obey all laws. The board must consider and may impose department-recommended conditions.

(2) The department may not recommend and the board may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions. The board shall notify the offender in writing of any such conditions or modifications.

(3) In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(4) If an offender violates conditions imposed by the court, the department, or the board during community custody, the board or the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.95.435.

(5) By the close of the next business day, after receiving notice of a condition imposed by the board or the department, an offender may request an administrative hearing under rules adopted by the board. The condition shall remain in effect unless the hearing examiner finds that it is not reasonably related to any of the following:

- (a) The crime of conviction;
- (b) The offender's risk of reoffending; or
- (c) The safety of the community.

(6) An offender released by the board under RCW 9.95.420 shall be subject to the supervision of the department until the expiration of the maximum term of the sentence. The department shall monitor the offender's compliance with conditions of community custody imposed by the court, department, or board, and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board shall be subject to the provisions of RCW 9.95.425 through 9.95.440.

(7) If the department finds that an emergency exists requiring the immediate imposition of conditions of release in addition to those set by the board under RCW 9.95.420 and subsection (1) of this section in order to prevent the offender from committing a crime, the department may impose additional conditions. The department may not impose conditions that are contrary to those set by

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

STATE OF WASHINGTON

Respondent,

v.

GLENN NORTHROP,

Appellant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

COA NO. 67925-2-1

**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 28<sup>TH</sup> DAY OF NOVEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GLENN NORTHROP  
DOC NO. 866827  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF NOVEMBER 2012.

x Patrick Mayovsky

2012 NOV 28 PM 4:50  
COURT OF APPEALS  
STATE OF WASHINGTON