699245

WASHINGTON STATE COURT OF APPEALS
Division One

State of Washington Respondent vs. Donnie W. Durrett Appellant	Case No. 69924-5-I STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW Pursuant to RAP 10.10 (c)

I, Donnie W. Durrett, have received the opening brief prepared by My Attorney, Ms. Maureen Cyr. After awaiting for the December 11, 2012, Report of Proceedings I still haven't recieved the Correct 12-11-12 transcript. Summerized below are the additional grounds for review that are not addressed in that brief. I Understand the Court will review When my appeal is considered on the merits.

ADDITIONAL GROUNDS ONE:

RCW 9.94A.701 Community Custody States:

"(1) If an offender is sentenced to the custody of the department for one of the following crimes, the Court shall, in addition to the other terms of the Sentence, Sentence the offender to Community Custody for three years:

(a) A sex offense not sentenced under RCW 9.94A.507; or

(b) A Serious violent offense."

Pursuant to (2007) RCW 9.94A.030 (42) "Sex Offense" Means:
(a) (i) A felony that is a violation of Chapter 9A.44
Other than ... RCW 9A.44.130 (11)

Appellant Durrett was convicted under RCW 9A.44.130 (11). Not RCW 9A.44.132, Where failure to register as a sex offender is not a sex offense, that requires 36 to 48 months of Community Custody, so pursuant to 9.94A.701 (1) (a) (b):

"(1) If an offender is sentenced to the custody of the department for one of the following crimes, the Court shall, in addition to the other terms of the sentence, sentence the offender to community custody for three years:
(a) A sex offense not sentenced under RCW 9.94A.507; or
(b) A Serious violent offense."

being that in 2007, RCW 9A.44.130 (11) was not a Sex Offense, and the fact that RCW 9A.44.140 (7) States:

"For purposes of determining whether a person has been convicted of more than one sex offense, failure to register as a sex offender or Kidnapping offender, IS NOT A SEX OR KIDNAPPING OFFENSE." Emphasis.

So the only action for the Court to take under 9.94A.701 (9):

"The term of Community Custody specified by this Section shall be reduced by the Court whenever an offender's Standard range term of Confinement in Combination with the term of Community Custody exceeds the Statutory Maximum for the Crime as provided in RCW 9A.20.021"

Was to reduce the Community Custody to Zero months, as non-applicable for the Crime.

The Saving Clause Specifically drafted for the repealed Statutes exempts three catagories from repeal: . . . The General Saving Clause, RCW 10.01.040, which is applicable to all repealed Criminal Statutes provides:

" No offense committed and no penalty or forfeiture incurred previous to the time when any Statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such appeal, unless a Contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recover of any penalty or forfeiture, pending at the time any Statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a Contrary intention is expressly declared in the repealing Act. Whenever any criminal or penal Statute shall be amended or repealed, all offenses committed or penalities or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal". See State v. Walker, 7 Wa. App. 978; 503 P.2d 123 (Div. I 1972).

RCW 9A.44.130, was replaced by RCW 9A.44.132. However, the laws in effect in 2006-2007 when Durrett allegedly violated the requirements of the 9A.44.130 Registration for Sex offenders, are still controlling, in 2013-2014.

These are just some of the discretional decisions that must be made, in determining how to apply 9.94A.701(9). This is why CrR 3.4 require that a defendant must be present in Court, and must be represented by Counsel, is a defendant's Constitutional right.

The State will no doubt claim that the Hon. Judge Mack, didn't use any discretion. That the computation is a "Ministerial Task" of calculating the number of months available for Community Custody within the Statutory Maximum. As they have alleged in the past. But, the judge didn't do the "Ministerial Task" of calculation, the State did the calculation and presented them in a proposed order for which Judge Mack simply signed. This, delegation of her judicial authority to the King County Prosecuter- Deborah Dwyer, a deputy, was an abuse of authority, that denied Donnie Durrett procedural Due Process of law. Without my attorney being present to represent my interest.

The State fails to inform this Court of the emails that was initiated by Judge Mack's Bailiff, Mr. Aaron Everett. This was the Court's intention to bring Durrett back to Court for a Court of Appeals Division One remand to correct a concealed Sentencing error. A copy of those E-mails are attached in Appendix A.

The State Supreme Court in State v. Ramos, 171 Wn.2d 46, 246 P.3d 811 (2011) has held that;

" The Supreme Court held that remand order called for trial Court to exercise its sentencing discretion as to require hearing at which defendant was present. "Reversed and remanded" ... "However, when a hearing on remand involves only a ministerial correction and no exercise of discretion, the defendant has no constitutional right to be present." See State v. Davenport, 140 Wn.App. 925, 931-32, 167 P.3d 1221 (2007) stated;

" When a sentence is insufficiently specific about the period of community placement, remand for Ministerial Task of expressly stating the correct period of community

Placement is usually all that is required." Broadway, 133 Wn 2d at 136, 942 P.2d 363 (1997) further Stated;

"resentencing with discretion would be proper when, for instance, the trial court was originally mistaken about the period of Community Supervision, making it necessary to allow the Court to exercise its discretion and consider the length of the prison sentence in light of the Correct Community Supervision term."

In the Case of appellant Durrett, Judge Mack, exercised her discretion and also reconsidered the length of the prison Sentence to be within the Statutory Maximum. The State insist That the proceedings was ministerial, and no discretion by the Court had been done.

Appellant Durrett, Submits Appendix -B- under cause No. 07-1-01165-7-SEA, and No. 11-1-01666-4-SEA. The Honorable Judge Mack, denied Durrett's motion for Change of Judge, per Affidavit of Prejudice. Judge Mack Clearly Stated That;

"Because this court has previously exercised Discretion In BOTH CASES."

Judge Mack confirms that she has "previously exercised Discretion in both cases." If she exercised discretion in both Cases, then appellant Durrett should have been present, as well as being represented by his Attorney at all proceedings.

And without any specific dates mentioned as to when Such discretion was not used, One must construe that discretion was used Throughout both Causes. Including the Amending on December 11, 2012 of Durrett's Judgment and Sentence.

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ADDITIONAL GROUNDS TWO:

"FRAUDULENT MISREPRESENTATION OF PROSECUTOR:"

The Opening brief of appellant, pointed out that on 12-11-2012, the trial Court allegedly amended the Judgment and Sentence and impose a new sentencing term of Community Custody without holding a hearing and without affording Mr. Durrett an opportunity to be present or be represented by Counsel. CP 198 ("Order Amending Judgment and Sentence as to term of Community Custody Only").

What appellant Durrett's Counsel didn't addressed, is that the failure to held a hearing, denied Durrett a right of RAP 9.1 (b) "Report of Proceedings." "The report of any oral proceeding must be transcribed in the form of a typewritten report of proceedings." "The Report of proceedings may take the form of a 'verbatim report of proceedings' as provided in rule 9.2".

In State v. Wade 138 Wash. 2d 460, 979 P.2d 852 (1999) the court has stated that; "Reversal based on trial court's Admission of prior bad acts evidence was error where appellate Court did not have before it report of oral hearing on motion at which trial Court gave its reasoning for admission of evidence, as appellate court could not properly determine whether trial court's exercise of discretion was manifestly unreasonable or based on unt enable grounds in absence of record."

Title 9 of Washington Court Rules, Rules of Appellate Procedure (RAP) Record of Review, is not available to this Court, or appellant Durrett for review, because no record was created, no hearing was held, no defendant present, and no counsel for

Presenting Durrett case was there to protect Durrett's interest.

This violation of Due Process procedure, has significantly Prejudice Durrett's right to effectively Appeal a Superior Court rulings, which denies Durrett Access to this Court.

This was abase of discretion, and Prosecutorial Misconduct on a attempt to defraud this Court by deception and by misrepresentation of the facts. And without a record to review, for December 11, 2012

An example of the fraudulent deception by the Court and the Prosecutor Deputy Deborah Dwyer. Durrett's Judgment and Sentence in Cause No. 07-1-01965-7-SEA, States:

> "The defendant's lawyer "Gordon Hill" and the deputy prosecuting Attorney, were present at the Sentencing hearing Conducted today."

The amendment didn't amend this section for accuracy of the judgment and Sentence by any reviewing Court. It misrepresented these facts, that Durrett was represented by Gordon Hill during the Amending process, on Dec. 11, 2012, which is fraudulent. See Appendix-A- 12-3-12 letter from defendant's attorney Gordon Hill, defendant's assigned Attorney. When in fact neither Durrett or his attorney was there at the December 11, 2013 Amendment.

"A party attacking judgment on fraud grounds must establish the fraud, misrepresentation, or other misconduct by clear and convincing evidence." Lindgren v. Lindgren, 58 Wa App. 588, 794 P. 2d 526 (1990) stated:

> "Thus, the fraudulent conduct or misrepresentation must cause the entry of the Judgment such that the losing party was prevented from fully and fairly presenting its case or defense."

Without a report of the proceeding being made for reviewing Court, the Judgment and Sentence fraudulently imply that Donnie W. Durrett was present for all stages of Sentencing. This would be interpreted by any reviewing Court, as including the alleged December 11, 2012 Amendment hearing.

The other fraudulent, misrepresentation of the prosecutor in this matter is on page 5, section b. "Durrett had no Constitutional right to be present when the Court performed this Purely Ministerial Task."

Ms Dwyer claims, "the Court performed" a "Purely Ministerial Task." But the facts are, "the Court" didn't "performed Purely Ministerial Task." Ms Dwyer, deputy King County Prosecutor, is the one who purely performed these task, that she claims were ministerial. And presented it to Judge Mack to sign. The order was already written by Ms. Dwyer in a proposed order.

Gilberts Legal Dictionary 1997 Edition, defines Procedural Due Process as: "Constitutional guarantee that a person whose right to life, liberty or property is to be affected is

> Entitled to reasonable notice and an opportunity to be heard and present a defense to the proposed action before a fair and impartial decision-maker." See

Due Process of law:

> "A flexible term for the fair and orderly administration of Justice in the Courts. Essential to the concept is the right a person has to be notified of legal proceedings against him, the opportunity to be heard and to defend himself in an orderly proceeding, and the right to have Counsel represent him. Basically, due process is the fundamental fairness principle at the core of the Anglo-American System of Jurisprudence."

Ms Dwyer, also asserts, that the Court didn't exercise her (Judge Mack) discretion, that the amendment was purely Ministerial. Yet, in an order dated Feb 4, 2014 from The Honorable Judge Mack, denying a Motion for Change of Judge Moved by Durrett, she Stated, Pursuant to RCW 4.12.050,

"because this Court has previously exercised discretion in both cases." See Attachment / Appendix "B".

With no record of the Verbatim Report of Proceedings of the December 11, 2012 Amendment hearing, how do we Know Judge Mack excluded any particular day in both of the 2007 cause, and the 2011 cause that She didn't exercise her discretion?

"It is immaterial whether misrepresentation was innocent or willful; effect is same whether misrepresentation was innocent, the result of carelessness, or deliberate." Peoples State Bank v. Hickey, 55 Wn. App. 367, 777 P.2d 1056 (Div. I 1989).

The Court Rules of Washington (RPC 8.4) Misconduct of the Rules of Professional Conduct; Title 8 "Maintaining the Integrity of the profession. RPC 8.4

(c). "It is professional misconduct for a lawyer to: Engage in Conduct involving dishonesty, fraud, deceit or misrepresentation;"

(d). "Engage in Conduct that is prejudicial to the administration of Justice;"

(f). "Knowingly assist a judge or judicial officer in Conduct that is a violation of applicable rules of judicial Conduct or other law;"

Judge Mack's Bailiff, Aaron Everett, acts for the Judge Mack. On October 26, 2012, he sent an email to all parties in this 2007 Cause, to address the mandate, hoping to schedule a hearing. He wasn't "Sure how far out it should be, given that we will need to transport Mr. Durrett. I look forward to guidance on that point and will then schedule a hearing downtown."

Mr. Everett is the Bailiff / Clerk to the Hon. Barbara A. Mack. He was performing his lawful duties in regards to the remand mandate. Until Deputy Prosecutor for King County Deborah Dwyer's misconduct engaged in conduct that is prejudicial to the Administration of Justice; which has interferred with Durrett's administration of Justice. His 14th Amendment rights under the United States Constitution "Due Process of law."

As it is now, these attached E-mails are the only Verbatim Report of Proceedings of the events, leading up to the Dec. 11, 2012 Amendment. Which clearly shows Ms. Dwyer engaged in Conduct involving dishonesty, fraud, deceit and misrepresentation to the Court to deny Due Process to M. Durrett.

Ms. Dwyer has used the King County Prosecutor's Office, as having authority to Calculate What, if any, Community Custody to impose pursuant to RCW 9.94A-701 (9). "The Court", "Shall", "reduce", not the King County Deputy Prosecutor, "Whenever an offender's Standard range term of Confinement in Combination with the term of Community Custody exceeds the Statutory Maximum for the crime as provided in RCW 9A.20.021.

Ms Dwyer has used her office, as having authority to deprive Durrett of the Administration of Justice. RPC 8.4(e)(f) States: (e) State or imply an ability to influence improperly a government agency or official or to achieve

results by means that violate the rules of Professional conduct or other laws;

(f). Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of Judicial conduct or other law;".

ADDITIONAL GROUNDS THREE:

Prosecutorial Misconduct By Ms Dwyer:

Ms Dwyer, using her office, and her partial relationship with the Honorable Judge Mack, to Severely prejudice Durrett Due process rights, and the representation of an Attorney at every critical Stage of proceedings. Including any type of Sentencing, ~~Amended~~ Sentencing, or re-Sentencing hearing. That Wouldn't require any record of the proceedings to be made of the 12-11-12 hearing was ever made.

In State V. Ramos, 171 Wn.2d 46, 246 P.3d 811 (2011) case, the Court focus on a key word "IF" "If no discretion is exercised by the Sentencing Court."

Reverside Webster's II new College Dictionary, defines the word "If" in many ways here are a couple that Stands out:

(4). Usage: "There is a growing tendency to use would have in Contrary-to-fact beginning with if, but this usage is Still considered incorrect. Correct models are if I had been successful (not if I would have been responsible). — n. A possibility, condition, or Stipulation <no ifs, and, or buts>." "[IF] Informal, marked by doubt, uncertainty, or chance." "Iffy".

As the Court can see, the word if, means "doubt," "uncertainty," or "chance." The Barnes case stated that;

"If" that is all the trial Court will be required to do, the remand hearing would be purely Ministrial, since the length of Community Placement is dictated by Statute."

The use of if, is ambigitous, and "if" followed, the rule of lenity must be applied in favor of Durrett.

The Statute for community placement is dictate by Statute of one year (12 months). Community Custody, isn't dictated by Statute not by 12 months, but by a range of months that could be 36-48 months, or 18 months, and by 12 months, depending on the Crime. There is no exactitude that is certain, or determinate. "The term of Community Custody specified by this section 'SHALL BE REDUCED BY THE COURT' whenever an offender's Standard range term of confinement in Combination With the term of Community Custody exceeds the Statutory Maximum for the Crime as provided in RCW 9A.20.021."

By the Court, means the assigned Judge, not the assigned County prosecutor Ms. Dwyer, who wrote the order to Amend, and had Judge Mack, rubber stamp it with her signature.

"Allowance of Compulsory process to aid in defense of accused in Criminal cases rests largely in discretion of trial Court, and such discretion is to be disturbed only on showing that accused was prejudiced by denial." See State v. Edwards, (1966) 68 Wash. 2d 246, 412 P. 2d 747.

"SHALL BE REDUCED BY THE COURT" is a discretionary Act that only the Court can do. And that reducing is a action by the Court which Appellant Durrett and his lawyer is Mandatory Present of each other.

CrR 3.4 - Rights of Defendants: PRESENCE OF THE DEFENDANT: (a). When Necessary. "The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of Sentence, except as otherwise provided by these rules, or as excused or excluded by the Court for good cause shown." The imposition of Sentence, requires the Presence of the Defendant. The Court has not Stated "excused" or "excluded" reason why the Court did not show why Durrett was not necessary at the imposition of the Sentence, even a Amending Sentencing process.

(c). Defendant not Present. "If in any case the defendant is not present when his or her personal attendance is necessary, the Court may order the Clerk to issue a bench Warrant for the defendant's arrest, which may be served as a Warrant of arrest in other cases."

The entire E-mail, addressing the interference with Durrett's Judicial administration of Justice rights to be present, conspired to deny Durrett his resentencing ordered by the Court of Appeals Division One, decision in 2009; State v. Durrett, 150 Wn.App. 402. At every stage since the 2009 ruling, the State has found every reasons to not Comply fully with that order of remand.

In State v. Krausse, 10 Wn. App. 574, 519 P.2d 266 (1974) States: "However, those Comments of the prosecutor were blatantly Contemptuous and are not to be condoned. The prosecuting Attorney is an officer of the Court whose duties not only extend to the Court and the public, but to the defendant as well." "The orderly administration of Justice requires that all Counsel abide by orders of the trial Court without making Threats in advance of a ruling that if adverse, the order will be disobeyed.

"In our view, the trial court exercised extreme patience in the face of these statements and would have been justified in taking appropriate action of a disciplinary nature. We trust that such conduct will not occur in the future."

The Threat by Ms Dwyer stating; "I plan to submit the proposed Order correcting the term of Community Custody to Judge Mack without your Signature. Thanks, Debbie Dwyer."

Here, Ms Dwyer claims that she has routinely violated other defendants rights via an amendment to the J&S.

"There is nothing more ministrial, and involving less discretion, than subtracting 43 (this confinement term) from 60 (the Statutory Maximum) and coming up with 17 (the term of Community Custody)."

Except, Ms. Dwyer, and not the Court, did the reducing, and she failed to calculate Durrett's 3 months in the King County jail awaiting for the re-Sentencing hearing to be held. So that 17 months now becomes 20 months. And 43 months and 20 months comes up with 63 months. Exceeding the Statutory Maximum by 3 months. This is Prosecutorial Misconduct.

Under CrR 3.1(2) "A lawyer shall be provided at every Stage of the proceedings, including Sentencing, Appeal, and Post-conviction review. A lawyer initially appointed shall continue to represent the defendant through <u>all</u> Stages of the proceedings unless a new appointment is made by the Court".

So, under RCW 9.94A.701(3)(d), only if it's your first felony failure to Register, do you have to be Sentenced to one year

of Community Custody. Otherwise, it is not a Sex Offense, that require Community Custody at all. Let alone a range of 36-48 months. Assigning Community Custody is a Court's discretion, not that of a prosecutor like Ms. Dwyer that even though Good Grounds had not been Shown Why Durrett was not required to be present at the imposition of Sentencing. Ms Dwyer went forward with the order.

In State v. Krausse, Supra, "On two Separate occasions, Counsel advised the trial Court that he would go to jail rather than Supply copies of the Statements to defense Counsel. We are not persuaded that these Comments influenced the trial Court's exercise of discretion, Since the Court advised the prosecutor that defendants were entitled to see the Signed Statements if the Court should order it."

See Appendix -B- of Ms. Dwyer, "State's Response to Personal Restraint Petition case No. 68685-2-I (Page 5) : Stated: "While failure to register as a Sex offender was formerly classified as a "Sex offense," this Court has Concluded that it is not a "Sexual offense". A Sexual offense is an offense involving Sexual gratification. Failing to comply with a registration Statute does not implicate Sexual gratification. "Failing to Comply with a registration Statute does not implicate Sexual gratification." State v. Nelson, 130 Wa. App. 467, 131 Wa. App. 175, 123 P.3d 526 (Div. 2 2005).

Yet, Ms Dwyer, still claims that Community Custody is required for failure to register as a Sex offender, When it is not Durrett's first felony violation, of That Offense.

Now looking at RCW 9.94A.030 (46) (a) (i) Clearly States that "Sex Offense" Means; "A felony that is a violation of Chapter 9A.44 RCW - Other than 9A.44.132 and 9A.44.130 (11) (2002)

Appellant Durrett asserts, that due to the Change in law that removed failure to register as a Sex Offender, from the "Sex Offense" definition under RCW 9.94A.030. Pursuant to RCW 10.73.100(5) "the Sentence imposed was in excess of the Court's jurisdiction; or (6). There has been a Significant Change in the law, whether substantive or procedural, which is material to the conviction, Sentence, or other Order entered in a Criminal or Civil proceeding instituted by the State or local government, and either the legislature has expressly provided that the Change in the law is to be applied retroactively, or a Court".

Appellant Durrett submits that on remand had he argued that the Change in law, that removed failure to Register as a Sex Offender, from the "Sex Offense" definition by the legislature is substantial.

Because now, Durrett could have brought this to the Court's attention for Consideration in reducing the Community Custody to Ø zero months. Under 9.94A.701(9). No Sex offense, no Community Custody to impose for failure to register as a Sex Offender, With a range of 36-48 months.

Under the Change in law, that is now in effect, "A Court Commits reversible error When it exceeds its Sentencing authority under the SRA. State v. Hale, 94 Wn. App. 46, 53, 971 P.2d 88 (1999). The appropriate remedy When this occurs is generally to remand for resentencing. In re Sentence of Jones, 129 Wn. App. 626, 627-28, 120 P.3d 84 (2005).

In re the Sentence of Jones, supra, The Court held That: "Statute Authorizing Community Custody limited Sentencing Court authority to impose Community Custody to offenses Specified

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in that Statute." Petition Granted, Causes remanded for re-Sentencing."

In the Jones Case Id. it was the Department of Correction who filed these Petitions for review, on a Single issue:

"We agree with DOC that the Superior Court Exceeded its Sentencing authority when it added a term of Community Custody to Sentences in those Consolidate Cases, all of which were for Crimes other than those Set forth in Statute. We Therefore, remand these Cases with directions that the Superior Court Strike the term of Community Custody from the Sentences."

Appellant Durrett asserts to this Court, that the Same Circumstances above, applies to Durrett's "failure to Register as a Sex offender." This Crime is not listed as a Sex Offense, a Violent Crime, Drug offense, or any Crime against a Person under RCW 9.94A.411(2). Therefore, it is not authorized for Community Custody. And the Honorable Judge Mack exceeded her Sentencing Authority, by imposing any Community Custody at all. Secondly, the Statute the legislature added new language requiring Sentencing Courts to impose fixed terms of Community Custody ranges from 36-48 months, 18 months, or 12 months. See State v. Winborne, 167 Wn. App. 320, 273 P.3d 454 (2012).

There is no fixed term of 17 months exactly. The Winborne Court Stated: "Most important here, it had added a new Subsection (9) by laws of 2010 Ch. 224 §5) Providing:

" The term of Community Custody specified by this Section shall be reduced by the Court whenever an Offender's Standard range term of Confinement in Combination with the Statutory Maximum for the Crime as provided in RCW 9A.20.021."

Doing the Calculation math, Durrett Served 43 months on a invalid Judgement and Sentence under Cause No. 07-1-01765-7, as have been determined by this Court in 158 Wa. App. 402. And That "defendant's Sentence Violated the Sentencing Reform ACT, because the Combined period of incarceration and Community Custody not to exceed" 60 months. And remanded for re-Sentencing within Statutory Maximum."

Durrett was additionally Sentenced to 36-48 months of Community Custody, and was remanded for resentencing, on one Count, instead of two Counts of failure to register. With a notation that the Combined Sentence of Confinement and Community Custody not to exceed 60 months of failure to register as a Sex offender a Class C felony.

Durrett was re-Sentenced on October 21, 2011, after being arrested for this offense of failure to appear for Sentencing, under Cause No. 07-1-01765-7-SEA.

Durrett was arrested on July 23, 2011, and was routed to King County Jail on August 10, 2011. Sat There in King County Jail, to until re-Sentenced on Oct. 21, 2011.

Adding those three months of Jail time, to the 43 months DOC Confinement time comes to 46 months of Confinement time Served. Adding to the 46 months, the 17 month of Community Custody imposed in the Amendment of Durrett's Judgement and Sentence, you have a Sentence of 63 months Combined. This Sentence exceed the 60 month Statutory Maximum, for a

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Class C felony. The Amended Sentence exceeds the Statutory Maximum, again.

The Deputy King County prosecutor Ms. Deborah Dwyer, knew that failure to register as a Sex offender, wasn't Durrett's first conviction of this offense. Thereby disqualifying this crime for imposing any Community Custody.

The Hon. Judge Mack, by signing Ms. Dwyer's Amended Judgment and Sentence, has again abused her discretion, and exceeding her Sentencing authority when she added a different term of Community Custody to the Sentence of Durrett's judgement, Without Durrett or his lawyer being present. Which were for crimes other than those set forth in the statute of RCW 9.94A.701 (1)(a)(b). And as defined in RCW 9.94A.030 (46)(a)(i) (2007).

Appellant Durrett's Judgement and Sentence of King County Cause No. 07-1-01965-7 SEA, still allows credit for time spent in the County Jail, awaiting Sentencing on a re-Sentence. And as such, 3 months more of Confinement time to the 43 months, plus the amended 17 months would exceed the Sentencing Authority of Judge Mack. Therefore, invalidating the Sentence for a third time, and must be dismissed by this Court.

See In the matter of the Personal restraint of Julio Mota, 114 Wn. 2d 465, 788 P. 2d 538 (1990). Which Stated:

> "To indigent defendants for time served in County Jail prior to trial and Sentencing due to their ability to make bail violates equal protection clause of fourteenth amendment under intermediate level of Scrutiny;" See; In the Matter of the Personal Restraint of Phelan, 97 Wn. 2d 590, 647 P. 2d 1026 (1982): "The Supreme Court held that:

" Prisoner was entitled to credit for time served between arrest and guilty plea, for time served between guilty plea and sentencing. Vacated with directions."

Pursuant to CrR 7.2 (c) "Record" "A Verbatim record of the Sentencing proceedings shall be made."

Because the State had conceded that failure to register as a Sex Offender, is not a Sex offense, (See Appendix-C- State's Response to P.R.P. No 68685-2-I / 68685-2-I page 5-6 of Ms. Dwyer's response brief. She must also be conceding, that Community Custody is not authorized by the legislature, for failure to Register as a Sex Offender, as a Non-Sex Offense, Non-Violent Crime, Not a Crime against a person, or a drug offense crime. Therefore, the Correct amount of time that should the Court reduce the Community Custody time, is down to 0 Zero months. To be incompliance with RCW 9.94A.701 (9) due to the change in Law, removing the crime from being a Sex offense.

CONCLUSION:

Since conviction in 2007, in this matter, Durrett has been violated, of his Constitutional Federal and State rights. As well as his Statutory rights, that has continued to his Sentencing Violations. This Case should be respectfully dismissed with prejudice Due to the Cumulative Due process of law. Another resentencing would only create another Constitutional Violation of Durrett's Constitutional Rights.

There are additional grounds, drafted in Durrett's Declaration In Support that are attached to this Statement, in Appendix C - D - E

Dated this 12th day of March 2014

Donnie W. Durrett DOC #241083
Donnie W Durrett – Appellant
Airway Heights Corr. Center
Post Office Box 2049
Airway Heights, WA 99001

WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

STATE OF WASHINGTON } ss:
COUNTY OF SPOKANE }

Case No. 69924-5-I
07-1-01965-7-SEA

Donnie Wayne Durrett

DECLATION IN SUPPORT OF MOTION TO FILE STATEMENT OF ADDITIONAL GROUNDS:

Donnie Wayne Durrett, appellant on oath, States:

1. That I am the appellant/defendant, in the above above case and cause numbers, and am competent to testify to the matters set forth below and I have Personal Knowledge in this matter.

2. The attached appendix from King County Judge, Prosecutor, and Mr. Gordon Hill are true and correct copies of the documents I recieved, and are in true form original - To include E-mails, legal correspondence from defense Counsel Gordon Hill, and Deputy Prosecutor Deborah Dwyer.

3. The attached appendix from King County Superior Court, are authentic to the documents on file.

4. On October 21, 2011 at the re-Sentencing hearing I was Present with defendant's attorney Gordon Hill.

5. On December 11, 2012 the Superior Court Judge Mack, amended my Judgment and Sentence. I was not present, nor was I represented by Counsel to protect my interest Mr Gordon Hill was the assigned attorney

6. On October 21, 2011 at the resentencing hearing on Cause No. 07-1-01666-7-SEA, I was offered the 57 months, until I realized that this would end, terminate my Work-release transfer, that I was transfered to, in cause No. 11-1-01666 4-SEA. See attached appendix of order, remanding me back to the King County Jail. And the order transfering me to Work Release, on Cause No. 11-1-01666-4-SEA.

7. After I walked into Court for Sentencing, un-escorted by Jail Staff, I walked in on my own for Sentencing. A Sentence, I Stipulated to an exceptional Sentence of 60 Months for a Class C felony. On condition that I would Serve the Sentence concurrently on the above causes. With no Community Custody imposed, or Served. Further, the Affiant Says not.

Sworn and subscribed before me this 13th day of March 2014

Dennie W. Durrett DOC# 241033

I certify and declare under Penalty of perjury under the laws of the State of Washington that the foregoing is true and Correct.

DECLaration In Support of SAG of Durrett: No. 69984-5-I

E-mails and letter from
Gordon Hill:

07-1-01965-7-SEA

APPENDIX -A-

Associated Counsel for the Accused
420 West Harrison Suite 201 Kent WA 98032
(253) 520-6509 FAX (253) 520-6635

To: Donnie Durrett
From: Gordon Hill
Re: COA Case 67927-9, KC Sup. Case 07-1-01965-7 SEA
Date: 12/3/12

Mr. Durrett,

I am writing you regarding the recent remand of case 07-1-01965-7 SEA for correct of the Judgment and Sentence. As instructed by your previous correspondence, I indicated to the State that you wished to be transported for entry of the amended Judgment and Sentence and that I would not sign any order amending the Judgment and Sentence in your absence. I have attached those emails to this letter. (Attached Email with "A" written on top).

The State indicated to me that they would attempt to get the court to sign the order amending the Judgment and Sentence without transporting you and without my signature. They emailed the court that request, and the court agreed to sign the order without my signature and without either you or I being present. I have attached those emails as well. (Attached Email with "B" written on top). I have also enclosed the State's proposed order.

Regards,

Gordon Hill
Associated Counsel For the Accused
420 West Harrison, Suite 201
Kent, WA 98032
Phn: (253) 520-6509 ext. 352
Fax: (253) 520-6635

Gordon Hill (ACA)

From: Dwyer, Deborah [Deborah.Dwyer@kingcounty.gov]
Sent: Tuesday, November 13, 2012 2:37 PM
To: Gordon Hill (ACA)
Subject: RE: 67927-9, State v. Donnie Durrett - Mandate

Gordon – The case was not remanded for resentencing. It was remanded "solely for entry of a community custody period consistent with RCW 9.94A.701(9)." Under State v. Ramos, 171 Wn.2d 46, 48-50 (2011), where the term of community placement is dictated by statute (as it is here), a remand hearing is "purely ministerial": "[W]hen a hearing on remand involves only a ministerial correction and no exercise of discretion, the defendant has no constitutional right to be present." There is nothing more ministerial, and involving less discretion, than subtracting 43 (his confinement term) from 60 (the statutory maximum) and coming up with 17 (the term of community custody).

We have routinely handled these via an amendment to the J&S. Where a defendant appealed, the Court of Appeals affirmed in an unpublished opinion. See, e.g., State v. Lonnie Burton, No. 65355-5-I (June 6, 2011).

I plan to submit the proposed order correcting the term of community custody to Judge Mack without your signature. Thanks, Debbie Dwyer

---

From: Hill, Gordon-acapd.org
Sent: Tuesday, November 13, 2012 2:05 PM
To: Dwyer, Deborah
Subject: RE: 67927-9, State v. Donnie Durrett - Mandate

Deborah-

Mr. Durrett has indicated to me that he wishes to be present for any (re)sentencing hearing, and I have been directed not to sign anything in his absence.

Regards,

Gordon Hill
Associated Counsel For the Accused
420 West Harrison, Suite 201
Kent, WA 98032
Phn: (253) 520-6509 ext. 352
Fax: (253) 520-6635

From: Dwyer, Deborah [mailto:Deborah.Dwyer@kingcounty.gov]
Sent: Monday, November 05, 2012 3:29 PM
To: Everett, Aaron; Gordon Hill (ACA)
Subject: FW: 67927-9, State v. Donnie Durrett - Mandate

Mr. Everett: Today I spoke with Gordon Hill, Mr. Durrett's attorney in the trial court. Mr. Hill is going to send his client a letter concerning the status of this case, and the proposal to amend the judgment and sentence to impose a definite term of community custody (17 months) per the State's concession

B

Gordon Hill (ACA)

From: Dwyer, Deborah [Deborah.Dwyer@kingcounty.gov]
Sent: Wednesday, November 21, 2012 3:44 PM
To: Everett, Aaron
Cc: Gordon Hill (ACA)
Subject: RE: Donnie Durrett

I will present an order next week.

From: Everett, Aaron
Sent: Wednesday, November 21, 2012 8:38 AM
To: Dwyer, Deborah
Cc: Hill, Gordon-acapd.org
Subject: RE: Donnie Durrett

The Court agrees that a hearing is not necessary. Please present a signed order.

Thank you,

Aaron Everett
Law Clerk/Bailiff to the Hon. Barbara A. Mack
Youth Services Center
1211 E. Alder St.
Seattle, WA 98122
206-296-9210

From: Dwyer, Deborah
Sent: Tuesday, November 20, 2012 4:57 PM
To: Everett, Aaron
Cc: Hill, Gordon-acapd.org
Subject: Donnie Durrett

Mr. Everett: Attached is the State's proposed order amending the judgment and sentence in accordance with the directive from the Court of Appeals. The Court accepted the State's concession of error and "remand[ed] solely for entry of a community custody period consistent with RCW 9.94A.701(9)." Unpublished opinion in No. 67927-9-I (filed 9-4-12).

It is my understanding from Mr. Hill that Mr. Durrett does not wish his attorney to sign the order (even though Mr. Durrett is getting exactly what he asked for on appeal). Mr. Durrett wishes to be present for his "resentencing." But the Court of Appeals did not remand for "resentencing" (see language quoted above). Rather, the term of community placement is dictated by statute: the statutory maximum is 60 months, Mr. Durrett was sentenced to 43 months of confinement, leaving exactly 17 months for community custody – no more, no less. (The term of community custody otherwise required for this crime, Failure to Register as a Sex Offender, is 36 months.)

Cause No. 07-1-01965-7-SEA
AND
11-1-01666-4-SEA

STATE'S RESPONSE TO PRP
No. 68685-2-I

APPENDIX -B-

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

State of Washington, Plaintiff, v. Donnie Wayne Durrett, Defendant.	No. 07-1-01965-7 SEA 11-1-01666-4 SEA ORDER DENYING MOTION FOR CHANGE OF JUDGE PER AFFIDAVIT OF PREJUDICE PURSUANT TO RCW 4.12.050

THIS MATTER came on for hearing upon motion by the defendant for change of judge per affidavit of prejudice. The motion is denied pursuant to RCW 4.12.050 because this court has previously exercised discretion in both cases.

IT IS SO ORDERED this 4 day of Feb., 2014.

JUDGE BARBARA A. MACK

STATE'S RESPONSE TO
PRP No. 68685-2-I

APPENDIX -C-

COPY

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

In re Personal Restraint Petition of DONNIE DURRETT, Petitioner.	No. 68685-2-I STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

A. AUTHORITY FOR RESTRAINT OF PETITIONER

Donnie Durrett is restrained pursuant to Judgment and Sentence in King County Superior Court No. 07-1-01965-7 SEA. Appendix A.

B. ISSUE PRESENTED

1. Whether Durrett has failed to show a fundamental defect that resulted in a complete miscarriage of justice by virtue of his being tried on two counts of Failure to Register as a Sex Offender, where one of those counts was ultimately vacated on double jeopardy grounds.

C. STATEMENT OF THE CASE

Petitioner Donnie Durrett was charged by Information with a single count of Failure to Register as a Sex Offender. Appendix B. The State alleged that, during the time period from December 6, 2006 through January 23, 2007, Durrett, a convicted sex offender, had failed to report as required by law. Id. At his first trial, the jury was unable to reach a verdict, and a mistrial was declared. Appendix C.

Prior to retrying Durrett, the State filed an Amended Information adding a second count of Failure to Register as a Sex Offender. Appendix D. In this second count, the State alleged that, during the period from November 6 through November 17, 2006, Durrett failed to report as required by law. Id. The jury found Durrett guilty as charged. Appendix E. He received a sentence within the standard range. Appendix F.

Durrett appealed. In a published opinion, the Court of Appeals held that the two convictions constituted only one unit of prosecution, and thus violated the constitutional protection against double jeopardy. Appendix G. The mandate issued on August 28, 2009 (No. 60728-6-I). Id. On October 21, 2011, the trial court

resentenced Durrett on a single count of Failure to Register as a Sex Offender.[1] Appendix A.

Durrett again appealed, arguing that the trial court had failed to enter a fixed term of community custody. The State conceded that the term of community custody was improper under State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012). This Court accepted the State's concession, and remanded "solely for entry of a community custody period consistent with RCW 9.94A.701(9)." Appendix I (No. 67927-9-I). The mandate issued on October 19, 2012. Id.

Consistent with this Court's directive, the trial court on December 11, 2012, entered an "Order Amending Judgment and Sentence as to Term of Community Custody Only." Appendix J. This order specified a community custody term of 17 months.[2] Id.

Durrett has also filed at least one previous collateral attack on this judgment and sentence. The Certificate of Finality in that matter issued on December 9, 2009 (No. 62300-1-I). Appendix K.

---

[1] The two years that elapsed between the mandate and resentencing was due to Durrett's failure to appeal for a scheduled resentencing, resulting in a bench warrant being issued for his arrest. Appendix H.

[2] The statutory maximum for Durrett's crime was 60 months; the trial court imposed a term of confinement of 43 months, leaving 17 months available for community custody. Appendix A.

The current personal restraint petition originated as a CrR 7.5 motion for a new trial.[3] This motion was filed in the trial court on November 9, 2011. The trial court transferred the motion to this Court, pursuant to CrR 7.8(c)(2), for consideration as a personal restraint petition.

D. ARGUMENT

An appellate court will grant substantive review of a personal restraint petition only when the petitioner makes a threshold showing of constitutional error from which he has suffered actual prejudice, or nonconstitutional error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice. In re Personal Restraint of Cook, 114 Wn. 2d 802, 813, 792 P.2d 506 (1990). In a personal restraint petition, the petitioner bears the burden of showing prejudicial error. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), review denied, 110 Wn.2d 1002 (1988).

1. THIS PERSONAL RESTRAINT PETITION SHOULD BE DISMISSED BECAUSE DURRETT HAS FAILED TO SHOW THE REQUISITE PREJUDICE.

In this collateral attack, Durrett argues that the addition of a second count at his second trial, which count was ultimately vacated under double jeopardy principles, violated his right to a fair

[3] CrR 7.5(b) requires that such a motion be filed within 10 days after the verdict. The verdict at Durrett's second trial was entered on September 12, 2007. Appendix E. The motion for new trial was not filed until November 9, 2011.

trial. This claim must fail, because Durrett cannot meet his burden to show that the addition of the second count was a fundamental defect that resulted in a complete miscarriage of justice.[4]

Durrett seems to base his claim of prejudice on the simple fact that, at his first trial, where he was charged with a single count of Failure to Register as a Sex Offender, the jury was unable to reach a verdict and a mistrial was declared; at his second trial, where he was charged with two counts of the same crime, the jury found him guilty as charged. He relies on a comment in State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009):

> Severance of charges is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt for another crime or to infer a general criminal disposition. The joinder of charges can be particularly prejudicial when the alleged crimes are sexual in nature. In this context there is a recognized danger of prejudice to the defendant even if the jury is properly instructed to consider the crimes separately.

165 Wn.2d at 883-84 (internal citations omitted).[5]

Durrett's reliance on this comment is misplaced. While Failure to Register as a Sex Offender was formerly classified as a

[4] While the underlying claim was based on double jeopardy (a constitutional violation), that error was remedied when the trial court on remand vacated the second count of Failure to Register as a Sex Offender. Durrett's claim that he was prejudiced from having to face two counts of this charge at his second trial is a claim of improper admission of evidence, based on either severance concerns (CrR 4.4), as he argues in his Motion for New Trial, or ER 404(b). Neither of these is a constitutional claim.

[5] Durrett misquotes this passage in his Motion for New Trial, substituting the term "sex offenses" for "this context" in the final quoted sentence. See Motion for New Trial at 6.

"sex offense," this Court has concluded that it is *not* a "sexual offense": "'[A] sexual offense' is an offense involving sexual gratification. Failing to comply with a registration statute does not implicate sexual gratification." State v. Nelson, 130 Wn. App. 467, 131 Wn. App. 175, 179-80, 123 P.3d 526 (2005); Former RCW 9.94.030(42)(a)(i); Former RCW 9A.44.130(11).[6]

The Sutherby court's caution as to crimes that are "sexual in nature" simply does not apply here. While courts may rightly be concerned that, when jurors hear that a defendant has committed other sexual offenses, they may have difficulty separating the prejudice this may arouse from their consideration of the current crime, no similar prejudice is likely to arise when the charged offense is merely a failure to report as required.

Moreover, Count I, which was before the jury in both the first and second trials, already alleged a significant time period of non-reporting (December 6, 2006 through January 23, 2007 – a total of almost seven weeks). The addition of Count II, alleging failure to report from November 6 through November 17, 2006 (a period of less than two weeks), was unlikely to have added much to the jury's consideration of Durrett's guilt.

The major difference between the two trials was that Durrett testified at the first trial and raised a defense of mistake, while he

---

[6] Failure to Register as a Sex Offender is no longer classified as a sex offense. RCW 9.94A.030(46)(a)(i); RCW 9A.44.132.

did not testify at the second trial. Appendix S; Motion for New Trial, at 2. At the first trial, Durrett told the jury that someone at the reporting desk in the King County Courthouse had told him that the law had changed, such that his previous weekly reporting requirement was now a requirement to report every 90 days. Appendix L. Durrett's attorney focused his closing argument in the first trial on this defense:

> Ladies and gentlemen, what bureaucracy ever admits its mistake. What bureaucracy ever admits its guilt. And who in our society is more likely to circle the wagons, everybody in lock step, than a bureaucracy. And when people rely on that information, mistakes get made. And you need to look no further than the news or the newspaper.

Appendix M. Durrett's testimony, buttressed by his attorney's argument, caused at least one juror to harbor a reasonable doubt that Durrett had "knowingly" failed to comply with his reporting requirements.[7]

At his second trial, the prosecutor informed the trial court that, if Durrett again chose to raise a claim of "mistake," the State planned to offer Durrett's prior convictions for Failure to Register as a Sex Offender under ER 404(b) to rebut this claim.[8] Appendix N. See ER 404(b) ("Evidence of other crimes, wrongs, or acts . . .

---

[7] Failure to Register as a Sex Offender requires "knowingly" failing to comply with the reporting requirements. See Appendix B, D.

[8] Durrett had prior convictions for Failure to Register as a Sex Offender, from 2005 and 2006. Appendix A.

may, however, be admissible for other purposes, such as proof of . . . absence of mistake or accident."). This possibility alone likely dissuaded Durrett from taking the stand and repeating this defense.

Without the defense of mistake available to him, Durrett relied on a weaker defense – that failure to sign the log did not prove failure to report. As his attorney argued in closing:

> The State hasn't come close to proving that Donnie Durrett is guilty of these two charges. Specifically, they have to prove that during a period of time, roughly from November and December of 2006, that Donnie, having an obligation to register and having an obligation to report, failed to comply with the law. Specifically, that he didn't report in person to the King County Sheriff's Office. And what evidence have they produced?
>
> They've produced logs. And to put it frankly, they've produced a document that Donnie didn't need to sign, and on some days he signed that document and on other days he didn't sign that document. But it's not a requirement under the law that he sign that document. And they're using that as evidence that he didn't report. That's not evidence that he didn't report.

Appendix O.

Further hampering Durrett at his second trial was the admission of statements that he had made at the first trial, at which he freely admitting that he had failed to register (based on allegedly incorrect information). A witness called by the State at the second trial read from the transcript of the first:

> Q: What was the question that was asked?
> A: "The week after November 29th did you register?"
> Q: And what was Mr. Durrett's response?
> A: "No, sir, I did not."

Q: And was he asked another question about that same topic at that hearing?
A: Yes, he was.
Q: And what was that question?
A: "And all during the month of December, 2006, did you register like you had been?"
And the answer is, "No, sir, I did not."

Appendix P.

Durrett also claims that the prosecutor "exacerbated the prejudice inherent in Mr. Durrett's multiple count trial" by improperly relying on uncharged misconduct in his closing argument at Durrett's second trial. Motion for New Trial at 6. In making this claim, Durrett omits the context of the prosecutor's argument:

> Now, the final thing that I wanted to discuss with you – I know you don't have a copy of the jury instructions in front of you, but instruction number 8, that's kind of a little confusing one. If you want to take a note to look at it carefully, it says that the State alleges that the defendant committed acts of failing to register as a sex offender on multiple occasions. To convict the defendant of failure to register, one particular act of failing to register as a sex offender must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved beyond a reasonable doubt. But it also says you need not unanimously agree the defendant committed all of the acts of failing to register as a sex offender. So what does that mean? That sounds like a lot. It seems pretty confusing at first read. Let me just clarify that for you so nobody gets confused back in the jury room.
>
> There's two counts in this case, and the only difference between the two is the charging period. You need to decide each of those counts, first of all, separately. And your verdict on one – let's say you find him guilty in count one. That doesn't mean you have to find him guilty on count two, or vice versa. Okay. You decide each count independently.

> But what this instruction I just read you to [sic] relates to is this: Remember when we went through the calendars. And let's just take the month of January, for example. You can see that the charging period encompasses four separate weeks plus of all of [sic] December. So really, what you have is probably – you've got eight weeks in which he didn't report. And technically speaking, each week that you don't come in is a separate offense of failing to register. That's a violation. So even though you've got eight different times he didn't come in and each one could be its own charge, it's all sort of lumped into one charge. So what this instruction tells you is that you all have to agree that on at least one of these weeks he in fact did not report; didn't show up at the sheriff's office.
>
> So you may agree that he didn't come in on all of these occasions. Again I'll put this – again, because you have, for example, these eight weeks. So you may say, "Well, you know what? We all think that he didn't show up during any of that time." That would be sufficient. Or maybe some of them, not others. But as long as you all agree that at least on one of those weeks he wasn't there, didn't register, you can find him guilty of the offense. Okay?
>
> And for the second count, the November count, same thing. There are two weeks in which he didn't come in, but this is one charge. So as long as you all unanimously agree beyond a reasonable doubt that he didn't come in at least on one of these two weeks, the same week – so you all have to agree that he doesn't come in on the week of the 6th, or you all have to agree that he didn't come in on the week of the 13th, or both. But as long as you agree with one of them, that's what that instruction says.

Appendix Q.

It is clear from this section of the State's closing argument that the prosecutor was simply explaining the Petrich[9] instruction to

[9] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

the jury.[10] Appendix R (Instruction No. 8). The prosecutor referred to separate weeks of non-reporting because the "to convict" instruction required the jury to find that Durrett had failed to comply with the requirement that he report weekly. Id. (Instruction Nos. 4, 5).

In sum, Durrett has failed to show the requisite prejudice from being tried on two counts of Failure to Register as a Sex Offender at his second trial. This petition should be dismissed.

E. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to deny and dismiss this personal restraint petition.

DATED this 6th day of February, 2013.

Respectfully Submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

by Deborah A. Dwyer

DEBORAH A. DWYER, #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office ID #91002

W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
(206) 296-9650

[10] Even if the prosecutor crossed the line into misconduct with any of these statements (and the State does not concede that he did), any independent claim of prosecutorial misconduct would necessarily fail. There was no objection and, in light of the Petrich issue, it cannot be said that any misconduct was so flagrant and ill-intentioned that no instruction could have cured any resulting prejudice. See, e.g., State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008).

CAUSE NO'S. 07-1-01965-2-SEA
11-1-01666-4-SEA

Condition of Conduct for Persons Ordered by the King Co. Superior Court into Work-Release

ORDER REMANDING DEFENDANT TO THE Department of Adult DETENTION FROM WORK-RELEASE.

APPENDIX - D -

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,	**NO.**
	BA NO.
	CCN NO.
Plaintiff	
vs.	**Conditions of Conduct for Persons Ordered by the King County Superior Court into Work Education Release**
Defendant	**(WER)**
	(ORWR)

The following are court imposed conditions of conduct for participation in King County's Work/Education Release (WER) Program. Compliance with these conditions of conduct shall be monitored by the King County Department of Adult and Juvenile Detention (DAJD) as specified herein by the court. Your continued participation in WER is subject to strict compliance with the following:

1. **You shall commit no crimes.** DAJD shall monitor bookings into the King County Correctional Facility and the Regional Justice Center for violations of any local, state, federal law or court order. Any booking will result in your removal from WER and incarceration into secure detention.

2. **You shall not use controlled substances without a valid prescription and shall not consume alcohol beginning from the date of this order**. Any use of controlled substances, other than as prescribed by a physician, will be considered a violation. You will submit to urinalysis testing as ordered, including a baseline urinalysis to determine the levels of THC within 5 days of beginning participation in WER and if the THC level does not decrease in your next urinalysis test, this will be considered a violation. DAJD shall monitor compliance with this condition by random urinalysis and/or breathalyzer testing [ ]1 or [ ]2 times every 30 days. Violation of this condition or failure to submit to testing on demand will result in removal from WER and incarceration into secure detention.

3. **You shall attend all court ordered therapy and treatment. You must provide a Release of Information to DAJD to verify your compliance.** DAJD shall contact the therapy and treatment providers [ ]1 or [ ]2 times every 30 days to verify compliance beginning 14 days from the date of this order. Non-compliance will result in removal from WER and incarceration into secure detention.

4. **You shall attend work or school. You must provide DAJD with a time sheet to be completed upon arrival and departure by a representative at your work or school. You must present this time sheet to DAJD staff upon return to the WER facility.** Also, DAJD shall monitor compliance with this condition by contacting the employer or school [ ]1 or [ ]2 times every 30 days. Non-compliance will result in removal of WER and incarceration into secure detention.

5. **You must obtain pre-approval to work overtime and you must be on time when you report back to the facility.** Three written warnings in a 30-day period for being less than sixty (60) minutes late will result in your removal from WER and incarceration into secure detention. One incident of being sixty (60) minutes late or more will result in your removal from WER and incarceration into secure detention.

6. **You must arrange for the employer to directly mail your wages to the WER facility**. Employer managed direct deposit may be exempt from mailing provided it is authorized by DAJD staff. Failure to abide by this condition will result in removal from WER and incarceration into secure detention.

7. **You shall not forge a document or provide false information to DAJD staff.** Such activity if actually known to DAJD will result in removal from WER and incarceration into secure detention.

DONE IN OPEN COURT this _____ day of _____, 20_____.

_____
JUDGE

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	
vs.	)	No.
Defendant,	)	ORDER REMANDING DEFENDANT TO THE DEPARTMENT OF ADULT DETENTION (JAIL)

THIS MATTER having come on before the undersigned judge of the above-entitled court upon the motion of the State of Washington, plaintiff, for the above-entitled order and the Court having either revoked or amended the defendant's conditions of release in the above-entitled cause, and the court being fully advises in the premises; now, therefore,

IT IS HEREBY ORDERED that the defendant be remanded immediately to the custody of the King County Department of Adult Detention (King County Jail), and

IT IS FURTHER ORDERED that:

(X) the defendant is not to be released pending further order of the court; *4

( ) the defendant's bail on this cause is reset at $_____, cash or surety, in addition to any prior non-monetary conditions which remain in effect; _____

_____

DONE IN OPEN COURT this 9th day of December, 200-.

_____
JUDGE

Presented by:

_____
Deputy Prosecuting Attorney

Approved for entry:

_____
Attorney for Defendant

Distribution:
White – Clerk's Office
Yellow – Jail
Pink – Prosecuting Attorney
Goldenrod - Defendant

* Defendant was sentenced to 60 months with DOC.

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

Cause No. 07-1-01965-7-SEA
COA. 6 7927-9-I
STATE'S RESPONSE
TO MOTION TO RECALL
MANDATE

APPENDIX - E

COPY

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent, vs. DONNIE DURRETT, Appellant.	)	No. 67927-9-I STATE'S RESPONSE TO MOTION TO RECALL MANDATE

1. IDENTITY OF RESPONDING PARTY

Respondent, the STATE OF WASHINGTON, responds as set out below.

2. STATEMENT OF RELIEF SOUGHT

The State asks this Court to deny Durrett's motion to recall the mandate in this case.

3. RELEVANT FACTS

Defendant Donnie Durrett stands convicted under this cause number of a single count of Failure to Register as a Sex Offender. Appendix A. On appeal, the State conceded that Durrett's term of

community custody was improperly imposed under State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012). This Court accepted the State's concession, and remanded "solely for entry of a community custody period consistent with RCW 9.94A.701(9)." Appendix B. In response, the trial court entered an "Order Amending Judgment and Sentence as to Term of Community Custody Only." Appendix C. Durrett has filed a notice of appeal of that order. Appendix D.[1] He has also filed a motion to recall the mandate.

4. ARGUMENT

RAP 12.9 governs recall of an appellate court's mandate:

> The appellate court may recall a mandate issued by it to determine if the trial court has complied with an earlier decision of the appellate court given in the same case. The question of compliance by the trial court may be raised by motion to recall the mandate, *or* by initiating a separate review of the lower court decision entered after issuance of the mandate.

RAP 12.9(a) (italics added).

---

[1] The order amending the judgment and sentence was signed on December 6, 2012, and filed on December 11, 2012. Appendix C. Durrett's notice of appeal was filed on February 4, 2013, more than 30 days later, and is thus presumptively untimely. Appendix D; RAP 5.2(a). However, Durrett signed the notice of appeal on December 8, 2012, and attached the notice to a motion for a finding of indigency, filed in the trial court on January 2, 2013. Appendix D, E. The State would thus be unable to show a knowing, voluntary and intelligent waiver of the right to appeal. See State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978).

This Court mandated this case to the King County Superior Court for "further proceedings in accordance with the attached true copy of the decision." Appendix B. As noted above, this Court in its decision remanded "solely for entry of a community custody period consistent with RCW 9.94A.701(9)." Id. The trial court followed this mandate.[2] Appendix C.

Durrett raises a number of substantive grounds for relief in his motion. He contends that he had a right to be present at his "sentencing/re-sentencing hearing," that he had a right to an attorney at such hearing, and that the amount of community custody to impose was within the trial court's discretion. These issues are appropriately raised in the appeal that he has filed, rather than in a motion to recall the mandate. The rule does not provide that he may proceed via *both* a motion to recall the mandate *and* a notice of appeal, but by *one or the other*. RAP 12.9(a).

---

[2] Durrett relies on a clerical directive on the face of the mandate, advising the superior court to "place this matter on the next available motion calendar." Appendix B. This clerical advice is not part of the mandate, as it is not part of the Court's opinion as expressed in "the attached true copy of the decision." Id. And in any event, this clerical advice says nothing about who must be present when the superior court enters the correct term of community custody in accordance with the mandate, or what term of community custody the court must impose.

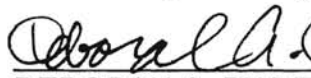
The State accordingly asks this Court to deny the motion to recall the mandate, and allow Durrett's claims to be resolved in his appeal of the order amending his judgment and sentence.

5. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to deny Durrett's motion to recall this Court's mandate in this case, and resolve Durrett's claims in his direct appeal.

Submitted this 7th day of February 2013.

DANIEL T. SATTERBERG
Prosecuting Attorney



DEBORAH A. DWYER, WSBA #18887
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

Appellate Unit
W554 King County Courthouse
Seattle, WA 98104
Telephone: 206-296-9650

Cause No. 07-1-01965-7-SEA
COA No. 69924-5-I

FILED
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STATE OF WASHINGTON
2014 MAR 18 PM 1:27

CERTIFICATE OF SERVICE:

I, Dommie W. Durrett, the Appellant hereby Certify that I served a Copy of; MOTION FOR LEAVE TO FILE STATEMENT OF ADDITIONAL GROUNDS, STATEMENT OF ADDITIONAL GROUNDS, DECLARATION IN SUPPORT, WITH A-E APPENDIX:

UPON:

Ms. Maureen Cyr - Attorney
Washington Appellate project
1511 3rd Ave Ste 701
Seattle, WA

MR. Richard D. Johnson - Clerk/Admin.
Court of Appeals - Division One
One Union Square - 600 Univ. St.
Seattle, WASH. 98101

By depositing at The Officer's Station in N-Unit at Airway Heights Correction Center. Postage prepaid first Class, for Placement in U.S. Postal Service to be Mailed out. I Certify under the penalty of perjury under the laws of Washington State That the foregoing is true and Correct.

Dated this 12th day of March 2014

Dommie W. Durrett DOC# 241083
Airway Heights Corr. Center
Post Office Box 2049
Airway Heights, WA 99001