

## **SWIFT AND CERTAIN COUNT**

### **TABLE OF CONTENTS**

- Swift and Certain Count 1-pager from Department of Corrections.....pages 1-2
- Washington State Criminal Sentencing Task Force Example Legislation: Swift and Certain.....pages 3-10
- (2019) Senate Bill 5848.....pages 11-26
- (2019) Senate Bill 5848 Bill Report.....pages 27-32
- Suggested amendment provided by Roger Rogoff.....pages 33-40
- State vs. Cornwell.....pages 41-49

Keep People Safe & Improve Lives  
**Swift and Certain (SAC) Count &  
Underlying 21 Designation**



The Department of Corrections (DOC) is seeking statutory changes to improve the process for sanctioning individuals who commit violations of conditions of community custody. This request will result in sanctions for violation behavior being guided by the behavior and the individual’s risk need and responsivity factors rather than a rigid violation count.

## Issue

**SAC Count** – Under current law, an individual’s first low-level violation while on community custody can result in the imposition of a non-confinement sanction, and subsequent low-level violations may be sanctioned to no more than three days confinement. Statute requires that after an individual commits five low-level violations, each subsequent low-level violation must be considered a high-level violation addressed through a DOC hearing and subject to a sanction of up to 30 days in jail. These counting rules apply regardless of the seriousness of the violation, the impact jail confinement will have on the individual’s stability in the community, and the likelihood that the sanction will prevent future violation behavior.

**Underlying 21** – Current law includes additional requirements for addressing violations that constitute new crimes by individuals on supervision for one of 21 underlying offenses (“Underlying 21”) listed in statute. These requirements increase complexity for staff and require sanctions that are not based on the violation behavior.

## Proposed Changes

This proposal aligns with the principles of Swift and Certain (SAC) and risk-need-responsivity by allowing sanctions for low-level violations to be guided by the violation behavior and the individual’s unique risk, needs, and responsivity factors rather than a rigid SAC count requirement.

- Removes language regarding responses to violation behavior that differentiates sanctions based solely on the number of low-level violations, creating a system that is fair and just given the personal liberty impacts.
  - DOC will continue to define low level and high level violations in policy, as well as factors that may mitigate or aggravate a specified response. Violation level will be based on risk and the seriousness of the behavior. Clear definitions promote consistent responses to violations.
  - DOC will outline in policy a range of allowable sanctions, which will include both confinement and non-confinement options consistent with RCW 9.94A.633.
  - Community Corrections Officers will continue to impose sanctions for low level violations. High level violations will continue to be addressed through a DOC hearing/review, with sanctions imposed by the presiding Hearing Officer.
- Removes language associated the Underlying 21 requirements.
  - DOC will address violation behavior for this population consistent with the process for other

## Advantages to Proposed Changes

**SAC Count** – Removing the SAC count shifts the focus to the individual’s risk and violation behavior. Sanctions would be more effective at influencing positive behavior change when guided by the violation behavior and the individual’s unique risk, needs, and responsivity factors.

Allowing sanctions to be selected from a range of options will give staff the ability to identify the most appropriate response to:

- Target identified risk or need areas
- Limit disruption to prosocial activities/influences (e.g., employment, programming, treatment)
- Address criminogenic need through a meaningful and impactful sanction
- Choose sanctions commensurate with the behavior

### Fact:

Research indicates that the *certainty* of a sanction and the *swiftness* with which it is applied have greater influence to change behavior than the severity of a sanction.

**Underlying 21** – Removing the Underlying 21 designation allows consistent treatment of violations for all individuals. It eliminates the complexity associated with ensuring a unique response to a small portion of violations committed by a small subgroup of individuals. It also resolves the inconsistencies within statute that govern violation response for these individuals.

**Underlying Felony Offenses** – (does not include Interstate Compact, Insanity Acquittal, or Less Restrictive Alternative)

- Assault 1 (RCW 9A.36.011)
- Assault of a child 1 or 2 (RCW 9A.36.120 and RCW 9A.36.130)
- Burglary 1 (RCW 9A.44.083)
- Child Molestation 1 (RCW 9A.44.083)
- Commercial sexual abuse of a minor (RCW 9.68A.100), or Promoting Commercial Sexual Abuse of a Minor (RCW 9.68A.101)
- Dealing in depictions of a minor engaged in sexually explicit conduct (RCW 9.68A.050)
- Homicide by abuse (RCW 9A.32.055)
- Indecent liberties by forcible compulsion (RCW 9A.44.100 (1)(a))
- Indecent liberties with a person incapable of consent (RCW 9A.44.100 (1)(b))
- Kidnapping 1 (RCW 9A.40.020)
- Murder 1 or 2 (RCW 9A.32.030 and RCW 9A.32.050)
- Rape 1 or 2 (RCW 9A.44.040 and RCW 9A.44.050)
- Rape of a child 1 or 2 (RCW 9A.44.073 and RCW 9A.44.076)
- Robbery 1 (RCW 9A.56.200)
- Sexual exploitation of a minor (RCW 9.68A.040)
- Vehicular homicide while under the influence of intoxicating liquor or any drug (RCW 46.61.520 (1)(a))

Washington State Criminal Sentencing Task Force  
Example Legislation: Swift and Certain  
October 31, 2019

1 AN ACT Relating to community custody;

2

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4

5 **Sec. 1.** RCW 9.94A.737 and 2012 1st sp.s. c 6 s 7 are each  
6 amended to read as follows:

7 (1) If an offender is accused of violating any condition or  
8 requirement of community custody, the department shall address the  
9 violation behavior. The department may hold offender disciplinary  
10 proceedings not subject to chapter 34.05 RCW. The department shall  
11 notify the offender in writing of the violation process.

12 (2)(a) The offender's violation behavior shall determine the  
13 sanction the department imposes. The department shall adopt rules  
14 creating a structured violation process that includes presumptive  
15 sanctions, aggravating and mitigating factors, and definitions for  
16 low level violations and high level violations.

17 (b) ~~((After an offender has committed and been sanctioned for~~  
18 ~~five low level violations, all subsequent violations committed by~~

19

1 ~~that offender shall automatically be considered high level~~  
2 ~~violations.~~

3 ~~(e))~~(i) The department must define aggravating factors that  
4 indicate the offender may present a current and ongoing foreseeable  
5 risk and which therefore(~~7~~) elevate an offender's behavior to a  
6 high level violation process.

7 (ii) The state and its officers, agents, and employees may not  
8 be held criminally or civilly liable for a decision to elevate or  
9 not to elevate an offender's behavior to a high level violation  
10 process under this subsection unless the state or its officers,  
11 agents, and employees acted with reckless disregard.

12 (3) The department may intervene when an offender commits a low  
13 level violation (~~as follows:~~

14 ~~(a) For a first low level violation, the department may~~  
15 ~~sanction))~~ by sanctioning the offender to one or more nonconfinement  
16 sanctions(~~7~~

17 ~~(b) For a second or subsequent low level violation, the~~  
18 ~~department may sanction the offender))~~ or to not more than three  
19 days in total confinement.

20 ~~((i))~~ (a) The department shall develop rules to ensure that  
21 each offender subject to a short-term confinement sanction is  
22 provided the opportunity to respond to the alleged violation prior  
23 to imposition of total confinement.

24 ~~((ii))~~ (b) The offender may appeal the short-term confinement  
25 sanction to a panel of three reviewing officers designated by the  
26 secretary or by the secretary's designee. The offender's appeal must  
27 be in writing and hand-delivered to department staff, or postmarked,  
28 within seven days after the sanction is imposed.

29 (4) If an offender is accused of committing a high level  
30 violation, the department may sanction the offender to not more than  
31 thirty days in total confinement per hearing.

32 (a) The offender is entitled to a hearing prior to the  
33 imposition of sanctions; and

34

1 (b) The offender may be held in total confinement pending a  
2 sanction hearing. Prehearing time served must be credited to the  
3 offender's sanction time.

4 ~~(5) ((If the offender's underlying offense is one of the  
5 following felonies and the violation behavior constitutes a new  
6 misdemeanor, gross misdemeanor or felony, the offender shall be held  
7 in total confinement pending a sanction hearing, and until the  
8 sanction expires or until if a prosecuting attorney files new  
9 charges against the offender, whichever occurs first:~~

10 ~~(a) Assault in the first degree, as defined in RCW 9A.36.011;~~

11 ~~(b) Assault of a child in the first degree, as defined in RCW  
12 9A.36.120;~~

13 ~~(c) Assault of a child in the second degree, as defined in RCW  
14 9A.36.130;~~

15 ~~(d) Burglary in the first degree, as defined in RCW 9A.52.020;~~

16 ~~(e) Child molestation in the first degree, as defined in RCW  
17 9A.44.083;~~

18 ~~(f) Commercial sexual abuse of a minor, as defined in RCW  
19 9.68A.100;~~

20 ~~(g) Dealing in depictions of a minor engaged in sexually  
21 explicit conduct, as defined in RCW 9.68A.050;~~

22 ~~(h) Homicide by abuse, as defined in RCW 9A.32.055;~~

23 ~~(i) Indecent liberties with forcible compulsion, as defined in  
24 RCW 9A.44.100(1)(a);~~

25 ~~(j) Indecent liberties with a person capable of consent, as  
26 defined in RCW 9A.44.100(1)(b);~~

27 ~~(k) Kidnapping in the first degree, as defined in RCW 9A.40.020;~~

28 ~~(l) Murder in the first degree, as defined in RCW 9A.32.030;~~

29 ~~(m) Murder in the second degree, as defined in RCW 9A.32.050;~~

30 ~~(n) Promoting commercial sexual abuse of a minor, as defined in  
31 RCW 9.68A.101;~~

32 ~~(o) Rape in the first degree, as defined in RCW 9A.44.040;~~

33 ~~(p) Rape in the second degree, as defined in RCW 9A.44.050;~~

34

1 ~~(q) Rape of a child in the first degree, as defined in RCW~~  
2 ~~9A.44.073;~~

3 ~~(r) Rape of a child in the second degree, as defined in RCW~~  
4 ~~9A.44.076;~~

5 ~~(s) Robbery in the first degree, as defined in RCW 9A.56.200;~~

6 ~~(t) Sexual exploitation of a minor, as defined in RCW 9.68A.040;~~  
7 ~~or~~

8 ~~(u) Vehicular homicide while under the influence of intoxicating~~  
9 ~~liquor or any drug, as defined in RCW 46.61.520(1)(a).~~

10 ~~(6))~~ The department shall adopt rules creating hearing  
11 procedures for high level violations. The hearings are offender  
12 disciplinary proceedings and are not subject to chapter 34.05 RCW.  
13 The procedures shall include the following:

14 (a) The department shall provide the offender with written  
15 notice of the alleged violation and the evidence supporting it. The  
16 notice must include a statement of the rights specified in this  
17 subsection, and the offender's right to file a personal restraint  
18 petition under court rules after the final decision;

19 (b) Unless the offender waives the right to a hearing, the  
20 department shall hold a hearing, and shall record it electronically.  
21 For offenders not in total confinement, the department shall hold a  
22 hearing within fifteen business days, but not less than twenty-four  
23 hours, after written notice of the alleged violation. For offenders  
24 in total confinement, the department shall hold a hearing within  
25 five business days, but not less than twenty-four hours, after  
26 written notice of the alleged violation;

27 (c) The offender shall have the right to: (i) Be present at the  
28 hearing; (ii) have the assistance of a person qualified to assist  
29 the offender in the hearing, appointed by the hearing officer if the  
30 offender has a language or communications barrier; (iii) testify or  
31 remain silent; (iv) call witnesses and present documentary evidence;  
32 (v) question witnesses who appear and testify; and (vi) receive a  
33 written summary of the reasons for the hearing officer's decision;  
34 and

1 (d) The sanction shall take effect if affirmed by the hearing  
2 officer. The offender may appeal the sanction to a panel of three  
3 reviewing officers designated by the secretary or by the secretary's  
4 designee. The offender's appeal must be in writing and hand-  
5 delivered to department staff, or postmarked, within seven days  
6 after the sanction was imposed. The appeals panel shall affirm,  
7 reverse, modify, vacate, or remand based on its findings. If a  
8 majority of the panel finds that the sanction was not reasonably  
9 related to any of the following: (i) The crime of conviction; (ii)  
10 the violation committed; (iii) the offender's risk of reoffending;  
11 or (iv) the safety of the community, then the panel will reverse,  
12 vacate, remand, or modify the sanction.

13 ~~((+7))~~ (6) For purposes of this section, the hearings officer  
14 may not rely on unconfirmed or unconfirmable allegations to find  
15 that the offender violated a condition.

16 ~~((+8))~~ (7) Hearing officers shall report through a chain of  
17 command separate from that of community corrections officers.

18

19 **Sec. 2.** RCW 9.94A.631 and 2012 1st sp.s. c 6 s 1 are each  
20 amended to read as follows:

21 (1) If an offender violates any condition or requirement of a  
22 sentence, a community corrections officer may arrest or cause the  
23 arrest of the offender without a warrant, pending a determination by  
24 the court or by the department. If there is reasonable cause to  
25 believe that an offender has violated a condition or requirement of  
26 the sentence, a community corrections officer may require an  
27 offender to submit to a search and seizure of the offender's person,  
28 residence, automobile, or other personal property.

29 (2) For the safety and security of department staff, an offender  
30 may be required to submit to pat searches, or other limited security  
31 searches, by community corrections officers, correctional officers,  
32 and other agency approved staff, without reasonable cause, when in  
33 or on department premises, grounds, or facilities, or while  
34 preparing to enter department premises, grounds, facilities, or

1 vehicles. Pat searches of offenders shall be conducted only by staff  
2 who are the same gender as the offender, except in emergency  
3 situations.

4 (3) A community corrections officer may also arrest an offender  
5 for any crime committed in his or her presence. The facts and  
6 circumstances of the conduct of the offender shall be reported by  
7 the community corrections officer, with recommendations, to the  
8 court, local law enforcement, or local prosecution for consideration  
9 of new charges. The community corrections officer's report shall  
10 serve as the notice that the department will hold the offender for  
11 not more than three days from the time of such notice for the new  
12 crime(~~(, except if the offender's underlying offense is a felony~~  
13 ~~offense listed in RCW 9.94A.737(5), in which case the department~~  
14 ~~will hold the offender for thirty days from the time of arrest or~~  
15 ~~until a prosecuting attorney charges the offender with a crime,~~  
16 ~~whichever occurs first~~)). This does not affect the department's  
17 authority under RCW 9.94A.737.

18 If a community corrections officer arrests or causes the arrest  
19 of an offender under this section, the offender shall be confined  
20 and detained in the county jail of the county in which the offender  
21 was taken into custody, and the sheriff of that county shall receive  
22 and keep in the county jail, where room is available, all prisoners  
23 delivered to the jail by the community corrections officer, and such  
24 offenders shall not be released from custody on bail or personal  
25 recognizance, except upon approval of the court or authorized  
26 department staff, pursuant to a written order.

27

28 **Sec. 3.** RCW 9.94A.716 and 2012 1st sp.s. c 6 s 6 are each  
29 amended to read as follows:

30 (1) The secretary may issue warrants for the arrest of any  
31 offender who violates a condition of community custody. The arrest  
32 warrants shall authorize any law enforcement or peace officer or  
33 community corrections officer of this state or any other state where  
34 such offender may be located, to arrest the offender and place him

1 or her in total confinement pending disposition of the alleged  
2 violation pursuant to RCW 9.94A.633.

3 (2) A community corrections officer, if he or she has reasonable  
4 cause to believe an offender has violated a condition of community  
5 custody, may suspend the person's community custody status and  
6 arrest or cause the arrest and detention in total confinement of the  
7 offender, pending the determination of the secretary as to whether  
8 the violation has occurred. The community corrections officer shall  
9 report to the secretary all facts and circumstances and the reasons  
10 for the action of suspending community custody status.

11 (3) If an offender has been arrested by the department for a new  
12 felony offense while under community custody, the facts and  
13 circumstances of the conduct of the offender shall be reported by  
14 the community corrections officer to local law enforcement or local  
15 prosecution for consideration of new charges. The community  
16 corrections officer's report shall serve as notice that the  
17 department will hold the offender in total confinement for not more  
18 than three days from the time of such notice for the new crime(~~(~~  
19 ~~except if the offender's underlying offense is a felony offense~~  
20 ~~listed in RCW 9.94A.737(5), in which case the department will hold~~  
21 ~~the offender for thirty days from the time of arrest or until a~~  
22 ~~prosecuting attorney charges the offender with a crime, whichever~~  
23 ~~occurs first~~)). Nothing in this subsection shall be construed as to  
24 permit the department to hold an offender past his or her maximum  
25 term of total confinement if the offender has not completed the  
26 maximum term of total confinement or to permit the department to  
27 hold an offender past the offender's term of community custody.

28 (4) A violation of a condition of community custody shall be  
29 deemed a violation of the sentence for purposes of RCW 9.94A.631.  
30 The authority granted to community corrections officers under this  
31 section shall be in addition to that set forth in RCW 9.94A.631.

32  
33  
34

1        NEW SECTION.    **Sec. 4.**    The department of corrections has the  
2 authority to begin implementing this act upon the effective date of  
3 this section.

4

5        NEW SECTION.    **Sec. 5.**    This act applies retroactively and  
6 prospectively regardless of the date of an offender's underlying  
7 offense.

8

--- END ---

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**SUBSTITUTE SENATE BILL 5848**

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**State of Washington**

**66th Legislature**

**2019 Regular Session**

**By** Senate Human Services, Reentry & Rehabilitation (originally sponsored by Senators Darneille and Nguyen; by request of Department of Corrections)

READ FIRST TIME 02/21/19.

1 AN ACT Relating to individuals under the department of  
2 corrections' jurisdiction; amending RCW 9.94A.589, 9.94B.050,  
3 9.94A.729, 9.94A.737, 9.94A.631, and 9.94A.716; adding a new section  
4 to chapter 9.94A RCW; creating new sections; providing an effective  
5 date; providing an expiration date; and declaring an emergency.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 NEW SECTION. **Sec. 1.** A new section is added to chapter 9.94A  
8 RCW to read as follows:

9 (1) Any offender sentenced for a drug offense committed prior to  
10 July 1, 2004, and serving a term of incarceration for that drug  
11 offense on the effective date of this section, is entitled to a  
12 resentencing hearing. The prosecuting attorney for the county in  
13 which any offender was sentenced and to whom this section applies  
14 must review the sentencing documents. If the offender is serving a  
15 term of incarceration for a drug offense committed prior to July 1,  
16 2004, the prosecuting attorney shall, or the offender may, make a  
17 motion for relief from sentence to the original sentencing court.

18 (2) The sentencing court shall grant the motion if it finds that  
19 the offender is serving a sentence for a drug offense committed prior  
20 to July 1, 2004, and shall immediately set an expedited date for  
21 resentencing. At resentencing, the court shall sentence the offender

1 as if sections 7 through 11 and 14 through 23, chapter 290, Laws of  
2 2002 were effective at the time the original sentence was imposed.

3 (3) In no case may the resentencing under this order result in  
4 the offender serving a greater term of total confinement.

5 (4) This section expires July 1, 2021.

6 **Sec. 2.** RCW 9.94A.589 and 2015 2nd sp.s. c 3 s 13 are each  
7 amended to read as follows:

8 (1) (a) Except as provided in (b), (c), or (d) of this subsection,  
9 whenever a person is to be sentenced for two or more current  
10 offenses, the sentence range for each current offense shall be  
11 determined by using all other current and prior convictions as if  
12 they were prior convictions for the purpose of the offender score:  
13 PROVIDED, That if the court enters a finding that some or all of the  
14 current offenses encompass the same criminal conduct then those  
15 current offenses shall be counted as one crime. Sentences imposed  
16 under this subsection shall be served concurrently. Consecutive  
17 sentences may only be imposed under the exceptional sentence  
18 provisions of RCW 9.94A.535. "Same criminal conduct," as used in this  
19 subsection, means two or more crimes that require the same criminal  
20 intent, are committed at the same time and place, and involve the  
21 same victim. This definition applies in cases involving vehicular  
22 assault or vehicular homicide even if the victims occupied the same  
23 vehicle.

24 (b) Whenever a person is convicted of two or more serious violent  
25 offenses arising from separate and distinct criminal conduct, the  
26 standard sentence range for the offense with the highest seriousness  
27 level under RCW 9.94A.515 shall be determined using the offender's  
28 prior convictions and other current convictions that are not serious  
29 violent offenses in the offender score and the standard sentence  
30 range for other serious violent offenses shall be determined by using  
31 an offender score of zero. The standard sentence range for any  
32 offenses that are not serious violent offenses shall be determined  
33 according to (a) of this subsection. All sentences imposed under this  
34 subsection (1) (b) shall be served consecutively to each other and  
35 concurrently with sentences imposed under (a) of this subsection.  
36 However, unless the court expressly orders that the community custody  
37 terms run consecutively to each other, the terms of community custody  
38 shall run concurrently to each other even if the court orders the  
39 confinement terms to run consecutively to each other.

1 (c) If an offender is convicted under RCW 9.41.040 for unlawful  
2 possession of a firearm in the first or second degree and for the  
3 felony crimes of theft of a firearm or possession of a stolen  
4 firearm, or both, the standard sentence range for each of these  
5 current offenses shall be determined by using all other current and  
6 prior convictions, except other current convictions for the felony  
7 crimes listed in this subsection (1)(c), as if they were prior  
8 convictions. The offender shall serve consecutive sentences for each  
9 conviction of the felony crimes listed in this subsection (1)(c), and  
10 for each firearm unlawfully possessed.

11 (d) All sentences imposed under RCW 46.61.502(6), 46.61.504(6),  
12 or 46.61.5055(4) shall be served consecutively to any sentences  
13 imposed under RCW 46.20.740 and 46.20.750.

14 (2) (a) (~~Except as provided in (b) of this subsection,~~) Whenever  
15 a person while under sentence for conviction of a felony commits  
16 another felony and is sentenced to another term of confinement, the  
17 latter term of confinement shall not begin until expiration of all  
18 prior terms of confinement. However, any terms of community custody  
19 shall run concurrently to each other, unless the court pronouncing  
20 the current sentence expressly orders that they be served  
21 consecutively.

22 (b) Whenever a second or later felony conviction results in  
23 consecutive community (~~supervision~~) custody with conditions not  
24 currently in effect, under the prior sentence or sentences of  
25 community (~~supervision~~) custody the court may require that the  
26 conditions of community (~~supervision~~) custody contained in the  
27 second or later sentence begin during the immediate term of community  
28 (~~supervision~~) custody and continue throughout the duration of the  
29 consecutive term of community (~~supervision~~) custody.

30 (3) Subject to subsections (1) and (2) of this section, whenever  
31 a person is sentenced for a felony that was committed while the  
32 person was not under sentence for conviction of a felony, the  
33 sentence shall run concurrently with any felony sentence which has  
34 been imposed by any court in this or another state or by a federal  
35 court subsequent to the commission of the crime being sentenced  
36 unless the court pronouncing the current sentence expressly orders  
37 that (~~they~~) the confinement terms be served consecutively to each  
38 other. Unless the court expressly orders that the community custody  
39 terms run consecutively, such terms of community custody run

1 concurrently to each other even if the court orders the confinement  
2 terms to run consecutively to each other.

3 (4) Whenever any person granted probation under RCW 9.95.210 or  
4 9.92.060, or both, has the probationary sentence revoked and a prison  
5 sentence imposed, that sentence shall run consecutively to any  
6 sentence imposed pursuant to this chapter, unless the court  
7 pronouncing the subsequent sentence expressly orders that they be  
8 served concurrently.

9 (5) In the case of consecutive sentences, all periods of total  
10 confinement shall be served before any partial confinement, community  
11 restitution, community supervision, or any other requirement or  
12 conditions of any of the sentences. Except for exceptional sentences  
13 as authorized under RCW 9.94A.535, if two or more sentences that run  
14 consecutively include periods of community supervision, the aggregate  
15 of the community supervision period shall not exceed twenty-four  
16 months.

17 **Sec. 3.** RCW 9.94B.050 and 2003 c 379 s 4 are each amended to  
18 read as follows:

19 When a court sentences an offender to a term of total confinement  
20 in the custody of the department for any of the offenses specified in  
21 this section, the court shall also sentence the offender to a term of  
22 community placement as provided in this section. Except as provided  
23 in RCW 9.94A.501, the department shall supervise any sentence of  
24 community placement imposed under this section.

25 (1) The court shall order a one-year term of community placement  
26 for the following:

27 (a) A sex offense or a serious violent offense committed after  
28 July 1, 1988, but before July 1, 1990; or

29 (b) An offense committed on or after July 1, 1988, but before  
30 July 25, 1999, that is:

31 (i) Assault in the second degree;

32 (ii) Assault of a child in the second degree;

33 (iii) A crime against persons where it is determined in  
34 accordance with RCW (~~9.94A.602~~) 9.94A.825 that the offender or an  
35 accomplice was armed with a deadly weapon at the time of commission;  
36 or

37 (iv) A felony offense under chapter 69.50 or 69.52 RCW not  
38 sentenced under RCW 9.94A.660.

1 (2) The court shall sentence the offender to a term of community  
2 placement of two years or up to the period of earned release awarded  
3 pursuant to RCW 9.94A.728, whichever is longer, for:

4 (a) An offense categorized as a sex offense committed on or after  
5 July 1, 1990, but before June 6, 1996, including those sex offenses  
6 also included in other offense categories;

7 (b) A serious violent offense other than a sex offense committed  
8 on or after July 1, 1990, but before July 1, 2000; or

9 (c) A vehicular homicide or vehicular assault committed on or  
10 after July 1, 1990, but before July 1, 2000.

11 (3) The community placement ordered under this section shall  
12 begin either upon completion of the term of confinement or at such  
13 time as the offender is transferred to community custody in lieu of  
14 earned release. When the court sentences an offender to the statutory  
15 maximum sentence then the community placement portion of the sentence  
16 shall consist entirely of the community custody to which the offender  
17 may become eligible. Any period of community custody actually served  
18 shall be credited against the community placement portion of the  
19 sentence. The community placement shall run concurrently to any  
20 period of probation, parole, community supervision, community  
21 placement, or community custody previously imposed by any court in  
22 any jurisdiction, unless the court pronouncing the current sentence  
23 expressly orders that they be served consecutively to each other.

24 (4) Unless a condition is waived by the court, the terms of any  
25 community placement imposed under this section shall include the  
26 following conditions:

27 (a) The offender shall report to and be available for contact  
28 with the assigned community corrections officer as directed;

29 (b) The offender shall work at department-approved education,  
30 employment, or community restitution, or any combination thereof;

31 (c) The offender shall not possess or consume controlled  
32 substances except pursuant to lawfully issued prescriptions;

33 (d) The offender shall pay supervision fees as determined by the  
34 department; and

35 (e) The residence location and living arrangements shall be  
36 subject to the prior approval of the department during the period of  
37 community placement.

38 (5) As a part of any terms of community placement imposed under  
39 this section, the court may also order one or more of the following  
40 special conditions:

1 (a) The offender shall remain within, or outside of, a specified  
2 geographical boundary;

3 (b) The offender shall not have direct or indirect contact with  
4 the victim of the crime or a specified class of individuals;

5 (c) The offender shall participate in crime-related treatment or  
6 counseling services;

7 (d) The offender shall not consume alcohol; or

8 (e) The offender shall comply with any crime-related  
9 prohibitions.

10 (6) An offender convicted of a felony sex offense against a minor  
11 victim after June 6, 1996, shall comply with any terms and conditions  
12 of community placement imposed by the department relating to contact  
13 between the sex offender and a minor victim or a child of similar age  
14 or circumstance as a previous victim.

15 (7) Prior to or during community placement, upon recommendation  
16 of the department, the sentencing court may remove or modify any  
17 conditions of community placement so as not to be more restrictive.

18 **Sec. 4.** RCW 9.94A.729 and 2015 c 134 s 4 are each amended to  
19 read as follows:

20 (1)(a) The term of the sentence of an offender committed to a  
21 correctional facility operated by the department may be reduced by  
22 earned release time in accordance with procedures that shall be  
23 developed and adopted by the correctional agency having jurisdiction  
24 in which the offender is confined. The earned release time shall be  
25 for good behavior and good performance, as determined by the  
26 correctional agency having jurisdiction. The correctional agency  
27 shall not credit the offender with earned release credits in advance  
28 of the offender actually earning the credits.

29 (b) Any program established pursuant to this section shall allow  
30 an offender to earn early release credits for presentence  
31 incarceration. If an offender is transferred from a county jail to  
32 the department, the administrator of a county jail facility shall  
33 certify to the department the amount of time spent in custody at the  
34 facility and the number of days of early release credits lost or not  
35 earned. The department may approve a jail certification from a  
36 correctional agency that calculates early release time based on the  
37 actual amount of confinement time served by the offender before  
38 sentencing when an erroneous calculation of confinement time served  
39 by the offender before sentencing appears on the judgment and

1 sentence. The department must adjust an offender's rate of early  
2 release listed on the jail certification to be consistent with the  
3 rate applicable to offenders in the department's facilities. However,  
4 the department is not authorized to adjust the number of presentence  
5 early release days that the jail has certified as lost or not earned.

6 (2) An offender who has been convicted of a felony committed  
7 after July 23, 1995, that involves any applicable deadly weapon  
8 enhancements under RCW 9.94A.533 (3) or (4), or both, shall not  
9 receive any good time credits or earned release time for that portion  
10 of his or her sentence that results from any deadly weapon  
11 enhancements.

12 (3) An offender may earn early release time as follows:

13 (a) In the case of an offender sentenced pursuant to RCW  
14 10.95.030(3) or 10.95.035, the offender may not receive any earned  
15 early release time during the minimum term of confinement imposed by  
16 the court; for any remaining portion of the sentence served by the  
17 offender, the aggregate earned release time may not exceed ten  
18 percent of the sentence.

19 (b) In the case of an offender convicted of a serious violent  
20 offense, or a sex offense that is a class A felony, committed on or  
21 after July 1, 1990, and before July 1, 2003, the aggregate earned  
22 release time may not exceed fifteen percent of the sentence.

23 (c) In the case of an offender convicted of a serious violent  
24 offense, or a sex offense that is a class A felony, committed on or  
25 after July 1, 2003, the aggregate earned release time may not exceed  
26 ten percent of the sentence.

27 (d) An offender is qualified to earn up to fifty percent of  
28 aggregate earned release time if he or she:

29 (i) Is not classified as an offender who is at a high risk to  
30 reoffend as provided in subsection (4) of this section;

31 (ii) Is not confined pursuant to a sentence for:

32 (A) A sex offense;

33 (B) A violent offense;

34 (C) A crime against persons as defined in RCW 9.94A.411;

35 (D) A felony that is domestic violence as defined in RCW  
36 10.99.020;

37 (E) A violation of RCW 9A.52.025 (residential burglary);

38 (F) A violation of, or an attempt, solicitation, or conspiracy to  
39 violate, RCW 69.50.401 by manufacture or delivery or possession with  
40 intent to deliver methamphetamine; or

1 (G) A violation of, or an attempt, solicitation, or conspiracy to  
2 violate, RCW 69.50.406 (delivery of a controlled substance to a  
3 minor);

4 (iii) Has no prior conviction for the offenses listed in (d)(ii)  
5 of this subsection;

6 (iv) Participates in programming or activities as directed by the  
7 offender's individual reentry plan as provided under RCW 72.09.270 to  
8 the extent that such programming or activities are made available by  
9 the department; and

10 (v) Has not committed a new felony after July 22, 2007, while  
11 under community custody.

12 (e) In the case of an offender convicted on or after July 1,  
13 2019, the aggregate earned release time may not exceed fifty percent  
14 of the sentence when the conviction is for an offense that is not  
15 classified as a:

16 (i) Sex offense;

17 (ii) Violent offense; or

18 (iii) Crime against a person as defined in RCW 9.94A.411.

19 (f) In no other case shall the aggregate earned release time  
20 exceed one-third of the total sentence.

21 (4) The department shall perform a risk assessment of each  
22 offender who may qualify for earned early release under subsection  
23 (3)(d) of this section utilizing the risk assessment tool recommended  
24 by the Washington state institute for public policy. Subsection  
25 (3)(d) of this section does not apply to offenders convicted after  
26 July 1, 2010.

27 (5)(a) A person who is eligible for earned early release as  
28 provided in this section and who will be supervised by the department  
29 pursuant to RCW 9.94A.501 or 9.94A.5011, shall be transferred to  
30 community custody in lieu of earned release time;

31 (b) The department shall, as a part of its program for release to  
32 the community in lieu of earned release, require the offender to  
33 propose a release plan that includes an approved residence and living  
34 arrangement. All offenders with community custody terms eligible for  
35 release to community custody in lieu of earned release shall provide  
36 an approved residence and living arrangement prior to release to the  
37 community;

38 (c) The department may deny transfer to community custody in lieu  
39 of earned release time if the department determines an offender's  
40 release plan, including proposed residence location and living

1 arrangements, may violate the conditions of the sentence or  
2 conditions of supervision, place the offender at risk to violate the  
3 conditions of the sentence, place the offender at risk to reoffend,  
4 or present a risk to victim safety or community safety. The  
5 department's authority under this section is independent of any  
6 court-ordered condition of sentence or statutory provision regarding  
7 conditions for community custody;

8 (d) If the department is unable to approve the offender's release  
9 plan, the department may do one or more of the following:

10 (i) Transfer an offender to partial confinement in lieu of earned  
11 early release for a period not to exceed three months. The three  
12 months in partial confinement is in addition to that portion of the  
13 offender's term of confinement that may be served in partial  
14 confinement as provided in RCW 9.94A.728(~~(5)~~) (1)(e);

15 (ii) Provide rental vouchers to the offender for a period not to  
16 exceed three months if rental assistance will result in an approved  
17 release plan.

18 A voucher must be provided in conjunction with additional  
19 transition support programming or services that enable an offender to  
20 participate in services including, but not limited to, substance  
21 abuse treatment, mental health treatment, sex offender treatment,  
22 educational programming, or employment programming;

23 (e) The department shall maintain a list of housing providers  
24 that meets the requirements of RCW 72.09.285. If more than two  
25 voucher recipients will be residing per dwelling unit, as defined in  
26 RCW 59.18.030, rental vouchers for those recipients may only be paid  
27 to a housing provider on the department's list;

28 (f) For each offender who is the recipient of a rental voucher,  
29 the department shall gather data as recommended by the Washington  
30 state institute for public policy in order to best demonstrate  
31 whether rental vouchers are effective in reducing recidivism.

32 (6) An offender serving a term of confinement imposed under RCW  
33 9.94A.670(5)(a) is not eligible for earned release credits under this  
34 section.

35 **Sec. 5.** RCW 9.94A.737 and 2012 1st sp.s. c 6 s 7 are each  
36 amended to read as follows:

37 (1) If an offender is accused of violating any condition or  
38 requirement of community custody, the department shall address the  
39 violation behavior. The department may hold offender disciplinary

1 proceedings not subject to chapter 34.05 RCW. The department shall  
2 notify the offender in writing of the violation process.

3 (2) (a) The offender's violation behavior shall determine the  
4 sanction the department imposes. The department shall adopt rules  
5 creating a structured violation process that includes presumptive  
6 sanctions, aggravating and mitigating factors, and definitions for  
7 low level violations and high level violations.

8 ~~(b) ((After an offender has committed and been sanctioned for  
9 five low level violations, all subsequent violations committed by  
10 that offender shall automatically be considered high level  
11 violations.~~

12 ~~(c))~~ (i) The department must define aggravating factors that  
13 indicate the offender may present a current and ongoing foreseeable  
14 risk and which therefore ~~((r))~~ elevate an offender's behavior to a  
15 high level violation process.

16 (ii) The state and its officers, agents, and employees may not be  
17 held criminally or civilly liable for a decision to elevate or not to  
18 elevate an offender's behavior to a high level violation process  
19 under this subsection unless the state or its officers, agents, and  
20 employees acted with reckless disregard.

21 (3) The department may intervene when an offender commits a low  
22 level violation ~~((as follows:~~

23 ~~(a) For a first low level violation, the department may  
24 sanction))~~ by sanctioning the offender to one or more nonconfinement  
25 sanctions ~~((.~~

26 ~~(b) For a second or subsequent low level violation, the  
27 department may sanction the offender))~~ or to not more than three days  
28 in total confinement.

29 ~~((i))~~ (a) The department shall develop rules to ensure that  
30 each offender subject to a short-term confinement sanction is  
31 provided the opportunity to respond to the alleged violation prior to  
32 imposition of total confinement.

33 ~~((ii))~~ (b) The offender may appeal the short-term confinement  
34 sanction to a panel of three reviewing officers designated by the  
35 secretary or by the secretary's designee. The offender's appeal must  
36 be in writing and hand-delivered to department staff, or postmarked,  
37 within seven days after the sanction is imposed.

38 (4) If an offender is accused of committing a high level  
39 violation, the department may sanction the offender to not more than  
40 thirty days in total confinement per hearing.

1 (a) The offender is entitled to a hearing prior to the imposition  
2 of sanctions; and

3 (b) The offender may be held in total confinement pending a  
4 sanction hearing. Prehearing time served must be credited to the  
5 offender's sanction time.

6 (5) ~~((If the offender's underlying offense is one of the  
7 following felonies and the violation behavior constitutes a new  
8 misdemeanor, gross misdemeanor or felony, the offender shall be held  
9 in total confinement pending a sanction hearing, and until the  
10 sanction expires or until if a prosecuting attorney files new charges  
11 against the offender, whichever occurs first:~~

12 ~~(a) Assault in the first degree, as defined in RCW 9A.36.011;~~

13 ~~(b) Assault of a child in the first degree, as defined in RCW  
14 9A.36.120;~~

15 ~~(c) Assault of a child in the second degree, as defined in RCW  
16 9A.36.130;~~

17 ~~(d) Burglary in the first degree, as defined in RCW 9A.52.020;~~

18 ~~(e) Child molestation in the first degree, as defined in RCW  
19 9A.44.083;~~

20 ~~(f) Commercial sexual abuse of a minor, as defined in RCW  
21 9.68A.100;~~

22 ~~(g) Dealing in depictions of a minor engaged in sexually explicit  
23 conduct, as defined in RCW 9.68A.050;~~

24 ~~(h) Homicide by abuse, as defined in RCW 9A.32.055;~~

25 ~~(i) Indecent liberties with forcible compulsion, as defined in  
26 RCW 9A.44.100(1)(a);~~

27 ~~(j) Indecent liberties with a person capable of consent, as  
28 defined in RCW 9A.44.100(1)(b);~~

29 ~~(k) Kidnapping in the first degree, as defined in RCW 9A.40.020;~~

30 ~~(l) Murder in the first degree, as defined in RCW 9A.32.030;~~

31 ~~(m) Murder in the second degree, as defined in RCW 9A.32.050;~~

32 ~~(n) Promoting commercial sexual abuse of a minor, as defined in  
33 RCW 9.68A.101;~~

34 ~~(o) Rape in the first degree, as defined in RCW 9A.44.040;~~

35 ~~(p) Rape in the second degree, as defined in RCW 9A.44.050;~~

36 ~~(q) Rape of a child in the first degree, as defined in RCW  
37 9A.44.073;~~

38 ~~(r) Rape of a child in the second degree, as defined in RCW  
39 9A.44.076;~~

40 ~~(s) Robbery in the first degree, as defined in RCW 9A.56.200;~~

1       ~~(t) Sexual exploitation of a minor, as defined in RCW 9.68A.040;~~  
2       ~~or~~  
3       ~~(u) Vehicular homicide while under the influence of intoxicating~~  
4       ~~liquor or any drug, as defined in RCW 46.61.520(1)(a).~~

5       (6)) The department shall adopt rules creating hearing  
6 procedures for high level violations. The hearings are offender  
7 disciplinary proceedings and are not subject to chapter 34.05 RCW.  
8 The procedures shall include the following:

9       (a) The department shall provide the offender with written notice  
10 of the alleged violation and the evidence supporting it. The notice  
11 must include a statement of the rights specified in this subsection,  
12 and the offender's right to file a personal restraint petition under  
13 court rules after the final decision;

14       (b) Unless the offender waives the right to a hearing, the  
15 department shall hold a hearing, and shall record it electronically.  
16 For offenders not in total confinement, the department shall hold a  
17 hearing within fifteen business days, but not less than twenty-four  
18 hours, after written notice of the alleged violation. For offenders  
19 in total confinement, the department shall hold a hearing within five  
20 business days, but not less than twenty-four hours, after written  
21 notice of the alleged violation;

22       (c) The offender shall have the right to: (i) Be present at the  
23 hearing; (ii) have the assistance of a person qualified to assist the  
24 offender in the hearing, appointed by the hearing officer if the  
25 offender has a language or communications barrier; (iii) testify or  
26 remain silent; (iv) call witnesses and present documentary evidence;  
27 (v) question witnesses who appear and testify; and (vi) receive a  
28 written summary of the reasons for the hearing officer's decision;  
29 and

30       (d) The sanction shall take effect if affirmed by the hearing  
31 officer. The offender may appeal the sanction to a panel of three  
32 reviewing officers designated by the secretary or by the secretary's  
33 designee. The offender's appeal must be in writing and hand-delivered  
34 to department staff, or postmarked, within seven days after the  
35 sanction was imposed. The appeals panel shall affirm, reverse,  
36 modify, vacate, or remand based on its findings. If a majority of the  
37 panel finds that the sanction was not reasonably related to any of  
38 the following: (i) The crime of conviction; (ii) the violation  
39 committed; (iii) the offender's risk of reoffending; or (iv) the

1 safety of the community, then the panel will reverse, vacate, remand,  
2 or modify the sanction.

3 ~~((7))~~ (6) For purposes of this section, the hearings officer  
4 may not rely on unconfirmed or unconfirmable allegations to find that  
5 the offender violated a condition.

6 ~~((8))~~ (7) Hearing officers shall report through a chain of  
7 command separate from that of community corrections officers.

8 **Sec. 6.** RCW 9.94A.631 and 2012 1st sp.s. c 6 s 1 are each  
9 amended to read as follows:

10 (1) If an offender violates any condition or requirement of a  
11 sentence, a community corrections officer may arrest or cause the  
12 arrest of the offender without a warrant, pending a determination by  
13 the court or by the department. If there is reasonable cause to  
14 believe that an offender has violated a condition or requirement of  
15 the sentence, a community corrections officer may require an offender  
16 to submit to a search and seizure of the offender's person,  
17 residence, automobile, or other personal property.

18 (2) For the safety and security of department staff, an offender  
19 may be required to submit to pat searches, or other limited security  
20 searches, by community corrections officers, correctional officers,  
21 and other agency approved staff, without reasonable cause, when in or  
22 on department premises, grounds, or facilities, or while preparing to  
23 enter department premises, grounds, facilities, or vehicles. Pat  
24 searches of offenders shall be conducted only by staff who are the  
25 same gender as the offender, except in emergency situations.

26 (3) A community corrections officer may also arrest an offender  
27 for any crime committed in his or her presence. The facts and  
28 circumstances of the conduct of the offender shall be reported by the  
29 community corrections officer, with recommendations, to the court,  
30 local law enforcement, or local prosecution for consideration of new  
31 charges. The community corrections officer's report shall serve as  
32 the notice that the department will hold the offender for not more  
33 than three days from the time of such notice for the new crime(~~(7~~  
34 ~~except if the offender's underlying offense is a felony offense~~  
35 ~~listed in RCW 9.94A.737(5), in which case the department will hold~~  
36 ~~the offender for thirty days from the time of arrest or until a~~  
37 ~~prosecuting attorney charges the offender with a crime, whichever~~  
38 ~~occurs first)). This does not affect the department's authority under  
39 RCW 9.94A.737.~~

1 If a community corrections officer arrests or causes the arrest  
2 of an offender under this section, the offender shall be confined and  
3 detained in the county jail of the county in which the offender was  
4 taken into custody, and the sheriff of that county shall receive and  
5 keep in the county jail, where room is available, all prisoners  
6 delivered to the jail by the community corrections officer, and such  
7 offenders shall not be released from custody on bail or personal  
8 recognizance, except upon approval of the court or authorized  
9 department staff, pursuant to a written order.

10 **Sec. 7.** RCW 9.94A.716 and 2012 1st sp.s. c 6 s 6 are each  
11 amended to read as follows:

12 (1) The secretary may issue warrants for the arrest of any  
13 offender who violates a condition of community custody. The arrest  
14 warrants shall authorize any law enforcement or peace officer or  
15 community corrections officer of this state or any other state where  
16 such offender may be located, to arrest the offender and place him or  
17 her in total confinement pending disposition of the alleged violation  
18 pursuant to RCW 9.94A.633.

19 (2) A community corrections officer, if he or she has reasonable  
20 cause to believe an offender has violated a condition of community  
21 custody, may suspend the person's community custody status and arrest  
22 or cause the arrest and detention in total confinement of the  
23 offender, pending the determination of the secretary as to whether  
24 the violation has occurred. The community corrections officer shall  
25 report to the secretary all facts and circumstances and the reasons  
26 for the action of suspending community custody status.

27 (3) If an offender has been arrested by the department for a new  
28 felony offense while under community custody, the facts and  
29 circumstances of the conduct of the offender shall be reported by the  
30 community corrections officer to local law enforcement or local  
31 prosecution for consideration of new charges. The community  
32 corrections officer's report shall serve as notice that the  
33 department will hold the offender in total confinement for not more  
34 than three days from the time of such notice for the new crime(~~(7~~  
35 ~~except if the offender's underlying offense is a felony offense~~  
36 ~~listed in RCW 9.94A.737(5), in which case the department will hold~~  
37 ~~the offender for thirty days from the time of arrest or until a~~  
38 ~~prosecuting attorney charges the offender with a crime, whichever~~  
39 ~~occurs first)). Nothing in this subsection shall be construed as to~~

1 permit the department to hold an offender past his or her maximum  
2 term of total confinement if the offender has not completed the  
3 maximum term of total confinement or to permit the department to hold  
4 an offender past the offender's term of community custody.

5 (4) A violation of a condition of community custody shall be  
6 deemed a violation of the sentence for purposes of RCW 9.94A.631. The  
7 authority granted to community corrections officers under this  
8 section shall be in addition to that set forth in RCW 9.94A.631.

9 NEW SECTION. **Sec. 8.** The legislature declares that the  
10 department of corrections' recalculations of community custody terms  
11 pursuant to sections 2 and 3 of this act do not create any  
12 expectations that a particular community custody term will end before  
13 July 1, 2019, and offenders have no reason to conclude that the  
14 recalculation of their community custody terms before July 1, 2019,  
15 is an entitlement or creates any liberty interest in their community  
16 custody term ending before July 1, 2019. The department of  
17 corrections is authorized to take the time reasonably necessary to  
18 complete the recalculations of community custody terms after the  
19 effective date of this section.

20 NEW SECTION. **Sec. 9.** The department of corrections has the  
21 authority to begin implementing this act upon the effective date of  
22 this section.

23 NEW SECTION. **Sec. 10.** Sections 2, 3, 5, 6, and 7 of this act  
24 apply retroactively and prospectively regardless of the date of an  
25 offender's underlying offense.

26 NEW SECTION. **Sec. 11.** The legislature declares that the changes  
27 to the maximum percentages of earned release time in RCW 9.94A.729 do  
28 not create any expectation that the percentage of earned release time  
29 cannot be revised and offenders have no reason to conclude that the  
30 maximum percentage of earned release time is an entitlement or  
31 creates any liberty interest. The legislature retains full control  
32 over the right to revise the percentages of earned release time  
33 available to offenders at any time. This section applies to persons  
34 convicted on or after the effective date of this section.

1        NEW SECTION.    **Sec. 12.**    This act is necessary for the immediate  
2    preservation of the public peace, health, or safety, or support of  
3    the state government and its existing public institutions, and takes  
4    effect July 1, 2019.

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# SENATE BILL REPORT

## SB 5848

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As Reported by Senate Committee On:  
Human Services, Reentry & Rehabilitation, February 20, 2019  
Ways & Means, February 27, 2019

**Title:** An act relating to individuals under the department of corrections' jurisdiction.

**Brief Description:** Concerning individuals under the department of corrections' jurisdiction.

**Sponsors:** Senators Darneille and Nguyen; by request of Department of Corrections.

**Brief History:**

**Committee Activity:** Human Services, Reentry & Rehabilitation: 2/14/19, 2/20/19 [DPS-WM, w/oRec].  
Ways & Means: 2/27/19 [w/oRec, DNP, w/oRec].

**Brief Summary of First Substitute Bill**

- Requires multiple terms of community custody run concurrent, unless the courts expressly order terms be served consecutively, regardless of how the term of confinement is ordered.
- Allows sanctions for low-level violations to be non-confinement sanctions when appropriate, or not more than three days in custody.
- Removes requirements for 30 days of sanction time for underlying 21 designation cases.
- Changes the allowable amount of earned time on a sentence from a maximum of 33 percent to a maximum of 50 percent, if the offense was not classified as a violent, sex, or crime against a person offense.
- Adds an entitlement to a resentencing hearing for offenders who were sentenced for a drug offense committed prior to July 1, 2004, and are currently serving a term of incarceration for that drug offense.

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**SENATE COMMITTEE ON HUMAN SERVICES, REENTRY & REHABILITATION**

**Majority Report:** That Substitute Senate Bill No. 5848 be substituted therefor, and the substitute bill do pass and be referred to Committee on Ways & Means.

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

Signed by Senators Darneille, Chair; Nguyen, Vice Chair; Cleveland, Wilson, C. and Zeiger.

**Minority Report:** That it be referred without recommendation.

Signed by Senators Walsh, Ranking Member; O'Ban.

**Staff:** Keri Waterland (786-7490)

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## SENATE COMMITTEE ON WAYS & MEANS

**Majority Report:** That it be referred without recommendation.

Signed by Senators Rolfes, Chair; Frockt, Vice Chair, Operating, Capital Lead; Mullet, Capital Budget Cabinet; Billig, Carlyle, Conway, Darneille, Hasegawa, Hunt, Keiser, Lias, Palumbo, Pedersen, Rivers and Van De Wege.

**Minority Report:** Do not pass.

Signed by Senators Braun, Ranking Member; Brown, Assistant Ranking Member, Operating; Honeyford, Assistant Ranking Member, Capital; Bailey, Becker, Wagoner, Warnick and Wilson, L..

**Minority Report:** That it be referred without recommendation.

Signed by Senator Schoesler.

**Staff:** Travis Sugarman (786-7446)

**Background:** Concurrent and Consecutive Sentences. Under the Sentencing Reform Act (SRA), judges determine sentences for felony offenses by selecting a determinate sentence from a range provided in statute. Ranges are determined by reference to a sentencing grid, which is based on the defendant's offender score and the seriousness level classification of the offense. When an offender is convicted for multiple offenses in the same case, the court imposes separate sentences, including terms of confinement, for each offense. In this context, the SRA generally requires the sentences to run concurrently, which means the offender serves both sentences simultaneously, with the longest period of confinement impacting the potential release date. The presence of multiple offenses affects the offender score, which then lengthens the base sentences for both offenses. There are exceptions to the requirement for concurrent sentences in exceptional circumstances. For example, sentences must run consecutively if the offender committed two or more serious violent offenses arising from separate and distinct criminal conduct. In the case of consecutive sentences, all periods of total confinement must be served before any periods of partial confinement, including community custody. If two or more sentences running consecutively include periods of community custody, the aggregate of the community custody period shall not exceed 24 months.

Conviction for a New Offense While Still Serving a Sentence. If an offender commits a new offense while still serving their sentence for a previous felony, including during a period of community custody, the term of confinement for the new offense does not commence until the expiration of the sentence for the prior offense, unless a judge imposes an exceptional sentence based on mitigating circumstances.

Conviction of Multiple Offenses in Different Jurisdictions. When an offender receives multiple convictions from different jurisdictions for offenses committed while the offender was not serving a sentence, the sentences run concurrently, unless the court ordering the subsequent sentence expressly orders they run consecutively.

Community Custody. Community custody is the portion of an offender's sentence served in the community under the supervision of the Department of Corrections (DOC). Courts are mandated to order community custody for offenders convicted of certain crimes. While on community custody, offenders are subject to a variety of conditions imposed by the court and DOC. DOC must assess the offender's risk to reoffend and may establish and modify the offender's conditions of community custody based on the offender's risk to community safety and conditions imposed by the court. DOC may issue warrants for the arrest of any offender who violates a condition of community custody. If an offender violates the conditions, the offender may be required to serve up to the remaining portion of their sentence in confinement.

Earned Release Time. Some offenders are eligible for earned early release for good behavior and good performance. The amount of the sentence eligible for earned early release varies depending on the circumstances of the offender's underlying offense and date of conviction. Earned early release is limited to 10 percent for class A felony sex offenses and serious violent offenses, and 33 percent for other offenses. Many sentences are currently not eligible for earned early release, including portions of sentences for mandatory firearm or deadly weapon enhancements.

Swift and Certain. DOC implemented the swift and certain (SAC) policy in May of 2012. SAC was established to reduce confinement time for sanctions following a violation of supervision conditions. While maintaining a substantial focus on public safety, the Washington SAC program sought to reduce correctional costs associated with short-term confinement for violation sanctioning.

Underlying 21 Designation. If the offender's underlying offense is one of the following felonies—known as the underlying 21 designation or U21—and the violation behavior constitutes a new misdemeanor, gross misdemeanor, or felony, the offender shall be held in total confinement pending a sanction hearing, and until the sanction expires—for up to 30 days—or until a prosecuting attorney files new charges against the offender, whichever occurs first:

- assault in the first degree;
- assault of a child in the first degree;
- assault of a child in the second degree;
- burglary in the first degree;
- child molestation in the first degree;
- commercial sexual abuse of a minor;
- dealing in depictions of a minor engaged in sexually explicit conduct;
- homicide by abuse;
- indecent liberties with forcible compulsion;
- indecent liberties with a person capable of consent;
- kidnapping in the first degree;

- murder in the first degree;
- murder in the second degree;
- promoting commercial sexual abuse of a minor;
- rape in the first degree;
- rape in the second degree;
- rape of a child in the first degree;
- rape of a child in the second degree;
- robbery in the first degree;
- sexual exploitation of a minor; or
- vehicular homicide while under the influence of intoxicating liquor or any drug.

**Summary of Bill:** The terms of community custody shall run concurrently to each other unless the court expressly orders community custody run consecutively. An individual who is currently in confinement and is subsequently sentenced for another felony shall serve their confinement terms consecutively. The terms of community custody shall run concurrently to each other unless the court expressly orders community custody run consecutively. The terms of community placement shall run concurrently to any period of probation, parole, community supervision, community placement or community custody, unless the court expressly orders the community placement run consecutively.

Individuals convicted on or after July 1, 2019, may not exceed 50 percent aggregate earned release time of the sentence, when the conviction is for an offense that is not classified as a sex offense, violent offense, or crime against a person.

DOC may sanction an offender who commits a low level violation by giving them one or more nonconfinement sanctions, or not more than three days in total confinement.

DOC's recalculations of community custody terms do not create any expectations a particular community custody term will end before July 1, 2019, and offenders have no reason to conclude the recalculation of their community custody terms before the effective date of this act is an entitlement or creates any liberty interest in their community custody term ending before July 1, 2019. DOC is authorized to take the time reasonably necessary to complete the recalculations of community custody terms after the effective date of this section.

DOC must apply this act retroactively and prospectively, regardless of an offender's underlying offense date.

The changes to the maximum percentages of earned release time do not create any expectation the percentage of earned release time cannot be revised, and offenders have no reason to conclude the maximum percentage of earned release time is an entitlement or creates any liberty interest. The Legislature retains full control over the right to revise the percentages of earned release time available to offenders at any time.

Individuals who were sentenced for a drug offense committed prior to July 1, 2004, and are currently serving a term of incarceration for that drug offense are entitled to a resentencing hearing. In no case may the resentencing under result in the offender serving a greater term of total confinement. The prosecuting attorney for the county in which any offender was sentenced must review the sentencing documents and shall, make a motion for relief from

sentence to the original sentencing court. The offender may make a motion for relief from sentence to the original sentencing court as well. The sentencing court shall grant the motion if it finds that the offender is serving a sentence for a drug offense committed prior to July 1, 2004, and shall immediately set an expedited date for resentencing.

**EFFECT OF CHANGES MADE BY HUMAN SERVICES, REENTRY & REHABILITATION COMMITTEE (First Substitute):**

- Adds an entitlement to a resentencing hearing for offenders who were sentenced for a drug offense committed prior to July 1, 2004, and are currently serving a term of incarceration for that drug offense.
- Adds processes for offenders, attorneys, and the sentencing court specific to motions for resentencing.
- Adds language that in no case may the resentencing under this order result in the offender serving a greater term of total confinement.
- The additional section expires on July 1, 2021.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** The bill contains an emergency clause and takes effect on July 1, 2019.

**Staff Summary of Public Testimony on Original Bill (Human Services, Reentry & Rehabilitation):** *The committee recommended a different version of the bill than what was heard.* PRO: Assists DOC in addressing capacity issues, reduces complexity of multiple community supervision terms, and streamlines the violation process. DOC is currently at 103 percent and 109 percent capacity for male to female respectively, and we currently have 44 and 28 males and females sleeping on the floor respectively. This impacts safety and security. Changes are prospective only in this bill for the earned release time going to 50 percent. This will have a positive impact on capacity. Between 2003 and 2010 DOC had the authority to do 50 percent good time, and WSIPP concluded that this led to a return on investment of \$1.86 for every \$1.00 spent. There is unnecessary complexity for the staff, and this makes this streamlined. DOSA is an example of this complexity and streamlining; prior to a supervision term starting, DOC cannot sanction on if the person not serving the community custody sentence, so DOSA offenders cannot be sanctioned sometimes if they are not on supervisions because the sentence for community custody is consecutive. The initial period of transition is a high risk time and this is a better use of funds to focus on. Swift and certain changes in this bill improve the process of those who commit violations of community custody. Based on current law, counting rules apply regardless of the actual violation, and removing the count allows for sanctions to be tailored to the individual and be based on risk versus just confining someone. Research and presentations shows that the first 12 months of community supervision is the most critical and if support is given.

CON: We tend to see these bills when there is a budget deficit. The overcrowding is not unexpected. We do not see these changes as advantageous to public safety. The 50 percent

good time is a reduction to a felony sanction by half and we do not think this number is based on science, and do not support this. We are not aware of science where there is a definitive point where it is determined to not be cost effective to supervise. The legislative changes should be based on public safety, not on financial considerations. This legislation would result in the loss of approximately 70 FTE's, and the stated purpose of DOC could be achieved without this bill. This is not for public safety. If multiple terms will run concurrently, then what is the ability to deter criminal behavior if there is no consecutive community custody? This creates a staff safety concern. The bill is not evidence based and it undermines the principles of community custody.

**Persons Testifying (Human Services, Reentry & Rehabilitation):** PRO: Senator Jeannie Darneille, Prime Sponsor; Alex MacBain, Department of Corrections; Mac Pevey, Assistant Secretary Community Corrections Division, DOC; Keri-Anne Jetzer, Sentencing Guidelines Commission.

CON: Judy Kuschel, Washington Federation of State Employees; Paul Okerman, Washington Federation of State Employees; James McMahan, Washington Association Sheriffs and Police Chiefs; Russell Brown, Washington Association of Prosecuting Attorneys.

**Persons Signed In To Testify But Not Testifying (Human Services, Reentry & Rehabilitation):** No one.

1 AN ACT Relating to community custody;

2

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4

5 **Sec. 1.** RCW 9.94A.737 and 2012 1st sp.s. c 6 s 7 are each  
6 amended to read as follows:

7 (1) If an offender is accused of violating any condition or  
8 requirement of community custody, the department shall address the  
9 violation behavior. The department may hold offender disciplinary  
10 proceedings not subject to chapter 34.05 RCW. The department shall  
11 notify the offender in writing of the violation process.

12 (2)(a) The offender's violation behavior shall determine the  
13 sanction the department imposes. The department shall adopt rules  
14 creating a structured violation process that includes presumptive  
15 sanctions, aggravating and mitigating factors, and definitions for  
16 low level violations and high level violations.

17 (b) ~~((After an offender has committed and been sanctioned for~~  
18 ~~five low level violations, all subsequent violations committed by~~

19

1 ~~that offender shall automatically be considered high level~~  
2 ~~violations.~~

3 ~~(e))~~(i) The department must define aggravating factors that  
4 indicate the offender may present a current and ongoing foreseeable  
5 risk and which therefore(~~7~~) elevate an offender's behavior to a  
6 high level violation process.

7 (ii) The state and its officers, agents, and employees may not  
8 be held criminally or civilly liable for a decision to elevate or  
9 not to elevate an offender's behavior to a high level violation  
10 process under this subsection unless the state or its officers,  
11 agents, and employees acted with reckless disregard.

12 (3) The department may intervene when an offender commits a low  
13 level violation (~~as follows:~~

14 ~~(a) For a first low level violation, the department may~~  
15 ~~sanction))~~ by sanctioning the offender to one or more nonconfinement  
16 sanctions(~~7~~

17 ~~(b) For a second or subsequent low level violation, the~~  
18 ~~department may sanction the offender))~~ or to not more than three  
19 days in total confinement.

20 ~~((i))~~ (a) The department shall develop rules to ensure that  
21 each offender subject to a short-term confinement sanction is  
22 provided the opportunity to respond to the alleged violation prior  
23 to imposition of total confinement.

24 ~~((ii))~~ (b) The offender may appeal the short-term confinement  
25 sanction to a panel of three reviewing officers designated by the  
26 secretary or by the secretary's designee. The offender's appeal must  
27 be in writing and hand-delivered to department staff, or postmarked,  
28 within seven days after the sanction is imposed.

29 (4) If an offender is accused of committing a high level  
30 violation, the department may sanction the offender to not more than  
31 thirty days in total confinement per hearing.

32 (a) The offender is entitled to a hearing prior to the  
33 imposition of sanctions; and

34

1 (b) The offender may be held in total confinement pending a  
2 sanction hearing. Prehearing time served must be credited to the  
3 offender's sanction time.

4 ~~(5) ((If the offender's underlying offense is one of the  
5 following felonies and the violation behavior constitutes a new  
6 misdemeanor, gross misdemeanor or felony, the offender shall be held  
7 in total confinement pending a sanction hearing, and until the  
8 sanction expires or until if a prosecuting attorney files new  
9 charges against the offender, whichever occurs first:~~

10 ~~(a) Assault in the first degree, as defined in RCW 9A.36.011;~~

11 ~~(b) Assault of a child in the first degree, as defined in RCW  
12 9A.36.120;~~

13 ~~(c) Assault of a child in the second degree, as defined in RCW  
14 9A.36.130;~~

15 ~~(d) Burglary in the first degree, as defined in RCW 9A.52.020;~~

16 ~~(e) Child molestation in the first degree, as defined in RCW  
17 9A.44.083;~~

18 ~~(f) Commercial sexual abuse of a minor, as defined in RCW  
19 9.68A.100;~~

20 ~~(g) Dealing in depictions of a minor engaged in sexually  
21 explicit conduct, as defined in RCW 9.68A.050;~~

22 ~~(h) Homicide by abuse, as defined in RCW 9A.32.055;~~

23 ~~(i) Indecent liberties with forcible compulsion, as defined in  
24 RCW 9A.44.100(1)(a);~~

25 ~~(j) Indecent liberties with a person capable of consent, as  
26 defined in RCW 9A.44.100(1)(b);~~

27 ~~(k) Kidnapping in the first degree, as defined in RCW 9A.40.020;~~

28 ~~(l) Murder in the first degree, as defined in RCW 9A.32.030;~~

29 ~~(m) Murder in the second degree, as defined in RCW 9A.32.050;~~

30 ~~(n) Promoting commercial sexual abuse of a minor, as defined in  
31 RCW 9.68A.101;~~

32 ~~(o) Rape in the first degree, as defined in RCW 9A.44.040;~~

33 ~~(p) Rape in the second degree, as defined in RCW 9A.44.050;~~

34

1 ~~(q) Rape of a child in the first degree, as defined in RCW~~  
2 ~~9A.44.073;~~

3 ~~(r) Rape of a child in the second degree, as defined in RCW~~  
4 ~~9A.44.076;~~

5 ~~(s) Robbery in the first degree, as defined in RCW 9A.56.200;~~

6 ~~(t) Sexual exploitation of a minor, as defined in RCW 9.68A.040;~~  
7 ~~or~~

8 ~~(u) Vehicular homicide while under the influence of intoxicating~~  
9 ~~liquor or any drug, as defined in RCW 46.61.520(1)(a).~~

10 ~~(6))~~ The department shall adopt rules creating hearing  
11 procedures for high level violations. The hearings are offender  
12 disciplinary proceedings and are not subject to chapter 34.05 RCW.  
13 The procedures shall include the following:

14 (a) The department shall provide the offender with written  
15 notice of the alleged violation and the evidence supporting it. The  
16 notice must include a statement of the rights specified in this  
17 subsection, and the offender's right to file a personal restraint  
18 petition under court rules after the final decision;

19 (b) Unless the offender waives the right to a hearing, the  
20 department shall hold a hearing, and shall record it electronically.  
21 For offenders not in total confinement, the department shall hold a  
22 hearing within fifteen business days, but not less than twenty-four  
23 hours, after written notice of the alleged violation. For offenders  
24 in total confinement, the department shall hold a hearing within  
25 five business days, but not less than twenty-four hours, after  
26 written notice of the alleged violation;

27 (c) The offender shall have the right to: (i) Be present at the  
28 hearing; (ii) have the assistance of a person qualified to assist  
29 the offender in the hearing, appointed by the hearing officer if the  
30 offender has a language or communications barrier; (iii) testify or  
31 remain silent; (iv) call witnesses and present documentary evidence;  
32 (v) question witnesses who appear and testify; and (vi) receive a  
33 written summary of the reasons for the hearing officer's decision;  
34 and

1 (d) The sanction shall take effect if affirmed by the hearing  
2 officer. The offender may appeal the sanction to a panel of three  
3 reviewing officers designated by the secretary or by the secretary's  
4 designee. The offender's appeal must be in writing and hand-  
5 delivered to department staff, or postmarked, within seven days  
6 after the sanction was imposed. The appeals panel shall affirm,  
7 reverse, modify, vacate, or remand based on its findings. If a  
8 majority of the panel finds that the sanction was not reasonably  
9 related to any of the following: (i) The crime of conviction; (ii)  
10 the violation committed; (iii) the offender's risk of reoffending;  
11 or (iv) the safety of the community, then the panel will reverse,  
12 vacate, remand, or modify the sanction.

13 ~~((+7))~~ (6) For purposes of this section, the hearings officer  
14 may not rely on unconfirmed or unconfirmable allegations to find  
15 that the offender violated a condition.

16 ~~((+8))~~ (7) Hearing officers shall report through a chain of  
17 command separate from that of community corrections officers.

18

19 **Sec. 2.** RCW 9.94A.631 and 2012 1st sp.s. c 6 s 1 are each  
20 amended to read as follows:

21 (1) If an offender violates any condition or requirement of a  
22 sentence, a community corrections officer may arrest or cause the  
23 arrest of the offender without a warrant, pending a determination by  
24 the court or by the department. If there is reasonable cause to  
25 believe that an offender has violated a condition or requirement of  
26 the sentence, a community corrections officer may require an offender  
27 to submit to a search and seizure of the offender's person,  
28 residence, automobile, or other personal property, so long as there  
29 is a nexus between the property searched and the alleged probation  
30 violation.

31 (2) For the safety and security of department staff, an offender  
32 may be required to submit to pat searches, or other limited security  
33 searches, by community corrections officers, correctional officers,  
34 and other agency approved staff, without reasonable cause, when in  
or on department premises, grounds, or facilities, or while  
preparing to enter department premises, grounds, facilities, or

1 vehicles. Pat searches of offenders shall be conducted only by staff  
2 who are the same gender as the offender, except in emergency  
3 situations.

4 (3) A community corrections officer may also arrest an offender  
5 for any crime committed in his or her presence. The facts and  
6 circumstances of the conduct of the offender shall be reported by  
7 the community corrections officer, with recommendations, to the  
8 court, local law enforcement, or local prosecution for consideration  
9 of new charges. The community corrections officer's report shall  
10 serve as the notice that the department will hold the offender for  
11 not more than three days from the time of such notice for the new  
12 crime(~~(, except if the offender's underlying offense is a felony~~  
13 ~~offense listed in RCW 9.94A.737(5), in which case the department~~  
14 ~~will hold the offender for thirty days from the time of arrest or~~  
15 ~~until a prosecuting attorney charges the offender with a crime,~~  
16 ~~whichever occurs first~~)). This does not affect the department's  
17 authority under RCW 9.94A.737.

18 If a community corrections officer arrests or causes the arrest  
19 of an offender under this section, the offender shall be confined  
20 and detained in the county jail of the county in which the offender  
21 was taken into custody, and the sheriff of that county shall receive  
22 and keep in the county jail, where room is available, all prisoners  
23 delivered to the jail by the community corrections officer, and such  
24 offenders shall not be released from custody on bail or personal  
25 recognizance, except upon approval of the court or authorized  
26 department staff, pursuant to a written order.

27

28 **Sec. 3.** RCW 9.94A.716 and 2012 1st sp.s. c 6 s 6 are each  
29 amended to read as follows:

30 (1) The secretary may issue warrants for the arrest of any  
31 offender who violates a condition of community custody. The arrest  
32 warrants shall authorize any law enforcement or peace officer or  
33 community corrections officer of this state or any other state where  
34 such offender may be located, to arrest the offender and place him

1 or her in total confinement pending disposition of the alleged  
2 violation pursuant to RCW 9.94A.633.

3 (2) A community corrections officer, if he or she has reasonable  
4 cause to believe an offender has violated a condition of community  
5 custody, may suspend the person's community custody status and  
6 arrest or cause the arrest and detention in total confinement of the  
7 offender, pending the determination of the secretary as to whether  
8 the violation has occurred. The community corrections officer shall  
9 report to the secretary all facts and circumstances and the reasons  
10 for the action of suspending community custody status.

11 (3) If an offender has been arrested by the department for a new  
12 felony offense while under community custody, the facts and  
13 circumstances of the conduct of the offender shall be reported by  
14 the community corrections officer to local law enforcement or local  
15 prosecution for consideration of new charges. The community  
16 corrections officer's report shall serve as notice that the  
17 department will hold the offender in total confinement for not more  
18 than three days from the time of such notice for the new crime(~~(~~  
19 ~~except if the offender's underlying offense is a felony offense~~  
20 ~~listed in RCW 9.94A.737(5), in which case the department will hold~~  
21 ~~the offender for thirty days from the time of arrest or until a~~  
22 ~~prosecuting attorney charges the offender with a crime, whichever~~  
23 ~~occurs first~~)). Nothing in this subsection shall be construed as to  
24 permit the department to hold an offender past his or her maximum  
25 term of total confinement if the offender has not completed the  
26 maximum term of total confinement or to permit the department to  
27 hold an offender past the offender's term of community custody.

28 (4) A violation of a condition of community custody shall be  
29 deemed a violation of the sentence for purposes of RCW 9.94A.631.  
30 The authority granted to community corrections officers under this  
31 section shall be in addition to that set forth in RCW 9.94A.631.

32  
33  
34

1        NEW SECTION.    **Sec. 4.**    The department of corrections has the  
2 authority to begin implementing this act upon the effective date of  
3 this section.

4

5        NEW SECTION.    **Sec. 5.**    This act applies retroactively and  
6 prospectively regardless of the date of an offender's underlying  
7 offense.

8

--- END ---

190 Wash.2d 296  
Supreme Court of Washington.

STATE of Washington, Respondent,  
v.  
Curtis Lamont CORNWELL, Petitioner.

No. 93845-8

|  
Filed: March 15, 2018

|  
Argued: September 26, 2017

### Synopsis

**Background:** Defendant was convicted in the Superior Court, Pierce County, No: 13-1-04618-2, [Jack Nevin, J.](#), of unlawful possession of a controlled substance with intent to deliver and resisting arrest. Defendant appealed. The Court of Appeals, [2016 WL 5077833](#), affirmed. Defendant petitioned for review, which was granted.

**Holdings:** The Supreme Court, en banc, [Yu, J.](#), held that:

warrantless searches of probationers are permitted only where there is a nexus between the property searched and the alleged probation violation, abrogating [State v. Parris](#), [163 Wash.App. 110, 259 P.3d 331](#), and

there was no nexus between defendant's suspected probation violation of failure to report to the Department of Corrections (DOC) and the search of vehicle he was driving, and thus search was unconstitutional.

Reversed.

[Madsen, J.](#), dissented and filed opinion.

**\*\*1266** Appeal from Pierce County Superior Court, Docket No: 13-1-04618-2, Honorable [Jack Nevin](#).

### Attorneys and Law Firms

[Stephanie C. Cunningham](#), Attorney at Law, 4616 25th Ave. Ne # 552, Seattle, WA, 98105-4183, for Petitioner.

Jason Ruyf, Pierce County Prosecutor's Office, Prosecuting Attorney Pierce County, Pierce County Prosecuting Attorney, 930 Tacoma Ave. S Rm. 946, Tacoma, WA, 98402-2102, for Respondent.

### Opinion

[YU, J.](#)

**\*297 ¶ 1** It is well established that an individual on probation has a reduced expectation of privacy, and a community corrections officer (CCO) may conduct a warrantless search if he or she suspects the individual has violated a probation condition. The issue in this case is whether there are any limitations on the scope of the CCO's search. We hold that [article I, section 7 of the Washington Constitution](#) requires a nexus between the property searched and the suspected probation violation. There was no nexus in the search at issue here. Accordingly, we reverse the Court of Appeals and Cornwell's convictions.

### **\*298** FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 In September 2013, petitioner Curtis Lamont Cornwell was placed on probation.<sup>1</sup> His judgment and sentence allowed his probation officer to impose conditions of his release, which included the following provision:

I am aware that I am subject to search and seizure of my person, residence, automobile, or other personal property if there is reasonable cause on the part of the Department of Corrections to believe that I have violated the conditions/requirements or instructions above.

Ex. 4, at 3. Cornwell failed to report to the Department of Corrections (DOC) in violation of his probation, and DOC subsequently issued a warrant for his arrest.

¶ 3 Cornwell first came to the attention of Tacoma Police Department Officer Randy Frisbie and CCO Thomas Grabski because of a distinctive Chevrolet Monte Carlo observed outside a house suspected of being a site for drug sales and prostitution. CCO Grabski later spoke with the registered

owner of the vehicle, who said that she had given the car to Cornwell to drive but she wanted it back. Unfamiliar with Cornwell, one of the officers conducted a records check and determined he had an outstanding warrant.

¶ 4 In late November 2014, at approximately 1:00 a.m., Officer Frisbie spotted the \*1267 Monte Carlo while on patrol with Officer Patrick Patterson, another member of the Tacoma Police Department. Officer Frisbie testified that he intended to stop the vehicle because he believed Cornwell was driving it and he had an outstanding warrant. He did not initiate the stop based on any belief that the car contained drugs or a gun or because he observed a traffic violation.

\*299 ¶ 5 Before Officer Frisbie could activate his police lights, the car pulled into a driveway and Cornwell began to exit it. Cornwell ignored Officer Frisbie's orders to stay in the vehicle, and Officer Frisbie believed Cornwell was attempting to distance himself from the car. Officer Frisbie then ordered Cornwell to the ground. Cornwell started to lower himself in apparent compliance before jumping up and running. Cornwell was apprehended after both officers deployed their Tasers. He had \$1,573 on his person at the time of arrest.

¶ 6 After securing Cornwell, Officer Patterson called CCO Grabski to the scene. CCO Grabski testified that his job is "to help apprehend fugitives of [DOC] as well as to look into violations of people that are on probation." 1 Verbatim Report of Proceedings (VRP) (Dec. 16, 2014) at 82. He testified that he believed Cornwell's warrant was for his failure to report to DOC because "that's pretty much why there's a warrant in the system is they failed to report to [DOC]." *Id.* at 113. Asked if he could think of another reason a warrant would issue, he said, "I can't think of anything that would be different." *Id.*

¶ 7 Upon arrival at the arrest scene, CCO Grabski searched the Monte Carlo. He described the basis for his search as follows:

When people are in violation of probation, they're subject to search. So he's driving a vehicle, he has a felony warrant for his arrest by [DOC] which is in violation of his probation. He's driving the vehicle, he has the ability to access to enter the vehicle, so I'm

searching the car to make sure there's no further violations of his probation.

*Id.* at 93. He explained, "If there is anything in the vehicle, whether it is in a suitcase, clothing, I'm going to go through those items." *Id.* at 94. In this case, CCO Grabski found a black nylon bag sitting on the front seat of the car. The bag contained oxycodone, amphetamine and methamphetamine pills, sim cards, and small spoons. A cell phone was also found in the car.

\*300 ¶ 8 Cornwell moved pursuant to CrR 3.6 to suppress the evidence obtained during the vehicle search. In denying the motion, the trial court stated that any subjective expectation of privacy Cornwell had "was not ... objectively reasonable" given that he was on probation and had signed conditions of release that reflected his reduced expectation of privacy. *Id.* at 141.

¶ 9 A jury convicted Cornwell of three counts of unlawful possession of a controlled substance with intent to deliver and one count of resisting arrest. In an unpublished opinion, the Court of Appeals affirmed, holding that there need not be a nexus between the property searched and the alleged probation violation. *State v. Cornwell*, No. 47444-1-II, slip op. at 7, 2016 WL 5077833 (Wash. Ct. App. Sept. 20, 2016) (unpublished), <http://www.courts.wa.gov/opinions/>. Alternatively, the court held that if such a nexus were required, it was satisfied in this instance. *Id.* at 8. We granted review only as to the lawfulness of the property search.

## ISSUE

¶ 10 Was the search of the car Cornwell was driving an unlawful search requiring suppression of the evidence obtained?

## ANALYSIS

¶ 11 Issues of statutory interpretation and constitutional law are reviewed de novo. *State v. Evans*, 177 Wash.2d 186, 191, 298 P.3d 724 (2013).

### A. Preservation of the issue

¶ 12 We first address the threshold question of issue preservation because the State argues Cornwell failed to preserve his claim that there must be a nexus between the property searched and the alleged probation violation. Ct. Ordered Answer to Pet. for Review at 6-7. At the CrR 3.6 hearing, defense counsel primarily relied on the theory that \*301 CCO Grabski knew that the car belonged to a third party and he did not have \*\*1268 authority to search property that did not belong to Cornwell.

¶ 13 However, Cornwell did raise the nexus argument. Defense counsel asserted that “the law does require considerably more nexus between the place being searched, in this case the car, and a probation violation.” 1 VRP at 134. He also raised the argument in response to a hypothetical question posed by the judge. The judge asked whether CCO Grabski would have had authority to search the car if Cornwell had stolen it. *Id.* at 127. Defense counsel said no “because there’s no reason to believe that there’s any nexus between that and any violation of his DOC conditions.” *Id.* at 128. In addition, both the State and Cornwell discussed the meaning of RCW 9.94A.631, the legislature’s codification of the probation exception to the warrant requirement.

¶ 14 We conclude that the issue was properly preserved. Moreover, an ongoing split in the Court of Appeals, as discussed further below, requires our review in this case. RAP 13.4(b)(2). We therefore address the merits of Cornwell’s claim.

#### B. Searches pursuant to article I, section 7

¶ 15 Article I, section 7 of the Washington Constitution provides a robust privacy right. It states that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” CONST. art. I, § 7. The “authority of law” needed is generally a warrant, “subject to ‘a few jealously and carefully drawn exceptions.’” *State v. Ladson*, 138 Wash.2d 343, 349, 979 P.2d 833 (1999) (internal quotation marks omitted) (quoting *State v. Hendrickson*, 129 Wash.2d 61, 70, 917 P.2d 563 (1996) ).

¶ 16 However, individuals on probation are not entitled to the full protection of article I, section 7. *State v. Olsen*, 189 Wash.2d 118, 124, 399 P.3d 1141 (2017). They have reduced expectations of privacy because they are “‘serving their time outside the prison walls.’” *Id.* at 124-25, 399 P.3d 1141 (quoting \*302 *State v. Jardinez*, 184 Wash. App. 518, 523, 338 P.3d 292 (2014) ). Accordingly, it is constitutionally permissible for a CCO to search an individual based only

on a “well-founded or reasonable suspicion of a probation violation,” rather than a warrant supported by probable cause. *State v. Winterstein*, 167 Wash.2d 620, 628, 220 P.3d 1226 (2009). The legislature has codified this exception to the warrant requirement at RCW 9.94A.631.<sup>2</sup> The statute reads in relevant part, “If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a [CCO] may require an offender to submit to a search and seizure of the offender’s person, residence, automobile, or other personal property.” RCW 9.94A.631(1).

¶ 17 The question presented in this case is whether article I, section 7 requires a nexus between the property searched and the alleged probation violation in order to protect the reduced privacy interest of individuals on probation. While the parties agree that we should determine the scope of a CCO’s search consistent with RCW 9.94A.631, their positions on the nexus requirement reflect an ongoing split in the Court of Appeals.

¶ 18 The State asks us to endorse the line of reasoning in *State v. Parris*, where a Division Two panel concluded that “probationers do not have a reasonable expectation of privacy in their residences, vehicles, or personal belongings.” 163 Wash. App. 110, 123, 259 P.3d 331 (2011). Because they do not have a reasonable expectation of privacy, the State argues, any probation violation warrants a search of all the individual’s property, regardless of whether it is likely to contain any evidence of the alleged violation.

¶ 19 Meanwhile, Cornwell relies on the reasoning of Division Three in *Jardinez*, 184 Wash. App. 518, 338 P.3d 292. Concluding \*303 that RCW 9.94A.631 is silent on the nexus requirement, the court used the following Sentencing Guidelines Commission commentary on a predecessor statute as evidence of legislative intent:

“The Commission intends that Community Corrections Officers exercise their arrest power’s sparingly, with due consideration \*\*1269 for the seriousness of the violation alleged and the impact of confinement on jail population. Violations may be charged by the Community Corrections Officer upon notice of violation and summons, without arrest.

*“The search and seizure authorized by this section should relate to the violation which the Community*

*Corrections Officer believes to have occurred.*”

*Id.* at 529, 338 P.3d 292 (quoting DAVID BOERNER, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981, at app. I-13 (1985).) The court held the commentary “demands a nexus between the searched property and the alleged crime,” which it noted was also “consistent with general principles of search and seizure law.” *Id.*

¶ 20 We agree with *Jardinez* that RCW 9.94A.631 is silent on the nexus requirement. We therefore resolve the question presented and the split in the Court of Appeals by interpreting the statute in a manner that conforms to article I, section 7 as permitted by a reasonable reading of the statute’s plain language. *Utter ex rel. State v. Bldg. Indus. Ass’n of Wash.*, 182 Wash.2d 398, 434, 341 P.3d 953 (2015).

¶ 21 It is already established that in accordance with article I, section 7, individuals on probation do not forfeit all expectations of privacy in exchange for their release into the community. *Olsen*, 189 Wash.2d at 125, 399 P.3d 1141. While the State may closely supervise them to advance the probation system’s goals of promoting rehabilitation and protecting public safety, its authority is limited. *Id.* at 128-29, 399 P.3d 1141. Individuals’ privacy interest can be reduced “only to the extent ‘necessitated by the legitimate demands of the operation of the \*304 [community supervision] process.’ ” *Id.* at 125, 399 P.3d 1141 (quoting *Parris*, 163 Wash. App. at 117, 259 P.3d 331).

¶ 22 When there *is* a nexus between the property searched and the suspected probation violation, an individual’s reduced privacy interest is safeguarded in two ways. First, a CCO must have “reasonable cause to believe” a probation violation has occurred before conducting a search at the expense of the individual’s privacy. RCW 9.94A.631(1). This threshold requirement protects an individual from random, suspicionless searches. Second, the individual’s privacy interest is diminished only to the extent necessary for the State to monitor compliance with the particular probation condition that gave rise to the search. The individual’s other property, which has no nexus to the suspected violation, remains free from search.

¶ 23 In contrast, allowing searches *without* a nexus between the property searched and the alleged probation violation

destroys what remains of the individual’s privacy. While a CCO must still have reasonable cause to believe there has been a violation, *no* property is free from search and the CCO does not need to suspect that the search will produce evidence of *any* particular probation violation. Much like a suspicionless search, an open-ended probation search may be used as “ ‘a fishing expedition to discover evidence of other crimes, past or present.’ ” *Olsen*, 189 Wash.2d at 134, 399 P.3d 1141 (quoting *State v. Combs*, 102 Wash. App. 949, 953, 10 P.3d 1101 (2000) ).

¶ 24 For example, the defendant in *Jardinez* failed to report for a meeting and admitted marijuana use, both violations of his conditions of release. 184 Wash. App. at 521, 338 P.3d 292. The CCO used these violations as the basis for a search of *Jardinez*’s iPod, during which he found a photo of *Jardinez* with a firearm. The photo was admitted as evidence at trial, which resulted in a firearm conviction, even though the CCO “had no reason to believe ... *Jardinez* possessed a firearm” before conducting the search. *Id.* at 528, 338 P.3d 292. Such \*305 sweeping searches conflict with article I, section 7’s mandate that an individual’s privacy right be reduced only when and to the extent *necessary*. *Olsen*, 189 Wash.2d at 125, 399 P.3d 1141.

¶ 25 Meanwhile, there is no compelling argument that the “ ‘legitimate demands’ ” of the probation system require open-ended property searches.<sup>3</sup> *Id.* (internal quotation \*\*1270 marks omitted) (quoting *Parris*, 163 Wash. App. at 117, 259 P.3d 331). *Parris* well illustrates that requiring a nexus does not impede the State’s ability to effectively supervise individuals on probation. Derek Lee *Parris* was on probation after he failed to register as a sex offender. *Parris*, 163 Wash. App. at 113, 259 P.3d 331. He violated numerous probation conditions, including contacting minors, failing a urinalysis test, and failing to participate in treatment. *Id.* at 113-14, 259 P.3d 331. His mother also informed his CCO that he may have obtained a firearm in violation of his probation. *Id.* at 120, 259 P.3d 331.

¶ 26 The CCO searched *Parris*’ room, where she found syringes, pornography, empty alcohol bottles, and three memory cards, one of which was marked with the name of a female minor. *Id.* at 115, 259 P.3d 331. When she viewed their contents, she found sexually explicit videos of *Parris* and a minor as well as photographs of guns. *Id.* A nexus between the memory cards and a suspected probation violation was undoubtedly satisfied because the CCO “believed she might find evidence of [an illegal firearm]” on the cards. *Id.* at 120,

259 P.3d 331. Thus, *Parris* shows that searches tethered to a particular probation condition are a practical and effective tool that further the State's interest in monitoring compliance and promoting public safety while still protecting individuals from arbitrary searches.

\*306 ¶ 27 In sum, we believe “[t]he goals of the probation process can ... be accomplished with rules and procedures that provide both the necessary societal protections as well as the necessary constitutional protections.” *State v. Lampman*, 45 Wash. App. 228, 233, 724 P.2d 1092 (1986). Limiting the scope of a CCO's search to property reasonably believed to have a nexus with the suspected probation violation protects the privacy and dignity of individuals on probation while still allowing the State ample supervision. We therefore hold that [article I, section 7](#) permits a warrantless search of the property of an individual on probation only where there is a nexus between the property searched and the alleged probation violation.

¶ 28 Applying the nexus requirement to this case, we conclude CCO Grabski's search of Cornwell's car exceeded its lawful scope. While CCO Grabski may have suspected Cornwell violated other probation conditions, the only probation violation supported by the record is Cornwell's failure to report.<sup>4</sup> This court has already determined that there is no nexus between property and the crime of failure to report. *State v. Patton*, 167 Wash.2d 379, 395, 219 P.3d 651 (2009). Moreover, CCO Grabski's testimony at the CrR 3.6 hearing confirmed that he had no expectation that the search would produce evidence of Cornwell's failure to report, and that he searched the vehicle only because Cornwell “ha[d] a felony warrant for his arrest ... in violation of his probation [and] [h]e's driving the vehicle.” 1 VRP at 93. He explained that his search was not limited in scope because “[i]f there is anything in the vehicle, whether it is in a suitcase, clothing, I'm going to go through those items.” *Id.* at 94. He also testified that he was looking for unrelated probation violations because he searched the vehicle “to make sure there's no further violations of his probation.” \*307 *Id.* at 93 (emphasis added). CCO Grabski's search was clearly “ ‘a fishing expedition,’ ” which [article I, section 7](#) does not permit. *Olsen*, 189 Wash.2d at 134, 399 P.3d 1141 (quoting *Combs*, 102 Wash. App. at 953, 10 P.3d 1101).

¶ 29 Because there was no nexus to Cornwell's suspected probation violation, the search of the car Cornwell was driving was unlawful. The evidence seized therefore should have been suppressed in accordance with our well-established

exclusionary rule. *State v. Ibarra-Cisneros*, 172 Wash.2d 880, 885-86, 263 P.3d 591 (2011). We thus reverse the Court of Appeals and Cornwell's convictions.

#### \*\*1271 CONCLUSION

¶ 30 Individuals on probation have a limited, but constitutionally protected, privacy interest that does not permit CCOs to conduct open-ended property searches. For a search to be lawful, there must be a nexus between the property searched and the alleged probation violation. In this case, the search of Cornwell's vehicle was unlawful because there was no nexus between the search and his suspected probation violation of failure to report to DOC. The evidence seized during the search should have been suppressed. Accordingly, we reverse the Court of Appeals and Cornwell's convictions.

WE CONCUR:

[Fairhurst](#), C.J.

Johnson, J.

[Stephens](#), J.

[Wiggins](#), J.

González, J.

Gordon McCloud, J.

[MADSEN](#), J. (dissenting)

¶ 31 The majority holds that a community corrections officer's (CCO) search of the car that probationer Curtis Lamont Cornwell was driving was unlawful because there was no nexus between that search and his suspected probation violation. I disagree. The imposition of a “direct nexus” requirement is contrary to Cornwell's status as a probationer, and it is not a requirement of the controlling statute defining his susceptibility to search, [RCW 9.94A.631\(1\)](#). But, even if an additional, direct \*308 nexus must be imposed beyond what is already required by the statute, that requirement is met under the facts of this case. Therefore, I dissent.

[Facts leading to the search](#)

¶ 32 The majority identifies the probation violation that prompted Cornwell's apprehension, the arrest warrant, as the only probation violation supported by the record, and thus the only probation violation that is relevant here. But the record also objectively supports an additional basis for the search. Cornwell's arrest warrant, coupled with the pursuing Tacoma police officers' belief that Cornwell was in possession of the Chevrolet Monte Carlo that they had stopped, are the facts that prompted Cornwell's apprehension. But, additional facts developed from that point in time, which raised an objectively reasonable basis to believe that Cornwell, who was indeed driving the Monte Carlo in question, had also violated the conditions of his probation concerning illegal drugs.<sup>1</sup>

¶ 33 First, Cornwell ignored the police officers' directive to stay in the car when he was stopped. Upon exiting the car, he again ignored the officers' directive to get on the ground. Then, Cornwell fled. When he was apprehended, officers found a large amount of cash (more than \$1,500) on his person. These facts added to the other information that CCO Thomas Grabski already had: CCO Grabski had earlier observed the car Cornwell was driving at a known drug house, and the car's owner had informed CCO Grabski that she had given the car to Cornwell but wanted it back. Taken together, there is ample reason to believe that Cornwell was likely in possession of and/or even dealing illegal drugs in violation of his probation. Restated, there is enough objective evidence in the record to establish \*309 "reasonable cause" to believe that Cornwell had violated the condition of his probation that prohibited his possession of controlled substances.

¶ 34 At the time of the search, Cornwell was subject to probation conditions, which Cornwell had acknowledged and agreed to abide by, including that he "[shall] [o]bey all laws," he "[shall] [r]eport to and be available for contact with assigned community corrections officer," he "[shall] not consume alcohol," he "[shall] not associate with drug users or sellers," and he "[shall] not use/possess/consume any controlled substances." Ex. 4, at 1-2. Additionally, commensurate with the requirements of RCW 9.94A.631(1), he also expressly acknowledged, "I am aware that I am subject to search and seizure of my person, residence, automobile, or other personal property if there is reasonable cause on \*\*1272 the part of the Department of Corrections to believe that I have violated the conditions/requirements or instructions above." *Id.* at 3. Based on this record, I would hold that CCO Grabski's search of Cornwell's car was justified under RCW 9.94A.631(1), with or without the additional nexus requirement imposed by the majority.

RCW 9.94A.631(1), nexus, and the Washington State Constitution

¶ 35 I also disagree with the majority's view that an additional nexus requirement must be added to the plain language of RCW 9.94A.631(1) in order to ensure that CCOs do not engage in improper fishing expeditions, or that such an addition is required by article I, section 7 of our state constitution.<sup>2</sup> First, as explained above, under the objective facts contained in the record, CCO Grabski's search of Cornwell's car cannot be accurately described as an unwarranted fishing expedition because there was reasonable cause to believe that Cornwell had violated the illegal drug prohibition condition of his probation.

\*310 ¶ 36 More importantly, this case does not concern the privacy expectations of an unconvicted citizen. Thus, our focus is more properly the parameters of a CCO's authority to supervise a convicted felon as that felon serves a portion of his sentence in the community on probation. Consideration of such parameters includes weighing the CCO's authority to strictly supervise the felon in order to promote the felon's rehabilitation and to monitor compliance with community custody conditions to protect the public against the felon's acknowledged limited expectations of privacy as a probationer. In my view, the appropriate balance of these considerations is struck by the legislature in the plain language of RCW 9.94A.631(1), which provides in relevant part:

If an offender violates *any* condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant .... If there is *reasonable cause* to believe that an offender has violated *a* condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

(Emphasis added.)

¶ 37 The statute's plain language directs that the availability of a search is triggered only where "reasonable cause" exists that the probationer has violated "a" condition of his or her sentence. *Id.* By requiring reasonable cause, the statute does not permit a CCO to conduct random, harassing, unwarranted searches. Further, by requiring the reasonable cause to concern only "a" violation, the statute gives the CCO the tools he needs to closely monitor the probationer to both promote rehabilitation and protect the public and provides the nexus required: that the search is triggered by a probation violation.<sup>3</sup> Under this plain reading, \*311 a probationer is encouraged to comply with all of the conditions of his or her probation in order to avoid triggering CCO searches under the statute. This properly balances the various interests involved and avoids the "fishing expeditions" that concern the majority.<sup>4</sup>

\*\*1273 ¶ 38 As to whether [article I, section 7](#) of our state constitution requires that a stricter nexus component be added to [RCW 9.94A.631](#), as the majority does here, I find our recent decision in [State v. Olsen](#), 189 Wash.2d 118, 399 P.3d 1141 (2017), instructive by analogy. There, we held that random urinalysis testing of probationers for controlled substances, as a condition of probation, does not violate [article I, section 7](#) of our state constitution. As this court explained, "probationers do not enjoy constitutional privacy protection to the same degree as other citizens." *Id.* at 124, 399 P.3d 1141. "Probationers have a reduced expectation of privacy because they are 'persons whom a court has sentenced to confinement but who are serving their time outside the prison walls.'" *Id.* at 124-25, 399 P.3d 1141 (quoting [State v. Jardinez](#), 184 Wash. App. 518, 523, 338 P.3d 292 (2014)). The State "may supervise and scrutinize a probationer more closely than it may other citizens." *Id.* at 125, 399 P.3d 1141. But " 'this diminished expectation of privacy is constitutionally permissible only to the extent necessitated by the legitimate demands of the operation of the parole process.' " *Id.* (internal quotation marks omitted) (quoting \*312 [State v. Parris](#), 163 Wash. App. 110, 117, 259 P.3d 331 (2011)). As we explained, the government indeed has "a compelling interest in disturbing [a probationer's] privacy interest in order to promote her rehabilitation and protect the public," the random testing was narrowly tailored to monitor compliance with a validly imposed probation condition, and "the judgment and sentence constitutes sufficient 'authority of law' to require random [urinalysis testing]." *Id.* at 126, 399 P.3d 1141. "[B]ecause probationers have a reduced expectation of privacy, the State does not need a warrant,

an applicable warrant exception, or even probable cause to search a probationer." *Id.*

¶ 39 Explaining the particular status of probationers, we observed that the probationer at issue "was convicted of a crime and is still in the State's legal custody. She has a duty to engage in her rehabilitation in exchange for the privilege of being relieved from jail time and 'should expect close scrutiny of her conduct.'" Her privacy interests are more constrained than those of [an unconvicted citizen]." *Id.* at 127, 399 P.3d 1141 (emphasis added) (citations omitted) (quoting [State v. Lucas](#), 56 Wash. App. 236, 241, 783 P.2d 121 (1989)). Probation is "not a right, but 'an act of judicial grace or lenience motivated in part by the hope that the offender will become rehabilitated.'" *Id.* at 128, 399 P.3d 1141 (quoting [Gillespie v. State](#), 17 Wash. App. 363, 366-67, 563 P.2d 1272 (1977)).

¶ 40 Commenting on the need for proper tools in the probation context, we observed that "[t]he State has a duty not just to promote and assess the rehabilitation of a probationer, but also to protect the public." *Id.* at 129, 399 P.3d 1141. Accordingly, a "sentencing court has great discretion to impose conditions and restrictions of probation to 'assure that the probation serves as a period of genuine rehabilitation and that the community is not harmed by the probationer's being at large.'" *Id.* at 128, 399 P.3d 1141 (quoting [Griffin v. Wisconsin](#), 483 U.S. 868, 875, 107 S.Ct. 3164, 97 L.Ed. 2d 709 (1987)).

¶ 41 We recognized that "the State has a compelling interest in closely monitoring probationers in order to promote their rehabilitation," and that because "probation officers' \*313 role is 'rehabilitative rather than punitive in nature,' they must, then, have tools at their disposal in order to accurately assess whether rehabilitation is taking place." *Id.* at 128, 399 P.3d 1141 (quoting [State v. Reichert](#), 158 Wash. App. 374, 387, 242 P.3d 44 (2010)). We held that random urinalysis testing was such a tool, reasoning that "[r]andom testing seeks to deter the probationer from consuming drugs or alcohol by putting her on notice that drug use can be discovered at any time. It also promotes rehabilitation and accountability by providing the probation officer with 'a practical mechanism to determine whether rehabilitation is indeed taking place.'" *Id.* at 131, 399 P.3d 1141 (quoting [Macias v. State](#), 649 S.W.2d 150, 152 (Tex. Crim. App. 1983)). We concluded that the random urinalysis testing as a condition of probation was a constitutionally permissible form of close scrutiny of the probationers because it was a narrowly tailored monitoring tool imposed pursuant to a valid

prohibition on drug and alcohol use, and was directly related to a **\*\*1274** probationer's rehabilitation and supervision. *Id.* at 134, 399 P.3d 1141.

¶ 42 As written, [RCW 9.94A.631\(1\)](#) is likewise a constitutionally permissible tool in the hands of a CCO. It is limited by its terms to reasonable cause. Where reasonable cause does exist that a probationer has violated a condition of his sentence, a CCO's authority to conduct a search is triggered. Such close supervision promotes a probationer's rehabilitation and accountability and also protects the public. By contrast, the majority's imposition of a direct nexus requirement impermissibly adds language to an unambiguous statute. The added requirement is both unnecessary and harmful because the statute itself contains

sufficiently limiting language and the additional nexus requirement dilutes the effectiveness of a CCO's ability to closely monitor probationers, promote rehabilitation, and protect the public. The majority's approach undermines and complicates a straightforward and effective monitoring process **\*314** and likely will result in increased challenges to the underlying violation supporting a CCO's legitimate compliance searches.

¶ 43 For these reasons, I dissent.

#### All Citations

190 Wash.2d 296, 412 P.3d 1265

#### Footnotes

- 1 The trial court judge did not make findings of fact or conclusions of law at the [CrR 3.6](#) hearing, and so the following facts are based on testimony presented at the hearing unless otherwise noted.
- 2 A CCO's authority to conduct a property search is derived from an authorizing probation condition in a valid, court-ordered judgment and sentence. However, the parties agree that the probation condition, and any limitations on the scope of searches conducted pursuant to its authorization, should be interpreted consistently with [RCW 9.94A.631](#).
- 3 Citing *Olsen*, the dissent asserts that searches without a nexus are constitutionally permissible because, like random urinalysis (UA) testing of individuals on probation for driving under the influence, they are a valid monitoring tool. Dissent at 1273. The comparison is unpersuasive. In *Olsen*, we upheld random UA testing because it was used to evaluate compliance with a *particular* probation condition that prohibited drug and alcohol use. [189 Wash.2d at 133, 399 P.3d 1141](#). Here, a search without a nexus to an alleged violation is *not* directly linked to evaluating compliance with a particular probation condition.
- 4 The dissent claims that there was a sufficient nexus in this case by inferring from the record that Cornwell violated other conditions of his probation. Dissent at 1271–72. However, the record indicates that the State failed to elicit testimony that established CCO Grabski had reasonable cause to believe evidence of *any* probation violation would be found inside the car.
- 1 In other words, the circumstance here is similar to a traffic stop morphing into a *Terry* investigation, see *Terry v. Ohio*, [392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 \(1968\)](#), based on developing circumstances that suggest to the officer that illegal activity is afoot and further investigation is warranted.
- 2 The Washington State Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” [WASH. CONST. art. I, § 7](#).
- 3 As the Ninth Circuit Court of Appeals observed when assessing [RCW 9.94A.631\(1\)](#)'s similarly worded predecessor statute, “offenders enjoy a reduced expectation of privacy while on supervised release, which the law protects by requiring reasonable grounds for a search.” *United States v. Conway*, [122 F.3d 841, 842 \(9th Cir. 1997\)](#) (citation omitted). Accordingly, the statute “promotes the goal of rehabilitation and it enhances community safety by permitting the rapid detection of contraband and criminal activity.” *Id.* (citations omitted).
- 4 In *Griffin v. Wisconsin*, [483 U.S. 868, 873-75, 107 S.Ct. 3164, 97 L.Ed. 2d 709 \(1987\)](#), the Supreme Court observed that, like incarceration, probation is a form of criminal sanction. Accordingly, probationers do not enjoy the absolute liberty to which unconvicted citizens are entitled, but only conditional liberty properly dependent on observance of special (probation) restrictions, and such restrictions are meant to assure that the probation serves as a period of genuine rehabilitation and the community is not harmed by the probationer being at large. *Id.* Such goals “require and justify the exercise of supervision to assure that the restrictions are in fact observed.” *Id.* at 875, [107 S.Ct. 3164](#). The *Griffin* Court further observed that “research suggests that more intensive supervision can reduce recidivism.” *Id.* (citing Joan Petersilia, *Probation and Felony Offenders*, 49 FED. PROB. 9 (June 1985) ).

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