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Court of Appeals
Division III
State of Washington

No. 33416-3-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

STEVEN K. YOUNG, Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. IS RCW 9A.44.130 UNCONSTITUTIONALLY VAGUE IN ITS REQUIREMENT THAT ANY PERSON CONVICTED OF A SEX OFFENSE REGISTER UPON RELEASE FROM INCARCERATION WHICH RESULTED FROM A SEX OFFENSE?

2. IS RCW 9A.44.130 AMBIGUOUS WHEN IT STATES THAT A PERSON CONVICTED OF ANY SEX OFFENSE MUST REGISTER UPON RELEASE FROM INCARCERATION PURSUANT TO A SEX OFFENSE?

3. WAS THE INFORMATION SUFFICIENT TO INFORM THE APPELLANT THAT HE WAS ACCUSED OF FAILING TO COMPLY WITH THE REQUIREMENTS OF RCW 9A.44.130, IN VIOLATION OF RCW 9A.44.132?

4. DID THE COURT PROPERLY CALCULATE THE APPELLANT'S OFFENDER SCORE RELATING TO HIS CONVICTION FOR ESCAPE FROM COMMUNITY CUSTODY?

II. ARGUMENT

1. RCW 9A.44.130 IS NOT UNCONSTITUTIONALLY VAGUE AND CLEARLY REQUIRES ANY PERSON CONVICTED OF A SEX OFFENSE TO REGISTER UPON RELEASE FROM INCARCERATION WHICH RESULTED FROM A SEX OFFENSE.

2. RCW 9A.44.130 UNAMBIGUOUSLY AND CLEARLY REQUIRES ANY PERSON CONVICTED OF ANY SEX OFFENSE TO REGISTER UPON RELEASE FROM INCARCERATION PURSUANT TO A SEX OFFENSE.

3. THE INFORMATION WAS SUFFICIENT TO INFORM THE APPELLANT THAT HE WAS ACCUSED OF FAILING TO COMPLY WITH THE REQUIREMENTS OF RCW 9A.44.130, IN VIOLATION OF RCW 9A.44.132.

4. THE COURT PROPERLY CALCULATED THE APPELLANT'S OFFENDER SCORE RELATING TO HIS CONVICTION FOR ESCAPE FROM COMMUNITY CUSTODY.

III. STATEMENT OF THE CASE

On February 5, 2004, the Defendant was convicted of Child Molestation in the Second Degree in the Garfield County Superior Court and subsequently required to register as a sex offender pursuant to RCW 9A.44.130. _See_ Exhibit P-1. On September 23, 2006, the Appellant failed to comply with his requirement to register and was convicted for the first time of Failure to Register as a Sex Offender on October 1, 2007, in Asotin County. _See_ Exhibit P-4. On September 25, 2008, the Appellant was convicted for the second time of the crime of Failure to Register as a Sex Offender based upon his noncompliance with the registration statute between November 5 and December 28, 2007, in Garfield County, Washington. _See_ Exhibit P-5. On October 19, 2012, in Asotin County Superior Court, the Appellant was yet again convicted of Failure to Register as a Sex Offender (Third or Subsequent Conviction), based upon his non-compliance with the registration statute between April 11 and May 15, 2012. _See_ Exhibit 6. The Appellant has now been convicted for the fourth time of Failure to Register as a Sex Offender, based upon his conduct occurring between July 8 and November 14, 2014, by making his whereabouts unknown to DOC and to the Asotin County Sheriff's Office. _See_ _Judgement and Sentence_, Clerk's Papers (herein after CP) 28 - 29. This appeal flows from this most recent conviction for failure to comply with RCW 9A.44.130 which was entered after bench

trial held May 11, 2015. Report of Proceedings (hereinafter RP) *et. al.*

The facts pertinent to the latest conviction, which is the conviction at issue herein are as follows: On November 25, 2013, the Appellant registered with the Asotin County Sheriff's Office as residing at 611 Seventh Street, Clarkston, Washington. RP 10, ***See also*** Exhibit P-2. This was the last time that the Appellant registered. During the time frame pertinent hereto, the Appellant was serving a period of community custody pursuant to his 2012 conviction for Failure to Register as a Sex Offender. RP 74.

On or around July 8, 2014, Sgt. Tammy Leavitt of the Asotin County Sheriff's Office received information that the Appellant may be in violation of his sex offender registration requirements. RP 11. Sgt. Leavitt is the sex offender coordinator for the Asotin County Sheriff's office and is tasked with maintaining sex offender registration records and monitor offender registration compliance. RP 11. On that date, Sgt. Leavitt learned from Community Corrections (CCO) Officer Kyle Helm, of the Washington Department of Corrections (DOC), that the Appellant may have moved from the residence at 611 Seventh Street. RP 11. Prior to July 8, 2014, the Appellant failed to report to DOC and on July 8, officers went to his residence to attempt contact. RP 75. The Appellant was not there and it appeared that other persons were moving belongings from the residence. RP 75, 95-96. Officers

were informed that the Appellant was not living there. RP 96. When they could not locate the Appellant at the residence, a DOC warrant was issued for his arrest. RP 75.

On July 23, 2014, the Appellant was arrested on this warrant, being found hiding in the laundry room of the 611 Seventh Street residence. RP 76, 97-98. Officers noted that the residence appeared empty other than a few boxes of clothing in the laundry room. RP 76-77. The Appellant was taken into custody and held in the Asotin County Jail. RP 78. The Appellant admitted to violating his community custody by failing to report on or after July 3, 2014 and was sanctioned with twenty days incarceration. RP 78-79. The Appellant spoke with his assigned CCO, Amanda Renzelman, who asked him about his living arrangements after release. RP 79. The Appellant advised he was not sure where he would be staying after his release. RP 79. The Appellant was instructed to report to the DOC office immediately upon release. RP 79.

On August 11, 2014, the Appellant was released from incarceration pursuant to his supervision violation. RP 79. At no point thereafter did the Apppellant register with the Asotin County Sheriff's office or any other agency. RP 13. On August 12, 2014, the Appellant reported to the DOC office and spoke with CCO Kevin Vogeler. RP 64-65. The Appellant advised that he was still homeless. RP 66. The Appellant further advised that he possibly had

one or two addresses where he might be able to stay, but he did not have specifics at that time. RP 66. The Appellant did not state that he expected to return to 611 Seventh Street. RP 66. The Appellant was instructed to report back to CCO Amanda Renzelman not later than August 14, 2014 with information concerning the residence at which he would be residing. RP 66-67. The Appellant failed to report by that date and did not report thereafter. RP 80. On September 2, 2014, a warrant was issued by DOC for the Appellant's arrest. Officers attempted contact at the Appellant's last known address, 611 Seventh Street, on September 3, 2014 and spoke to a person who identified herself as the Appellant's sister. She told the officers that the Appellant did not reside at that location, and that she did not have any contact information for him. RP 81.

On November 14, 2014, the Appellant was contacted by Cpl. Rod Taylor of the Nez Perce County Sheriff's Office in Culdesac, Idaho, at approximately 2:00 a.m. RP 52. Upon contact, the Appellant advised he was looking for his dog which had run off from where he was staying. RP 54. He told Cpl. Taylor that he was saying there in Culdesac at 110 Ponderosa Loop. RP 54. The address of 110 Ponderosa Loop was, at that time, the residence of Sheila Hassett, the Appellant's girlfriend. RP 135. A records check revealed a warrant for the Appellant's arrest and he was taken into custody at that time on the DOC warrant. RP 55, 81. On November 19, 2014,

the Appellant was transported to the Asotin County Jail where, coincidentally, CCO Amanda Renzelman and CCO Michael Grimm were attending to other business with a different community custody inmate. RP 82, 99. When CCO Grimm saw the Appellant, he exchanged pleasantries and asked him what was going on, to which the Appellant replied he was in Culdesac. RP 100. When asked why he was in Culdesac, the Appellant responded,[1] "Well, living there, getting high." RP 100. While in the jail, the Appellant made a call to his mother, wherein he exhorted her to contact his sister and have her testify that she lied to the police when she said he did not live at the residence.[2] RP 18-22, 163.

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[1]The Appellant did not object to any of these statements at trial, and while no special hearing pursuant to CrR 3.5 was held, this was a bench trial, and the Court was able to hear testimony concerning the circumstances of the statements. As noted by the Appellant, the Trial Court decided the Appellant's guilt based upon grounds not related to the substance of these statements. As such, the Appellant has not argued concerning the failure to conduct a separate and specific inquiry concerning CrR 3.5. It should be further noted that introduction of these statements is of no consequence as the same would have been admissible for impeachment based upon the Appellant's trial testimony that he was only in Culdesac for a very short period of time as there is no showing that these statements, even if elicited in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966), were involuntary. RP 180-181. *See* State v. Borsheim, 140 Wn. App. 357, 371-372, 165 P.3d 417(Div 1, 2007)(*"A defendant's statements are admissible as impeachment evidence, even when such statements are obtained in violation of Miranda safeguards, so long as the statements are voluntarily made."*)(*citing* Michigan v. Harvey, 494 U.S. 344, 350-51, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990); Harris v. New York, 401 U.S. 222, 223-26, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971)).

[2]The transcription of the recording (P-3) contains too many omissions to reflect a clear record of the conversation and, since the Court failed to find sufficient evidence to support the charge of Witness

The Appellant was ultimately charged in the Second Amended Information with Failure to Register as a Sex Offender (Felony)(Third or Subsequent Violation), Witness Tampering, and Escape from Community Custody. Second Amended Information, CP 19 - 21. The Appellant waived jury and the matter was tried to the Bench on May 11, 2015. CP 11, 28 - 29, RP *et. al.*

At trial, Marilyn Jones[3] testified. RP 37 - 50. Marilyn Jones owned the residence at 611 Seventh Street and rented the residence to the Appellant, with his mother, Cheryl Young, as a co-signator, up until July 27, 2014. RP 37-38, 40. The Appellant's sister took over the rental on August 1, 2014, again, with Cheryl Young as co-signator. RP 40. Ms Jones testified that, after August 1, 2014, the Appellant was not allowed to reside at the residence. RP 41. Ms Jones further testified to seeing the Appellant at the residence, apparently during the time frame that Kimberly Young was moving into the residence. RP 42. Ms Young spoke to the Appellant and told him he wasn't allowed on the property[4] and that he needed to leave. RP 42 - 43.

Tampering, designation of that exhibit to this Court seems unnecessary.

[3]Ms Jones was a colorful witness who described herself as eighty years young and was not easily directed in answering questions of counsel. RP 39. At one point, in response to the prosecutor's questioning concerning the rental agreement, Ms Jones, posed the question to the Appellant, seated at counsel table. RP 41, ln. 14.

[4]The record makes clear that there was no formal eviction, but it also appears that all parties to the rental agreement considered the Appellant to have relinquished his tenancy once his sister, Kimberly

In summation, the State argued that the Appellant had violated the registration laws when he failed to report a change of residence status. RP 223. To that point, the State argued that, either the Appellant ceased residing at 611 Seventh Street during the charged time period, or was no longer lawfully upon the premises, rendering him homeless, triggering his obligation to register as such.[5] RP 233. Additionally, the State pointed to the fact that the Appellant failed to register as required upon release on August 11, 2014, from incarceration on a supervision violation pursuant to his 2012 conviction for Failure to Register as a Sex Offender (Third or Subsequent Conviction) and as such, was guilty of the charged offense for that reason alone.[6] At the conclusion of the trial, the Trial

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Young moved in. The Appellant didn't take any steps to set aside the new rental agreement between Ms Jones and his sister, nor did he protest when told by her that he wasn't allowed on the property, and instead he claimed that he simply hid from the landlord. RP 199-200, 203 - 204

[5]The Appellant claims that the State argued at trial that the Appellant moved to Culdesac, Idaho. *See* Brief of Appellant, p. 4. The State did not argue that he had moved to Culdesac. The State pointed out that he had been found and arrested in Culdesac and told the arresting deputy that he had been "staying" there. The State pointed out that he didn't tell the officer that he was living at 611 Seventh Street in Clarkston, Washington. The State argued the fact that he didn't claim residence at 611 Seventh Street at the time of his arrest, coupled with his statement that he was "staying" in Culdesac proved that he was no longer residing at 611 Seventh Street, thus requiring him to register a new residential status with the Asotin County Sheriff's Office. To establish his guilt on this theory, the State is not required to prove where he moved to, just that he wasn't at his last registered address.

[6]The Appellant again mischaracterizes the State's argument. The State did not argue that he continued to lawfully reside at 611 Seventh

Court found the Appellant guilty of Failure to Register as a Sex Offender (Third or Subsequent Conviction) and Escape From Community Custody. CP 22 - 27, RP 239. The Court rested its finding, as to the charge of Failure to Register as a Sex Offender, on the fact that the Appellant did not register upon release from incarceration on August 11, 2014. The Court declined to determine whether the Appellant had ceased residing at 611 Seventh Street, or whether he was lawfully allowed to reside there. RP 240. While declining to decide these issues, the Court turned a jaundiced eye toward the Appellant's excuses concerning the evidence suggesting he had ceased residing at 611 Seventh Street, stating:

> The other factual scenarios that come up, I could go on ad nauseam about - talking about who to believe, who not to believe, who has what motivation and who doesn't. It was just awfully coincidental, I'll say, that all of these individuals had information that you weren't residing in the home, and for each and every instance there was a "Yes, but" kind of answer. Those issues go to credibility but I don't find it necessary to go into that based upon my findings on the statutory analysis.

RP 240.

On May 18, 2015, the Appellant appeared at sentencing and did not dispute his offender score or standard range as to either count. RP 245, 251 - 254. The Appellant merely requested a

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Street. The State consistently argued that he had ceased residing at that residence, and was upon the premises unlawfully. On this point, the State argued that it was irrelevant where the Appellant was residing since he was required to register upon release, regardless of where he was residing, and failed to do so.

sentence at the low end of the calculated standard range. RP 254. The Court imposed a sentence at the mid range of both counts, thirty-eight months and four months respectively, to be served concurrently. RP 255 - 257, CP 28 - 39. The Court also entered the Findings of Fact and Conclusions of Law as presented by the State. RP 243 - 245, CP 22 - 27. Appellant's counsel only objected to language in Findings 16 and 17, relating to credibility, which the Court confirmed as accurate recitations of the Court's ruling and entered the same over objection. RP 244 - 245. The Appellant filed timely notice of appeal. CP 41 - 61.

IV. DISCUSSION

The Appellant claims that RCW 9A.44.130(3)(a)(i) is unconstitutionally vague as applied to him, and is ambiguous as to whether he was required to register upon release on August 11, 2014. *See* Brief of Appellant, p. 11. He further complains that the Information charging him with Failure to Register as a Sex Offender failed to allege all necessary elements of the crime and was therefore legally insufficient. Finally, he asserts that the Court erred in calculating his offender score as to the conviction for Escape from Community Custody. Because his arguments are not supported by law and are based upon misconstruction or misunderstanding of the facts, as will be discussed more thoroughly below, this Court should enter a ruling denying the appeal herein.

1. <u>RCW 9A.44.130 IS NOT UNCONSTITUTIONALLY VAGUE AND CLEARLY REQUIRES ANY PERSON CONVICTED OF A SEX OFFENSE TO REGISTER UPON RELEASE FROM INCARCERATION WHICH RESULTED FROM A SEX OFFENSE</u>.

The Appellant first claims that RCW 9A.44.130(3)(a)(i) is unconstitutionally vague as applied to him. As a preliminary matter, it should be noted that the section relied upon by the State to support conviction in this matter is RCW 9.44.130**<u>(1)(a)</u>**. RP 215. It is this section that creates the Appellant's obligation to register upon release from incarceration pursuant to a sex offense. The Appellant's challenge to section (3)(a)(i) of that statute is misplaced. However, the State assumes, *arguendo*, that the Appellant's challenge goes to the section of the statute upon which the State relies, which is substantially similar language to the section assailed by the Appellant. Section (1)(a) creates the obligation to register. Section (3)(a) sets forth deadlines for registering in various circumstances.

"One who challenges a statute's constitutionality for vagueness bears the burden of proving beyond a reasonable doubt that it is unconstitutionally vague." <u>State v. Watson</u>, 160 Wn.2d 1, 11, 154 P.3d 909 (2007). A statute is presumed to be constitutional and the standard for demonstrating constitutional deficiency is high. *<u>See</u>* *<u>id</u>*. "[T]he presumption in favor of a law's constitutionality should be overcome only in exceptional cases." <u>State v. Eze</u>, 111 Wn.2d 22, 28,

759 P.2d 366 (1988). A statute is void for vagueness only if it is framed in terms so vague that "persons of common intelligence must necessarily guess at its meaning and differ as to its application." *See id*. at 26.

> The vagueness doctrine serves two important purposes: to provide fair notice to citizens as to what conduct is proscribed and to protect against arbitrary enforcement of the laws.

Id. A statute is presumed to be constitutional unless its unconstitutionality appears beyond a reasonable doubt. *See* State v. Aver, 109 Wn.2d 303, 306-307, 745 P.2d 479 (1987). Impossible standards of specificity are not required. *See id*. at 307. As stated in Eze, "Condemned to the use of words, we can never expect mathematical certainty from our language." Eze at 27. (*Quoting* Grayned v. Rockford, 408 U.S. 104, 110, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972)). In Eze, the Court went on:

> Consequently, a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct.

Id.

The issue of the constitutionality of RCW 9A.44.130 has already been decided in this State. In State v. Watson, 160 Wn.2d 1, 154 P.3d 909 (2007), the Court determined that the statute was not vague and can be readily understood to require that the sex offender

register upon release from incarceration which resulted from violation of supervision on a sex offense. Watson, at 11-12.

The Appellant acknowledges Watson, but attempts to distinguish it by inserting an unstated limitation on the holding therein, claiming that Watson holds that only incarceration for the ***original*** sex offense triggers the obligation to register upon release. Brief of Appellant, p. 18. But neither Watson nor RCW 9A.44.130(1)(a) contains this limitation. That statute provides in pertinent part:

> Any adult or juvenile . . . who has been found to have committed or has been convicted of any sex offense . . . shall register with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation, or as otherwise specified in this section. When a person required to register under this section is in custody of the state department of corrections, . . . or a local jail . . . . as a result of ***a sex offense*** . . . the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person.

RCW 9A.44.130(1)(a) (*emphasis added*).

The term "sex offense" is defined, for the purposes of this the offender registration statute at RCW 9A.44.128 as follows:

> (10) "Sex offense" means:
>
> (a) Any offense defined as a sex offense by RCW 9.94A.030;

RCW 9.94A.030(46)(a)(v)[7] further clarifies that a "sex offense" is a felony that is a:

> [F]elony violation of RCW 9A.44.132(1) (failure to register as a sex offender) if the person has been convicted of violating RCW 9A.44.132(1) (failure to register as a sex offender) on at least one prior occasion.

Here, the Appellant was on supervision for the crime of Failure to Register as a Sex Offender (Third or Subsequent Conviction) pursuant to RCW 9A.44.132(1)(b). As stated above, this is defined as a sex offense as a matter of law. His incarceration for violation of his supervision pursuant thereto, was incarceration pursuant to "a sex offense." *See* Watson, *supra*, at 8-9. When he was released from this incarceration, which was pursuant to an offense defined by law as a sex offense, based upon the plain clear language of RCW 9A.44.130(1)(a), he was required to register, regardless of whether he had moved from 611 Seventh Street, had become homeless, or returned to that residence. *See id.* at 11. As stated therein:

> [J]ust as local law enforcement needs to know when a sex offender moves to its community, it needs to know

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[7]Since the Appellant's crime this section has since been renumbered at (47)(a)(v) pursuant to Laws of 2015, ch. 287, sec, 1. The language was also amended to clarify that this definition was intended to include convictions under RCW 9A.44.130 occurring prior to June 10, 2010. *See* Laws of 2015, ch. 261, sec. 12. Prior to June 10, 2010, the penalty language was for violation of the registration law was found at RCW 9A.44.130(11). The penalties prescribed under this provision were recodified at RCW 9A.44.132 in 2010. *See* Laws of 2010, ch. 267, sec. 3.

> when a sex offender returns to the community. Consequently, the offender remains obligated to reregister upon return to the previously registered residence.

Watson, at 11. The Appellant ignores the clear logic of the statute and claims that the holding in Watson somehow dictates that only incarceration pursuant to the ***original*** sex offense triggering the obligation. This misstates and misconstrues the Court's holding. Therein, the Court held:

> We conclude that Watson has not overcome the presumption of constitutionality in this case. Because there is case law and legislative guidance available to clarify the requirements of the sex offender registration statute, we hold that it is not unconstitutionally vague as to whether sex offenders must reregister when they are released from incarceration that was due to violation of their probation for ***a sex offense***.

Id. (*emphasis added*). Even if the Appellant's argument that the incarceration must be for an offense that itself requires registration, the Appellant ignores the fact that a second or subsequent conviction for violation of RCW 9A.44.130 is a "sex offense" which triggers the obligation to register under the same statute. RCW 9A.44.130(1)(a) requires that anyone convicted of a "sex offense," as defined in RCW 9A.44.128, is required to register as a sex offender. As shown above, a second or subsequent conviction for violation of RCW 9A.44.132 (Failure to Register as a Sex Offender) ***is***, as a matter of law and statutory construction, a "sex offense." Therefore, the Appellant,

having been convicted of the sex offense of Failure to Register as a Sex Offender (Third or Subsequent Conviction) was required to register as a sex offender.

The Appellant can hardly be heard to complain about lack of knowledge. Just as in Watson, the Appellant had been reminded on several occasions (three prior convictions for violating the registration statute) of his duty to register. *See* Watson, at 4. The Appellant was not the victim of a poorly worded piece of legislation, but rather he made a conscious decision to abscond from supervision, hide from DOC officers and law enforcement, and use drugs. His claim that he did not understand his obligations to keep law enforcement apprised of his whereabouts is beyond dubious. He, like Watson, has failed to carry his burden to demonstrate that, as applied to his facts, that RCW 9A.44.130 is unconstitutional beyond a reasonable doubt. His excuses for not registering are just that: excuses.

2. RCW 9A.44.130 UNAMBIGUOUSLY AND CLEARLY REQUIRES ANY PERSON CONVICTED OF ANY SEX OFFENSE TO REGISTER UPON RELEASE FROM INCARCERATION PURSUANT TO A SEX OFFENSE.

The Appellant next argues that the RCW 9A.44.130 is ambiguous as to whether he must register after release from incarceration pursuant to his 2012 conviction for Failure to Register as a Sex Offender (Third or Subsequent Conviction). If a statute is ambiguous, the rule of lenity requires that the statute be interpreted

in favor of the defendant absent legislative intent to the contrary. *See* State v. Jacobs, 154 Wn.2d 596, 600-601, 115 P.3d 281 (2005). The rule of lenity only applies if the statute is ambiguous. *Id*. A statute is ambiguous if it is susceptible to two or more reasonable interpretations; it is not ambiguous "merely because different interpretations are conceivable." State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). Absent ambiguity, "the court must give effect to [the statute's] plain meaning as an expression of legislative intent." Jacobs, 154 Wn.2d at 600 (*quoting* Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)).

> We may determine a statute's plain language by looking to the text of the statutory provision in question, as well as the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.

State v. Larson, __ Wn.2d __, __ P.3d __, 2015 Wash. LEXIS 1451, *5 (Wash. Dec. 24, 2015) (*internal citations and quotes omitted*).

RCW 9A.44.130(1)(a) is unambiguous. This statute requires that a person who is convicted of a sex offense must register:

> Any adult or juvenile . . . who has been found to have committed or has been convicted of any sex offense . . . shall register with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation, or as otherwise specified in this section.

RCW 9A.44.130(1)(a). The next portion of that same section unambiguously states that an offender who is released from custody pursuant to a sex offense, must register upon release:

> When a person required to register under this section is in custody of the state department of corrections, . . . or a local jail . . . . ***as a result of <u>a</u> sex offense*** . . . the person ***<u>shall</u> also register*** at the time of release from custody with an official designated by the agency that has jurisdiction over the person.

RCW 9A.44.130(1)(a) (*emphasis added*). Further, as established above, RCWs 9A.44.128 and 9.94A.030(46)(a)(v) clearly, and without alternate interpretation, define a conviction for Failure to Register as a Sex Offender as a "sex offense" where the conviction is a second or subsequent violation of the offender registration statute. The statute, in no uncertain terms, required the Appellant to register upon release from custody for violation of his supervision which was pursuant to his third conviction for Failure to Register as a Sex Offender.

Appellant acknowledges that the statute unambiguously requires registration after release from custody for violation of the terms of community custody for the "original sex offense." *<u>See</u>* <u>Brief of Appellant</u>, p. 19-20. As further acknowledged by the Appellant, <u>Watson</u> as much as found that the statute was clear on this point. <u>Watson</u>, 160 Wn.2d at 8. The Appellant ignores this obvious result and argues the language of RCW 9A.44.130(3)(a)(i) is ambiguous in

requiring registration upon release. RCW 9A.44.130(3)(a)(i), as enacted at the time of the Appellant's offense stated, in pertinent part:

> OFFENDERS IN CUSTODY. (A) Sex offenders who committed ***a sex offense*** on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of ***that offense***, of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, . . . must register at the time of release from custody . . . The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence . . .

Contrary to the Appellant's arguments, this section, by its expressed terms, does not limit itself to only the "original" sex offense, but rather, by its clear terms, applies to offenders who committed ***a*** sex offense. The Appellant's arguments concerning whether the incarceration is a result of the first sex offense or any subsequent offense are specious and a "red herring." The statute does not speak in terms of original or subsequent sex offenses, only that the incarceration was the result of ***a*** sex offense. The Appellant's arguments ignore the plain and obvious fact that, prior to his release on August 11, 2014, he was incarcerated pursuant to a sex crime as defined under applicable statute. As clearly established above, and as a simple exercise of statutory construction, under the plain and unambiguous meaning of the language, the Appellant, after serving his sentence for violation of his Judgement on the sex crime of Failure to Register as

a Sex Offender, was required to register. The Appellant has failed to demonstrate ambiguity in the language of RCW 9A.44.130(1)(a) or (3)(a)(i).

Faced with this obvious result, the Appellant attempts to create ambiguity in the statute by inserting language that does not exist therein; specifically, the requirement that the incarceration be as a result of the "original" sex conviction. The term "original" does not appear in the language of the statute relating to the duty to register upon release from incarceration. *See* RCW 9A.44.130(3)(a)(i). Further, a statute must not be construed to reach an absurd or unintended result. *See* State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Under the Appellant's rewrite of the statute, an offender, once convicted of a sex offense, who has completed all incarceration and community custody terms, who subsequently commits a new sex crime, does not have to register upon release from incarceration which was the result of the new crime, since this was not the "original" offense for which the offender was required to register. The Appellant's "interpretation would require less of a twice convicted sex offender, than was required after the offender's first conviction. This is clearly not the intent of legislature:

Contrary to the Appellant's argument, the recent amendments, which now require that sex offenders must register upon release from

incarceration regardless of the origins of that confinement, make clear the legislature's intent to promote accurate tracking of sex offenders who are out of custody. *See* Laws of 2015, ch 261, sec. 3. A statute is not necessarily ambiguous or vague simply because it could be stated more clearly. *See* Aver, 109 Wn.2d at 307. The language was clear before the amendment in 2015 and limited the duty to register upon release to those cases where the offender was confined as a result of a sex offense. Now, post amendment, the language clearly expands the duty to register to all offenders release from custody, regardless of the underlying cause for incarceration. The 2015 amendment to the statute does not render the prior act ambiguous. RCW 9A.44.130 is clear in its requirement that sex offenders, such as the Appellant, upon release from custody pursuant to a sex offense as defined by the act, as was the Appellant, register pursuant to the statute. The Appellant failed to comply with the clear mandates of the law. RCW 9A.44.130 is neither vague, nor ambiguous. This appeal should be denied on this basis.

3. THE INFORMATION WAS SUFFICIENT TO INFORM THE APPELLANT THAT HE WAS ACCUSED OF FAILING TO COMPLY WITH THE REQUIREMENTS OF RCW 9A.44.130, IN VIOLATION OF RCW 9A.44.132.

The Appellant claims that the Information herein, as it relates to the charge of Failure to Register as a Sex Offender was insufficient. This argument is premised upon a claim that it failed to

aver all the necessary elements of that crime. A charging document is constitutionally adequate if it sets forth the essential elements of the charged offense. U.S. Const. amend. VI (“*In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.*”); Const. art. I, § 22 (amend. 10),(“*In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him.*”); State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). To determine the elements of a crime, a court looks at the language of the statute. *Id*. at 101. RCW 9A.44.132(1) describes the crime of Failure to Register as a Sex Offender and states:

> A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

Since, as discussed above, the plain language of this statute is unambiguous, the Court need not construe the statute. *See* State v. Cooper, 176 Wn.2d 678, 683, 294 P.3d 704 (2013). Under the clear and unambiguous language of the statute, the elements of the crime of Failure to Register as a Sex Offender are: a duty to register (i.e. a prior conviction for a felony sex crime) and a knowing failure to comply with the requirements of RCW 9A.44.130. *See* State v.

Peterson, 145 Wn.App. 672, 677 - 678, 186 P.3d 1179 (Div. I, 2008); *aff'd*, 168 Wn.2d 763, 230 P.3d 588 (2010).

In the case at bar, the Second Amended Information alleged in Count I:

> That on or about and between the 8th day of July, and 14th day of November 2014, in Asotin County, Washington, the Defendant, having previously been convicted of a felony level sex offense, being required to register pursuant to RCW 9A.44.130, and having been convicted in this state of a felony failure to register as a sex offender on two or more prior occasions, knowingly failed to comply with any of the requirements of RCW 9A.44.130.

CP 19. The Appellant contends that the charging language omits a necessary alternative means of committing the crime of Failure to Register as a Sex Offender. Noticeably absent from the Appellant's argument is any identification or statement as to what the "missing" element would or ought to be.

A charging document is constitutionally adequate if it sets forth the essential elements of the charged offense. *See* State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)(*Citations omitted*). "The purpose of this 'essential elements' rule is to give notice of the nature and cause of an accusation against the accused so that a defense can be prepared." State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). "[T]he question . . . is whether all the words used would

reasonably apprise an accused of the elements of the crime charged." Kjorsvik, 117 Wn.2d at 109.

When sufficiency of an information is raised for the first time on appeal, courts liberally construe the charging document in favor of validity on appeal. *See* Campbell, 125 Wn.2d at 801; Kjorsvik, 117 Wn.2d at 105. In liberally construing the information, the Court is to determine whether the elements of the offense "appear in any form, or by fair construction can ... be found, in the charging document." Kjorsvik, 117 Wn.2d at 105.

At the core of his argument, the Appellant claims that the crime of Failure to Register as a Sex Offender is an alternate means crime. The Washington Supreme Court has already rejected this claim. *See* State v. Peterson, 168 Wn.2d 763, 771, 230 P.3d 588 (2010). Therein, the Court affirmed the decision of Court of Appeals and stated, "We hold that the failure to register is not an alternative means crime." *Id*. Previously, the Court of Appeals had determined: "For a sex offender, like Peterson, there is only one means of committing a crime—knowingly failing to register as required by RCW 9A.44.130(1)(a)." *See* State v. Peterson, 145 Wn. App. 672, 678, 186 P.3d 1179 (Div. I, 2008).

The Appellant attempts to avail himself of a subsequent decision of Division II of the Court of Appeals that called into question

the Supreme Court's broad ruling. In State v. Mason, 170 Wn.App. 375, 285 P.3d 154 (Div. II, 2012), the sufficiency of the Information was challenged and the Court therein questioned whether, under certain circumstances, the crime might have alternate means. *Id.* at 381 - 382. However, this discussion can be viewed as *dicta*, since ultimately, the Court declined to consider the issue as the defendant therein failed to adequately raise and brief the issue. *Id.* at 384. Therein, the Court asserted that the holding in Peterson is limited to violations involving change in residency status. *Id.* at 380 - 381. The Mason Court discussed several provisions of the statute, the violation of which would support conviction under RCW 9A.44.130. *Id.* at 381 - 382. However, it should be noted that, none the examples discussed in Mason, which that Court characterized as possible alternate means of violating the statute, involve the provision at issue herein, and none involve a change in residency. *See id.* However, in light of the Court's determination not to reach the issue and resolve the matter on other grounds, such discussion is clearly *obiter dicta*.

> Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.

State v. Potter, 68 Wn.App. 134, 150, 842 P.2d 481 (Div. II, 1992) (*citation omitted*).

In determining that the offender's residency status is not an essential element of the offense of Failure to Register as a Sex Offender, the Supreme Court stated:

> The "elements of a crime" are commonly defined as "'[t]he constituent parts of a crime—[usually] consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction.'" State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009) (*quoting* Black's Law Dictionary 559 (8th ed. 2004)). Although Peterson is correct that a registrant's residential status informs the deadline by which he must register, it is possible to prove that a registrant failed to register within any applicable deadline without having to specify the registrant's particular residential status. That is what happened here. Peterson registered outside of any deadline contained in the statute. It was therefore unnecessary to show his particular residential status in order to prove a violation of the statute.

State v. Peterson, 168 Wn.2d at 772. The Appellant contends that his violation (i.e. failure to register upon release) is distinguishable from the violation in Peterson. In Peterson, the offender vacated his residence and did not notify the sheriff in that jurisdiction. Peterson, at 766 - 767. The State had no information thereafter as to his residency status or location until his subsequent arrest. *Id*. at 767. On appeal, the offender argued that his residency status was a necessary element that the State had the burden to prove. *Id*. at 769 770. As stated above, this argument was soundly rejected by the Supreme Court. *Id*. at 772.

The Appellant claims that, because Peterson involved a change in residency, his case is distinguishable, as the event triggering the obligation to register in his case was his release from incarceration. This argument ignores a fundamental fact of incarceration: release therefrom is a change in his residency status which substantially impacts the ability of law enforcement to locate him. As recognized in Watson, *supra*, "[T]he 'purpose behind sex offender registration is to assist law enforcement agencies' protection efforts.'" Watson, 160 Wn.2d at 9-10 (*citations* omitted). The Court went on to explain:

> This purpose is served by requiring sex offenders to register their address when they are first released and requiring reregistration when they move. However, it is also served by requiring reregistration when they are released from jail after violating their probation on the sex offense. Reregistration at such a time informs law enforcement that a potentially dangerous offender is returning to a residence in their area, which enables law enforcement to take any precautions necessary to protect their community. This information does not lose its usefulness to law enforcement simply because, as in this case, the offender can still be found at the same address registered prior to incarceration. It still informs law enforcement of a change in the sex offender's whereabouts—from jail or prison to the previously registered address—and notifies law enforcement of the presence of a potential danger.

Id. at 10. The Washington Supreme Court recognized that release from incarceration is not a technical event but a significant and substantial change in residential status, equal to that of moving from

one house to another. The Court used a hypothetical to demonstrate the significance of requiring registration upon release:

> If a sex offender moved to a residence next door to the local jail and then moved back to his or her previous residence, the statute would clearly require reregistration upon each move. Although incarceration and release are certainly not the same as moving voluntarily, the treatment of this situation under the registration statute provides a useful comparison. Local law enforcement does not need to know that a sex offender is reincarcerated in order to protect the community, so the sex offender need not reregister upon entry into the jail or prison; the fact that the offender physically relocated to a jail, rather than a private residence, essentially relieves him or her of this obligation. However, just as local law enforcement needs to know when a sex offender moves to its community, it needs to know when a sex offender returns to the community. Consequently, the offender remains obligated to reregister upon return to the previously registered residence.

Watson, 160 Wn.2d at 10-11.

The Courts recognition of this crucial point applies *a fortiori* where the Appellant herein left incarceration and reported only once to DOC, advising the officer that he wasn't sure where he would be residing. He never stated he intended to return to the 611 Seventh Street address upon release. His claim at trial, and *sub silentio*, on appeal, that he continued to lawfully reside at 611 Seventh Street is dubious based upon his admission to CCO Vogeler that he would be homeless when released. It is further rendered specious as the Appellant could not be located at the residence thereafter, his sister's

statement to law enforcement who came looking for him,[8] and the landlord's testimony that he was told he could not be at the 611 Seventh Street residence. It is finally laid in the grave by his arrest in Culdesac, Idaho, months later. However, regardless of whether he continued to reside at 611 Seventh Street after his release on August 11, 2014, law enforcement had no way to know where he was staying, or even where he was claiming to stay, during his three month hiatus. RCW 9A.44.130 imposes a duty upon the Appellant to provide accurate and up to date information regarding his living arrangement. Just as in Peterson, his release from custody on August 11, 2014 was a change in residency status and he was obligated to update his residency information with the Asotin County Sheriff's Office. After three prior convictions, he was painfully aware of his obligation to do so. The Information filed in this matter adequately notified the Appellant of the necessary elements pursuant statute and case law.

The Appellant claims that the State charged inconsistent alternate means. *See* Brief of Appellant, at 25-26. Having established that the crime charged is not an "alternate means" and that the State charged the only means for which the statute provides, this argument

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[8]The Appellant expresses concern regarding the failure of trial counsel to object to introduction of these statements of the sister, as well as the statements of the "movers," on July 8, 2015. Raising an issue in a footnote is insufficient to command appellate review. *See* St. Joseph Gen. Hosp. v. Dep't of Revenue, 158 Wn.App. 450, 472-473, 242 P.3d 897 (Div. II, 2010)(*citing* State v. Johnson, 69 Wn.App. 189, 194 n.4, 847 P.2d 960 (Div. I, 1993).

necessarily fails. However, the Appellant's argument lacks basis in fact as well. In support thereof, the Appellant claims that the State pursued separate, and mutually exclusive alternate means. Specifically, he claims that the State argued at trial that he became homeless or moved to moved to Culdesac, Idaho, and did not return to 611 Seventh Street, that he returned to 611 Seventh Street unlawfully, and that he failed to register upon release on August 11, 2014. As noted in the fact section, the Appellant has mischaracterized the State's arguments and theory of prosecution.

It was unnecessary for the State to prove his residency status after release. Peterson, 168 Wn.2d at 774. All the State was required to prove was that any event had occurred which triggered his obligation to register. *See id*. at 773. The trigger, as argued by the State at trial, was that the Appellant ceased having a "fixed residence" at 611 Seventh Street. RCW 9A.44.130(3)(a)(vii) and (4) require him to register if he changes his fixed residence, or ceases having a fixed residence. RCW 9A.44.128 defines a "fixed residence" as a "building that a person lawfully and habitually uses as living quarters a majority of the week." Here, the State asserted that the Appellant's duty to register was triggered when he vacated the residence and supported this claim with testimony from DOC officers who attempted to contact him there and the landlord who testified that he had voluntarily vacated and the residence was being rented to another person. The

State offered further evidence to show that he was no longer lawfully allowed to reside at that residence. These facts are not mutually exclusive as it relates to the State's burden to demonstrate that the Appellant was obligated to register after some event. To hold otherwise would fly in the face of reason. As recognized in Peterson:

> Reduced to its essentials, Peterson's argument is that an offender who successfully hides his whereabouts after moving cannot be convicted of failure to register despite clear evidence that he failed to register within any statutorily prescribed deadline.

Peterson, at 744. The operative fact to be proved by the State at trial was that the Appellant was no longer lawfully residing at the residence at 611 Seventh Street. That this fact might be proven through different evidence is of no consequence.

In the alternative and as more fully discussed above, the Appellant's duty to register was triggered by his release from custody on August 11, 2014. This fact is in addition to the other facts which may have triggered his obligations under the statute. The Appellant makes a conclusory assertion that these alternate theories are repugnant to one another. Even cursory discussion of the facts reveals this claim to be completely without merit. The Appellant could certainly have 1) left custody, triggering his obligation to register, and 2) ceased lawfully residing at 611 Seventh Street, also triggering his obligation to register.

Alternative means of committing a crime are not repugnant to each other unless the proof of one will disprove the other. State v. Allen, 127 Wn.App. 125, 132, 110 P.3d 849 (Div. I, 2005)(*quotes and citation omitted*). First, and not to unduly stress the point, the Appellant was not charged with a crime that contains alternate means. Further, under these facts, proof that the Appellant was released from custody does not disprove the proposition that he ceased lawfully residing at 611 Seventh Street. Both propositions can be true, and, although the Trial Court only conclusively found that the Appellant failed to register after release from custody, the State continues to assert that the Appellant also ceased lawfully residing at the residence. His reliance on State v. Bray, 52 Wn.App. 30, 756 P.2d 1332 (Div. I, 1988), is misplaced because RCW 9A.44.130 does not create an alternate means offense, nor did the State charge or proceed on repugnant theories.

To the extent the Appellant's assertions can be construed as a vagueness challenge to the Information, the Appellant's claim must likewise fail.

> Washington courts distinguish between charging documents that are constitutionally deficient because of the State's failure to allege each essential element of the crime charged and charging documents that are factually vague as to some other significant matter. The State may correct a vague charging document with a bill of particulars. Mason failed to request a bill of particulars at trial, thus, he waived his vagueness challenge. Therefore, we hold that Mason waived his challenge on appeal to any vagueness in the charging

> document. Moreover, Mason does not contend that the language used in the charging document prejudiced him. We reject Mason's challenges to the information.

State v. Mason, 170 Wn.App. at 385 (*citing* State v. Winings, 126 Wn.App. 75, 84, 107 P.3d 141 (2005), and State v. Leach, 113 Wn.2d 679, 686-87, 782 P.2d 552 (1989)). The Appellant also did not request a Bill of Particulars. Any such claim is therefore waived and should not be considered. *See Id*. *See also* RAP 2.5(a).

Because the crime defined in RCW 9A.44.132 is not an alternate means crime, the Information was not defective. The language used in the Second Amended Information was virtually identical to language used in Peterson, which was affirmed. Further, because the Appellant failed to seek a bill of particulars, he waived any claim regarding vagueness of the charging document.

4. THE COURT PROPERLY CALCULATED THE APPELLANT'S OFFENDER SCORE RELATING TO HIS CONVICTION FOR ESCAPE FROM COMMUNITY CUSTODY

As a last resort, the Appellant claims that the Court incorrectly calculated his offender score as to the charge in Count III of Escape from Community Custody. *See* Brief of Appellant, p. 27. To that end, the Appellant asserts that the Court incorrectly added one point to his offender score on that charge based upon his status as serving a period of community custody at the time of commission of the offense. The Appellant claims that since he must necessarily be on community

custody to commit the offense, the sentencing court cannot add a point pursuant to RCW 9.94A.525(19).

As a starting point, this Court should decline to accept review of this unpreserved issue. RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. State v. Guzman Nunez, 160 Wn.App. 150, 157, 248 P.3d 103 (Div. III, 2011)(*citing* State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)); *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012)). Not only did the Appellant not object below, he was specifically asked if there was a dispute as to the offender score and counsel stated that there was not. RP 245. Later, during counsel's argument to the Court on sentencing, he specifically stated that there was no disagreement as to his standard range. RP 251 - 254. The Appellant acknowledges in a footnote that this claim, if granted, would only impact his sentence on the conviction for Escape from Community Custody. *See* Brief of Appellant, p. 30. The sentence of four months and would have no practical effect on his overall sentence, since it is being served concurrently, and as such, further discussion and consideration is merely an academic exercise with no practical consequences. *See* State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995)(*"Ordinarily, this court will not consider a question that is purely academic."*). While recognizing that a claim of sentencing error may be raised for the first time on appeal, under

these circumstances, the State would request this Court decline to do so. *See* State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)(*"In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal."*)(*emphasis added*).

The Appellant first claims that the statute is ambiguous. As discussed above, a statute is only ambiguous if it is susceptible to two or more ***reasonable*** interpretations; and not "merely because different interpretations are conceivable." State v. Tili, 139 Wn.2d at 115.65 (1999). Absent ambiguity, the plain meaning controls as an expression of legislative intent." State v. Jacobs, 154 Wn.2d at 600.

RCW 9.94A.525(7) provides the general rule for scoring prior felony convictions for nonviolent offenses. That statute provides:

> If the present conviction is for a non-violent offense and not covered by subsection (11), (12), or (13) of this section, count one point for each adult prior felony conviction and one point for each juvenile prior violent conviction and ½ point for each juvenile nonviolent felony conviction.

RCW 9.94A.525(7). Under that section, all felony convictions (except for those that have "washed out" under RCW 9.94A.525(2)) contribute to the offender score for nonviolent offenses, of which Escape from Community Custody is defined by statute. *See* RCW 9.94A.030(33) and (54). As an exception to the scoring rules generally applicable to counting prior felony convictions, RCW 9.94A.525(14) states:

> If the present conviction is for Escape from Community Custody, RCW 72.09.310, count only prior escape convictions in the offender score. Count adult prior escape convictions as one point and juvenile prior escape convictions as ½ point.

The clear implication of this statute is to elimate from consideration in the offender score all convictions except those defined as escape convictions (defined at RCW 9.94A.030(24)) from the computation.

RCW 9.94A.525(19) unequivocally provides, in pertinent part, "If the present conviction is for an offense committed while the offender was under community custody, add one point." The Appellant attempts to introduce ambiguity by arguing that a person cannot commit the crime of Escape from Community Custody without being under community custody. This does not create ambiguity. Further, the Appellant's reliance on the word "only" in (14) likewise does not make the mandate in subsection (19) ambiguous. The use of the term "only" relates to counting of felony convictions. In other terms, the statute is merely clarifying that only prior escape convictions are scored, in contravention of the ordinary rule that felony convictions for any crime are counted. As further confirmation, subsection (19) states that it is applicable to any conviction for any offense and does not except from its application any crimes.

Had the legislature intended that (19) and its mandated point for community custody not apply to the crime of Escape from Community Custody, it certainly could have so excluded it in either

section (14) or (19). The Legislature could have stated in subsection (14) that (19) was inapplicable, or (19) could exempt violations of RCW 72.09.310 from its instruction to add a point to any offense.

There are examples where the Legislature has expressly exempted application of a statute to certain situations. RCW 9.94A.533(3) provides for enhanced penalties for crimes committed while armed with a firearm. Subsection (f) provides:

> The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possession of a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first or second degree and use of a machine gun in a felony.

These are all crimes which necessitate, as an element fo the crime, the possession or use of a firearm. On the other hand, the Legislature has not exempted application of a deadly weapon enhancement to the crime of Assault in the Second Degree predicated on an assault with a deadly weapon. *See* State v. Aguirre, 168 Wn.2d 350, 366, 229 P.3d 669 (2010)("*Washington courts repeatedly have held that double jeopardy is not offended by weapon enhancements even when being armed with the weapon is an element of the underlying crime.*").

That an elemental fact might also increase the offender score is not peculiar to the crime of Escape from Community Custody. In the area of Felony Driving Under the Influence, the prior convictions which elevate the charge from a gross misdemeanor to a felony are

also included in the calculation of the offender score. *See* RCW9.94A.525(2)(e). The statute is not ambiguous and the Trial Court properly calculated his offender score.

Despite his acknowledgment that this claim of error should only impact his sentence on the conviction for Escape from Community Custody, he attempts to infect the sentence on Count 1 of Failure to Register as a Sex Offender with a whole new level of disjointed logic. He claims that the Court "double counted" the fact that he was on supervision in his offender score. This claim is factually unsupportable as simple discussion of the facts shows.

The Appellant was convicted of Failure to Register as a Sex Offender. When he committed this crime, he was on supervision. This adds a point to his offender score. *See* RCW 9.94A. 525(19). The Appellant failed to report to DOC and hid from them. He was therefore convicted of Escape from Community Custody. This added an additional point as a current offense. *See* RCWs 9.94A.525(18) and 9.94A.589(1)(a). The Appellant's argument presupposes that he could not have committed the crime of Failure Register without committing Escape from Community Custody. This is simply a faulty premise. Had the Appellant reported to DOC after his release and thereafter, but still failed to register after release as required, he would still be guilty of Failure to Register and would receive a point for being under community custody. He would not be guilty of Escape from

Community Custody, since, while not registering, he was reporting to DOC. Further, had the Appellant merely failed to report to DOC but registered with the sheriff's office upon release, he would only be guilty of Escape from Community Custody and not Failure to Register. His argument that he is being doubly punished for the same crime is not well taken.

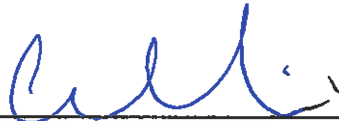
The Appellant complains, "This essentially penalized Young twice for failing to register while on community custody." Brief of Appellant, p. 31. This too is a false statement. The Appellant was punished once for failing to register. The Appellant was punished more harshly because he was on supervision at the time he chose to ignore his obligations to register as a sex offender. Imposition of one additional point on the Appellant's conviction for Escape from Community Custody imposes no greater punishment than the Legislature intended. *See* State v. Larkin, 70 Wn.App. 349, 853 P.2d 451 (Div. I, 1993). Adding a point to the offender score for violations of community placement is rationally related to the State's interest in protecting the public. *See* State v. Miles, 66 Wn.App. 365, 368, 832 P.2d 500, *review denied*, 120 Wn.2d 1012, 844 P.2d 435 (Div. III, 1992). Community custody inmates are subject to an additional point on their offender score because the Legislature chose to deal more severely with them for the protection of the community. The Appellant's offender score was properly calculated.

V. CONCLUSION

RCW 9A.44.130 is constitutional. It is neither ambiguous nor is it vague. The Appellant was and has been adequately advised of his obligations thereunder and has, yet again, chosen to ignore his duties. The Second Amended Information adequately apprized the Appellant of the essential elements of the crime for which he was charged. Upon conviction, the Appellant, having agreed with the State's calculation of his offender score, was properly sentenced. This Court should deny this appeal. The State respectfully requests that this Court enter a decision upholding the statute and affirming the Appellant's conviction and sentence.

Dated this 20th day of January, 2016.

Respectfully submitted,



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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. STEVEN K. YOUNG, Appellant.	Court of Appeals No: 33416-3-III **DECLARATION OF SERVICE**

DECLARATION

On January 20, 2016 I electronically mailed, with prior approval from Ms. Swift, a copy of the BRIEF OF RESPONDENT in this matter to:

MARY T. SWIFT
Swiftm@nwattorney.net

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on January 20, 2016.

LISA M. WEBBER
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