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JUL 06 2009

King County Prosecutor
Appellate Unit

NO. 62962-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

CLARENCE BENNETT, JR.,

Appellant.

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

The Honorable Bruce Heller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's failure to set forth all essential elements of the crime in the to-convict conviction instruction denied appellant his right to due process.¹

2. The trial court's failure to instruct the jury it must find each element of the crime beyond a reasonable doubt denied appellant his right to due process.

3. The sentencing court erred when it failed to exercise its discretion in imposing a non-mandatory DNA collection fee on the ground it was mandatory.

4. The sentencing court's retroactive application of the amended DNA collection statute violates the constitutional prohibition on ex post facto laws.

5. Appellant was deprived of effective assistance of counsel at sentencing.

6. The sentencing court incorrectly required HIV testing as part of appellant's judgment and sentence.

¹ This Court's reached a contrary result in State v. Peterson, 145 Wn. App. 672, 186 P.3d 1179 (2008), review granted, 165 Wn.2d 1027 (2009). The Supreme Court granted review on March 3, 2009 but as of July 7, 2009 an argument date has not been set.

Issues Pertaining to Assignments of Error

1. Did the trial court's failure to instruct the jury on each element of failure to register as a sex offender (1) violate appellant's right to a complete to-convict instruction and (2) deprive appellant of his due process right to have the jury determine each element of the charged crime beyond a reasonable doubt?

2. The sentencing court waived all other non-mandatory legal financial obligations based on appellant's indigency, but imposed a non-mandatory DNA collection fee on the mistaken view the fee was "mandatory." Did the court err by failing to exercise its discretion?

3. Did the sentencing court's retrospective application of the amended DNA collection fee statute violate the constitutional prohibition on ex post facto laws?

4. Was trial counsel ineffective for failing to object to the imposition of an inapplicable "mandatory" DNA collection fee?

5. Did the sentencing court err when it incorrectly required HIV testing as part of appellant's judgment and sentence?

B. STATEMENT OF THE CASE²

The State charged appellant Clarence Bennett, Jr. with failure to register as a sex offender under RCW 9A.44.130³ between January 1 and April 30, 2008. CP 1-4. The information alleged Bennett knowingly failed to comply with one of five possible registration requirements under the statute. CP 1.

The State sought to prove two of the five alternatives at trial.

Under the first requirement,

Any person required to register under this section who lacks a fixed residence shall provide written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence.

RCW 9A.44.130(6)(a). Alternatively, under the second,

If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send written notice of the change of address to the county sheriff within seventy-two hours of moving.

RCW 9A.44.130(5)(a).

² This brief refers to the verbatim report of proceeding as follows: 1RP – 9/19/08, 9/25/08, 10/1/08 (excluding sealed transcript of Bennett’s motion to discharge his attorney), 10/2/08, 10/3/08 and 3RP – sentencing. This brief does not contain any references to 2RP (sealed motion to discharge attorney).

³ The complete statute is attached as an Appendix.

Bennett stipulated he was previously convicted of a felony sex offense that required him to meet RCW 9A.44.130 registration requirements during the charging period. CP 11; 1RP 110.

Bennett's father, Clarence Bennett, Sr., testified Bennett lived with him between November 2007 and March 2008, when the father told Bennett to leave. 1RP 46-47. Bennett then stayed with his sister. 1RP 46. Bennett Sr. boxed Bennett's belongings and gave them to Bennett. 1RP 50, 53-54. Bennett Sr. continued to receive mail for his son and they occasionally spoke on the phone. 1RP 47.

About five months before trial and after Bennett moved out, a police officer came to the apartment looking for Bennett. 1RP 48.

On January 2, 2008, Detective Douglas Garrett of the Kent Police Department sent a certified letter to Bennett's last known address requesting confirmation Bennett resided there. 1RP 56, 60. Garrett received confirmation that Bennett Sr. signed for and returned the letter on January 11. 1RP 59. After waiting a few weeks and receiving no response from Bennett, Garrett sent police officers to the apartment. 1RP 60. Another police officer testified Bennett was not at home when he went to the apartment on February 5. 1RP 69-71.

On February 8, 2008, Garrett spoke with Bennett after receiving a message Bennett called the night before. 1RP 61-62. Bennett told Garrett

he had not stayed at his father's residence for a few months and lived "here and there" while working at the union hall to earn enough money for his own place. 1RP 62.

Garrett advised Bennett to register as homeless. 1RP 62. On April 30, 2008, the King County Sherriff's records custodian searched Bennett's file and learned Bennett last registered an address change in December 2006. 1RP 84-85, 90, 108. Had Bennett notified the sheriff he was homeless, he would have been required to sign the log of homeless sex offenders each week. 1RP 107.

Bennett testified he moved in with his father in December 2006 and registered the address change as required. 1RP 117. Bennett lived with his father during January 2008, housesat for his sister between February 3 and March 14, 2008, and shuttled back and forth between his father's and sister's homes the rest of March and April. 1RP 120, 138-41. Bennett kept some items at his father's residence and some at his sister's. He nevertheless acknowledged he rarely slept at his father's home after early February. 1RP 118-19, 139-41. Bennett said he and his father had a disagreement, but he denied his father asked him to leave. 1RP 120-21. Bennett explained his father had memory problems due to early-stage Alzheimer's disease. 1RP 117.

Bennett never saw Detective Garrett's letter. 1RP 124. He vaguely recalled a February 2008 conversation with a police officer. 1RP 124. Bennett reached the police officer at a number left on his sister's answering machine. 1RP 124-25. But he was certain he did not tell the police officer that he was homeless because he was never homeless. 1RP 125-26. Likewise, he would not have told the police officer he was house-sitting for his sister, who was hospitalized at the time, because he did not believe his sister's situation was the officer's business. 1RP 125-26, 138.

Bennett knew he had to register a change of residence but insisted he never moved. 1RP 131. Bennett did not know of the registration requirements if he lacked a fixed address, but he always had a fixed address. 1RP 137.

After the jury retired for deliberation, it submitted the following question to the court: "Can we obtain the stipulation or the date it was made?" CP 28. On agreement of the parties, the court informed the jury the stipulation (which the court read to jurors) would be treated as testimony and therefore would not be repeated. 1RP 178.

The jury convicted Bennett as charged. CP 27.

C. ARGUMENT

1. THE STATE'S "TO-CONVICT" INSTRUCTION FAILS TO SET FORTH EACH ESSENTIAL ELEMENT OF THE CRIME AND FAILS TO INFORM THE JURY IT MUST FIND EACH ELEMENT BEYOND A REASONABLE DOUBT.

Rather than placing the alternative means of committing the charged crime in the "to convict" instruction, the trial judge erroneously placed them in a confusing "definitional" instruction. In doing so, the court also failed to inform the jury it must find each element beyond a reasonable doubt. Because the State cannot prove these errors were harmless beyond a reasonable doubt, this Court should reverse Bennett's conviction.

a. Introduction to Applicable Law

“[E]lements [of the crime]’ are ‘[t]he constituent parts of a crime . . . that the prosecution must prove to sustain a conviction.’” State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005) (quoting Black's Law Dictionary 559 (8th ed. 2004)). With a few limited exceptions not applicable here, all statutory elements must appear in the to-convict instruction. State v. Mills, 154 Wn.2d 1, 7-10, 15, 109 P.3d 415 (2005) (approving bifurcated to-convict instructions in limited class of cases).

A proper “to convict” instruction need not contain all pertinent law such as “definitions of terms, duties of the jury to disregard statements that are not evidence, and so forth.” Id. at 8 (citing State v. Emmanuel, 42 Wn.2d

799, 259 P.2d 845 (1953)). But where the court issues a summary instruction setting forth each element necessary to convict, the instruction must contain all elements of the charged crime "because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). Failure to include every element in the to-convict instruction is constitutional error an appellant may raise for the first time on appeal. Mills, 154 Wn.2d at 6. This Court reviews the adequacy of a "to convict" instruction de novo. DeRyke, 149 Wn.2d at 910.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). This Court will, therefore, reverse a conviction if the jury instructions relieve the State of its burden of proving every element beyond a reasonable doubt. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

b. The Trial Court's Instructions, While Arguably Consistent With *Peterson*, Violate Due Process.

The trial court's to-convict instructions omitted statutory elements of the crime and placed the alternative theories of guilt in a confusing "definitional" instruction that failed to adequately explain its relation to the

to-convict instruction. By so instructing the jury, the court also failed to inform the jury it must find each element of the charged crime beyond a reasonable doubt.

The court's "to convict" instruction states:

To convict the defendant of the crime of failure to register as a sex offender as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the time intervening between January 1, 2008 and April 30, 2008 the defendant was required to register as a sex offender;

(2) That during the time intervening between January 1, 2008 and April 30, 2008 the defendant knowingly failed to comply with the requirements of sex offender registration;

(3) That these acts occurred in the State of Washington.

CP 24 (Instruction 7); Supp. CP ___ (sub no. 21, Plaintiff's Proposed Instructions).

A separate instruction purports to define what constitutes such failure to comply. That instruction states:

A person commits the crime of failure to register as a sex offender when that person, having been convicted of a sex offense for which he is required to register as a sex offender with the county sheriff's office, [1] knowingly fails to send signed written notice of a change of address to the county sheriff within seventy-two hours of moving to a new residence within the same county or [2] knowingly fails to comply with the requirement that the defendant who had a fixed residence, send a signed written notice of where the defendant plans to stay to the sheriff of the county where the defendant last registered within forty-eight hours, excluding weekends and holidays, of ceasing to have a fixed residence.

CP 22 (Instruction 5); RCW 9A.44.130(5)(a) and (6)(a); Supp. CP __ (sub no. 21, supra).

Instruction 5 is confusing because it defines the crime of “failure to register as a sex offender.” But Instruction 7, the to-convict instruction, contains no such language. The closest language appears in the second element of the “to-convict” instruction: “the defendant knowingly failed to comply with the requirements of sex offender registration.” But nowhere do the instructions define “the requirements of sex offender registration.” Nor do the instructions specify the only way the State could prove the second element beyond a reasonable doubt was to prove either the first or second alternative under Instruction 5.

Nonetheless, this instructional scheme appears to be an attempt to comply with this Court’s decision in State v. Peterson, 145 Wn. App. 672, 676-78, 186 P.3d 1179 (2008), review granted, 165 Wn.2d 1027 (2009), which was decided about three months before trial. Peterson holds RCW 9A.44.130(5)(a) and (6)(a) merely define the crime of failing to register. Under Peterson, these statutory provisions set forth neither elements nor “alternative means” of committing the crime but rather define the offense of failing to register. 145 Wn. App. at 678. This Court thus rejected Peterson’s argument that the State presented insufficient evidence of the crime when it

presented evidence he moved from his registered address but not which statutory registration requirement was triggered. Id. at 677.

The instructional scheme the court used here, however, is not simply confusing. The instructions also violate Bennett's due process right to a to-convict instruction listing each element of the crime, including the alternative means set forth under RCW 9A.44.130 (5)(a) and (6)(a). Similarly, the scheme violates Bennett's right to be proven guilty of each element of the crime beyond a reasonable doubt.

- c. The "To-Convict" Instruction Fails to List Each Element of the Crime; It Thus Fails to Inform the Jury It Must Find Each Element of the Crime Beyond A Reasonable Doubt.

This Court reviews questions of statutory interpretation de novo. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). The goal of statutory construction is to carry out legislative intent. Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002). When the meaning of a statute is clear on its face, this Court assumes the Legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). "In determining the elements of a statutorily defined crime, principles of statutory construction require the court to give effect to all statutory language if possible." Smith, 155 Wn.2d at 504.

"Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). In Smith, for example, the Supreme Court recognized the separate subsections in the assault statutes represented alternative means of committing the same offense, whereas the three unmodified common law assault definitions did not constitute alternative means. Id. at 784-85.

While statutes that merely define terms do not create alternative means of committing the crime, the registration statute is "different in kind from those definition statutes that merely elaborate upon various terms or words." State v. Linehan, 147 Wn.2d 638, 646, 648, 56 P.3d 542 (2002). RCW 9A.44.130 articulates a single criminal offense: failure to register as a sex offender. Numerous subsections detail the means by which the offense may be committed. Subsections (5)(a) and (6)(a), listing different obligations based on residential status, represent alternative means of committing the offense. Smith, 159 Wn.2d at 784-85.

Under the statutory scheme, therefore, a predicate to such failure is the residential status of the accused. In other words, status as a sex offender is itself insufficient to create an obligation to register under the applicable

statues. Cf. RCW 9A.44.030(7) (“All offenders who are required to register pursuant to this section . . . who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered.”).

Reading the statute as creating alternative means based on residential status is also consistent with this Court’s earlier interpretations of the statute. Under RCW 9A.44.130(6)(a), for example, the State needed to prove Bennett was homeless. See State v. Stratton, 130 Wn. App. 760, 766-67, 124 P.3d 660 (2005) (conviction reversed for insufficient evidence where the State failed to prove Stratton lacked a fixed residence but was convicted for failure to register as transient under RCW 9A.44.130(6)(a)). Under RCW 9A.44.130(5)(a), the State needed to prove Bennett moved to a residential address without properly notifying authorities. See State v. Pickett, 95 Wn. App. 475, 478-80, 975 P.2d 584 (1999) (conviction reversed for insufficient evidence where State charged homeless sex offender with failing to register a residential address); cf. State v. Pray, 96 Wn. App. 25, 980 P.2d 240, (temporary habitation may be a “residence” for purposes of registration requirement), review denied, 139 Wn.2d 1010 (1999). Similarly, this Court has recognized RCW 9A.44.130(5)(a) creates distinct legal duties depending on whether residence remains within the county and that the failure to comply with any one duty is a violation of the registration statute. State v.

Vanderpool, 99 Wn. App. 709, 713, 995 P.2d 104 (2000). That would not be the case if the subsections were merely definitional.

The trial court did not instruct the jury it was required to find Bennett's residential status (set forth in Instruction 5) beyond a reasonable doubt. Based on Instruction 7, the to-convict instruction, the jury thus could have convicted Bennett by concluding he did not register during the charging period, which is an uncontroverted fact. But this does not satisfy the elements of the statute because there is no general, catchall "failure to register" provision among the alternative means listed.

This Court worried in Peterson that to construe the statute as creating alternative means would lead to "strange" or even "absurd" results. 145 Wn.2d at 677. But as long as a statute remains rational on the whole, the courts will not correct omissions or perceived errors in particular provisions. Delgado, 148 Wn. 2d at 730. In other words, courts will not, "arrogate to [themselves] the power to make legislative schemes more perfect, more comprehensive and more consistent." State v. Taylor, 97 Wn.2d 724, 729, 649 P.2d 633 (1982). Yet even after this Court's decisions in Stratton and Pickett, the Legislature has not included a "catchall" failure to register provision, and residential status thus remains an element of the crime. This Court should therefore reconsider its decision in Peterson.

d. The Constitutional Violations Were Not Harmless Beyond A Reasonable Doubt.

Bennett anticipates the State will argue that even if the to-convict instruction failed to list each essential element of the crime, any error was harmless beyond a reasonable doubt because a separate instruction informed the jury of the means in which a violation of the registration might occur. This Court should reject such an argument.

Erroneous jury instructions that omit an element of the charged offense or that misstate the law are subject to harmless error analysis under Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). The Neder test for determining whether a constitutional error is harmless is whether the State can demonstrate, beyond a reasonable doubt, the error did not contribute to the verdict. State v. Thomas, 150 Wn.2d 821, 845, 83 P.3d 970 (2004). Where the court's instructions omit or misstate elements of the crime, this Court may find the error harmless if uncontroverted evidence supports that element. Id.

As discussed above, Instruction 5 informed jurors a person "commits the crime of failure to register as a sex offender" when a person who is required to register (1) moves to a new residence and knowingly fails to notify the county sheriff within 72 hours of the move or (2) ceases to have a

fixed residence and knowingly fails to notify the sheriff within 48 hours of that event. CP 22. But the trial court did not instruct the jury on the connection between Instruction 5 and 7. The result of this failure is jurors could have found Bennett guilty without first having found the State proved one of these alternatives beyond a reasonable doubt. Cf. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.23, at 106-07 (3rd ed. 2008) (pattern to-convict instruction for alternative means crimes, listing each element of each alternative means, and explaining jury need not be unanimous as to each alternative but each juror must find one alternative was proven beyond a reasonable doubt).

Even though the State introduced some evidence supporting each alternative, the evidence as to each was far from uncontroverted. Bennett, for example, testified he was never homeless and maintained a residence at his father's home for, at a minimum, a large portion of the four-month charging period. Bennett also testified when he did not stay at his father's residence, he housesat for his hospitalized sister. Even Bennett's father testified Bennett lived with him during a large portion of the charging period, which undermines the theory Bennett's failure to register occurred over the four-month period asserted by the State. See State v. Durrett, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 1508567 (June 1, 2009) (sex offender's failure to

report is an ongoing course of conduct that cannot be divided into separate time periods to support separate charges).

In addition, instructional error is presumed prejudicial unless it “affirmatively” appears to be harmless. Brown, 147 Wn.2d at 340. The opposite is true here. The jury’s question seeking clarification of the parties’ stipulation (informing jurors Bennett had a conviction requiring him to register as a sex offender during the charging period) suggests the jury was confused about what the State was required to prove. CP 11, 28. Under these circumstances, it is not only possible but also probable the to-convict instruction and inadequate “definitional” instruction misled the jury on the State’s burden.

The trial court’s failure to include all elements in the “to-convict” instruction and corresponding failure to instruct the jury it must find all the essential elements of the crime beyond a reasonable doubt violated Bennett’s right to due process. Because the State cannot demonstrate beyond a reasonable doubt the errors were harmless, this Court should reverse.

2. THE COURT ERRED WHEN IT FAILED TO CONSIDER WHETHER TO IMPOSE THE DNA COLLECTION FEE UNDER THE APPLICABLE STATUTE, AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

The court stated at sentencing it would “impose \$600 [in fees] which is the mandatory fees and costs and will waive all non-mandatory fees and

costs." 3RP 21. It thus appears the court imposed the DNA fee under the mistaken impression it was "mandatory" while waiving all other non-mandatory fees. But the fee was not mandatory under the statute in force on the date of the offense. Moreover, any retroactive application of the amended DNA collection statute would violate the constitutional prohibition on ex post facto laws. This Court should remand so the trial court may exercise its discretion in deciding whether to impose the DNA fee based on a correct understanding of applicable law.

a. The Court's Failure to Exercise Discretion Under the Applicable Statute Requires Reversal and Remand.

An offender may challenge the procedure by which a sentence was imposed. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (court's failure to exercise discretion in sentencing is reversible error). Moreover, a defendant may challenge an illegal sentence for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

In State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992), the Court set out the requirements for imposing monetary obligations at sentencing. Although a sentencing court need not enter "formal, specific findings" regarding the defendant's ability to pay court costs and recoupment fees, the court listed these prerequisites for constitutionally permissible costs:

1. Repayment must not be mandatory;

...

3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end.

Curry, 118 Wn.2d at 915-16; see also former RCW 10.01.160(3) (2005) (“The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.”).

Notwithstanding this test, Curry upheld the statute establishing that a VPA must be imposed regardless of the financial resources of the convicted person. Curry, 118 Wn.2d at 917-18. RCW 7.68.035(1) provides, “Whenever any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment.” The court reasoned that statutory safeguards prevented the incarceration based on inability to pay. Curry, 118 Wn.2d at 918.

Statutes authorizing costs in criminal prosecution are in derogation of the common law and should be strictly construed. State v. Buchanan, 78 Wn. App. 648, 651, 898 P.2d 862 (1995).

The version of RCW 43.43.7541 in effect at the time of sentencing provides, “Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars.” Laws of 2008, ch. 97, § 3 (effective June 12, 2008); see also RCW 9.94A.750 (sentencing court must impose restitution).

But under the version in effect between January 1 and April 30, 2008, the dates of Bennett’s offense, the DNA fee was not mandatory. Former RCW 43.43.7541 (2002). That version states the court should impose fee “unless the court finds that imposing the fee would result in undue hardship on the offender. Former RCW 43.43.7541. This is the controlling version because in adopting the 2008 version, the Legislature expressed no intent to contravene the general criminal prosecution saving statute, RCW 10.01.040, which establishes the version in force on the date of the offense is presumed to apply.⁴ The saving statute deemed a part of each

⁴ RCW 10.01.040 states:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed,

statute that amends or repeals an existing penal statute. State v. Ross, 152 Wn.2d 220, 237-38, 95 P.3d 1225 (2004).

The Supreme Court has in two cases found non-explicit, yet arguably express, intent to trump the saving statute. State v. Grant, 89 Wn.2d 678, 682, 575 P.2d 210 (1978); State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979). But in each case the statutory amendment at issue contained relatively specific language directing that no prosecutions under an earlier version of a statute should occur. In both cases, moreover, the Court read the language against the State, and thus concerns regarding the constitutional prohibition on ex post facto law were not implicated. U.S. Const. art. 1, § 10, cl. 1; Wash. Const. art. 1, § 23.

While formal findings are not required, the applicable statute directs the court to consider ability to pay. Former RCW 43.43.7541; Curry, 118

unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

Wn.2d at 916. Failure to do so is an abuse of the trial court's discretion. See Grayson, 154 Wn.2d at 342 (sentencing court's failure to exercise discretion is reversible error); State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (decision to impose a standard range sentence reviewable for abuse of discretion where court has refused to exercise discretion).

- b. Assuming, Arguendo, The Legislature Intended to Subvert The Savings Statute, The Amended Statute Alters The Standard of Punishment Without Notice and Therefore Violates The Prohibition On Ex Post Facto Laws.

Bennett anticipates the State will argue (as it has previously) the amended statute, enacted after the events in this case transpired, applied at Bennett's sentencing. The State's interpretation of the amendment, however, would violate the prohibition on ex post facto laws.

The ex post facto clause is rooted in the right of the individual to fair notice. In re Pers. Restraint of Powell, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991). In determining whether a statute violates the prohibition, this Court assesses whether the statute "(1) is substantive [or] merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it." Id. at 185. In the criminal context, "disadvantage" means "the statute alters the standard of punishment which existed under the prior law." State v. Schmidt, 143 Wn.2d 658, 673, 23 P.3d 462 (2001)). The amendment meets these criteria in that it is a

substantive, retrospective change in the law that alters the standard of punishment: it removes from the sentencing court any discretion to waive the fine based on hardship. Thus, even assuming the Legislature expressed its intent to subvert the saving statute, the resulting retrospective amendment runs afoul of the prohibition on ex post facto laws.

c. Counsel Rendered Ineffective Assistance By Failing to Object to Sentencing Under The Incorrect Statute.

Bennett's counsel rendered ineffective assistance in failing to object to the trial court's imposition of the DNA fee, which was not "mandatory" under the controlling statute.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. 6; Const. art. 1, § 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant receives ineffective assistance when (1) counsel's performance is deficient, and (2) the deficient representation prejudices the defendant. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is

constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998).

A defendant suffers prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Bennett satisfies both prongs of the Strickland test and therefore has demonstrated he received constitutionally ineffective assistance. There was no legitimate reason for counsel to fail to inform the court the applicable version of statute permitted the court to waive the DNA collection fee based on hardship. Counsel's is presumed to know applicable statutes favorable to his or her client. See State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel presumed to know court rules). Moreover, there is a reasonable likelihood that counsel's deficient performance affected the outcome because the court waived all other non-mandatory fees based on Bennett's indigence.

In summary, this Court should remand this case for resentencing so the court may properly consider Bennett's indigence and ability to pay in light of the applicable statutes and, if appropriate, amend the judgment and sentence to eliminate the fee. See State v. Broadaway, 133 Wn.2d 118, 136,

942 P.2d 363 (1997) (on remand, the trial court has the authority to correct a sentence where court was initially mistaken about the controlling law).

3. THE SENTENCING COURT INCORRECTLY ORDERED BENNETT TO SUBMIT TO HIV TESTING.

The court erred when it ordered Bennett to submit to HIV testing without statutory authority to do so.

A defendant may challenge an illegal sentence for the first time on appeal. Ford, 137 Wn.2d at 477. HIV testing may be imposed for specified offenders including those convicted of a “sexual offense” under chapter 9A.44 RCW. RCW 70.24.030(1)(a). But failure to register as a sex offender, although considered a “sex offense” under chapter 9.94A RCW, is not a “sexual” offense. State v. Nelson, 131 Wn. App. 175, 178-80, 123 P.3d 526 (2005) (“sexual offense” is an offense involving sexual gratification; failing to comply with a registration statute does not implicate sexual gratification). Accordingly, this Court should remand so the trial court may strike the illegal requirement.

D. CONCLUSION

The "to convict" instruction was defective because it failed to set forth all the elements of the crime and failed to inform the jury it must find each element of the crime beyond a reasonable doubt. Because the State cannot prove these errors were harmless beyond a reasonable doubt, this Court should reverse Bennett's conviction.

Moreover, resentencing is required because the court (1) failed to exercise its discretion when it imposed a non-mandatory DNA collection fee based on the mistaken view the fee was "mandatory" and (2) incorrectly imposed a requirement Bennett submit to HIV testing absent statutory authority.

DATED this 7TH day of July, 2009.

Respectfully submitted,

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APPENDIX

RCW 9A.44.130

Registration of sex offenders and kidnapping offenders — Procedures — Definition — Penalties. (Expires ninety days after adjournment sine die of the 2010 legislative session.)

(1)(a) Any adult or juvenile residing whether or not the person has a fixed residence, or who is a student, is employed, or carries on a vocation in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping 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. Where a person required to register under this section is in custody 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 as a result of a sex offense or kidnapping 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.

(b) Any adult or juvenile who is required to register under (a) of this subsection:

(i) Who is attending, or planning to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW shall, within ten days of enrolling or prior to arriving at the school to attend classes, whichever is earlier, notify the sheriff for the county of the person's residence of the person's intent to attend the school, and the sheriff shall promptly notify the principal of the school;

(ii) Who is admitted to a public or private institution of higher education shall, within ten days of enrolling or by the first business day after arriving at the institution, whichever is earlier, notify the sheriff for the county of the person's residence of the person's intent to attend the institution;

(iii) Who gains employment at a public or private institution of higher education shall, within ten days of accepting employment or by the first business day after commencing work at the institution, whichever is earlier, notify the sheriff for the county of the person's residence of the person's employment by the institution; or

(iv) Whose enrollment or employment at a public or private institution of higher education is terminated shall, within ten days of such termination, notify the sheriff for the county of the person's residence of the person's termination of enrollment or employment at the institution.

(c) Persons required to register under this section who are enrolled in a public or private institution of higher education on June 11, 1998, or a public or private school regulated under Title 28A RCW or chapter 72.40 RCW on September 1, 2006, must notify the county sheriff immediately.

(d) The sheriff shall notify the school's principal or institution's department of public safety and shall provide that department with the same information provided to a county sheriff under subsection (3) of this section.

(e)(i) A principal receiving notice under this subsection must disclose the information received from the sheriff under (b) of this subsection as follows:

(A) If the student who is required to register as a sex offender is classified as a risk level II or III, the principal shall provide the information received to every teacher of any student required to register under (a) of this subsection and to any other personnel who, in the judgment of the principal, supervises the student or for security purposes should be aware of the student's record;

(B) If the student who is required to register as a sex offender is classified as a risk level I, the principal shall provide the information received only to personnel who, in the judgment of the principal, for security purposes should be aware of the student's record.

(ii) Any information received by a principal or school personnel under this subsection is confidential and may not be further disseminated except as provided in RCW 28A.225.330, other statutes or case law, and the family and educational and privacy rights act of 1994, 20 U.S.C. Sec. 1232g et seq.

(2) This section may not be construed to confer any powers pursuant to RCW 4.24.550 upon the public safety department of any public or private school or institution of higher education.

(3)(a) The person shall provide the following information when registering: (i) Name; (ii) complete residential address; (iii) date and place of birth; (iv) place of employment; (v) crime for which convicted; (vi) date and place of conviction; (vii) aliases used; (viii) social security number; (ix) photograph; and (x) fingerprints.

(b) Any person who lacks a fixed residence shall provide the following information when registering: (i) Name; (ii) date and place of birth; (iii) place of employment; (iv) crime for which convicted; (v) date and place of conviction; (vi) aliases

used; (vii) social security number; (viii) photograph; (ix) fingerprints; and (x) where he or she plans to stay.

(4)(a) Offenders shall register with the county sheriff within the following deadlines. For purposes of this section the term "conviction" refers to adult convictions and juvenile adjudications for sex offenses or kidnapping offenses:

(i) 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, and (B) kidnapping offenders who on or after July 27, 1997, are in custody 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 with an official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register within twenty-four hours from the time of release 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. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register. Failure to register at the time of release and within twenty-four hours of release constitutes a violation of this section and is punishable as provided in subsection (1) of this section.

When the agency with jurisdiction intends to release an offender with a duty to register under this section, and the agency has knowledge that the offender is eligible for developmental disability services from the department of social and health services, the agency shall notify the division of developmental disabilities of the release. Notice shall occur not more than thirty days before the offender is to be released. The agency and the division shall assist the offender in meeting the initial registration requirement under this section. Failure to provide such assistance shall not constitute a defense for any violation of this section.

(ii) OFFENDERS NOT IN CUSTODY BUT UNDER STATE OR LOCAL JURISDICTION. Sex offenders who, on July 28, 1991, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of corrections' active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 28, 1991. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of corrections' active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (4)(a)(ii) as of July 28, 1991, or a kidnapping offender required to register as of July 27, 1997, shall not relieve the offender of the duty to register or to reregister following a change in residence. The obligation to register shall only cease pursuant to RCW 9A.44.140.

(iii) OFFENDERS UNDER FEDERAL JURISDICTION. Sex offenders who, on or after July 23, 1995, and kidnapping offenders who, on or after July 27, 1997, as a result of that offense are in the custody of the United States bureau of prisons or other federal or military correctional agency for sex offenses committed before, on, or after February 28, 1990, or kidnapping offenses committed on, before, or after July 27, 1997, must register within twenty-four hours from the time of release 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. Sex offenders who, on July 23, 1995, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 23, 1995. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (4)(a)(iii) as of July 23, 1995, or a kidnapping offender required to register as of July 27, 1997 shall not relieve the offender of the duty to register or to reregister following a change in residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. The obligation to register shall only cease pursuant to RCW 9A.44.140.

(iv) OFFENDERS WHO ARE CONVICTED BUT NOT CONFINED. Sex offenders who are convicted of a sex offense on or after July 28, 1991, for a sex offense that was committed on or after February 28, 1990, and kidnapping offenders who are convicted on or after July 27, 1997, for a kidnapping offense that was committed on or after July 27, 1997, but who are not sentenced to serve a term of confinement immediately upon sentencing, shall report to the county sheriff to register immediately upon completion of being sentenced.

(v) OFFENDERS WHO ARE NEW RESIDENTS OR RETURNING WASHINGTON RESIDENTS. Sex offenders and kidnapping offenders who move to Washington state from another state or a foreign country that are not under the jurisdiction of the state department of corrections, the indeterminate sentence review board, or the state department of

social and health services at the time of moving to Washington, must register within three business days of establishing residence or reestablishing residence if the person is a former Washington resident. The duty to register under this subsection applies to sex offenders convicted under the laws of another state or a foreign country, federal or military statutes for offenses committed before, on, or after February 28, 1990, or Washington state for offenses committed before, on, or after February 28, 1990, and to kidnapping offenders convicted under the laws of another state or a foreign country, federal or military statutes, or Washington state for offenses committed before, on, or after July 27, 1997. Sex offenders and kidnapping offenders from other states or a foreign country who, when they move to Washington, are under the jurisdiction of the department of corrections, the indeterminate sentence review board, or the department of social and health services must register within twenty-four hours of moving to Washington. The agency that has jurisdiction over the offender shall notify the offender of the registration requirements before the offender moves to Washington.

(vi) OFFENDERS FOUND NOT GUILTY BY REASON OF INSANITY. Any adult or juvenile who has been found not guilty by reason of insanity under chapter 10.77 RCW of (A) committing a sex offense on, before, or after February 28, 1990, and who, on or after July 23, 1995, is in custody, as a result of that finding, of the state department of social and health services, or (B) committing a kidnapping offense on, before, or after July 27, 1997, and who on or after July 27, 1997, is in custody, as a result of that finding, of the state department of social and health services, must register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence. The state department of social and health services shall provide notice to the adult or juvenile in its custody of the duty to register. Any adult or juvenile who has been found not guilty by reason of insanity of committing a sex offense on, before, or after February 28, 1990, but who was released before July 23, 1995, or any adult or juvenile who has been found not guilty by reason of insanity of committing a kidnapping offense but who was released before July 27, 1997, shall be required to register within twenty-four hours of receiving notice of this registration requirement. The state department of social and health services shall make reasonable attempts within available resources to notify sex offenders who were released before July 23, 1995, and kidnapping offenders who were released before July 27, 1997. Failure to register within twenty-four hours of release, or of receiving notice, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

(vii) OFFENDERS WHO LACK A FIXED RESIDENCE. Any person who lacks a fixed residence and leaves the county in which he or she is registered and enters and remains within a new county for twenty-four hours is required to register with the county sheriff not more than twenty-four hours after entering the county and provide the information required in subsection (3)(b) of this section.

(viii) OFFENDERS WHO LACK A FIXED RESIDENCE AND WHO ARE UNDER SUPERVISION. Offenders who lack a fixed residence and who are under the supervision of the department shall register in the county of their supervision.

(ix) OFFENDERS WHO MOVE TO, WORK, CARRY ON A VOCATION, OR ATTEND SCHOOL IN ANOTHER STATE. Offenders required to register in Washington, who move to another state, or who work, carry on a vocation, or attend school in another state shall register a new address, fingerprints, and photograph with the new state within ten days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. The person must also send written notice within ten days of moving to the new state or to a foreign country to the county sheriff with whom the person last registered in Washington state. The county sheriff shall promptly forward this information to the Washington state patrol.

(b) Failure to register within the time required under this section constitutes a per se violation of this section and is punishable as provided in subsection (11) of this section. The county sheriff shall not be required to determine whether the person is living within the county.

(c) An arrest on charges of failure to register, service of an information, or a complaint for a violation of this section, or arraignment on charges for a violation of this section, constitutes actual notice of the duty to register. Any person charged with the crime of failure to register under this section who asserts as a defense the lack of notice of the duty to register shall register immediately following actual notice of the duty through arrest, service, or arraignment. Failure to register as required under this subsection (4)(c) constitutes grounds for filing another charge of failing to register. Registering following arrest, service, or arraignment on charges shall not relieve the offender from criminal liability for failure to register prior to the filing of the original charge.

(d) The deadlines for the duty to register under this section do not relieve any sex offender of the duty to register under this section as it existed prior to July 28, 1991.

(5)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send signed written notice of the change of address to the county sheriff within seventy-two hours of moving. If any person required to register pursuant to this section moves to a new county, the person must send signed written notice of the change of address at least fourteen days before moving to the county sheriff in the new county of residence and must register with that county sheriff within twenty-four hours of moving. The person must also send signed written notice within ten days of the change of address in the new county to the county sheriff with whom the

person last registered. The county sheriff with whom the person last registered shall promptly forward the information concerning the change of address to the county sheriff for the county of the person's new residence. Upon receipt of notice of change of address to a new state, the county sheriff shall promptly forward the information regarding the change of address to the agency designated by the new state as the state's offender registration agency.

(b) It is an affirmative defense to a charge that the person failed to send a notice at least fourteen days in advance of moving as required under (a) of this subsection that the person did not know the location of his or her new residence at least fourteen days before moving. The defendant must establish the defense by a preponderance of the evidence and, to prevail on the defense, must also prove by a preponderance that the defendant sent the required notice within twenty-four hours of determining the new address.

(6)(a) Any person required to register under this section who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence. The notice shall include the information required by subsection (3)(b) of this section, except the photograph and fingerprints. The county sheriff may, for reasonable cause, require the offender to provide a photograph and fingerprints. The sheriff shall forward this information to the sheriff of the county in which the person intends to reside, if the person intends to reside in another county.

(b) A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff's office may require the person to list the locations where the person has stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

(c) If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within forty-eight hours excluding weekends and holidays after ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (4)(a)(vii) or (viii) and (6) of this section. To prevail, the person must prove the defense by a preponderance of the evidence.

(7) All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. An offender who complies with the ninety-day reporting requirement with no violations for a period of at least five years in the community may petition the superior court to be relieved of the duty to report every ninety days. The petition shall be made to the superior court in the county where the offender resides or reports under this section. The prosecuting attorney of the county shall be named and served as respondent in any such petition. The court shall relieve the petitioner of the duty to report if the petitioner shows, by a preponderance of the evidence, that the petitioner has complied with the reporting requirement for a period of at least five years and that the offender has not been convicted of a criminal violation of this section for a period of at least five years, and the court determines that the reporting no longer serves a public safety purpose. Failure to report, as specified, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

(8) A sex offender subject to registration requirements under this section who applies to change his or her name under RCW 4.24.130 or any other law shall submit a copy of the application to the county sheriff of the county of the person's residence and to the state patrol not fewer than five days before the entry of an order granting the name change. No sex offender under the requirement to register under this section at the time of application shall be granted an order changing his or her name if the court finds that doing so will interfere with legitimate law enforcement interests, except that no order shall be denied when the name change is requested for religious or legitimate cultural reasons or in recognition of marriage or dissolution of marriage. A sex offender under the requirement to register under this section who receives an order changing his or her name shall submit a copy of the order to the county sheriff of the county of the person's residence and to the state patrol within five days of the entry of the order.

(9) The county sheriff shall obtain a photograph of the individual and shall obtain a copy of the individual's fingerprints. A photograph may be taken at any time to update an individual's file.

(10) For the purpose of RCW 9A.44.130, 10.01.200, 43.43.540, 70.48.470, and 72.09.330:

(a) "Sex offense" means:

(i) Any offense defined as a sex offense by RCW 9.94A.030;

(ii) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree);

(iii) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes);

(iv) Any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense under this subsection; and

(v) Any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030 or this subsection.

(b) "Kidnapping offense" means: (i) The crimes of kidnapping in the first degree, kidnapping in the second degree, and unlawful imprisonment, as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent; (ii) any offense that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a kidnapping offense under this subsection (10)(b); and (iii) any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a kidnapping offense under this subsection (10)(b).

(c) "Employed" or "carries on a vocation" means employment that is full-time or part-time for a period of time exceeding fourteen days, or for an aggregate period of time exceeding thirty days during any calendar year. A person is employed or carries on a vocation whether the person's employment is financially compensated, volunteered, or for the purpose of government or educational benefit.

(d) "Student" means a person who is enrolled, on a full-time or part-time basis, in any public or private educational institution. An educational institution includes any secondary school, trade or professional institution, or institution of higher education.

(11)(a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (10)(a) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense as defined in subsection (10)(a) of this section.

(b) If the crime for which the individual was convicted was other than a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be other than a felony, violation of this section is a gross misdemeanor.

(12)(a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony if the crime for which the individual was convicted was a felony kidnapping offense as defined in subsection (10)(b) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony kidnapping offense as defined in subsection (10)(b) of this section.

(b) If the crime for which the individual was convicted was other than a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be other than a felony, violation of this section is a gross misdemeanor.

(13) Except as may otherwise be provided by law, nothing in this section shall impose any liability upon a peace officer, including a county sheriff, or law enforcement agency, for failing to release information authorized under this section.

[2006 c 129 § 2; (2006 c 129 § 1 expired September 1, 2006); 2006 c 128 § 2; (2006 c 128 § 1 expired September 1, 2006); 2006 c 127 § 2; 2006 c 126 § 2; (2006 c 126 § 1 expired September 1, 2006); 2005 c 380 § 1. Prior: 2003 c 215 § 1; 2003 c 53 § 68; 2002 c 31 § 1; prior: 2001 c 169 § 1; 2001 c 95 § 2; 2000 c 91 § 2; prior: 1999 sp.s. c 6 § 2; 1999 c 352 § 9; prior: 1998 c 220 § 1; 1998 c 139 § 1; prior: 1997 c 340 § 3; 1997 c 113 § 3; 1996 c 275 § 11; prior: 1995 c 268 § 3; 1995 c 248 § 1; 1995 c 195 § 1; 1994 c 84 § 2; 1991 c 274 § 2; 1990 c 3 § 402.]

Notes:

Reviser's note: This section was amended by 2006 c 126 § 2, 2006 c 127 § 2, 2006 c 128 § 2, and by 2006 c 129 § 2, each without reference to the other. All amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date – 2006 c 129 § 2: "Section 2 of this act takes effect September 1, 2006." [2006 c 129 § 4.]

Expiration date – 2006 c 129 § 1: "Section 1 of this act expires September 1, 2006." [2006 c 129 § 3.]

Effective date – 2006 c 128 § 2: "Section 2 of this act takes effect September 1, 2006." [2006 c 128 § 8.]

Expiration date – 2006 c 128 § 1: "Section 1 of this act expires September 1, 2006." [2006 c 128 § 7.]

Severability – 2006 c 127: "If any provision of this act or its application to any person or circumstance is held invalid,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62962-0-1
)	
CLARENCE BENNETT, JR.,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CLARENCE BENNETT, JR.
DOC NO. 931538
MONROE CORRECTIONAL COMPLEX
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JULY, 2009.

x. Patrick Mayovsky

FILED
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STATE OF WASHINGTON
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