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COURT OF APPEALS

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NO. 34325-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL RAY SMITH,

Appellant.

BRIEF OF APPELLANT

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it refused to allow the defendant to withdraw his guilty plea because the defendant did not knowingly, voluntarily and intelligently enter it.

2. The trial court erred when it ordered the defendant to submit a second DNA sample and pay a second DNA fee and when it imposed community custody conditions not authorized by the legislature.

3. The trial court exceeded the statutory maximum for Count II when it imposed community custody without limiting the total sentence to the statutory maximum of five years.

*Issues Pertaining to Assignment of Error*

1. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it refuses to allow the defendant to withdraw a guilty plea that the defendant did not knowingly, voluntarily and intelligently enter it?

2. Does a trial court err when it orders a defendant to submit a second DNA sample and pay a second DNA fee that is unauthorized by the legislature and when it imposes community custody conditions not authorized by the legislature?

3. Does a trial court exceed its statutory authority if it imposes community custody and incarceration time that exceeds the statutory maximum for a particular offense?

## STATEMENT OF THE CASE

On November 29, 2004, the Klickitat County Superior Court in Cause Number 04-1-0080-9 sentenced the defendant Daniel R. Smith to 89 months in prison on one count of first degree child molestation concurrent to 131 months in prison for one count of second degree child rape. CP 111. The named victims were his two step-daughters. RP The offenses occurred sometime in 2003. *Id.* One month prior to the imposition of the Klickitat County sentences the Clark County Prosecutor charged the defendant with two counts of first degree child molestation and two counts of second degree child molestation. CP 1-2. The prosecutor named the same two step-daughters as the alleged victims. *Id.* However the Clark County charges alleged that the conduct occurred between April and September of 2001, more than a year prior to the Klickitat County charges. *Id.*

The court continued the case at bar a number of times during which. CP 15-28. During part of the interim the defendant underwent a competency evaluation performed by the staff from Western State Hospital at his own request. CP 24-28, 33-44. The evaluation found that the defendant was illiterate and had a below normal intelligence level. RP 94. However, it did render the opinion that he was competent. CP 33-44. The defense thereafter stipulated to competency without having it's own evaluation performed. CP

56; RP 94-97.<sup>1</sup> In fact, the defense attorney did not inform the defendant that he had the right to have his own evaluation performed. RP 97.

Finally on August 15, 2005 the case was called for trial. RP 37. However, after voir dire the defense informed the prosecutor and the state that the defendant wished to enter a *Newton* plea to counts one and two pursuant to a prior offer by the state. RP 38. The state consented and the court began it's colloquy with the defendant after a break in which the defendant and his attorney reviewed a statement of defendant on plea of guilty. RP 84-89. During the colloquy the defendant expressed confusion and reluctance and the court immediately adjourned to allow the defendant to consult with his attorney. RP 44.

After a break the defendant and his attorney returned and the court finished the colloquy. RP 46-52. During the colloquy the state established a factual basis for the pleas and the defendant agreed that the state's facts would be sufficient to sustain a guilty verdict on both counts one and two. RP 52. The court then accepted the pleas and dismissed Counts III and IV pursuant to the plea agreement. RP 52. However, during the colloquy the

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<sup>1</sup>The record in this case includes one volume of verbatim reports each for the February 24, 2005 CrR 3.5 hearing, the August 15, 2005 guilty plea and the November 19, 2005 motion to withdraw guilty plea and sentencing. All three volumes are continuously numbered and are referred to herein as "RP x" with the "x" designating the page number.

court did not enquire into the defendant's motivation for entering the *Newton* plea and what benefit he was obtaining from it. RP 36-52. In fact, given the six prior offender points for the two Klickitat County convictions and the three concurrent points for the concurrent offense, the defendant's range on Counts I and II of the Clark County charges was exactly the same both with and without Counts III and IV. CP 163. After accepting the plea the court sent over sentencing with all parties agreeing to use the Klickitat County pre-sentence investigation report for the purpose of sentencing. CP 33-43.

Prior to sentencing the defendant moved to withdraw his guilty plea arguing that he did not knowingly, voluntarily, and intelligently enter it. 120-121. The court then appointed new counsel for the motion, which the court heard on November 10, 2005. During this motion the defendant took the stand on his own behalf and explained that he is illiterate. He further testified that (1) his attorney did not inform him that his standard range would remain the same whether or not he entered the guilty plea or went to trial, and (2) that had he known this he would have gone to trial. RP 75. His testimony concerning this point went as follows:

Q. So you saw yourself as going to jail for less time by this plea agreement.

A. Well, kinda, yeah.

Q. Right, rather than --

A. But then I took -- then I went back to my cell and -- and -- and looked at the range on that, and it's the same thing either way, whether I'd have took it either way. I -- and that's something that just bugged me.

Q. Well, you understood, though, that if you went to trial and lost, you would get more time than the plea agreement that you entered at the time of trial.

A. That's what I was thinking at the time, but it's not what it is on the paper.

Q. And that's why you took the plea agreement, wasn't it, it was because you were to get less time by agreeing to the plea than you would if you lost at trial?

A. Yeah, that's why I eventually took it, but I got scared. I mean, it had all the thing to do with being scared, I didn't -- to me, it was just being scared. I don't know how to explain it.

RP 78-79.

Following the defendant's testimony the state called the defendant's original trial attorney. RP 84-97. At no point during his testimony did he explain what benefit the defendant received from entering the guilty plea. *Id.* Neither did he testify that he explained what the standard ranges would be or what the sentencing consequences would be with or without the guilty plea. *Id.* After argument by counsel the trial court denied the motion and sentenced the defendant within the standard range. RP 112; CP 161-182. The court later entered the following findings of fact and conclusions of law on the denial of the motion withdraw guilty plea.

## FINDINGS OF FACT

1. The court has had the full opportunity to review the entirety of the file and all of the proceedings, including the video tape of the defendant's prior change of plea in Clark County for which this hearing concerns.

2. Mr. Smith had indicated to the Court prior to the change of plea that he had prior serious felony charges proceeding against him allegedly involving the same two victims in both Klickitat County and Clark County. He told the Court resolved the Klickitat County matters first by change of plea.

3. The Court appointed Mr. Harp as the attorney to represent the defendant on his Clark County matters. Mr. Harp continued to represent him throughout these proceedings including a CrR 3.5 hearing on February 24, 2005, the Competency Hearing, and ultimately the beginnings of the trial in the present case.

4. On June 13, 2005, Mr. Smith wrote to then assigned Judge Roger A. Bennett indicating that in Mr. Smith's opinion, the guilty plea he signed in Goldendale was under force and duress and that he signed that plea agreement because he was told he had to. He claimed people didn't listen to him and that he was innocent and he didn't want that to happen in Clark County.

5. In June of 2005, the defendant raised a competency issue in court, which required his evaluation through Western State Hospital. Mr. Smith made this request himself and was found to be competent after evaluation and by a court order on July, 29, 2005. At the present time the Court has no evidence to indicate that Mr. Smith is not competent in the sense indicated by those reports and by the competency finding made by Judge Bennett on July 29, 2005.

6. On August 12, 2005, Mr. Smith filed with this court, and again addressed to Judge Bennett, a letter which indicated that he had taken the plea under duress in Klickitat County, which he shouldn't have taken, he knew that he shouldn't have done so, and that he had all of this evidence that he wanted to present, and included copies of letters from Terry A. Smith, a letter from Eric Warren of the children and Family Services, a letter he wrote to Judge Reynolds in May, a

letter that Theresa Smith wrote to Judge Reynolds in May, a letter from Linda Lutz Smith to Judge Reynolds which was written in June of 2005, and finally a letter from Rod Crible a doctor from Family Health Care Center written at Ms. Lutz Smith's request.

7. The trial began on August 15, 2005. Judge Lewis was the assigned trial judge. The morning of the trial date was spent dealing with preliminary motions and with the selection of the jury. The defendant was present. The court recessed at noon with the jury having been selected and the court sent the jury out until 1:30 p.m. for lunch, indicating to counsel that they would need to be back at 1:00 p.m. in order to deal with some of the pre-trial motions so the witnesses could be adequately informed of any rulings of Motions in Limine.

8. At approximately 1:30 pm the defendant, Mr. Smith, raised with his counsel and with the prosecutor in the courtroom that he was interested in continuing plea negotiations and accepting a plea to the original offer made by the State if that offer was still open, which it was confirmed to be.

9. The defense then indicated to the court that Mr. Smith wished to enter a change of plea and therefore the court recessed the proceedings, but held the jury until the plea was either resolved or not resolved. The Court was aware at the time the plea was to be entered that Mr. Smith had sent letters to Judge Bennett indicating that his plea in Klickitat County was forced or improper and so the Court indicated to counsel that the Court would not release the jury and discharge them and not cause the trial to proceed until the Court was assured that Mr. Smith was making a knowingly, voluntarily, intelligently entered plea of guilty in this case.

10. The proceedings were recessed from 1:30 p.m. until 3:11 p.m. while paperwork was prepared for the change of plea and Mr. Smith discussed the matter with his attorney. The Court went back on the record at 3:11 p.m. and the Court went through an extensive colloquia with Mr. Smith to make sure that he understood what he was pleading guilty to and the consequences to that plea. At one point during the proceedings Mr. Smith began to indicate that he didn't understand what was going on. Mr. Smith indicated he wasn't sure about the change of plea and the court told him at that time that

there was not going to be a repeat of what happened in Klickitat county, that the Court would not accept his plea if there was any doubt in his mind if he should do it, and that if he needed to go back and talk to his attorney to do so and inform the court within fifteen minutes of whether he was proceeding with a plea or he was going to trial.

11. Although it is true that there were time pressures with regard to Mr. Smith accepting the plea, they are the same time pressures that are involved when ever a defendant is coming up on a trial or is at a trial, and has to make decisions about his case. There was nothing unusual about this change of plea. While it is true that the court is sure Mr. Smith was feeling stressed and fearful about the possibility that he might be convicted of four serious felony sexual crimes, that is the same fear and stress that practically any defendant would feel when called upon to make a choice about things of this nature. There was nothing unusual about that stressful situation.

12. Proceedings resumed again at 3:19 p.m. about ten minutes after they had been recessed and Mr. Smith indicated to the Court he wished to proceed with the guilty plea, and responded to numerous questions from the court, that he fully understood that he was entering a Newton Plea, and that he was waiving his right to a jury trial and have the trial proceed. While he did not agree that the evidence that was recited by the State was true, he did indicate that he understood a jury might convict him of those serious crimes, if they believed the State's evidence, and that he did not want to run that risk.

13. After the Court reviewed all of the change of plea form with him in court, the Court was satisfied that he knew exactly what he was doing and did so knowingly, voluntarily and intelligently and then the Court accepted his plea of guilty.

14. Mr. Smith pled guilty to a Second Amended Information with reduced the number of counts against him from four to two and obtained a recommendation that any time he served in this case would be served concurrent to his time in Klickitat County.

15. Several days after Mr. Smith entered his change of plea with the court, Mr. Smith filed a Motion to Withdraw Plea with the court. In that motion to withdraw the defendant indicated that he had new

evidence. The new evidence consisted of all of the documents sent on August 12, 2005 in his letter to Judge Bennett and the attached letters from Terry Smith, Eric Warren, Judge Reynolds, Theresa Smith's letter to Judge Reynolds, Linda Lutz Smith to Judge Reynolds and the letter from Rod Crible written at Ms. Lutz Smith's request.

16. In reviewing such evidence the Court finds that all parties possessed these letters prior to the entry of the change of plea and considered them.

17. The critical review in a motion to withdraw plea, based upon new evidence was when the parties became aware of the evidence and their materiality. As both attorneys were aware of this evidence, as was the court, the Court cannot find this is new evidence that could not have been discovered prior to trial.

18. Although not specifically required to rule on the evidence which Mr. Smith maintains is new or should have changed the case, the court would indicate that most of the material proposed by Mr. Smith would most probably have found to be irrelevant because, the mere fact that someone else is willing to admit that they may have abused somebody does not necessarily mean that Mr. Smith has not abused them as well, so they are not mutually exclusive things. As the prior attorney, John Harp testified, and the Court would tend to agree, the relevance of that evidence is low and the prejudicial effect of presenting the factual issue related to Klickitat County, which otherwise wouldn't come in to the present trial, the prejudicial effect would be substantial. The Court believes that should this evidence have been offered it most probably would have been found inadmissible.

19. The court has not evidence from which it can conclude that the prior attorney, Mr. John Harp, was not prepared to proceed to trial or that he failed to do something which a competent attorney would do, with the one exception that he apparently didn't tell Mr. Smith of the potential of a second competency evaluation. It appears to the court that the reason he didn't do so was that he had no evidence to believe that Mr. Smith was incompetent. It appears from the record that Mr. Smith had maintained he was incompetent and counsel had agreed to send him to a competency evaluation for that purpose,

primarily because Mr. Smith said he wanted it rather than the attorney having any particular reason to believe that Mr. Smith wasn't competent.

20. The Court in reviewing the evidence that was presented since the change of plea in Clark County and since the written materials were submitted by Mr. Smith to support his withdraw of plea, finds nothing which would indicate anything substantial to warrant a withdrawal of the change of plea of guilty other than that Mr. Smith has had second thoughts. If subjective second thoughts by a defendant were the basis for withdrawing a plea, then any plea could be withdrawn, and the court wouldn't need rules and standards about it. All a defendant would have to do is return to court and say I have changed my mind, I want to change my plea and get a new plea or go to trial. That's unacceptable to the legitimate review of criminal justice standards.

21. There is nothing in the record that the court could find that would indicate that there is a manifest of injustice which should be granted if the Court didn't keep Mr. Smith to his bargain. The Court finds the defendant acted knowingly, intelligently and voluntarily in entering the plea of guilty.

22. The Court finds that the defendant had the change of plea form read to him by the defense counsel. The court further finds that Mr. Smith asked questions of his counsel, with counsel fully aware that Mr. Smith could not read and write and that Mr. Smith, not only to the defense attorney, but in court, made representations that he had the plea form read to him in full and that he understood it.

CP 151-156.

Following imposition of sentence the defendant filed timely notice of appeal. CP 187.

## ARGUMENT

### I. THE TRIAL COURT DENIED THE DEFENDANT HIS RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT REFUSED TO ALLOW THE DEFENDANT TO WITHDRAW HIS GUILTY PLEA BECAUSE THE DEFENDANT DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY ENTER IT

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *Personal Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.3d 1005 (2001). Guilty pleas that are entered without a statement of the consequences of the sentence are not “knowingly” made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

Failure to inform a defendant of direct sentencing consequences upon a plea of guilty is also governed by court rule. Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a “manifest injustice.” A plea that is not knowingly, voluntarily and intelligently entered produces a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505

(1991). Finally, since pleas which are not knowingly, voluntarily, and intelligently entered violate a defendant's right to due process, they may be challenged for the first time on appeal. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991 (2000).

For example, in *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), the state originally charged the defendant with first degree kidnaping, first degree rape, and second degree assault. The defendant later agreed to plead guilty to a single charge of Second Degree Rape upon the state's agreement to recommend a low end sentence upon a range that both the state and the defense miscalculated at 86 to 114 months. In fact, at sentencing, the court and the attorneys determined that the defendant's correct standard range was from 95 to 125 months. Although the state recommended the low end of the standard range, the court imposed an exceptional sentence of 136 months based upon a finding of intentional cruelty. The defendant thereafter appealed, arguing that his plea was not voluntarily, knowingly, and intelligently made, based upon the error in calculating his standard range.

On appeal, the Court of Appeals affirmed, finding that since the defendant did not move to withdraw his guilty plea at the time of sentencing when the correct standard range was determined, he waived his right to object to the acceptance of his plea. On further review, the Washington Supreme Court reversed, finding that (1) a claim that a plea was not voluntarily made

constituted a claim of constitutional magnitude that could be raised for the first time on appeal, (2) that the record did not support a conclusion that the defendant waived his right to claim his plea was involuntarily, and (3) a plea entered upon a mistaken calculation of the standard range is not knowingly and voluntarily made. The court stated the following on the final two holdings:

Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence. Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. The defendant's choice of remedy does not control, however, if there are compelling reasons not to allow that remedy. Walsh has chosen to withdraw his plea. The State has not argued it would be prejudiced by withdrawal of the plea.

The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

*State v. Walsh*, 143 Wn.2d at 8-9. See also *State v. Kisse*, 88 Wn.App. 817, 947 P.2d 262 (1997) (mistaken belief that the defendant qualifies for a SOSSA sentence is a basis upon which to withdraw a guilty plea).

The court's duty to ensure that a guilty plea is knowingly, voluntarily, and intelligently entered is heightened when the defendant enters an *Alford* or *Newton* plea as did the defendant in this case. Under the decision in *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), the

United State's Supreme Court held that a defendant who denies guilt may nonetheless enter a guilty plea if the court finds a factual basis for the plea. As the court notes in and there is a benefit to the defendant to forgo trial. As the court noted, this was precisely the situation in *Alford* where the defendant wanted to accept the plea bargain in order to avoid the death penalty and limit the maximum sentence to 30 years.

As previously recounted, after Alford's plea of guilty was offered and the State's case was placed before the judge, Alford denied that he had committed the murder but reaffirmed his desire to plead guilty to avoid a possible maximum provided for second degree murder.

*North Carolina v. Alford*, 400 U.S. at 31.

The need for the court to exercise extra caution when taking an *Alford* plea was restated in *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976). In this case the Washington Supreme Court adopted the *Newton* plea procedure and quoted the following from *United States v. Gaskins*, 158 U.S.App.D.C. 267, 485 F.2d 1046, 1049 (1973) and that federal court's comments on accepting *Alford* pleas under the federal rules:

When a defendant seeks to plead guilty while protesting his innocence, the trial judge is confronted with a danger signal. It puts him on guard to be extremely careful that his duties under Rule 11 are fully discharged.

*State v. Newton*, 87 Wn.2d at 373 (quoting *Gaskins, supra* at 1049).

In the case at bar the defendant's testimony reveals that the reason he entered an *Alford* plea was that he thought he was receiving a reduced

standard range with the dismissal of Counts III and IV. His testimony on this issue went as follows:

Q. So you saw yourself as going to jail for less time by this plea agreement.

A. Well, kinda, yeah.

Q. Right, rather than --

A. But then I took -- then I went back to my cell and -- and -- and looked at the range on that, and it's the same thing either way, whether I'd have took it either way. I -- and that's something that just bugged me.

Q. Well, you understood, though, that if you went to trial and lost, you would get more time than the plea agreement that you entered at the time of trial.

A. That's what I was thinking at the time, but it's not what it is on the paper.

Q. And that's why you took the plea agreement, wasn't it, it was because you were to get less time by agreeing to the plea than you would if you lost at trial?

A. Yeah, that's why I eventually took it, but I got scared. I mean, it had all the thing to do with being scared, I didn't -- to me, it was just being scared. I don't know how to explain it.

RP 78-79.

In fact, the defendant's standard range was the same whether or not he pled guilty or went to trial. With the two prior Klickitat County convictions and the one concurrent offense the defendant's offender score was nine or more points no matter what he did. It is clear that had the

defendant known this fact, as his attorney should have told him, he would not have entered the guilty plea. As in *State v. Walsh, supra*, the defendant's plea in the case at bar was not knowingly, voluntarily, and intelligently entered because the defendant was not correctly informed of the direct consequences of entering his plea as opposed to going to trial. As a result, the trial court abused its discretion when it denied the defendant's motion to withdraw his guilty plea and the court thereby denied the defendant his right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

**II. THE TRIAL COURT ERRED WHEN IT ORDERED THE DEFENDANT TO SUBMIT A SECOND DNA SAMPLE AND PAY A SECOND DNA FEE AND WHEN IT IMPOSED COMMUNITY CUSTODY CONDITIONS NOT AUTHORIZED BY THE LEGISLATURE.**

In Washington the establishment of penalties for crimes is solely a legislative function. *See State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). As such, the power of the legislature to set the type, amount and terms of criminal punishment is plenary and only confined by constitutional constraints. *Id.* Thus a trial court may only impose those terms and conditions of punishment that the legislature authorizes. *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). In the case at bar the defendant argues that the trial court exceeded its statutory authority when it ordered the defendant to submit a second DNA sample and pay a second DNA fee and

when it imposed community custody conditions not authorized in the sentencing reform act. The following sets out these arguments.

***(1) RCW 43.43.754 Does Not Authorize the Trial Court to Order a Defendant to Submit Multiple DNA Samples or Pay Multiple DNA Fees.***

Under RCW 43.43.754 the trial court is authorized to require that a defendant convicted of a felony give a DNA sample for identification analysis. Under RCW 43.43.7541 the trial court has authority to impose a fee for the collection of the biological sample. Subsection (1) of the former statute states:

(1) Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis in the following manner:

RCW 43.43.754.

Under this statute the question arises whether or not the phrase “convicted of a felony” means “every time a person is convicted of a felony” even if a biological sample and fee have previously been collected as part of another judgment and sentence. Since the statute does not use the phrase “every time a defendant is convicted of a felony” it is susceptible to two equally reasonable interpretations: first, that the process should be repeated with every judgment and sentence, and second, that the process should only

be performed once.

The court's primary duty when interpreting any statute is to discern and implement the intent of the legislature. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003). Under RCW 43.43.753 the legislature has stated its intent as regards the collection of biological samples of DNA. This purpose is to create a forensic DNA database of all offenders which can be checked against DNA samples taken as evidence in crime scenes, thereby aiding in the identification of the perpetrators of new crimes. The reason such a database is effective is that each person's DNA is unique and once obtained functions like fingerprints do in aiding to identify the perpetrators of crimes and exclude innocent persons. *See State v. Gentry*, 125 Wn.2d 570, 888 P.2d 1105 (1995).

In addition part of the theory behind DNA analysis is that DNA does not change over time. Once a sample is taken, analyzed and the results placed in a database, there is no need to take a new sample if the defendant is convicted of a new felony. Interpreting RCW 43.43.754 to require the taking of a new sample for each subsequent felony conviction does not further the purpose of DNA testing. In fact, requiring a new sample and subsequent testing for each new felony sentence has a detrimental effect upon the creation of a state database because it wastes scarce state resources in the analysis of duplicate samples. Consequently, the interpretation of RCW

43.43.754 that best implements the intent of the legislature is the one that limits its application to the collection of a single DNA sample.

In the case at bar the defendant's criminal history includes two 2004 Klickitat County convictions for the same charges involving the same victims as those in the case at bar. These convictions were well after the July 1, 2002 implementation date for RCW 43.43.754. Consequently the State of Washington had already gathered the defendant's DNA sample and placed the results of the test in the state data bank. As a result there is neither a need nor authority for gathering a second sample and imposing a second fee. Thus, the trial court in this case erred when it imposed a second DNA test and fee.

In addition, there is a second error in imposing the DNA testing fee in the case at bar. In this case the crimes occurred between April and November of 2001. CP 69-70. Under RCW 43.43.7541 the legislature has not authorized collection of a DNA fee. This statute states:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit fees collected to the state treasurer for deposit in the state DNA data base account created under RCW 43.43.7532.

RCW 43.43.7541.

Under the plain language of this statute the legislature has only authorized collection of the DNA fee “for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002.” Since the commission of the offenses in the case at bar predate July 1, 2002, the trial court erred when it imposed the DNA fee, whether or not it erred when it ordered the testing.

***(2) The Trial Court May Only Order Community Custody Conditions Specifically Authorized under the Sentencing Reform Act.***

In the case of *In re Jones*, 118 Wn.App. 199, 76 P.3d 258 (2003), the court of appeals addressed the issue of what conditions a trial court may impose as part of community custody. In this case the defendant pled guilty to a number of felonies including first degree burglary. The court sentenced him to concurrent prison time and community custody which included the following conditions among others: (1) that the defendant violate no laws, (2) that the defendant not consume alcohol, (3) that the defendant complete alcohol treatment, and (4) that the defendant participate in mental health treatment. At the time of sentencing the court had no evidence before it that alcohol or mental health problems contributed to the defendant’s crimes. The defendant appealed the sentence arguing that the trial court did not have authority to impose these conditions.

In addressing these claims the court of appeals first looked to the applicable statutes concerning conditions of community custody and determined that certain statutes RCW 9.94A specifically allowed the court to order that a defendant not violate the law and not consume alcohol. The court then reviewed the remaining two conditions and determined that the legislature only allowed imposition of alcohol or mental health treatment if it found that alcohol or mental health issues were “reasonably related” to the defendant’s commission of the crimes to which the court was sentencing him. Finding no such evidence in the record the court struck these two conditions.

In the case at bar the defendant pled guilty to child molestation in the first and second degree under RCW 9A.44.083 and RCW 9A.44.086. Under RCW 9.94A.030(41)(a)(i) the term “sex offense” is defined to include any “felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11).” Thus, violations of RCW 9A.44.083 and RCW 9A.44.086 are sex offenses. The imposition of community custody for sex offense sentences of confinement for one year or more is controlled by RCW 9.94A.715. This statute states in part:

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712. . . . committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW

9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. . . .

RCW 9.94A.715(1).

As this statute explicitly states it applies to when the court sentences a person “to the custody of the department for a sex offense not sentenced under RCW 9.94A.712.” Thus the trial court in the case at bar had authority to impose community custody. Subsection 2 of this statute states the following concerning the conditions of community custody the trial court may impose:

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

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender’s risk of reoffense and may establish and modify additional conditions of the offender’s community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

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

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

RCW 9.94A.715(2).

As RCW 9.94A.715(2)(a) states, “the conditions of community custody shall include those provided for in RCW 9.94A.700(4).” In addition, “[t]he conditions may also include those provided for in RCW 9.94A.700(5).” Herein one finally finds the actual conditions. Subsection 4 of RCW 9.94A.700 states:

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

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

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

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

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

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

RCW 9.94A.700(4).

Section (5) of this same statute provides the trial court with authority to impose further conditions. It states:

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

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

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

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

(d) The offender shall not consume alcohol; or

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

RCW 9.94A.700(5).

Under these provisions no causal link need be established between the condition imposed and the crime committed so long as the condition relates to the circumstances of the crime. *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992). A condition relates to the “circumstances” of the crime if it is “an accompanying or accessory fact.” Black’s Law Dictionary 259 (8<sup>th</sup> ed. 2004). On review, objections to these conditions can be raised for the first time on appeal. *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000), *review denied*, 143 Wn.2d 1003 (2001) (“sentences imposed without statutory authority can be addressed for the first time on appeal”). Imposition of crime-related prohibitions are reviewed for an abuse of discretion and will

only be reversed if the decision is manifestly unreasonable or based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

In the case at bar the trial court imposed the following conditions among others:

- ☒ Defendant shall not violate any federal, state or local criminal laws, and shall not be in the company of any person known by him/her to be violating such laws.
- ☒ Defendant shall not commit any like offenses.
- ☒ Defendant shall notify his/her community corrections officer within forty-eight (48) hours of any arrest or citation.
- ☒ Defendant shall not initiate or permit communication or contact with persons known to him/her to be substance abusers.
- ☒ Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling and data storage devices.
- ☒ Defendant shall not frequent known drug activity areas or residences.
- ☒ Defendant shall submit to urine, breath or other screening whenever requested to do so by treatment program staff and/or the community corrections officer.
- ☒ Defendant shall sign necessary release of information documents as required by the Department of Corrections.
- ☒ Defendant shall adhere to the following additional crime-related prohibitions or conditions of community placement/community custody: As listed in the attached Department of Corrections "Appendix F" and the Prosecutor's PRetrial Officer Appendix

“A”

CP 161-178.

Appendix A as mentioned in the last condition listed above includes the following conditions:

12. You shall not possess, use, or own any firearms, ammunition, or deadly weapon. Your community corrections officer shall determine what those deadly weapons are.

14. You shall submit to urine, breath, or other screening whenever requested to do so by the program staff or your community corrections officer.

17. You shall take antabuse per community corrections officer's direction.

24. You shall sign necessary release information documents as required by Department of Corrections or the Prosecuting Attorney.

25. You shall have no association with persons known to be on probation, parole or community placement.

CP 179-182.

The last sentence of RCW 9.94A.715(2)(b) provides that “the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.” Thus, the first half of the first condition listed above and the second condition are valid. However neither this provision nor any other allows the court to prohibit the defendant from being “in the company of any person known by him/her to be violating such laws.” Thus, the second half of the first

condition listed above is invalid. In addition, nothing within the statute gives the court authority to require that a defendant “notify his/her community corrections officer within forty-eight (48) hours of any arrest or citation.” Similarly the statute does not give the court authority to require that the defendant “not initiate or permit communication or contact with persons known to him/her to be substance abusers.” As a result these two conditions are also invalid.

Under RCW 9.94A.700(4)(c) the court does have authority to prohibit a defendant from possessing or consuming controlled substances “except pursuant to lawfully issued prescriptions.” There is nothing in this section that allows the court to require that the defendant notify the department upon receiving a valid prescription for a controlled substance. Neither is there anything in this section that allows the trial court to prohibit a defendant from possessing or using “any paraphernalia that can be used for the ingestion of controlled substance” such as “pagers, cell phone, and police scanners.” Similarly sections 4 and 5 of RCW 9.94A.700 do not give the trial court authority to require a defendant to take urinalysis tests, to require a defendant to “sign necessary release of information documents as required by the Department of Corrections,” to require that a defendant take antabuse, or to prohibit a defendant from associating with “persons known to be on probation, parole or community placement.” Thus the trial court exceeded

it's authority when it imposed all of these conditions.

Finally, while the court does have authority to prohibit a defendant from possessing firearms it does not have the authority to prohibit a defendant from possessing "deadly weapons." Indeed, this term is so ambiguous as to make give the defendant's probation officer blanket authority to prevent the defendant from possessing a steak knife, a bottle of bleach, a motor vehicle, or a razor blade just to name a few items that can qualify as "deadly weapons" depending upon how they are used. The trial court did not have authority to impose this condition.

It is true that RCW 9.94A.700(5)(e) does authorize the court to impose "crime-related prohibitions." However as the decision in *Jones* explains the trial court must have facts to support the conclusion that the condition imposed "relates to the circumstances of the crime" before it may impose the condition. In the case at bar the defendant committed the crime of child molestation. The state did not allege, the defendant did not admit, and the court did not find any facts that related "to the circumstances of the crime." Thus the conditions here at issue cannot be saved under RCW 9.94A.700(5)(e). As a result the trial court abused it's discretion when it imposed the conditions noted above.

**III. THE TRIAL COURT EXCEEDED THE STATUTORY MAXIMUM FOR COUNT II WHEN IT IMPOSED COMMUNITY CUSTODY WITHOUT LIMITING THE TOTAL SENTENCE TO THE STATUTORY MAXIMUM OF FIVE YEARS.**

Under RCW 9A.20.021 the legislature has set statutory maximums for felonies in Washington State. This statute provides:

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

RCW 9A.20.021.

In the case at bar the defendant pled guilty in Count II to violating RCW 9A.44.086. This offense is a Class B felony and under RCW 9A.20.021(1)(b) the statutory maximum for this offense is 10 years in prison. In spite of this fact the court imposed a sentence 116 months on Count II (Second Degree Child Molestation) plus from 36 to 48 months community custody, thereby creating a sentence over the statutory maximum even if the

defendant obtains all possible good time credits. The court did not state in the judgment and sentence that the actual time in custody plus the community custody may not exceed 120 months on Count II. As a careful review of the decision in *State v. Sloan*, 121 Wn.App. 220, 87 P.3d 1214 (2004), explains this was error.

In *State v. Sloan, supra*, the defendant pled guilty to three counts of third degree rape and one count of third degree child molestation. All of the offenses are Class C felonies with a statutory maximum of five years in prison each. The trial court imposed sentences of 60 months in prison plus 36 to 48 months community custody on each count concurrent. The defendant then appealed arguing that the terms of community custody exceeded the statutory maximum on each count. However, citing to its decision in *State v. Vanoli*, 86 Wn.App. 643, 937 P.2d 1166 (1997) the court rejected this argument. In *Vanoli* the court addressed the same argument and noted that given the realities of good time and early release a person sentenced to the statutory maximum confinement would probably be released prior to serving the statutory maximum. Thus, time would still be available within the statutory maximum for serving community custody.

While the court in *Sloan* rejected the defendant's argument that the trial court had exceeded the statutory maximum at sentencing it did not deny the defendant any relief at all. Rather the court recognized that the statutory

maximum would be exceeded if a defendant did serve the entire sentence in custody or if the amount of earned early release was less than the term of community custody. Given this possibility the court remanded the case for the trial court to include specific instructions in the judgment and sentence that the combined term of imprisonment and community custody could not exceed the statutory maximum. The court held:

Sloan argues Vanoli was wrongly decided. She contends an individual who has served the statutory maximum may be nevertheless forced to comply with conditions of community custody, and may be jailed for non-compliance if her community corrections officer fails to appreciate the situation. While we are inclined to give CCOs more credit than this, we recognize that sentences like Vanoli's and Sloan's may generate uncertainty in some circumstances. To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.

“Where a sentence is insufficiently specific about the period of community placement required by law, remand for amendment of the judgment and sentence to expressly provide for the correct period of community placement is the proper course.” *State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997). Accordingly, we remand for clarification of Sloan's judgment and sentence.

*State v. Sloan*, 121 Wn.App. at 223-224.

In the case at bar just as in *Sloan* the trial court imposed an incarceration term on Count II near the statutory maximum for that count. The court also imposed a term of community custody that will exceed the statutory maximum when combined with the actual term of incarceration the

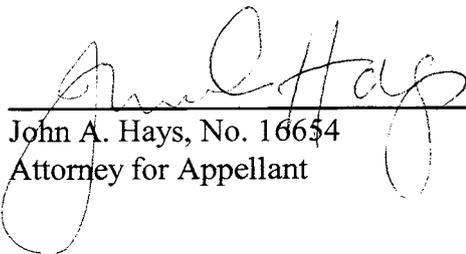
defendant serves. Finally, as in *Sloan*, the court in this case failed to include any language in the judgment and sentence that limited the combined actual term of confinement and community custody to the statutory maximum for each offense. As a result, this court should remand this case with instructions that the trial court modify the judgment and sentence to include that language mandated by *Sloan*.

## CONCLUSION

The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it refused to allow him to withdraw a guilty plea that was not knowingly, voluntarily, and intelligently entered. In the alternative, the trial court erred when it imposed community custody condition not authorized by the legislature and when it failed to limit the defendant's sentence to the statutory maximum allowable under law.

DATED this 12<sup>th</sup> day of July, 2006.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**RCW 9.94A.700**

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

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

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

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

(i) Assault in the second degree;

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

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

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

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

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

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

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

(3) The community placement ordered under this section shall begin either upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. When the court sentences an offender to the statutory maximum sentence then the community placement portion of the sentence shall consist entirely of the community custody to which the offender may become eligible. Any period of community custody actually served shall be credited against the community placement portion of the sentence.

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

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

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

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

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

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

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

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

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

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

(d) The offender shall not consume alcohol; or

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

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

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

#### **RCW 9.94A.715**

(1) When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any

crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer. The community custody shall begin: (a) Upon completion of the term of confinement; (b) at such time as the offender is transferred to community custody in lieu of earned release in accordance with RCW 9.94A.728 (1) and (2); or (c) with regard to offenders sentenced under RCW 9.94A.660, upon failure to complete or administrative termination from the special drug offender sentencing alternative program. Except as provided in RCW 9.94A.501, the department shall supervise any sentence of community custody imposed under this section.

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

(b) As part of any sentence that includes a term of community custody imposed under this subsection, the court shall also require the offender to comply with any conditions imposed by the department under RCW 9.94A.720. The department shall assess the offender's risk of reoffense and may establish and modify additional conditions of the offender's community custody based upon the risk to community safety. In addition, the department may require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws.

(c) The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court imposed conditions. The department shall notify the offender in writing of any such conditions or modifications. In setting, modifying, and enforcing conditions of community custody, the department shall be deemed to be performing a quasi-judicial function.

(3) If an offender violates conditions imposed by the court or the

department pursuant to this section during community custody, the department may transfer the offender to a more restrictive confinement status and impose other available sanctions as provided in RCW 9.94A.737 and 9.94A.740.

(4) Except for terms of community custody under RCW 9.94A.670, the department shall discharge the offender from community custody on a date determined by the department, which the department may modify, based on risk and performance of the offender, within the range or at the end of the period of earned release, whichever is later.

(5) At any time prior to the completion or termination of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of RCW 9.94A.631 and may be punishable as contempt of court as provided for in RCW 7.21.040. If the court extends a condition beyond the expiration of the term of community custody, the department is not responsible for supervision of the offender's compliance with the condition.

(6) Within the funds available for community custody, the department shall determine conditions and duration of community custody on the basis of risk to community safety, and shall supervise offenders during community custody on the basis of risk to community safety and conditions imposed by the court. The secretary shall adopt rules to implement the provisions of this subsection.

(7) By the close of the next business day after receiving notice of a condition imposed or modified by the department, an offender may request an administrative review under rules adopted by the department. The condition shall remain in effect unless the reviewing officer finds that it is not reasonably related to any of the following: (a) The crime of conviction; (b) the offender's risk of reoffending; or (c) the safety of the community.

### **RCW 43.43.753**

The legislature finds that recent developments in molecular biology and genetics have important applications for forensic science. It has been scientifically established that there is a unique pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of the human body. The process for identifying this pattern is called "DNA identification."

The legislature further finds that DNA data bases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interest of the state to establish a DNA data base and DNA data bank containing DNA samples submitted by persons convicted of felony offenses and DNA samples necessary for the identification of missing persons and unidentified human remains.

The legislature further finds that the DNA identification system used by the Federal Bureau of Investigation and the Washington state patrol has no ability to predict genetic disease or predisposal to illness. Nonetheless, the legislature intends that biological samples collected under > RCW 43.43.754, and DNA identification data obtained from the samples, be used only for purposes related to criminal investigation, identification of human remains or missing persons, or improving the operation of the system authorized under RCW 43.43.752 through 43.43.758.

### **RCW 43.43.754**

(1) Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis in the following manner:

(a) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense who do not serve a term of confinement in a department of corrections facility, and do serve a term of confinement in a

city or county jail facility, the city or county shall be responsible for obtaining the biological samples either as part of the intake process into the city or county jail or detention facility for those persons convicted on or after July 1, 2002, or within a reasonable time after July 1, 2002, for those persons incarcerated before July 1, 2002, who have not yet had a biological sample collected, beginning with those persons who will be released the soonest.

(b) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense who do not serve a term of confinement in a department of corrections facility, and do not serve a term of confinement in a city or county jail facility, the local police department or sheriff's office is responsible for obtaining the biological samples after sentencing on or after July 1, 2002.

(c) For persons convicted of such offenses or adjudicated guilty of an equivalent juvenile offense, who are serving or who are to serve a term of confinement in a department of corrections facility or a department of social and health services facility, the facility holding the person shall be responsible for obtaining the biological samples either as part of the intake process into such facility for those persons convicted on or after July 1, 2002, or within a reasonable time after July 1, 2002, for those persons incarcerated before July 1, 2002, who have not yet had a biological sample collected, beginning with those persons who will be released the soonest.

(2) Any biological sample taken pursuant to RCW 43.43.752 through 43.43.758 may be retained by the forensic laboratory services bureau, and shall be used solely for the purpose of providing DNA or other tests for identification analysis and prosecution of a criminal offense or for the identification of human remains or missing persons. Nothing in this section prohibits the submission of results derived from the biological samples to the Federal Bureau of Investigation combined DNA index system.

(3) The director of the forensic laboratory services bureau of the Washington state patrol shall perform testing on all biological samples collected under subsection (1) of this section, to the extent allowed by funding available for this purpose. The director shall give priority to testing on samples collected from those adults or juveniles convicted of a felony or adjudicated guilty of an equivalent juvenile offense that is defined as a sex offense or a violent offense in RCW 9.94A.030.

(4) This section applies to all adults who are convicted of a sex or

violent offense after July 1, 1990; and to all adults who were convicted of a sex or violent offense on or prior to July 1, 1990, and who are still incarcerated on or after July 25, 1999. This section applies to all juveniles who are adjudicated guilty of a sex or violent offense after July 1, 1994; and to all juveniles who were adjudicated guilty of a sex or violent offense on or prior to July 1, 1994, and who are still incarcerated on or after July 25, 1999. This section applies to all adults and juveniles who are convicted of a felony other than a sex or violent offense, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, or communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense, on or after July 1, 2002; and to all adults and juveniles who were convicted or adjudicated guilty of such an offense before July 1, 2002, and are still incarcerated on or after July 1, 2002.

(5) This section creates no rights in a third person. No cause of action may be brought based upon the noncollection or nonanalysis or the delayed collection or analysis of a biological sample authorized to be taken under RCW 43.43.752 through 43.43.758.

(6) The detention, arrest, or conviction of a person based upon a data base match or data base information is not invalidated if it is determined that the sample was obtained or placed in the data base by mistake, or if the conviction or juvenile adjudication that resulted in the collection of the biological sample was subsequently vacated or otherwise altered in any future proceeding including but not limited to posttrial or postfact-finding motions, appeals, or collateral attacks.

#### **RCW 43.43.7541**

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit fees collected to the state treasurer for deposit in the state DNA data base account created under RCW 43.43.7532.

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COURT OF APPEALS

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STATE OF WASHINGTON

BY Cmm

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

6 **STATE OF WASHINGTON,** )  
7 **Respondent,** )  
8 **vs.** )  
9 **DANIEL RAY SMITH,** )  
10 **Appellant,** )

**CLARK CO. NO. 04-1-02056-5**  
**APPEAL NO: 34325-8-II**  
**AFFIDAVIT OF MAILING**

11 **STATE OF WASHINGTON** )  
12 **COUNTY OF CLARK** ) vs.

13 **DONNA BAKER**, being duly sworn on oath, states that on the **12<sup>TH</sup> day of JULY, 2006**,  
14 affiant deposited into the mails of the United States of America, a properly stamped envelope  
directed to:

15 **ARTHUR CURTIS**  
16 **CLARK COUNTY PROSECUTING ATTORNEY**  
17 **1200 FRANKLIN ST.**  
**VANCOUVER, WA 98668**

**DANIEL R. SMITH**  
**WASHINGTON STATE**  
**PENITENTIARY**  
**P.O. Box 520**  
**WALLA WALLA, WA 99362**

18 and that said envelope contained the following:

- 19 1. **BRIEF OF APPELLANT**
- 20 2. **AFFIDAVIT OF MAILING**

21 **DATED** this 12TH day of JULY, 2006.

  
\_\_\_\_\_  
**DONNA BAKER**

22 **SUBSCRIBED AND SWORN** to before me this 12 day of JULY, 2006.



23 Heather Chittock  
24 **NOTARY PUBLIC** in and for the  
25 **State of Washington,**  
**Residing at:** Longview  
**Commission expires:** 11-04-2009