

NO. 45044-5-II

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

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STATE OF WASHINGTON,

Appellant,

v.

D.J.C.  
Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge

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BRIEF OF RESPONDENT AND  
CROSS APPELLANT

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## TABLE OF CONTENTS

	<b>Page</b>
A. ASSIGNMENTS OF ERROR .....	6
Issues Presented on Appeal .....	6
B. STATEMENT OF THE CASE .....	7
C. ARGUMENTS .....	9
1. D.J.C.'S GUILTY PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLGENT BECAUSE HE WAS NOT APPRISED OF THE ESSENTIAL ELEMENTS OF THE CRIME PLEADED OR OF THE MANDATORY SEX OFFENDER REGISTRATION.....	9
a. <u>Direct Consequence of Plea: Sex Offender Registration</u> .....	10
b. <u>Essential Element of Element of Crime</u> .....	15
c. <u>Remedy</u> .....	19

2. TRIAL COUNSEL WAS INEFFECTIVE FOR: (1) FAILING TO ADVISE D.J.C. OF THE MADATORY SEX OFFENDER REGISTRATION; (2) ARGUING FOR WAIVER OF SEX OFFENDER REGISTRATION WHEN IT WAS NOT STATUTORILY AVAIALBLE; AND (3) FAILING TO ENSURE THE PLEA FORM CONTAINED THE ESSENTIAL ELEMENT "MINOR" IN THE CHARGE OF COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES.....20

a. Ineffective Assistance.....20

b. Failure to Advise of Sex Offender Registration Prejudicial.....22

3. THE TRIAL COURT BASED ITS DECISION TO WAIVE SEX OFFENDER REGISTRASTION ON FORMER RCW 9A.44.143.....25

D. CONCLUSION .....25

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<i>In re Pers. Restraint of Isadore</i> , 151 Wn.2d 294, 88 P.3d 390 (2004).....	14, 18
<i>In re the Pers. Restraint of Keene</i> , 95 Wn.2d 203, 622 P.2d 360 (1980).....	16,18, 19
<i>State v. A.N.J.</i> , 168 Wn. 2d 91, 225 P. 3d 956 (2010).....	10, 12, 13, 14, 16, 22, 24
<i>State v. Barber</i> , 170 Wn.2d 854, 248 P.3d 494 (2011).....	11, 19
<i>State v. Barton</i> , 93 Wn.2d 301609 P.2d 1353 (1980).....	22
<i>State v. Cameron</i> , 30 Wn.App. 229, 633 P.2d 901, <i>review denied</i> , 96 Wn.2d 1023, (1981).....	21
<i>State v. Garrett</i> , 124 Wash.2d 504, 881 P.2d 185 (1994).....	20
<i>State v. McCollum</i> , 88 Wn.App. 977, 947 P.2d 1235 (1997), <i>review denied</i> , 137 Wn.2d 1035, 980 P.2d 1285 (1999).....	21
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	21
<i>State v. Miller</i> , 110 Wn.2d 528, 756 P.2d 122 (1988).....	11

TABLE OF AUTHORITIES –Cont’d

Page

WASHINGTON CASES

*State v. Osborne*,  
102 Wn.2d 87, 684 P.2d 683 (1984).....21, 22, 24

*State v. Robinson*,  
172 Wn.2d 783, 263 P.3d 1233 (2011).....10, 11

*State v. Ross*,  
129 Wn.2d 279, 916 P.2d 405 (1996).....10

*State v. Thomas*,  
109 Wn.2d 222, 743 P.2d 816 (1987).....21

*State v. Tourtellotte*,  
88 Wn.2d 579, 564 P.2d 799 (1977).....19

*State v. Ward*,  
123 Wn.2d 488, 869 P.2d 1062 (1994).....22

FEDERAL CASES

*Henderson v. Grady*,  
426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).....16-19

*Bousley v. United States*,  
523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998).....16, 17, 19

*Boykin v. Alabama*,  
395 U.S. 238, , 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).....10

*Strickland v. Washington*  
466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....20, 24

**TABLE OF AUTHORITIES –Cont’d**

	<b>Page</b>
<u>STATUTES, RULES AND OTHERS</u>	
U.S. CONST. amend. VI.....	20
WASH. CONST. art. I, § 22.....	20
CrR 4.2(d).....	10
WASH. STATE CASELOAD FORECAST COUNCIL, 2012 WASHINGTON STATE JUVENILE DISPOSITION GUIDELINES MANUAL § 1, at 7–8 (Rev.20130625).....	11
RCW 9.68A.090(1).....	15
RCW 9A.44.140(4).....	20, 24
RCW 9A.44.143.....	22, 23, 25
RCW 13.40.020(18).....	11

## A. ASSIGNMENTS OF ERROR

1. Trial counsel was ineffective for failing to advise appellant of the sex offender registration, a direct consequence of pleading guilty.

2. Counsel was ineffective for misleading D.J.C. into believing that the trial court could waive sex offender registration.

3. Appellant's plea was not knowing, voluntary and intelligent because he was not advised of the "minor" element of the charge of communicating with a minor for immoral purposes.

4. Appellant's plea was not knowing, voluntary and intelligent because he was misled into believing that the trial court could waive sex offender registration.

5. Appellant's plea was not knowing, voluntary and intelligent because he was not advised that sex offender registration was a mandatory sentencing requirement.

### Issues Presented on Appeal

1. Was trial counsel ineffective for failing to advise appellant of the sex offender registration, a direct consequence of pleading guilty?

2. Was counsel ineffective for misleading D.J.C. into believing that the trial court could waive sex offender registration?

3. Was Appellant's plea knowing, voluntary and intelligent where he was not advised of the essential element "minor", of the charge of communicating with a minor for immoral purposes?

4. Was Appellant's plea knowing, voluntary and intelligent where he was misled into believing that the trial court could waive sex offender registration?

5. Was Appellant's plea knowing, voluntary and intelligent where he was not advised that sex offender registration was a mandatory sentencing requirement?

B. STATEMENT OF THE CASE

During the plea hearing, the state moved to amend the information to communicating with a minor for immoral purposes to pursue plea negotiations with D.J.C. VRP 2. The defense attorney informed the court that the defense and the state had a disagreement regarding "whether he should register or not". RP 2-3. The trial court asked D.J.C if he went through the plea form with his attorney and informed D.J.C. that he was charged with communicating with a minor

for immoral purposes. RP 3. D.J.C. agreed that his attorney went over the plea form and acknowledged the charge. Id. The entire length of the plea, sentencing and probation violation hearing cover only six pages of transcripts. RP 2-6.

D.J.C. responded “yes” when the court asked if he communicated with S.B. “who is under the age of 18”. RP 3. D.J.C. turned seventeen one month prior to the initial act charged. CP 3. The statement of defendant on plea of guilty did not list the essential element “minor” and did not list sex offender registration as a consequence of pleading guilty. The court accepted the plea of guilty and proceeded to sentencing where defense counsel provided the following argument:

Your Honor, as the Court is well aware of registration, you know, for a juvenile the Court can determine whether or not it serves any reasonable purpose to have him register.

[[D.J.C.] is originally charged with rape of a child and it's not the situation and – it's not the situation of rape where we normally think of as lay people do, forceful compulsion or anything else such as this. This was a voluntary part on both of theirs [sic]. The young lady made it quite clear she wanted to have sex with [D.J.C.]. She was hoping in fact that she could get pregnant by [D.J.C.]. She has been on Facebook telling everyone about this and at one point she was sending

notes that she was, in fact, going to lie to the Court at trial so that [D.J.C.], you know, could – she would perjure herself- she didn't quite use that word, she doesn't know it, but she was going to lie to the Court about this whole circumstance so that she could basically do what she wanted to for [D.J.C.].

[D.J.C.] was open and honest with the officer when questioned and that's why we're accepting this plea bargain today. He admitted to the officer he had sex with the young lady, it was consensual. It doesn't serve any reasonable purpose for [D.J.C.] to have to register and carry that stigma about him when this was done on a consensual basis by both parties. There's no indication that he's had any type of sexual contact with any other person.

RP 5-6.

1. D.J.C.'S GUILTY PLEA WAS NOT KNOWING, VOLUNTARY AND INTELLGENT BECAUSE HE WAS NOT APPRISED OF THE ESSENTIAL ELEMENTS OF THE CRIME PLEADED OR OF THE MANDATORY SEX OFFENDER REGISTRATION.

D.J.C. was not advised that sex offender registration was a direct consequence of pleading guilty to communication with a minor for immoral purposes or that communication with a "minor" was an element of that crime. Supp. CP (statement of defendant on plea of guilty May 9, 2013); RP 1-8.

Due process requires that a guilty plea may be accepted only upon a showing the accused understands the nature of the charge and enters the plea intelligently and voluntarily. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011) (citing, *State v. A.N.J.*, 168 Wn. 2d 91, 117, 225 P. 3d 956 (2010); *Boykin v. Alabama*, 395 U.S. 238, 242–43, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). A trial court may not accept a guilty plea without first determining that a criminal defendant has entered into the plea “voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d).

a. Direct Consequence of Plea: Sex Offender Registration

A guilty plea is involuntary when a defendant is not informed of all direct consequences of pleading guilty. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 300, 88 P.3d 390 (2004). A direct consequence is one having a definite, immediate, and largely automatic effect on the range of punishment. *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996). A defendant need not be informed of all possible collateral consequences of his plea. *In re*

*Isadore*, 151 Wn.2d at 298.

A defendant cannot make a knowing, voluntary and intelligent decision to plead guilty when he decides to plead guilty on misinformation regarding sentencing consequences. *Robinson*, 172 Wn.2d at 790 (citing, *State v. Miller*, 110 Wn.2d 528, 531, 756 P.2d 122 (1988) *overruled on other grounds by State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (2011)).

Here the plea form simply stated under sentencing recommendations, “local sanctions”. Local sanctions are community based consequences, under which the juvenile remains in the community or is released after a short stay in the local juvenile detention facility. WASH. STATE CASELOAD FORECAST COUNCIL, 2012 WASHINGTON STATE JUVENILE DISPOSITION GUIDELINES MANUAL § 1, at 7–8 (Rev.20130625).

“Local sanctions” is defined by RCW 13.40.020(18) to mean “one or more of the following: (a) 0–30 days of confinement; (b) 0–12 months of community supervision; (c) 0–150 hours of community restitution; or (d) \$0–\$500 fine.” Prior to March 28, 2014, this provision was located in subsection (17).

In *A.N.J.* the Supreme Court held that sex offender registration is a direct consequence of pleading guilty to a sex offense. *A.N.J.*, 168 Wn.2d at 115. *A.N.J.* argued that he was misled about sex offender registration and the ability to petition for removal of this offense from his record. Sex offender registration is a direct consequence of pleading guilty to a sex offense but the ability to remove the sex offense from the juvenile record is not. *A.N.J.*, 168 Wn.2d at 115.

Under existing statutes, the obligation to register follows directly from the conviction. *E.g.*, RCW 9A.44.130. While the registration obligation does not affect the immediate sentence, its impact is significant, certain, and known before a guilty plea is entered.

*A.N.J.*, 168 Wn.2d at 115.

The Court found that *A.N.J.* was in fact properly advised of the requirement to register but misadvised that his sex offense could be removed from his record. The Court held that the combined misadvisement regarding removing the sex offense from the record, the lack of time counsel spent with *A.N.J.* and the lack of understanding *A.N.J.* and his family expressed regarding the consequences of the

plea were sufficient to permit withdrawal of the plea as involuntary. *A.N.J.*, 168 Wn.2d at 116-117.

The instant case shares features with *A.N.J.*; specifically, the record fails to reveal: (1) that D.J.C. was advised that sex offender registration was mandatory; and (2) that counsel spent enough to explain the plea and its consequences. RP 2-3. In addition to the facts in *A.N.J.*, here the plea form did not advise that sex offender registration was required. Supp. CP (Statement of Defendant on Plea of Guilty May 9, 2013).

The oral colloquy and the statement of defendant on plea of guilty do not provide notice that sex offender registration is mandatory. The only mention of sex offender registration occurs before the plea was taken when trial counsel informed the trial court that the defense and state disagreed about sex offender registration. RP 2-3. Further the information was amended at the same time the court considered the plea, a probation violation, and sentencing --a minimal amount of time that covered only 6 pages of transcript. RP 2-6 (page 1 is a cover page).

Trial counsel's noting to the trial court that he and the state disagreed regarding sex offender registration did not indicate that D.J.C. understood that sex offender registration was mandatory. Rather it implied that D.J.C. was misadvised that sex offender registration was not a direct consequence of pleading guilty, but rather something that could be waived.

Trial counsel's apparent failure to correctly inform D.J.C., and the apparent brevity of the communication between counsel and A.N.J. created the same lack of a correct understanding of sex offender registration that the Court held insufficient to constitute a knowing, voluntary and intelligent plea in *A.N.J.* RP 2-6.

In *Isadore* the Court unequivocally held that a defendant is denied due process during a guilty plea when he is not informed of all direct consequences of pleading guilty. *Isadore*, 151 Wn.2d at 298., 300. In *Isadore*, the plea agreement did not mention community placement, and the prosecutor informed the court that community placement did not apply. The Court held the plea was invalid because *Isadore* was not advised of the direct consequence of mandatory community placement. *Isadore*, 151 Wn.2d at 301.

*Isadore* is legally indistinguishable from the instant case. Here, D.J.C. was not advised of sex offender registration during the combined plea and sentencing hearing and the plea form did not indicate sex offender registration just as *Isadore* was not advised of mandatory community placement. D.J.C. was denied due process because the trial court and counsel did not advise him that sex offender registration was not a local sanction but rather a mandatory and direct consequence of pleading to the crime charged.

b. Essential Element of Element of Crime

Communicating with a minor for immoral purposes reads in pertinent part as follows: “a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.” RCW 9.68A.090(1). To convict D.J.C. of communicating with a minor for immoral purposes, the state had to prove the following essential elements in RCW 9.68A.090(1): (1) communicate with; (2) a minor; (3) for immoral purposes.

Here, the plea form did not list “minor” in the elements section; counsel did not state that he explained to D.J.C. the elements of the

crime charged; and D.J.C. did not acknowledge that he received a copy of the information that was first presented at the time of the plea. RP 2-3. The plea form simply contained in the elements section: “having a communication with another request sex”. Supp. CP. Statement of Defendant on Plea of Guilty May 9, 2014).

To satisfy due process “being advised” requires that the defendant have “real notice” of the elements of the crime charged. *Bousley v. United States*, 523 U.S. 614, 628, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); *Henderson v. Grady*, 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976). For a plea to be knowing, voluntary and intelligent, the defendant must know all of the elements of the offense and understand that his conduct satisfies those elements. *A.N.J.*, 168 Wn.2d at 117-119; *In re the Pers. Restraint of Keene*, 95 Wn.2d 203, 208–09, 622 P.2d 360 (1980) (defendant acknowledged he received a copy of the information).

This means that the plea statement must contain all of the elements of the crime charged unless the information under which the defendant pleads guilty states all of the elements, and the defendant acknowledges that he received a copy of the information. *Keene*, 95

Wn.2d at 208–09.

A plea that misinformed D.J.C. of the elements of the crime “does not qualify as knowing, voluntary and intelligent.” *Id.* In *Bousley*, was not advised of the elements of the crime but the Court did not decide the issue of the voluntariness of the plea holding instead that as a PRP it was procedurally barred. *Bousley*, 523 U.S. at 622. The Court noted however that if Bousley’s claim was not procedurally barred and if he established that he was unaware of the elements of the crime, his plea would be invalid. *Bousley*, 523 U.S. at 618-19 (Bousley claimed neither he, his attorney nor the court, were aware of the elements of the crime pleaded).

In *Henderson v. Grady*, the defendant, a person with low mental capacity, pleaded to a reduced charge that was never formally made. *Henderson v. Grady*, 426 U.S. at 645. The record therein did not provide an explanation of the charge or representation that counsel explained to the defendant the elements of the offense. *Henderson v. Grady*, 426 U.S. at 647. The Court held that in some cases it is permissible to presume the defendant understood the charge, but not where the defendant has a low mental capacity. *Id.* A

juvenile like a person with a low mental capacity needs an explanation of the elements of the charge, thus without any evidence that D.J.C. understood the elements, the Court may not presume that counsel provided sufficient explanation of the charge and its consequences. Id.

In *Keene*, unlike in this case, the defendant received a copy of the information and had actual notice of the elements from the information and acknowledged so in court. *Keene*, 95Wn.2d at 208-209. Here by contrast, D.J.C. was not provided a copy of the information, and the court did not ask if he read or reviewed the charging document with counsel. RP 3. The court only asked if D.J.C. reviewed the statement of defendant on plea of guilty which did not contain the element “minor” and could not have provided notice of the elements. This distinguishes *Keene* where the defendant received the information and acknowledged that he reviewed that document. Id; Supp. CP (Statement of Defendant on Plea of Guilty May 9, 2013).

This case is similar to *Henderson*, because D.J.C. like *Henderson* was not advised on the record of the elements of the crime and as a juvenile he needed a clear explanation of the elements

of the charge. D.J.C. only acknowledged that he went through the plea statement with his attorney and that document did not contain the essential element of “minor”. RP 3-4. Under *Keene, Henderson,* and *Bousley*, D.J.C.’s plea was not knowing, voluntary and intelligent.

c. Remedy

For many years, the Supreme Court has held that “[t]he defendant is entitled to the benefit of his original bargain.” *Isadore*, 151 Wn.2d at 303 (quoting, *State v. Tourtellotte*, 88 Wn.2d 579, 585, 564 P.2d 799 (1977)). However in *Barber*, the Supreme Court held that the defendant is not entitled to rely on a sentencing recommendation in a plea that is based on mutual mistake when it is contrary to law. *Barber*, 170 Wn.2d at 873. D.J.C. may therefore choose to withdraw his plea.

2. TRIAL COUNSEL WAS INEFFECTIVE FOR: (1) FAILING TO ADVISE D.J.C. OF THE MANDATORY SEX OFFENDER REGISTRATION; (2) ARGUING FOR WAIVER OF SEX OFFENDER REGISTRATION WHEN IT WAS NOT STATUTORILY AVAILABLE; AND (3) FAILING TO ENSURE THE PLEA FORM CONTAINED THE ESSENTIAL ELEMENT "MINOR" IN THE CHARGE OF COMMUNICATION WITH A MINOR FOR IMMORAL PURPOSES.

Trial Counsel did not list the element of "minor" on the plea agreement, and there is nothing in the record to indicate that D.J.C. was advised that sex offender registration was a direct consequence of pleading guilty. In apparent reliance on a repealed version of RCW 9A.44.140(4), counsel incorrectly argued that the trial court could waive sex offender registration.

- a. Ineffective Assistance

Effective assistance of counsel is guaranteed by both the federal and state constitutions. See U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The purpose of the guaranty is to ensure a reliable disposition of the case. *State v. Garrett*, 124 Wash.2d 504, 520, 881 P.2d 185 (1994) (quoting *Strickland v. Washington*, 466 U.S.

668, 691–92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). It is well settled that to demonstrate ineffective assistance of counsel, a defendant must show two things: “(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.” *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987)).

This test applies to claims of ineffective assistance in the plea bargaining process. *State v. McCollum*, 88 Wn.App. 977, 982, 947 P.2d 1235 (1997), *review denied*, 137 Wn.2d 1035, 980 P.2d 1285 (1999). In order to satisfy the first prong of the test in a plea bargaining context, D.J.C. must demonstrate that his counsel failed to “actually and substantially” assist him in determining whether to plead guilty. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wn.App. 229, 232, 633 P.2d 901, *review denied*, 96 Wn.2d 1023, 1981 WL 191072 (1981)). This means

among other things, “discussing the possible direct consequences of a guilty plea.” *Osborne*, 102 Wn.2d at 99.

A consequence is direct and not collateral if it “ ‘represents a definite, immediate[,] and largely automatic effect on the range of the defendant's punishment.’” *State v. Ward*, 123 Wn.2d 488, 512–13, 869 P.2d 1062 (1994) (quoting *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980)).

As discussed in the previous sections of this brief, sex offender registration is a direct consequence of pleading guilty. *A.N.J.*, 168 Wn.2d at 115. Under an ineffective assistance of counsel challenge, the state Supreme Court held that misinforming A.N.J. that his sex offense would not stay on his record forever was deficient performance that was sufficiently prejudicial to warrant withdrawal of the plea. *A.N.J.*, 168 Wn.2d at 116-117.

b. Failure to Advise of Sex Offender Registration Prejudicial.

Here, trial counsel relied on a repealed sex offender registration provision which provides in relevant part as follows: RCW 9A.44.143:

“(4) An offender having a duty to register under RCW

9A.44.130 for a sex offense or kidnapping offense committed when the offender was a juvenile may petition the superior court to be relieved of that duty. The court shall consider the nature of the registrable offense committed, and the criminal and relevant noncriminal behavior of the petitioner both before and after adjudication, and may consider other factors.

(RCW 9A.44.143(3)(a)). The new statute provides that juvenile may petition the court to extinguish the sex offender registration after two years without a subsequent sex offense. RCW 9A.44.143(3)(a). The relevant portions of RCW 9A.44.143 are as follows:

(1) An offender having a duty to register under RCW 9A.44.130 for a sex offense or kidnapping offense committed when the offender was a juvenile may petition the superior court to be relieved of that duty as provided in this section.

.....

(3) For all other [non class A] sex offenses or kidnapping offenses committed by a juvenile not included in subsection (2) of this section, the court may relieve the petitioner of the duty to register if:

(a) At least twenty-four months have passed since the petitioner's adjudication and completion of any term of confinement for the offense giving rise to the duty to register and the petitioner has not been adjudicated or convicted of any additional sex offenses or kidnapping offenses;

Id. The new provision requires two years in the community without a sex offense before a juvenile may petition to be relieved of sex offender registration. Counsel was unaware of the correct law.

Similar to *A.N.J.*, counsel here misled the court and failed to accurately advise D.J.C. that sex offender registration was a direct consequence of pleading guilty that could not be waived. This misrepresentation like the misleading information in *A.N.J.* was both deficient performance and prejudicial because the impact required registration and a permanent record of a sex offense.

Moreover, as required by *Osborne* Counsel did not “actually and substantially” assist D.J.C. in determining whether to plead guilty because he was mistaken as to the direct consequences of the plea. *Osborne*, 102 Wn.2d 87. It is obvious from the record that trial counsel was unaware that sex offender registration could not be waived under the current statutory scheme. RCW 9A.44.140; .143

Counsel’s performance was deficient and D.J.C. was prejudiced because within a reasonable probability, he would not have pleaded guilty had he been properly advised of sex offender registration. *Strickland, supra*.

3. THE TRIAL COURT BASED ITS  
DECISION TO WAIVE SEX OFFENDER  
REGISTRATION ON FORMER RCW  
9A.44.143.

Prior to June 2010, a defendant could petition the court to waive sex offender registration. RCW 9A.44.143(4). The Laws 2010, ch. 267, § 4, replaced this provision with a new statute that permits a juvenile to petition the court to extinguish the sex offender registration after two years without a subsequent sex offense. RCW 9A.44.143(3)(a).

D. CONCLUSION

D.J.C. respectfully requests this court remand for withdrawal of the plea because trial court failed to ensure that D.J.,C. made a knowing voluntary and intelligent decision to plead guilty with an understanding the direct consequence of sex offender registration and of the essential element of “minor”, which rendered the plea involuntary. This Court should also remand to vacate the plea because D.J.C. was denied effective assistance of counsel where trial counsel mislead D.J.C. into believing that sex offender registration was not mandatory and for failing to ensure that D.J. C. knew all of

the essential elements of the crime.

DATED this 21th day of April 2014.

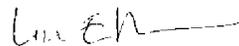
Respectfully submitted,



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LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County prosecutor's office Greg Fuller [Gfuller@co.grays-harbor.wa.us](mailto:Gfuller@co.grays-harbor.wa.us) and D.J.C. 1101 Woodlawn Ave. #15 Centralia, WA 98531 a true copy of the document to which this certificate is affixed, on April 21, 2014. Service was made to D.J.C. by depositing in the mails of the United States of America, properly stamped and addressed and electronically to the prosecutor.



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Signature

**ELLNER LAW OFFICE**

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