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NO. 52605-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JASON ALLAN LUSK-HUTCHINS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

Jason Lusk-Hutchins, a registered sex offender, registered as required and also reported when he ceased to have a fixed residence as required. After initially reporting weekly during the time he lacked a fixed residence, Mr. Lusk-Hutchins stopped reporting weekly when the residence at which he was staying became his fixed residence. Because this did not involve a move, he did not report a change of address to the sheriff's office, and the statute does not impose a duty to do so. This Court should reverse the sole conviction for insufficient evidence.

B. ASSIGNMENTS OF ERROR

1. The court violated Mr. Lusk-Hutchins's right to due process under the Fourteenth Amendment and article I, section 3, when it found Mr. Lusk-Hutchins guilty of failure to register where the State presented insufficient evidence to prove every element of the offense beyond a reasonable doubt.

2. The court erred by failing to apply the proper statutory standard and failing to consider meaningfully whether mitigating circumstances justified an exceptional sentence below the standard range.

3. The court erred in imposing discretionary legal financial obligations (LFOs).

4. The court erred in entering Finding of Fact 2.¹ CP 22.
5. The court erred in entering Finding of Fact 4. CP 23.
6. The court erred in entering Finding of Fact 5. CP 23.
7. The court erred in entering Finding of Fact 6. CP 23.
8. The court erred in entering Finding of Fact 7. CP 23.
9. The court erred in entering Finding of Fact 8. CP 23.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Due process requires the State to present sufficient evidence to prove beyond a reasonable doubt every element of a charged offense. Failure to register requires proof that a registrant failed to comply with a requirement of the registration statute. Here, the State failed to prove Mr. Lusk-Hutchins lacked a fixed residence and was therefore required to report weekly. In addition, the State failed to prove Mr. Lusk-Hutchins changed his address and was therefore required to report a change of address within three days of moving. Is reversal required where the State presented insufficient evidence of failure to register when it failed to prove Mr. Lusk-Hutchins did not comply with a requirement of the registration statute?

¹ The court's "Findings of Fact and Conclusions of Law on Defendant's Bench Trial" is at CP 22-24 and attached as Appendix 1.

2. Courts have the discretion to impose an exceptional sentence below the standard range where a defendant establishes a mitigating circumstance by a preponderance of the evidence and where the court determines the mitigating circumstances is a substantial and compelling reason justifying a lower sentence. Where the court fails to consider a mitigating circumstance or applies the wrong legal standard, the court abuses its discretion. Here, the court failed to apply the appropriate statutory standard to consider Mr. Lusk-Hutchins's request for an exceptional sentence and failed to consider meaningfully whether Mr. Lusk-Hutchins's mental health issues created a mitigating circumstance justifying an exceptional sentence. Should this Court reverse and remand for a new sentencing hearing for the court to apply the appropriate standard and to consider whether the proposed mitigating circumstances justify an exceptional sentence below the standard range?

3. Recent amendments to the LFO statutes prohibit the imposition of a criminal filing fee where a defendant is indigent, prohibit the imposition of a DNA collection fee where the State has previously collected a DNA sample from that individual, and prohibit interest accrual on non-restitution portions of LFOs. *State v. Ramirez*² held those

² 191 Wn.2d 732, 426 P.3d 714 (2018).

amendments apply prospectively to individuals whose cases are pending on direct appeal. Here, the court imposed the criminal filing fee even though Mr. Lusk-Hutchins was indigent, imposed the DNA fee even though he has been convicted of a previous offense that required the collection of a sample, and ordered all LFOs shall bear interest from the date of the judgment until the payments are made in full. Should this Court strike the criminal filing fee, DNA collection fee, and immediate accrual of interest because they are no longer authorized by statute?

D. STATEMENT OF THE CASE

Mr. Lusk-Hutchins has a duty to register as a sex offender. CP 22. Mr. Lusk-Hutchins initially registered with the Cowlitz County sheriff's office on June 26, 2017, following his release from custody. CP 22; RP 57; Exs. 7, 8 (p.1), 9.

After several months, Mr. Lusk-Hutchins's community custody supervisor withdrew her permission for Mr. Lusk-Hutchins to live at the home where he had been residing. RP 83. Therefore, Mr. Lusk-Hutchins returned to the sheriff's office on October 24, 2017, and registered as "transient."³ CP 22; RP 63-64, 83-84; Ex. 8 (p.2-3). At that time, he also

³ The State's evidence and arguments all use the word "transient." Therefore, this statement of fact uses that same language when citing to the evidence. However, under the applicable version of the statute, it is a registrant's having or lacking a "fixed residence" which imposes certain additional reporting obligations, not a registrant's status as "transient." See Section E.1 *infra*; see generally RCW 9A.44.130.

filled out a Resident Sex Offender Transient-Weekly Tracking Log for the preceding week and signed the Transient Check In Log. CP 22; Ex. 10 (p.1, 3). Mr. Lusk-Hutchins listed the address of Jared Sutters at 1000 17th Avenue in Longview as the address at which he stayed for two of the three dates in the preceding week. CP 22; Ex. 10 (p.1).

Mr. Lusk-Hutchins returned to the sheriff's office on October 31, 2017. CP 22. He again signed the Transient Check In Log and filled out a Resident Sex Offender Transient-Weekly Tracking Log. CP 22; Ex. 10 (p.2, 3). Mr. Lusk-Hutchins listed the address of Jared Sutters at 1000 17th Avenue in Longview as the address at which he stayed for six of the seven dates in the preceding week. CP 22; Ex. 10 (p.2). Jarod Sutters, a friend of Mr. Lusk-Hutchins, lived at that address and gave him permission to stay at the apartment. RP 84-85.

Mr. Lusk-Hutchins did not return to the sheriff's office thereafter. CP 23. The State charged Mr. Lusk-Hutchins with failure to register as a sex offender for failing to comply with his registration requirements from November 7 through December 5, 2017. CP 3-4. Mr. Lusk-Hutchins waived a jury and proceeded to a bench trial. CP 18.

The prosecution presented a single witness, the support specialist for the Cowlitz County Sheriff's Office registered sex offender unit. RP 42-78. The State's theory at trial was that Mr. Lusk-Hutchins was

transient and therefore had a duty to report to the sheriff's office weekly but that he failed to do so after October 31, 2017. RP 41, 115-16. Mr. Lusk-Hutchins argued that he initially reported the loss of his fixed residence as required and then reported weekly as required, but that once he obtained a fixed residence, as evidenced by the logs establishing he stayed at the same address eight times in two weeks, the statute no longer required him to report weekly. RP 116-18.

The State argued in rebuttal that Mr. Lusk-Hutchins failed to comply with his reporting requirements either by not reporting weekly when he was transient or by failing to report "that he's registered at a specific address, not as transient." RP 118. The State focused on his status as either transient or not transient. *See, e.g.*, RP 121-22 ("if that status changes," "if he stays under the transient status"). The court found Mr. Lusk-Hutchins guilty, finding he failed to comply with his registration obligations for either reason. CP 22-23; RP 127-31.

Mr. Lusk-Hutchins requested an exceptional sentence below the standard range based on his significant and persistent mental health issues. RP 135-41. Mr. Lusk-Hutchins suffers from numerous mental health issues and has previously received disability benefits. RP 79-82, 87, 136-37, 140-41. The court acknowledged Mr. Lusk-Hutchins has mental health issues and noted the idea of an exceptional sentence "has some

traction with me.” RP 143. However, the court imposed a standard range sentence without considering whether the proposed mitigation met the statutory standard and without considering whether it offered a sufficient reason to depart from the standard sentencing range. RP 141-44.

The court sentenced Mr. Lusk-Hutchins to 43 months, followed by 36 months of community custody. CP 32-33; RP 143-44. The court imposed only “the standard non-discretionary costs,” including the \$200 criminal filing and \$100 DNA collection fees. CP 34-35; RP 144. The court also imposed the immediate accrual of interest from the date of the sentence. CP 35.

E. ARGUMENT

1. Reversal is required because the State presented insufficient evidence that Mr. Lusk-Hutchins committed the offense of failure to register.

- a. The State is required to prove all essential elements of the charged offense beyond a reasonable doubt.

The State is required to prove every element of the charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse unless it concludes every rational fact finder could have found each essential element beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781,

61 L. Ed. 2d 560 (1979); *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Failure to register as a sex offender requires proof beyond a reasonable doubt that the defendant (1) has a duty to register under RCW 9A.44.130, (2) for a felony sex offense, and (3) knowingly (4) failed to comply with any of the requirements of the statute, and (5) has been convicted of felony failure to register on two or more occasions. RCW 9A.44.130, 9A.44.132(1)(b). At issue here is whether the State proved by sufficient evidence that Mr. Lusk-Hutchins failed to comply with a requirement of RCW 9A.44.130 and whether he did so knowingly.

- b. RCW 9A.44.130 imposes registration requirements triggered by the loss of a fixed residence, the ongoing lack of a fixed residence, or the change of address by moving but imposes no separate registration requirement triggered by the acquiring of a fixed residence.

The failure to register statute is comprised of a number of different reporting obligations triggered by certain events. Some obligations apply to all registrants. Other obligations apply only to certain registrants. In order to determine whether a registrant has failed to comply with the reporting requirements of the statute, one must read the statute as a whole to understand the different reporting requirements and time frames that apply to a particular registrant. *See State v. Peterson*, 168 Wn.2d 763,

770, 230 P.3d 588 (2010) (recognizing that “different [reporting] deadlines may apply, depending on the offender’s residential status”).

Basic principles of statutory interpretation requires courts to rely on the plain language of the statute. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015); *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Courts must give penal statutes “a literal and strict interpretation.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). In addition, where the plain language of the statute is not clear and a statute is ambiguous, the rule of lenity requires courts to interpret the statute in the defendant’s favor. *State v. Linville*, 191 Wn.2d 513, 521, 423 P.3d 842 (2018) (noting ambiguity must be “resolved under the rule of lenity” which “compels the interpretation that is less punitive, not more punitive”); *Conover*, 183 Wn.2d at 712 (“In criminal cases, we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant’s favor.”). Appellate courts review the meaning of a statute de novo. *Conover*, 183 Wn.2d at 711.

Courts must read the statute narrowly and may not impose a duty not contained in the statute, nor may courts interpret the statute to cover conduct not addressed by the statute. *See, e.g., State v. Drake*, 149 Wn. App. 88, 201 P.3d 1093 (2009) (reversing conviction for failure to register where State failed to show defendant knowingly failed to report loss of

fixed address or changed address where, despite evidence manager evicted defendant, State failed to prove defendant knew he was evicted and evidence established his intent to return to registered address); *State v. Pickett*, 95 Wn. App. 475, 476, 975 P.2d 584 (1999) (reversing homeless registrant’s conviction for failure to register because former statute “neither provides a way of registering for homeless individuals who have no permanent place of residence nor requires that all such offenders establish a residence upon release”).

RCW 9A.44.130(1)(a) requires all individuals who have been convicted of sex offenses to “register with the county sheriff for the county of the person’s residence.”⁴ Subsection two identifies the information registrants must provide. If incarcerated at the time of conviction, all individuals must register with the sheriff in their county of residence upon their release from custody. RCW 9A.44.130(4)(a)(i). In addition, registrants must notify the sheriff when they change their address by moving. RCW 9A.44.130(5). The statute requires reporting within

⁴ The statute imposes additional reporting requirements related to school, employment, and travel, but only the residence reporting requirements are relevant for purposes of Mr. Lusk-Hutchins’s appeal. *See, e.g.*, RCW 9A.44.130(1)(b) (reporting requirements for attending school and working at educational institutes), 9A.44.130(3) (reporting requirements for international travel), 9A.44.130(4)(a)(viii) (reporting requirements for interstate work or school), 9A.44.130(7) (reporting requirements for name change applicants).

three business days of each of these triggering events. RCW 9A.44.130(4)(a)(i), 9A.44.130(5)(a), 9A.44.130(6)(a).

Beyond these initial residential registration requirements that apply to all registrants, when and how often particular registrants must report depends upon whether that registrant possesses or lacks a fixed residence. A “fixed residence” is “a building that a person lawfully and habitually uses as living quarters a majority of the week.” RCW 9A.44.128(5). A registrant “lacks a fixed residence” where he “does not have a living situation that meets the definition of fixed residence and includes, but is not limited to, a shelter program designed to provide temporary living accommodations for the homeless, an outdoor sleeping location, or locations where the person does not have permission to stay.” RCW 9A.44.128(9).

Individuals who have a fixed residence are required to register only when they change their address by moving or when they cease to have a fixed residence. RCW 9A.44.130(5)(a) (requiring notification within three days of a change of address by moving), RCW 9A.44.130(6)(a) (requiring notification within three days of “ceasing to have a fixed residence). Individuals who lack a fixed residence must report in person every single week to the county sheriff’s office and “must keep an

accurate accounting of where he or she stays during the week” for the entire duration of their reporting period. RCW 9A.44.130(6)(b).

This chart summarizes the residential reporting duties the statute imposes.

TRIGGERING EVENT	CORRESPONDING OBLIGATION IMPOSED	STATUTE
release from incarceration	register with sheriff within three business days from time of release	9A.44.130(4)(a)(i)
change residence address by moving	register with sheriff within three business days of moving	9A.44.130(5)(a)
lose fixed residence	register with sheriff within three business days after ceasing to have a fixed residence	9A.44.130(6)(a)
lack a fixed residence	report weekly, in person, to the sheriff	9A.44.130(6)(b)
acquire a fixed residence	none	none

Although the statute imposes upon registrants a clear duty to notify the sheriff when a registrant *ceases* to have a fixed residence, RCW 9A.44.130(6)(a), the statute imposes no countervailing duty to notify the sheriff when a registrant *obtains* a fixed residence. Even though the statute creates no independent requirement upon a registrant to report

when he obtains a fixed residence, a “change of address” does impose a requirement upon all registrants to register “within three business days of moving.” RCW 9A.44.130(5)(a). Read as a whole, nothing in the statute requires a registrant to notify the sheriff that he has secured a fixed residence once he no longer lacks a fixed residence if his fixed residence is not a changed address to which he has moved. In other words, if the house where a registrant reported as staying while he lacked a fixed residence becomes his fixed residence, the registrant has not moved, and no reporting duty is triggered.

c. Mr. Lusk-Hutchins complied with the registration requirements.

i. Mr. Lusk-Hutchins reported the loss of his fixed residence and reported in-person weekly while he lacked a fixed residence.

Mr. Lusk-Hutchins reported as required when he was initially released from custody and resumed his reporting obligations. RCW 9A.44.130(4)(a)(i); CP 22; RP 57; Exs. 7, 8 (p.1), 9. In addition, on October 24, 2017, Mr. Lusk-Hutchins reported he ceased to have a fixed residence as required by the statute. RCW 9A.44.130(6)(a); CP 22; RP 63; Ex. 8 (p.2-3). At that time, he also provided an accounting of his previous week’s stays. RCW 9A.44.130(6)(b); CP 22; RP 63; Ex. 10 (p.1). Mr. Lusk-Hutchins also reported to the sheriff in person the

following week, on October 31, 2017, and provided his accurate accounting of the previous week's stay. RCW 9A.44.130(6)(b); CP 22; Ex. 10 (p.2).

ii. Mr. Lusk-Hutchins acquired a fixed residence without moving, so the statute imposed no reporting obligation.

Mr. Lusk-Hutchins's October 31, 2017, reporting established Mr. Lusk-Hutchins had stayed at the same location – 1000 17th Avenue – for six of the seven days of the preceding week. Ex. 10 (p.2). That location was a building that Mr. Lusk-Hutchins was using as a living quarters. RP 84-85; Ex. 10 (p.2). Mr. Lusk-Hutchins was staying there with the permission of the apartment's resident, his friend, Mr. Jared Sutters. RP 84-85; Ex. 10 (p.2). He stayed there a majority of the week, for six out of the seven days. Ex. 10 (p.2). Therefore, that location had become Mr. Lusk-Hutchins's "fixed residence." RCW 9A.44.128(5) (defining "fixed residence" as "a building that a person lawfully and habitually uses as living quarters a majority of the week").

Once Mr. Lusk-Hutchins had obtained a fixed residence, he no longer lacked a fixed residence and, therefore, had no statutory obligation to report weekly. RCW 9A.44.128(9), 9A.44.130(6)(b). The court's finding that Mr. Lusk-Hutchins lacked a fixed residence is unsupported by sufficient evidence, and its conclusion that Mr. Lusk-Hutchins had a duty

to report weekly after October 31, 2017, is wrong as a matter of law. CP 22-23.

In addition, because Mr. Lusk-Hutchins's fixed residence was not one he acquired after a move and was not a change of address, the statute imposed no duty to notify the sheriff of a change of address. RCW 9A.44.130(5)(a) (requiring registration where registrant "changes his or her residence address" "within three business days of moving"). Had Mr. Lusk-Hutchins moved to his friend's residence on October 31, 2017, for example, he would have been required to notify the sheriff. RCW 9A.44.130(5)(a). But, Mr. Lusk-Hutchins was already living at the apartment when he lacked a fixed residence. He then acquired it as fixed residence once he resided there a majority of the week. RCW 9A.44.128(5). He did not move or change his address.

This chart summarizes when Mr. Lusk-Hutchins reported to the sheriff.

TRIGGERING EVENT	STATUTORY OBLIGATION IMPOSED	MR. LUSK-HUTCHINS'S ACTIONS	RECORD
Mr. Lusk-Hutchins was released from incarceration	must register with sheriff within three business days from time of release 9A.44.130(4)(a)(i)	Mr. Lusk-Hutchins registered with Cowlitz County Sheriff's Office Registered Sex Offender Unit on June 26, 2017	CP 22 RP 57 Exs. 7, 8, 9
Mr. Lusk-Hutchins lost his fixed residence	must register with sheriff within three business days after ceasing to have a fixed residence 9A.44.130(6)(a)	Mr. Lusk-Hutchins reported to the sheriff the loss of his fixed residence on October 24, 2017	CP 22 RP 63, 83 Ex. 8 (p.2-3)
Mr. Lusk-Hutchins lacked a fixed residence	must report weekly, in person, to the sheriff 9A.44.130(6)(b)	Mr. Lusk-Hutchins reported weekly, in person, to the sheriff, on October 24 and October 31, 2017	CP 22 RP 63, 83-85 Ex. 10
Mr. Lusk-Hutchins acquired a fixed residence	no statutory obligation	none	RP 84-85

The State's entire theory throughout the case was Mr. Lusk-Hutchins was transient and therefore had a duty to report weekly and failed in his duty. RP 41 (opening), 61-67 (discussing weekly reporting obligations), 115-16 (closing). Only in rebuttal closing arguments, in response to an argument raised by the defense, did the State first argue Mr. Lusk-Hutchins was guilty for not reporting a move. RP 118-31. The State argued Mr. Lusk-Hutchins had a duty to notify the sheriff if he was no longer transient. RP 119-23. But the statute creates no such duty.

The statute does not require notification of a change in status from lacking to obtaining a fixed residence, nor does the statute impose any duties based on one's status as "transient." The statute requires initial registration (done here), notification of losing a fixed residence (done here), weekly reporting while lacking fixed residence (done here), and of moving to a new address. RCW 9.94A.130. Nothing in the statute requires notification of a change of status from lacking to obtaining a fixed residence. In those perhaps rare circumstances where one's so-called status changes but one's address does not, the statute imposes no notification requirement.

It is possible to reside in the same location and yet lack a fixed residence. *State v. Batson*, 194 Wn. App. 326, 332-35, 377 P.3d 238 (2016) (recognizing some shelter programs may qualify as fixed

residences while others may not). It is also possible to be homeless or transient and yet have a fixed residence. *Id.* at 338 (recognizing homeless defendant has fixed residence if he stays at qualifying shelter). In *Batson*, the issue was whether a particular shelter program qualified as a fixed residence under the statute. In rejecting the State’s argument, this Court acknowledged the distinction between homelessness or transient status and having or lacking a fixed residence. *Id.* at 338 (“[T]he State conflates homelessness with lacking a ‘fixed residence.’ . . . [W]hether [the defendant] was ‘homeless’ is immaterial. The relevant question is whether he lacked a ‘fixed residence.’”).

Here, as in *Batson*, the controlling issue is not whether the sheriff or the State considered Mr. Lusk-Hutchins to be transient. The relevant issue is whether the State proved the location at which Mr. Lusk-Hutchins was staying and reported staying was not a fixed residence under the statute. Without that proof the State cannot prove Mr. Lusk-Hutchins had a duty to continue weekly reporting and thus cannot prove he violated that nonexistent obligation. Therefore, the State failed to prove Mr. Lusk-Hutchins knowingly failing to register by not reporting weekly when he lacked a fixed residence.

The State also failed to prove Mr. Lusk-Hutchins knowingly failed to register by not reporting a change of address following a move. Where

a registrant does not move, no reporting obligation is triggered. *Peterson*, 168 Wn.2d at 773 (distinguishing case where registrant “never moved in the first place,” and so finding “the duty to register was not triggered and no crime had been committed,” (citing *State v. Stratton*, 130 Wn. App. 760, 124 P.2d 660 (2005))). “[T]he phrase ‘changes his or her residence address’ can only apply when a person establishes a different residence or replaces one residence with another. . . . [T]he phrase ‘changes his or her residence address’ means when a person makes a different location ‘the place where a person lives.’” *State v. Breidt*, 187 Wn. App. 534, 543, 349 P.3d 924 (2015) (quoting *Pickett*, 95 Wn. App. at 478).

Because the State failed to prove Mr. Lusk-Hutchins changed his residence address by moving on October 31, 2017, and that he, therefore, had a statutory obligation to report a change of address, the State also failed to prove Mr. Lusk-Hutchins did not comply with a reporting obligation under this theory. *See Peterson*, 168 Wn.2d at 770 (“There is only one method by which an offender fails to register, and that is if he moves from his residence without notice.” (emphasis added)).

- d. This Court should reverse the failure to register conviction with instructions to dismiss the charge with prejudice.

The State did not prove beyond a reasonable doubt that Mr. Lusk-Hutchins knowingly failed to comply with a reporting requirement under

either theory. Sufficient evidence fails to support the court's findings of fact and conclusions of law to the contrary. CP 22-23.

Where insufficient evidence supports a conviction, double jeopardy prevents the State from retrying the defendant for the same offense. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (“Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only ‘just’ remedy available for that court is the direction of a judgment of acquittal.”); *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016) (“Reversal for insufficient evidence is ‘equivalent to an acquittal’ and bars retrial for the same offense.” (quoting *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009))). Insufficient evidence supports Mr. Lusk-Hutchins’s conviction for failure to register. Therefore, this Court should reverse with instructions to dismiss the charge. *See, e.g., State v. Caton*, 174 Wn.2d 239, 240-43, 273 P.3d 980 (2012) (reversing and dismissing conviction for failure to register based on insufficient evidence where ambiguity in the reporting requirement required interpretation in favor of defendant).

2. Resentencing is required because the court failed to consider meaningfully Mr. Lusk-Hutchins’s motion for an exceptional sentence under the appropriate statutory standard.

- a. The Sentencing Reform Act authorizes courts to impose sentences below the standard range.

In the Sentencing Reform Act (SRA), the legislature established presumptive standard range sentences based on an assessment of the appropriate punishment for a particular offense adjusted for a particular offender’s criminal history. RCW 9.94A.505(2)(a)(i), 9.94A.510, 9.94A.530; *State v. Amo*, 76 Wn. App. 129, 133, 882 P.2d 1188 (1994). Despite these presumptive guidelines, courts may impose a sentence below the standard range where mitigating circumstances are established by a preponderance of the evidence and the mitigating circumstances offer a substantial and compelling reason to depart from the standard range. RCW 9.94A.535.

RCW 9.94A.535(1) contains a nonexhaustive list of mitigating circumstances on which a court may rely to impose a sentence below the standard range. In addition, courts may consider any mitigating circumstances as long as they were not necessarily considered by the legislature in establishing the standard range sentence and are “sufficiently substantial and compelling to distinguish the crime in question from others in the same category.” *State v. O’Dell*, 183 Wn.2d

680, 690, 358 P.3d 359 (2015) (quoting *State v. Ha'mim*, 132 Wn.2d 834, 840, 940 P.2d 633 (1997)); *see also* RCW 9.94A.010 (system of sentencing established in SRA was developed as one that “structures, but does not eliminate, discretionary decisions affecting sentences.”); *State v. Houston-Sconiers*, 188 Wn.2d 1, 35, 391 P.3d 409 (2017) (Madsen, J., concurring) (recognizing legislature intended for structured discretionary sentencing).

Defendants may appeal a standard range sentence where a sentencing court refuses to exercise its discretion, abuses its discretion, or misapplies the law. *State v. Corona*, 164 Wn. App. 76, 78, 261 P.3d 680 (2011) (citing *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)); *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A court abuses its discretion where it “makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law.” *Corona*, 164 Wn. App. at 79. Appellate courts review de novo whether a court applied the correct legal standard and whether it properly applied the law to the facts of the case. *Id.*

Defendants are entitled to “actual consideration” of their request for an exceptional sentence, and courts must exercise “meaningful discretion” in deciding whether a departure is appropriate. *State v. Grayson*, 154 Wn.2d 333, 335-36, 111 P.3d 1183 (2005) (remanding for

new sentencing hearing where court categorically denied defendant's request for DOSA sentence). In addition, a court's erroneous belief that it cannot consider circumstances justifying an exceptional sentence provides grounds for appeal. *O'Dell*, 183 Wn.2d at 697 (noting failure to exercise discretion and consider exceptional sentence is abuse of discretion). A court commits reversible error when it refuses to meaningfully consider a sentencing option. *Grayson*, 154 Wn.2d at 342.

- b. Mr. Lusk-Hutchins moved for an exceptional sentence based on mitigating circumstances that distinguished his crime from others in the same category and demonstrated his diminished culpability.

Mr. Lusk-Hutchins moved for an exceptional sentence based on his significant and persistent mental health issues. RP 135-41. Mr. Lusk-Hutchins suffers from a host of mental health issues, including Asperger's syndrome, bipolar disorder, attention deficit hyperactivity disorder, post-traumatic stress disorder, anxiety, agoraphobia, and panic attacks. RP 79-80. In addition, Mr. Lusk-Hutchins previously received disability benefits. RP 87. These health issues, along with episodic homelessness, his struggle to comply with the restrictive rules of community custody, and his inability to secure appropriate assistance to address these struggles, contributed to Mr. Lusk-Hutchins's ability to comply with his registration requirements. *See generally* RP 79-87, 135-37, 140-41.

These mitigating circumstances provided a basis for a departure for a host of possible reasons. For example, Mr. Lusk-Hutchins’s mental health issues could qualify as a statutory mitigating circumstance if they significantly impaired either his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. RCW 9.94A.535(1)(e). *Cf. State v. Boyd*, 1 Wn. App. 2d 501, 525-28, 408 P.3d 362 (2017) (Becker, J., dissenting) (recognizing difficulty transient registrants with mental health issues may have in complying with “burdensome” weekly in-person reporting requirements), *review denied*, 190 Wn.2d 1008, *cert. denied*, ___ U.S. ___, 139 S. Ct. 639 (2018). The fact that his mental health did not rise to the level of a complete defense to the crime does not prohibit its consideration as mitigation at sentencing. *See State v. Jeannotte*, 133 Wn.2d 847, 851-55, 947 P.2d 1192 (1997) (recognizing mitigating factors may provide basis for sentencing departure even where those same factors failed to establish legal defense).

In addition, Mr. Lusk-Hutchins’s mental health issues provided a possible basis for an exceptional sentence as a non-statutory mitigating circumstance. Courts may consider any relevant mitigating circumstances in sentencing, provided the circumstance is proven by a preponderance of the evidence and that the circumstance offers a substantial and compelling reason to depart. RCW 9.94A.535; *O’Dell*, 183 Wn.2d 680. *O’Dell* held

that courts may consider personal factors relevant to the particular defendant in determining the propriety of an exceptional sentence. In so holding, *O'Dell* recognized that courts may consider any circumstance that could “amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range.” *Id.* at 696. *O'Dell* recognizes courts must consider a defendant’s culpability in a broader context and that a defendant’s culpability relates to more than simply his actions at the time of the crime considered in a vacuum.

Here, Mr. Lusk-Hutchings presented mitigating circumstances that distinguished his crimes from others in the same category and addressed his lack of culpability: his mental health. They also bore on Mr. Lusk-Hutchins’s culpability and ability to comply with the reporting requirements. Courts always have the authority to depart based on factors that “relate to the crime, the defendant’s culpability for the crime, or the past criminal record of the defendant.” *State v. Law*, 154 Wn.2d 85, 89, 110 P.3d 717 (2005). Because these are not factors “the legislature *necessarily* considered . . . when it established the standard range,” the court could have considered it as mitigation at Mr. Lusk-Hutchins’s sentence. *O'Dell*, 183 Wn.2d at 690.

- c. The court failed to apply the appropriate legal standard and failed to consider meaningfully Mr. Lusk-Hutchins's motion for a sentence below the standard range based on mitigating circumstances.

The court acknowledged Mr. Lusk-Hutchins has mental health issues and noted the idea of an exceptional sentence “has some traction with me.” RP 143. However, the court imposed a standard range sentence without considering whether the defense established the mitigating circumstances by a preponderance of the evidence and without considering whether substantial and compelling reasons justified an exceptional sentence. The court made no findings and did not apply the standard of RCW 9.94A.535. This also demonstrates the court did not recognize its ability to depart from the standard range.

Here, the record does not establish that the court actually considered the merits of Lusk-Hutchins's request for an exceptional sentence under the statutory standard. The court appears to have found Mr. Lusk-Hutchins established his mitigating circumstances by sufficient evidence, finding “the mental health issues are -- are present.” RP 143. However, the court did not determine whether those mitigating circumstances provided a substantial and compelling reason to depart.

The court made no finding that the circumstances did or did not create a substantial and compelling reason. Instead, the court employed its

own standard when it balanced a request for an exceptional sentence in general against “the concern for the safety and protection of the community.” RP 144. The court’s substitution of its own balancing test instead of applying the statutory standard constitutes an abuse of discretion. *Corona*, 164 Wn. App. at 78.

d. This Court should reverse and remand for resentencing.

Mr. Lusk-Hutchins was entitled to have his motion for an exceptional sentence based on mitigating circumstances considered by the court under the appropriate legal standard identified in the statute. The court failed to follow the statutory framework when it did not consider whether the proffered mitigating circumstances provided substantial and compelling reasons justifying a departure. A court abuses its discretion when it misapplies the law or misunderstands the scope of its discretion. *Grayson*, 154 Wn.2d at 342. Here, the court did both, depriving Mr. Lusk-Hutchins of his right to have his motion considered and undermining the sentence imposed.

The court failed to apply the correct legal standard provided by RCW 9.94A.535 and failed to fully appreciate its authority to consider mitigating circumstances and to impose an exceptional sentence below the statutory range. The appropriate remedy when a court applies the wrong legal standard or fails to meaningfully consider an exceptional sentence is

to permit the defendant an opportunity to have his sentencing motion fully and actually considered under the correct legal standard. *See Grayson*, 154 Wn.2d at 343 (remedy for court’s failure to meaningfully consider DOSA sentence is remand for resentencing hearing); *State v. Williams*, 176 Wn. App. 138, 144, 307 P.3d 819 (2013) (reversing and remanding for resentencing where court applied wrong legal standard at sentence); *see also O’Dell*, 183 Wn.2d at 697 (remanding for resentencing hearing where court failed to exercise its discretion to consider mitigating circumstance of youth). Therefore, this Court should vacate the sentence and order a new sentencing hearing.

3. This Court should strike the imposition of certain legal financial obligations from Mr. Lusk-Hutchins’s judgment and sentence.

- a. The court found Mr. Lusk-Hutchins indigent but imposed now-prohibited costs.

Mr. Lusk-Hutchins was represented by appointed counsel throughout the case, and the court found Mr. Lusk-Hutchins indigent for purposes of appeal. CP 63-65. At sentencing, the court imposed only those costs it believed to be mandatory, specifically referencing “the standard non-discretionary costs.” CP 144.

The court imposed the \$200 criminal filing fee and \$100 DNA collection fee. CP 34-35; RP 144. Mr. Lusk-Hutchins has seven previous adult felony convictions, all after 2002. CP 29. Therefore, the State

previously collected a DNA sample from him. *See State v. Shelton*, 194 Wn. App. 660, 667, 378 P.3d 230 (2016) (noting amendments requiring all adults convicted of any felony provide DNA sample became effective in 2002); Laws of 2002, ch. 289, § 2 (enacting statute mandating collection of DNA samples from adults convicted of any felony). Finally, the judgment ordered interest accrue from the date of the judgment through payment in full. CP 35.

- b. Ramirez requires this Court strike the \$200 criminal filing fee, \$100 DNA collection fee, and interest accrual from Mr. Lusk-Hutchins's judgment and sentence.

In Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (2018) our legislature amended the LFO statutes to prohibit more clearly courts from imposing costs when a defendant is indigent. Laws of 2018, ch. 269, § 6. The legislature removed from a court's discretion the nebulous determination of whether a defendant "is or will be able to pay" costs and instead unequivocally mandated that if a person is indigent under the statute, the court may not impose certain costs. RCW 10.01.160(3). Those costs include criminal filing fees. RCW 36.18.020(2)(h) (prohibiting imposition of criminal filing fee on indigent defendants); Laws of 2018, ch. 269, § 17(2)(h). In addition, amendments prohibit collection of the DNA fee where the State previously collected a DNA sample from the defendant. RCW 43.43.7541 (exempting fee and

collection of DNA where State already collected sample); Laws of 2018, ch. 269, § 18. Finally, amendments eliminate interest accrual on LFOs except for restitution. RCW 10.82.090(1) (“no interest shall accrue on nonrestitution [LFOs]”); Laws of 2018, ch. 269, § 1. The amendments took effect June 7, 2018.

In *State v. Ramirez*, the Supreme Court held these amendments apply prospectively to all defendants whose cases are pending on direct appeal. 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018). A resentencing hearing is unnecessary, and appellate courts may remand with a directive that the LFOs be stricken from the judgment and sentence. *Id.* at 750 (reversing and remanding for trial court to amend judgment and sentence to strike criminal court filing and DNA fees, as well as discretionary LFOs); *State v. Lundstrom*, 6 Wn. App. 2d 388, 396-97, 429 P.3d 1116 (2018) (following *Ramirez* and reversing imposition of criminal court filing and DNA fees and remanding).

Mr. Lusk-Hutchins is indigent, as the court recognized. However, the court imposed fees and interest which the legislature now prohibits in amended statutes. Under *Ramirez*, these amendment apply prospectively, and this Court should strike the criminal filing and DNA collection fees, as well as the imposition of interest, from Mr. Lusk-Hutchins’s judgment and sentence.

F. CONCLUSION

Insufficient evidence supports the conviction. Mr. Lusk-Hutchins did not lack a fixed residence and therefore was not required to report weekly. Mr. Lusk-Hutchins acquired a fixed residence once he lawfully and habitually resided at a friend's apartment for a majority of the week. He did not move and therefore was not required to report a change of address. The State did not prove Mr. Lusk-Hutchins failed to comply with a registration requirement. Therefore, this Court should reverse and dismiss the conviction.

In addition, the court applied the wrong legal standard and misunderstood its discretion at sentencing. Therefore, Mr. Lusk-Hutchins is entitled to a new sentencing hearing. Finally, the criminal filing and DNA fees and accrual of interest must be stricken.

DATED this 19th day of March 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', written in a cursive style.

KATE R. HUBER (WSBA 47540)
Washington Appellate Project (91052)
Attorneys for Appellant
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APPENDIX 1

Findings of Fact and Conclusions of Law on
Defendant's Bench Trial

CP 22-24

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17-1-01604-08
FNFLC 27
Findings of Fact and Conclusions of Law
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SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,)	NO. 17-1-01604-08
)	
Plaintiff,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
v.)	ON DEFENDANT'S BENCH
)	TRIAL
JASON ALLAN LUSK-HUTCHINS,)	
)	
Defendant,)	

On June 28, 2018, the Honorable Michael Evans, Superior Court Judge, presided over the defendant's bench trial. The court heard arguments of counsel, considered the evidence presented, and found the following:

Findings of Fact

1. On June 26, 2017, based upon a convictions for Rape of a Child in the Third Degree, Failure to Register as a Sex Offender (2nd conviction), Failure to Register as a Sex Offender 3rd conviction), Failure to Register as a Sex Offender (4th conviction), and Indecent Liberties without Forcible Compulsion DV, the Defendant registered with the Cowlitz County Sheriff's Office (CCSO) as a sex offender.
2. On October 24, 2017, the Defendant registered his address with CCSO as transient. The Defendant was provided notice of his requirements as a registered sex offender and his duty as a transient to check in with CCSO on a weekly basis. The Defendant was also provided with notice of his requirements if he were to obtain a fixed residence.
3. On October 31, 2017, the Defendant checked in with CCSO as required. He provided documentation of the addresses where he stayed during the previous week. The Defendant indicated that he stayed at 1000 17th Ave Apt 202, Longview, WA six out of the seven nights.

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Cowlitz County Prosecuting Attorney
312 SW 1st Avenue
Kelso, WA 98626
SCANNED

- 1 4. The Defendant failed to check in with CCSO on November 7, 2017 as required.
- 2 5. The Defendant failed to check in with CCSO on November 14, 2017 as required.
- 3 6. The Defendant failed to check in with CCSO on November 21, 2017 as required.
- 4 7. The Defendant failed to check in with CCSO on November 28, 2017 as required.
- 5 8. The Defendant failed to check in with CCSO on December 5, 2017 as required.

6 **Conclusions of Law**

- 7 1. The Defendant was required to register as a sex offender.
- 8 2. Between November 7, 2017 and December 5, 2017, the Defendant was registered as a sex
- 9 offender with the Cowlitz County Sheriff's Office.
- 10 3. The Defendant registered his address as transient, thereby requiring him to check in with
- 11 CCSO on a weekly basis.
- 12 4. The Defendant failed to check in with CCSO on a weekly basis between November 7, 2017
- 13 and December 5, 2017.
- 14 5. If the Defendant had intended on making 1000 17th Ave Apt 202, Longview, WA his
- 15 residence, he was required to notify CCSO within three business days after moving into
- 16 that residence.
- 17 6. The Defendant failed to notify the Cowlitz County Sheriff's Office within three business
- 18 days after moving into 1000 17th Ave. Apt. 202, Longview, Washington.
- 19 7. The Defendant is guilty of failing to register as a sex offender.

20 DATED this 6 day of August 2018.

21 
22 SUPERIOR COURT JUDGE

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Presented by:



SEAN M. BRITTAIN
WSBA # 36804
Attorney for the State

Approved as to form:



ELIZABETH HALLS
WSBA #32291
Attorney for Defendant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 52605-1-II
v.)	
)	
JASON LUSK-HUTCHINS,)	
)	
APPELLANT.)	

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