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36047-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

JAMES NATHEN DOLLARHYDE,

Appellant.

---

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

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BRIEF OF APPELLANT

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## **A. INTRODUCTION**

A juvenile offense requires James Dollarhyde to register as a sex offender. His status as a sex offender prevents him from establishing a permanent residence and renders him homeless. If he had a permanent residence he would only be required to report changes of address by mail and would have no in-person reporting requirements, but his homeless status imposes the additional onerous requirement of reporting weekly in person to the sheriff's office.

Mr. Dollarhyde dutifully reported in person to the Klickitat County Sheriff's Office every single week without absence. However, his report omitted the two nights he spent in the sheriff's custody in the Klickitat County jail as a sanction for a violation of his community custody conditions. In addition, he did not report two nights allegedly spent at an acquaintance's apartment, a fact he disputed.

The State did not prove Mr. Dollarhyde failed to register when he reported as required each week and the picayune complaints about the details of his weekly reporting do not constitute a violation of the statute. Alternatively, the State failed to prove the sheriff ever requested Mr. Dollarhyde to list his previous weeks' stays or that he knowingly failed to comply with his reporting requirements. This Court should reverse the sole count of conviction and remand with a directive it be dismissed.

## **B. ASSIGNMENTS OF ERROR**

1. The court erred and exceeded its sentencing authority when it imposed a sentence based on an incorrect offender score.

2. The court erred in finding Mr. Dollarhyde guilty of failure to register where the State presented insufficient evidence to prove every element of the offense beyond a reasonable doubt.

3. The court erred in finding Mr. Dollarhyde guilty of failure to register where the statute does not criminalize a registrant's failure to provide the sheriff with a list of where the registrant stayed the previous week.

4. The court erred and violated Mr. Dollarhyde's rights to state and federal due process in finding Mr. Dollarhyde guilty based on an absurd interpretation of the statute.

5. The court erred and exceeded its sentencing authority in imposing community custody conditions (9), (10), (14), and (15), which are unrelated to his offense of conviction.

6. The court erred and exceeded its sentencing authority in imposing community custody condition (13), which is unconstitutionally vague in violation of state and federal due process.

7. Recent amendments to the legal financial obligation (LFO) statutes require the DNA fee, the criminal court filing fee, and the immediate accrual of interest be stricken from the judgment and sentence.

8. The court erred in entering Finding of Fact 3. CP 10.

9. The court erred in entering Finding of Fact 7. CP 10.

10. The court erred in entering Finding of Fact 11. CP 11.

11. The court erred in entering Finding of Fact 12. CP 11.

### **C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. RCW 9.94A.525(18) governs calculating the offender score for individuals convicted of failure to register and requires counting prior failure to register convictions as one point each. Applying RCW 9.94A.525(18), Mr. Dollarhyde's offender score is seven. Did the court err in sentencing Mr. Dollarhyde based on an offender score of nine, and should this Court remand for resentencing within the standard range as determined by the proper offender score?

2. State and federal due process require the State prove each element of the charged offense to the trier of fact beyond a reasonable doubt. Here, the State failed to prove beyond a reasonable doubt that omitting a complete accounting during weekly reporting violates the statute, that the sheriff's office made a specific request of Mr. Dollarhyde for an accurate accounting of his stays during the time period in question,

that Mr. Dollarhyde failed to comply with his reporting requirements, and that any failure to comply was knowingly. Did the State present insufficient evidence to prove the crime of failure to register beyond a reasonable doubt?

3. In *State v. Flowers*,<sup>1</sup> this Court held the failure to register statute does not criminalize a registrant's noncompliance with a sheriff's request to provide information on the previous weeks' stays. Here, the court convicted Mr. Dollarhyde solely based on his failure to provide the sheriff with a complete, accurate accounting of his previous weeks' stays. Where this Court has held a registrant's failure to provide the sheriff with a list of his previous week's stays does not violate the statute, did the court erroneously convict Mr. Dollarhyde of failure to register?

4. Sentencing courts may not impose discretionary community custody conditions unless they are directly related to the crime of conviction. Here, the sentencing court imposed several conditions related to drug and alcohol testing, use, and treatment, as well as conditions confining Mr. Dollarhyde's geographic movement. Where the court made no finding any of these conditions were related to Mr. Dollarhyde's conviction for failure to register and where the record does not establish

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<sup>1</sup> 154 Wn. App. 462, 465-66, 225 P.3d 476 (2010).

these conditions are related to that offense, did the court exceed its sentencing authority and act improperly in imposing the conditions?

5. The Fourteenth Amendment and Article 1, Section 3 prohibit imposition of unconstitutionally vague conditions of community custody and protect against arbitrary enforcement. Here, the court imposed the condition that Mr. Dollarhyde not frequent “location[s] where children are known to congregate,” a condition this Court has previously found void for vagueness. Should this Court find this condition unconstitutionally vague and strike it?

6. Recent amendments to the LFO statutes prevent courts from imposing the criminal court filing fee where a defendant is indigent, prevent courts from imposing the DNA fee where the State has previously collected a DNA sample from that individual, and eliminate interest accrual on non-restitution portions of LFOs. *State v. Ramirez*<sup>2</sup> held those amendment apply prospectively to individuals whose cases are pending on direct appeal. Here, Mr. Dollarhyde was indigent but the court imposed the criminal court filing fee, imposed the DNA fee even though Mr. Dollarhyde has been convicted of a previous offense that required the collection of a sample, and ordered all LFOs shall bear interest from the

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<sup>2</sup> \_\_ Wn.2d \_\_, 426 P.3d 714 (2018).

date of the judgment and sentence until the payments are made in full.

Should this Court strike the criminal court filing fee, DNA fee, and immediate accrual of interest from the judgment and sentence?

#### **D. STATEMENT OF THE CASE**

When he was a juvenile, Mr. Dollarhyde was convicted of a sex offense. CP 15; Ex. 1. That conviction triggered reporting obligations, and Mr. Dollarhyde's failure to comply with those obligations resulted in two previous felony convictions for failure to register. CP 9, 15; Exs. 2, 3.

Following his release for his most recent conviction, Mr. Dollarhyde registered with the Klickitat County Sheriff's Office as homeless. RP 19, 29, 42-43, 74; CP 10, 11. His status as a homeless person triggered more onerous reporting obligations than if he had a permanent residence, including weekly in-person check-ins at the Klickitat County Sheriff's Office. RP 19, 30-31; CP 10-11; *compare* RCW 9A.44.130(1)(a) (general residence registration requirements for all registrants) *with* RCW 9A.44.130(6)(b) (additional residence registration requirements for homeless registrants).

In addition to weekly in-person reporting to the sheriff's office to satisfy his sex offender registration requirements, a Department of Corrections Community Corrections Officer (DOC CCO), Jordan Bergstrom, also monitored Mr. Dollarhyde in accordance with his

conditions of community custody from his previous sentence. RP 39. Because of his status as a homeless person, Mr. Dollarhyde's conditions of community custody also imposed a weekly reporting requirement to DOC. RP 42-43. Mr. Dollarhyde's weekly in-person reporting requirement to his DOC CCO as part of his community custody is separate from and in addition to his weekly in-person reporting requirements to the county sheriff's office as part of his sex offender registration obligations. RP 42-44. Mr. Dollarhyde complied with his weekly reporting requirements to DOC as required by his conditions of community custody. RP 43.

Mr. Dollarhyde reported to the sheriff's office every single week in person. CP 10; Exs. 5-8; RP 93, 96-97. Upon reporting in person, Mr. Dollarhyde would fill out a pre-printed form requesting certain biographical information, as well as information related to his crime of conviction, his former and current registered addresses, and employment and school information. Exs. 5-8; RP 19, 31. The pre-printed form contained no request for a registrant to indicate where they had slept during the preceding week or where they spent specific nights during specific days of the preceding week. Exs. 5-8; RP 97 (court acknowledging form "is just a blank" and contains no question about or specific place to fill in information regarding previous week's stays).

On the forms Mr. Dollarhyde filled out each week at the sheriff's office for the dates in question Mr. Dollarhyde wrote on the blank backside of the pre-printed form three locations: 315 West Allyn; ABC Bridge; and Singing Bridge. Exs. 5-8. He also wrote Goldendale, WA, 98620. Exs. 5-8. On two of the forms, he wrote a number next to each location. Exs. 7-8. On two of the forms he did not. Exs. 5-6. Mr. Dollarhyde's mother lives at 315 West Allyn. RP 67. The ABC and Singing Bridges are two bridges located in the city of Goldendale, Klickitat County. RP 32-33, 62-63.

The State charged Mr. Dollarhyde with failing to comply with his reporting requirements for the period of January 1-31, 2018.<sup>3</sup> The State proceeded on the theory that Mr. Dollarhyde reported in person each week but did not also provide the sheriff's office with a complete accounting of his stays during that period because he did not disclose stays in the county jail and at a private residence. RP 13-15.

During the charged time period, the State ordered Mr. Dollarhyde to spend two nights in the Klickitat County Jail operated by the Klickitat County Sheriff: January 2-4, 2018. RP 40-42, 77; CP 10, 12. Mr.

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<sup>3</sup> Although the information charged Mr. Dollarhyde with failure to comply with his reporting requirements "on or about January 8, 2018," immediately before trial the court granted the State's motion to orally amend the information to January 1-31, 2018, over Mr. Dollarhyde's objection. CP 1; RP 13-15.

Dollarhyde's DOC CCO imposed the two night jail stay as a sanction for violating a condition of his community custody by testing positive for marijuana. RP 40-41, 77; CP 10. CCO Bergstrom personally brought Mr. Dollarhyde to the Klickitat County Jail, which is located in the same building as the sheriff's office, and booked him in for two nights. RP 40-44, 77-78. Upon his release from the Klickitat County Jail, Mr. Dollarhyde reported to DOC CCO in compliance with his community custody conditions. RP 42; CP 10. In addition, Mr. Dollarhyde reported to the sheriff's office for his next weekly, in-person, check-in, as required by the statute. Ex. 6 (reporting form dated January 8, 2018, covering January 1-7, 2018); RP 78; CP 10. Mr. Dollarhyde did not include the two nights he spent in Klickitat County Jail on the blank backside of the form he filled out at the Klickitat County Sheriff's Office. Ex. 6; CP 11-12; RP 95.

In addition, Julie Larson testified Mr. Dollarhyde spent "several nights" in her apartment following her January 7, 2018, move into 102 East 21st Street. RP 45-47. Mr. Dollarhyde, a friend of her daughter's friends, helped Ms. Larson move into the apartment, along with her three children and four other friends of her daughter. RP 46, 49. Ms. Larson called the police after she learned Mr. Dollarhyde was a registered sex

offender. RP 51.<sup>4</sup> Ms. Larson's daughter testified Mr. Dollarhyde spent one or more nights in the apartment. RP 57-58.

Mr. Dollarhyde acknowledged helping the Larsons move into their new apartment but denied staying there. RP 78-79. He testified he spent each of the relevant weeks in one of three locations: under the ABC Bridge, under the Singing Bridge, or at his mother's house (315 Allyn Street). RP 81. Mr. Dollarhyde explained he registered every week, in person, with the Klickitat County Sheriff's Office, as well as with his DOC CCO. RP 74-75, 77. He testified no one at the sheriff's office ever requested he provide his accounting of the previous weeks' stays. RP 75-77. He said he did not list his two nights spent in the Klickitat County Jail because the Sheriff's Office knew he was there. RP 77-78, 83-84. He denied spending the night at the Larson residence and testified he spent all his nights at his mother's house or under one of the two bridges as indicated on his forms. RP 78-82.

Finally, Goldendale Police Officer Stanley Berkshire, a city police officer who was familiar with Mr. Dollarhyde from grade school football, testified he did not see Mr. Dollarhyde under either the ABC or the

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<sup>4</sup> She also told the police she thought he might have been an individual she saw in her backyard but she was unsure. RP 54.

Singing Bridge during the time in question, although he acknowledged he was not looking for Mr. Dollarhyde in those locations. RP 62-64.

The court found Mr. Dollarhyde guilty of failure to register and sentenced him to 50 months. CP 12-13, 16; RP 110. The court based this sentence on an offender score of nine and resulting standard range of 43-57 months. CP 15; RP 108. The court also imposed 36 months community custody. CP 17; RP 110. The court imposed several conditions on community custody, including the following discretionary conditions: “(9) Remain within geographic boundary, as set forth in writing by the Community Corrections Officer;” “(10) Submit to UA/BA as directed by DOC;” “(13) Not frequent playground [sic], parks, schools, or and [sic] location where children are known to congregate;” “(14) Not to use, possess, or consume any alcohol;” and “(15) Obtain a drug and alcohol evaluation and follow through with all recommended treatment.” CP 27. Finally, the court imposed the \$500 victim assessment penalty, \$200 criminal court filing fee, \$100 DNA collection fee, ordered the immediate accrual of interest, and set a schedule of \$25 per month commencing July 1, 2018. CP 19-20; RP 108-10.

## **E. ARGUMENT**

### **1. The court erred in sentencing Mr. Dollarhyde based on an incorrect offender score, requiring remand for resentencing.**

The court sentenced Mr. Dollarhyde to 50 months confinement. CP 16; RP 110. It did so based on a standard range of 43-57 months calculated from a seriousness level of two and an offender score of nine. CP 15; RP 108. However, Mr. Dollarhyde's actual offender score is seven. A seriousness level of two and an offender score of seven provides for a standard range of 22-29 months. RCW 9.94A.510. Because the court sentenced Mr. Dollarhyde based on the wrong standard range derived from an erroneous offender score, it imposed a greater sentence than that authorized by statute, and Mr. Dollarhyde is entitled to resentencing.

#### *a. Courts lack authority to impose unauthorized sentences.*

Courts may not impose sentences in excess of a sentence authorized by law. *In re Personal Restraint of Schorr*, 191 Wn.2d 315, 322-23, 422 P.3d 451 (2018) (holding defendant's waiver of collateral attack on judgment and sentence cannot waive challenge that sentence exceeded court's authority); *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002) (noting "a defendant cannot agree to punishment in excess of that which the Legislature has established").

“A sentencing court acts without statutory authority . . . when it imposes a sentence based on a miscalculated offender score.” *In re Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

Appellate courts review offender score calculations de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003).

*b. The plain language of RCW 9.94A.525(18) dictates Mr. Dollarhyde’s offender score is seven, not nine.*

Basic rules of statutory construction require courts rely on the plain language of a statute to interpret its meaning. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). Where the plain language of a statute is “unambiguous” and has only one reasonable interpretation, the court’s inquiry ends. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). In addition, courts must give criminal statutes “a literal and strict interpretation.” *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

RCW 9.94A.525(18) applies to offender score calculations where the instant offense is a failure to register. RCW 9.94A.525(18) provides:

If the present conviction is for failure to register as a sex offender under RCW 9A.44.130 or 9A.44.132, count priors as in subsections (7) through (11) and (13) through (16) of this section; however count three points for each adult and juvenile prior sex offense conviction, **excluding prior convictions for failure to register as a sex offender under RCW 9A.44.130 or 9A.44.132, which shall count as one point.**

(emphasis added). The language of the statute is clear: The court shall count each prior failure to register conviction as one point. The statute is unambiguous. It dictates each prior failure to register conviction counts as one point.

The court sentenced Mr. Dollarhyde on his third failure to register conviction pursuant to RCW 9A.44.132(1)(b). CP 13. RCW 9.94A.515 designates such offense a seriousness level of two, which the court properly found. CP 15. The court found Mr. Dollarhyde had an offender score of nine.<sup>5</sup> RP 105, 108; CP 15.

Under the plain language of the statute, Mr. Dollarhyde's offender score is seven. The statute clearly dictates his offender score be calculated as follows: his two prior juvenile burglary convictions count as ½ point each; his prior juvenile child molestation conviction counts as 3 points; his two prior failure to register convictions count as 1 point each; and he is assessed 1 point for being on community custody when the current offense

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<sup>5</sup> The court did not make a finding as to how it arrived at the offender score. The judgment and sentence reflects the included prior offenses but not the points assigned to them. CP 15. At the sentencing hearing, the State argued Mr. Dollarhyde's juvenile sex offense counted as three points and that his other two juvenile felony offenses were each one half point, totaling four points. RP 105. That is accurate. The prosecutor continued, "And then the two points for the Fail to Register, and then he was on community custody at the time of the offense, so that would be a score of seven -- I'm sorry, nine, Your Honor. There was a second Fail to Register. So, that's a nine count with a range of 43 to 57 months on a Serious Level 2 offense, Your Honor." RP 105. What points the State assigned to each of these offenses is unclear from the record.

occurred. RCW 9.94A.525(18). Thus, Mr. Dollarhyde's total offender score is seven.

A seriousness level of two and an offender score of seven provide a standard sentencing range of 22 to 29 months. RCW 9.94A.510.

*c. This Court should remand for resentencing within the standard range based on the accurate offender score of seven.*

The offender score on which the court sentenced Mr. Dollarhyde contained a legal error. As a result, the court sentenced Mr. Dollarhyde to a sentence 21-28 months in excess of the authorized range. This Court should remand for resentencing with a directive to the court to impose a sentence within the standard range of 22-29 months calculated with the correct offender score of seven. *Tili*, 148 Wn.2d at 358 (recognizing appropriate remedy for unlawful sentence based on miscalculated offender score is vacation of sentence and remand for resentencing).

**2. The State presented insufficient evidence of failure to register as a sex offender.**

*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. amends. V, VI, XIV; Const. art. I, §§ 3, 21; *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. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

Failure to register as a sex offender requires proof beyond a reasonable doubt 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.44.132(1)(b). At issue here is whether the State proved by sufficient evidence that Mr. Dollarhyde failed to comply with a requirement of RCW 9A.44.130 and whether he did so knowingly.

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.”<sup>6</sup> Subsection (2) identifies the information registrants must provide. All individuals must register with

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<sup>6</sup> Only the residence reporting requirements are discussed here. The statute imposes additional reporting requirements related to school, employment, and travel, among other things, but they are not relevant for purposes of Mr. Dollarhyde’s appeal. *See, e.g.*, RCW 9A.44.130(1)(b) (reporting requirements for attending school and working at educational institutes), (3) (reporting requirements for international travel), (4)(a)(viii) (reporting requirements for interstate work or school), (7) (reporting requirements for name change applicants).

the sheriff in their county of residence upon their release from custody. RCW 9A.44.130(4)(a)(i). Thereafter, an individual who has a permanent home is only required to register within three business days of a move. RCW 9A.4.130(5). Conversely, individuals who lack a permanent home or are homeless 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). In addition, the statute permits but does not require sheriffs to request registrants provide sheriffs with an accurate accounting of where they stayed during the preceding week. *Id.*

Here the State advanced the theory that Mr. Dollarhyde failed to comply with the reporting requirements by failing to report to the sheriff the two nights he spend in the county jail and the nights the Larsons claimed he spent in their apartment.

*b. The statute does not criminalize a registrant's failure to comply with a county sheriff's request to provide an accurate accounting of his previous week's stays.*

The sheriff's office did not request Mr. Dollarhyde provide a complete and accurate accounting of his previous weeks' stays for January 1-31, 2018. *See* Section E.2.c *infra*. However, even if the court properly found the sheriff's office made a request for Mr. Dollarhyde to provide an accurate accounting of his previous weeks' stays, the State did not prove

beyond a reasonable doubt that a registrant's failure to provide the sheriff with a list of his previous weeks' stays violates the statute.

Nothing in RCW 9A.44.130(6)(b)<sup>7</sup> requires registrants provide a complete and accurate list of their previous weeks' stays as a statutory reporting obligation. Basic statutory interpretation requires courts start with the plain language of the statute. *Conover*, 183 Wn.2d at 711; *Armendariz*, 160 Wn.2d at 110. Here, the plain language of the statute authorizes county sheriffs to request a list of the previous week's stays from homeless registrants when they report weekly. However, the statute does not demand sheriff's request the list from registrants as a statutory reporting obligation. Therefore, a registrant's failure to provide a list is not a violation of the statutory reporting obligations. Alternatively, if this Court finds the statute is ambiguous as to this condition, the rule of lenity requires the Court 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

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<sup>7</sup> RCW 9A.44.130(6)(b) states:

A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

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.”).

This Court considered the relevant provision in *State v. Flowers*, 154 Wn. App. 462, 465-66, 225 P.3d 476 (2010). In *Flowers*, this Court found former RCW 9A.44.130(6)(b) did not require homeless registrants to list the location of their preceding weeks’ stays because it found the statute permitted but did not obligate sheriffs to request such information. *Flowers*, 154 Wn. App. at 465-66. In that case, in response to the sheriff’s policy requiring registrants report where they stayed the previous week when they appeared for their weekly in-person report, Mr. Flowers provided a list of places he stayed during the week. *Id.* at 464. The State alleged Mr. Flower’s list was neither accurate nor complete and charged Mr. Flowers with failure to register on that basis. *Id.* at 464-65.

The trial court ruled not providing the sheriff with a list of his previous week’s stays did not violate the statute and dismissed charges against Mr. Flowers. *Id.* at 463. This Court affirmed. The Court found under the plain meaning of the statute, RCW 94.44.130 “authorizes, but does not require” sheriffs to request information on registrant’s locations during the previous week and, therefore, a registrant’s failure to provide the sheriff with a list of his previous weeks’ stays did not constitute a

violation of the statute. *Id.* at 466. Therefore, the Court affirmed the trial court’s dismissal of the failure to register charge, even where the registrant did not provide the sheriff with accurate, requested location information. *Id.*

The former and current versions of the statute are similar. Both versions have near identical provisions authorizing but not requiring sheriffs to demand registrants provide information of where they stayed during the week preceding. *Compare* former RCW 9A.44.130(6)(b)<sup>8</sup> (“The county sheriff’s office may require the person to list the locations where the person has stayed during the last seven days.”) *with* current RCW 9A.44.130(6)(b) (“The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request.”). The failure to provide the sheriff with a list of the

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<sup>8</sup> Former RCW 9A.44.130(6)(b) provided:

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

The statute was amended in relevant part in 2010. Laws of 2010, ch. 265, § 1. Current RCW 9A.44.130(6)(b) is substantially similar except it also imposes an affirmative obligation to “keep an accurate accounting of where he or she stays during the week.” Both versions permit but do not require a sheriff to request information regarding where the registrant stayed during the previous week.

previous weeks' stays is not a violation of the statute under the former or current version.

RCW 9A.44.130(6)(b) "authorizes, but does not require, the county sheriff to command that transient sex offenders list their locations during the previous week." *Flowers*, 154 Wn. App. at 466. Because a failure "to comply with the sheriff's requirements" "is not a 'requirement' for which noncompliance is a crime" under the statute, and Mr. Dollarhyde otherwise fulfilled his reporting obligations, the State failed to prove Mr. Dollarhyde guilty beyond a reasonable doubt. *Id.* This Court should reverse and dismiss.

*c. Even if the failure to provide a requested accounting could constitute a violation of the statute, the State failed to prove beyond a reasonable doubt the sheriff's office actually requested Mr. Dollarhyde provide his accurate accounting for the relevant time period.*

The condition that homeless registrants provide an accurate accounting of the previous week's stay is a separate, discretionary option from the requirement that registrants appear in person once a week at their county sheriff's office. RCW 9A.44.130(6)(b). Whereas the statute mandates all homeless registrants appear once a week, in person, at their county sheriff's office, and the statute mandates all homeless registrants maintain an accurate accounting of where they stay during the week preceding their reporting, the statute only permits but does not require

these registrant to provide their accurate reporting to the sheriff, and it is triggered only “upon request.” RCW 9A.44.130(6)(b). Courts must give penal statutes “a literal and strict interpretation.” *Delgado*, 148 Wn.2d at 727. Thus, if a request triggers a statutory obligation to provide a list of a registrant’s stays, the request must be specific and clear. Here, the State failed to prove beyond a reasonable doubt that the sheriff’s office made such a request of Mr. Dollarhyde.

The court’s findings of fact that “The Sheriff’s Office required . . . an accounting of where he stayed the prior week” and that Mr. Dollarhyde was aware of that supposed requirement are unsupported by substantial evidence. CP 10 (Findings of Fact 3, 7). Likewise, the court’s conclusion of law that Mr. Dollarhyde “was required to provide to the sheriff’s office an accurate accounting every week of where he had stayed the prior week” is erroneous. CP 11 (Conclusion of Law 4). If it may be construed as a requirement at all (*see* Section E.2(b) *supra*), the requirement to provide the accurate accounting is only triggered “upon request,” and the State presented insufficient evidence the sheriff’s officer ever made such a request for January 1-31, 2018.

- i. The form does not constitute a request for an accurate accounting of the previous week's stays.

The pre-printed form the sheriff's office gave Mr. Dollarhyde to fill out at his weekly, in-person, reports does not constitute a request for an accounting of an offender's whereabouts for the preceding week. The form is a preprinted document with blanks for the registrants to fill in certain requested information. Exs. 5-8. Nothing on the form asks a person to accurately list each place he stayed. Exs. 5-8. For example, the form does not contain a space to fill in, "locations stayed last week" or any similar question, nor does it have a calendar with blank spaces in which one might obviously provide such information. The form contains no request for the registrant fill in where he stayed during the previous week. Exs. 5-8. Indeed, the court acknowledged as much.<sup>9</sup> RP 97; Exs. 5-8.

- ii. No other evidence showed the State expressly requested Mr. Dollarhyde list each place he stayed on the form.

Mr. Dollarhyde was notified of his obligation to register as a sex offender when he was convicted of his underlying sex offense. Ex. 1, p.5,

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<sup>9</sup> "While I agree it may not be the best practice -- the form that is used by the Sheriff's Office, which is just a blank for filling information in, the requirement is on Mr. Dollarhyde to provide the accurate accounting of where he had -- register where he had been for the week. So, while it may be more beneficial to put a weekly calendar on these forms to have them fill in exactly where they stayed each day, that is -- the Court does find that that's a requirement that is not a requirement of the Sheriff's Office, but the requirement is on Mr. Dollarhyde to register accurately in this matter." RP 97.

¶ 3.4<sup>10</sup>. In addition, Mr. Dollarhyde received notice of his statutory reporting obligations with both of his subsequent convictions for failure to register. Ex. 2, p.8-9, § 5.6, Ex. 3, p.10-11, § 5.6. However, these notifications simply informed Mr. Dollarhyde of his obligation to comply with the statute. They did not contain a request for his accurate accounting (nor could they, as Mr. Dollarhyde was not yet homeless).

In addition, no witness testified they specifically requested Mr. Dollarhyde provide an accounting of where he stayed the previous weeks during the relevant time frame of January 1-31, 2018. In the absence of evidence of such a request either on the form itself or from a sheriff's office employee, the State failed to prove beyond a reasonable doubt this element of the offense.

Klickitat County Sheriff's Office criminal records technician Lisa Schupe testified she provided Mr. Dollarhyde with a copy of the RCWs when he first began registering. RP 30. This provided him with notice of his statutory reporting obligations. It was not a request for an accurate reporting. The statute does not impose a requirement for registrants to provide the information; it permits sheriff's offices to request the

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<sup>10</sup> "The juvenile shall register, under penalty of law, as a convicted sex offender, with the sheriff of their county of residence, within 24 hours of their release from the Department of Juvenile Rehabilitation. Thereafter, RCW 9A.44.130(4) and RCW 9A.44.140 governs registration requirements." Ex. 1, p.5, ¶3.4.

information. *Flowers*, 154 Wn. App. at 465-66. Informing Mr. Dollarhyde of the statute does not constitute a request for this specific, additional information.

Nor does Ms. Schupe's testimony that she requested Mr. Dollarhyde provide a list satisfy this requirement. RP 30. Ms. Schupe did not testify she made an explicit request for an accurate accounting of stays during January 1-31, 2018. RP 30. A contextual reading of her testimony suggests she made a general request to Mr. Dollarhyde "when he first began registering" in 2015. RP 30. However, Ms. Schupe elaborated her meeting with Mr. Dollarhyde was to "provide[] him a copy of the RCWs," which authorize the request but are themselves not a request. RP 30.

Nor did Angel Hill, the front desk employee at the sheriff's office who interacted with registrants, make such a request. Ms. Hill testified:

Q: "Did you make any requests to have him give any accounting as to his whereabouts each day of those weeks?"

A: "I may have. I know I have -- I couldn't tell you if it was in January specifically, but I have requested of him information on the form, yes."

Q: "But you don't recall whether or not you did that during these particular times in January, is that correct?"

A: "No, sir."

RP 26. First, Ms. Hill did not testify she ever made a request of Mr. Dollarhyde for his accounting of the previous week – she testified she had at some time made a request of him for the information on the form. RP

26. But the form does not request an accounting of the previous week's stays. Second, whatever the content of Ms. Hill's request, she did not testify that she made that request of Mr. Dollarhyde during the time period in January that supports the charged offense. RP 26.

Finally, Mr. Dollarhyde testified no one ever asked him where he spent specific nights. RP 75-76.

- iii. The sheriff's office never requested Mr. Dollarhyde provide an accurate accounting of his previous weeks' stays for January 1-31, 2018.

To the extent the statute can be construed as imposing criminal liability based on the failure to provide a complete list of the previous weeks' stays, it may only be when the sheriff makes a clear, explicit request of a registrants. The form the sheriff's office provided to Mr. Dollarhyde contains no such request for this information, nor did any sheriff's office employee make such a request of Mr. Dollarhyde for this information during the relevant time periods.

The court conflated the statutory requirement that homeless registrants report weekly in person and keep an accurate accounting of where they stayed the preceding week with the statute's grant of permission to request registrants provide that accounting to the sheriff. The court essentially found that by reporting weekly in person, the sheriff

had made a request that Mr. Dollarhyde provide his accurate accounting. CP 10 (Findings of Fact 3, 7). However, the State failed to establish beyond a reasonable doubt anyone ever requested Mr. Dollarhyde provide his accounting for the dates of January 1-31, 2018. The court's conclusion that merely registering as an individual without a fixed address imposes the requirement to provide an accurate accounting of the previous week's stays is erroneous. CP 11 (Conclusion of Law 4). Therefore, the State failed to prove this element beyond a reasonable doubt, and this Court should reverse and dismiss.

*d. The State failed to prove beyond a reasonable doubt that Mr. Dollarhyde "knowingly" failed to comply with a reporting requirement when he did not list on the form that the sheriff's office booked him into the jail for two days.*

Mr. Dollarhyde's Department of Corrections Community Corrections Officer, Jordan Bergstrom, took Mr. Dollarhyde into custody following a positive urinalysis for marijuana, which violated one of his community custody conditions. RP 40-41. Officer Bergstrom transported Mr. Dollarhyde to the Klickitat County jail and "surrendered Mr. Dollarhyde to the custody of the Klickitat County Sheriff," who booked him in to the Klickitat County jail. RP 41. Mr. Dollarhyde reported to DOC upon his release two days later and also reported to the Sheriff's

Office on his next required reporting date. CP 10 (Findings of Fact 4, 5, 8); Ex. 6.

The Klickitat County Sheriff operates the Klickitat County Jail. The Klickitat County Jail is in the same building as the Klickitat County Sheriff's Office. RP 84; Exs. 5-8 (stamped "Klickitat County Sheriff, 205 South Columbus, Room 108, MS-CH-7, Goldendale, WA 988620."); *see also* Klickitat County Sheriff's website<sup>11</sup> (identifying Klickitat County Sheriff's Office location as 205 S. Columbus Ave., Rm. 108, Goldendale, WA 98620) and Klickitat County Jail website<sup>12</sup> (identifying Klickitat County Jail location as "205 S. Columbus Ave., Goldendale, WA 98620). The Klickitat County Sheriff's Office website also posts a "Jail Booking Roster" identifying the names of individuals currently booked into the Klickitat County Jail as well as the date the sheriff booked them into the jail.<sup>13</sup> The "Jail Booking Roster" page includes a link to the roster itself and a statement "The roster is updated approximately once per week." In addition, records custodian Schupe even testified she "receive[s] an email every day from the Jail Records Clerk with the list of names on the jail register. And I look every day at my email." RP 36-37. She testified she

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<sup>11</sup> <https://www.klickitatcounty.org/373/Sheriff> (last accessed 12/10/2018).

<sup>12</sup> <https://www.klickitatcounty.org/835/County-Jail> (last accessed 12/10/2018).

<sup>13</sup> <https://www.klickitatcounty.org/850/Jail-Roster> (last accessed 12/10/2018).

does so, “To see if there is any sex offenders registered with us that are incarcerated at the time.” RP 37.

Mr. Dollarhyde testified he did not report to the Klickitat County Sheriff’s Office the two nights he spent in the Klickitat County jail because “I spaced it because I had just got out of jail and they should know.” RP 77-78. He elaborated, “I didn’t think that I had to write that I was at the jail because it was right under the Sheriff’s Office.” RP 84. The State did not provide his failure to provide this information was knowing.

In convicting Mr. Dollarhyde, the court found he spent two nights in the Klickitat County Jail but failed to report those two nights to the Klickitat County Sheriff’s Office and thereby failed to provide an accurate accounting. CP 10-12. “No accounting by the defendant listed . . . the Klickitat County Jail as [a] place[] he stayed the night.” CP 12 (Conclusion 6). This is an absurd interpretation of the statute. In a circumstance such as this one, where an individual required to register is temporarily lodged into the county jail of the same county where he reports weekly in the jail run by the sheriff to whom he reports, the individual reasonably assumes the sheriff is aware of his location.

It is absurd to criminalize the failure to report to the county sheriff a stay in the county jail run by the sheriff. Criminal statutes are to be

construed narrowly. *See generally State v. Watson*, 160 Wn.2d 1, 14, 154 P.3d 909 (2007). Courts must give penal statutes a strict and literal interpretation. *Delgado*, 148 Wn.2d at 727. In addition, courts must avoid “a reading that results in absurd results.” *Id.* at 733. To interpret the statute to require a homeless person to account for where he is every night and to completely and accurately report every night’s stay, even when the stay is in the jail in the same county where he reports, is nonsensical: The sheriff knows where the registrant is because he has actual custody of him.

In addition, the statute creates drastically different obligations based on whether an individual has a fixed address. *See generally State v. Boyd*, 1 Wn. App. 2d 501, 525, 408 P.3d 362 (2017), (Becker, J., dissenting) (noting the weekly in-person reporting requirements for homeless registrants “makes Washington’s statute perhaps the most burdensome in the country”), *review denied*, 190 Wn.2d 1008, and *cert. denied*, \_\_\_ U.S. \_\_\_, 2018 WL 3329204 (Mem.) (2018). In doing so, it mandates unattainable requirements for homeless individuals. It criminalizes not being able to remember, account, and report accurately where an individual stayed each night of the proceeding week, which could be a different place very week. To interpret the statutory requirements in such a draconian manner effectively criminalizes a registrant’s statutes as homeless. Our state and federal constitutions

prohibit such criminalization of one's status. *See, e.g., Martin v. City of Boise*, 902 F.3d 1031, 1035 (2018) (holding city ordinance prohibiting camping violates the Eighth Amendment prohibition against cruel and unusual punishment "insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them").

Such an interpretation renders the statute arbitrary because it is unrelated to the purpose for which it was created. Our Court has emphasized the need of law enforcement to learn where someone is in the community, not where they are incarcerated.

Local law enforcement does not need to know that a sex offender is reincarcerated in order to protect the community, so the sex offender need not reregister upon entry into the jail or prison; the fact that the offender physically relocated to a jail, rather than a private residence, essentially relieves him or her of this obligation.

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

Here, where the court interpreted the statute to require reporting to the sheriff a stay in the sheriff's own jail, the statute fails to meet its purpose of providing law enforcement with information on where sex offenders are currently residing in the community. Thus, the State failed to prove that Mr. Dollarhyde knew that the statutory reporting requirements included an obligation to inform the county sheriff's office

of a two-night stay in that same sheriff's county jail, and the court interpreted the statute in an absurd manner in finding the statute encompassed such conduct.

The court also found Mr. Dollarhyde failed to comply with the statute because he did not list nights allegedly spent at the Larson residence and because he did not stay under the bridges as he wrote on the form. However, Ms. Larson's testimony conflicted with her daughter's testimony in certain instances, and Mr. Dollarhyde contradicted their claims. RP 84-85. Mr. Dollarhyde's testimony, as well as the inconsistencies between the testimony of Ms. Larson and her daughter, created a reasonable doubt as to whether Mr. Dollarhyde spent any nights at the Larson's apartment, and the court's finding that he did is unsupported by substantial evidence. CP 11 (Finding of Fact 11), 12 (Conclusions of Law 7, 8). In addition, the court's finding that Mr. Dollarhyde did not stay under the bridges is unsupported by substantial evidence, as Mr. Dollarhyde clearly testified to this fact and no evidence contradicted it.<sup>14</sup> CP 11 (Finding of Fact 12); RP 78-82. Regardless, the record is clear the court did not understand the statute, apply it properly, or

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<sup>14</sup> Officer Berkshire's testimony he did not happen to observe Mr. Dollarhyde under either bridge fails to establish Mr. Dollarhyde did not stay under the bridges, particularly since he was not looking for Mr. Dollarhyde. RP 62-64.

hold the State to its burden of proof. Therefore, this Court should reverse Mr. Dollarhyde's conviction.

*e. This court should reverse Mr. Dollarhyde's conviction with instructions to dismiss the charge with prejudice.*

Under *Flowers*, noncompliance with a sheriff's request is not a criminal violation of the statute. Therefore, Mr. Dollarhyde's failure to list stays in the county jail or at the Larson residence does not violate the statute. In the alternative, the State failed to prove beyond a reasonable doubt the sheriff's office made a request for Mr. Dollarhyde's accurate accounting. In addition, the State failed to prove beyond a reasonable doubt Mr. Dollarhyde knowingly failed to comply with his reporting requirements. Substantial evidence fails to support the court's findings of fact and conclusions of law to the contrary.

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 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. Dollarhyde’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).

**3. The court exceeded its statutory authority in imposing discretionary community custody conditions which are not reasonably crime related, requiring the conditions be stricken.**

*a. The community custody statute requires discretionary conditions be “crime-related.”*

RCW 9.94A.701(1)(a) authorizes the court to sentence Mr. Dollarhyde to three years of community custody under RCW 9.94A.703. Permissible conditions of community custody are those identified by statute (either as mandatory or waivable) and those within a court’s discretion if they are “crime-related prohibitions.”<sup>15</sup> RCW 9.94A.703(1) (mandatory conditions), .703(2) (mandatory unless waived conditions),

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<sup>15</sup> The statute also provides for “special conditions” of community custody. RCW 9.94A.703(4). None of those conditions were ordered by the court, and they are not at issue here.

.703(3) (discretionary conditions). “[C]rime-related prohibition[s]” are conditions that “directly relate[] to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10), 9.94A.703(3)(f).

*b. Conditions (9), (10), (14), and (15) are unrelated to Mr. Dollarhyde’s crime of failure to register.*

The court imposed several discretionary community custody conditions unrelated to Mr. Dollarhyde’s crime of conviction: failure to register. Specifically, conditions (10) (14), and (15) all impose prohibitions or requirements related to possession or use of alcohol and drugs or to testing for or treating of such use. CP 27. In addition, condition (9) requires Mr. Dollarhyde “Remain within geographic boundary, as set forth in writing by the Community Corrections Officer.”<sup>16</sup> CP 27. None of these four conditions are “directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Therefore, the court lacked authority to impose them, and this Court should strike them.

The court made no findings that any of these conditions were related to the offense. No evidence in the record suggests that Mr.

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<sup>16</sup> The court included this condition under the “mandatory conditions” section, but the statute clearly identifies this as a “discretionary condition.” CP 27; RCW 9.94A.703(3)(a).

Dollarhyde's failure to register involved or was related to an issue with alcohol or controlled substances. Nor does this failure to register offense support a basis to restrict Mr. Dollarhyde to a certain geographic area.

Because none of this prohibited conduct "directly relate[s] to the circumstances of the crime," the imposition of these conditions is manifestly unreasonable, and the court abused its discretion in imposing them. *State v. Nguyen*, \_\_\_ Wn.2d \_\_\_, 425 P.3d 847, 853 (2018). In *State v. Munoz-Rivera*, this Court struck drug-related conditions where the record contained no evidence that drugs contributed to the offense. 190 Wn. App. 870, 893, 361 P.3d 182 (2015). *Compare to In re Personal Restraint of Brettell*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2018 WL 6042816 at \*5 (2018) (finding drug and alcohol related condition sufficiently crime-related where evidence established defendant gave his victims drugs or alcohol during assaults). In addition to exceeding the court's statutory authority, to the extent that ordering submission to UA/BA testing bears no connection to Mr. Dollarhyde's underlying offense and is not narrowly tailored to rehabilitation related to his offense, this condition also violates Mr. Dollarhyde's privacy interests under the Fourth Amendment and Article One, section seven. *See State v. Olsen*, 189 Wn.2d 118, 134, 399 P.3d 1141 (2017).

Because conditions 9, 10, 14, and 15 are not related to Mr. Dollarhyde's conviction for failure to register, this Court should strike them.

**4. The court violated Mr. Dollarhyde's right to due process in imposing an unconstitutionally vague community custody condition, requiring it be stricken.**

*a. Due process prohibits courts from imposing vague conditions.*

A community custody condition which fails to provide fair warning of proscribed behavior is unconstitutionally vague and violates due process. *Nguyen*, 425 P.3d at 851; *Brettell*, 2018 WL 6042816 at \*2; U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3. A community custody condition “is unconstitutionally vague if (1) it does not sufficiently define the proscribed conduct so an ordinary people can understand the prohibition or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Courts must strike conditions where “a person of ordinary intelligence” would not understand what behavior a particular condition forbids. *Nguyen*, 425 P.3d at 851.

*b. Community custody condition (13) is unconstitutionally vague and should be stricken.*

Condition (13) requires Mr. Dollarhyde “Not frequent playground, parks, schools, or and [sic] location [sic] where children are known to

congregate.” CP 27. The phrase “where children are known to congregate” is unconstitutionally vague under both prongs and should be stricken.

In *State v. Irwin*, this Court found the community custody condition directing the defendant “not frequent areas where children are known to congregate” was unconstitutionally vague and reversed and remanded for resentencing. 191 Wn. App. 644, 652-55, 364 P.3d 830 (2015). The Court suggested that including an illustrative list may cure this defect as to the notice issue but could still permit arbitrary enforcement and so was constitutionally problematic. *Id.* at 655.

However, in *State v. Wallmuller*, this Court held that a community custody condition prohibiting the defendant from frequenting “‘places where children congregate such as parks, video arcades, campgrounds, and shopping malls,’ was still unconstitutionally vague, despite the inclusion of the illustrative list. 4 Wn. App. 2d 698, 700, 423 P.3d 282 (2018).

*Wallmuller* focused on the vagueness of “congregate” and held even an illustrative list as suggested in *Irwin* failed to cure the vagueness notice defect. *Id.* at 702-04 (finding inclusion of “places where children congregate” unconstitutionally vague); *but see State v. Johnson*, 4 Wn. App. 2d 352, 360-61, 421 P.3d 969 (2018) (rejecting vagueness challenge

where condition prohibited frequenting areas “where children congregate” but included an illustrative list).

Here, the court did include a short illustrative list of “playground, parks, schools.” CP 27. However, the inclusion of “or and location [sic] where children are known to congregate” is still vague. First, a common person of ordinary intelligence would not know where minors “are known to congregate.” Known by whom? What about a place where children are, in fact, congregated, but where they do so unexpectedly, i.e., not known? Second, even if notice is sufficient, the condition permits arbitrary enforcement because DOC is left to determine what locations satisfy this condition. *Irwin*, 191 Wn. App. at 655 (noting even an illustrative list “would leave the condition vulnerable to arbitrary enforcement”). Finally, the use of the word “children” as opposed to “children under sixteen” is vague. *Johnson*, 4 Wn. App. 2d at 361 (requiring “children” be changed to “individuals under 16 years of age”). The condition should be clarified to substituted “children under sixteen” or “individuals under sixteen.”

Because condition (13) is unconstitutionally vague, this Court should strike it. *See Irwin*, 191 Wn. App. at 655 (reversing and striking condition as void for vagueness and remanding for resentence); *see also Brettell*, 2018 WL 6042816 at \*2 (accepting State’s concession that

condition prohibiting defendant from “frequenting ‘areas where minor children are known to congregate’” is unconstitutionally vague and remanding for rewriting); *State v. Norris*, 1 Wn. App. 2d 87, 95, 404 P.3d 83 (2017) (accepting State’s concession that “the portion of the condition that prohibits [the defendant] from entering ‘any places where minors congregate’ is unconstitutionally void for vagueness” and striking it), *aff’d in part on other grounds, rev’d in part on other grounds, by*, \_\_\_ Wn.2d \_\_\_, 425 P.3d 847 (2018).

**5. This Court should strike the imposition of certain LFOs from Mr. Dollarhyde’s judgment and sentence.**

*a. The court treated Mr. Dollarhyde as indigent but imposed costs.*

The court conducted no inquiry into Mr. Dollarhyde’s indigency status before imposing the LFOs. However, at the commencement of the case, Mr. Dollarhyde requested and the court ordered the appointment of counsel at public expense. CP \_\_\_, sub. 5. In addition, the court found Mr. Dollarhyde indigent for purposes of appeal. CP 28-31. Finally, the court imposed only those costs then believed to be mandatory. CP 19. Thus, the court treated Mr. Dollarhyde as indigent.

The court imposed the \$200 Criminal Court Filing Fee and \$100 Biological Sample Fee. CP 19; RP 108. Mr. Dollarhyde has two previous adult felony convictions. CP 15. 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 court ordered interest accrue from the date of the judgment through payment in full and ordered payments commence on July 1, 2018. CP 20.

*b. Ramirez requires this Court strike the \$100 DNA fee, \$200 criminal court filing fee, and interest accrual from Mr. Dollarhyde'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. In doing so, 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 court filing fees. RCW 36.18.020(2)(h) (prohibiting imposition of criminal court 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 *Ramirez*, the Court held these amendments apply prospectively to all defendants whose cases are pending on direct appeal. 426 P.3d at 721-23. 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 723 (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*, \_\_\_ Wn. App. \_\_\_, 429 P.3d 1116, 1121 (2018) (following *Ramirez* and reversing imposition of criminal court filing and DNA fees and remanding).

Mr. Dollarhyde is indigent. CP \_\_\_, sub. 5, CP 28-31. 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 DNA and criminal court filing fees as well as the imposition of interest from Mr. Dollarhyde’s judgment and sentence.

## F. CONCLUSION

The court convicted Mr. Dollarhyde based on conduct the statute fails to criminalize. Alternatively, Mr. Dollarhyde's sole count of conviction rests on insufficient evidence. This Court should reverse and dismiss the charge. If this Court disagrees and affirms the conviction, this Court should find Mr. Dollarhyde's offender score is a seven, should find several of the conditions of community custody are not crime-related or are unconstitutionally vague, and should find the imposition of LFOs erroneous. At minimum, the Court should remand the case for resentencing.

DATED this 12th day of December 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

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