

NO. 62792-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEROME TALLEY
aka AZIZUDIN SALAHUD-DIN,

Appellant.

REC'D
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King County Prosecutor
Appellate Unit

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KING COUNTY

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

The Honorable Jim Rogers, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
D. <u>ARGUMENT</u>	5
1. THE TRIAL COURT ERRED BY ANSWERING THE JURY'S QUESTION ABOUT THE WEIGHT RECEIPT WITHOUT FIRST SOLICITING A RESPONSE FROM THE PARTIES.	5
2. THE COURT ERRED WHEN IT FAILED TO CONSIDER WHETHER TO IMPOSE THE DNA COLLECTION FEE UNDER THE APPLICABLE STATUTE AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.....	12
a. <i>The Court's Failure to Exercise Discretion Under the Applicable Statue Requires Reversal and Remand.</i>	13
b. <i>Assuming for Argument the Legislature Intended to Subvert the Savings Statute, the Amended Statute Alters the Standard of Punishment Without Notice and Therefore Violates the Prohibition on Ex Post Facto Laws.</i>	16
c. <i>Counsel was Ineffective for Failing to Object to Sentencing Under the Incorrect Statute.</i>	17
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>In re Personal Restraint of Powell</u> 117 Wn.2d 175, 814 P.2d 635 (1991).....	17
<u>In re Personal Restraint of Howerton</u> 109 Wn. App. 494, 36 P.3d 565 (2001).....	10, 11
<u>State v. Aho</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	18
<u>State v. Allen</u> 50 Wn. App. 412, 749 P.2d 702 (1988).....	10
<u>State v. Ashcraft</u> 71 Wn. App. 444, 859 P.2d 60 (1993).....	5, 6
<u>State v. B.J.S.</u> 140 Wn. App. 91, 169 P.3d 34 (2007).....	18
<u>State v. Babich</u> 68 Wn. App. 438, 842 P.2d 1053 (1993) <u>review denied</u> , 121 Wn.2d 1015 (1993).....	9
<u>State v. Beard</u> 74 Wn.2d 335, 444 P.2d 651 (1968).....	9
<u>State v. Broadway</u> 133 Wn.2d 118, 942 P.2d 363 (1997).....	19
<u>State v. Buchanan</u> 78 Wn. App. 648, 898 P.2d 862 (1995).....	15
<u>State v. Caliguri</u> 99 Wn.2d 501, 664 P.2d 466 (1983).....	5, 6

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Carter</u> 56 Wn. App. 217, 783 P.2d 589 (1989).....	18
<u>State v. Curry</u> 118 Wn.2d 911, 829 P.2d 166 (1992).....	13, 14, 16
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	13
<u>State v. Grant</u> 89 Wn.2d 678, 575 P.2d 210 (1978).....	15
<u>State v. Grayson</u> 154 Wn.2d 333, 111 P.3d 1183 (2005).....	13, 16
<u>State v. Hardy</u> 133 Wn.2d 701, 946 P.2d 1175 (1997).....	10
<u>State v. Langdon</u> 42 Wn. App. 715, 713 P.2d 120 <u>review denied</u> , 105 Wn.2d 1013 (1986).....	10
<u>State v. Martz</u> 8 Wn. App. 192, 504 P.2d 1174 (1973) <u>review denied</u> , 82 Wn.2d 1002 (1973).....	9
<u>State v. McFarland</u> 127 Wn.2d 322, 899 P.2d 1251 (1995).....	18
<u>State v. McGill</u> 112 Wn. App. 95, 47 P.3d 173 (2002).....	16
<u>State v. Newton</u> 109 Wn.2d 69, 743 P.2d 254 (1987).....	8

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Rice
110 Wn.2d 577, 757 P.2d 889 (1988)
cert. denied, 491 U.S. 910 (1989).....5

State v. Saunders
91 Wn. App. 575, 958 P.2d 364 (1998)..... 10

State v. Schmidt
143 Wn.2d 658, 23 P.3d 462 (2001)..... 17

State v. Stenson
132 Wn.2d 668, 940 P.2d 1239 (1997)
cert. denied, 523 U.S. 1008 (1998) 18

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987)..... 17

State v. Toney
103 Wn. App. 862, 14 P.3d 826 (2000)..... 16

State v. Zornes
78 Wn.2d 9, 475 P.2d 109 (1970)..... 15

FEDERAL CASES

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 17, 18

United States v. Batchelder
442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)..... 15

RULES, STATUTES AND OTHER AUTHORITIES

CrR 6.15.....5

TABLE OF AUTHORITIES (CONT'D)

	Page
CrR 7.5.....	4
Former RCW 10.01.160(3) (2005)	14
Former RCW 43.43.7541 (2002).....	15
Laws of 2008, ch. 97, § 3.....	15
RAP 7.5.....	4
RCW 7.68.035	14
RCW 9.94A	15
RCW 10.01.040	15
RCW 43.43.754	15
RCW 43.43.7541	15, 16
U.S. Const. amend. V	5
U.S. Const. amend. VI	5, 17
Wash. Const. art. I, § 3.....	5
Wash. Const. art. I, § 22.....	5, 17

A. ASSIGNMENTS OF ERROR

1. The trial court erred by answering the jury's question about an apparently inadvertent attachment to an exhibit without first seeking input from the parties.

2. The trial court erred when it imposed a non-mandatory DNA collection fee on the mistaken belief the fee was mandatory.

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

4. The appellant was deprived of effective assistance of counsel at sentencing because counsel failed to object to the court's imposition of the DNA collection fee.

Issues Pertaining to Assignments of Error

1. The jury asked a question about a weight receipt that was apparently inadvertently attached to an exhibit that contained the heroin the appellant purportedly sold to an undercover police officer. The trial court answered the jury's question without first notifying the parties and seeking their input on what the answer should be. Did the trial court commit reversible error requiring a new trial?

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

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

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

B. STATEMENT OF THE CASE

On October 22, 2007, a group of Seattle police officers operating an undercover narcotics "buy/bust" operation deployed to a downtown area known for drug deals. 3RP 48-50, 4RP 62, 5RP 10-15, 39-42.¹ The "buyer" in the operation bought black tar heroin from the appellant, Azizuddin Salahud-Din. 3RP 50-55, 5RP 14-17, 6RP 33-35. Salahud-Din was arrested almost immediately after the transaction. 3RP 57-58, 5RP 18-19, 42-43. The arresting officer searched Salahud-Din and found

¹ Salahud-Din refers to the nine-volume verbatim report of proceedings as follows: 1RP – 12/10/2007; 2RP – 4/15/2008; 3RP – 4/16/2008; 4RP 4/17/2008 (morning); 5RP – 4/17/2008 (afternoon); 6RP 4/21/2008; 7RP – 4/22/2008; 8RP – 5/16/2008; 9RP – 7/2/2008; 10RP – 12/10/2008.

pre-recorded "buy money" the "buyer" officer used to buy heroin from Salahud-Din. 5RP 44, 48-51. The drug transaction occurred about 225 feet from an unsigned, active school bus stop. 6RP 64-68, 97-99.

The state charged Salahud-Din with delivering heroin within 1000 feet of a school bus stop. CP 7-8. During deliberations, a King County jury asked the following question:

There is a date (8/21/07) on a weight receipt attached to the back of State's Exhibit #2: What does it refer to, and can we get clarification?

CP 37. Exhibit 2 was an envelope purportedly containing the heroin Salahud-Din delivered to the "buyer" officer. Ex. 2; Supp. CP __ (sub. no. 63C, Exhibit List, filed April 22, 2008); 3RP 61-62, 6RP 24-26, 34-35.

The trial court did not notify the parties of the jury's query. CP 38; 8RP 7; 9RP 6-8. Instead, the court on its own answered the question by instructing jurors to "rely upon the evidence presented in court for your deliberations." CP 38; 9RP 7-8.²

Later that day, the jury found Salahud-Din guilty as charged. CP 31-32. Salahud-Din, who had represented himself at trial, moved for the appointment of counsel to help him file post-trial motions. 7RP 17-18.

² The question and answer are attached as an appendix.

The trial court denied the motion and appointed counsel for sentencing only. CP 39-40.

Salahud-Din later filed a pro se motion to vitiate the verdict and for a new trial, as well as a reply to the state's response. CP 41-50. Citing CrR 7.5(a)(1),³ Salahud-Din argued the jury's question about the weight receipt attached to exhibit 2 and the trial court's response resulted in the jury's receipt of a document not admitted into evidence. CP 41-48. Salahud-Din also challenged the trial court's sua sponte response to the jury's question, contending the court deprived the parties of an opportunity to comment on the response. CP 44, 49-50; 8RP 7; 9RP 3-6.

The trial court denied the motion, concluding exhibit 2 "does not constitute evidence 'not allowed by the court.'" CP 52; 9RP 6-7. With respect to Salahud-Din's challenge to the sua sponte response, the court observed it "didn't actually tell [the prosecutor] either." 8RP 7; 9RP 7-8. The court found it unnecessary to first contact the parties because the

³ RAP 7.5(a) provides,

The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

(1) Receipt by the jury of any evidence, paper, document or book not allowed by the court[.]

answer it gave was the only possible way to address the question without commenting on the evidence. 9RP 7-8.

The trial court imposed a standard range sentence plus a 24-month school bus stop enhancement. CP 60-68, 10RP 21-22. The court waived all non-mandatory fees. CP 63, 10RP 21-22. The court did, however, impose the \$500 Victim Penalty Assessment and \$100 DNA collection fee. CP 63. Defense counsel did not object to the DNA collection fee.

D. ARGUMENT

1. THE TRIAL COURT ERRED BY ANSWERING THE JURY'S QUESTION ABOUT THE WEIGHT RECEIPT WITHOUT FIRST SOLICITING A RESPONSE FROM THE PARTIES.

In criminal cases a judge should not communicate with the jury in the accused's absence. State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). Such communications violates the accused's constitutional rights to appear and defend himself in person and by counsel. U.S. Const. amend. V, VI; Const. art. I, §§ 3, 22; State v. Rice, 110 Wn.2d 577, 613-614, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). More specifically, the trial court must notify the parties of the contents of a deliberating jury's inquiry and provide an opportunity to remark upon a response. CrR 6.15(f)(1); State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60 (1993).

In Salahud-Din's case, the trial court erred by violating these established rules and answering the jury's question about the weight receipt attached to exhibit 2 outside Salahud-Din's presence and without first requesting the parties' input. Caliguri, 99 Wn.2d at 508 (trial court erred in replaying tapes in response to jury's request outside defendant's presence); Ashcraft, 71 Wn. App. at 464 (trial court erred by replacing an initial juror with an alternate juror after deliberations began). The remaining issue is whether the court's error can be excused as harmless.

Once a defendant raises a possibility of prejudice, the state must prove the error harmless beyond a reasonable doubt. Caliguri, 99 Wn.2d at 509. The possibility of prejudice exists in Salahud-Din's case. The state alleged that the delivery occurred October 22, 2007. CP 7-8. The evidence showed only that a drug transaction occurred on October 22. The August 21, 2007 date on the weight receipt attached to exhibit 2 was therefore incongruent, a feature that obviously troubled jurors because they asked to what the date referred and for clarification.

The jury's concern follows logically from the nature of exhibit 2. Among other notations written on the envelope portion of the exhibit was Salahud-Din's name and birth date. 3RP 60-62. Because of the

discrepancy in dates, a reasonable juror could have believed Salahud-Din had also been part of a narcotics transaction on August 21.

The possibility of such an inference gets stronger when the prosecutor's cross-examination of Salahud-Din is considered. Salahud-Din testified on direct examination he was stopped by an "Officer Jokela" for drug traffic loitering on October 22. 6RP 145-53. Jokela, however, did not testify and Salahud-Din was not arrested for drug traffic loitering.

On cross-examination, the prosecutor asked Salahud-Din whether he was confusing the October 22 incident with another incident. 6RP 162. After Salahud-Din gave a long answer that did not address the question, the prosecutor asked, "Now, I just asked you about confusion because you have been a defendant in criminal court before, haven't you?" 6RP 164. Salahud-Din asked the prosecutor to repeat the question. The prosecutor said, "You have been a defendant in a criminal court before?" 6RP 164. Salahud-Din said he did not hear the question. The prosecutor repeated, "You have been convicted of a crime in the past?" 6RP 164. Salahud-Din objected, and the court informed the prosecutor to provide "foundation specific." 6RP 164. So the prosecutor asked, "You have been convicted of a second degree crime?" 6RP 165. Salahud-Din objected to admission of criminal history. 6RP 165.

The court excused the jury, then framed the issue as whether Salahud-Din's prior second degree burglary conviction could be used by the state as impeachment evidence. 6RP 165. The court stated it had earlier ruled the conviction was admissible. But the court ruled the prosecutor could not use the conviction because it appeared Salahud-Din may not have understood the earlier evidentiary ruling. 6RP 166.

When the jury returned, the judge gave the following admonition:

There was a question about a crime, and that question, which is not evidence anyway, because there is no answer to it, is stricken. . . . So that evidence is stricken and should be disregarded by you in your deliberations.

6RP 178.

The trial court's instruction to disregard was addressed to only one question. But the prosecutor asked four questions that insinuated Salahud-Din had been in trial before for a criminal offense and had been convicted. Our Supreme Court has observed that referring to convictions for impeachment purposes "has extraordinary potential for misleading and confusing a jury into believing it is being told the defendant is a 'bad' person and therefore guilty of the crime charged." State v. Newton, 109 Wn.2d 69, 70, 743 P.2d 254 (1987).

The same is true of a prosecutor's insinuations of prior criminal conduct during cross examination. See State v. Beard, 74 Wn.2d 335,

339, 444 P.2d 651 (1968) and State v. Martz, 8 Wn. App. 192, 196, 504 P.2d 1174 (1973) (holding a prosecutor may not attempt impeachment by asking about a prior conviction unless the prosecutor is prepared to prove the existence of a valid conviction), review denied, 82 Wn.2d 1002 (1973); see also State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993) (during cross examination, prosecutor improperly insinuated defense witnesses made inconsistent statements to a confidential informant where prosecutor failed to perfect the impeachment), review denied, 121 Wn.2d 1015 (1993).

Even if the prosecutor in Salahud-Din's case had a good faith basis for asking the questions,⁴ and even if the trial judge created the insinuation by preventing the prosecutor from perfecting her impeachment, the prejudicial effect remains the same. Combined with the contents of the weight receipt, the prosecutor's questions support a reasonable inference Salahud-Din had been involved in a previous drug transaction. Salahud-Din has shown the possibility of prejudice.

The trial court's failure to consult with the parties before answering the jury's query was not harmless beyond a reasonable doubt. Evidence of

⁴ Counsel on appeal found no trial court ruling in the current record that permitted the prosecutor to use a burglary conviction to impeach Salahud-Din.

a prior conviction is inherently prejudicial when the defendant is the witness because the evidence tends to divert the jury's focus to the defendant's general propensity for criminal behavior. State v. Hardy, 133 Wn.2d 701, 710, 946 P.2d 1175 (1997). Further, "the more similar the prior crime to the one presently charged, the greater the prejudice." State v. Saunders, 91 Wn. App. 575, 580, 958 P.2d 364 (1998).

The trial court enhanced the likelihood of great prejudice by sanctioning the jury's use of the receipt for any purpose, including an improper one. In response to the jury's request for clarification, the court merely instructed jurors to "rely upon the evidence presented in court for your deliberations." CP 38. Because exhibit 2, including the receipt, was "evidence presented in court," the trial court's sua sponte answer was not harmless beyond a reasonable doubt.

It is true that courts have found "neutral" trial court responses to a jury inquiry harmless. In contrast with Salahud-Din's case, however, the responses in those cases was essentially to refer to instructions given. In re Personal Restraint of Howerton, 109 Wn. App. 494, 506, 36 P.3d 565 (2001); State v. Allen, 50 Wn. App. 412, 420, 749 P.2d 702 (1988); State v. Langdon, 42 Wn. App. 715, 717-718, 713 P.2d 120, review denied, 105 Wn.2d 1013 (1986). Absent an error in the instructions, it is difficult to

conceive of a circumstance where referring the jury to correct instructions would be prejudicial.

But in Salahud-Din's case, the jury's question and the court's answer involved evidence that was mistakenly overlooked by the parties and the court and inadvertently admitted. Instead of first seeking the parties' input, the court told jurors to consider this mysterious evidence that on its face had nothing to do with Salahud-Din's case. The court's instruction was therefore not "neutral" in the sense courts have used that term in the context here. Salahud-Din's case is thus distinguishable from Howerton and other like cases.

One further feature of Salahud-Din's case supports the conclusion the court committed prejudicial error: the jury struggled with its verdict.⁵ After deliberating all morning and part of the afternoon, the jury notified the court at 2:43 P.M. that it could not make a unanimous decision. CP 29. The court asked jurors whether there was "a reasonable possibility

⁵ About one hour after beginning its deliberations, the jury asked, "Is there any minimum amount of controlled substance that needs to be transferred to constitute delivery[?]" CP 33; Supp. CP __ (sub. no. 55A, Clerk's Minutes, at 8-9, filed May 15, 2008). Less than an hour later, jurors requested copies of the testimony of the "buyer" officer and scientist who analyzed the heroin. CP 35. At 1:30 p.m., the jury asked the question about the weight receipt. CP 37. The court answered the question at 1:35 p.m. CP 38.

within a reasonable period of time of reaching a decision." 7RP 9. After one juror said she was not sure and two said maybe, the judge sent the jury back for continued deliberations. 7RP 9-11. At 4:08 p.m., the jury returned a guilty verdict and found Salahud-Din delivered the heroin within 1,000 feet of a school bus stop. Supp. CP __ (sub. no. 55A, Clerk's Minutes, at 9).

The confluence of the unusual factors in Salahud-Din's case gave rise to the possibility of prejudice. The problems created by the trial court's sua sponte response to the jury's question about the weight receipt could easily have been avoided. The state cannot show the court's error in failing to consult with the parties before answering the jury's question was harmless beyond a reasonable doubt. This Court should reverse Salahud-Din's conviction and remand for a fair trial.

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

The trial court imposed the \$100 DNA fee after stating it "will waive all nonmandatory fees and assessments." 10RP 21. The court therefore apparently believed the DNA fee was mandatory. This was error; the fee was not mandatory under the statute in force on the date of

the offense. Moreover, any retroactive application of the amended DNA collection statute would violate the constitutional prohibition on ex post facto laws. This Court should therefore remand so the trial court may exercise its discretion in deciding whether to impose the DNA fee based on a correct understanding of pertinent law.

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

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

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

1. Repayment must not be mandatory;

...

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

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

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

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

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

But under the version in effect October 22, 2007, the date of Salahud-Din's offenses, the DNA fee was not mandatory. Former RCW 43.43.7541 (2002). That version states the court should impose a fee "unless the court finds that imposing the fee would result in undue hardship on the offender." Former RCW 43.43.7541.

The former statute controls in Salahud-Din's case. When the Legislature amends a criminal or penal statute, its pre-amendment version applies to crimes committed before the amendment's effective date, unless a contrary intention is fairly conveyed in the amendatory action. RCW 10.01.040; State v. Grant, 89 Wn.2d 678, 682, 575 P.2d 210 (1978); State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979); State v. Toney, 103 Wn. App. 862, 864, 14 P.3d 826

(2000). The Legislature gave no indication at the time it amended the DNA fee statute that it had retroactive effect. Absent such intent, the former statute applied to Salahud-Din.

That statute directed the court to consider an offender's ability to pay. Former RCW 43.43.7541; Curry, 118 Wn.2d at 916. Failing to so consider ability to pay is an abuse of the trial court's discretion. See Grayson, 154 Wn.2d at 342 (sentencing court's failure to exercise discretion is reversible error); State v. McGill, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (decision to impose a standard range sentence reviewable for abuse of discretion where court has refused to exercise discretion).

b. Assuming for Argument the Legislature Intended to Subvert the Savings Statute, the Amended Statute Alters the Standard of Punishment Without Notice and Therefore Violates the Prohibition on Ex Post Facto Laws.

Salahud-Din anticipates the State will argue the amended statute, enacted after the events in this case transpired, applied at Salahud-Din's sentencing. The State's interpretation of the amendment, however, would violate the prohibition on ex post facto laws.

In determining whether a statute violates the prohibition, this Court assesses whether the statute (1) is substantive rather than simply procedural; (2) is retrospective in that it applies to events that happened

before its enactment); and (3) disadvantages the affected person. In re Personal Restraint of Powell, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991). In the criminal context, “disadvantage” means “the statute changes the standard of punishment that existed under the former law. State v. Schmidt, 143 Wn.2d 658, 673, 23 P.3d 462 (2001).

The DNA collection fee amendment meets these criteria. The amendment is a substantive, retrospective change in the law that alters the standard of punishment by removing from the sentencing court any discretion to waive the fee based on hardship. Thus, even assuming the Legislature expressed its intent to subvert the saving statute, the resulting retrospective amendment runs afoul of the prohibition on ex post facto laws.

c. Counsel was Ineffective for Failing to Object to Sentencing Under the Incorrect Statute.

Salahud-Din’s counsel was ineffective for failing to object to the trial court’s imposition of the DNA fee because it was not “mandatory” under the controlling statute.

The Sixth Amendment and article 1, section 22 guarantee the right to effective representation. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defendant receives ineffective assistance

when (1) counsel's performance is deficient, and (2) the deficient representation prejudices the defendant. Strickland, 466 U.S. at 687; State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Counsel is deficient when his performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). While an attorney's decisions are afforded deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1995). Prejudice exists where, but for the deficient performance, there is a reasonable probability the result would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007).

Salahud-Din satisfies both prongs of the Strickland test. First, counsel is presumed to know applicable statutes favorable to his or her client. See State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel presumed to know court rules). Second, there was no legitimate tactical reason for counsel to stand mute while the trial judge imposed a \$100 fee without first considering Salahud-Din's ability to pay. Moreover, there is a reasonable likelihood counsel's deficient performance affected the outcome because the court waived all other non-mandatory fees.

This Court should remand for resentencing so the court may properly consider Salahud-Din's indigence and ability to pay in light of the applicable statute and, if appropriate, amend the judgment and sentence to eliminate the fee. See State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (on remand, the trial court has the authority to correct a sentence where court was initially mistaken about the controlling law).

D. CONCLUSION

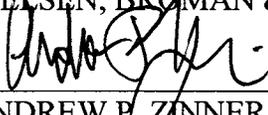
The trial court erred by failing to consult with the parties before answering the jury's question about a weight receipt attached to exhibit 2. The trial court also failed to exercise its discretion when it imposed a non-mandatory DNA collection fee based on the mistaken view the fee was "mandatory." Trial counsel rendered ineffective assistance for failing to object to the fee. This Court should reverse Salahud-Din's conviction and

remand for a new trial and/or remand for resentencing to allow the court to properly exercise its discretion in determining whether to impose the \$100 DNA fee.

DATED this 20 day of August, 2009.

Respectfully submitted,

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APPENDIX

FILED
KING COUNTY, WASHINGTON

APR 22 2008

SUPERIOR COURT CLERK
BY DAVID J. ROBERTS
DEPUTY

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

State

Plaintiff/Petitioner

vs.

Salah-din

Defendant/Respondent

No. *07-1-07827-1 SEA*

INQUIRY FROM THE JURY
AND COURT'S RESPONSE
(JYN)

JURY INQUIRY:

There is a date (8/21/07) on a weight receipt attached to the back of State's Exhibit #2: what does it refer to and can we get clarification?

Melissa D. Dall
FOREMAN

~~#102~~ *4-22-08 1:30 pm*
DATE AND TIME

DATE AND TIME RECEIVED: _____

****DO NOT DESTROY- LEAVE IN JURY ROOM****

Inquiry From the Jury and Court's Response, Page 1 of 2 SC Form JO-117 (7/00)

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES
OPPORTUNITY TO BE HEARD):

@

Please rely upon ~~your~~^A
the evidence presented in
court for your deliberations.

@

JUDGE Rogus
DATE AND TIME RETURNED TO JURY: 22 April 2008 1:35 pm

****DO NOT DESTROY. LEAVE IN JURY ROOM****

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62792-9-I
)	
JEROME TALLEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 21ST DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JEROME TALLEY
DOC NO. 631354
MONORE CORRECTIONAL COMPLEX
P.O. BOX 514
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF AUGUST, 2009.

x Patrick Mayovsky

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 AUG 20 PM 3:57