

63049-1

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NO. 63049-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
MICHAEL MILAM,
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JUDGE MONICA BENTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Did the Legislature intend that when a defendant steals or unlawfully possesses a person's means of identification (identity theft), and then uses the means of identification to unlawfully obtain goods, services, or property of another (theft), that he can be punished for both crimes?

2. Did the trial court properly impose the \$100 DNA collection fee?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged by Second Amended Information with Theft in the Second Degree and Identity Theft in the Second Degree. CP 28-29. A jury found the defendant guilty as charged. CP 44-45.

The defendant has an offender score of 18. CP 81. His standard range on his theft conviction is 22 to 29 months. CP 81. His standard range on his identity theft conviction is 43 to 57 months. CP 81. The sentencing court imposed a Drug Offender Sentencing Alternative (DOSA), with a term of confinement of 25 months and a term of community custody of 25 months. CP 83.

2. SUBSTANTIVE FACTS

Mark Jacobs is a student at Central Washington University in Ellensburg. 5RP¹ 2. Mark's mother, Michelle Jacobs, works as an administrator for the University of Washington. 6RP 404. When Mark was born, Michelle set up a bank account for him with the Washington State Employees Credit Union. 5RP 3; 6RP 404-05. Michelle kept an ATM card for the account in her purse, along with the PIN (personal identification number) for the account. 6RP 405, 407.

On October 8, 2007, an unknown person entered Michelle's office at the University of Washington and stole her purse. 6RP 407. Michelle chased the person but he got away. 6RP 408. Michelle called to cancel the ATM card but it was too late, Mark's account had been drained. 6RP 413.

Shortly after the theft, the defendant was caught on camera at an ATM located at 4545 Stone Way in the University District making, and attempting to make, a number of transactions using Michelle's ATM card. 5RP 14-20. At 10:54, the defendant first tried to withdraw money from the checking account, but the ATM card

¹ The verbatim report of proceedings is cited as follows: 1RP--7/1/08; 2RP--11/5/08; 3RP--11/6/08; 4RP--11/10/08 (A.M.); 5RP--11/10/08; 6RP--11/12/08; 7RP--11/12/08 (P.M.); 8RP--11/13/08; 9RP--1/21/009, and 10RP--2/18/09.

was not authorized to withdraw money for the checking account. 6RP 431. The defendant tried again, but again the transaction was rejected. 6RP 431. The defendant then switched to the savings account and made withdrawals of \$80, \$80, \$120, \$20, \$20, and \$40, leaving a balance of less than \$20. 6RP 427-33. In between some of the withdrawals, the defendant attempted other withdrawals that were rejected for insufficient funds. 6RP 432-33. He would then attempt a withdrawal for a lesser amount. 6RP 432-33. The defendant drained the account in a little over four minutes, with four attempted withdrawal and six cash withdrawals. 6RP 427-33; Exh. 6.

The defendant did not testify. Additional facts are included in the sections they pertain.

C. ARGUMENT

1. COMMITTING THEFT OF A PERSON'S IDENTITY AND COMMITTING THEFT OF GOODS, SERVICES OR PROPERTY ARE DISTINCT CRIMES THAT CAN BE PUNISHED SEPARATELY.

The defendant contends that his theft of Mark Jacobs' identity and his theft of cash from Mark Jacobs' bank account cannot be punished separately; i.e., that no matter what other crime

the person commits with someone's stolen identity, the Legislature intended that the person can only be punished for the identity theft. This argument should be rejected for three reasons. First, the identity theft statute has an anti-merger provision. Second, the defendant incorrectly applies the "same evidence" test. In applying the test correctly, under State v. Baldwin,² and In re Fletcher,³ the same evidence test is not satisfied. Third, there is clear legislative intent showing that the Legislature intended that a person can be punished for stealing a person's identity, and the crimes they commit using the stolen identity.

Subject to constitutional constraints, the Legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In many cases a defendant's single act may violate more than one criminal statute. When this occurs, without question, a defendant can permissibly receive punishment for each statute violated. Calle, 125 Wn.2d at 776-82 (finding no double jeopardy violation for a single act of intercourse that violated the rape statute and the incest statute). Double jeopardy is only implicated when the court

² State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003).

³ In re Fletcher, 113 Wn.2d 42, 776 P.2d 114 (1989).

exceeds the authority designated to it by the Legislature and imposes multiple punishments where multiple punishments have not been authorized. Calle, at 776. Therefore, a reviewing court's role "is limited to determining what punishments the legislative branch has authorized," and determining whether the sentencing court has properly complied with this authorization. Id.

In Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the Legislature. The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Calle, at 776. Should this step not result in a definitive answer, the court turns to another rule of statutory construction, the two-part "same evidence" or "Blockburger" test. This test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the Legislature did not intend for the crimes to be punished separately. Calle, at 778-80.

a. **Step One: The Identity Theft Statute Has An Anti-Merger Clause.**

The identity theft statute contains the following anti-merger provision:

Every person who, in the commission of identity theft, shall commit any other crime may be punished therefore as well as for the identity theft, and may be prosecuted for each crime separately.

RCW 9.35.020(6). The defendant notes that this provision of the statute went into effect in June of 2008. However, that does not preclude the provision's application to this case. The defendant was convicted in November of 2008 and sentenced in January of 2009.

It is a fundamental rule of statutory construction that once a statute had been construed by the highest court of the state, that construction operates as if it were originally written into it. Bowman v. State, 162 Wn.2d 325, 335, 172 P.3d 681 (2007). A subsequent legislative amendment to a previously court-construed statute cannot apply retroactively because the amendment cannot change prior case law. In re Detention of Elmore, 162 Wn.2d 27, 35-36, 168 P.3d 1285 (2007). However, such is not the case here.

When a statute or regulation is adopted to clarify its original intent, it may properly be retroactive as curative. State v. Bunker,

144 Wn. App. 407, 416, 183 P.3d 1086 (citing In re Matteson,
142 Wn.2d 298, 308-09, 12 P.3d 585 (2000), rev. granted,
165 Wn.2d 1003 (2008)).

When an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive. This is particularly so where an amendment is enacted during a controversy regarding the meaning of the law.

Tomlinson v. Clarke, 118 Wn.2d 498, 510-11, 825 P.2d 706 (1992).

Here, only one Supreme Court case, State v Baldwin, supra, has construed the identity theft statute under this type of double jeopardy challenge.⁴ Baldwin argued that when she used the identity she had stolen to commit two forgeries, her convictions for forgery and identity theft violated double jeopardy. The Supreme Court rejected Baldwin's claim, holding that her convictions for forgery--although committed with the use of a stolen identity--and her conviction of identity theft, did not violate double jeopardy. The Court found the convictions failed the same evidence test and that there was no other evidence suggesting the Legislature intended

⁴ The State agrees with the defendant that State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006) dealt with a different double jeopardy issue, the "unit of prosecution" for identity theft for persons charged with multiple counts of identity theft; not persons charged with identity theft and a crime under another statute.

only one punishment when a defendant uses a stolen identity to commit another crime. Baldwin, 150 Wn.2d at 455-57. The 2008 provision to the identity theft statute is consistent with this opinion, thus it clarifies the legislative intent and is retroactive. With express language clearly allowing for multiple convictions, the defendant's double jeopardy claim is defeated.

b. Step Two: The Offenses Do Not Satisfy The Same Evidence Test.

Even if this Court finds the anti-merger provision of the identity theft statute does not apply to the defendant's case, his double jeopardy argument is defeated because the two crimes fail the "same evidence" test. The "same evidence" or "Blockburger"⁵ test asks whether the offenses are the same "in law" and "in fact." Calle, 125 Wn.2d at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. If each offense includes elements not included in the other,

⁵ Referring to Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

the offenses are considered different and multiple convictions can stand. Calle, at 777.

Here, the convictions are not the same "in law." As charged and proven here, to convict the defendant of theft in the second degree, the State was required to prove that on October 8, 2007, the defendant wrongfully obtained property of another that exceeded \$250 in value and that the defendant intended to deprive the other person of the property. CP 61; RCW 9A.56.040(1)(a).

As charged and proven here, to convict the defendant of identity theft in the second degree, the State was required to prove that on October 8, 2007, the defendant obtained or possessed or used financial information of another person, and did so with the intent to commit any crime. CP 63; RCW 9.35.020(1). The State included a non-statutory element in the jury instructions that "the defendant used that financial information and obtained an aggregate total of money less than one thousand five hundred dollars."⁶ CP 63.

⁶ See Leyda, 157 Wn.2d at 341 ("we hold that value is not an essential element of second degree identity theft"). To be guilty of identity theft in the second degree, a person does not need to obtain anything; they simply need to have the intent to commit another crime. Id. It is only when charged with identity theft in the first degree that proof must be provided that the defendant obtained something of value and that the value was in excess of \$1500. RCW 9.35.020(2).

Theft requires the actual taking of the property of another and that the taking was unlawful. Identity theft only "requires use of a means of identification with the *intent* to commit an unlawful act."⁷ Baldwin, at 455 (emphasis in original). Thus, as the Supreme Court found in Baldwin, the elements of identity theft, and the other completed crime perpetrated with the use of the stolen identity, fail the same evidence test because identity theft requires only the intent to commit another crime, it does not require the completion of another crime. Baldwin, at 454-55. The fact that the other crime here was a theft, as opposed to the forgeries Baldwin committed with the stolen identification, is of no moment. For identity theft, the perpetrator must possess and use a stolen identity; elements not included in the theft statute; and the perpetrator need not commit a theft to be convicted. For theft, the perpetrator must commit a taking and the taking must be unlawful; elements not included in the identity theft statute.

⁷ The defendant implies that because the State included a non-essential element in the "to convict" instruction somehow this analysis is different. This is incorrect. First, double jeopardy is a constitutional question of legislative intent based on the statutes involved. The fact that an additional element may have been included in the "to convict" instruction does not change the legislative intent nor create a double jeopardy problem. Second, the added "element" here does not amount to a theft; i.e., the added "element" does not include the elements of theft, and unlawful taking.

This result and the analysis from Baldwin are also consistent with the Supreme Court's analysis in In re Fletcher, supra. Fletcher and an accomplice carjacked a vehicle, kidnapped the two women inside, and eventually shot them both. Fletcher was convicted of robbery, kidnapping in the first degree and assault. Fletcher argued that convictions for robbery and kidnapping violated double jeopardy. The Supreme Court disagreed. A person is guilty of kidnapping in the first degree "if he intentionally abducts another person with *intent* to facilitate commission of any felony." RCW 9A.40.020(1)(b) (emphasis added). The Court noted that the kidnapping statute "only requires proof of *intent* to commit various acts, some of which are defined as crimes elsewhere in the criminal code. It does not require that the acts actually be committed." Fletcher, 113 Wn.2d at 52-53. "Thus," the Court said, "the Legislature has not indicated that a defendant must also commit another crime in order to be guilty of first degree kidnapping. . . [and] Fletcher may be punished separately for the kidnapping and robbery convictions." Id.

The identity theft statute is written in the exact same manner, the defendant must commit an act--the possession or use of a stolen identity (abduction for kidnapping), with the intent to commit any other crime. Here, the other crime with the unlawful taking of the property of another, a crime that need not be completed to be convicted of identity theft.

With each charged crime having an element not contained in the other, and no requirement one commit another crime to be convicted of either offense, the two offenses fail the same "in law" prong of the "same evidence" test. It makes no difference if they are the same "in fact." Because the offenses are not the same "in law," this Court must find that the defendant's convictions should have been punished separately unless "there is a clear indication of contrary legislative intent." Calle, at 780.

The defendant's only argument to the contrary is his assertion that the same acts proved both crimes and thus, he claims, the same evidence test is satisfied. However, this is merely the factual part of the "same evidence" test. It ignores the elements part of the "same evidence" test. Further, this limited focus fact-based type analysis was rejected by both the United States

Supreme Court and the Washington State Supreme Court.⁸ The Supreme Court has stated many times that a reviewing court must determine "whether each provision requires proof of a fact which the other does not." In re Orange, 152 Wn.2d 795, 817-18, 100 P.3d 291 (2004) (emphasis added); State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). Because the offenses are not the same "in law," this Court must find that the defendant can be punished for each statute he violated unless "there is a clear indication of contrary legislative intent." Calle, at 780.

⁸ Calle represented an affirmation of the rejection of the factual type analysis that was being conducted by some courts prior to the early 90's (and what the defendant tries to argue here). In 1993, the United States Supreme Court rejected the "same conduct" fact-based test for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the Washington State Supreme Court did the same, recognizing that a factual analysis based test had been rejected by the United States Supreme Court and that the State double jeopardy clause did not provide broader protection than its federal counterpart. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). This rejection of a fact-based double jeopardy/merger analysis makes sense when considering the question is one of legislative intent of which the facts of a particular case tell us nothing. See also State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996), rev. denied, 131 Wn.2d 1018 (1997) (recognizing rejection of the "same conduct" rule in finding no double jeopardy for kidnap and rape).

c. Step Three: There Is No Clear Evidence That The Legislature Intended To Prohibit Multiple Punishments.

The "strong presumption" created by the "same evidence" test can be overcome only by the defendant showing clear evidence that the Legislature intended only one punishment. Calle, at 780. The defendant provides no such evidence here. The evidence, in fact, is to the contrary, the independent statutory schemes and different purposes underlying each statute shows that the Legislature intended to allow for separate punishments when a person steals a person's identity and then uses the stolen identity to commit another crime.

An indicator of legislative intent is whether the crimes address separate evils and whether the crimes are in different sections of the criminal code. State v. Vermillion, 112 Wn. App. 844, 859-60, 51 P.3d 188 (2002), rev. denied, 148 Wn.2d 1022 (2003). To begin, even if this Court does not consider the anti-merger provision enacted in 2008 to be retroactive, it is strong evidence of what the Legislature has intended all along, that both crimes can be punished separately. See Bunker, 144 Wn. App. at 415-16 (amendment to no-contact order statute evidence of Legislative intent in interpreting meaning of prior version of statute).

From its inception, the purpose behind the identity theft statute was to address the harm caused to the person whose identification information was taken. In its statement of intent, the Legislature found that "financial information is personal and sensitive information that if unlawfully obtained by others may do significant harm to a person's privacy, financial security and other interests. The Legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain and use financial information." Laws of 1999, Ch. 368, § 1.

The law was enacted at a time when the entire country was beginning to appreciate that identity theft was a growing problem. As one commentator noted, "[t]he illegal use of identity information has increased exponentially in recent years." Sean Hoar, Identity Theft: The Crime of the New Millennium, 80 Or. L. Rev. 1423, 1424 (2001). Traditional criminal statutes did not necessarily focus on the harm caused to the victim by the misuse of his or her financial information or identity; rather, the law treated the misappropriation of identity as the means to commit some other crime, such as theft, fraud, or forgery, where the "victim" was frequently the merchant or financial institution that suffered the direct loss. Yet the person whose identity was used could suffer

serious consequences as a result of the identity theft: credit card problems, harassment by debt collectors, loan rejection, difficulty obtaining insurance, utilities cut off, civil suits, and criminal investigations. See Federal Trade Commission – Identity Theft Survey Report at 47 (2003), available at <http://www.ftc.gov/os/2003/09/synovatoreport.pdf> (listing problems experienced by victims of identity theft).

Washington's identity theft statute expressly recognized that the victim was the person whose identity was used. Indeed, the statute provided the victim with a civil remedy against the defendant: five hundred dollars or actual damages, including the costs to repair the victim's credit record. Laws of 1999, Ch. 368, § 3.

Identity theft is contained in a separate and distinct statutory chapter entitled "Identity Crimes"; a chapter dealing solely with possession and use of another person's identity and financial information. RCW 9, Ch. 9.35.

On the other hand, theft in the second degree is contained in a separate statutory chapter entitled "Theft and Robbery." RCW 9A, Ch. 9A.56. All the crimes in this chapter involve the actual unlawful taking of "property or services" of another. See

RCW 9A.56.020 (definitions of theft); Vermillion, 112 Wn. App. at 861 (robbery statute serves to protect individuals from loss of property). The two statutes clearly are intended to protect and address a separate evil; one deals with the stealing of a person's identity, the other, the stealing of another person's property.

In addition, many times, if not most times, the victim of identity theft and the victim of the use of the stolen identity will be different. For example, in Baldwin, the victims of Baldwin's forgeries were a mortgage company and a seller of real estate. Baldwin, 150 Wn.2d at 451. The victim of Baldwin's identity theft was an unknowing innocent person not associated with either the mortgage company or real estate seller. It would be absurd to assume that the Legislature did not intend that a victim of a theft, fraud or forgery have no criminal redress if the defendant were charged with identity theft. Statutory constructions which lead to unlikely, strange, or absurd results are to be avoided. State v. Contreras, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

Finally, it would make no sense to punish persons equally-- and it would violate the purposes of the Sentencing Reform Act,⁹ when the harm inflicted is far different. A person committing identity theft need not commit any other crime beyond the stealing of the identity with intent to commit another crime. Still, a person committing identity theft can commit a myriad of other crimes, creating a far greater harm, and yet, under the defendant's interpretation of the law, the Legislature intended these persons to be punished equally. This, the Legislature could not have intended.

A double jeopardy determination is a three step process, any one of which is dispositive. Here, the defendant's argument fails at every step of the analysis, and the trial court properly punished the defendant from violating the theft statute and for violating the identity theft statute.

2. THE SENTENCING COURT WAS REQUIRED TO IMPOSE A \$100 DNA COLLECTION FEE.

The defendant contends that the \$100 DNA collection fee is not mandatory, and therefore either the trial court improperly

⁹ RCW 9.94A.010 provides that punishment for a criminal offense should be "proportionate to the seriousness of the offense," and be "commensurate with the punishment imposed on others committing similar offense."

sentenced the defendant believing the fee was mandatory,¹⁰ or his trial counsel was ineffective for failing to argue the fee was not mandatory. The defendant's argument rests on his belief that the imposition of the DNA collection fee is permissive; it is not. RCW 43.43.7541 requires the court impose the fee for all sentences occurring after enactment of the statute, regardless of the date of offense or conviction. The statute violates neither the savings clause nor *ex post facto* clause.

The statute under which the DNA collection fee was imposed is RCW 43.43.7541. In pertinent part the statute reads:

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.

RCW 43.43.7541 (emphasis added). This version of the statute took effect on June 12, 2008. See RCW 43.43.7541 (2008 c 97 § 3, eff. June 12, 2008). The defendant was convicted in August of 2008, and sentenced in January of 2009.

¹⁰ When the court imposed the fee here, the prosecutor asked, "Is the Court ordering a five hundred-dollar Victim Penalty Assessment and the one hundred-dollar DNA-collection fee, your Honor?" Judge Benton responded, "I must order those; the Legislature requires it. 9RP 38; see also, CP 82.

The defendant asserts that because he committed his criminal acts in October of 2007, a former version of RCW 43.43.7541 is applicable, a version of the statute that made the imposition of the DNA fee permissive rather than mandatory.¹¹ The defendant's two arguments, based on the savings clause and the *ex post facto* clause, are not persuasive.

a. The Savings Clause.

In pertinent part, the savings clause reads as follows:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or

¹¹ The former version reads in pertinent part:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (2002 c 289 § 4).

repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

In short, the savings clause provides that a criminal or penal statute in effect on the date a crime is committed controls unless the amended or new statute declares otherwise. See State v. Kane, 101 Wn. App. 607, 612-13, 5 P.3d 741 (2000). The savings clause does not even apply to the situation here.

In State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007), a similar claim was made, that the savings clause prohibited the Legislature's new procedures to have juries determine the facts for purposes of imposing an exceptional sentence from applying to his case. The Supreme Court rejected this claim, holding that RCW 10.01.040 applies only to substantive changes to the law, not to procedural ones. Pillatos, 159 Wn.2d at 472.

Even if the savings clause did apply, it is defeated here. In applying RCW 10.01.040, the Supreme Court does "not insist that a legislative intent to affect pending litigation be declared in express terms in a new statute"; rather, such intent need only be expressed in "words that fairly convey that intention." Kane, 101 Wn. App. at 612 (citing 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)); see also State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

In Zornes, the Supreme Court held that a newly enacted drug law controlled cases pending at the time of the enactment of the statute even though the law was not in effect at the time of the commission of the crime. The Zornes, a husband and wife, were convicted under a drug statute pertaining to "narcotic drugs," for their possession of marijuana. The particular amendment to the drug statute enacted while the Zornes' case was pending, stated that "the provisions of this chapter [the narcotic drug statute] shall not ever be applicable to any form of cannabis." Zornes, 78 Wn.2d at 11. The Court found it could be reasonably inferred that the Legislature intended the amendment, by use of this language, to

apply to pending cases as well as those arising in the future.

Zornes, at 13-14, 26.

In Grant, a new statute provided that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages." Grant, 89 Wn.2d at 682. The policy behind the statute was that alcoholics and intoxicated persons should receive treatment rather than punishment. Grant was convicted of being intoxicated on a public highway. The Supreme Court held that this new statute applied to Grant's case that was pending at the time of the enactment of the statute. The Court found that the language of the statute (cited above) fairly expressed the legislative intent to avoid the savings statute default rule. Grant, at 684.

Here, the statutory language clearly shows the Legislature intended RCW 43.43.7541 to apply to "every sentence" imposed after the effective date of the statute, regardless of the date the offense was committed. In the original version of RCW 43.43.7541, the Legislature put in specific language that indicated that the statute applied only to crimes "committed on or after July 1, 2002." In amending the statute, the Legislature removed any reference to when the crime was committed. This in itself indicates that the

Legislature did not intend the date a crime is committed to be a limiting factor. See In re Personal Restraint of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the Legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred); Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (if the Legislature thought such a provision necessary it would have included it within the statute's text).

In addition, the statute specifically says it applies to "[e]very sentence" imposed under the Sentencing Reform Act. The term "every" means "all." See State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991); State v. Harris, 39 Wn. App. 460, 463, 693 P.2d 750, rev. denied, 103 Wn.2d 1027 (1985).¹²

Finally, the amendment to the statute pertaining to the DNA collection fee is consistent with, was done in conjunction with, and refers directly to, the amendment to RCW 43.43.754, the statutory provision regarding the actual collection of DNA samples. Under RCW 43.43.7541, the DNA collection fee is mandatory for crimes specified in RCW 43.43.754. The 2008 amendment to RCW

¹² See also In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) ("*Expressio unius est exclusio alterius*, 'specific inclusions exclude implication.' In other words, where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions").

43.43.754 expanded the crimes for which a DNA sample is required to be taken. See RCW 43.43.754 (2008 c 97 § 2, eff. June 12, 2008). The Legislature stated, in pertinent part, that [t]his section applies to . . . [a]ll adults and juveniles to whom this section applied prior to June 12, 2008." RCW 43.43.754(6)(a). The former version of RCW 43.43.754 referred to by the 2008 amendment applied to "[e]very adult or juvenile individual convicted of a felony." Former RCW 43.43.754(1) (2002 c 289 § 2). Thus, the Legislature made it clear that RCW 43.43.7541 and RCW 43.43.754 applied to crimes committed both before and after June 12, 2008. The trial court here properly imposed the mandatory DNA collection fee.

b. The *Ex Post Facto* Clause.

The *ex post facto* clause of the federal and state constitutions¹³ forbids the State from enacting a law that imposes a punishment for an act that was not punishable when the crime was

¹³ U.S. Const. art 1, § 10, cl. 1; WA Const. art. I, § 23.

committed, or that increases the quantum of punishment for the crime beyond that which could have been imposed when the crime was committed. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). Not every sanction or term of a criminal sentence constitutes a criminal penalty or punishment, and if a sanction or term is not a penalty or punishment, the *ex post facto* clause does not apply. Ward, 123 Wn.2d at 498-99; Johnson v. Morris, 87 Wn.2d 922, 928, 557 P.2d 1299; In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

For example, the Legislature's increase of the mandatory victim penalty assessment from \$100 to \$500 was held not to constitute punishment, and thus, imposition of the \$500 amount for crimes committed before the increase in the amount was not a violation of the *ex post facto* clause. State v. Humphrey, 91 Wn. App. 677, 959 P.2d 681 (1998), reversed on other ground, 139 Wn.2d 53, 62, 62 n.1, 983 P.2d 1118 (1999) (the Supreme Court stating that the assessment was not a "penalty" and "would

not, therefore, constitute punishment for the purposes of an *ex post facto* determination").¹⁴

In determining if a term of sentence imposes a "punishment," courts look first for legislative intent. If the Legislature intended the sanction as punishment, then the inquiry stops and the *ex post facto* clause applies. Metcalf, 92 Wn. App. at 178. The defendant cannot show a punitive effect here because the Legislature clearly did not intend either the collection of the DNA sample, or the imposition of the \$100 collection fee, to be a criminal penalty. As the 2SHB 2713 Final Bill Report states, the purpose of the creation of a DNA database is to "help with criminal investigations and to identify human remains or missing persons." The fee is simply intended to fund the creation and maintenance of the database. See 2SHB 2713 Final Bill Report; RCW 43.43.7541.

¹⁴ See also State v. Blank, 80 Wn. App. 638, 640-42, 910 P.2d 545 (1996) (law requiring convicted indigent defendants to pay appellate costs not punishment and did not violate *ex post facto* provisions), cited with approval in, State v. Blank, 131 Wn.2d 230, 250 n.8, 930 P.2d 1213 (1997); Ward, 123 Wn.2d at 488 (law requiring sex offenders to register was not punishment and did not violate *ex post facto* provisions); In re Metcalf, 92 Wn. App. 165, 963 P.2d 911 (1998) (law requiring deductions from prisoner's wages and funds to pay for cost of incarcerations not punishment and did not violate *ex post facto* provisions); State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997) (law authorizing civil forfeiture of property used to facilitate drug offenses not punishment and did not violate *ex post facto* provisions).

If the Legislature did not intend a term to be punitive, courts still examine the effects of the legislation to make sure the effects are not so burdensome as to transform the term into a criminal penalty. Metcalf, at 180; Ward, at 499. The courts will consider seven factors: (1) whether the sanction involves an affirmative restraint on the defendant; (2) whether the term has historically been considered a criminal punishment; (3) whether its enforcement depends on a finding of scienter; (4) whether its imposition promotes the traditional aims of punishment (deterrence and retribution); (5) whether it applies to behavior that is already a crime; (6) whether it is rationally related to a purpose other than punishment; and (7) whether it appears excessive in relation to this other purpose. Metcalf, at 180 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)). In order to override a non-punitive legislative intent, the factors "must on balance demonstrate a punitive effect by the clearest proof." Metcalf, at 180-81.

Application of these factors shows that the legislation here does not have the effect of imposing a criminal punishment. It is no different than the victim penalty assessment, found not to be

punishment in violation of the *ex post facto* clause. See Humphrey, supra.

First, a sanction "involves an affirmative restraint" only when it approaches the "infamous punishment of imprisonment." Metcalf, at 181. The imposition of a \$100 fee is certainly not analogous to imprisonment.

Second, monetary fees and assessments have historically not been regarded as criminal penalties within the meaning of the second factor. Metcalf, at 181.

Third, the imposition of the DNA fee can be imposed only after a person has been convicted, but the fee itself is not triggered by any particular finding of scienter and, thus, it does not violate the third factor. See Metcalf, at 181-82.

Fourth, the imposition of the fee does not have the primary effect of promoting the traditional aims of punishment (deterrence and retribution). Metcalf, at 182; Ward, at 508. It would be difficult to argue the nominal \$100 fee is retributive or could act as a deterrent. Rather, the purpose of the fee is to reimburse the agency responsible for the collection of DNA samples and to pay to maintain the State database. RCW 43.43.7541.

Fifth, whether the fee applies to behavior that is already a crime depends upon whether it applies specifically to the felony for which the defendant is convicted instead of to the status of having been convicted of a felony. In Metcalf, the Court reviewed a retroactively applied statutory change that required the deduction of funds received by inmates to pay for costs of incarceration. The Court found that this sanction was not "applied to behavior that is already a crime" within the meaning of this factor, because it was triggered by the status of having been convicted of a felony rather than by commission of the felony itself. Metcalf, at 182. Similarly, here the DNA fee is triggered by the status of having been convicted of a felony rather than by anything specific to the behavior that constituted the crime.

The sixth and seventh factors examine whether the sanction has a rational non-punitive purpose and whether the sanction is excessive in relation to that purpose. In the context of fines, courts draw a line between fees or assessments that are primarily intended to reimburse the State and those primarily intended to impose criminal punishment for the purposes of public justice. Metcalf, at 177-78. Here, the fee is the former. It has the rational non-punitive purpose of reimbursing the State for the costs of

collecting the DNA sample and maintaining the database.

A nominal fee of \$100 appears proportionate to that purpose.

c. The Defendant's Statement Of Additional Authorities.

The defendant seeks to rely on the Supreme Court's opinion in State v. Humphrey, 139 Wn.2d 53, 983 P.2d 1118 (1999).

However, the decision actually supports the State's position.

The legislative provision at issue in Humphrey, RCW 7.68.035(1)(a), reads as follows:

(1)(a) Whenever any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a).

The Court of Appeals in Humphrey held that the language of the subsection unambiguously indicated that the assessment is imposed upon the finding of guilt, and that a defendant's conviction

triggered the operation of the statute. The Supreme Court reversed.

In its opinion, the Supreme Court made much of the wording of RCW 7.68.035(1)(a):

The statute uses “whenever,” not “when,” and in so doing describes a relationship between a typical event and a necessary consequence. The statute does not use “when,” which specifies a precise point in time. The language of the statute does not say that the operative, precipitating, or triggering event is a person’s conviction. Unlike the attorney general opinion quoted above, this section does not use unambiguous language such as “operative event.” Instead, this provision directs that the victim penalty assessments for gross misdemeanors and felonies shall be \$500. This is a mandatory assessment which courts shall impose upon persons convicted of such crimes. Even if one were to read this passage as attempting to specify a triggering event, one cannot tell whether the event is supposed to be the date of conviction or the date of sentencing. The passage could just as easily make the imposition of the sentence, not the finding of guilt, the triggering event. Because “whenever” does not refer to a precise instant in time, we interpret this section as remaining silent as to a precipitating event.

Humphrey, 139 Wn.2d at 58-59.

Here, in stark contrast, is the first sentence of RCW 43.43.7541, as amended in 2008, "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." In addition, as was noted in

the sections above, the Supreme Court also stated that the victim penalty assessment was not a "penalty" and "would not, therefore, constitute punishment for the purposes of an *ex post facto* determination." Humphrey, at 62, 62 n.1.

The defendant also cites to Humphrey and the proposition that statutory amendments are presumed to be prospective. The State agrees that generally statutes "operate prospectively to give fair warning that a violation carries specific consequences." Pillatos, 159 Wn.2d at 470. A corollary to that proposition, however, is the axiom that "if the changes to the statute do not alter the consequences of the crime then there is likely no relevant lack of notice." Id.

In Pillatos, the Supreme Court held that application of a new procedure to have juries determine the facts for purposes of imposing an exceptional sentence could properly apply to defendants who had not pled guilty or had not gone to trial before the new law's effective date. The Court noted that all defendants were aware at the time they committed their alleged offenses of the possible consequences: "All of these defendants had warning of the risk of an exceptional sentence. At the time all of these defendants committed the crimes set forth above, Washington had

a seemingly valid exceptional sentencing system which gave fair notice of the risk of receiving such a sentence.” Pillatos, at 470.

The same principle applies here. Before June 12, 2008, RCW 43.43.7541 directed trial courts to impose the \$100 DNA collection fee for applicable offenses “unless the court finds that imposing the fee would result in undue hardship on the offender.” One of the effects of Laws of 2008, Ch. 97, was to remove the court’s discretion to find “undue hardship” and thereby to waive the \$100 DNA collection fee. But an offender who committed an offense before June 12, 2008 would be well aware that he or she would potentially be subject to the fee. The only difference after June 12, 2008 was that such a fee was mandatory, undue hardship or not. There was no change in the amount of the fee collected.

In Humphrey, the Supreme Court explained this distinction in more detail in considering whether the increase in the victim penalty assessment from \$100 to \$500 was remedial or substantive:

We find that the increase in the amount of the assessment from \$100 to \$500 is more in the nature of a new liability than a remedial increase in an already existing obligation. In Macumber we allowed retrospective application of an increase in the homestead exemption from \$10,000 to \$20,000 because the amendment was enacted in response to

a constant rise in the cost of living. We found the increased dollar amount to be remedial in nature. The increase in the amount of the victim penalty assessment from \$100 in 1989 to \$500 in 1996 cannot be explained as a cost-of-living increase. Because the 1996 amendment to RCW 7.68.035 appears to create a new liability, we find it is not remedial and will not construe it to apply retroactively.

Humphrey, at 63.

Here, there is no increase in the DNA collection fee.

RCW 10.01.040 therefore does not apply to the changes in Laws of 2008, Ch. 97, making the \$100 DNA collection fee mandatory, as that change is remedial in nature.

Finally, the defendant argues that RCW 9.94A.345 serves to bar the amended version of RCW 43.43.3451 from applying to his case. That statute reads simply, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." In Pillatos, the Supreme Court rejected a similar argument raised, noting that RCW 9.94A.345 had been enacted by the Legislature in response to the opinion in State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999). The Supreme Court went on to conclude: "In this case, both past and present law allows for exceptional sentencing. The 'law in effect when the current offense was committed,' reasonably read,

includes the possibility of exceptional sentences, and does not violate the letter or purpose of RCW 9.94A.345.” Pillatos, at 473.

The same logic applies to the case at bar. The law before June 12, 2008 mandated the imposition of the \$100 DNA collection fee, save where the court waived the fee upon a finding that its imposition would constitute an “undue hardship.” After June 12, 2008, even this minimal potential exercise of discretion has been disallowed, but the amount of the fee remains the same. Moreover, as the State has already argued, the specific intent of the Legislature, as evinced in its amendments in Laws of 2008, Ch. 97, would serve to override the general mandate of RCW 9.94A.345.

Based on the above, the \$100 DNA collection fee does not constitute a criminal penalty or punishment and was properly imposed.¹⁵

¹⁵ The State will not address the defendant's ineffective assistance of counsel claim. In the event this Court finds the DNA fee is not mandatory, the case should be remanded for the sentencing court to exercise its discretion. It is clear here, the sentencing court believed as the State does, that the fee is mandatory. The State will also not address the defendant's citation to State v. Theriot, 782 S.2c 1078 (La. Ct. App. 2001). That case, not authority in Washington, dealt with a "fine," which constitutes punishment, not a "fee," as we have here.

D. **CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction and sentence.

DATED this 13 day of October, 2009.

Respectfully submitted,

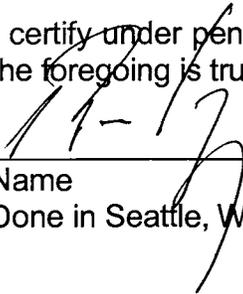
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: DJM CW
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MILAM, Cause No. 63049-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

10-13-2009

Date