

No. 74933-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JASON BOYD,

Appellant.

FILED
Sep 28, 2016
Court of Appeals
Division I
State of Washington

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

BRIEF OF APPELLANT

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE..... 3

D. ARGUMENT 5

1. The application of the amended registration statute to Mr. Boyd violates the ex post facto clauses of the federal and state constitutions, requiring reversal of the conviction on count one and dismissal of the charge with prejudice 5

 a. The ex post facto clauses prohibit the application of punishment that is more burdensome than the punishment in effect at the time of the crime. 5

 b. An analysis of the *Mendoza-Martinez* factors shows that although the original registration statute was regulatory, subsequent amendments have rendered it punitive..... 8

 i. *Affirmative disability or restraint.* 9

 ii. *Sanctions historically considered punishment.*..... 12

 iii. *Finding of scienter.* 14

 iv. *Traditional aims of punishment.* 14

 v. *Whether the act applies to behavior that is already a crime.* 15

 vi. *Rational connection to non-punitive purpose.* 16

 vii. *Excessiveness.* 17

2. The State failed to prove that Mr. Boyd was convicted of the predicate offense on July 29, 1999, requiring reversal of the conviction for failure to register and dismissal of the charge with prejudice 18

a.	The State successfully moved to amend both the information and the ‘to convict’ instruction to include the element ‘on July 29, 1999, the defendant was convicted of Rape of a Child in the Third Degree.’	18
b.	Under Washington law, the State was required to prove all elements in the ‘to convict’ instruction, and its failure to do so here requires reversal.....	21
c.	<i>Musacchio</i> and <i>Tyler</i> do not apply.....	22
3.	The State presented insufficient evidence to prove bail jumping, requiring reversal of the conviction on count two and dismissal of the charge with prejudice.....	24
4.	Prosecutorial misconduct deprived Mr. Boyd of his right to a fair trial, requiring reversal and remand for a new trial	28
a.	A prosecutor has a duty to ensure a fair trial and may not denigrate defense counsel, appeal to passion or prejudice, or otherwise distract the jury from its role as rational decision-maker.....	28
b.	The prosecutor in this case committed prejudicial misconduct by mocking defense counsel’s argument and Mr. Boyd’s poverty and mental illness.....	29
5.	The trial court erred in overruling Mr. Boyd’s objection to the reasonable-doubt instruction, because this Court and the Supreme Court have held the jury’s job is not to find the truth but to determine whether the State proved its case.	34
E.	CONCLUSION	39

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

City of Richland v. Wakefield ___ Wn.2d ___, ___ P.3d ___ (No. 92594-1, filed 9/22/16)..... 32

In re the Personal Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012)..... 28

State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007)..... 35, 36, 37, 38

State v. Cooper, 176 Wn. 2d 678, 294 P.3d 704 (2013) 22

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012)..... 34, 37

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 21

State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996) 22

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998)..... 21, 22

State v. Kjorsvik, 117 Wn. 2d 93, 812 P.2d 86 (1991)..... 23

State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014) passim

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011)..... 28, 29, 33, 34

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995)..... 37

State v. Walker, 182 Wn.2d 463, 341 P.3d 976 (2015)..... 29, 34

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

Washington Court of Appeals Decisions

State v. Berube, 171 Wn. App. 103, 286 P.3d 402 (2012)..... 35

State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998) 26

State v. Cardwell, 155 Wn. App. 41, 226 P.3d 243 (2010) 24, 27

State v. Castle, 86 Wn.App. 48, 53, 935 P.2d 656 (1997)..... 36

<i>State v. Fedorov</i> , 181 Wn. App. 187, 324 P.3d 784 (2014).....	37
<i>State v. Heath</i> , 168 Wn. App. 894, 279 P.3d 458 (2012)	22
<i>State v. Pedro</i> , 148 Wn. App. 932, 201 P.3d 398 (2009)	23
<i>State v. Pickett</i> , 95 Wn. App. 475, 975 P.2d 584 (1999)	3, 9
<i>State v. Tyler</i> , ___ Wn. App. ___, ___ P.3d ___ (No. 73564-1-I (filed 8/15/16)).....	23

United States Supreme Court Decisions

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	21
<i>Collins v. Youngblood</i> , 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).....	6
<i>In re Winship</i> , 397 U.S. 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	21
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970) 21	
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).....	passim
<i>Landgraf v. USI Film Products</i> , 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).....	6
<i>Martin v. Ohio</i> , 480 U.S. 228, 107 S. Ct. 1098, 1101, 94 L. Ed. 2d 267 (1987).....	23
<i>Musacchio v. United States</i> , ___ U.S. ___, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016).....	22, 24
<i>Smith v. Doe</i> , 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) passim	
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).....	35, 38
<i>Victor v. Nebraska</i> , 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)	37

Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). 5, 8

Decisions of Other Jurisdictions

<i>Doe v. Dept. of Pub. Safety and Corr. Servs.</i> , 430 Md. 535, 62 A.3d 123 (2013).....	13
<i>Doe v. State</i> , 167 N.H. 382, 111 A.3d 1077 (N.H. 2015).....	passim
<i>Doe v. State</i> , 189 P.3d 999 (Alaska 2008)	7
<i>Does v. Snyder</i> , ___ F.3d ___, 2016 WL 4473231 (6 th Cir. 2016) ...	passim
<i>People v. Fielding</i> , 158 N.Y. 542, 53 N.E. 497 (1899)	29
<i>Starkey v. Oklahoma Department of Corrections</i> , 2013 OK 43, 305 P.3d 1004 (Okla. 2013).....	6, 11, 17
<i>State v. Letalien</i> , 2009 ME 130, 985 A.2d 4 (Me. 2009).....	7, 11, 12
<i>United States v. Buchanan</i> , 59 F.3d 914 (9 th Cir. 1995).....	25
<i>Wallace v. State</i> , 905 N.E.2d 371 (Ind. 2009)	14, 15

Constitutional Provisions

Const. art. I, § 22.....	28
Const. art. I, § 23.....	5
U.S. Const. amend. XIV	21, 28
U.S. Const. art. I, § 10.....	5
U.S. Cont. amend. VI.....	28

Statutes

1999 1 st sp.s. c 6.....	3, 10
2002 Wash. Legis. Serv. Ch. 118 (S.S.B. 6488).....	13

Alaska Stat. § 12.63.010	10
RCW 4.24.550	13
RCW 4.24.550 (1998).....	13
RCW 9.94A.030.....	22
RCW 9A.44.130.....	3, 12, 19
RCW 9A.44.130 (1998).....	3, 7, 9, 10
RCW 9A.44.130 (2000).....	3
RCW 9A.44.130 (2011).....	3, 7, 10
RCW 9A.44.132.....	10, 12, 19
RCW 9A.44.140.....	3
RCW 9A.76.170.....	24

Other Authorities

11 <i>Washington Practice: Washington Pattern Jury Instructions: Criminal</i> (3 rd ed. 2008).....	36
J.J. Prescott & Jonah E. Rockoff, <i>Do Sex offender Registration and Notification Laws Affect Criminal Behavior?</i> , 54 J.L. & Econ. 161 (2011).....	17
Lawrence A. Greenfield, <i>Recidivism of Sex Offenders Released from Prison in 1994</i> (2003).....	16

A. ASSIGNMENTS OF ERROR

1. The application of the current sex offender registration statute to Mr. Boyd violates the ex post facto clauses of the federal and state constitutions.

2. The State presented insufficient evidence to convict Mr. Boyd of failure to register.

3. The State presented insufficient evidence to convict Mr. Boyd of bail jumping.

4. Prosecutorial misconduct deprived Mr. Boyd of a fair trial, and the trial court erred in denying Mr. Boyd's motion for a mistrial based on the misconduct.

5. The trial court erred in rejecting Mr. Boyd's proposed instruction defining reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The ex post facto clauses of the federal and state constitutions prohibit the infliction of punishment that is greater than the punishment permitted at the time of the crime. Several courts have held that although sex offender registration statutes did not originally impose punishment, increasingly onerous amendments converted formerly regulatory statutes into punitive provisions that may not be applied to defendants whose crimes were committed before the amendments were enacted. Does the

application of the registration statute to Mr. Boyd violate the ex post facto clauses, where the extraordinarily burdensome requirements for homeless people were enacted after Mr. Boyd's crime?

2. The State requested and the court provided a "to convict" jury instruction for failure to register that included the element: "on July 29, 1999, the defendant was convicted of Rape of a Child in the Third Degree." CP 97. Mr. Boyd was convicted on May 27, 1999. Ex. 1. Did the State present insufficient evidence to support the conviction under the law of the case?

3. Although the trial court gave Mr. Boyd written notice of a November 6 court hearing, the trial court orally advised Mr. Boyd that the hearing was December 6. Did the State fail to prove Mr. Boyd committed bail jumping by failing to appear on November 6?

4. In closing argument, Mr. Boyd's attorney explained that it was incredibly difficult for a homeless, mentally ill person like Mr. Boyd to comply with onerous in-person registration requirements and attend every court hearing. In rebuttal, the prosecutor mocked Mr. Boyd's deficits and said, "Bla, bla, bla." Mr. Boyd moved for a mistrial but the motion was denied. Did prosecutorial misconduct deprive Mr. Boyd of a fair trial, requiring reversal and remand for a new trial?

5. Over Mr. Boyd's objection, the court instructed the jury that it could find the State met its burden of proof if it had "an abiding belief in the truth of the charge." Where both this Court and the Supreme Court have held the jury's job is not to determine the truth, did the court err in overruling Mr. Boyd's objection ?

C. STATEMENT OF THE CASE

In February of 1998 when Jason Boyd was 23 years old he had sex with a 15-year-old. CP 108; Ex. 1 at 1. He ultimately pleaded guilty to rape of a child in the third degree. Ex. 1. Mr. Boyd has not committed a sex offense against anyone since. CP 108. Nevertheless, he is still required to register as a sex offender under RCW 9A.44.130 and RCW 9A.44.140.

Mr. Boyd is homeless and mentally ill. Exs. 3, 4A, 4B, 4C, 4D; ex. 5 at 7; RP (9/24/15) 3-6. At the time of his crime in 1998, homeless people did not have to register as sex offenders, because they do not have addresses. RCW 9A.44.130 (1998); *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999). But the legislature later amended the statute to require homeless people to register in-person weekly. 1999 1st sp.s. c 6; RCW 9A.44.130 (2000); RCW 9A.44.130 (2011).

Mr. Boyd largely complied, RP (2/29/16) 30, but the obligations were onerous and occasionally he did not report as required. He pleaded guilty to the crime of failure to register in 2009, 2010, and 2013. Exs. 5-

10. After his most recent release from confinement, he registered address changes with the Skagit County Sheriff's Office more than 20 times. CP 2. He then registered as transient on December 11, 2014, and checked in weekly for the next six weeks. CP 2; Exs. 4A, 4B, 4C, 4D.

After he failed to check in between January 27, 2015 and February 10, 2015, the State charged him with failure to register as a sex offender. CP 2, 119. Mr. Boyd appeared at four hearings, then was referred for a competency evaluation. Supp. CP ____ (sub nos. 11, 15, 26, 28); RP (9/24/15) 6. On October 16, 2015 the court found Mr. Boyd competent to stand trial, and issued a scheduling order. Ex. 12. The order stated that the omnibus hearing would be November 6, 2015, but the judge told Mr. Boyd that the next court date for which he needed to appear was December 6, 2015. RP (10/16/15) 21. Despite the mistaken advisement, when Mr. Boyd was not in court on November 6, a bench warrant was issued and the State amended the information to add a charge of bail jumping. Ex. 13; CP 10-11.

At trial, Mr. Boyd's attorney told the jury that because of Mr. Boyd's homelessness and mental deficits it was very difficult for him to comply with the obligations to appear frequently at the Sheriff's Office and in court. She told the jury that in light of these difficulties the State

failed to prove the knowledge element of the crimes. RP (3/1/16) 104, 110-12.

In response, the deputy prosecutor mocked Mr. Boyd's deficits and dismissed his difficulties by saying "bla bla bla." RP (3/1/16) 112-15. Mr. Boyd moved for a mistrial based on the misconduct, but the motion was denied. RP (3/1/16) 118-20.

Mr. Boyd was convicted as charged and sentenced to 45 months in prison. CP 106-09.

D. ARGUMENT

1. The application of the amended registration statute to Mr. Boyd violates the ex post facto clauses of the federal and state constitutions, requiring reversal of the conviction on count one and dismissal of the charge with prejudice.

- a. The ex post facto clauses prohibit the application of punishment that is more burdensome than the punishment in effect at the time of the crime.

The ex post facto clauses of the federal and state constitutions prohibit the application of a law which increases the punishment for a crime beyond that which was prescribed when the crime was committed. U.S. Const. art. I, § 10; Const. art. I, § 23; *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); *State v. Ward*, 123 Wn.2d 488, 496-97, 869 P.2d 1062 (1994). Stated differently, if a law makes the punishment for a crime "more burdensome," then that punishment may

not be imposed upon a person whose crime pre-dated the law. *Ward*, 123 Wn.2d at 497 (citing *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)).

Because the ex post facto clause is in the body of the Constitution and was not left to the amendment process, “it is evident the framers viewed the ban on ex post facto laws as fundamental to the protection of individual liberty.” *Starkey v. Oklahoma Department of Corrections*, 2013 OK 43, 305 P.3d 1004, 1018-19 (Okla. 2013).

[R]etroactive statutes raise particular concerns. The Legislature’s unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Id. at 1019 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 266, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)).

The dispositive issue in determining whether a registration statute violates the ex post facto clauses is whether the statute imposes punishment or is merely regulatory. *See Ward*, 123 Wn. 2d at 499-500; *Starkey* 305 P.3d at 1019; *see also Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003); *Does v. Snyder*, ___ F.3d ___, 2016 WL 4473231 (6th Cir. 2016); *Doe v. State*, 167 N.H. 382, 111 A.3d 1077, 1100 (N.H. 2015); *State v. Letalien*, 2009 ME 130, 985 A.2d 4, 16 (Me.

2009); *Doe v. State*, 189 P.3d 999, 1007-08 (Alaska 2008). In *Ward*, the Washington Supreme Court determined that the registration statute that existed 22 years ago was regulatory and therefore its application to defendants who committed their crimes prior to its enactment did not violate the prohibition on ex post facto laws. *Ward*, 123 Wn.2d at 511. However, the statute has been amended numerous times since *Ward*, and now includes particularly onerous obligations for homeless people which render the formerly regulatory statute punitive. Compare RCW 9A.44.130 (2011) (statute applied to Mr. Boyd) with RCW 9A.44.130 (1998) (statute in effect at time of Mr. Boyd's predicate offense).¹ The application of these amendments to Mr. Boyd, whose crime occurred before the amendments, violates the constitutional prohibition on ex post facto laws. Cf. *Does v. Snyder* at *1-*2 (holding that amendments to Michigan's registration statute render formerly regulatory statute punitive and violate ex post facto clause as applied to those whose crimes pre-dated the amendments); *Doe v. State*, 111 A.3d at 1084 (revisiting prior holding rejecting ex post facto argument as to 1994 New Hampshire statute, and holding that in light of subsequent amendments statute was punitive and

¹ For the Court's convenience, the statutes are attached as appendices.

violated the ex post facto clause as applied to defendants who committed their crimes before the amendments).

- b. An analysis of the *Mendoza-Martinez* factors shows that although the original registration statute was regulatory, subsequent amendments have rendered it punitive.

In evaluating whether a statute imposes punishment, courts first ask whether the legislature intended the law to be punitive or regulatory. *Ward*, 123 Wn.2d at 499. But even if the legislative purpose was regulatory, if the actual *effect* of the law is punitive, the law may not be applied retroactively without running afoul of the ex post facto clauses. *Id.* “[I]t is the effect, not the form, of the law that determines whether it is *ex post facto*.” *Does v. Snyder* at *3 (quoting *Weaver*, 450 U.S. at 31).

To determine whether a law is punitive in effect, courts consider several factors: whether the law imposes an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment (retribution and deterrence), whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative

purpose assigned. *Ward*, 123 Wn.2d at 499 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)).

Here, even assuming the legislature's intent remained regulatory as it amended the statute, an analysis of the *Mendoza-Martinez* factors shows that the *effect* of the amendments upon homeless people like Mr. Boyd is so onerous as to be punitive. Accordingly, the retroactive application of the amendments to Mr. Boyd violates the ex post facto clauses, and the conviction for failure to register should be reversed.

i. *Affirmative disability or restraint.*

The first factor weighs heavily in favor of a finding that the amended registration statute is punitive. At the time of Mr. Boyd's predicate offense, there was no requirement that homeless people register. RCW 9A.44.130 (1998); *State v. Pickett*, 95 Wn. App. 475, 478, 975 P.2d 584 (1999); ex. 1 at 1 (predicate offense occurred in February 1998). Rather, defendants with fixed addresses simply had to fill out and send in a short form with their name, address, and other basic information, and had to send written notice of a change of address if they moved to another address. RCW 9A.44.130 (1998). The Supreme Court in *Ward* said, "it is inconceivable that filling out a short form with eight blanks creates an affirmative disability." *Ward*, 123 Wn. App. at 501.

But after Mr. Boyd's offense, the legislature amended the statute in response to *Pickett* and added onerous registration requirements for homeless people. 1999 1st sp.s. c 6. The statute that was applied to Mr. Boyd required him to register *in person weekly*, and to write down where he stayed each night of the preceding week. RCW 9A.44.130 (2011); exs. 2, 4A. Furthermore, the punishment for non-compliance has increased since 1998, such that failure to register is now a class B felony if the person has two prior convictions for the crime. *Compare* RCW 9A.44.130(7) (1998) *with* RCW 9A.44.132(1)(b). These amendments render the statute punitive and the statute cannot be applied retroactively to Mr. Boyd without running afoul of the Constitution.

Several cases are instructive. In *Smith v. Doe*, the Ninth Circuit found the Alaska registration statute was punitive and could not be applied retroactively, in large part because the court believed a verification clause mandated in-person updates. *Smith v. Doe*, 538 U.S. at 101. In fact, Alaska law requires only *written* updates, and only once per quarter. *Id.*; Alaska Stat. § 12.63.010. Thus, the Supreme Court found it did not impose a significant disability or restraint, and did not violate the ex post facto clause when applied retroactively. *Smith v. Doe*, 538 U.S. at 101.

But like Washington (and unlike Alaska), some other states amended their statutes to impose in-person reporting requirements, and

courts have held these requirements impose a significant disability or restraint. Maine's registration statute mandates quarterly in-person updates, and the Maine Supreme Court distinguished *Smith v. Doe* on this basis. *Letalien*, 985 A.2d at 18. The court held that quarterly in-person registration for life "imposes a disability or restraint that is neither minor nor indirect." *Id.* The Oklahoma Supreme Court similarly held that *Smith v. Doe* was inapposite when analyzing that state's statute, which required in person registration annually for some offenders, semi-annually for other offenders, and every 90 days for habitual sex offenders. *Starkey*, 305 P.3d at 1022. The court noted:

Although SORA poses no physical restraints on registrants the affirmative "in person" registration and verification requirements alone cannot be said to be "minor and indirect" especially when failure to comply is a felony subject to 5 years imprisonment and a fine not to exceed \$5,000.

Id. Other courts have also recognized that onerous in-person registration requirements impose an affirmative disability or restraint. *Does v. Snyder* at *5; *Doe v. State*, 111 A.3d at 403 & 405.

The frequency with which the Washington statute requires homeless people to register in person is greater than in any of the states mentioned above. In light of the fact that courts held these less burdensome statutes could not be applied retroactively without violating

the ex post facto clause, the same should be true here. The affirmative disability or restraint imposed by Washington's amended statute is extraordinary, and this factor should be considered virtually dispositive.

ii. *Sanctions historically considered punishment.*

As to the second factor, the amended statute includes sanctions historically considered punishment. The Supreme Court in *Smith v. Doe* found that resolution of this prong was a close case with respect to the Alaska law. The defendants had argued that Alaska's registration regime was similar to probation or parole, and the Court acknowledged the argument "has some force[.]" *Smith v. Doe*, 538 U.S. at 101. The Court ultimately rejected the comparison on the basis that "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." *Id.*

In contrast, Mr. Boyd and other homeless people in Washington *are* subject to supervision, as they must report in person every week or face criminal prosecution. RCW 9A.44.130; RCW 9A.44.132. Thus, the burdens imposed on Mr. Boyd are akin to the traditional punishments of parole and probation. *See Does v. Snyder* at *5 ("...much like parolees, they must report in person, rather than by phone or mail"); *Letalien*, 985 A.2d at 18 (quarterly in-person verification for life "is undoubtedly a form

of significant supervision by the state.”); *Doe v. Dept. of Pub. Safety and Corr. Servs.*, 430 Md. 535, 562, 62 A.3d 123 (2013) (statutory obligations requiring offenders to report in person to law enforcement every three months, give notice to law enforcement of any change of address, notify law enforcement before being away from home for more than seven days, under threat of imprisonment, “have the same practical effect as placing Petitioner on probation or parole”).

Not only are the registration requirements akin to probation or parole, they are also akin to the historical punishment of public shaming. The Supreme Court rejected the analogy in *Smith v. Doe*, 538 U.S. at 99, but the prevalence of the Internet has exploded since that case was decided.² As the New Hampshire Supreme Court noted last year:

Our communities have grown, and in many ways, the internet is our town square. Placing offenders’ pictures and information online serves to notify the community, but also holds them out for others to shame or shun.

Doe v. State, 111 A.3d at 1097. The Indiana Supreme Court agrees that registration “resembles the punishment of shaming.” *Wallace v. State*, 905

² In Washington, the Washington Association of Sheriffs and Police Chiefs was tasked with providing a publicly available registered sex offender website in 2002 – well after *Ward* and well after Mr. Boyd’s predicate offense. *See* RCW 4.24.550(5); 2002 Wash. Legis. Serv. Ch. 118 (S.S.B. 6488); RCW 4.24.550 (1998); <http://www.waspc.org/assets/SexOffenders/so%20community%20notification%20model%20policy%20july%202015.docx%20final.pdf> at 4.

N.E.2d 371, 380 (Ind. 2009). In light of its resemblance to both public shaming and parole, courts have concluded “this factor weighs in favor of finding a punitive effect.” *Doe v. State*, 111 A.3d at 1097. This Court should similarly so hold.³

iii. Finding of scienter.

The third factor is whether the law comes into play only on a finding of scienter. *Mendoza-Martinez*, 372 U.S. at 168. The Washington Supreme Court did not analyze this factor in *Ward*, and the U.S. Supreme Court has stated that this factor is “of little weight” in addressing registration statutes. *Smith v. Doe*, 538 U.S. at 105.

iv. Traditional aims of punishment.

The fourth factor in determining whether a statute is punitive is whether it promotes retribution and deterrence, which are traditional aims of punishment. *Mendoza-Martinez*, 372 U.S. at 168. In *Ward*, the Supreme Court acknowledged “that a registrant, aware of the statute's protective

³ Public shaming also encourages vigilante justice. *See Wallace*, 905 N.E.2d at 380. Sadly, our State has witnessed this outcome on multiple occasions. <http://www.npr.org/templates/story/story.php?storyId=4836246> (“Vigilante Used Web Site to Find Sex Offenders”) (discussing murder of two sex offenders in Whatcom County); <http://usnews.nbcnews.com/news/2012/09/18/13943695-man-sentenced-to-life-for-killing-sex-offenders-judge-chastises-supporters?lite> (“Man sentenced to life for killing sex offenders; judge chastises supporters.”) (discussing a double murder of two sex offenders in Clallam County).

purpose, may be deterred from committing future offenses.” 123 Wn.2d at 508. But the court concluded, “[e]ven if a secondary effect of registration is to deter future crimes in our communities, we decline to hold that such positive effects are punitive in nature.” *Id.*

Here again, it is significant that *Ward* predated the Internet Age. More recently, courts have found this factor weighs in favor of finding the law to be punitive because the deterrent and retributive effects of online community notification are substantial. The Indiana court explained:

It is true that to some extent the deterrent effect of the registration and notification provisions of the Act is merely incidental to its regulatory function. And we have no reason to believe the Legislature passed the Act for purposes of retribution—“vengeance for its own sake.” Nonetheless it strains credulity to suppose that the Act’s deterrent effect is not substantial, or that the Act does not promote “community condemnation of the offender,” both of which are included in the traditional aims of punishment. We conclude therefore that the fourth *Mendoza-Martinez* factor slightly favors treating the effects of the Act as punitive when applied to Wallace.

Wallace, 905 N.E.2d at 382 (citations omitted); *accord Doe v. State*, 111 A.3d at 1098.

v. *Whether the act applies to behavior that is already a crime.*

The fifth factor is whether the act applies to behavior that is already a crime. *Mendoza-Martinez*, 372 U.S. at 168. If it does, the factor weighs in favor of finding that the effects are punitive. *Doe v. State*, 111

A.3d at 1098. Neither the U.S. Supreme Court nor the Washington Supreme Court found this factor relevant in evaluating registration statutes. *See Does v. Snyder* at *4; *Ward*, 123 Wn.2d at 500-08.

vi. *Rational connection to non-punitive purpose.*

The sixth factor is “whether an alternative purpose to which [the law] may rationally be connected is assignable for it.” *Mendoza-Martinez*, 372 U.S. at 168-69. The legislature’s stated purpose in enacting the registration statute was to assist law enforcement efforts to protect the community. *See Ward*, 123 Wn.2d at 499. But recent empirical studies rebut any alleged connection between community notification and recidivism reduction. At least one study suggests that sex offenders are *less* likely to reoffend than other criminals – yet Washington’s law imposes onerous burdens only upon sex and kidnapping offenders. *See Does v. Snyder* at *6 (citing Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003)). Another statistical study concluded that registration statutes “actually *increase* the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities.” *Does v. Snyder* at *6 (citing J.J. Prescott & Jonah E. Rockoff, *Do Sex offender Registration and*

Notification Laws Affect Criminal Behavior?, 54 J.L. & Econ. 161 (2011)). Thus, this Court should agree with the Sixth Circuit that this factor also favors a finding that the amended registration statute is punitive.

vii. Excessiveness.

The final factor is whether the statute “appears excessive in relation to the alternative purpose assigned.” *Mendoza-Martinez*, 372 U.S. at 169. In *Ward*, the Supreme Court concluded the effects of the 1994 statute were not excessive in relation to its nonpunitive purpose, 123 Wn.2d at 509, but that conclusion is no longer applicable in light of the arduous in-person registration obligations and widespread online notification. Other courts have found the nonpunitive purpose of their registration and notification statutes to be outweighed by their punitive effects. *See, e.g., Does v. Snyder* at *6 (“The requirement that registrants make frequent, in-person appearances before law enforcement ... appears to have no relationship to public safety at all.”); *Doe v. State*, 111 A.3d at 1100 (finding excessiveness where offenders must appear in person several times per year, information is put online for anyone to access, and there was no way for offender to be relieved from duty to register); *Starkey*, 305 P.3d at 1029-30 (finding excessive the retroactive application

of level assignment requiring offender to register in person every 90 days for life and have personal information publicly disseminated).

In sum, the current version of Washington's sex offender registration and community notification statute is "punitive" for purposes of ex post facto analysis. The statute imposes significant burdens and restraints on homeless individuals, it is akin to supervised probation and public shaming, it has a substantial deterrent and retributive effect, and its punitive effects outweigh the legitimate aim of protecting the public. The law therefore violates ex post facto prohibitions as applied to Mr. Boyd. Mr. Boyd asks this Court to reverse the conviction on count one and remand for dismissal of the charge with prejudice.

2. The State failed to prove that Mr. Boyd was convicted of the predicate offense on July 29, 1999, requiring reversal of the conviction for failure to register and dismissal of the charge with prejudice.

- a. The State successfully moved to amend both the information and the 'to convict' instruction to include the element 'on July 29, 1999, the defendant was convicted of Rape of a Child in the Third Degree.'

If this Court disagrees that reversal of count one is required because of the ex post facto violation, it should nevertheless reverse the conviction on that count because the State failed to prove the first element of the crime.

The State originally charged Mr. Boyd with failure to register as follows:

On or about and between January 27, 2015 and February 10, 2015, in the County of Skagit, State of Washington, the above-named Defendant, **having been convicted on or about 27th of May, 1999**, of a felony sex offense as defined in RCW 9A.44.128 and RCW 9A.44.130, to-wit: Rape of a Child in the Third Degree; Skagit County Superior Court Cause #99-1-00050-1, and being required to register pursuant to RCW 9A.44.130, and having been convicted of a felony failure to register as a sex offender in this state or pursuant to the laws of another state on two or more prior occasions, did knowingly fail to comply with one or more of the requirements of RCW 9A.44.130, to wit: You lacked a fixed residence, you lived in Skagit County, and you failed to update your registration information with the Skagit County Sheriff as required; in violation of RCW 9A.44.132(1)(b).

CP 119 (information) (emphasis added); *see also* CP 4 (first amended information); CP 8 (second amended information); CP 10 (third amended information).

Consistent with the original charge, the State initially proposed the following “to convict” instruction:

To convict the defendant of the crime of failure to register as a sex offender, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) **That on May 27, 1999, the defendant was convicted of Rape of a Child in the Third Degree;**
- (2) That due to this conviction, the defendant was required to register in the State of Washington as a sex offender between January 27, 2015 and February 10, 2015, and

(3) That during that time period, the defendant knowingly failed to comply with the requirement that the defendant, lacking a fixed residence, report weekly, in person, to the sheriff of the county where the defendant is registered.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Supp. CP ____ (sub no. 71) (emphasis added).

During trial, however, the State moved to amend both the information and the “to convict” instruction to reflect a conviction date of July 29, 1999, for the predicate offense. RP (2/29/16) 44-45. The judge asked the prosecutor if she was sure she wanted to change the date. He noted that although Mr. Boyd had been sentenced on July 29, the plea was entered on May 27 and therefore that was the date of conviction. RP (2/29/16) 44-45. The prosecutor rejected the judge’s advice and requested that both the information and “to convict” instruction be changed. RP (2/29/16) 44-45. A fourth amended information was filed with the new date, CP 6, and the first element of the “to convict” instruction given to the jury read: “That **on July 29, 1999**, the defendant was convicted of Rape of a Child in the Third Degree.” CP 97 (emphasis added); *see also* RP

(3/1/16) 84-85 (oral instructions), 93 (prosecutor in closing says, “Element number 1, I have to prove that on July 29th, 1999, the defendant was convicted of rape of a child in the third degree.”).

- b. Under Washington law, the State was required to prove all elements in the ‘to convict’ instruction, and its failure to do so here requires reversal.

The Due Process Clause of the Fourteenth Amendment requires the State to prove all of the elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 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). Under Washington’s law of the case doctrine, the elements the State must prove include both the statutory elements and any other element included in the “to convict” instruction. *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). On appeal, a conviction will be affirmed only if, after viewing the evidence in the light most favorable to the State, a rational jury could have found all of the elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A conviction that does not meet this standard violates due process, requiring reversal of the conviction and dismissal of the charge with prejudice.

Hickman, 135 Wn.2d at 103; *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

Here, the State failed to prove that on July 29, 1999, Mr. Boyd was convicted of Rape of a Child in the Third Degree. As the trial judge correctly noted, the date of conviction was May 27. Ex. 1. “Under the Sentencing Reform Act of 1981, ‘conviction’ means ‘an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.’ RCW 9.94A.030(9).” *State v. Heath*, 168 Wn. App. 894, 898, 279 P.3d 458 (2012). “The acceptance of a plea of guilty satisfies the statutory definition of an adjudication of guilt for purposes of Washington criminal history.” *State v. Cooper*, 176 Wn. 2d 678, 684, 294 P.3d 704 (2013). Because the State failed to prove this element of the crime, the conviction should be reversed, and the charge dismissed with prejudice. *Hickman*, 135 Wn.2d at 103.

c. *Musacchio* and *Tyler* do not apply.

Although our state’s law of the case rule goes back over a hundred years, the same rule is not followed in federal court prosecutions. Compare *Hickman*, 135 Wn.2d at 101-05 with *Musacchio v. United States*, ___ U.S. ___, 136 S.Ct. 709, 713, 193 L.Ed.2d 639 (2016). This Court recently applied *Musacchio* over *Hickman* in *State v. Tyler*, ___ Wn. App.

___, ___ P.3d ___ (No. 73564-1-I (filed 8/15/16)). Mr. Boyd respectfully disagrees with *Tyler* because the determination of the elements of the crime is a *state law* issue even though the requirement of proof beyond a reasonable doubt is a federal constitutional issue. *See Hickman*, 135 Wn.2d at 102-05; *State v. Kjorsvik*, 117 Wn. 2d 93, 101, 812 P.2d 86 (1991) (explaining that elements of a crime are both statutory and “court-imposed”); *Martin v. Ohio*, 480 U.S. 228, 232, 107 S. Ct. 1098, 1101, 94 L. Ed. 2d 267 (1987) (referencing “preeminent role of the States” to define crimes). Thus, *Hickman* controls in Washington. *See State v. Pedro*, 148 Wn. App. 932, 950, 201 P.3d 398 (2009) (a decision by the Washington Supreme Court is binding on all courts in the state).

However, the dispute is immaterial in this case because here, the State not only convinced the court to change the element in the “to convict” instruction, it also successfully moved to amend the charging document to reflect the different date. The U.S. Supreme Court explicitly left open the question of whether it would reach the same holding in these circumstances:

In resolving the first question presented, we leave open several matters. First, we express no view on the question whether sufficiency of the evidence at trial must be judged by reference to the elements charged in the indictment, even if the indictment charges one or more elements not required by statute.

Musacchio, 136 S.Ct. at 715 n.2; *see also id.* at 715 (describing elements that must be proved as “the elements of *the charged crime*”) (emphasis added). Because the U.S. Supreme Court did not reach this issue but our state supreme court would clearly reverse under these circumstances, *Hickman* controls and reversal is required.

In sum, Mr. Boyd respectfully requests that this Court reverse the conviction for failure to register because the State failed to prove he was convicted of the predicate crime on July 29, 1999.

3. The State presented insufficient evidence to prove bail jumping, requiring reversal of the conviction on count two and dismissal of the charge with prejudice.

Not only did the State fail to prove count one, it also failed to prove that Mr. Boyd committed bail jumping as charged in count two. The State was required to prove that Mr. Boyd knew he was supposed to be in court on November 6, 2015, but failed to appear. CP 7, 99; RCW 9A.76.170(3)(c); *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243 (2010). The State proved that Mr. Boyd was not in court on November 6, but it failed to prove that Mr. Boyd *knew* he was supposed to appear on that date.

The State did present a document signed by Mr. Boyd and his attorney listing several court dates, including November 6. Ex. 12. This document was filed the day Mr. Boyd was found competent after being

evaluated by Western State Hospital. *Id.* However, as Mr. Boyd’s attorney pointed out in closing argument:

Well, we haven’t heard any testimony that Mr. Boyd was actually in court, that he was in court on October 16th, 2015, when there was this order entered about a requirement to appear in court.

...

And what might have been stated and told to Mr. Boyd when he’s supposedly in court?

RP (3/1/16) 110-11. In fact, what was stated to Mr. Boyd in court on October 16 was that his next court date was *December 6th*, not November 6th:

THE COURT: I’ve signed the order. You need to be here the next court date on **December 6th**, Mr. Boyd.

RP (10/16/15) 21 (emphasis added). Accordingly, the State failed to prove that Mr. Boyd *knowingly* failed to appear on November 6, 2015. *Cf. United States v. Buchanan*, 59 F.3d 914, 918 (9th Cir. 1995) (judge’s oral statement at sentencing that defendant had right to appeal conflicted with appeal waiver in guilty plea statement, and controlled: “Litigants need to be able to trust the oral pronouncements of district court judges.”).

This Court’s opinions in *Bryant* and *Cardwell* are instructive. In *Bryant*, the defendant argued the State failed to prove the knowledge element because “he forgot about the hearing based on confusion regarding his court dates.” *State v. Bryant*, 89 Wn. App. 857, 870, 950

P.2d 1004 (1998). This Court rejected the argument because the defendant had been informed of his court date both orally and in writing:

At trial, a superior court deputy clerk testified that Bryant was present in court on December 2, 1994, when the judge ordered him to appear on December 8, 1994. The deputy clerk also testified that Bryant signed an order that stated: “appear for Omnibus on 12/8, 1994.”

Id. This Court concluded, “a rational, fair minded jury could conclude that Bryant had actual knowledge on December 8, 1994, based on the written and verbal notice he received only a few days earlier” *Id.* at 871.

Here, in contrast to *Bryant*, no clerk testified that Mr. Boyd was present in court on October 16, 2015, and heard a judge order him to appear on November 6, 2015. In fact, the transcript of October 16, 2015, shows that the judge told Mr. Boyd his next court date was December 6. RP (10/16/15) 21. Thus, in contrast to *Bryant*, Mr. Boyd did not have both written and verbal notice of his next court date – the State presented no evidence of verbal notice and the actual record from the relevant court date demonstrates that Mr. Boyd received conflicting information. Under these circumstances, the State cannot be said to have proved knowing failure to appear beyond a reasonable doubt.

This Court reversed a bail jumping conviction for insufficient evidence of knowledge in *Cardwell*. There, the State presented evidence that notice of the hearing date was sent and received at the address the

defendant had given the court at the time of his release. *Cardwell*, 155 Wn. App. at 47. However, on the hearing date the defendant's father appeared and told the court that his son no longer lived with him at that address and that he had not received the notice. *Id.* at 45, 47. Thus, there was insufficient evidence to support the knowledge element, and the conviction was reversed and the charge dismissed with prejudice. *Id.* at 47-48.

The same should occur here. The State failed to prove Mr. Boyd *knowingly* failed to appear because although there was a written order including a November 6 hearing, there was no testimony about what Mr. Boyd was told and in fact the judge told Mr. Boyd his next hearing was December 6. Accordingly, Mr. Boyd asks this Court to reverse his conviction on count two and remand for dismissal of the charge with prejudice. *See Cardwell*, 155 Wn. App. at 47-48.

4. Prosecutorial misconduct deprived Mr. Boyd of his right to a fair trial, requiring reversal and remand for a new trial.

- a. A prosecutor has a duty to ensure a fair trial and may not denigrate defense counsel, appeal to passion or prejudice, or otherwise distract the jury from its role as rational decision-maker.

If this Court disagrees that dismissal of both charges is required for the reasons set forth above, it should reverse and remand for a new trial because the prosecutor committed prejudicial misconduct.

“The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution.” *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *Glasmann*, 175 Wn.2d at 703-04.

Although a prosecutor must enforce the law, she also “functions as the representative of the people in a quasijudicial capacity in a search for justice.” *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Thus, a prosecutor may not appeal to the jury’s passion or prejudice, denigrate defense counsel, or otherwise “distract the jury from its proper function as a rational decision-maker.” *State v. Walker*, 182 Wn.2d 463,

479, 341 P.3d 976 (2015); *State v. Lindsay*, 180 Wn.2d 423, 431-33, 326 P.3d 125 (2014).

As our supreme court has repeatedly emphasized:

[A] public prosecutor ... is a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

Walker, 182 Wn.2d at 476 (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)); *accord Monday*, 171 Wn.2d at 676 n.2.

On appeal, reversal is required if a prosecutor committed misconduct and there is a substantial likelihood that the misconduct affected the jury's verdict. *Lindsay*, 180 Wn.2d at 440. A motion for mistrial preserves the misconduct issue for appeal. *Id.* at 441.

- b. The prosecutor in this case committed prejudicial misconduct by mocking defense counsel's argument and Mr. Boyd's poverty and mental illness.

In this case, the prosecutor's unprofessional behavior in rebuttal closing argument deprived Mr. Boyd of his right to a fair trial.

In her closing argument, Mr. Boyd's attorney pointed out that the obligations to register in person each Monday and later to appear in court

for numerous hearings were overwhelming in light of the barriers Mr. Boyd faced as a homeless, mentally ill person. RP (3/1/16) 104. Mr. Boyd's attorney argued that in light of Mr. Boyd's circumstances, the State failed to prove the mens rea for the crimes. As to bail jumping specifically, she asked:

Would this be straightforward even for a person without the barriers that Mr. Boyd was facing? You can see that a number of dates are scribbled out, crossed over, that it's difficult to read, and it's probably about as chaotic as Mr. Boyd's life is. It indicates that there was a finding that Mr. Boyd was competent to stand trial and that there was an evaluation that was entered in court that day. So where was Mr. Boyd's mindset at that point if that was something that was even being called into question? Did he knowingly fail to appear?

RP (3/1/16) 111.

In rebuttal closing argument, the prosecutor denigrated defense counsel, mocked Mr. Boyd's homelessness and mental illness, and falsely claimed there was no evidence showing that Mr. Boyd faced these barriers. RP (3/1/16) 112- 15. According to defense counsel, the prosecutor even changed her tone of voice – although the judge did not notice the same shift. RP (3/1/16) 118-20. Without question, the prosecutor's actual words were derogatory, unprofessional, and improper, and it is difficult to imagine the words being delivered *without* a concomitant change in tone. The prosecutor said:

MS. KAHOLOKULA: I'd like to remind you of the reasonable doubt instruction which tells you that a reasonable doubt arises from the evidence. **Not speculation, not, oh, Mr. Boyd might have barriers, Mr. Boyd might have problems meeting his obligations, Mr. Boyd's life might have chaos.**

Here's the thing. **There's no evidence of any of this. None.** We've heard from one witness, Ms. Jarolimek, and she testified I've been working with this guy for over ten years, he's been getting the notifications and he's in fact been registering for part of that time.

The only evidence is that he very much has the ability to do so. He chose not to.

There's no evidence of chaos. There's no evidence of any sort of problems that he might be having that would prohibit him from coming. This is all speculation, and speculation is not an appropriate basis to find reasonable doubt.

...
Same thing with the bail jump. **And again, Counsel talks about chaos in his life, barriers, bla, bla, bla.** No evidence of that. Well, did he really fail to appear? Was he even in court? Perhaps people are just making stuff up on these forms when the form speaks for itself and shows that Mr. Boyd was in court.

...
This defendant has made poor choices, not because of barriers or chaos or issues or whatever other speculation there might be. The defendant is sitting there because he made poor choices and decided not to comply with the law, and for that reason, he should be found guilty.

RP (3/1/16) 112-15 (emphases added)

The prosecutor's mocking of Mr. Boyd's poverty and mental problems is shocking and should not be tolerated by Washington courts.

The prosecutor herself is the one who introduced evidence of Mr. Boyd's extreme indigence and questionable mental health – yet she falsely claimed that there was “no evidence” of chaos in Mr. Boyd's life. She denigrated defense counsel and trivialized Mr. Boyd's struggles with the dismissive phrase “blah, blah, blah.” She did so even though the *State* presented exhibits showing that Mr. Boyd was homeless, rarely stayed in the same place two nights in a row, was forced to sleep outside by the highway, and was evaluated for incompetence by Western State Hospital. Exs. 2, 3, 4A, 4B, 4C, 4D, 12; *cf. City of Richland v. Wakefield* ___ Wn.2d ___, ___ P.3d ___ (No. 92594-1, filed 9/22/16) (reversing trial court finding that defendant's indigence was by “choice,” and stating “the record shows that Wakefield is completely disabled and unable to work due to her multiple mental disabilities, and that this inability to earn income results in her poverty. Wakefield did not make the ‘life style choice’ to be mentally disabled.”).

Defense counsel moved for a mistrial based on the misconduct, but the motion was denied. RP (3/1/16) 118-20. Therefore, the issue is preserved for review. *Lindsay*, 180 Wn.2d at 440.

This Court should hold that the prosecutor committed prejudicial misconduct and should reverse and remand for a fair trial. As defense counsel properly noted, *Monday* is instructive. RP (3/1/16) 119. There, the

prosecutor mocked the accents of African American witnesses by pronouncing “police” as “po-leese,” and described an alleged “code” under which “black folk don’t testify against black folk.” *Monday*, 171 Wn.2d at 671-74. The Supreme Court condemned not only the overtly racist remarks, but also the more subtle imitation of the accents. *Id.* at 678-79. The conduct was “highly improper” and required a new trial notwithstanding the significant evidence of guilt. *Id.* at 679-81.

Lindsay is also relevant. There, both defense counsel and the prosecuting attorney “engaged in unprofessional behavior, trading verbal jabs and snide remarks . . .” *Lindsay*, 180 Wn.2d at 426-27. Among other things, the prosecutor called the defense argument “a crock,” and described the defendant’s testimony as “the most ridiculous thing I’ve ever heard.” *Id.* at 429. Also, when defense counsel complained that she could not hear the prosecutor because he was whispering, the prosecutor mocked her by standing behind her and shouting, which made the jury laugh. *Id.* at 430. Defense counsel made a motion for a mistrial directly following rebuttal closing argument, but the motion was denied. *Id.* at 430-31.

The Supreme Court reversed. It held that the prosecutor improperly impugned defense counsel by calling her arguments “a crock,” *id.* at 434, and impermissibly expressed his personal opinion by describing the defendant’s testimony as “the most ridiculous thing I’ve ever heard.” *Id.* at

438. Furthermore, the prosecutor’s mocking of defense counsel by whispering and then shouting “was highly unprofessional and potentially damaging to the fairness of the proceedings.” *Id.* at 440. “Such incivility threatens the fairness of the trial, not to mention public respect for the courts.” *Lindsay*, 180 Wn.2d at 432. The prosecutor’s improper comments were even more prejudicial in light of the fact that they were made in rebuttal closing argument, right before the jury retired for deliberations. *Id.* at 443. Accordingly, the court remanded for a new trial. *Id.* at 444.

The same should occur here. The prosecutor falsely characterized the defense arguments as baseless whining and dismissed the serious problems of homelessness and mental illness as so much “blah blah blah.” Such incivility and disrespect rendered the proceedings fundamentally unfair, and this court should reverse and remand for a new trial. *See Walker*, 182 Wn.2d at 479-81; *Lindsay*, 180 Wn.2d at 440-44; *Monday*, 171 Wn.2d at 679-81.

5. The trial court erred in overruling Mr. Boyd’s objection to the reasonable-doubt instruction, because this Court and the Supreme Court have held the jury’s job is not to find the truth but to determine whether the State proved its case.

A jury’s role is not to search for the truth. *State v. Lindsay*, 180 Wn. 2d 423, 437, 326 P.3d 125 (2014); *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *see also State v. Berube*, 171 Wn. App. 103,

286 P.3d 402, 411 (2012) (“truth is not the jury's job. And arguing that the jury should search for truth and not for reasonable doubt both misstates the jury's duty and sweeps aside the State's burden”). Instead, the job of the jury “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760. “[A] jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

Over Mr. Boyd’s objection, the trial court instructed the jury that proof beyond a reasonable doubt means that, after considering the evidence, the jurors had “an abiding belief in the truth of the charge.” CP 92 (Instruction 2); CP 103 (defense proposed instruction without this language); RP (3/1/16) 76. By equating proof beyond a reasonable doubt with a “belief in the truth” of the charge, the court confused the critical role of the jury. The “belief in the truth” language encourages the jury to undertake an impermissible search for the truth and invites the error identified in *Lindsay* and *Emery*.

The presumption of innocence may be diluted or even “washed away” by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). It is the court’s obligation to vigilantly

protect the presumption of innocence. *Id.* In *Bennett*, the Supreme Court found the reasonable doubt instruction derived from *State v. Castle*, 86 Wn. App. 48, 53, 935 P.2d 656 (1997), was “problematic” as it was inaccurate and misleading. 161 Wn.2d at 317-18. Exercising its “inherent supervisory powers,” the Supreme Court directed trial courts to use WPIC 4.01 in all future cases. *Id.* at 318.

That pattern instruction reads:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. [If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt].

11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01, at 85 (3rd ed. 2008) (“WPIC”).

This Court has relied in part on *Bennett* to uphold the instruction given here. *See State v. Fedorov*, 181 Wn. App. 187, 199-200, 324 P.3d

784 (2014). But the *Bennett* Court did not comment at all on the bracketed “belief in the truth” language. More recent cases show the problematic nature of such language. In *Emery*, the prosecution told the jury that “your verdict should speak the truth,” and “the truth of the matter is, the truth of these charges, are that” the defendants are guilty. 174 Wn.2d at 751. The court held that these remarks misstated the jury’s role, but because they were not part of the court’s instructions, and the evidence was overwhelming, the error was harmless. *Id.* at 764 n.14.

The other case this court relied on in *Fedorov* was *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995). *See Fedorov*, 181 Wn. App. at 200. But in *Pirtle*, the language at issue was not “the truth.” Instead, the defendant challenged the phrase “abiding belief” as inconsistent with proof beyond a reasonable doubt. *Pirtle*, 127 Wn.2d at 658. The court rejected the argument because the U.S. Supreme Court had held “[a]n instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof.” *Id.* (citing *Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994)).

Regardless of whether the phrase “abiding belief” is proper, the point is that the jury’s role is not to determine “the truth.” *Lindsay*, 180

Wn. 2d at 437; *Emery*, 174 Wn.2d at 760. Thus, the trial court erred in overruling Mr. Boyd's objection to the inclusion of this language.

Improperly instructing the jury on the meaning of proof beyond a reasonable doubt is structural error. *Sullivan*, 508 U.S. at 281-82. In any event, the error could not be considered harmless in light of the evidentiary weaknesses discussed above and the prosecutor's emphasis on this improper definition of reasonable doubt in closing argument. RP (3/1/16) 91-92.

This Court has a supervisory role in ensuring the jury's instructions fairly and accurately convey the law. *Bennett*, 161 Wn.2d at 318. This Court should hold that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the prosecution's burden of proof, confuses the jury's role, and denies an accused person his right to a fair trial by jury as protected by the state and federal constitutions.

E. CONCLUSION

For the reasons set forth above, Mr. Boyd asks this Court to reverse his convictions and remand for dismissal of the charges with prejudice. In the alternative, the convictions should be reversed and the case remanded for a new trial.

DATED this 28th day of September, 2016.

Respectfully submitted,

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Appellant

Appendix A

RCW 9A.44.130 (1998)

West's RCWA 9A.44.130
WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 9A. WASHINGTON CRIMINAL CODE
CHAPTER 9A.44. SEX OFFENSES

9A.44.130. Registration of sex offenders and kidnapping offenders—Procedures—Definition
—Penalties

(1) Any adult or juvenile residing in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence.

(2) The person shall provide the county sheriff with the following information when registering: (a) Name; (b) address; (c) date and place of birth; (d) place of employment; (e) crime for which convicted; (f) date and place of conviction; (g) aliases used; and (h) social security number.

(3)(a) Offenders shall register within the following deadlines. For purposes of this section the term “conviction” refers to adult convictions and juvenile adjudications for sex offenses or kidnapping offenses:

(i) **OFFENDERS IN CUSTODY.** (A) Sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of that offense, of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, and (B) kidnapping offenders who on or after July 27, 1997, are in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, must register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register. Failure to register within twenty-four hours of release constitutes a violation of this section and is punishable as provided in subsection (7) of this section.

(ii) **OFFENDERS NOT IN CUSTODY BUT UNDER STATE OR LOCAL JURISDICTION.** Sex offenders who, on July 28, 1991, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of correction's active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 28, 1991. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of correction's active supervision, as defined by the department of corrections, the state

department of social and health services, or a local division of youth services, for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (3)(a)(ii) as of July 28, 1991, or a kidnapping offender required to register as of July 27, 1997, shall not relieve the offender of the duty to register or to reregister following a change in residence. The obligation to register shall only cease pursuant to RCW 9A.44.140.

(iii) **OFFENDERS UNDER FEDERAL JURISDICTION.** Sex offenders who, on or after July 23, 1995, and kidnapping offenders who, on or after July 27, 1997, as a result of that offense are in the custody of the United States bureau of prisons or other federal or military correctional agency for sex offenses committed before, on, or after February 28, 1990, or kidnapping offenses committed on, before, or after July 27, 1997, must register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence. Sex offenders who, on July 23, 1995, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 23, 1995. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (3)(a)(iii) as of July 23, 1995, or a kidnapping offender required to register as of July 27, 1997 shall not relieve the offender of the duty to register or to reregister following a change in residence. The obligation to register shall only cease pursuant to RCW 9A.44.140.

(iv) **OFFENDERS WHO ARE CONVICTED BUT NOT CONFINED.** Sex offenders who are convicted of a sex offense on or after July 28, 1991, for a sex offense that was committed on or after February 28, 1990, and kidnapping offenders who are convicted on or after July 27, 1997, for a kidnapping offense that was committed on or after July 27, 1997, but who are not sentenced to serve a term of confinement immediately upon sentencing, shall report to the county sheriff to register immediately upon completion of being sentenced.

(v) **OFFENDERS WHO ARE NEW RESIDENTS OR RETURNING WASHINGTON RESIDENTS.** Sex offenders and kidnapping offenders who move to Washington state from another state or a foreign country that are not under the jurisdiction of the state department of corrections, the indeterminate sentence review board, or the state department of social and health services at the time of moving to Washington, must register within thirty days of establishing residence or reestablishing residence if the person is a former Washington resident. The duty to register under this subsection applies to sex offenders convicted under the laws of another state or a foreign country, federal or military statutes, or Washington state for offenses committed on or after February 28, 1990, and to kidnapping offenders convicted under the laws of another state or a foreign country, federal or military statutes,

or Washington state for offenses committed on or after July 27, 1997. Sex offenders and kidnapping offenders from other states or a foreign country who, when they move to Washington, are under the jurisdiction of the department of corrections, the indeterminate sentence review board, or the department of social and health services must register within twenty-four hours of moving to Washington. The agency that has jurisdiction over the offender shall notify the offender of the registration requirements before the offender moves to Washington.

(vi) **OFFENDERS FOUND NOT GUILTY BY REASON OF INSANITY.** Any adult or juvenile who has been found not guilty by reason of insanity under chapter 10.77 RCW of (A) committing a sex offense on, before, or after February 28, 1990, and who, on or after July 23, 1995, is in custody, as a result of that finding, of the state department of social and health services, or (B) committing a kidnapping offense on, before, or after July 27, 1997, and who on or after July 27, 1997, is in custody, as a result of that finding, of the state department of social and health services, must register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence. The state department of social and health services shall provide notice to the adult or juvenile in its custody of the duty to register. Any adult or juvenile who has been found not guilty by reason of insanity of committing a sex offense on, before, or after February 28, 1990, but who was released before July 23, 1995, or any adult or juvenile who has been found not guilty by reason of insanity of committing a kidnapping offense but who was released before July 27, 1997, shall be required to register within twenty-four hours of receiving notice of this registration requirement. The state department of social and health services shall make reasonable attempts within available resources to notify sex offenders who were released before July 23, 1995, and kidnapping offenders who were released before July 27, 1997. Failure to register within twenty-four hours of release, or of receiving notice, constitutes a violation of this section and is punishable as provided in subsection (7) of this section.

(b) Failure to register within the time required under this section constitutes a per se violation of this section and is punishable as provided in subsection (7) of this section. The county sheriff shall not be required to determine whether the person is living within the county.

(c) An arrest on charges of failure to register, service of an information, or a complaint for a violation of this section, or arraignment on charges for a violation of this section, constitutes actual notice of the duty to register. Any person charged with the crime of failure to register under this section who asserts as a defense the lack of notice of the duty to register shall register immediately following actual notice of the duty through arrest, service, or arraignment. Failure to register as required under this subsection (c) constitutes grounds for filing another charge of failing to register. Registering following arrest, service, or arraignment on charges shall not relieve the offender from criminal liability for failure to register prior to the filing of the original charge.

(d) The deadlines for the duty to register under this section do not relieve any sex offender of the duty to register under this section as it existed prior to July 28, 1991.

(4)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send written notice of the change of address to the county sheriff at least fourteen days before moving. If any person required to register pursuant to this section moves to a new county, the person must send written notice of the change of address at least fourteen days before moving to the county sheriff in the new county of residence and must register with that county sheriff within twenty-four hours of moving. The person must also send written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered. If any person required to register pursuant to this section moves out of Washington state, the person must also send written notice within ten days of moving to the new state or a foreign country to the county sheriff with whom the person last registered in Washington state.

(b) It is an affirmative defense to a charge that the person failed to send a notice at least fourteen days in advance of moving as required under (a) of this subsection that the person did not know the location of his or her new residence at least fourteen days before moving. The defendant must establish the defense by a preponderance of the evidence and, to prevail on the defense, must also prove by a preponderance that the defendant sent the required notice within twenty-four hours of determining the new address.

(5) The county sheriff shall obtain a photograph of the individual and shall obtain a copy of the individual's fingerprints.

(6) For the purpose of RCW 9A.44.130, 10.01.200, 43.43.540, 70.48.470, and 72.09.330:

(a) "Sex offense" means any offense defined as a sex offense by RCW 9.94A.030 and any violation of RCW 9.68A.040 (sexual exploitation of a minor), 9.68A.050 (dealing in depictions of minor engaged in sexually explicit conduct), 9.68A.060 (sending, bringing into state depictions of minor engaged in sexually explicit conduct), 9.68A.090 (communication with minor for immoral purposes), 9.68A.100 (patronizing juvenile prostitute), or 9A.44.096 (sexual misconduct with a minor in the second degree), as well as any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030.

(b) "Kidnapping offense" means the crimes of kidnapping in the first degree, kidnapping in the second degree, and unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent.

(7) A person who knowingly fails to register or who moves without notifying the county sheriff as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony. If the crime was other than a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be other than a felony, violation of this section is a gross misdemeanor.

CREDIT(S)

1997 Electronic Pocket Part Update

Enacted by Laws 1990, ch. 3, § 402, eff. Feb. 28, 1990. Amended by Laws 1991, ch. 274, § 2; Laws 1994, ch. 84, § 2; Laws 1995, ch. 195, § 1; Laws 1995, ch. 248, § 1; Laws 1995, ch. 268, § 3. Reenacted and amended by Laws 1996, ch. 275, § 11. Amended by Laws 1997, ch. 113, § 3; Laws 1997, ch. 340, § 3.

HISTORICAL AND STATUTORY NOTES

1997 Electronic Pocket Part Update

1991 Legislation

Laws 1991, ch. 274, § 2, rewrote the section, which formerly read:

“(1) Any adult or juvenile residing in this state who has been found to have committed or has been convicted of any sex offense shall register with the county sheriff for the county of the person's residence.

“(2) The person shall, within forty-five days of establishing residence in Washington, or if a current resident within thirty days of release from confinement, if any, provide the county sheriff with the following information: (a) Name; (b) address; (c) place of employment; (d) crime for which convicted; (e) date and place of conviction; (f) aliases used; and (g) social security number.

“(3) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send written notice of the change of address to the county sheriff within ten days of establishing the new residence. If any person required to register pursuant to this section moves to a new county, the person must register with the county sheriff in the new county within ten days of establishing the new residence. The person must also send written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered.

“(4) The county sheriff shall obtain a photograph of the individual and shall obtain a copy of the individual's fingerprints.

“(5) ‘Sex offense’ for the purpose of RCW 9A.44.130, 10.01.200, 43.43.540, 70.48.470, and 72.09.330 means any offense defined as a sex offense by RCW 9.94A.030:

“(a) Committed on or after February 28, 1990; or

“(b) Committed prior to February 28, 1990, if the person, as a result of the offense, is under the custody or active supervision of the department of corrections or the department of social and health services on or after February 28, 1990.

“(6) A person who knowingly fails to register as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a class A felony or a federal or out-of-state conviction for an offense that under the laws of this state would be a class A felony. If the crime was other than a class A felony or a federal or out-of-state conviction for an offense that under the laws of this state would be a class A felony, violation of this section is a gross misdemeanor.”

1994 Legislation

Laws 1994, ch. 84, § 2, in subsec. (3)(a)(ii), in the first sentence, substituted “or under the department of correction's active supervision, as defined by the department of corrections” for “or under the active supervision of the state department of corrections”; and added the second and third sentences which relate to the duty to register when the supervision status of a sex offender has changed and the cessation of the obligation to register; and made a nonsubstantive change.

1995 Legislation

Laws 1995, ch. 195, § 1, in subsec. (6), added a reference to any violation of § 9.68A.090.

Laws 1995, ch. 248, § 1, in subsec. (1), inserted the reference to being found not guilty by reason of insanity; in subsec. (3)(a), inserted registration requirements for sex offenses under federal jurisdiction and sex offenders found not guilty by reason of insanity; redesignated the other subdivisions of subsec. (3)(a) accordingly; in redesignated subdiv. (3)(a)(v) inserted three references to sex offenders from a foreign country; in the second sentence inserted “or military” preceding “statutes”; in subsec. (4), in the first and second sentences, substituted “moving” for “establishing the new residence”; and added the final sentence relating to persons moving out of Washington state; and in subsec. (7) inserted the phrase concerning moving without notifying the county sheriff.

Laws 1995, ch. 268, § 3, in subsec. (6) added the references to any gross misdemeanors under chapter 9A.28 and § 9.94A.030.

1996 Legislation

Laws 1996, ch. 275, § 11, rewrote subsec. (4), which previously read:

“If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send written notice of the change of address to the county sheriff within ten days of moving. If any person required to register pursuant to this section moves to a new county, the person must register with the county sheriff in the new county within ten days of moving. The person must also send written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered. If any person required to register pursuant to this section moves out of Washington state, the person must also send written notice within ten days of moving to the new state or a foreign country to the county sheriff with whom the person last registered in Washington state.”;

and, in subsec. (6), which defines “sex offense”, inserted “or 9A.44.096”.

1997 Legislation

Laws 1997, ch. 113, § 3, generally made registration requirements applicable to persons convicted of a kidnapping offense as defined, by making the following changes: in headings throughout the section, substituted “OFFENDERS” for “SEX OFFENDER”; in subsec. (1), twice following “any sex offense” inserted “or kidnapping offense”; in subsec. (3) (a), in the introductory paragraph, in the first sentence, substituted “Offenders” for “Sex offenders”; and, at the end of the second sentence, added “or kidnapping offenses”; in subsec. (3)(a)(i), in the first sentence, designated subd. “(A)” and added subd. (B); and, in the second sentence, preceding “offender” deleted “sex”; in subsec. (3)(a)(ii), inserted the second sentence; in the resulting third sentence, inserted “or a kidnapping offender required to register as of July 27, 1997,”; in subsec. (3)(a)(iii), in the first sentence, following “July 23, 1995,” inserted “and kidnapping offenders who, on or after July 27, 1997,”; and following “February 28, 1990,” inserted “or kidnapping offenses committed on, before, or after July 27, 1997,”; inserted the third sentence; and, in the fourth sentence of subsec. (3)(a)(iii), inserted “or a kidnapping offender required to register as of July 27, 1997,”; in subsec. (3)(a)(iv), following “February 28, 1990,” inserted “and kidnapping offenders who are convicted on or after July 27, 1997, for a kidnapping offense that was committed on or after July 27, 1997,”; in subsec. (3)(a)(v), in the first sentence, following “Sex offenders” inserted “and kidnapping offenders”; in the second sentence, following “February 28, 1990” inserted “, and to kidnapping offenders convicted under the laws of another state or a foreign country, federal or military statutes, or Washington state for offenses committed on or after July 27, 1997”; in the third sentence of subsec. (3)(a)(v), following “Sex offenders” inserted “and kidnapping offenders”; in subsec. (3)(a)(vi), inserted subdivision designation “(A)” and added subd. (B); in the third sentence, following “July 23, 1995,” inserted “or any adult or juvenile who has been found not guilty by reason of insanity of committing a kidnapping offense but who was released before July 27, 1997,”; in the fourth sentence of subsec. (3)(a)

(vi), following “July 23, 1995,” added “and kidnapping offenders who were released before July 27, 1997”; and rewrote subsec. (6), which previously read:

“ ‘Sex offense’ for the purpose of RCW 9A.44.130, 10.01.200, 43.43.540, 70.48.470, and 72.09.330 means any offense defined as a sex offense by RCW 9.94A.030 and any violation of RCW 9.68A.090 or 9A.44.096 as well as any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030.”

Laws 1997, ch. 340, § 3, throughout subsec. (7), substituted “felony” for “class A felony”; and rewrote the last sentence of subsec. (7), which previously read: “If the crime was other than a class A felony or a federal or out-of-state conviction for an offense that under the laws of this state would be a class A felony, violation of this section is a gross misdemeanor.”

Reviser's note: This section was amended by 1997 c 113 § 3 and by 1997 c 340 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Findings—1997 c 113: See note following RCW 4.24.550.

Finding—1996 c 275: See note following RCW 9.94A.120.

Purpose—1995 c 268: See note following RCW 9.94A.030.

Intent—Laws 1994, ch. 84: “This act is intended to clarify existing law and is not intended to reflect a substantive change in the law.” [Laws 1994, ch. 84, § 1.]

Finding and intent—Laws 1991, ch. 274: “The legislature finds that sex offender registration has assisted law enforcement agencies in protecting their communities. This act is intended to clarify and amend the deadlines for sex offenders to register. This act's clarification or amendment of RCW 9A.44.130 does into relieve the obligation of sex offenders to comply with the registration requirements of RCW 9A.44.130 as that statute exits before July 28, 1991.” [Laws 1991, ch. 274, § 1.] This act consisted of the Laws 1991, ch. 274 amendments to §§ 9A.44.130 and 9A.44.140.

Index, part headings not law—Severability—Effective dates—Application—Laws 1990, ch. 3: See §§ 18.155.900 to 18.155.902.

Finding—Policy—Laws 1990, ch. 3, § 402: “The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction. Therefore, this state's

policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in RCW 9A.44.130." [Laws 1990, ch. 3, § 401.]

CROSS REFERENCES

Notice to defendant charged with sex offense of registration requirement, see § 10.01.200.

LAW REVIEW AND JOURNAL COMMENTARIES

Prevention versus punishment: Toward a principled distinction in the restraint of released sex offenders. 109 Harv.L.Rev. 1711 (1996).

LIBRARY REFERENCES

7WAP

Arrestment, see Wash.Prac. vol. 12, Ferguson, § 1105.

Sentencing hearing, registration of sex offenders, see Wash.Prac. vol. 13, Ferguson, § 4328.5.

NOTES OF DECISIONS

In general 3/4

Disclosure 4

Juveniles 2

Retroactivity 1

Under supervision 5

Validity 1/2

Waiver 3

1/2. Validity

Washington statute requiring convicted felony sex offenders to register as such was not unconstitutional ex post facto law, as applied to defendants convicted of felony sex offenses prior to statute's effective date; legislature's purpose in enacting statute was regulatory and not punitive, and all persons had opportunity to petition court to be relieved of duty to register. *State v. Ward* (1994) 123 Wash.2d 488, 869 P.2d 1062.

Washington statute requiring convicted felony sex offenders to register as such did not violate defendant's equal protection rights, though statute distinguished between convicted offenders who were under correctional supervision and those who were not for purposes of establishing registration deadlines; legislature could rationally conclude that classification

provided Department of Corrections with manageable number of sex offenders to notify and monitor. *State v. Ward* (1994) 123 Wash.2d 488, 869 P.2d 1062.

Washington statute requiring convicted felony sex offenders to register as such would be upheld from equal protection challenge, based on distinction drawn in statute between those who were under correctional supervision and those who were not, as long as statute rested upon legitimate state objective and was not wholly irrelevant to achieving that objective. *State v. Ward* (1994) 123 Wash.2d 488, 869 P.2d 1062.

Fact that defendant would have to register as felony sex offender if he pled guilty in accordance with plea agreement was mere “collateral consequence” of plea, of which defendant did not have to be notified, as matter of due process, prior to entry of plea. *State v. Ward* (1994) 123 Wash.2d 488, 869 P.2d 1062.

3/4. In general

Stepfather who was found civilly liable for sexual abuse of his stepdaughter was not convicted of sex offense and, therefore, was not required to register under sex offender registration statute. *Oostra v. Holstine* (1997) 86 Wash.App. 536, 937 P.2d 195.

Sex offender registration statute applies only where there has been adult criminal conviction or juvenile adjudication for sex offense. *Oostra v. Holstine* (1997) 86 Wash.App. 536, 937 P.2d 195.

Duty to register as sex offender arises pursuant to legislative mandate, rather than by order of sentencing court. *State v. Munds* (1996) 83 Wash.App. 489, 922 P.2d 215.

Duty to register as sex offender arises pursuant to legislative mandate, rather than “order.” *State v. Acheson* (1994) 75 Wash.App. 151, 877 P.2d 217.

1. Retroactivity

Public notification provisions of Washington's Community Protection Act, authorizing local law enforcement agencies to notify public and media of convicted sex offender's identity, criminal record, address, place of employment, and assessed propensity to reoffend, were punitive, not merely regulatory, such that ex post facto clause prohibited their enforcement against sex offender convicted of crimes predating enactment of Act; public notification unavoidably inflicted humiliation and ostracism, and exposed released offenders to hostility, harassment, and reprisal. *Doe v. Gregoire*, W.D.Wash.1997, 960 F.Supp. 1478.

Provisions of Washington's Community Protection Act requiring registration of convicted sex offenders and notification to law enforcement agencies were regulatory, not punitive,

such that ex post facto clause did not preclude application of those provisions to offender convicted prior to enactment of Act. *Doe v. Gregoire*, W.D.Wash.1997, 960 F.Supp. 1478.

Although sex offender registration requirement was retroactive, the disadvantage it placed upon convicted sex offender was not “punishment” since purpose of registration was to protect public, and thus, registration requirement did not constitute ex post facto law with respect to defendant convicted prior to its effective date. *Petition of Estavillo* (1993) 69 Wash.App. 401, 848 P.2d 1335, review denied 122 Wash.2d 1003, 859 P.2d 602.

Sex offender registration statute does not address only conduct occurring after its enactment so as to be prospective in application; statute imposes an affirmative obligation upon sex offenders, including those who committed sex offense prior to enactment of statute; thus, statute applies retroactively. *Petition of Estavillo* (1993) 69 Wash.App. 401, 848 P.2d 1335, review denied 122 Wash.2d 1003, 859 P.2d 602.

Retroactive application to defendant, convicted of attempted indecent liberties, of statutory requirement that he register as sex offender with sheriff in county in which he would be living did not operate to his disadvantage to such extent that it was in effect additional punishment, violative of ex post facto prohibition. *State v. Taylor* (1992) 67 Wash.App. 350, 835 P.2d 245, review denied 123 Wash.2d 1031, 877 P.2d 695.

2. Juveniles

Juveniles that commit sex offenses have duty to register as sex offenders. *State v. Heiskell* (1995) 77 Wash.App. 943, 895 P.2d 848, review granted 128 Wash.2d 1001, 907 P.2d 297, reversed 129 Wash.2d 113, 916 P.2d 366.

Court of Appeals could not add juvenile sexual motivation statute to the statutory definition of “sex offense” for that would be to create offense by judicial construction which Court may not do; legislature's omission of juvenile sexual motivation statute from definition of “sex offense” was likely inadvertent and did not undermine effectiveness of sex offender registration statute or statute defining sex offenses, addition of juvenile sexual motivation statute to definition of “sex offense” was not imperatively required to make any of the statutes rational, and omission of juvenile sexual motivation statute from definition of “sex offense” did not make registration statute ambiguous. *State v. S.M.H.* (1995) 76 Wash.App. 550, 887 P.2d 903.

Although juvenile was found to have committed a felony with sexual motivation, he did not commit sex offense as defined by statute to include adult sexual motivation statute but not juvenile sexual motivation statute and therefore, juvenile was not required to register as sex offender. *State v. S.M.H.* (1995) 76 Wash.App. 550, 887 P.2d 903.

Juvenile's duty to register as sex offender does not terminate upon juvenile's 21st birthday, as duty to register as sex offender arises pursuant to legislative mandate, rather than court order. *State v. Acheson* (1994) 75 Wash.App. 151, 877 P.2d 217.

Sex offender registration statute included juveniles under jurisdiction of juvenile court, as it uses "conviction," which triggers registration requirement, to mean both "adult convictions and juvenile adjudications for sex offenses." *State v. Acheson* (1994) 75 Wash.App. 151, 877 P.2d 217.

3. Waiver

Trial court had authority to grant waiver of sex offender registration, within two years of offense, to juvenile sex offender who was under age 15 when he committed offense, upon showing by clear and convincing evidence that registration would not serve purposes of registration statute. *State v. Heiskell* (1995) 77 Wash.App. 943, 895 P.2d 848, review granted 128 Wash.2d 1001, 907 P.2d 297, reversed 129 Wash.2d 113, 916 P.2d 366.

4. Disclosure

Defendant's assertion that he would not have pleaded guilty to child molestation had State disclosed sex offender registration requirement in judgment and sentence was not credible, given that defendant entered guilty plea seven weeks before registration law was enacted. *State v. Munds* (1996) 83 Wash.App. 489, 922 P.2d 215.

Failure to advise sex offender of duty to register at time of guilty plea is not reversible error, as registration is only collateral consequence of plea. *State v. Munds* (1996) 83 Wash.App. 489, 922 P.2d 215.

State's failure to include notification of sex offender registration requirement in judgment and sentence for child molestation was cured by promptly notifying defendant when oversight was discovered; defendant's duty to register was triggered at that time. *State v. Munds* (1996) 83 Wash.App. 489, 922 P.2d 215.

5. Under supervision

Sex offender registration law applied to convicted child molester, despite claim that he was not under supervision when he was released; subsequent amendments to law, which established registration deadlines according to various factors including whether convict is in custody or under supervision, did not relieve molester or any other sex offender of duty to register. *State v. Munds* (1996) 83 Wash.App. 489, 922 P.2d 215.

Appendix B

RCW 9A.44.130 (2011)

West's RCWA 9A.44.130

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

Chapter 9A.44. Sex Offenses (Refs & Annos)

**9A.44.130. Registration of sex offenders and kidnapping offenders—
Procedures—Definition—Penalties**

(1)(a) Any adult or juvenile residing whether or not the person has a fixed residence, or who is a student, is employed, or carries on a vocation in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation, or as otherwise specified in this section. When a person required to register under this section is in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility as a result of a sex offense or kidnapping offense, the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person.

(b) Any adult or juvenile who is required to register under (a) of this subsection:

(i) Who is attending, or planning to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW shall, within three business days prior to arriving at the school to attend classes, notify the sheriff for the county of the person's residence of the person's intent to attend the school, and the sheriff shall promptly notify the principal of the school;

(ii) Who is admitted to a public or private institution of higher education shall, within three business days prior to arriving at the institution, notify the sheriff for the county of the person's residence of the person's intent to attend the institution;

(iii) Who gains employment at a public or private institution of higher education shall, within three business days prior to commencing work at the institution, notify the sheriff for the county of the person's residence of the person's employment by the institution; or

(iv) Whose enrollment or employment at a public or private institution of higher education is terminated shall, within three business days of such termination, notify the sheriff for the

county of the person's residence of the person's termination of enrollment or employment at the institution.

(c) The sheriff shall notify the school's principal or institution's department of public safety and shall provide that department with the same information provided to a county sheriff under subsection (3) of this section.

(d)(i) A principal receiving notice under this subsection must disclose the information received from the sheriff under (b) of this subsection as follows:

(A) If the student who is required to register as a sex offender is classified as a risk level II or III, the principal shall provide the information received to every teacher of any student required to register under (a) of this subsection and to any other personnel who, in the judgment of the principal, supervises the student or for security purposes should be aware of the student's record;

(B) If the student who is required to register as a sex offender is classified as a risk level I, the principal shall provide the information received only to personnel who, in the judgment of the principal, for security purposes should be aware of the student's record.

(ii) Any information received by a principal or school personnel under this subsection is confidential and may not be further disseminated except as provided in RCW 28A.225.330, other statutes or case law, and the family and educational and privacy rights act of 1994, 20 U.S.C. Sec. 1232g et seq.

(2) This section may not be construed to confer any powers pursuant to RCW 4.24.550 upon the public safety department of any public or private school or institution of higher education.

(3)(a) The person shall provide the following information when registering: (i) Name; (ii) complete residential address; (iii) date and place of birth; (iv) place of employment; (v) crime for which convicted; (vi) date and place of conviction; (vii) aliases used; (viii) social security number; (ix) photograph; and (x) fingerprints.

(b) Any person who lacks a fixed residence shall provide the following information when registering: (i) Name; (ii) date and place of birth; (iii) place of employment; (iv) crime for which convicted; (v) date and place of conviction; (vi) aliases used; (vii) social security number; (viii) photograph; (ix) fingerprints; and (x) where he or she plans to stay.

(4)(a) Offenders shall register with the county sheriff within the following deadlines:

(i) OFFENDERS IN CUSTODY. (A) Sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a result of

that offense, of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, and (B) kidnapping offenders who on or after July 27, 1997, are in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, must register at the time of release from custody with an official designated by the agency that has jurisdiction over the offender. The agency shall within three days forward the registration information to the county sheriff for the county of the offender's anticipated residence. The offender must also register within three business days from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register.

When the agency with jurisdiction intends to release an offender with a duty to register under this section, and the agency has knowledge that the offender is eligible for developmental disability services from the department of social and health services, the agency shall notify the division of developmental disabilities of the release. Notice shall occur not more than thirty days before the offender is to be released. The agency and the division shall assist the offender in meeting the initial registration requirement under this section. Failure to provide such assistance shall not constitute a defense for any violation of this section.

(ii) **OFFENDERS NOT IN CUSTODY BUT UNDER STATE OR LOCAL JURISDICTION.** Sex offenders who, on July 28, 1991, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of corrections' active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 28, 1991. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of corrections' active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (4)(a)(ii) as of July 28, 1991, or a kidnapping offender required to register as of July 27, 1997, shall not relieve the offender of the duty to register or to reregister following a change in residence.

(iii) **OFFENDERS UNDER FEDERAL JURISDICTION.** Sex offenders who, on or after July 23, 1995, and kidnapping offenders who, on or after July 27, 1997, as a result of that offense are in the custody of the United States bureau of prisons or other federal or military correctional agency for sex offenses committed before, on, or after February 28, 1990, or

kidnapping offenses committed on, before, or after July 27, 1997, must register within three business days from the time of release with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation. Sex offenders who, on July 23, 1995, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 23, 1995. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (4)(a)(iii) as of July 23, 1995, or a kidnapping offender required to register as of July 27, 1997 shall not relieve the offender of the duty to register or to reregister following a change in residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation.

(iv) **OFFENDERS WHO ARE CONVICTED BUT NOT CONFINED.** Sex offenders who are convicted of a sex offense on or after July 28, 1991, for a sex offense that was committed on or after February 28, 1990, and kidnapping offenders who are convicted on or after July 27, 1997, for a kidnapping offense that was committed on or after July 27, 1997, but who are not sentenced to serve a term of confinement immediately upon sentencing, shall report to the county sheriff to register within three business days of being sentenced.

(v) **OFFENDERS WHO ARE NEW RESIDENTS OR RETURNING WASHINGTON RESIDENTS.** Sex offenders and kidnapping offenders who move to Washington state from another state or a foreign country that are not under the jurisdiction of the state department of corrections, the indeterminate sentence review board, or the state department of social and health services at the time of moving to Washington, must register within three business days of establishing residence or reestablishing residence if the person is a former Washington resident. The duty to register under this subsection applies to sex offenders convicted under the laws of another state or a foreign country, federal or military statutes for offenses committed before, on, or after February 28, 1990, or Washington state for offenses committed before, on, or after February 28, 1990, and to kidnapping offenders convicted under the laws of another state or a foreign country, federal or military statutes, or Washington state for offenses committed before, on, or after July 27, 1997. Sex offenders and kidnapping offenders from other states or a foreign country who, when they move to Washington, are under the jurisdiction of the department of corrections, the indeterminate sentence review board, or the department of social and health services must register within three business days of moving to Washington. The agency that has jurisdiction over the

offender shall notify the offender of the registration requirements before the offender moves to Washington.

(vi) **OFFENDERS FOUND NOT GUILTY BY REASON OF INSANITY.** Any adult or juvenile who has been found not guilty by reason of insanity under chapter 10.77 RCW of (A) committing a sex offense on, before, or after February 28, 1990, and who, on or after July 23, 1995, is in custody, as a result of that finding, of the state department of social and health services, or (B) committing a kidnapping offense on, before, or after July 27, 1997, and who on or after July 27, 1997, is in custody, as a result of that finding, of the state department of social and health services, must register within three business days from the time of release with the county sheriff for the county of the person's residence. The state department of social and health services shall provide notice to the adult or juvenile in its custody of the duty to register. Any adult or juvenile who has been found not guilty by reason of insanity of committing a sex offense on, before, or after February 28, 1990, but who was released before July 23, 1995, or any adult or juvenile who has been found not guilty by reason of insanity of committing a kidnapping offense but who was released before July 27, 1997, shall be required to register within three business days of receiving notice of this registration requirement.

(vii) **OFFENDERS WHO LACK A FIXED RESIDENCE.** Any person who lacks a fixed residence and leaves the county in which he or she is registered and enters and remains within a new county for twenty-four hours is required to register with the county sheriff not more than three business days after entering the county and provide the information required in subsection (3)(b) of this section.

(viii) **OFFENDERS WHO LACK A FIXED RESIDENCE AND WHO ARE UNDER SUPERVISION.** Offenders who lack a fixed residence and who are under the supervision of the department shall register in the county of their supervision.

(ix) **OFFENDERS WHO MOVE TO, WORK, CARRY ON A VOCATION, OR ATTEND SCHOOL IN ANOTHER STATE.** Offenders required to register in Washington, who move to another state, or who work, carry on a vocation, or attend school in another state shall register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. The person must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom the person last registered in Washington state. The county sheriff shall promptly forward this information to the Washington state patrol.

(b) The county sheriff shall not be required to determine whether the person is living within the county.

(c) An arrest on charges of failure to register, service of an information, or a complaint for a violation of RCW 9A.44.132, or arraignment on charges for a violation of RCW 9A.44.132, constitutes actual notice of the duty to register. Any person charged with the crime of failure to register under RCW 9A.44.132 who asserts as a defense the lack of notice of the duty to register shall register within three business days following actual notice of the duty through arrest, service, or arraignment. Failure to register as required under this subsection (4)(c) constitutes grounds for filing another charge of failing to register. Registering following arrest, service, or arraignment on charges shall not relieve the offender from criminal liability for failure to register prior to the filing of the original charge.

(d) The deadlines for the duty to register under this section do not relieve any sex offender of the duty to register under this section as it existed prior to July 28, 1991.

(5)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address to the county sheriff within three business days of moving.

(b) If any person required to register pursuant to this section moves to a new county, the person must register with that county sheriff within three business days of moving. Within three business days, the person must also provide, by certified mail, with return receipt requested or in person, signed written notice of the change of address in the new county to the county sheriff with whom the person last registered. The county sheriff with whom the person last registered shall promptly forward the information concerning the change of address to the county sheriff for the county of the person's new residence. Upon receipt of notice of change of address to a new state, the county sheriff shall promptly forward the information regarding the change of address to the agency designated by the new state as the state's offender registration agency.

(6)(a) Any person required to register under this section who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within three business days after ceasing to have a fixed residence. The notice shall include the information required by subsection (3)(b) of this section, except the photograph and fingerprints. The county sheriff may, for reasonable cause, require the offender to provide a photograph and fingerprints. The sheriff shall forward this information to the sheriff of the county in which the person intends to reside, if the person intends to reside in another county.

(b) 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.

(c) If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within three business days of ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (4)(a)(vii) or (viii) and (6) of this section. To prevail, the person must prove the defense by a preponderance of the evidence.

(7) A sex offender subject to registration requirements under this section who applies to change his or her name under RCW 4.24.130 or any other law shall submit a copy of the application to the county sheriff of the county of the person's residence and to the state patrol not fewer than five days before the entry of an order granting the name change. No sex offender under the requirement to register under this section at the time of application shall be granted an order changing his or her name if the court finds that doing so will interfere with legitimate law enforcement interests, except that no order shall be denied when the name change is requested for religious or legitimate cultural reasons or in recognition of marriage or dissolution of marriage. A sex offender under the requirement to register under this section who receives an order changing his or her name shall submit a copy of the order to the county sheriff of the county of the person's residence and to the state patrol within three business days of the entry of the order.

(8) The county sheriff shall obtain a photograph of the individual and shall obtain a copy of the individual's fingerprints. A photograph may be taken at any time to update an individual's file.

(9) Except as may otherwise be provided by law, nothing in this section shall impose any liability upon a peace officer, including a county sheriff, or law enforcement agency, for failing to release information authorized under this section.

CREDIT(S)

[2010 c 267 § 2, eff. June 10, 2010; 2010 c 265 § 1, eff. June 10, 2010; 2008 c 230 § 1, eff. June 10, 2010. Prior: 2006 c 129 § 2, eff. Sept. 1, 2006; (2006 c 129 § 1 expired September 1, 2006); 2006 c 128 § 2, eff. Sept. 1, 2006; (2006 c 128 § 1 expired September 1, 2006); 2006 c 127 § 2, eff. Sept. 1, 2006; 2006 c 126 § 2, eff. Sept. 1, 2006; (2006 c 126 § 1 expired September 1, 2006); 2005 c 380 § 1, eff. Sept. 1, 2006; prior: 2003 c 215 § 1, eff. July 27, 2003; 2003 c 53 § 68, eff. July 1, 2004; 2002 c 31 § 1; prior: 2001 c 169 § 1; 2001 c 95 § 2; 2000 c 91 § 2; prior: 1999 sp.s. c 6 § 2; 1999 c 352 § 9; prior: 1998 c 220 § 1; 1998 c 139 § 1; prior: 1997 c 340 § 3;

1997 c 113 § 3; 1996 c 275 § 11; prior: 1995 c 268 § 3; 1995 c 248 § 1; 1995 c 195 § 1; 1994 c 84 § 2; 1991 c 274 § 2; 1990 c 3 § 402.]

HISTORICAL AND STATUTORY NOTES

Reviser's note: This section was amended by 2010 c 265 § 1 and by 2010 c 267 § 2, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Application—2010 c 267: See note following RCW 9A.44.128.

Delayed effective date—2008 c 230 §§ 1-3: “Sections 1 through 3 of this act take effect ninety days after adjournment sine die of the 2010 legislative session.” [2008 c 230 § 5.]

Effective date—2006 c 129 § 2: “Section 2 of this act takes effect September 1, 2006.” [2006 c 129 § 4.]

Expiration date—2006 c 129 § 1: “Section 1 of this act expires September 1, 2006.” [2006 c 129 § 3.]

Effective date—2006 c 128 § 2: “Section 2 of this act takes effect September 1, 2006.” [2006 c 128 § 8.]

Expiration date—2006 c 128 § 1: “Section 1 of this act expires September 1, 2006.” [2006 c 128 § 7.]

Severability—2006 c 127: “If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.” [2006 c 127 § 1.]

Effective date—2006 c 127: “This act takes effect September 1, 2006.” [2006 c 127 § 3.]

Effective date—2006 c 126 § 2: “Section 2 of this act takes effect September 1, 2006.” [2006 c 126 § 10.]

Expiration date—2006 c 126 § 1: “Section 1 of this act expires September 1, 2006.” [2006 c 126 § 8.]

Effective date—2006 c 126 §§ 1 and 3-7: “Sections 1 and 3 through 7 of this act are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and take effect immediately [March 20, 2006].” [2006 c 126 § 9.]

Effective date—2005 c 380: “This act takes effect September 1, 2006.” [2005 c 380 § 4.]

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Application—2002 c 31: “This act applies to all persons convicted of communication with a minor either on, before, or after July 1, 2001, unless otherwise relieved of the duty to register under RCW 9A.44.140.” [2002 c 31 § 2.]

Severability—2002 c 31: “If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.” [2002 c 31 § 3.]

Effective date—2002 c 31: “This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [March 12, 2002].” [2002 c 31 § 4.]

Effective date—2001 c 95: See note following RCW 9.94A.030.

Intent—1999 sp.s. c 6: “It is the intent of this act to revise the law on registration of sex and kidnapping offenders in response to the case of *State v. Pickett*, Docket number 41562-0-I. The legislature intends that all sex and kidnapping offenders whose history requires them to register shall do so regardless of whether the person has a fixed residence. The lack of a residential address is not to be construed to preclude registration as a sex or kidnapping offender. The legislature intends that persons who lack a residential address shall have an affirmative duty to report to the appropriate county sheriff, based on the level of risk of offending.” [1999 sp.s. c 6 § 1.]

Effective date—1999 sp.s. c 6: “This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [June 7, 1999].” [1999 sp.s. c 6 § 3.]

Severability—1998 c 220: “If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.” [1998 c 220 § 7.]

Findings—1997 c 113: See note following RCW 4.24.550.

Finding—1996 c 275: See note following RCW 9.94A.505.

Purpose—1995 c 268: See note following RCW 9.94A.030.

Intent—1994 c 84: “This act is intended to clarify existing law and is not intended to reflect a substantive change in the law.” [1994 c 84 § 1.]

Finding and intent—1991 c 274: “The legislature finds that sex offender registration has assisted law enforcement agencies in protecting their communities. This act is intended to clarify and amend the deadlines for sex offenders to register. This act's clarification or amendment of RCW 9A.44.130 does not relieve the obligation of sex offenders to comply with the registration requirements of RCW 9A.44.130 as that statute exists before July 28, 1991.” [1991 c 274 § 1.]

Finding—Policy—1990 c 3 § 402: “The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction. Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in RCW 9A.44.130.” [1990 c 3 § 401.]

Index, part headings not law—Severability—Effective dates—Application—1990 c 3: See RCW 18.155.900 through 18.155.902.

Laws 1991, ch. 274, § 2, rewrote the section, which formerly read:

“(1) Any adult or juvenile residing in this state who has been found to have committed or has been convicted of any sex offense shall register with the county sheriff for the county of the person's residence.

“(2) The person shall, within forty-five days of establishing residence in Washington, or if a current resident within thirty days of release from confinement, if any, provide the county sheriff with the following information: (a) Name; (b) address; (c) place of employment; (d) crime for which convicted; (e) date and place of conviction; (f) aliases used; and (g) social security number.

“(3) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send written notice of the change of address to the county sheriff within ten days of establishing the new residence. If any person required to register pursuant to this section moves to a new county, the person must register with the county sheriff in the new county within ten days of establishing the new residence. The person

must also send written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered.

“(4) The county sheriff shall obtain a photograph of the individual and shall obtain a copy of the individual's fingerprints.

“(5) ‘Sex offense’ for the purpose of RCW 9A.44.130, 10.01.200, 43.43.540, 70.48.470, and 72.09.330 means any offense defined as a sex offense by RCW 9.94A.030:

“(a) Committed on or after February 28, 1990; or

“(b) Committed prior to February 28, 1990, if the person, as a result of the offense, is under the custody or active supervision of the department of corrections or the department of social and health services on or after February 28, 1990.

“(6) A person who knowingly fails to register as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a class A felony or a federal or out-of-state conviction for an offense that under the laws of this state would be a class A felony. If the crime was other than a class A felony or a federal or out-of-state conviction for an offense that under the laws of this state would be a class A felony, violation of this section is a gross misdemeanor.”

Laws 1994, ch. 84, § 2, in subsec. (3)(a)(ii), in the first sentence, substituted “or under the department of correction's active supervision, as defined by the department of corrections” for “or under the active supervision of the state department of corrections”; and added the second and third sentences which relate to the duty to register when the supervision status of a sex offender has changed and the cessation of the obligation to register; and made a nonsubstantive change.

Laws 1995, ch. 195, § 1, in subsec. (6), added a reference to any violation of § 9.68A.090.

Laws 1995, ch. 248, § 1, in subsec. (1), inserted the reference to being found not guilty by reason of insanity; in subsec. (3)(a), inserted registration requirements for sex offenses under federal jurisdiction and sex offenders found not guilty by reason of insanity; redesignated the other subdivisions of subsec. (3)(a) accordingly; in redesignated subdiv. (3)(a)(v) inserted three references to sex offenders from a foreign country; in the second sentence inserted “or military” preceding “statutes”; in subsec. (4), in the first and second sentences, substituted “moving” for “establishing the new residence”; and added the final sentence relating to persons moving out of Washington state; and in subsec. (7) inserted the phrase concerning moving without notifying the county sheriff.

Laws 1995, ch. 268, § 3, in subsec. (6) added the references to any gross misdemeanors under chapter 9A.28 and § 9.94A.030.

Laws 1996, ch. 275, § 11, rewrote subsec. (4), which previously read:

“If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send written notice of the change of address to the county sheriff within ten days of moving. If any person required to register pursuant to this section moves to a new county, the person must register with the county sheriff in the new county within ten days of moving. The person must also send written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered. If any person required to register pursuant to this section moves out of Washington state, the person must also send written notice within ten days of moving to the new state or a foreign country to the county sheriff with whom the person last registered in Washington state.”;

and, in subsec. (6), which defines “sex offense”, inserted “or 9A.44.096”.

Laws 1997, ch. 113, § 3, generally made registration requirements applicable to persons convicted of a kidnapping offense as defined, by making the following changes: in headings throughout the section, substituted “OFFENDERS” for “SEX OFFENDER”; in subsec. (1), twice following “any sex offense” inserted “or kidnapping offense”; in subsec. (3) (a), in the introductory paragraph, in the first sentence, substituted “Offenders” for “Sex offenders”; and, at the end of the second sentence, added “or kidnapping offenses”; in subsec. (3)(a)(i), in the first sentence, designated subd. “(A)” and added subd. (B); and, in the second sentence, preceding “offender” deleted “sex”; in subsec. (3)(a)(ii), inserted the second sentence; in the resulting third sentence, inserted “or a kidnapping offender required to register as of July 27, 1997,”; in subsec. (3)(a)(iii), in the first sentence, following “July 23, 1995,” inserted “and kidnapping offenders who, on or after July 27, 1997,”; and following “February 28, 1990,” inserted “or kidnapping offenses committed on, before, or after July 27, 1997,”; inserted the third sentence; and, in the fourth sentence of subsec. (3)(a)(iii), inserted “or a kidnapping offender required to register as of July 27, 1997,”; in subsec. (3)(a)(iv), following “February 28, 1990,” inserted “and kidnapping offenders who are convicted on or after July 27, 1997, for a kidnapping offense that was committed on or after July 27, 1997,”; in subsec. (3)(a)(v), in the first sentence, following “Sex offenders” inserted “and kidnapping offenders”; in the second sentence, following “February 28, 1990” inserted “, and to kidnapping offenders convicted under the laws of another state or a foreign country, federal or military statutes, or Washington state for offenses committed on or after July 27, 1997”; in the third sentence of subsec. (3)(a)(v), following “Sex offenders” inserted “and kidnapping offenders”; in subsec. (3)(a)(vi), inserted subdivision designation “(A)” and

added subd. (B); in the third sentence, following “July 23, 1995,” inserted “or any adult or juvenile who has been found not guilty by reason of insanity of committing a kidnapping offense but who was released before July 27, 1997,”; in the fourth sentence of subsec. (3)(a) (vi), following “July 23, 1995,” added “and kidnapping offenders who were released before July 27, 1997”; and rewrote subsec. (6), which previously read:

“ ‘Sex offense’ for the purpose of RCW 9A.44.130, 10.01.200, 43.43.540, 70.48.470, and 72.09.330 means any offense defined as a sex offense by RCW 9.94A.030 and any violation of RCW 9.68A.090 or 9A.44.096 as well as any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030.”

Laws 1997, ch. 340, § 3, throughout subsec. (7), substituted “felony” for “class A felony”; and rewrote the last sentence of subsec. (7), which previously read: “If the crime was other than a class A felony or a federal or out-of-state conviction for an offense that under the laws of this state would be a class A felony, violation of this section is a gross misdemeanor.”

Laws 1998, ch. 139, § 1, in subsec. (1), added the second, third, and fourth sentences; inserted subsec. (2); renumbered the subsequent subsections; then, in the resulting subsec. (8), in the first sentence, substituted “A person who knowingly fails to register with the county sheriff or notify the county sheriff as required by this section is guilty of a class C felony” for “A person who knowingly fails to register or who moves without notifying the county sheriff as required by this section is guilty of a class C felony”.

Laws 1998, ch. 220, § 1, rewrote the section, which previously read:

“(1) Any adult or juvenile residing in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence.

“(2) The person shall provide the county sheriff with the following information when registering: (a) Name; (b) address; (c) date and place of birth; (d) place of employment; (e) crime for which convicted; (f) date and place of conviction; (g) aliases used; and (h) social security number.

“(3)(a) Offenders shall register within the following deadlines. For purposes of this section the term ‘conviction’ refers to adult convictions and juvenile adjudications for sex offenses or kidnapping offenses:

“(i) OFFENDERS IN CUSTODY. (A) Sex offenders who committed a sex offense on, before, or after February 28, 1990, and who, on or after July 28, 1991, are in custody, as a

result of that offense, of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, and (B) kidnapping offenders who on or after July 27, 1997, are in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility, must register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence. The agency that has jurisdiction over the offender shall provide notice to the offender of the duty to register. Failure to register within twenty-four hours of release constitutes a violation of this section and is punishable as provided in subsection (7) of this section.

“(ii) **OFFENDERS NOT IN CUSTODY BUT UNDER STATE OR LOCAL JURISDICTION.** Sex offenders who, on July 28, 1991, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of correction's active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 28, 1991. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the indeterminate sentence review board or under the department of correction's active supervision, as defined by the department of corrections, the state department of social and health services, or a local division of youth services, for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (3)(a)(ii) as of July 28, 1991, or a kidnapping offender required to register as of July 27, 1997, shall not relieve the offender of the duty to register or to reregister following a change in residence. The obligation to register shall only cease pursuant to RCW 9A.44.140.

“(iii) **OFFENDERS UNDER FEDERAL JURISDICTION.** Sex offenders who, on or after July 23, 1995, and kidnapping offenders who, on or after July 27, 1997, as a result of that offense are in the custody of the United States bureau of prisons or other federal or military correctional agency for sex offenses committed before, on, or after February 28, 1990, or kidnapping offenses committed on, before, or after July 27, 1997, must register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence. Sex offenders who, on July 23, 1995, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for sex offenses committed before, on, or after February 28, 1990, must register within ten days of July 23, 1995. Kidnapping offenders who, on July 27, 1997, are not in custody but are under the jurisdiction of the United States bureau of prisons, United States courts, United States parole commission, or military parole board for kidnapping offenses committed before, on, or after July 27, 1997, must register within ten days of July 27, 1997. A change in supervision status of a sex offender who was required to register under this subsection (3)(a)(iii) as of July 23, 1995, or a kidnapping offender required

to register as of July 27, 1997 shall not relieve the offender of the duty to register or to reregister following a change in residence. The obligation to register shall only cease pursuant to RCW 9A.44.140.

“(iv) **OFFENDERS WHO ARE CONVICTED BUT NOT CONFINED.** Sex offenders who are convicted of a sex offense on or after July 28, 1991, for a sex offense that was committed on or after February 28, 1990, and kidnapping offenders who are convicted on or after July 27, 1997, for a kidnapping offense that was committed on or after July 27, 1997, but who are not sentenced to serve a term of confinement immediately upon sentencing, shall report to the county sheriff to register immediately upon completion of being sentenced.

“(v) **OFFENDERS WHO ARE NEW RESIDENTS OR RETURNING WASHINGTON RESIDENTS.** Sex offenders and kidnapping offenders who move to Washington state from another state or a foreign country that are not under the jurisdiction of the state department of corrections, the indeterminate sentence review board, or the state department of social and health services at the time of moving to Washington, must register within thirty days of establishing residence or reestablishing residence if the person is a former Washington resident. The duty to register under this subsection applies to sex offenders convicted under the laws of another state or a foreign country, federal or military statutes, or Washington state for offenses committed on or after February 28, 1990, and to kidnapping offenders convicted under the laws of another state or a foreign country, federal or military statutes, or Washington state for offenses committed on or after July 27, 1997. Sex offenders and kidnapping offenders from other states or a foreign country who, when they move to Washington, are under the jurisdiction of the department of corrections, the indeterminate sentence review board, or the department of social and health services must register within twenty-four hours of moving to Washington. The agency that has jurisdiction over the offender shall notify the offender of the registration requirements before the offender moves to Washington.

“(vi) **OFFENDERS FOUND NOT GUILTY BY REASON OF INSANITY.** Any adult or juvenile who has been found not guilty by reason of insanity under chapter 10.77 RCW of (A) committing a sex offense on, before, or after February 28, 1990, and who, on or after July 23, 1995, is in custody, as a result of that finding, of the state department of social and health services, or (B) committing a kidnapping offense on, before, or after July 27, 1997, and who on or after July 27, 1997, is in custody, as a result of that finding, of the state department of social and health services, must register within twenty-four hours from the time of release with the county sheriff for the county of the person's residence. The state department of social and health services shall provide notice to the adult or juvenile in its custody of the duty to register. Any adult or juvenile who has been found not guilty by reason of insanity of committing a sex offense on, before, or after February 28, 1990, but who was released before July 23, 1995, or any adult or juvenile who has been found not guilty by reason of insanity of

committing a kidnapping offense but who was released before July 27, 1997, shall be required to register within twenty-four hours of receiving notice of this registration requirement. The state department of social and health services shall make reasonable attempts within available resources to notify sex offenders who were released before July 23, 1995, and kidnapping offenders who were released before July 27, 1997. Failure to register within twenty-four hours of release, or of receiving notice, constitutes a violation of this section and is punishable as provided in subsection (7) of this section.

“(b) Failure to register within the time required under this section constitutes a per se violation of this section and is punishable as provided in subsection (7) of this section. The county sheriff shall not be required to determine whether the person is living within the county.

“(c) An arrest on charges of failure to register, service of an information, or a complaint for a violation of this section, or arraignment on charges for a violation of this section, constitutes actual notice of the duty to register. Any person charged with the crime of failure to register under this section who asserts as a defense the lack of notice of the duty to register shall register immediately following actual notice of the duty through arrest, service, or arraignment. Failure to register as required under this subsection (c) constitutes grounds for filing another charge of failing to register. Registering following arrest, service, or arraignment on charges shall not relieve the offender from criminal liability for failure to register prior to the filing of the original charge.

“(d) The deadlines for the duty to register under this section do not relieve any sex offender of the duty to register under this section as it existed prior to July 28, 1991.

“(4)(a) If any person required to register pursuant to this section changes his or her residence address within the same county, the person must send written notice of the change of address to the county sheriff at least fourteen days before moving. If any person required to register pursuant to this section moves to a new county, the person must send written notice of the change of address at least fourteen days before moving to the county sheriff in the new county of residence and must register with that county sheriff within twenty-four hours of moving. The person must also send written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered. If any person required to register pursuant to this section moves out of Washington state, the person must also send written notice within ten days of moving to the new state or a foreign country to the county sheriff with whom the person last registered in Washington state.

“(b) It is an affirmative defense to a charge that the person failed to send a notice at least fourteen days in advance of moving as required under (a) of this subsection that the person did not know the location of his or her new residence at least fourteen days before moving.

The defendant must establish the defense by a preponderance of the evidence and, to prevail on the defense, must also prove by a preponderance that the defendant sent the required notice within twenty-four hours of determining the new address.

“(5) The county sheriff shall obtain a photograph of the individual and shall obtain a copy of the individual's fingerprints.

“(6) For the purpose of RCW 9A.44.130, 10.01.200, 43.43.540, 70.48.470, and 72.09.330:

“(a) ‘Sex offense’ means any offense defined as a sex offense by RCW 9.94A.030 and any violation of RCW 9.68A.040 (sexual exploitation of a minor), 9.68A.050 (dealing in depictions of minor engaged in sexually explicit conduct), 9.68A.060 (sending, bringing into state depictions of minor engaged in sexually explicit conduct), 9.68A.090 (communication with minor for immoral purposes), 9.68A.100 (patronizing juvenile prostitute), or 9A.44.096 (sexual misconduct with a minor in the second degree), as well as any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030.

“(b) ‘Kidnapping offense’ means the crimes of kidnapping in the first degree, kidnapping in the second degree, and unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent.

“(7) A person who knowingly fails to register or who moves without notifying the county sheriff as required by this section is guilty of a class C felony if the crime for which the individual was convicted was a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony. If the crime was other than a felony or a federal or out-of-state conviction for an offense that under the laws of this state would be other than a felony, violation of this section is a gross misdemeanor. ”

Laws 1999, ch. 352, § 9, in subsec. (10), in two places inserted “sex offenses as defined in subsection (8)(a) of this section”; and added subsec. (11).

Laws 1999, 1st Sp.Sess., ch. 6, § 2, in subsec. (1), in the first sentence, following “Any adult or juvenile residing” inserted “whether or not the person has a fixed residence”; at the end of the first sentence, added “, or as otherwise specified in this section”; in subsec. (3), designated subd. (a); in the resulting subd. (3)(a), substituted lower case roman numerals for letters; inserted subd. (3)(b); inserted subds. (4)(a)(vii) and (4)(a)(viii); inserted subsec. (6); renumbered the subsequent subsections; and changed internal cross-references to reflect the renumbering.

Laws 2000, ch. 91, § 2, added subsec. (a)(a)(ix); from subsec. (5)(a), following “the county of the person's new residence.” deleted:

“If any person required to register pursuant to this section moves out of Washington state, the person must also send written notice within ten days of moving to the new state or a foreign country to the county sheriff with whom the person last registered in Washington state.”;

and in subsec. (11), following “A person who knowingly fails to register or who moves” inserted “within the state”.

Laws 2001, ch. 95, § 2 rewrote subsecs. (9)(a) and (9)(b), which formerly read:

“(a) ‘Sex offense’ means any offense defined as a sex offense by RCW 9.94A.030 and any violation of RCW 9.68A.040 (sexual exploitation of a minor), 9.68A.050 (dealing in depictions of minor engaged in sexually explicit conduct), 9.68A.060 (sending, bringing into state depictions of minor engaged in sexually explicit conduct), 9.68A.090 (communication with minor for immoral purposes), 9.68A.100 (patronizing juvenile prostitute), or 9A.44.096 (sexual misconduct with a minor in the second degree), as well as any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030.

“(b) ‘Kidnapping offense’ means the crimes of kidnapping in the first degree, kidnapping in the second degree, and unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent.”

Laws 2001, ch. 169, § 1 rewrote subsec. (6), which formerly read:

“(a) Any person required to register under this section who lacks a fixed residence shall provide written notice to the sheriff of the county where he or she last registered within fourteen days after ceasing to have a fixed residence. The notice shall include the information required by subsection (3)(b) of this section, except the photograph and fingerprints. The county sheriff may, for reasonable cause, require the offender to provide a photograph and fingerprints. The sheriff shall forward this information to the sheriff of the county in which the person intends to reside, if the person intends to reside in another county.

“(b) A person who lacks a fixed residence must report in person to the sheriff of the county where he or she is registered. If he or she has been classified as a risk level I sex or kidnapping offender, he or she must report monthly. If he or she has been classified as a risk level II or III sex or kidnapping offender, he or she must report weekly. The lack of a fixed residence is a factor that may be considered in determining a sex offender's risk level.

“(c) If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within fourteen days after ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (4)(a)(vii) or (viii) and (6) of this section. To prevail, the person must prove the defense by a preponderance of the evidence.”

Laws 2002, ch. 31, § 1, reenacted the section and, in subsec. (9), inserted subd. (a)(iii) and redesignated former subds. (a)(iii) and (a)(iv) as (a)(iv) and (a)(v).

Laws 2003, ch. 53 reorganized criminal provisions in order to clarify and simplify the identification and referencing of crimes.

Laws 2003, ch. 215, § 1, in subsec. (1), in the third sentence, designated cl. (a) and added cls. (b) and (c).

Laws 2005, c. 380, § 1, rewrote subsec. 1; in subsec. (2) added public and private schools to the scope of the subsection; and added subsec. 12 relating to the imposition of liability for failing to release information. Prior to revision subsec. (1), read:

“(1) Any adult or juvenile residing whether or not the person has a fixed residence, or who is a student, is employed, or carries on a vocation in this state who has been found to have committed or has been convicted of any sex offense or kidnapping offense, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping offense, shall register with the county sheriff for the county of the person's residence, or if the person is not a resident of Washington, the county of the person's school, or place of employment or vocation, or as otherwise specified in this section. Where a person required to register under this section is in custody of the state department of corrections, the state department of social and health services, a local division of youth services, or a local jail or juvenile detention facility as a result of a sex offense or kidnapping offense, the person shall also register at the time of release from custody with an official designated by the agency that has jurisdiction over the person. In addition, any such adult or juvenile: (a) Who is admitted to a public or private institution of higher education shall, within ten days of enrolling or by the first business day after arriving at the institution, whichever is earlier, notify the sheriff for the county of the person's residence of the person's intent to attend the institution; (b) who gains employment at a public or private institution of higher education shall, within ten days of accepting employment or by the first business day after commencing work at the institution, whichever is earlier, notify the sheriff for the county of the person's residence of the person's employment by the institution; or (c) whose enrollment or employment at a public or private institution of higher education is terminated shall, within ten days of such termination, notify the sheriff for the county of the person's

residence of the person's termination of enrollment or employment at the institution. Persons required to register under this section who are enrolled in a public or private institution of higher education on June 11, 1998, must notify the county sheriff immediately. The sheriff shall notify the institution's department of public safety and shall provide that department with the same information provided to a county sheriff under subsection (3) of this section.”

Laws 2006, ch. 126, § 2, in subsec. 2, corrected a citation; in subsec. 3, par. (a), cl. (ii), substituted “complete residential address” for “address”; in subsec. 4, par. (a), cl. (v), substituted “within three business days” for “within thirty days”; in subsecs. 5 and 6, inserted “signed” preceding “written notice” throughout each respective subsection; in subsec. 10, par. (a), substituted “A person who knowingly fails to comply with any of the requirements of this section” for “A person who knowingly fails to register with the county sheriff or notify the county sheriff, or who changes his or her name without notifying the county sheriff and the state patrol, as required by this section”; and in subsec. 11, par. (a), substituted “A person who knowingly fails to comply with any of the requirements of this section” for “A person who knowingly fails to register or who moves within the state without notifying the county sheriff as required by this section”.

Laws 2006, ch. 127, § 2, in subsec. (2), substituted “4.24.550” for “4.24.500”; in subsec. (4) (a)(v), substituted “three business days” for “thirty days”; inserted “for offenses committed before, on, or after February 28, 1990,”; and twice inserted “before,”.

Laws 2006, ch. 128, § 2, in subsec. (2), substituted “4.24.550” for “4.24.500”; and, in subsec. (10), substituted “comply with any of the requirements of” for “register with the county sheriff or notify the county sheriff, or who changes his or her name without notifying the county sheriff and the state patrol, as required by”.

Laws 2006, ch. 129, § 2, in subsec. (2), substituted “4.24.550” for “4.24.500”; inserted subsec. (7) and made conforming changes to designations and internal references; and, in subsec. (9), added the second sentence.

Laws 2008, ch. 230, § 1, in subsec. (11)(a) substituted “class B felony” for “class C felony”.

2010 Legislation

Laws 2010, ch. 265, § 1, in subsec. (6)(b), substituted the present third sentence for a former third sentence, which read “The county sheriff's office may require the person to list the locations where the person has stayed during the last seven days.”; deleted a former subsec. (7) and made conforming changes. Former subsec. (7) read:

“(7) All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety

days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. An offender who complies with the ninety-day reporting requirement with no violations for a period of at least five years in the community may petition the superior court to be relieved of the duty to report every ninety days. The petition shall be made to the superior court in the county where the offender resides or reports under this section. The prosecuting attorney of the county shall be named and served as respondent in any such petition. The court shall relieve the petitioner of the duty to report if the petitioner shows, by a preponderance of the evidence, that the petitioner has complied with the reporting requirement for a period of at least five years and that the offender has not been convicted of a criminal violation of this section for a period of at least five years, and the court determines that the reporting no longer serves a public safety purpose. Failure to report, as specified, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.”

Laws 2010, ch. 267, § 2, rewrote the section.

CROSS REFERENCES

Biological samples collected for DNA identification analysis, see § 43.43.754.

Change of name, sex offenders subject to registration to follow procedures set forth in this section, see § 4.24.130.

Notice of inmate's discharge or release to county of residence other than county of conviction, see § 70.48.470.

Notice to defendant charged with sex offense of registration requirement, see § 10.01.200.

Schools for the deaf and blind, duty of superintendents to report attendance of sex offenders to parent, custodian, or guardian of other students, see § 72.40.210.

Statewide registered kidnapping and sex offender web site, inclusion of level I sex offenders who fail to maintain registration as required by this section, see § 4.24.550.

ADMINISTRATIVE CODE REFERENCES

Sex offender and kidnapping offender registration, see WAC 446-20-500 et seq.

LAW REVIEW AND JOURNAL COMMENTARIES

Custody requirement in the context of sex offender registration and notification statutes. Tina D, Santos, 23 Seattle U.L.Rev. 457 (1999).

Prevention versus punishment: Toward a principled distinction in the restraint of released sex offenders. 109 Harv.L.Rev. 1711 (1996).

Washington's unconstitutional law of single-count, single-defendant inconsistent verdicts in *State v. Goins*. Natasha Shekdar Black, 78 Wash.L.Rev. 557 (2003).

LIBRARY REFERENCES

2009 Main Volume

Mental Health 452, 469.
Westlaw Topic No. 257A.

RESEARCH REFERENCES

ALR Library

54 ALR 6th 99, Invasion of Privacy by Internet or Website Postings.

41 ALR 6th 141, Court's Duty to Advise Sex Offender as to Sex Offender Registration Consequences or Other Restrictions Arising from Plea of Guilty, or to Determine that Offender is Advised Thereof.

39 ALR 6th 577, State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register With Authorities as Applied to Juvenile Offenders—Expungement, Stay or Deferral, Exceptions, Exemptions...

38 ALR 6th 1, State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register With Authorities as Applied to Juvenile Offenders—Duty to Register, Requirements for Registration, and Procedural...

37 ALR 6th 55, State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register With Authorities as Applied to Juvenile Offenders—Constitutional Issues.

34 ALR 6th 171, Validity, Construction, and Application of State Statutory Requirement that Person Convicted of Sexual Offense in Other Jurisdiction Register or be Classified as Sexual Offender in Forum State.

33 ALR 6th 91, Validity, Construction, and Application of State Statutes Imposing Criminal Penalties for Failure to Register as Required Under Sex Offender or Other Criminal Registration Statutes.

36 ALR 5th 161, State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register With Authorities.

167 ALR 845, Effect, as to Prior Offenses, of Amendment Increasing Punishment for Crime.

83 ALR 1362, Constitutionality of Statute Which Makes Specified Punishment or Penalty Mandatory and Permits No Exercise of Discretion on Part of Court or Jury.

Encyclopedias

39 Am. Jur. Proof of Facts 2d 587, Establishment of Person's Domicil.

Treatises and Practice Aids

12 Wash. Prac. Series § 1015, Legal Effect of Finding of Insanity.

12 Wash. Prac. Series § 1111, Conduct of the Arraignment.

13 Wash. Prac. Series § 4819, Advisement of Rights and Responsibilities.

22 Wash. Prac. Series § 4.24.130, Action for Change of Name—Fees.

4A Wash. Prac. Series CrR 4.2, Pleas.

4A Wash. Prac. Series CrR 6.16, Verdicts and Findings.

4B Wash. Prac. Series CrRLJ 4.2, Pleas and Pretrial Disposition.

4B Wash. Prac. Series CrRLJ 6.16, Jury Verdicts and Findings.

5D Wash. Prac. Series ER 807, Child Victims or Witnesses.

5D Wash. Prac. Series 43.43.754, DNA Identification System—Biological Samples—Collection, Use, Testing—Scope and Application of Section.

11A Wash. Prac. Series WPIC 300.15, Aggravating Circumstance—Sexual Motivation [RCW 9.94A.535(3)(F)].

13A Wash. Prac. Series § 110, Sexual Motivation.

13A Wash. Prac. Series § 1609, Practical Considerations.

13B Wash. Prac. Series § 2408, Defenses.

13B Wash. Prac. Series § 2415, Practical Considerations.

13B Wash. Prac. Series § 2418, Sex Offender Registration.

UNITED STATES CODE ANNOTATED

2009 Main Volume

Child protection, sex offender registration and notification,
Crime information databases, access, see 42 U.S.C.A. § 16961.

Generally, see 42 U.S.C.A. §§ 16911 to 16929.

Project Safe Childhood program, see 42 U.S.C.A. § 16942.

Sex offender registration,

Failure to register, see 18 U.S.C.A. § 2250.

Supervised release, see 18 U.S.C.A. § 3583.

UNITED STATES SUPREME COURT

Due process, sex offender registration, right to hearing on dangerousness, public notification provisions, see *Connecticut Dept. of Public Safety v. Doe*, 2003, 123 S.Ct. 1160, 538 U.S. 1, 155 L.Ed.2d 98.

NOTES OF DECISIONS

In general 2

Classification of offenders 5.7

Defenses 15

Delegation of authority 2.5

Discretion of court 1.5

Discretion of court 14

Double jeopardy 5.5

Due process 5

Evidence 17

Ex post facto law 4

Failure to object 20

Failure to register 11

Habeas corpus 13

Indictment and information 16.5

Ineffective assistance of counsel 16

Justiciable controversy 4.5

Juveniles 7

Mootness 4.5

Notice 6

Out-of-state convictions 13.5

Place of residence 9

Preservation of issues 20

Purpose 3

Residence 10

Retroactivity 4

Review 19

Sentence and punishment 18

Substantial compliance 12

Under supervision 8

Validity 1

1. Validity

State statutory requirement that convicted sex offenders register with local law enforcement agencies did not amount to “punishment” subject to ex post facto clause, as to offenders who were convicted before statute was enacted; statute evidenced regulatory, not punitive, intent, and sanction was not so punitive in effect as to overcome nonpunitive legislative intent, even though statute imposed affirmative duty to register and criminal penalty for failure to do so. *Russell v. Gregoire*, C.A.9 (Wash.)1997, 124 F.3d 1079, certiorari denied 118 S.Ct. 1191, 523 U.S. 1007, 140 L.Ed.2d 321. Constitutional Law 🔑 2821; Mental Health 🔑 433(2)

State statute requiring convicted sex offenders to register with local law enforcement authorities and requiring disclosure of offenders' conviction information to community did not violate any constitutional right to privacy. *Russell v. Gregoire*, C.A.9 (Wash.)1997, 124 F.3d 1079, certiorari denied 118 S.Ct. 1191, 523 U.S. 1007, 140 L.Ed.2d 321. Constitutional Law 🔑 1245; Mental Health 🔑 433(2)

State statute which required registration by convicted sex offenders and disclosure of offenders' conviction information to local community did not deprive offenders of liberty interest and thus did not violate due process. *Russell v. Gregoire*, C.A.9 (Wash.)1997, 124 F.3d 1079, certiorari denied 118 S.Ct. 1191, 523 U.S. 1007, 140 L.Ed.2d 321. Constitutional Law 🔑 4343; Mental Health 🔑 433(2)

Sex offender registration statute was not unconstitutionally vague as to whether sex offenders must reregister when they are released from incarceration that was due to violation of their probation for a sex offense, as case law held that incarceration for probation violations was a consequence of the original crime, and thus incarceration due to violating probation for a sex offense is a result of the original sex offense and thus requires reregistration. *State v. Watson* (2007) 160 Wash.2d 1, 154 P.3d 909. Constitutional Law 🔑 4343; Mental Health 🔑 433(2)

Statute requiring registration as a sex offender upon release from custody, and which applied to release from confinement for probation violations regardless of whether registration information had changed, was not unconstitutionally vague; confinement on the basis of probation violations constituted a continuing consequence of the original prosecution, and nothing in the statute suggested that a prior registration exempted a registrant from later registration requirements when the registrant was returning to the same address. *State v. Watson* (2005) 130 Wash.App. 376, 122 P.3d 939, review granted 157 Wash.2d 1016, 142 P.3d 608, affirmed 160 Wash.2d 1, 154 P.3d 909. Constitutional Law 🗝️ 4343; Mental Health 🗝️ 433(2)

Defendant failed to establish that statute which set forth the requirements for sex offender registration was unconstitutional as applied to him; although statute had been previously held unconstitutional because it did not allow a sex offender who did not have a fixed residence to know “when” he needed to give written notice that he was changing his residence, defendant's argument did not address such issue, but rather addressed the issue of “what” constituted sufficient written notice that defendant was changing his residence. *State v. Prestegard* (2001) 108 Wash.App. 14, 28 P.3d 817. Mental Health 🗝️ 469.5

Provision of sex offender registration statute requiring newly released sex offenders to register an “address” was unconstitutionally vague; provision did not distinguish between residential address and mailing address, requiring a person of common intelligence to guess at meaning and application of term “address.” *State v. Jenkins* (2000) 100 Wash.App. 85, 995 P.2d 1268, review denied 141 Wash.2d 1011, 10 P.3d 1072. Constitutional Law 🗝️ 4343; Mental Health 🗝️ 433(2)

Provision of sex offender registration statute requiring a offender to send a written notice of change to his or her “residence address” was unconstitutionally vague; one could reasonably conclude that a person without a fixed, regular place to sleep did not have a residence under the statute, and persons of common intelligence were required to guess as to the types of living situations encompassed by the term “residence.” *State v. Jenkins* (2000) 100 Wash.App. 85, 995 P.2d 1268, review denied 141 Wash.2d 1011, 10 P.3d 1072. Constitutional Law 🗝️ 4343; Mental Health 🗝️ 433(2)

Washington statute requiring convicted felony sex offenders to register as such was not unconstitutional ex post facto law, as applied to defendants convicted of felony sex offenses prior to statute's effective date; legislature's purpose in enacting statute was regulatory and not punitive, and all persons had opportunity to petition court to be relieved of duty to register. *State v. Ward* (1994) 123 Wash.2d 488, 869 P.2d 1062. Constitutional Law 🗝️ 2821; Mental Health 🗝️ 433(2)

Washington statute requiring convicted felony sex offenders to register as such did not violate defendant's equal protection rights, though statute distinguished between convicted offenders who were under correctional supervision and those who were not for purposes of establishing registration deadlines; legislature could rationally conclude that classification provided Department of Corrections with manageable number of sex offenders to notify and monitor. *State v. Ward* (1994) 123 Wash.2d 488, 869 P.2d 1062. Constitutional Law 🔑 3176; Mental Health 🔑 433(2)

Washington statute requiring convicted felony sex offenders to register as such would be upheld from equal protection challenge, based on distinction drawn in statute between those who were under correctional supervision and those who were not, as long as statute rested upon legitimate state objective and was not wholly irrelevant to achieving that objective. *State v. Ward* (1994) 123 Wash.2d 488, 869 P.2d 1062. Constitutional Law 🔑 3176; Mental Health 🔑 433(2)

1.5. Discretion of court

Trial court did not abuse its discretion in relieving defendant of his duty to register as a sex offender, where defendant showed by clear and convincing evidence that he had, for ten years, complied with probation, community supervision, community custody, and was at a low risk to reoffend, and that the purpose of the sex offender registration statutes were no longer being met by continuing to require defendant to register. *State v. McMillan* (2009) 152 Wash.App. 423, 217 P.3d 374. Mental Health 🔑 469(2)

2. In general

Trial court lacked statutory authority to require defendant, who had been convicted of possessing videotapes of a minor engaged in sexually explicit conduct, to register as a sex offender, as offense for which defendant was convicted was not a "sex offense." *State v. Johnson* (2001) 104 Wash.App. 489, 17 P.3d 3. Mental Health 🔑 469(2)

Convicted sex offender who had been evicted from his former residence, and who was homeless and living on streets, showed by preponderance of the evidence that he did not know location of any new residence before moving, thus establishing affirmative defense to charge of failing to register his address in violation of statute. *State v. Pickett* (1999) 95 Wash.App. 475, 975 P.2d 584. Mental Health 🔑 469.5

Objective of registration requirement for convicted sex offenders is to allow law enforcement to remain aware of the residence of sex offenders for reasons of public notification. *State v. Pickett* (1999) 95 Wash.App. 475, 975 P.2d 584. Mental Health 🔑 469(1)

Stepfather who was found civilly liable for sexual abuse of his stepdaughter was not convicted of sex offense and, therefore, was not required to register under sex offender registration statute. *Oostra v. Holstine* (1997) 86 Wash.App. 536, 937 P.2d 195, review denied 133 Wash.2d 1034, 950 P.2d 478. Mental Health  469(2)

Sex offender registration statute applies only where there has been adult criminal conviction or juvenile adjudication for sex offense. *Oostra v. Holstine* (1997) 86 Wash.App. 536, 937 P.2d 195, review denied 133 Wash.2d 1034, 950 P.2d 478. Mental Health  454

Duty to register as sex offender arises pursuant to legislative mandate, rather than by order of sentencing court. *State v. Munds* (1996) 83 Wash.App. 489, 922 P.2d 215. Mental Health  469(1)

Duty to register as sex offender arises pursuant to legislative mandate, rather than “order.” *State v. Acheson* (1994) 75 Wash.App. 151, 877 P.2d 217. Mental Health  469(1)

2.5. Delegation of authority

The legislature improperly delegated authority to classify sex offenders to the county sheriffs, in violation of the separation of powers principles, and thus conviction for failure to report to the county sheriff's office as a registered sex offender was required to be reversed; the sex offender classification statute did not provide guidance to law enforcement in how to determine a sex offender's classification. *State v. Ramos* (2009) 149 Wash.App. 266, 202 P.3d 383. Constitutional Law  2438; Mental Health  433(2); Mental Health  469.5

3. Purpose

The purpose of the sex offender registration statute is to assist law enforcement agencies' efforts to protect their communities against sex offenders who re-offend. *State v. Stratton* (2005) 130 Wash.App. 760, 124 P.3d 660. Mental Health  469(1)

The purpose of statute that requires sex offenders to give written notice upon a change of residence is to help law enforcement protect the public by making sex offenders easy to locate. *State v. Prestegard* (2001) 108 Wash.App. 14, 28 P.3d 817. Mental Health  469(1)

4. Retroactivity

Public notification provisions of Washington's Community Protection Act, authorizing local law enforcement agencies to notify public and media of convicted sex offender's identity, criminal record, address, place of employment, and assessed propensity to reoffend, were punitive, not merely regulatory, such that ex post facto clause prohibited their enforcement against sex offender convicted of crimes predating enactment of Act; public notification unavoidably inflicted humiliation and ostracism, and exposed released offenders

to hostility, harassment, and reprisal. *Doe v. Gregoire*, W.D.Wash.1997, 960 F.Supp. 1478. Constitutional Law 🔑 2820; Mental Health 🔑 433(2)

Provisions of Washington's Community Protection Act requiring registration of convicted sex offenders and notification to law enforcement agencies were regulatory, not punitive, such that ex post facto clause did not preclude application of those provisions to offender convicted prior to enactment of Act. *Doe v. Gregoire*, W.D.Wash.1997, 960 F.Supp. 1478. Constitutional Law 🔑 2821; Mental Health 🔑 433(2)

Although sex offender registration requirement was retroactive, the disadvantage it placed upon convicted sex offender was not "punishment" since purpose of registration was to protect public, and thus, registration requirement did not constitute ex post facto law with respect to defendant convicted prior to its effective date. *Petition of Estavillo* (1993) 69 Wash.App. 401, 848 P.2d 1335, review denied 122 Wash.2d 1003, 859 P.2d 602. Constitutional Law 🔑 2821; Mental Health 🔑 433(2)

Sex offender registration statute does not address only conduct occurring after its enactment so as to be prospective in application; statute imposes an affirmative obligation upon sex offenders, including those who committed sex offense prior to enactment of statute; thus, statute applies retroactively. *Petition of Estavillo* (1993) 69 Wash.App. 401, 848 P.2d 1335, review denied 122 Wash.2d 1003, 859 P.2d 602. Mental Health 🔑 433(2)

Retroactive application to defendant, convicted of attempted indecent liberties, of statutory requirement that he register as sex offender with sheriff in county in which he would be living did not operate to his disadvantage to such extent that it was in effect additional punishment, violative of ex post facto prohibition. *State v. Taylor* (1992) 67 Wash.App. 350, 835 P.2d 245, review denied 123 Wash.2d 1031, 877 P.2d 695. Constitutional Law 🔑 2821; Mental Health 🔑 433(2)

4.5. Justiciable controversy

Appeal in case of sex offender challenging Washington's sex offender registration statute was moot where, following the district court's grant of summary judgment to defendants, the state repealed the challenged provision of the statute. *TW v. Spokane County*, C.A.9 (Wash.)2010, 2010 WL 2640342, Unreported. Federal Courts 🔑 724

Where repeal of challenged provision of Washington's sex offender registration statute rendered moot sex offender's appeal challenging the constitutionality of the statute, sex offender's request for costs and attorneys fees was not sufficient to keep the case alive; although the repeal of a challenged law does not moot a claim for damages by a plaintiff alleging a past violation of his rights, sex offender did not attempt to state a cause of action for damages based on any past deprivation of his constitutional rights but, instead, requested

injunctive and declaratory relief, “reasonable costs and attorney fees,” and such further legal and equitable relief as to the court appeared just. *TW v. Spokane County*, C.A.9 (Wash.)2010, 2010 WL 2640342, Unreported. Federal Courts 🔑 724

5. Due process

Conviction for failure to register as kidnapping offender violated due process, where the amended registration statute was not sufficiently specific so that defendant would have been on notice that he was subject to registration requirement; statute applied to kidnapping offenders on “active supervision” when the statute was amended and provided that Department of Corrections' (DOC) definition of active supervision would control, DOC had not provided a written definition of active supervision, and community corrections officers' testimony that active supervision included monetary supervision directly conflicted with DOC's records indicating defendant's active supervision had ended before the statute was amended and while he was still on monetary supervision. *State v. Liden* (2003) 118 Wash.App. 734, 77 P.3d 668. Constitutional Law 🔑 4509(16); Criminal Law 🔑 1222.1

Fact that defendant would have to register as felony sex offender if he pled guilty in accordance with plea agreement was mere “collateral consequence” of plea, of which defendant did not have to be notified, as matter of due process, prior to entry of plea. *State v. Ward* (1994) 123 Wash.2d 488, 869 P.2d 1062. Constitutional Law 🔑 4587; Criminal Law 🔑 273.1(4)

5.5. Double jeopardy

Statute requiring a convicted sex offender to register “in person, every ninety days” was ambiguous regarding whether the unit of prosecution, for double jeopardy purposes, was each 90-day period in which an offender with a fixed residence failed to register, or instead the failure was an ongoing course of conduct, and thus, under the rule of lenity, the unit of prosecution would be construed as involving an ongoing course of conduct. *State v. Green* (2010) 156 Wash.App. 96, 230 P.3d 654. Double Jeopardy 🔑 148

Defendant's conviction for two counts of failure to register as a sex offender violated double jeopardy because his failure to report weekly during the two charged time periods constituted only a single criminal act or one “unit of prosecution;” duty to report weekly was an ongoing course of conduct that could not be divided into separate time periods to support separate charges. *State v. Durrett* (2009) 150 Wash.App. 402, 208 P.3d 1174. Double Jeopardy 🔑 139.1

5.7. Classification of offenders

County sheriff's classification of defendant as a level III sex offender, which classification was based on the recommendation of Department of Social and Health Services (DSHS), did not

violate separation of powers principles; the legislature provided adequate standards to guide DSHS in classifying a sex offender's risk level, and the use of numeric scoring in response to identical questions and designated risk considerations minimized subjective, arbitrary considerations in classifying defendant's risk level. *State v. Brosius* (2010) 154 Wash.App. 714, 225 P.3d 1049. Constitutional Law 🔑 2438; Mental Health 🔑 469(3)

6. Notice

Defendant's assertion that he would not have pleaded guilty to child molestation had State disclosed sex offender registration requirement in judgment and sentence was not credible, given that defendant entered guilty plea seven weeks before registration law was enacted. *State v. Munds* (1996) 83 Wash.App. 489, 922 P.2d 215. Criminal Law 🔑 273.1(5)

Failure to advise sex offender of duty to register at time of guilty plea is not reversible error, as registration is only collateral consequence of plea. *State v. Munds* (1996) 83 Wash.App. 489, 922 P.2d 215. Criminal Law 🔑 1167(5)

State's failure to include notification of sex offender registration requirement in judgment and sentence for child molestation was cured by promptly notifying defendant when oversight was discovered; defendant's duty to register was triggered at that time. *State v. Munds* (1996) 83 Wash.App. 489, 922 P.2d 215. Mental Health 🔑 458

7. Juveniles

Court of Appeals could not add juvenile sexual motivation statute to the statutory definition of "sex offense" for that would be to create offense by judicial construction which Court may not do; legislature's omission of juvenile sexual motivation statute from definition of "sex offense" was likely inadvertent and did not undermine effectiveness of sex offender registration statute or statute defining sex offenses, addition of juvenile sexual motivation statute to definition of "sex offense" was not imperatively required to make any of the statutes rational, and omission of juvenile sexual motivation statute from definition of "sex offense" did not make registration statute ambiguous. *State v. S.M.H.* (1995) 76 Wash.App. 550, 887 P.2d 903. Constitutional Law 🔑 2507(1); Mental Health 🔑 454

Although juvenile was found to have committed a felony with sexual motivation, he did not commit sex offense as defined by statute to include adult sexual motivation statute but not juvenile sexual motivation statute and therefore, juvenile was not required to register as sex offender. *State v. S.M.H.* (1995) 76 Wash.App. 550, 887 P.2d 903. Infants 🔑 227(2)

Juvenile's duty to register as sex offender does not terminate upon juvenile's 21st birthday, as duty to register as sex offender arises pursuant to legislative mandate, rather than court order. *State v. Acheson* (1994) 75 Wash.App. 151, 877 P.2d 217. Infants 🗝️ 227(2)

Sex offender registration statute included juveniles under jurisdiction of juvenile court, as it uses “conviction,” which triggers registration requirement, to mean both “adult convictions and juvenile adjudications for sex offenses.” *State v. Acheson* (1994) 75 Wash.App. 151, 877 P.2d 217. Infants 🗝️ 227(2)

8. Under supervision

Sex offender registration law applied to convicted child molester, despite claim that he was not under supervision when he was released; subsequent amendments to law, which established registration deadlines according to various factors including whether convict is in custody or under supervision, did not relieve molester or any other sex offender of duty to register. *State v. Munds* (1996) 83 Wash.App. 489, 922 P.2d 215. Mental Health 🗝️ 469(2)

9. Place of residence

Transient sex offender's failure to comply with county sheriff's requirement that he list his locations during the previous week did not constitute a failure to comply with registration requirements, for purposes of offense of failure to register as a sex offender; although county sheriff was statutorily authorized to command that transient sex offenders list their locations during the previous week, sex offender registration statute did not mandate that transient sex offenders list their locations, and thus such was not a “requirement” for which noncompliance was a crime. *State v. Flowers* (2010) 154 Wash.App. 462, 225 P.3d 476. Mental Health 🗝️ 469.5

Defendant who did not have a fixed, regular nighttime residence after serving time in jail for a sex offense, and instead stayed with various friends while he looked for work, was “homeless” and did not violate sex offender registration statute by failing to provide authorities with a residential address; defendant did not have sufficient funds to rent appropriate shelter for himself, and did not know from day to day whether his friends would provide shelter. *State v. Jenkins* (2000) 100 Wash.App. 85, 995 P.2d 1268, review denied 141 Wash.2d 1011, 10 P.3d 1072. Mental Health 🗝️ 469.5

10. Residence

Residential status is not an element of the crime of failure to register as a sex offender. *State v. Peterson* (2010) 168 Wash.2d 763, 230 P.3d 588. Mental Health 🗝️ 469.5

Although a registrant's residential status informs the deadline by which he must register as a sex offender, it is possible to prove that a registrant failed to register within any applicable deadline without having to specify the registrant's particular residential status. *State v. Peterson* (2010) 168 Wash.2d 763, 230 P.3d 588. Mental Health 🗝️ 469.5

Residential status is not an element of the crime of failing to register as a sex offender. *State v. Bennett* (2010) 154 Wash.App. 202, 224 P.3d 849, review denied 168 Wash.2d 1042, 233 P.3d 889. Mental Health 🗝️ 469.5

Defendant's child molestation conviction, in Georgia, was not comparable to the Washington State felony offense of attempted second-degree child molestation, and thus, defendant was not required, when changing residences in Washington State after having registered as a sex offender in Washington State, to change his registered address; the Georgia statute criminalizing child molestation did not include two essential elements required by the Washington State crime of attempted second-degree child molestation, i.e., that the victim was not married to the perpetrator and that the perpetrator was at least 36 months older than the victim, and there was no showing that the Georgia court had found, beyond a reasonable doubt, that the victim was not married to the defendant and that the defendant was at least 36 months older than the victim. *State v. Werneth* (2008) 147 Wash.App. 549, 197 P.3d 1195. Mental Health 🗝️ 469(5)

Defendant sex offender was not required to re-register under the registration statute based on a change of address, inasmuch as defendant's previously registered address was still his fixed residence; although defendant had moved out of the house he was living in, he still received his mail there, he received phone service there, he spent nights there in his car, and the sheriff could have contacted him at the address by mail, phone, or in person in the evenings. *State v. Stratton* (2005) 130 Wash.App. 760, 124 P.3d 660. Mental Health 🗝️ 469(5)

Convicted sex offender does not have statutory duty to give written notice of a change of address at least fourteen days before moving, where the offender does not know fourteen days in advance that he will be moving and he has no known residence into which to move. *State v. Bassett* (1999) 97 Wash.App. 737, 987 P.2d 119. Mental Health 🗝️ 469(5)

For purposes of convicted sex offender registration statute's requirement that convicted offenders file written notice of a change in residence address, living on the streets, homelessness, does not constitute a "residence." *State v. Bassett* (1999) 97 Wash.App. 737, 987 P.2d 119. Mental Health 🗝️ 469(5)

Determination that defendant had established a "residence" in Bellingham, and therefore was required as convicted sex offender to register with Whatcom County sheriff, was supported by evidence that defendant, who had earlier registered his Seattle residence with King County sheriff, moved out of Seattle residence to look for job and apartment in Bellingham and

stayed at three locations in Bellingham over 10-day period, each of which he intended to return to and did not plan to leave on any definite date. *State v. Pray* (1999) 96 Wash.App. 25, 980 P.2d 240, publication ordered, review denied 139 Wash.2d 1010, 994 P.2d 849. Mental Health 🗝️ 469(4)

Requirement that convicted sex offender register with county sheriff each time offender changes his residence is not triggered only by a permanent residence arrangement; temporary habitation may be a “residence” for purposes of registration requirement. *State v. Pray* (1999) 96 Wash.App. 25, 980 P.2d 240, publication ordered, review denied 139 Wash.2d 1010, 994 P.2d 849. Mental Health 🗝️ 469(5)

Convicted sex offender who was homeless and lived on streets, sometimes staying overnight in parks and sometimes on sidewalks, did not have “residence,” and thus could not be convicted for failing to register residence address with authorities as required by statute. *State v. Pickett* (1999) 95 Wash.App. 475, 975 P.2d 584. Mental Health 🗝️ 469.5

“Residence” of convicted sex offender, for purposes of statute requiring such offenders to give notice to specified authorities of changes in their residence address, is the place where a person lives as either a temporary or permanent dwelling, and a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit. *State v. Pickett* (1999) 95 Wash.App. 475, 975 P.2d 584. Mental Health 🗝️ 469(5)

It is an affirmative defense to the charge of failure to register as convicted sex offender that the offender does not know the location of his or her new residence at least 14 days before moving. *State v. Pickett* (1999) 95 Wash.App. 475, 975 P.2d 584. Mental Health 🗝️ 469.5

11. Failure to register

Indictment charging defendant with failure to register as sex offender was fatally deficient, in that it did not allege that defendant “knowingly” failed to register. *State v. Peterson* (2008) 145 Wash.App. 672, 186 P.3d 1179, review granted 165 Wash.2d 1027, 203 P.3d 379, affirmed 168 Wash.2d 763, 230 P.3d 588. Mental Health 🗝️ 469.5

Failure to register as sex offender did not require State to prove whether defendant moved to fixed address or was homeless, for purposes of determining time periods within which defendant was required to register with sheriff; rather, statute required State to prove only that defendant knowingly failed to register. *State v. Peterson* (2008) 145 Wash.App. 672, 186 P.3d 1179, review granted 165 Wash.2d 1027, 203 P.3d 379, affirmed 168 Wash.2d 763, 230 P.3d 588. Mental Health 🗝️ 469.5

There was sufficient evidence that defendant knowingly failed to register as sex offender to support his conviction for that offense, despite defendant's claim that he was

unable to understand registration statute; defendant had followed registration statute for approximately four years before incident at issue, there was testimony that authorities read registration statute to defendant, and defendant signed form setting forth statutory requirements. *State v. Vanderpool* (2000) 99 Wash.App. 709, 995 P.2d 104, review denied 141 Wash.2d 1017, 10 P.3d 1072. Mental Health 🗝️ 469.5

12. Substantial compliance

Substantial compliance with statutory sex offender requirement that offender provide written notice to sheriff's office concerning his change of residence is not a defense for failing to provide actual notice. *State v. Prestegard* (2001) 108 Wash.App. 14, 28 P.3d 817. Mental Health 🗝️ 469.5

Even assuming that substantial compliance was defense to charge of failing to register as sex offender, facts of defendant's case did not support such defense; defendant admitted that he did not notify county of residence that he was returning to other county, and this was simple nonperformance, rather than misperformance. *State v. Vanderpool* (2000) 99 Wash.App. 709, 995 P.2d 104, review denied 141 Wash.2d 1017, 10 P.3d 1072. Mental Health 🗝️ 469.5

13. Habeas corpus

Habeas petitioner who had completed his sentence for child molestation but was required to register as sex offender under Washington law was not “in custody” for purposes of federal habeas corpus, and therefore district court lacked jurisdiction over petition; state's registration and notification requirements were more properly characterized as collateral consequence of conviction than as restraint on petitioner's liberty. *Williamson v. Gregoire*, C.A.9 (Wash.) 1998, 151 F.3d 1180, certiorari denied 119 S.Ct. 824, 525 U.S. 1081, 142 L.Ed.2d 682. Habeas Corpus 🗝️ 253

Convict released on his own recognizance pending execution of his sentence is “in custody” for habeas corpus purposes because he is obligated to appear at times and places ordered by the court. *Williamson v. Gregoire*, C.A.9 (Wash.) 1998, 151 F.3d 1180, certiorari denied 119 S.Ct. 824, 525 U.S. 1081, 142 L.Ed.2d 682. Habeas Corpus 🗝️ 255

13.5. Out-of-state convictions

To determine whether an out-of-state conviction qualifies as a sex offense, which would subject the offender to sex offender registration requirements, first, the trial court must examine the elements of the out-of-state crime and compare them to the elements of the comparable Washington crime, if the crimes have similar elements, the analysis is complete, but, if the elements are not identical, or the foreign statute is broader than the Washington definition of the particular crime, then, as a second step, the trial court may examine the facts

of the out-of-state crime as evidenced by the indictment or information. *State v. Howe* (2009) 151 Wash.App. 338, 212 P.3d 565. Mental Health 🗝️ 469(2)

Defendant's out of state conviction for failing to register as a sex offender was not legally comparable to failure to register as a sex offender offense under state law, and thus could not support conviction for failure to register as a sex offender; the out of state failure to register statute encompassed sex crimes that were not legally comparable to state sex offenses. *State v. Howe* (2009) 151 Wash.App. 338, 212 P.3d 565. Mental Health 🗝️ 469(2); Mental Health 🗝️ 469.5

14. Discretion of court

Prosecution for failure to register as sex offender for “a couple weeks” did not fall within circumstances necessary for discretionary dismissal by trial court, absent evidence that prosecution was product of arbitrary action or governmental misconduct and that there had been prejudice to defendant's rights. *State v. Stewart* (2007) 141 Wash.App. 791, 174 P.3d 111. Criminal Law 🗝️ 303.30(3)

Whether to conduct an evidentiary hearing on a sex offender's petition for early termination of sex offender registration requirements is in the reviewing court's discretion. *State v. Gossage* (2007) 138 Wash.App. 298, 156 P.3d 951, review granted 163 Wash.2d 1011, 180 P.3d 1290, affirmed in part, reversed in part 165 Wash.2d 1, 195 P.3d 525, certiorari denied 129 S.Ct. 2842, 174 L.Ed.2d 564. Mental Health 🗝️ 469(4)

15. Defenses

Substantial compliance was not defense in case of defendant charged with failing to register as sex offender. *State v. Vanderpool* (2000) 99 Wash.App. 709, 995 P.2d 104, review denied 141 Wash.2d 1017, 10 P.3d 1072. Mental Health 🗝️ 469.5

16. Ineffective assistance of counsel

Counsel's failure to call to trial court's attention recent decisions of the court of appeals, which held that the former sex offender registration statute under which defendant was prosecuted was unconstitutionally vague as applied to a homeless sex offender, was ineffective assistance of counsel, constituting reversible error; if counsel would have been aware of the decisions, which were decided nearly a year, and five months earlier, respectively, the trial court would have realized it was incorrect in its oral remarks stating that homelessness was unavailable as a defense. *State v. McKinnon* (2001) 110 Wash.App. 1, 38 P.3d 1015. Criminal Law 🗝️ 1910

16.5. Indictment and information

Charging information that charged defendant with failure to register as a sex offender provided sufficient notice of the element of defendant's sex offender risk level classification; although the charging document did not expressly state that defendant had a level II or III risk classification, it did state that he failed to report during the 90-day period required by statute, so it was necessarily implied that he had a level II or III classification since only level II or III sex offenders were required to report under the statute. *State v. Brosius* (2010) 154 Wash.App. 714, 225 P.3d 1049. Indictment And Information 🔑 71.4(1)

17. Evidence

There was sufficient evidence that defendant charged with violating 72-hour registration deadline did not register within 72 hours after vacating his registered address, to support conviction for failure to register as sex offender. *State v. Peterson* (2010) 168 Wash.2d 763, 230 P.3d 588. Mental Health 🔑 469.5

Failure to register as a sex offender is not an alternative means crime. *State v. Peterson* (2010) 168 Wash.2d 763, 230 P.3d 588. Mental Health 🔑 469.5

Evidence that defendant had no legal right to reside at the address he had given to the sheriff's office was insufficient to support his conviction for failing to register as a sex offender, where there was no evidence that he was notified of his ouster from his apartment by the landlord, that he changed addresses or maintained a residence elsewhere, or that he did not intend to return to his apartment; defendant was not legally evicted, and if he intended to return to his apartment, he had no legal duty to change his registration. *State v. Drake* (2009) 149 Wash.App. 88, 201 P.3d 1093, review denied 166 Wash.2d 1026, 217 P.3d 337. Mental Health 🔑 469.5

Evidence was sufficient, in prosecution for failing to register as a sex offender, to show that defendant had changed his residence; police officers, who went to apartment of defendant's sister 14 days after defendant reported that apartment as his address, testified that they did not find any men's clothing or any indication that a male lived there, that sister stated that defendant did not live there and had not been there in over a month, and that defendant's father also stated that defendant did not live at apartment. *State v. Castillo* (2008) 144 Wash.App. 584, 183 P.3d 355. Mental Health 🔑 469.5

Evidence was sufficient to support finding that defendant “knowingly” failed to register as a sex offender after changing residences; defendant's testimony that he registered his sister's address as his residence when he left jail and that he had registered as a transient with the sheriff's department every week earlier in the year allowed reasonable inference that defendant knew the registration requirements, and law enforcement specialist testified that the sheriff's department did not receive a change of address notice from defendant after date on which he reported his address as being his sister's apartment, where he was determined

to no longer be residing. *State v. Castillo* (2008) 144 Wash.App. 584, 183 P.3d 355. Mental Health 🔑 469.5

Conviction for failure to register as sex offender was supported by evidence that officer located defendant at residence in county where he had not registered, and defendant admitted he had been living there for “a couple weeks.” *State v. Stewart* (2007) 141 Wash.App. 791, 174 P.3d 111. Mental Health 🔑 469.5

Evidence was sufficient to support finding that defendant failed to register as a sex offender, given that state's only obligation was to prove that defendant was a sex offender who had not registered, even though defendant alleged he was homeless at time of incident, unless trial court believed his testimony on that point. *State v. McKinnon* (2001) 110 Wash.App. 1, 38 P.3d 1015. Mental Health 🔑 469.5

Evidence was sufficient to support defendant's conviction for failing to register as a sex offender; officer's testimony that he did not take defendant's photographs or fingerprints until day after defendant filled out sex offender registration form merely showed that office varied in its standard procedure and did not show that office misplaced defendant's registration form, and officer's testimony that sex offender registration forms were kept in two places only demonstrated where the forms were kept and did not establish that defendant's form was lost. *State v. Prestegard* (2001) 108 Wash.App. 14, 28 P.3d 817. Mental Health 🔑 469.5

Evidence was insufficient to support conviction for failing to register as a convicted sex offender, where defendant did not know 14 days in advance that he would be “evicted” from his sister's apartment, defendant was homeless for 11-day-period following eviction, and defendant had been in hotel for only hours before his arrest. *State v. Bassett* (1999) 97 Wash.App. 737, 987 P.2d 119. Mental Health 🔑 469.5

18. Sentence and punishment

Trial court appropriately recognized substantial and compelling reasons to impose an exceptional sentence downward for conviction by guilty plea to failure to register as a sex offender, of 36 months' confinement and 24 months of community custody; bottom of standard range was 43 months' confinement and 36 months' community custody, which together exceed 60-month statutory maximum by 19 months, and thus, to fit within statutory maximum, trial court reduced term of confinement to 36 months and term of community custody to 24 months. *State v. Davis* (2008) 146 Wash.App. 714, 192 P.3d 29, review denied 166 Wash.2d 1033, 217 P.3d 782. Sentencing and Punishment 🔑 870

Trial court was required to sentence defendant to a term of community custody upon his conviction for failure to register as a sex offender, even though a literal reading of applicable

provisions suggested otherwise; legislature had amended and renumbered one statute relating to community custody without correcting numbering in related provisions, and the result dictated by the literal statutory language as result of the renumbering was not intended. *State v. Castillo* (2008) 144 Wash.App. 584, 183 P.3d 355. Mental Health 🔑 469.5

Because defendant received consecutive sentences of three months for the charge of failure to register as a sex offender and 60 months for second degree trafficking in stolen property, each of which was within the statutory maximum for that offense, defendant's sentences did not exceed any maximum statutory penalty; accordingly, the trial court did not err in imposing consecutive sentences based upon defendant's unscored misdemeanor history, his likelihood of recidivism, and the court's determination that the standard sentence was clearly too lenient. *State v. Kuhlman* (2006) 135 Wash.App. 527, 144 P.3d 1214, review granted, cause remanded, review granted in part 161 Wash.2d 1014, 171 P.3d 1056. Sentencing And Punishment 🔑 601; Sentencing And Punishment 🔑 642

19. Review

Test for reviewing a defendant's challenge to the sufficiency of evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Drake* (2009) 149 Wash.App. 88, 201 P.3d 1093, review denied 166 Wash.2d 1026, 217 P.3d 337. Criminal Law 🔑 1144.13(3); Criminal Law 🔑 1159.2(7)

State's initial failure to provide a complete record on appeal from judgment of sentence for conviction for failure to register as a sex offender did not require dismissal, where State eventually supplemented the record with transcripts of guilty plea hearing and sentencing hearing. *State v. Davis* (2008) 146 Wash.App. 714, 192 P.3d 29, review denied 166 Wash.2d 1033, 217 P.3d 782. Mental Health 🔑 469.5

Defendant's argument that substantial compliance was defense to charge of failing to register as sex offender did not raise constitutional issue, and thus such argument could not be raised for first time on appeal. *State v. Vanderpool* (2000) 99 Wash.App. 709, 995 P.2d 104, review denied 141 Wash.2d 1017, 10 P.3d 1072. Criminal Law 🔑 1030(2)

On defendant's appeal from conviction for failing to register as sex offender, Court of Appeals would not review state's allegations that trial court improperly found that defendant was arrested in certain month and that defendant became registered when he was arrested, where state did not file notice of cross review and did not assign error to finding of fact, and state raised allegations for first time in argument section of its response brief. *State v. Vanderpool* (2000) 99 Wash.App. 709, 995 P.2d 104, review denied 141 Wash.2d 1017, 10 P.3d 1072. Criminal Law 🔑 1128(1); Criminal Law 🔑 1136

20. Preservation of issues

Defendant adequately preserved for appellate review his claim that the trial court erred in its comparability conclusions, which determined whether defendant's out of state convictions qualified as sex offenses, in prosecution for failure to register as a sex offender, where defendant refused to stipulate during trial or during sentencing that his out of state convictions were comparable to Washington sex offenses. State v. Howe (2009) 151 Wash.App. 338, 212 P.3d 565. Criminal Law 🗝️ 1030(3)

Current with all 2010 Legislation

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

Appendix C

RCW 9A.44.132 (2011)

West's RCWA 9A.44.132

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

Chapter 9A.44. Sex Offenses (Refs & Annos)

9A.44.132. Failure to register as sex offender or kidnapping offender

(1) A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense as defined in that section and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

(a) Except as provided in (b) of this subsection, the failure to register as a sex offender pursuant to this subsection is a class C felony.

(b) If a person has been convicted in this state of a felony failure to register as a sex offender on two or more prior occasions, the failure to register under this subsection is a class B felony.

(2) A person is guilty of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a sex offense other than a felony and knowingly fails to comply with any of the requirements of RCW 9A.44.130. The failure to register as a sex offender under this subsection is a gross misdemeanor.

(3) A person commits the crime of failure to register as a kidnapping offender if the person has a duty to register under RCW 9A.44.130 for a kidnapping offense and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

(a) If the person has a duty to register for a felony kidnapping offense, the failure to register as a kidnapping offender is a class C felony.

(b) If the person has a duty to register for a kidnapping offense other than a felony, the failure to register as a kidnapping offender is a gross misdemeanor.

(4) Unless relieved of the duty to register pursuant to RCW 9A.44.141 and 9A.44.142, a violation of this section is an ongoing offense for purposes of the statute of limitations under RCW 9A.04.080.

CREDIT(S)

[2010 c 267 § 3, eff. June 10, 2010.]

HISTORICAL AND STATUTORY NOTES

Application—2010 c 267: See note following RCW 9A.44.128.

Current with all 2010 Legislation

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 74933-1-I
)	
JASON BOYD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-----|--|-------------------|--|
| [X] | ERIK PEDERSEN, DPA
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S THIRD ST.
MOUNT VERNON, WA 98273 | (X)
()
() | U.S. MAIL
HAND DELIVERY
AGREED E-SERVICE
VIA COA PORTAL |
| [X] | JASON BOYD
797150
MCC-SOU
PO BOX 514
MONROE, WA 98272-0514 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF SEPTEMBER, 2016.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711