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King County Prosecutor  
Appellate Unit

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COURT OF APPEALS  
STATE OF WASHINGTON  
2009 SEP -4 PM 3:22  
NO. 62407-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN OGDEN,

Appellant.

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

The Honorable Steven Gonzalez, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

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

Issue Pertaining to Supplemental Assignment of Error

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

B. SUPPLEMENTAL ARGUMENT

ASSUMING, *ARGUENDO*, THE LEGISLATURE INTENDED TO SUBVERT THE SAVINGS STATUTE, THE AMENDED STATUTE ALTERS THE STANDARD OF PUNISHMENT WITHOUT NOTICE AND THEREFORE VIOLATES THE PROHIBITION ON EX POST FACTO LAWS.

1. Introduction

At sentencing, the court imposed a "mandatory" \$100 DNA collection fee and the \$500 victim penalty assessment, but waived all other fees. CP 321-27; 21RP 12.

It thus appears the court imposed the DNA fee under the mistaken impression it was "mandatory" while waiving all other non-mandatory fees. As discussed in Mr. Ogden's opening brief, based on the savings statute, RCW 10.01.040, the fee was not mandatory under the statute in force on the date of the offense. Former RCW 43.43.7541 (2002)

But assuming that the legislature intended to subvert the savings statute, any retroactive application of the amended DNA collection statute would violate the constitutional prohibition on ex post facto laws.

2. The Amended Statute Violates The Prohibition On Ex Post Facto Laws.

The ex post facto clause<sup>1</sup> is rooted in the right of the individual to fair notice. In re Pers. Restraint of Powell, 117 Wn.2d 175, 184-85, 814 P.2d 635 (1991). In determining whether a statute violates the prohibition, this Court assesses whether the statute “(1) is substantive [or] merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.” Id. at 185. In the criminal context, “disadvantage” means “the statute alters the standard of punishment which existed under the prior law.” State v. Schmidt, 143 Wn.2d 658, 673, 23 P.3d 462 (2001)). “A retrospective change in the law is not insulated from ex post facto scrutiny merely by labeling the change ‘procedural.’” State v. Theriot, 782 So.2d 1078, 1086 (La. Ct. App. 2001) (quoting Collins v. Youngblood, 497 U.S. 37, 45-46, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990)).

The amendment to RCW 43.43.7541 meets these criteria in that it is a substantive, retrospective change in the law that alters the standard of

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<sup>1</sup> U.S. Const. art. 1, § 10, cl. 1; Wash. Const. art. 1, § 23.

punishment: it removes from the sentencing court any discretion to waive the fine based on hardship.<sup>2</sup> The Theriot court held retrospective application of a statute making mandatory a previously discretionary fine for driving while intoxicated violated the prohibition on ex post facto laws under U.S. Const. art. 1, § 10, cl. 1 and the state constitution. Theriot, 782 So.2d at 1085-87. The amendment was not merely procedural; as here, removal of the court's discretion made the punishment for the crime more burdensome and "deprive[d] defendant of substantial protection." Id. at 1087.<sup>3</sup> The Theriot case is persuasive authority that this Court should follow in finding a violation of the prohibition on ex post facto laws.

In summary, even assuming the Legislature expressed its intent to subvert the saving statute, the resulting retrospective amendment runs afoul of the prohibition on ex post facto laws. This Court should remand this case for resentencing so the court may properly consider Ogden's indigence and ability to pay in light of the applicable statutes and, if appropriate, amend the judgment and sentence to eliminate the fee. See

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<sup>2</sup> Insofar as the amendment purports to apply to crimes committed before the original statute took effect, it runs afoul of the ex post facto clause in that respect as well.

<sup>3</sup> Cf. Lindsey v. Washington, 301 U.S. 397, 400-02, 57 S. Ct. 797, 81 L. Ed. 1182 (1937) (Washington statute removing court's discretion and making mandatory what was previously a maximum sentence violated prohibition on ex post facto laws).

State v. Broadaway, 133 Wn.2d 118, 136, 942 P.2d 363 (1997) (on remand, the trial court has the authority to correct a sentence where court was initially mistaken about the controlling law).

C. CONCLUSION

For the foregoing reasons, this Court should grant the relief requested.

DATED this 4<sup>TH</sup> day of September, 2009.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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JOHN OGDEN,	)	
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Appellant.	)	

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**DECLARATION OF SERVICE**

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

THAT ON THE 4<sup>TH</sup> DAY OF SEPTEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHN OGDEN  
DOC NO. 323896  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 4<sup>TH</sup> DAY OF SEPTEMBER, 2009.

x *Patrick Mayovsky*