

COURT OF APPEALS
DIVISION II

NO. 38893-6-II

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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY *cn*
DEPUTY

STATE OF WASHINGTON,

Appellant,

v.

JAMES L. GREEN,

Respondent.

ON APPEAL FROM THE
SUPERIOR COURT OF PACIFIC COUNTY

Before the Honorable Michael J. Sullivan, Judge

BRIEF OF RESPONDENT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Respondent

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. RESPONSES TO ASSIGNMENTS OF ERROR

1. The trial court correctly dismissed the charge of failure to register as a sex offender on the basis that the charge violated the state and federal constitutional provisions against double jeopardy. Clerk's Papers [CP] 47.

2. The trial court correctly dismissed the charge of failure to register as a sex offender on the ground that the charge violated the mandatory joinder rule. CP 47.

3. The trial court's ruling did not infringe on the prosecution's decision when to charge offenses and was not a violation of the separation of powers doctrine.

B. STATEMENT OF THE CASE

The respondent James Green [Green] accepts the state's recitation of the procedural history of the case, with the following addition: on January 21, 2009, the Honorable Michael J. Sullivan entered the Court's Memorandum on Defendant's Motion to Dismiss, which is attached hereto as Appendix A. CP 42-46.

C. ARGUMENT

Response to State's Argument A.

1. **THE TRIAL COURT PROPERLY FOUND THAT DOUBLE JEOPARDY PROHIBITS THE STATE FROM CHARGING GREEN WITH FAILURE TO REGISTER AS A SEX OFFENDER BASED ON A SINGLE COMMISSION OF THE CRIME.**

The State argues that the trial court erred by dismissing the second prosecution against Green, and that double jeopardy did not attach because the second prosecution is not the same offense as the offense charged in the first prosecution. Brief of Appellant at 11. The State contends that under RCW 9A.44.130, a new violation occurs upon the expiration of each 90 day period in which a level 2 or level 3 sex offender is required to register with the county sheriff. Brief of Appellant at 1-2.

The State may not prosecute and convict a person for a series of similar transactions if the statute defines the offense as a course of conduct. The Double Jeopardy Clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. 5.¹ Washington’s constitution provides that no individual shall “be twice put in jeopardy for the same offense.” Const. art. I, § 9. The state constitutional prohibition against double jeopardy offers the same scope of protection as its federal counterpart. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

The State contends that Judge Sullivan “did not address the issue of the “unit of prosecution” for the offense of failure to register as a sex offender.” Brief of Appellant at 9. Green submits that Judge Sullivan’s

¹ The Fifth Amendment’s double jeopardy protection is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

order of dismissal was correct, that the failure to register on July 9, 2007 and October 8, 2007, alleged in the first and second prosecutions constitute the same offenses under the “unit of prosecution” analysis.

Double jeopardy principles prohibit prosecution for multiple charges under the same statute if the defendant commits only one unit of the crime. *United States v. Bell*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955); *State v. Adel*, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998). When an individual is charged with multiple counts of the same offense, the court must determine the “unit of prosecution” the Legislature intended as the punishable act under the statute. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221, 73 S.Ct. 227, 229, 97 L.Ed 260 (1952); *Adel*, 136 Wn.2d at 634.

The unit of prosecution set forth in the statute will be either an act or a course of conduct. *Universal C.I.T. Credit*, 344 U.S. at 221-22; *Adel*, 136 Wn.2d at 634. Where the statute defines the crime as a course of conduct, prosecutors may not divide the crime into “a series of temporal or spatial units.” *Adel*, 136 Wn.2d at 635 (quoting *Brown v. Ohio*, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)). If the offense is punishable as a course of conduct, the crime is not completed until the continuing criminal behavior has been terminated. *State v. Carrier*, 36 Wn. App. 755, 758, 677 P.2d 768 (1984) (citing *State v. Vining*, 2 Wn.

App. 802, 472 P.2d 564 (1970)).

The Legislature must “clearly and without ambiguity” intend to turn a series of similar transactions into multiple offenses. *Adel*, 136 Wn.2d at 634-35 (citing *Bell*, 349 U.S. at 84). The Legislature must state its intent to create multiple offenses in “language that is clear and definite.” *Universal C.I.T. Credit*, 344 U.S. at 221-22. If the Legislature’s intent is not clear, this Court must apply the “rule of lenity” and resolve the ambiguity in favor of concluding there was only one offense. *Adel*, 125 Wn.2d at 634-35; *Bell*, 349 U.S. at 83-84; *Universal C.I.T. Credit*, 344 U.S. at 221-22.

Here, Green was charged with violation of RCW 9A.44.130, for allegedly failing to register as a level 2 sex offender every ninety days. CP 12-13.

RCW 9A.44.130(7) states in relevant part:

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.

As discussed *infra*, the statute defines the crime as an ongoing offense that terminates when the person is either relieved of the duty to register, or is arrested on charges of failure to register, is served with an information charging the offense, or is arraigned on such charges. To

discern what the Legislature intended the unit of prosecution to be, the first step is to analyze the criminal statute. *Adel*, 125 Wn.2d at 635. This Court must start with the statute's "plain language and ordinary meaning" in order to determine legislative intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). The "plain meaning" rule requires the court to look not only at the language of the statute in question, but also at related statutes that disclose legislative intent about that provision. *Id.* (citing *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002)).

The statutory requirement with which Green allegedly failed to comply was the requirement that he report to the sheriff's officer every ninety days. "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." RCW 9A.44.130(7). The State alleged that Green failed to report on or about July 9, 2007 (first prosecution), and on about October 8, 2007 (second prosecution). CP 1-2, 12-13.

Although the statute sets forth a periodic duty to report in person to the sheriff's office, the Legislature did not intend that each ninety day

period an offender fails to report be a separate crime. Instead, the Legislature plainly defined the crime as a continuing offense: “Unless relieved of the duty to register pursuant to this section, a violation of RCW 9A.44.130 is an ongoing offense for purposes of the statute of limitations under RCW 9A.04.080.” RCW 9A.44.140(6). The statute also clearly states the ongoing offense is not terminated until the person is “relieved of the duty to register.” RCW 9A.44.140(6). The course of conduct is also terminated for “[a]n 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.” RCW 9A.44.130(4)(c). When any of those latter events occur, if the offender again fails to comply with the registration requirements of the statute, that “constitutes grounds for filing another charge of failing to register.” *Id.*

When the Legislature defines the crime as an ongoing offense for statute of limitations purposes, the crime is not completed, and the statute of limitations does not begin to run, until the continuing criminal impulse has been terminated. *State v. Carrier*, 36 Wn. App. 755, 758, 677 P.2d 768 (1984); *State v. Mermis*, 105 Wn. App. 738, 745, 20 P.3d 1044 (2001). Even if a continuing crime is committed by a series of similar acts, the crime is considered to be “the result of a single, continuing criminal impulse or intent.” *Carrier*, 36 Wn. App. at 757 (quoting *State*

v. Vining, 2 Wn. App. 802, 808-09, 472 P.2d 564 (1970)). The successive acts constitute a single crime, regardless of the time that may elapse between each act. *Id.*

Where a statute defines a crime as a continuing offense, the “unit of prosecution” includes all of the individual violations “that arise from that singleness of thought, purpose or action.” *Universal C.I.T. Credit*, 344 U.S. at 224 (citing *Blockburger v. United States*, 284 U.S. 299, 302, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932)). If the defendant committed only one continuing offense but is charged and convicted of multiple crimes, a double jeopardy violation occurs. *Bell*, 349 U.S. at 83; *Adel*, 136 Wn.2d at 633-34.

The "unit of prosecution" for statute of limitations purposes is the same as for double jeopardy purposes. *See, e.g., United States v. Pollen*, 987 F.2d 78, 86 (3rd Cir. 1992) (equating "unit of prosecution" of crime of tax evasion for double jeopardy purposes with unit of prosecution for statute of limitations purposes) (citing *United States v. Kirkman*, 755 F.Supp. 304, 306 (D. Idaho 1991) (concluding, for statute of limitations purposes, that tax evasion is not continuing offense); *State v. Williams*, 776 So.2d 1066, 1072 (Fla. App. 2001) (holding unit of prosecution of crime of grand theft is same for both double jeopardy and statute of limitations purposes); *State v. Green*, 38 Kan. App. 781, 785-86, 172 P.3d

1213 (2007) (same for crime of identity theft); *Webb v. State*, 311 Md. 610, 615, 536 A.2d 1161 (Md. App. 1988) (same for crime of possession of handgun).

Here, the Legislature plainly defined the crime of failure to register as a sex offender as a "continuing offense" that does not terminate unless the offender is "relieved of the duty to register," or is arrested on charges of failure to register, is served with an information or complaint for such charges, or is arraigned on such charges. RCW 9A.44.140(6); RCW 9A.44.130(4)(c). Unless any of these termination events occur, multiple subsequent violations of the statute are deemed to be the result of a single, continuing "criminal impulse," and are therefore part of a single crime. *Carrier*, 36 Wn. App. at 757; *Vining*, 2 Wn. App. at 808-09. In this case, the State alleged that Green failed to contact the sheriff on or about July 9, 2007. The information in that cause² was filed May 2, 2008. After he was found not guilty of the offense, he was charged in an information filed October 13, 2008 with a second violation alleged to have occurred October 8, 2007. CP 12-13. The second violation was alleged by the State to have occurred prior to the filing of the first information, and therefore the duty to register was not relieved by service of an information on the charge.

² Pacific County Superior Court cause number 08-1-00054-9.

Because the language of the statute is plain and unambiguous, this Court must derive the meaning of the statute from the wording of the statute itself. *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). However, to the extent the statute is ambiguous, this Court must construe the statute in favor of lenity. *Adel*, 125 Wn.2d at 634-35; *Bell*, 349 U.S. at 83-84. A statute is ambiguous if it is susceptible to two or more reasonable interpretations. *State v. Leyda*, 157 Wn.2d 335, 352, 138 P.3d 610 (2006). It is reasonable to interpret the statute as criminalizing a continuing course of conduct rather than a series of individual minor transgressions. Therefore, to the extent two reasonable interpretations are possible, this Court must adopt the interpretation that favors Green.

Once the unit of prosecution is determined, a factual analysis is necessary to decide whether, under the facts of the case, more than one unit of prosecution is present. *State v. Westling*, 145 Wn.2d 607, 612, 40 P.3d 669 (2002). Here, the evidence shows Green committed a single continuing offense. Green was alleged to have failed to report in person every ninety days to the sheriff's office in July, 2007 and again in the subsequent prosecution, in October, 2007. He was not charged with either offense, however, until May, 2008. These multiple alleged omissions amounted to a single "ongoing offense." RCW 9A.44.140(6). It was not until May, 2008, that Green was charged with the offense of failure to

register as a sex offender. At that point, the continuing offense terminated. RCW 9A.44.130(4)(c). Because Green was charged during the second prosecution for committing only a single unit of the crime, Judge Sullivan correctly ruled that a second prosecution was in violation of the Double Jeopardy Clause. *Adel*, 136 Wn.2d 629. Therefore, the court's order of dismissal must be affirmed.

Response to State's Argument B.

2. THE COURT CORRECTLY FOUND THAT MANDATORY JOINDER BARS THE STATE FROM REILING CHARGES AGAINST GREEN.

In Washington, CrR 4.3.1(b) prohibits retrial on a related offense not originally charged or tried. The mandatory joinder rule is a limit on the prosecution's usually broad charging discretion. Under the rule, when a defendant has been tried for one offense, he may "thereafter move to dismiss a charge for a related offense." *State v. Anderson (II)*, 96 Wn.2d 739, 740-741, 638 P.2d 1205 (1982), cert. denied, 459 U.S. 842 (1982); *State v. Downing*, 122 Wn. App. 185, 93 P.3d 900 (2004), *review denied*, 153 Wn.2d 1014 (2005). The motion must be granted unless the case presents the very unique situation of meeting a limited exception for the "ends of justice." *See Anderson*, 96 Wn.2d at 740.

The State was required to bring all charges against Green when he

was first tried in September, 2008 because both offenses were related.

In looking at this issue, it is important to note that the mandatory joinder rule strongly favors—and even creates a presumption of—dismissal of subsequent charges. The rule, CrR 4.3.1(b) Failure to Join Related Offenses provides in relevant part:

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense unless a motion for joinder of these offenses was previously denied or the right of joinder was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

By requiring that the trial court “shall” grant a request for a dismissal unless certain additional findings are made, the plain language of the rule creates a presumption of dismissal of additional charges, which the proponent of the new charges must overcome. *See, e.g., In re Personal Restraint of McCarthy*, 161 Wn.2d 234, 239-40, 164 P.3d 1283 (2007) (statute providing the Board “shall order release” absent certain findings creates a presumption in favor of release). Thus, whenever the prosecution seeks to add new charges after having already tried a defendant for related charges, the prosecution bears the burden of proving

that one of the exceptions to the presumption apply, *i.e.*, that either 1) it was unaware of facts constituting the related offense, 2) it did not have sufficient evidence to try that offense, or 3) “the ends of justice” would be defeated by dismissal of the related charge. CrR 4.3.1.(3). Otherwise, the trial court is required to dismiss related charges once the defendant has been through an initial trial. *Id.*

The State alleges that the “mandatory joinder” rule, CrR 4.3.1(b), does not apply. The rule requires the prosecution to level all related charges against a defendant at the time of the first trial, rather than trying to add related charges later, in further proceedings. See, *Anderson (II)*, *supra*; *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987); *State v. Russell*, 101 Wn.2d 349, 678 P.2d 332 (1984). The rule is intended to limit the prosecution from subjecting a defendant to successive prosecutions based upon the same conduct, regardless of the prosecution’s motive for bringing such prosecutions. *State v. Dallas*, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995); see *State v. McNeil*, 20 Wn. App. 527, 532, 582 P.2d 524 (1978). Thus, regardless whether the prosecution brings successive prosecutions with the motive of harassing the defendant or simply fails to charge correctly, the mandatory joinder rule applies “to require a dismissal of the second prosecution” and prevent the State from subjecting the defendant to multiple prosecutions based on the very same

conduct. *Dallas*, 126 Wn.2d at 332.

The first question in any mandatory joinder case is to determine whether the relevant added offenses are “related” under the rule. Offenses are “related” if they are “within the jurisdiction and venue of the same court and are based on the same conduct.” CrR 4.3.1(c)(1); *State v. Lee*, 132 Wn.2d 498, 500, 939 P.2d 1223 (1997). Mandatory joinder applies to “conduct involving a single criminal incident or episode.” *Lee*, at 503 (“[W]e hold that same conduct ‘for purposes of deciding what offenses are related offenses’ and, therefore, subject to mandatory joinder is conduct involving a single criminal incident or episode.”). According to *Lee*, this conduct includes all offenses based on the same series of physical acts, or a series of acts constituting the same criminal episode. *Id.* The rationale behind the mandatory joinder rule is to protect defendants from “successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a ‘hold’ upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.”

Here, the offenses were filed in Pacific County Superior Court. There is thus no question that they were all within the jurisdiction and venue of the same court for CrR 4.3.1(c)(1) purposes. Further, the offenses

all arose from the same conduct. “Same conduct” is defined expansively. *Lee*, 132 Wn.2d at 503, 503 n. 2. To amount to the “same conduct,” offenses need not even arise from “the same criminal incident.” 132 Wn.2d at 503, 503 n.2. Offenses based upon a series of acts may all amount to the same conduct even if they are committed over a period of time and in more than one place. *Id.* Here, based on the facts, and argument presented in Section 1 above, it is clear that the two alleged instances constitute the same conduct.

Response to State’s Argument B.2.

3. THE “ENDS OF JUSTICE” EXCEPTION TO MANDATORY JOINDER DOES NOT APPLY

The State argues that the “ends of justice” exception to mandatory joinder should prevent dismissal of the second prosecution. Brief of Appellant at 21. The State argues that the acquittal in the first trial “was based purely on a material misstatement of the laws, according to the holding of *Peterson*,^[3] namely, that the State was required to prove that Green had a fixed residence.” Brief of Appellant at 22. (Footnote added). Judge Sullivan properly found that it was an assumption on the part of the State that if Green had been charged with failing to register that he would have been found not guilty. Court’s Memorandum on Motion to Dismiss at 2. CP 43. Judge Sullivan noted that the State’s ends of justice

³ *State v. Peterson*, 145 Wn.App. 672, 186 P.3d 1179 (2008).

argument begs the question of whether the State should be required to charge all crimes in one information if the State is in possession of all facts that would result in all possible charges. CP 43. The State conceded that that it knew about Green's failure to register on or about October 8, 2007, when it charged him in the original information with failing to register on July 9, 2007. Judge Sullivan noted: "All the facts regarding both charges of "failing to register" were known to the State at the September 18, 2008, bench trial." CP 44. As a result, there is no question that CrR 4.3.1(3) and the mandates of "mandatory joinder" apply. Instead, the only question is whether the requirements of the mandatory joinder rule should be waived in this particular case as argued by the State under an "ends of justice" exception.

The State merely argues that the acquittal in the first case was based on a misstatement of the law, but does not explain why it did not charge Green with both offenses when it knew about both alleged instances when the first matter was charged. *Dallas, supra*, is one of the very few cases in which the "ends of justice" exception to mandatory joinder has been discussed. In that case, the Court addressed whether dismissal with or without prejudice was the proper remedy for violation of the mandatory joinder rule. *Dallas*, 126 Wn.2d at 328. In that case, the prosecution argued, *inter alia*, that it should be excused from failing to

charge a theft at the same time as a count of possession of the property stolen in the theft because the “ends of justice” exception applied. 126 Wn.2d at 333. In deciding that question, the Court looked at a Division One decision, *State v. Carter*, 56 Wn. App. 217, 783 P.2d 589 (1989), and concluded that the reasoning of that decision regarding the proper interpretation of the “ends of justice” exception was appropriate. 126 Wn.2d at 328. In *Carter*, the court had analogized the exception to a state (and corresponding federal) civil rule, CR 60(b)(11), which allowed vacation of judgments whenever “appropriate to accomplish justice.” 56 Wn. App. at 223. The *Carter* court concluded—and the *Dallas* Court agreed—that the “ends of justice” exception did not apply unless there were “extraordinary circumstances,” greater than simply a failure to charge sufficiently in the first place. *Carter*, 56 Wn. App. at 223; *Dallas*, 126 Wn.2d at 333. In *Dallas*, the Court further held that circumstances are not “extraordinary” unless they are “extraneous to the action of the court or go to the regularity of its proceedings.” *Dallas*, 126 Wn.2d at 333. Because the facts of *Dallas* involved a “very ordinary mistake” in choosing the proper charge to file, the Court found, there was no “credible argument” of extraordinary circumstances sufficient to justify excusing the failure to charge fully, and the state had not established that “ends of justice” exception should apply. *Id.* Thus, in *Dallas*, the Court implicitly

prosecutors. Here, the State makes a similar argument, saying that the acquittal “was based purely on a material misstatement of the law, according to the holding of *Peterson*” Brief of Appellant at 22. It is far from clear, however, that this constitutes an “extraordinary circumstance meriting application of the exception. It is uncontested that the State was aware that Green had failed to notify the sheriff in October, 2007, but did not charge him with that offense. The State’s choice not to charge Green with an alleged violation of the statute until after loss at the first does not constitute an extraordinary circumstance that merits application of the “ends of justice” exception, and the State’s argument should be denied.

Response to State’s Argument C.

4. THE COURT’S RULING DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

The State argues that ruling dismissing the information prevents it from exercising its discretion to charge or not charge multiple offenses and constitutes a violation of the separation of powers doctrine. The fundamental principle of the separation of powers is that each branch wields only the power it is given. *State v. Moreno*, 147 Wn.2d. 500, 505, 58 P.3d 265 (2002).

Courts have announced the following test for determining whether

an action violates the separation of power:

The question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another.

Carrick, 125 Wn.2d 129, 135, 882 P.2d 173 (quoting *Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975)).

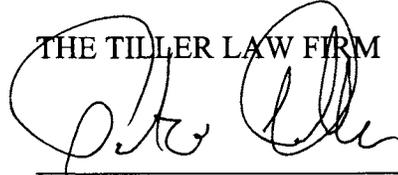
Here, the State submits that the court's ruling has the effect of preventing a prosecutor from exercising his or her discretion to charge or not charge multiple offenses, "merely because of a subjective belief that the power to do so might hypothetically lead to an unfair result in some situations." Brief of Appellant at 25. The State does not demonstrate, however, that Judge Sullivan's ruling has chilled the State's ability to charge offenses, and in fact asserts that "had the first Green trial resulted in a conviction rather than an acquittal, the state could, hypothetically, go back and charge Mr. Green again for a different time period." Brief of Appellant at 25. The State has not demonstrated how the court's decision prevented it from prosecuting Green for failure to register—to the extent permitted by the Legislature—or how this case differs from any garden variety case where a successive prosecution is dismissed for violation of double jeopardy or mandatory joinder.

E. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's order of dismissal.

DATED: July 16, 2009.

Respectfully submitted,

THE TILLER LAW FIRM


PETER B. TILLER-WSBA #20835
Of Attorneys for Respondent

APPENDIX A

information, but can charge each “failing to register” crime in a separate information. The State further argued that because neither the State nor the Court were aware of State v. Peterson, 145 Wash. App. 672 (2008) (Division I) at the time of trial under Pacific County Cause No. 08-1-00054-9, that the State now can charge the present failing to register under the “ends of justice standard”.

Analysis: Prior charge under Pacific County Cause No. 08-1-00054-9. The Court agrees with the State that under State v. Peterson, supra, the State is only required to prove that a defendant failed to register and that the subsections of the registration statute are definitional and not elements of the crime. The State argues that the “ends of justice” will not be served because neither the State nor the Court knew of the holding in State v. Peterson (the defendant’s knowledge in the prior case as to the existence of State v. Peterson is unknown). There is an assumption under this argument that if the State had charged Mr. Green for two counts of failing to register under prior case No. 08-1-00054-9, that Mr. Green would have been found not guilty of both counts, and therefore, it would “defeat the ends of justice to prevent the State from now charging the Defendant under the present cause number. This argument begs the question. The question remains the same. Should the State be forced to charge all crimes in one information if the State is in possession of all the facts which could result in the State charging all possible charges (in this case, each “failing to register”). The answer is “yes”.

COURT’S MEMORANDUM
ON DEFENDANT’S MOTION
TO DISMISS

Does it matter that the Prosecutor and Court were not aware of State v. Peterson, supra?

No.

Does it matter if State v. Peterson, if brought to the Court's attention, may have resulted in a guilty verdict at Mr. Green's first trial? No.

The "ends of justice" doctrine is inextricably woven into the fabric of "basic fairness" under our system of jurisprudence. Further, in State v. Ramos, 124 Wash. App. 334, (2004), the outcome of a previous trial was invalidated due to a subsequent change in the law. In Mr. Green's case, State v. Peterson, 145 Wn. App. 672 (2008) was decided July 7, 2008, prior to the State resting in Mr. Green's first trial.

The State admits that it knew of Mr. Green's failing to register on or about October 8, 2007, when it charged Mr. Green for failing to register on or about July 9, 2007. All the facts regarding both charges of "failing to register" were known to the State at the September 18, 2008, bench trial.

Whether the State can elect to either charge multiple counts in the same information or separate counts in multiple information is ground upon which the State must tread carefully. To guess wrong could result in dismissal of charged counts.

The State argues that because the Defendant failed to register two times and the time frame for each failing to register is separated by several months, that the crime is not part of the

same course of conduct and, therefore, the latter crime can be charged in a separate information. To allow such charging decisions would allow the State to “stack” crimes against a defendant. The State did agree that although the State could charge a separate crime in separate informations, the State could probably not stack up the points to increase the sentencing range. The State did not give any legal basis for this statement. If it were legal to “stack” charges in multiple informations, then logic would hold that the penalties for each successive conviction would be more severe. It also is patently unfair to allow such “stacking”.

Put simply, if the State has information in its possession and that information is the same or almost the same information that the State would rely upon to prove the Defendant’s guilt on both counts of failing to register, then the State must charge all counts up front in the same information. To allow otherwise, would be patently unfair and allow the State to “stack offenses and also stack punishments”.

The Court need not decide at this time whether the State could file multiple “failing to register” charges in a single indictment.

In response to the Court’s questions, the State believed that even if the State had prevailed in the first Green Trial, it could then file the present charge. In other words, the State’s argument remains the same regardless of the verdict(s). The State, in response to the Court’s questioning, argued that if there were fifteen “failure to register” charges running consecutively

to each other, the State could file fourteen additional informations, charging one “failing to register” after each trial, regardless of the verdicts. The Court cannot agree to this reasoning and cannot find any Washington Appellate decision that agrees with the State’s position.

Double Jeopardy: the Court finds that double jeopardy has attached when the State failed to charge every crime in the same information as noted above.

Decided this 21st day of January, 2009.



Judge Michael J. Sullivan

APPENDIX B

WASHINGTON CONSTITUTION
ARTICLE 1, § 9

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

UNITED STATES CONSTITUTION,
FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9A.44.130

Registration of sex offenders and kidnapping offenders — Procedures — Definition — Penalties. (Expires ninety days after adjournment sine die of the 2010 legislative session.)

(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. 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.

(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 ten days of enrolling or prior to arriving at the school to attend classes, whichever is earlier, 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 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;

(iii) 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

(iv) 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.

(c) Persons required to register under this section who are enrolled in a public or private institution of higher education on June 11, 1998, or a public or private school regulated under Title 28A RCW or chapter 72.40 RCW on September 1, 2006, must notify the county sheriff immediately.

(d) 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.

(e)(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. 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 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 twenty-four hours 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. Failure to register at the time of release and within twenty-four hours of release constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

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. 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, 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. 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 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 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 (11) of this section.

(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 twenty-four hours 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 ten 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 ten 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) 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 (11) 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 (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 send signed written notice of the change of address to the county sheriff within seventy-two hours of moving. If any person required to register pursuant to this section moves to a new county, the person must send signed 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 signed written notice within ten days 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.

(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.

(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 forty-eight hours excluding weekends and holidays 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 county sheriff's office may require the person to list the locations where the person has stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large

pursuant to RCW 4.24.550.

(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 forty-eight hours excluding weekends and holidays 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.

(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.

(8) 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 five days of the entry of the order.

(9) 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.

(10) 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:

(i) Any offense defined as a sex offense by RCW 9.94A.030;

(ii) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree);

(iii) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes);

(iv) Any federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense under this subsection; and

(v) 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 or this subsection.

(b) "Kidnapping offense" means: (i) 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; (ii) any offense that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a kidnapping offense under this subsection (10)(b); and (iii) any federal or out-of-state

conviction for an offense that under the laws of this state would be classified as a kidnapping offense under this subsection (10)(b).

(c) "Employed" or "carries on a vocation" means employment that is full-time or part-time for a period of time exceeding fourteen days, or for an aggregate period of time exceeding thirty days during any calendar year. A person is employed or carries on a vocation whether the person's employment is financially compensated, volunteered, or for the purpose of government or educational benefit.

(d) "Student" means a person who is enrolled, on a full-time or part-time basis, in any public or private educational institution. An educational institution includes any secondary school, trade or professional institution, or institution of higher education.

(11)(a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense as defined in subsection (10)(a) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony sex offense as defined in subsection (10)(a) of this section.

(b) If the crime for which the individual was convicted 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.

(12)(a) A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony if the crime for which the individual was convicted was a felony kidnapping offense as defined in subsection (10)(b) of this section or a federal or out-of-state conviction for an offense that under the laws of this state would be a felony kidnapping offense as defined in subsection (10)(b) of this section.

(b) If the crime for which the individual was convicted 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.

(13) 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.

RCW 9A.44.140

Registration of sex offenders and kidnapping offenders — End of duty to register — Expiration of subsection.

(1) The duty to register under RCW 9A.44.130 shall end:

(a) For a person convicted of a class A felony or an offense listed in subsection (5) of this section, or a person convicted of any sex offense or kidnapping offense who has one or more prior convictions for a sex offense or kidnapping offense: Such person may only be relieved of the duty to register under subsection (3) or (4) of this section.

(b) For a person convicted of a class B felony, and the person does not have one or more prior convictions for a sex offense or kidnapping offense and the person's current offense is not listed in subsection (5) of this section: Fifteen years after the last date of release from confinement, if any, (including full-time residential treatment) pursuant to the conviction, or entry of the judgment and sentence, if the person has spent fifteen consecutive years in the community without being convicted of any new offenses.

(c) For a person convicted of a class C felony, a violation of RCW 9.68A.090 or 9A.44.096, or an attempt, solicitation, or conspiracy to commit a class C felony, and the person does not have one or more prior convictions for a sex offense or kidnapping offense and the person's current offense is not listed in subsection (5) of this section: Ten years after the last date of release from confinement, if any, (including full-time residential treatment) pursuant to the conviction, or entry of the judgment and sentence, if the person has spent ten consecutive years in the community without being convicted of any new offenses.

(2) The provisions of subsection (1) of this section shall apply equally to a person who has been found not guilty by reason of insanity under chapter 10.77 RCW of a sex offense or kidnapping offense.

(3)(a) Except as provided in (b) of this subsection, any person having a duty to register under RCW 9A.44.130 may petition the superior court to be relieved of that duty, if the person has spent ten consecutive years in the community without being convicted of any new offenses. The petition shall be made to the court in which the petitioner was convicted of the offense that subjects him or her to the duty to register, or, in the case of convictions in other states, a foreign country, or a federal or military court, to the court in Thurston county. The prosecuting attorney of the county shall be named and served as the respondent in any such petition. The court shall consider the nature of the registrable offense committed, and the criminal and relevant noncriminal behavior of the petitioner both before and after conviction, and may consider other factors. Except as provided in subsection (4) of this section, the court may relieve the petitioner of the duty to register only if the petitioner shows, with clear and convincing evidence, that future registration of the petitioner will not serve the purposes of RCW 9A.44.130, 10.01.200, 43.43.540, 46.20.187, 70.48.470, and 72.09.330.

(b)(i) The court may not relieve a person of the duty to register if the person has been determined to be a sexually violent predator as defined in RCW 71.09.020, or has been convicted of a sex offense or kidnapping offense that is a class A felony and that was committed with forcible compulsion on or after June 8, 2000.

(ii) The court may not relieve a person of the duty to register if the person has been convicted of one aggravated offense or more than one sexually violent offense, as defined in subsection (5) of this section, and the offense or offenses were committed on or after March 12, 2002.

(c) Any person subject to (b) of this subsection or subsection (5) of this section may petition the court to be exempted from any community notification requirements that the person may be subject to fifteen years after the later of the entry of the judgment and sentence or the last date of release from confinement, including full-time residential treatment, pursuant to the conviction, if the person has spent the time in the community without being convicted of any new offense.

(4) An offender having a duty to register under RCW 9A.44.130 for a sex offense or kidnapping offense committed when the offender was a juvenile may petition the superior court to be relieved of that duty. The

court shall consider the nature of the registrable offense committed, and the criminal and relevant noncriminal behavior of the petitioner both before and after adjudication, and may consider other factors.

(a) The court may relieve the petitioner of the duty to register for a sex offense or kidnapping offense that was committed while the petitioner was fifteen years of age or older only if the petitioner shows, with clear and convincing evidence, that future registration of the petitioner will not serve the purposes of RCW 9A.44.130, 10.01.200, 43.43.540, 46.20.187, 70.48.470, and 72.09.330.

(b) The court may relieve the petitioner of the duty to register for a sex offense or kidnapping offense that was committed while the petitioner was under the age of fifteen if the petitioner (i) has not been adjudicated of any additional sex offenses or kidnapping offenses during the twenty-four months following the adjudication for the offense giving rise to the duty to register, and (ii) proves by a preponderance of the evidence that future registration of the petitioner will not serve the purposes of RCW 9A.44.130, 10.01.200, 43.43.540, 46.20.187, 70.48.470, and 72.09.330.

This subsection shall not apply to juveniles prosecuted as adults.

(5)(a) A person who has been convicted of an aggravated offense, or has been convicted of one or more prior sexually violent offenses or criminal offenses against a victim who is a minor, as defined in (b) of this subsection may only be relieved of the duty to register under subsection (3)(b) of this section. This provision shall apply to convictions for crimes committed on or after July 22, 2001.

(b) Unless the context clearly requires otherwise, the following definitions apply only to the federal lifetime registration requirements under this subsection:

(i) "Aggravated offense" means an adult conviction that meets the definition of 18 U.S.C. Sec. 2241, which is limited to the following:

(A) Any sex offense involving sexual intercourse or sexual contact where the victim is under twelve years of age;

(B) RCW 9A.44.040 (rape in the first degree), RCW 9A.44.073 (rape

of a child in the first degree), or RCW 9A.44.083 (child molestation in the first degree);

(C) Any of the following offenses when committed by forcible compulsion or by the offender administering, by threat or force or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that person to appraise or control conduct: RCW 9A.44.050 (rape in the second degree), RCW 9A.44.100 (indecent liberties), RCW 9A.44.160 (custodial sexual misconduct in the first degree), RCW 9A.64.020 (incest), or RCW 9.68A.040 (sexual exploitation of a minor);

(D) Any of the following offenses when committed by forcible compulsion or by the offender administering, by threat or force or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that person to appraise or control conduct, if the victim is twelve years of age or over but under sixteen years of age and the offender is eighteen years of age or over and is more than forty-eight months older than the victim: RCW 9A.44.076 (rape of a child in the second degree), RCW 9A.44.079 (rape of a child in the third degree), RCW 9A.44.086 (child molestation in the second degree), or RCW 9A.44.089 (child molestation in the third degree);

(E) A felony with a finding of sexual motivation under RCW 9.94A.835 where the victim is under twelve years of age or that is committed by forcible compulsion or by the offender administering, by threat or force or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that person to appraise or control conduct;

(F) An offense that is, under chapter 9A.28 RCW, an attempt or solicitation to commit such an offense; or

(G) An offense defined by federal law or the laws of another state that is equivalent to the offenses listed in (b)(i)(A) through (F) of this subsection.

(ii) "Sexually violent offense" means an adult conviction that meets the definition of 42 U.S.C. Sec. 14071(a)(1)(A), which is limited to the

following:

(A) An aggravated offense;

(B) An offense that is not an aggravated offense but meets the definition of 18 U.S.C. Sec. 2242, which is limited to RCW 9A.44.050(1) (b) through (f) (rape in the second degree) and RCW 9A.44.100(1) (b) through (f) (indecent liberties);

(C) A felony with a finding of sexual motivation under RCW 9.94A.835 where the victim is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the conduct;

(D) An offense that is, under chapter 9A.28 RCW, an attempt or solicitation to commit such an offense; or

(E) An offense defined by federal law or the laws of another state that is equivalent to the offenses listed in (b)(ii)(A) through (D) of this subsection.

(iii) "Criminal offense against a victim who is a minor" means, in addition to any aggravated offense or sexually violent offense where the victim was under eighteen years of age, an adult conviction for the following offenses where the victim is under eighteen years of age:

(A) RCW 9A.44.060 (rape in the third degree), RCW 9A.44.076 (rape of a child in the second degree), RCW 9A.44.079 (rape of a child in the third degree), RCW 9A.44.086 (child molestation in the second degree), RCW 9A.44.089 (child molestation in the third degree), RCW 9A.44.093 (sexual misconduct with a minor in the first degree), RCW 9A.44.096 (sexual misconduct with a minor in the second degree), RCW 9A.44.160 (custodial sexual misconduct in the first degree), RCW 9A.64.020 (incest), RCW 9.68A.040 (sexual exploitation of a minor), RCW 9.68A.090 (communication with a minor for immoral purposes), or *RCW 9.68A.100 (patronizing a juvenile prostitute);

(B) RCW 9A.40.020 (kidnapping in the first degree), RCW 9A.40.030 (kidnapping in the second degree), or RCW 9A.40.040 (unlawful imprisonment), where the victim is a minor and the offender is not the

minor's parent;

(C) A felony with a finding of sexual motivation under RCW 9.94A.835 where the victim is a minor;

(D) An offense that is, under chapter 9A.28 RCW, an attempt or solicitation to commit such an offense; or

(E) An offense defined by federal law or the laws of another state that is equivalent to the offenses listed in (b)(iii)(A) through (D) of this subsection.

(6) Unless relieved of the duty to register pursuant to this section, a violation of RCW 9A.44.130 is an ongoing offense for purposes of the statute of limitations under RCW 9A.04.080.

(7) Nothing in RCW 9.94A.637 relating to discharge of an offender shall be construed as operating to relieve the offender of his or her duty to register pursuant to RCW 9A.44.130.

(8) For purposes of determining whether a person has been convicted of more than one sex offense, failure to register as a sex offender or kidnapping offender is not a sex or kidnapping offense.

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

JAMES L. GREEN,

Respondent.

COURT OF APPEALS NO.
38893-6-II

PACIFIC COUNTY NO.
08-1-00162-6

CERTIFICATE OF HAND
DELIVERY AND MAILING

The undersigned attorney for the Respondent hereby certifies that one original and one copy of the Opening Brief of Respondent and one copy of the Third Motion for Extension of Time To File Respondent's Brief Without Sanctions and Supporting Declaration was hand delivered to the Court of Appeals, Division 2, and copies were mailed to James Green, Respondent, and Mr. David J. Burke, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on July 16, 2009, at the Centralia, Washington post office addressed as follows:

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CERTIFICATE OF HAND
DELIVERY AND MAILING

1

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE - P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828

Mr. David J. Burke
Deputy Prosecutor
P.O. Box 45
South Bend, WA 98586-0045

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. James L. Green
30307 Stack Pole Rd.
Ocean Park, WA 98640

Dated: July 16, 2009.


THE TILLER LAW FIRM

PETER B. TILLER – WSBA #20835
Of Attorneys for Respondent

CERTIFICATE OF HAND
DELIVERY AND MAILING

2

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE – P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828