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ASSIGNMENTS OF ERROR

1. The trial court erred by denying Ms. Phillips's motion to withdraw her guilty plea.
2. Ms. Phillips's guilty plea was entered in violation of her Fourteenth Amendment right to due process.
3. Ms. Phillips's Failure to Register conviction was predicated on a constitutionally invalid prior conviction.
4. Ms. Phillips's prior Utah conviction did not qualify as a "sex offense" within the meaning of RCW 9A.44.130.
5. The trial court erred by entering Finding of Fact No. 1.2.
6. The trial court erred by entering Conclusion of Law Nos. 2.2, 2.3, and 2.4.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction for Failure to Register must be predicated on a constitutionally valid prior offense. Ms. Phillips's prior guilty plea in Utah juvenile court was entered without an understanding of the nature and the elements of the charged crime. Was Ms. Phillips's Failure to Register conviction obtained in violation of her Fourteenth Amendment right to due process because it was predicated on a constitutionally invalid prior offense?
2. For purposes of the Failure to Register statute, the phrase "sex offense" includes only certain juvenile convictions. Ms. Phillips's juvenile conviction from Utah did not fall within the statute's definition. Was Ms. Ms. Phillips's Failure to Register conviction entered in violation of her Fourteenth Amendment right to due process because it was predicated on an offense that did not qualify as a "sex offense" under the registration statute?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Amanda Phillips pled guilty to Failure to Register as a Sex Offender in April of 2008. CP 1. The charge was based on a Utah juvenile matter, in which she was found to have committed “sexual abuse.” CP 18, 35.

A year later, her attorney filed a Motion for Relief From Judgment. CP 14-17. Ms. Phillips argued that her juvenile Utah matter was not equivalent to a criminal conviction, and therefore could not form the basis for a registration requirement. Specifically, the Utah matter was called an “agreement,” not a plea, the final order was not denoted a Judgment, and it was not signed by any attorneys or by Ms. Phillips. Ms. Phillips was not informed of a right to trial or to challenge witnesses, and there was no evidence that she was told the nature and elements of the offense. CP 14-17, 18-25; RP 13-15, 23-24.

The state responded that Utah’s juvenile court system is similar to Washington’s, in that both refer to “offenses” when juveniles are involved, and that the defense had not shown that Ms. Phillips’s conviction had been vacated. CP 26-30. The prosecution did not submit any evidence to prove that the Utah matter was a constitutionally valid conviction. Ms. Phillips’s

attorney filed the only document addressing the content of Ms. Phillips's Utah matter. CP 22-23; attached as Appendix.

After hearing argument, the court denied the defense motion and entered findings. RP 25; CP 35-37. This timely appeal followed. CP 38.

ARGUMENT

I. MS. PHILLIPS MUST BE ALLOWED TO WITHDRAW HER GUILTY PLEA BECAUSE THE CHARGE WAS PREDICATED ON A UTAH CONVICTION THAT WAS NOT CONSTITUTIONALLY VALID.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *In re Detention of Strand*, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009).

B. A conviction for Failure to Register may not be predicated on a constitutionally invalid prior conviction.

RCW 9A.44.130 criminalizes Failure to Register. Under the statute, convicted sex offenders are required to register with the sheriff in their county of residence. RCW 9A.44.130(1). Failure to register is a Class C felony (unless the predicate offense is other than a felony). RCW 9A.44.130(11). A charge of Failure to Register may not be based on a constitutionally invalid predicate conviction. *See, e.g., State v. Summers*, 120 Wn.2d 801, 846 P.2d 490 (1993); *State v. Swindell*, 93 Wn.2d 192, 607 P.2d 852 (1980). Where an accused person disputes the

constitutional validity of a predicate conviction, the burden is on the prosecution to prove beyond a reasonable doubt that it was constitutionally obtained. *Swindell*, at 199.

In *Swindell*, the defendant was charged with unlawfully possessing a pistol after having been convicted of a crime of violence. He challenged his prior second-degree assault conviction, contending that his guilty plea had been involuntary. The Supreme Court agreed, found that the state had not proven constitutional validity beyond a reasonable doubt, and dismissed the firearm charge. *Id.*, at 199.

In this case, Ms. Phillips's Failure to Register was predicated on a constitutionally invalid prior conviction. Accordingly, the trial judge should have permitted her to withdraw her guilty plea.

C. Ms. Phillips's 2006 guilty plea was entered in violation of her Fourteenth Amendment right to due process.

Due process requires an affirmative showing that an accused person's guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004); *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996). A plea of guilty "is an admission of criminal conduct as well as the waiver of the right to trial." *Finch v. Vaughn*, 67 F.3d 909, 914 (11th Cir. 1995) (citing *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)). A

waiver of constitutional rights must be knowing, intelligent, and voluntary, “with sufficient awareness of the relevant circumstances and likely consequences.” *Vaughn*, at 914 (quoting *Brady*, at 748).

In Utah, guilty pleas in juvenile court are governed by Juvenile Procedure Rule 25. In December of 2007, the Utah Supreme Court held that former Rule 25 (2007) did not adequately safeguard the constitutional rights of juvenile offenders.¹ *State ex rel. K.M.*, 173 P.3d 1279 (UT, 2007). Specifically, the rule did not ensure that juveniles understood the nature and elements of a charged offense before pleading guilty. *Id.*, at 1284. In *K.M.*, the Utah Supreme Court reversed the lower courts’ denial of a juvenile offender’s motion to withdraw her guilty plea, finding that the juvenile had not knowingly, intelligently, and voluntarily entered the plea. *Id.*, at 1286 –1287.

Ms. Phillips’s guilty plea was entered in 2006, under the constitutionally invalid version of Utah’s Juvenile Procedure Rule 25.² The evidence of her Utah conviction consists of a document captioned

¹ The rule has since been amended. *See* Utah Juvenile Procedure Rule 25.

² The state submitted to the trial court what appears to be the amended version of the rule. *See* State’s Supplemental Response, Attachments 1 and 2, CP 31-34. However, the amendment did not take effect until 2009, long after Ms. Phillips’s Utah conviction was final.

“Minutes, Findings, and Order.” CP 22. The document does not establish that Ms. Phillips understood the nature and elements of the prior offense, and the prosecution did not submit any additional evidence on this point. Accordingly, the record does not affirmatively establish beyond a reasonable doubt that Ms. Phillips’s predicate conviction was constitutionally valid.

In the absence of evidence establishing the validity of the prior conviction, Ms. Phillips’s guilty plea cannot stand. *Swindell, supra*. Her conviction for Failure to Register must be reversed and the case dismissed with prejudice. *Id.*

II. MS. PHILLIPS MUST BE ALLOWED TO WITHDRAW HER GUILTY PLEA BECAUSE HER UTAH CONVICTION IS NOT A “SEX OFFENSE” WITHIN THE MEANING OF RCW 9A.44.130.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Strand, at* 186. Statutory construction is a question of law reviewed *de novo*. *In re Detention of Martin*, 163 Wn.2d 501, 506, 182 P.3d 951 (2008).

B. Ms. Phillips’s 2006 juvenile conviction does not qualify as a “sex offense” under the plain language of RCW 9A.44.130.

In interpreting a statute, a court must assume that the legislature means exactly what it says. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d

1030 (2001), *cert. den. sub nom Keller v. Washington*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). If the statute is clear on its face, its meaning is derived from the statutory language alone; an unambiguous statute is not subject to judicial interpretation. *State v. Cramm*, 114 Wn.App. 170, 173, 56 P.3d 999 (2002); *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). The court may not add language to a clearly worded statute, even if it believes the legislature intended more. *Id.*, *supra*.

The registration statute applies to any person who “has been found to have committed or has been convicted of any sex offense.” RCW 9A.44.130(1)(a). For purposes of the statute, the phrase “sex offense” is defined to mean:

- (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.

RCW 9A.44.130 (10)(a). RCW 9.94A.030(42), in turn, defines “sex offense” to include:

- (a)
 - (i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(12);
 - (ii) A violation of RCW 9A.64.020;
 - (iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080; or
 - (iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;
- (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;
- (c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or
- (d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

RCW 9.94A.030(42).

Thus, under the registration statute, federal or out-of-state convictions are examined to see if they “would be classified as a sex offense under this subsection.” RCW 9A.44.130(1)(a)(iv). In this case, Ms. Phillips’s prior Utah conviction must be analyzed under RCW 9.94A.030, because it does not fit within any of the other categories listed in the registration statute. RCW 9A.44.130(1)(a)(i). It does not qualify as a “sex offense” under RCW 9.94A.030 unless it is “an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.” RCW 9.94A.030(42)(d).

In Washington, juvenile offenses are not felonies. *State v. Schaaf*, 109 Wn.2d 1, 8, 743 P.2d 240 (1987) (citing *In re Frederick*, 93

Wn.2d 28, 29-30, 604 P.2d 953 (1980)); *see also In re Weaver*, 84 Wn.App. 290, 293-294, 929 P.2d 445 (1996) (citing RCW 13.04.240, and RCW 13.40.020, RCW 10.64.110). The Supreme Court recently reaffirmed this core distinction between the juvenile and adult systems when it held (once again) that juvenile offenders are not entitled to jury trials. *State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008).

Since juvenile adjudications are not felonies, a juvenile offense cannot be “an offense that under the laws of this state would be a felony classified as a sex offense.” RCW 9.94A.030(42)(d). Because Ms. Phillips’s 2006 juvenile conviction is not “an offense that under the laws of this state would be a felony classified as a sex offense,” it does not qualify as a “sex offense” for purpose of the registration statute. *Schaaf, supra; Frederick, supra*; RCW 9.94A.030(42)(d); RCW 9A.44.130. Accordingly, it cannot form the basis for her conviction in this case. RCW 9A.44.130(1).

Ms. Phillips must be permitted to withdraw her guilty plea. Her conviction must be reversed, and the case dismissed with prejudice. RCW 9A.44.130; *Schaaf, supra*.

C. Even if the statute is ambiguous, Ms. Phillips's 2006 juvenile adjudication does not qualify as a "sex offense."

A statute is ambiguous if it is "amenable to more than one reasonable interpretation." *State v. Mendoza*, 165 Wn.2d 913, 921, 205 P.3d 113 (2009). To determine legislative intent, courts turn to rules of statutory construction. *Delyria v. State*, 165 Wn.2d 559, 563, 199 P.3d 980 (2009). Here, if the phrase "sex offense" is found to be ambiguous, the rules of statutory construction favor Ms. Phillips's interpretation for three reasons.

First, under the rule of lenity, a criminal statute must be construed in the manner most favorable to the accused person. *State v. Gonzales Flores*, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008); *State v. Jackson*, 61 Wn.App. 86, 93, 809 P.2d 221 (1991). The policy underlying the rule of lenity is "to place the burden squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." *Id.*, at 93. Applying the rule of lenity, the narrowest interpretation of the phrase "sex offense" used in RCW 9A.44.130 and RCW 9.94A.030(42) would exempt Ms. Phillips from the registration requirement.

Second, the maxim *expressio unius est exclusio alterius* compels the same interpretation. *Martin, supra*. Under this rule, omissions are

deemed to be exclusions. *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008). When the legislature intends to refer to both adult felonies and equivalent juvenile offenses it is capable of doing so. *See, e.g.*, RCW 9A.76.070 and .080 (Rendering Criminal Assistance involves helping a person sought for any “felony or equivalent juvenile offense...”); RCW 9A.76.110 and .120 (Escape committed by a person detained “pursuant to a conviction of a felony or an equivalent juvenile offense...”). By repeatedly using the word “felony” in RCW 9.94A.030(42), and by omitting the phrase “or equivalent juvenile offense” from that statute, the legislature is deemed to have excluded juvenile felony-equivalents from the registration requirement.³

Third, “subsequent legislative changes can be considered when trying to determine legislative intent.” *Mendoza*, at 921. Appellate courts presume “that every amendment is made to effect some material purpose.” *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978); *State v. Krall*, 125 Wn.2d 146, 149, 881 P.2d 1040 (1994). *See, e.g., State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981) (omission of the words “with intent” leads “conclusively to the view that ‘[h]ad the legislature

³ With the exception of those crimes covered by RCW 9A.44.130(10)(a)(ii)-(iv) or RCW 9.94A.030(42)(a)(ii) and (c).

intended to retain guilty knowledge or intent as an element of the crime of possession, it would have spelled it out as it did in the previous statute.”
Id., at 378 (citation omitted)).

The legislature has made a change to the registration statute that establishes that juvenile offenses are not generally within the statute’s reach. Specifically, when the Court of Appeals pointed out that former RCW 9.94A.030(42)(c) (1994) did not reference juveniles who’d committed felony-equivalent offenses with sexual motivation, the legislature amended subsection c to add a reference to RCW 13.40, but did not amend the other subsections. *State v. S.M.H.*, 76 Wn.App. 550, 556, 887 P.2d 903 (1995); Laws of 1995, ch. 268, § 2. This amendment conclusively establishes that those subsections using the word felony but devoid of reference to juveniles or RCW 13.40 do not apply to juvenile offenses. *Vita Food, supra*.

Accordingly, even if the statute were found to be ambiguous, the rules of statutory construction compel an interpretation that excludes most juvenile offenses, including Ms. Phillips’s 2006 conviction from Utah. *Mendoza, supra*. The legislature created a statutory scheme that applies to all adult sex offenders but only some juvenile offenders.

Under the statute, Ms. Phillips does not have a duty to register, and thus must be allowed to withdraw her guilty plea. Her conviction must be reversed, and her case dismissed with prejudice.

- D. The Court may not “correct” RCW 9A.44.130 by rewriting it to cover all juvenile sexual offenses.

A court may not rewrite a statute even if the legislature intended something else but failed to express it adequately. *Martin*, at 509; *State v. Azpitarte*, 140 Wn.2d 138, 142, 995 P.2d 31 (2000). In *Martin*, the Supreme Court explained that only inconsistencies rendering a statute meaningless may be corrected by the judiciary:

[T]here are three types of cases addressing legislative omissions: an understandable omission, an omission creating an inconsistency, and an omission rendering the statute meaningless. In the first type of case the court is able to ascertain why the legislature intended a literal reading of the statute. “The court does not correct this type of perceived legislative error.” ...In the second type of omission case, the omission does not undermine the effectiveness of the entire statute but “simply kept the purposes [of the statute] from being effectuated comprehensively.” If a statute contains an inconsistency but remains rational as a whole, this court will not correct any supposed legislative omission in order to make the statute “more perfect, more comprehensive and more consistent.” Under these circumstances the court does not “suppl[y] the omitted language because it [is] not ‘imperative’ to make the statute rational.” By contrast, in the third type of omission case, the omission makes the “statute entirely meaningless.” This court will compensate for this type of omission if “it is ‘imperatively required to make it a rational statute.’ “ For example, an omission simultaneously qualifying a person for confinement *and* release is meaningless. Under this circumstance the statute is *completely* ineffectual unless corrected.

Martin, at 512-513 (citations omitted).

Here, the statute is not entirely meaningless; instead, the law is less comprehensive than individual legislators may have intended. Under the plain language of the statute, juveniles are required to register if convicted of one of the enumerated offenses in RCW 9A.44.130(10)(a)(ii)-(iv) or RCW 9.94A.030(42)(a)(ii) and (c). If this limitation in the plain language of the statute was inadvertent, the judiciary is permitted to highlight it for the legislature, but not permitted to correct it. *Martin, supra*.

E. The 1994 decision in *State v. Acheson* should be reconsidered.

In 1994, the Court of Appeals examined RCW 9A.44.130, and concluded that the registration requirements applied equally to adults and to juveniles. *State v. Acheson*, 75 Wn.App. 151, 877 P.2d 217 (1994). According to the *Acheson* court, RCW 9A.44.130 differed from the escape statute at issue in *Frederick, supra*, because the registration statute (unlike the escape statute) was “not limited to defendants convicted of a felony.” *Acheson*, at 154. Instead, RCW 9.94A.130 explicitly required “registration by “[a]ny adult or *juvenile* residing in the state *who has been found to have committed* or has been convicted of *any sex offense ...*” *Acheson*, at 153-155 (emphasis in original, quoting RCW 9.94A.130). This opinion indicated that RCW 9.94A.030 defined “sex offense” to include child molestation in the first degree.

Acheson should be reexamined for three reasons. First, the opinion summarily concluded that any felony-equivalent juvenile sexual offense qualified as a “sex offense,” without examining RCW 9.94A.030. Second, the *Acheson* court did not have the benefit of *S.M.H.* or the 1995 amendment to RCW 9.94A.030(42). Third, the *Acheson* decision preceded *Weaver* and the Supreme Court’s recent *Chavez* decision.

Had the *Acheson* court closely examined RCW 9.94A.030 in light of *S.M.H.*, the 1995 amendments, *Weaver*, and the Supreme Court’s continuing explication of the difference between the juvenile and adult systems (as outlined in *Chavez, supra*), it would have concluded that the phrase “sex offense” as used in RCW 9A.44.130 does not apply broadly to all juvenile adjudications of sexual offenses. RCW 9A.44.130(10); RCW 9.94A.030(42). *Acheson* should be reexamined, and its holding abandoned.

CONCLUSION

For the foregoing reasons, Ms. Phillips must be allowed to withdraw her guilty plea. Her conviction must be reversed, and the case must be dismissed with prejudice.

Respectfully submitted on May 3, 2010.

BACKLUND AND MISTRY


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant


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Attorney for the Appellant

APPENDIX

08-8731

Fourth District Juvenile Court
FOR UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, in the interest of	Minutes, Findings, and Order
Phillips, Amanda Nicole 01-07-1989 A person under the age of 18 years	Case No. 501807

Before Judge Sterling B. Sainsbury on September 12, 2006

This case came before the Court for a hearing on the following:

Case Number 501807, Amanda Phillips

2 - AGG.SEX.ABUSE,CHILD-V UNDER 14 (Felony - 1st Degree) - Pretrial

3 - DETENTION HEARING (Administrative - Other) - Detention Hearing

MINUTES:

Present: Amanda Nicole Phillips; Dennis Karl Moxon, Probation Officer; Karla Hayes, Guardian; Margaret P. Lindsay, Attorney; PAUL WAKE, Attorney

Petition(s) is/are read and admitted.

Report(s) and recommendation(s) are submitted to the Court by Mr Moxon.

The Court addresses and accepts comments from all parties present.

Incidents:

Amanda Phillips ***** allegation 2, SEXUAL ABUSE,CHILD-V.UNDER 14, on the petition filed August 28, 2006.

Amanda Phillips ***** allegation 3, DETENTION HEARING, on the petition filed August 23, 2006.

FINDINGS:

Based upon the admission to allegation(s) 2 - SEXUAL ABUSE,CHILD-V.UNDER 14, the Court finds the allegation(s) to be true and correct and Amanda Nicole Phillips comes within the provisions of the Utah Juvenile Court Act.

ORDERS:

Amanda Nicole Phillips is ordered to:

For allegation # 2 - SEXUAL ABUSE,CHILD-V.UNDER 14:

--is placed on probation. Amanda Nicole Phillips and parents are to comply with the terms of probation as incorporated in the signed Probation Order.

--is committed to detention for a period of 30 days to commence immediately with prior release to Mr Moxon, Probation Officer

Continued on next page

EXHIBIT "A"

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08-8731

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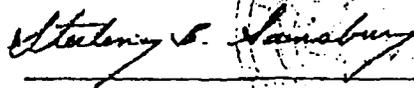
--is to provide a DNA saliva specimen to a designated employee of this court within 120 days. The \$100.00 fee is waived.

For allegation # 3 - DETENTION HEARING:

--to continue in detention with prior release to Mr Moxon, Probation Officer.

Signed and filed this 12th day of September, 2007.

BY THE COURT



Sterling B. Sainsbury, Judge

Recorded by D. Diamond

SBS-09-11-2006

CC: Amanda Nicole Phillips; PAUL WAKE; Margaret P. Lindsay; Karla Hayes; Dennis Karl Moxon

EXHIBIT "A"

23

10

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Amanda Phillips
P. O. Box 935
Winlock, WA 98596

and to:

Lewis County Prosecuting Attorney
MS:pro01
360 NW North Street
Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 3, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 3, 2010.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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