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ARGUMENT

THE PROSECUTION FAILED TO PROVE THAT MR. TAYLOR HAS A PRIOR CONVICTION THAT QUALIFIES AS A “SEX OFFENSE” UNDER RCW 9A.44.130.

To convict Mr. Taylor, the prosecution was required to prove beyond a reasonable doubt that he had been convicted of a “sex offense.” RCW 9A.44.130. That phrase is defined to include (*inter alia*) “[a] felony that is a violation of chapter 9A.44 RCW” and “[a]ny conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony [currently] classified as a sex offense...” RCW 9.94A.030(45).¹ The prosecution did not prove a prior conviction that fell within either definition.²

First, Mr. Taylor’s prior conviction was entered under a statute that was later repealed, and thus was not “[a] felony that *is* a violation of chapter 9A.44 RCW...” *Id* (emphasis added). Second, the legislature

¹ Respondent erroneously contends that the correct section (in effect at the time of Mr. Taylor’s alleged failure to register) is former RCW 9.94A.030(42). Brief of Respondent, p. 1. In fact, the correct citation to the prior statute is former RCW 9.94A.030(46) (2009). The 2008 legislature twice amended RCW 9.94A.030, each time without reference to the other amendment. *See* Laws of 2008, Chapters 230 and 231. However, both amendments went into effect *after* Mr. Taylor’s alleged failure to register. To simplify matters, Appellant has chosen to reference the numbering in the current statute, which retains the same language.

² The other statutory definitions are inapplicable in this case. *See* former RCW 9A.44.130(10) (2009) *and* RCW 9.94A.030(45).

made specific provision for convictions entered under statutes that have since been repealed; however, that provision applies only to laws in effect “prior to July 1, 1976.” *Id.* Mr. Taylor’s prior conviction was a violation of former RCW 9A.44.090, which was enacted in 1979 and repealed in 1988. *See* Laws of 1979, Ex.Sess., Chapter 244; Laws of 1988, Chapter 145, Section 24. Thus, he was not convicted of “a felony offense in effect at any time *prior to* July 1, 1976...” RCW 9A.44.030(45) (emphasis added).

Respondent ignores the plain language of the statute, and fails to address Mr. Taylor’s arguments relating thereto. Brief of Respondent, pp. 1-3. This failure to address the plain language of the statute may be treated as a concession that the plain language defining “sex offense” does not incorporate Mr. Taylor’s offense. *See, e.g., In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead of addressing the statute’s plain language, Respondent focuses on the savings clause presumption (contained in RCW 10.01.040) and on language in the 1988 repeal of RCW 9A.44.090 to support this argument. Brief of Respondent, p. 2. These provisions do not have the effect claimed by Respondent.

Neither the savings clause nor the language from the act repealing RCW 9A.44.090 enlarge the definition of “sex offense;” nor do they

otherwise expand the scope of criminal liability for failure to register. Instead, they explain that repeal does not affect any civil or criminal liability, penalty, or forfeiture in existence at the time of repeal. RCW 10.01.040; Laws of 1988, Chapter 145, Section 25. This means that an offense committed prior to the repeal date can result in conviction under the former statute, even after the repeal's effective date. It also means that an offender convicted under the repealed statute may still be liable for civil damages, even after the repeals effective date.

Respondent argues that the language should also be read to require people convicted under the repealed statute to register, if they were obligated to do so prior to repeal. Brief of Respondent, pp. 1-3. This is a stretch—the two provisions use the words 'penalty,' 'forfeiture,' and 'liability;' they do not use words like duty, obligation, or registration.

The duty or obligation to register cannot be described as a penalty, a forfeiture, or a liability—instead, it is a collateral consequence of conviction. *State v. Ward*, 123 Wash.2d 488, 513-514, 869 P.2d 1062 (1994). The legislature chose the words penalty, forfeiture, and liability, thus signaling its intent not to extend beyond the repeal date any potential collateral obligations—such as a duty to register—that fall outside those

three categories. This is so because omissions from a statute are deemed to be exclusions.³

Furthermore, even if these provisions required Mr. Taylor to continue registering even after the repeal, this does not mean his failure to register would be a criminal violation of RCW 9A.44.130. That statute only applies to people convicted of a “sex offense,” a phrase that has a specific meaning under the plain language of the statute. *See* RCW 9.94A.030(45) *and* former RCW 9A.44.130(10) (2009).

The legislature did not define “sex offense” to include a violation of former RCW 9A.44.090. Because the prosecutor did not submit evidence that Mr. Taylor had been convicted of a qualifying sex offense, it failed to prove beyond a reasonable doubt that he was obligated to register, or that his failure to do so violated RCW 9A.44.130. Accordingly, his conviction must be reversed and the case dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

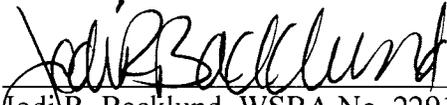
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CONCLUSION

Mr. Taylor's conviction must be reversed and his case dismissed
with prejudice.

Respectfully submitted on February 21, 2011.

BACKLUND AND MISTRY



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

Homer Taylor III, DOC #250420
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Monroe, WA 98272

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway, #102
Montesano, WA 98563

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

All postage prepaid, on February 21, 2011.

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 February 21, 2011.

[Signature]

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

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Homer Taylor, III

Appellant.

Grays Harbor County Superior Court Cause No. 09-1-00336-2

The Honorable Judge Gordon Godfrey

Appellant's Reply Brief

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The legislature did not define “sex offense” to include a violation of former RCW 9A.44.090. Because the prosecutor did not submit evidence that Mr. Taylor had been convicted of a qualifying sex offense, it failed to prove beyond a reasonable doubt that he was obligated to register, or that his failure to do so violated RCW 9A.44.130.

Accordingly, his conviction must be reversed and the case dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

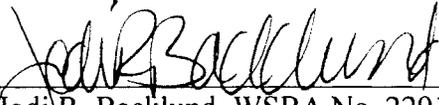
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CERTIFICATE OF MAILING

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

Homer Taylor III, DOC #250420
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and to:

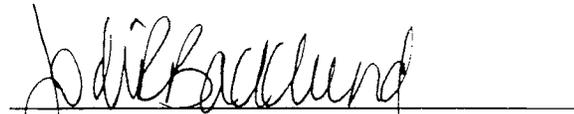
Grays Harbor Prosecuting Attorney
102 West Broadway, #102
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