

No. 30605-4-III (consolidated) with No. 306062, 306071
306089 & 306097

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

SCOTT THOMAS HURLEY,
Defendant/Appellant.

FILED
SEPT 11, 2012
Court of Appeals
Division III
State of Washington

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Annette S. Plese, Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A.	ASSIGNMENTS OF ERROR.....	1
B.	STATEMENT OF THE CASE.....	3
C.	ARGUMENT.....	10
1.	The court lacked authority to impose the reporting, completion and notification requirements as sentencing conditions for which Hurley could be sanctioned for noncompliance.....	10
	a. The reporting, completion and notification requirements are not legislatively authorized sentencing conditions.....	10
	b. The reporting, completion and notification requirements are not punishable as sentencing violations.....	14
	c. The issue is properly before this court.....	19
	d. Hurley did not waive legal errors predicated on lack of statutory authority.....	20
	e. This appeal is not moot and review is otherwise appropriate...22	
2.	RCW 9.94A.030(2) and RCW 9.94A.760(4), (7)(b), (8) and (13) violate the separation of powers doctrine because the legislation delegates the power to collect legal financial obligations to county clerks without providing standards or safeguards against arbitrary actions or discretionary abuse.....	27
	a. Review is appropriate.....	27
	b. The county clerk’s power is limited.....	27
	c. The legislation provides inadequate administrative delegation.....	28

3. Reversal on due process grounds is required where Mr. Hurley was found to have committed a condition of sentence violation without being notified in writing of the nature of the violation.....	38
4. The sentencing condition requiring an offender to notify the clerk’s office of any change in circumstances is unconstitutionally vague.....	40
5. The finding that Hurley violated the requirement that he complete a financial assessment form is unsupported by the evidence and must be reversed.....	43
D. CONCLUSION.....	45

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Gagnon v. Scarpelli</u> , 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756 (1973).....	38
<u>Caffall Bros. Forest Prods. v. State</u> , 79 Wn.2d 223, 484 P.2d 912 (1971).....	29
<u>City of Spokane v. Douglass</u> , 115 Wn.2d 171, 795 P.2d 693 (1990).....	40
<u>City of Yakima v. Mollett</u> , 115 Wn. App. 604, 63 P.3d 177 (2003).....	26
<u>Davis v. Gibbs</u> , 39 Wn.2d 481, 236 P.2d 545 (1951).....	13
<u>Diversified Inv. Partnership v. Department of Social and Health Services</u> , 113 Wn.2d 19, 775 P.2d 947 (1989).....	28

<u>In re Boone</u> , 103 Wn.2d 224, 691 P.2d 964 (1984).....	38
<u>In re Interest of Mowery</u> , 141 Wn. App. 263, 169 P.3d 835 (2007).....	23
<u>In re Marriage of Irwin</u> , 64 Wn. App. 38, 822 P.2d 797 (1992).....	22
<u>In re Pers. Restraint of Carle</u> , 93 Wn.2d 31, 604 P.2d 1293 (1980).....	30
<u>In re Pers. Restraint of Hopkins</u> , 137 Wn.2d 897, 976 P.2d 616 (1999).....	18, 19
<u>In re Pers. Restraint of Mines</u> , 146 Wn.2d 279, 45 P.3d 535 (2002).....	24
<u>In re Pers. Restraint of Moore</u> , 116 Wn.2d 30, 803 P.2d 300 (1991).....	21
<u>In re Pers. Restraint of Myers</u> , 105 Wn.2d 257, 714 P.2d 303 (1986).....	26
<u>In re Pers. Restraint of Spires</u> , 151 Wn. App. 236, 211 P.3d 437 (2009)..	17
<u>In re Recall of Pearsall-Stipek</u> , 141 Wn.2d 756, 10 P.3d 1034 (2000).....	17
<u>John H. Sellen Constr. Co. v. Dep’t of Revenue</u> , 87 Wn.2d 878, 558 P.2d 1342 (1976).....	17
<u>Keeting v. Public Util. Dist. No. 1 of Clallam Cy.</u> , 49 Wn.2d 761, 306 P.2d 762 (1957).....	28
<u>Kilian v. Atkinson</u> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	16
<u>Peterson v. Hagan</u> , 56 Wn.2d 48, 351 P.2d 127 (1960).....	31
<u>Queets Band of Indians v. State</u> , 102 Wn.2d 1, 682 P.2d 909 (1984).....	18
<u>Standlee v. Smith</u> , 83 Wn.2d 405, 518 P.2d 721 (1974).....	45
<u>State ex rel. McDonald v. Whatcom County Dist. Court</u> 92 Wn.2d 35, 593 P.2d 546 (1979).....	19
<u>State ex rel. Namer Inv. Corp. v. Williams</u> , 73 Wn.2d 1 435 P.2d 97 (1968).....	28

<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	19, 40, 42
<u>State v. Barnett</u> , 139 Wn.2d 462, 987 P.2d 626 (1999).....	10
<u>State v. Bird</u> , 95 Wn.2d 83, 622 P.2d 1262 (1980).....	14
<u>State v. Delgado</u> , 148 Wn.2d 723, 63 P.3d 792 (2003).....	16, 17
<u>State v. Eilts</u> , 94 Wn.2d 489, 617 P.2d 993 (1980).....	20
<u>State v. G.A.H.</u> , 133 Wn. App. 567, 137 P.3d 66 (2006).....	22, 24
<u>State v. Gilroy</u> , 37 Wn.2d 41, 221 P.2d 549 (1950).....	31
<u>State v. Hunter</u> , 102 Wn. App. 630, 9 P.3d 872 (2000).....	19
<u>State v. Jackson</u> , 61 Wn. App. 86, 809 P.2d 221 (1991).....	19
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	27
<u>State v. Kuhn</u> , 81 Wn.2d 648, 503 P.2d 1061 (1972).....	45
<u>State v. Motter</u> , 139 Wn. App. 797, 162 P.3d 1190 (2007) , <i>rev. denied</i> , 163 Wn.2d. 1025, 185 P.3d 1194 (2008), <i>overruled on other grounds by</i> <u>State v. Valencia</u> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	21
<u>State v. Murray</u> , 118 Wn. App. 518, 77 P.3d 1188 (2003).....	10
<u>State v. Myers</u> , 86 Wn.2d 419, 545 P.2d 538 (1976).....	45
<u>State v. Nason</u> , 168 Wn.2d 936, 233 P.3d 848 (2010).....	4, 5, 19
<u>State v. Paulson</u> , 131 Wn. App. 579, 128 P.3d 133 (2006).....	10, 14
<u>State v. Peterson</u> , 145 Wn. App. 672, 186 P.3d 1179 (2008), <i>aff'd</i> , 168 Wn.2d 763, 230 P.3d 588 (2010).....	24
<u>State v. Phelps</u> , 113 Wn. App. 347, 357, 57 P.3d 624 (2002).....	21

<u>State v. Raines</u> , 83 Wn. App. 312, 922 P.2d 100 (1996).....	18, 23
<u>State v. Ramos</u> , 149 Wn. App. 266, 202 P.3d 383 (2009).....	27, 29, 30, 31, 37, 38
<u>State v. Salavea</u> , 151 Wn.2d 133, 86 P.3d 125 (2004).....	17
<u>State v. Sansone</u> , 127 Wn. App. 630, 111 P.3d 1251 (2005).	
<u>State v. Simmons</u> , 152 Wn.2d 450, 98 P.3d 789 (2004).....	26, 29, 31
<u>State v. Thompson</u> , 151 Wn.2d 793, 92 P.3d 228 (2004).....	16
<u>State v. Valencia</u> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	40, 41
<u>State v. Wallin</u> , 125 Wn. App. 648, 105 P.3d 1037, <i>rev. denied</i> , 155 Wn.2d 1012, 122 P.3d 186 (2005).....	21
<u>State v. Wilson</u> , 170 Wn.2d 682, 244 P.3d 950 (2010).....	22
<u>Washington State Republican Party v. Washington State Public Disclosure Comm'n</u> , 141 Wn.2d 245, 4 P.3d 808 (2000).....	17–18
<u>Westerman v. Cary</u> , 125 Wn.2d 277, 892 P.2d 1067 (1994).....	22
<u>United States Steel Corp. v. State</u> , 65 Wn.2d 385, 397 P.2d 440 (1964).....	31

Statutes

U.S. Const. amend. 14.....	40
Const. art. IV, § 26.....	27
Const. art. I, § 3.....	40
Laws of 1998 c 260 § 4.....	14
Laws of 1999 c 196 § 6.....	11
Laws of 2000 c 31 § 28.....	11
Laws of 2000 c 226 § 4.....	11
Laws of 2002 c 175 § 8.....	14
Laws of 2003 c 379 §§ 13-27.....	28
Laws of 2003 c 379 § 13.....	12
Laws of 2003 c 379 § 14.....	11
Laws of 2003 c 379 § 24.....	12
Laws of 2008 c 231 § 56.....	14
RCW 2.32.050(8).....	27
RCW 4.24.550(6).....	30
RCW 4.24.550(6)(a).....	30
RCW 4.24.550(6)(b).....	30, 31
RCW 18.235.130(10).....	35
RCW 18.235.130(11).....	35

Chapter 19.16 RCW.....	35
RCW 19.16.100(2)(a).....	35
RCW 19.16.120.....	35
RCW 19.16.250.....	36
RCW 36.16.070.....	27
RCW 36.18.190.....	32
RCW 36.29.010(9).....	32
RCW 9.94.070.....	29
Chapter 9.94A RCW.....	12, 13, 16
RCW 9.94A.030(2).....	27, 32, 35, 37
Former RCW 9.94A.145.....	11
RCW 9.94A.345.....	11
RCW 9.94A.505.....	12
RCW 9.94A.505(8).....	12, 13
Former RCW 9.94A.634.....	14
RCW 9.94A.737.....	15, 16
RCW 9.94A.740.....	16
RCW 9.94A.760.....	12, 14, 16, 17, 18, 27, 35
RCW 9.94A.760(1).....	14, 28
RCW 9.94A.760 (3).....	28

RCW 9.94A.760 (4).....	27, 28, 37
Former RCW 9.94A.760(7)(b).....	11
RCW 9.94A.760(7)(b).....	9, 11, 12, 15, 16, 20, 25, 27, 28, 37, 41
RCW 9.94A.760(8).....	27, 28, 37
RCW 9.94A.760(9).....	28
RCW 9.94A.760(10).....	13, 15, 18, 27
RCW 9.94A.760 (11)(d).....	28
RCW 9.94A.760 (13).....	27, 28, 32, 37
RCW 9.94B.040.....	14, 15, 16, 19
RCW 9.94B.040(1).....	13, 14
RCW 9.94B.040(3)(c).....	14, 39, 43
RCW 9A.44.130(7).....	30
RCW 79.01.212.....	29

Court Rules

RAP 2.5(a)(3).....	27
--------------------	----

Other Resources

Black’s Law Dictionary (5th ed. 1979).....31

Black’s Law Dictionary (8th ed.).....14

Lawrence-Turner, Jody. “Debt to society.” *The Spokesman Review* [Spokane, WA] 24 Mar. 2009. 6 Jun 2009.
<<http://www.spokesman.com/stories/2009/may/24/debt-to-society>>.....37

Lawrence-Turner, Jody. “High court takes criminal fees case.” *The Spokesman Review* [Spokane, WA] 24 Mar. 2009. 6 Jun 2009.
<<http://www.spokesman.com/stories/2009/may/24/high-court-takes-criminal-fees-case>>.....37

McAllister, Joel, Finance Division Manager, King County Clerk’s Office on behalf of Washington Association of County Officials. “2008 Report to the Washington State Legislature on the Fiscal Impact of ESSB 5990, or Chapter 379, Laws of 2003 and SSB 5256, or Chapter 362, Laws of 2005”, page 4 ¶1, page 8 ¶1. November 2008.
http://media.spokesman.com/documents/2009/05/study_collectingsuccess.pdf.....33

Michael L. Vander Giessen, Note, LEGISLATIVE REFORMS FOR WASHINGTON STATE’S CRIMINAL MONETARY PENALTIES, 47 Gonz. L. Rev. 547, 551–52 (2011–2012).....26

Webster’s Encyclopedic Unabridged Dictionary of the English Language. Thunder Bay Press, Advantage Publishers Group, 2001.....32

A. ASSIGNMENTS OF ERROR

1. The court below lacked statutory authority to penalize appellant's failure to report as directed to the county clerk as a violation of a sentencing condition.

2. The court below lacked statutory authority to penalize appellant's failure to complete and return financial assessment form to the county clerk as a violation of a sentencing condition.

3. The court below lacked statutory authority to penalize appellant's failure to notify the clerk's office of a change in circumstances as a violation of a sentencing condition.

4. The court erred by finding appellant had committed a condition of sentence violation without being notified in writing of the nature of the violation.

5. The court erred by finding appellant violated the sentencing condition requiring him to notify the clerk's office of any change in circumstances.

6. The evidence was insufficient to support the finding that appellant violated the sentencing condition requiring him to complete and return a financial assessment form.

7. The court erred in denying appellant's motion to reconsider.

Issues Pertaining to Assignments of Error

1. Whether the plain language of the statute governing legal financial obligations and established rules of statutory construction demonstrate the court lacked authority (1) to punish appellant for not reporting, completing a financial assessment form, and/or notifying the clerk's office of a change in circumstances and (2) to impose these requirements as conditions of appellant's sentence.

2. Whether RCW 9.94A.030(2) and RCW 9.94A.760(4), (7)(b), (8) and (13) violate the separation of powers doctrine because the legislation delegates the power to collect legal financial obligations to county clerks without providing standards or safeguards against arbitrary actions or discretionary abuse.

3. Should the failure to report violation be reversed because appellant was found to have committed the condition of sentence violation without having been notified in writing of the nature of the violation?

4. Is the sentencing condition requiring an offender to notify the clerk's office of any change in circumstances unconstitutionally vague?

5. Is the finding that the appellant violated the requirement that he complete a financial assessment form unsupported by the evidence?

B. STATEMENT OF THE CASE

In 2002, Scott Thomas Hurley pleaded guilty (under two separate cause numbers¹) to conspiracy to manufacture methamphetamine, attempt to elude and possession of methamphetamine. CP 1, 63–64. The court imposed confinement of three 6 month terms, to be served concurrently. CP 7, 69. The court also ordered Hurley to pay \$4,757 in legal financial obligations (“LFOs”). CP 5, 67.

In 2004, Hurley pleaded guilty (under three separate cause numbers²) to conspiracy to manufacture methamphetamine, first degree theft and first degree assault, and second degree possession of stolen property. CP 125, 188–89, 246. The court imposed confinement of 365 days, 22 and 33 months, and 14 months, to be served concurrently. CP 131, 194, 252. The court ordered Hurley to pay an additional \$3,370 in legal financial obligations. CP 129, 192, 250.

The 2002 and 2004 Judgment and Sentences required Hurley to “make payments in accordance with the policies of the clerk . . . , commencing immediately.” CP 5, 67, 129, 192, 250.

¹ Spokane County Superior Court Nos. 02-1-01409-8 and 02-1-01896-4.

² Spokane County Superior Court Nos. 03-1-02132-7, 03-1-03732-1 and 03-1-03872-6.

In 2007, the court sanctioned Hurley 30 days for failure to report, pay financial obligations and complete financial assessment form. CP 16, 78, 141, 263. The court modified the sentence in various ways including the insertion of the following boilerplate language:

Defendant is to report, in person, to the Office of the Spokane County Clerk ... within 48 hours of his release, or at the time of any change in information, to provide a current address, to keep the Clerk advised of a current address at all times, to provide current financial information to the Clerk and to pay the legal financial obligations. **Failure to do any of the above may result in a bench warrant being issued for your arrest.**

CP 17, 79, 142, 264 (bolding original). The modification also included an “auto jail” provision³ requiring Hurley to report to jail on January 9, 2008 should he fail to make payments. Hurley was not represented by counsel.

Id.

In 2008, the court sanctioned Hurley 60 days for failure to complete financial assessment form, comply with the 2007 order and report to jail per the 2007 order. CP 20, 82, 145. 206, 267. The modification order contained the same boilerplate language as the 2007 order. The “auto jail” provision required Hurley to report to jail on

³See State v. Nason, 168 Wn.2d 936, 233 P.3d 848 (2010). The Washington State Supreme Court found this procedure void as violative of due process. 168 Wn.2d at 948.

December 3, 2008 should he fail to make payments. CP 21, 83, 146, 207, 268.

In 2009, the court sanctioned Hurley 60 days for failure to comply with both the 2007 and 2008 orders and report to jail per the 2008 order. CP 26, 88, 151, 209, 273. The modification order contained the same boilerplate language as the 2007 and 2008 orders, with a slight change from “may” to “shall”—“**Failure to do any of the above shall result in a bench warrant being issued for your arrest.**” The “auto jail” provision required Hurley to report to jail on June 16, 2010 should he fail to make payments. Hurley again was not represented by counsel. CP 27, 89, 152, 210, 274.

In 2010, the court sanctioned Hurley 60 days for “failing to pay per Order Enforcing Sentence-LFO”. CP 34, 96, 159, 217, 281. By the time of this hearing, the Washington State Supreme Court had thrown out the “auto jail” procedure as violative of due process. State v. Nason, 168 Wn.2d 936, 948, 233 P.3d 848 (June 10, 2010). The modification order contained a new revision of the boilerplate language:

THE REQUIREMENTS OF THIS ORDER, unless modified by the Court, SHALL CONTINUE IN FULL FORCE AND EFFECT UNTIL THIS CASE IS PAID IN FULL. Defendant is to report, in person, ... within 48 hours of his release, or at the time of any change in circumstances, to provide a current

address, to keep the Clerk advised of a current address at all times, to provide current financial information to the Clerk and to pay the legal financial obligations. Failure to do any of the above shall result in a bench warrant being issued for your arrest and additional sanctions may be imposed.

...

Defendant shall contact his/her Court Collection Deputy ... within 48 hours or release. ALL OTHER CONDITIONS OF THE JUDGMENT AND SENTENCE ARE TO REMAIN IN FULL FORCE AND EFFECT.

CP 35, 97, 160, 218, 282 (emphasis and bolding in original).

In late 2011 Hurley was arrested on a bench warrant issued as a result of information contained in a violation report. The violation report is not attached to the motion for bench warrant and apparently was never filed in the superior court. CP 37, 40, 99, 102, 162, 165, 220, 223, 284, 287.

In early 2012 an evidentiary hearing was held. The State alleged and argued Hurley should be sanctioned for violating the conditions of his sentence as follows: (1) failure to pay, (2) failure to complete and return the financial assessment form, and (3) failure to notify the clerk's office of a change in circumstances "about three or four times". RP 6, 21–22.

Todd Taylor, whose role was never identified on the record but presumably has something to do with the clerk's office, testified Hurley has paid \$398.52 to date, last made a payment in 2010 and has a current

LFO balance of \$16,792.99 in costs and interest. RP 2–4. Defense counsel acknowledged Hurley’s failure to pay. RP 22. The court found Hurley in willful violation of the requirement to pay. RP 28; CP 41, 103, 166, 224, 288.

Mr. Taylor did not dispute that he had earlier received a current financial declaration on behalf of Hurley, but since it was unsigned he “could not say that this was actually reviewed by the defendant or filled out by the defendant.” RP 4–6. Mr. Taylor agreed the only reason for his alleging this violation was because there was no signature on it. RP 9. Hurley testified he’d met with a public defender in the attorney booth at the jail a few days before this hearing and completed the declaration. The financial information was provided to the clerk two days before this hearing. Hurley didn’t sign the form because staff would not give him a pen. RP 14, 28. After back and forth discussion with defense counsel, the court found Hurley in willful violation of this requirement. RP 28–32; CP 41, 103, 166, 224, 288.

Mr. Taylor’s basis for alleging the failure to report a change in circumstances was, based on comparison of old and current financial information, that Hurley was working then and did not notify Taylor’s office of his current unemployment. RP 6–7. Based on “previous cases

that have been tried and advice that I've received from prosecut[ors] and [others from] my office," Mr. Taylor said it was his "understanding that when an individual is working and they're not working any longer, that's considered a change in circumstance, and they're supposed to notify our office." An offender would also have to notify Mr. Taylor's office of a change to higher paying employment. RP 10–11. Defense counsel argued among other things that the requirement is undefined, encompasses irrelevant and minor life events, fails to give notice of what constitutes a relevant change of circumstances and is not an affirmative duty under the LFO statute. RP 23–26. The court found Hurley in willful violation of this requirement. RP 27–29; CP 41, 103, 166, 224, 288.

The prosecutor argued that Hurley failed to notify the clerk's office of a change in circumstances "about three or four times" by not reporting his incarceration or when he got out of treatment or when he lost his job. RP 22. After comparing the new and old financial declaration forms, the court noted Hurley now resided back in the State of Washington. RP 27. Over objection of defense counsel, the court *sua sponte* found Hurley in willful violation of a fourth allegation which had not been asserted by the State: the failure to report as directed. RP 27, 29–30; CP 41, 103, 166, 224, 288. The court stated it added the "failing to report" violation

because “I took it as part of the not coming down and giving them the financial information” and “[Hurley] signed an obligation [sic] to report change in circumstances, financial information, address. All of those are included in what he was ordered to do.” RP 30. The court invited defense counsel to file a motion to reconsider because “[w]e can do this again and maybe you can brief it because I’m ... not following you at all.” RP 31.

The court imposed a sanction of 180 days as requested by the State. RP 28. The jail time was concurrent in each of the five cases and could be served on work release or work crew. CP 41, 103, 166, 224, 288.

Defense counsel filed a motion to reconsider. CP 43–49, 111–17, 174–80, 232–38, 296–302. In its written decision, the court appeared to back off its stance at the hearing. The court ruled it found Hurley in willful violation of the three requirements alleged by the state: failure to pay, to complete a financial assessment form and to report a change in circumstances. The court viewed these requirements as subsets of the “umbrella language” of RCW 9.94A.760(7)(b), which requires an offender to report to the clerk when the clerk requires it. As the basis for finding violation of the requirement to complete a financial assessment form, the court noted that “[t]he testimony presented was that Mr. Hurley did not

sign the financial assessment form and was not going to sign the financial form.” CP 58–60, 120–22, 183–85, 241–43, 305–07.

This appeal followed. CP 50–53, 105–08, 168–171, 226–29, 290–93.

C. ARGUMENT

1. The court lacked authority to impose the reporting, completion and notification requirements as sentencing conditions for which Hurley could be sanctioned for noncompliance.⁴

A court may impose only a sentence authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). “If the trial court exceeds its sentencing authority, its actions are void.” State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). Whether a trial court has exceeded its statutory authority under the Sentencing Reform Act of 1981 is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

a. The reporting, completion and notification requirements are not legislatively authorized sentencing conditions. Any sentence imposed under the authority of the Sentencing Reform Act “shall be determined in

⁴ Assignment of Error 1, 2, 3.

accordance with the law in effect when the current offense was committed.” RCW 9.94A.345. Here, the purported sentencing conditions requiring Hurley to report, complete a financial form and notify the clerk of any change in circumstances did not exist at the time of Hurley’s October 2001 offenses. Former RCW 9.94A.145 Legal financial obligations (effective July 1, 2001) (Laws of 2000 c 31 § 28; Laws of 2000 c 226 § 4; Laws of 1999 c 196 § 6) (copy attached as **Appendix A**).

In 2003, the legislature amended the legal financial obligations (“LFOs”) statute— currently codified as RCW 9.94A.760(7)(b)—to include a discretionary “clerk reporting requirement”:

Subsequent to any period of supervision, or if the department is not authorized to supervise the offender in the community, the county clerk may make a recommendation to the court that the offender's monthly payment schedule be modified so as to reflect a change in financial circumstances. If the county clerk sets the monthly payment amount, the clerk may modify the monthly payment amount without the matter being returned to the court. During the period of repayment, the county clerk may require the offender to report to the clerk for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the county clerk in order to prepare the collection schedule.

Former RCW 9.94A.760(7)(b) (Laws of 2003 c 379 § 14, eff. Oct. 1, 2003) (emphasis added). The legislative intent behind this amendment

was to improve the processes for billing and collecting legal financial obligations. Laws of 2003 c 379 § 13.⁵ This amendment applied to all offenders currently subject to sentences with legal financial obligations. Laws of 2003 c 379 § 24.⁶ Thus, a county clerk may properly require Hurley report to him or her, and provide truthful and honest financial information.

RCW 9.94A.760(7)(b) authorizes *the county clerk* to require the offender to report to the clerk. However, nothing in RCW 9.94A.760 or Chapter 9.94A authorizes *the court* to impose that requirement *as part of the sentence*. RCW 9.94A.505 governs the imposition of sentences upon a felony conviction, and provides that “[a]s a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.” RCW 9.94A.505(8). The requirement to report and provide financial information to a clerk is an

⁵ Laws of 2003 c 379 § 13 provides: “The legislature intends to revise and improve the processes for billing and collecting legal financial obligations. The purpose of sections 13 through 27, chapter 379, Laws of 2003 is to respond to suggestions and requests made by county government officials, and in particular county clerks, to assume the collection of such obligations in cooperation and coordination with the department of corrections and the administrative office for of the courts. . . . The intent of sections 13 through 27, chapter 379, Laws of 2003 is to promote an increased and more efficient collection of legal financial obligations and, as a result, improve the likelihood that the affected agencies will increase the collections which will provide additional benefits to all parties and, in particular, crime victims whose restitution is dependent upon the collections.”

⁶ Law of 2003 c 379 § 24 provides: “The provisions of sections 13 through 27 of this act apply to all offenders currently, or in the future, subject to sentences with unsatisfied legal financial obligations.”

affirmative condition. Under the ‘last antecedent rule’, qualifying words and phrases refer to only the immediately preceding antecedent where no contrary intention appears in the statute. *See, e.g., Davis v. Gibbs*, 39 Wn.2d 481, 483, 236 P.2d 545 (1951). Applying the last antecedent rule to RCW 9.94A.505(8), the qualifying phrase, “as provided in this chapter,” is limited to the immediately preceding antecedent, “affirmative conditions,” rather than to both affirmative conditions and crime-related prohibitions. A sentencing court is therefore limited to imposition of affirmative conditions only as provided in chapter 9.94A.

Chapter 9.94A provides no authority to impose the affirmative conditions at issue here—reporting to a county clerk, completion/return of a financial form and notifying the clerk of a change in circumstances—as part of a sentence *or* as a modification of a sentence.⁷ In contrast, the LFO statute expressly states that the requirement that an offender pay a monthly sum towards a legal financial obligation *does* “constitute[] a condition or requirement of a sentence”. RCW 9.94A.760(10). The prior courts’ modifications of Hurley’s original sentences to include the reporting, completion and notification requirements were made without statutory

⁷ RCW 9.94B.040(1) provides: “If an offender violates any condition or requirement of a sentence, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.”

authority, and those portions are void and must be stricken. Paulson, 131 Wn. App. at 588; *see State v. Bird*, 95 Wn.2d 83, 85, 622 P.2d 1262 (1980) (court may only suspend sentence if authorized by Legislature); *see* Black’s Law Dictionary 1604 (8th ed.) (“void” means “of no legal effect; null.”).

b. The reporting, completion and notification requirements are not punishable as sentencing violations. A trial court may sanction an offender who violates a condition of his sentence. RCW 9.94B.040(1).⁸ The court may sanction the offender to confinement for a period not to exceed sixty days for each violation. RCW 9.94B.040(3)(c). As discussed in the preceding section, the prior courts had no statutory authority to impose the reporting, completion and notification requirements as conditions of sentence. The plain language of RCW 9.94A.760 and established rules of statutory construction compel the further conclusion that the court below lacked authority to sanction Hurley for noncompliance with these reporting requirements.

Under RCW 9.94A.760(1), “the court may order the payment of a legal financial obligation as part of the sentence.” RCW 9.94A.760 (1)

⁸ The legislature recodified former RCW 9.94A.634 (Laws of 2002, ch. 175 § 8; Laws of 1998, ch. 260 § 4) as RCW 9.94B.040. Laws of 2008, ch. 231, § 56. The recodification did not substantively affect the statute.

further directs the court to set the monthly payment amount or failing that, authorizes the Department of Corrections or the county clerk to do so. RCW 9.94A.760(7)(b), meanwhile, provides in part: “If the county clerks sets the monthly payment amount, or if the department set the monthly payment amount and the department has subsequently turned the collection of the legal financial obligation over to the county clerk, the clerk may modify the monthly payment amount without the matter being returned to the court.” The legislature further provided a permissive “clerk reporting requirement” as an available tool for the county clerk to use in determining and evaluating the continued viability of an individual offender’s actual monthly payment. RCW 9.94A.760(7)(b).⁹

The crucial provision for this appeal is RCW 9.94A.760(10), which specifies “The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence and the offender is subject to the penalties for noncompliance as provided in RCW 9.94B.040, 9.94A.737, or

⁹ RCW 9.94A.760(7)(b) provides in pertinent part: “... During the period of repayment, the county clerk may require the offender to report to the clerk for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the county clerk in order to prepare the collection schedule.”

9.94A.740.”¹⁰ This requirement to pay towards LFOs is the only condition or requirement in RCW 9.94A.760 that subjects an offender to penalties for noncompliance under RCW 9.94B.040. The legislation provides for no other. Nor does the remainder of chapter 9.94A.

When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). “[C]ourts are to give effect to that plain meaning as an expression of legislative intent.” State v. Thompson, 151 Wn.2d 793, 801, 92 P.3d 228 (2004). For this reason, courts “may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.” Kilian v. Atkinson, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

The only way Hurley could lawfully be sanctioned for violating the clerk reporting requirements under RCW 9.94A.760(7)(b) is if RCW 9.94A.760 specified the violation of that requirement subjects the offender to penalties for noncompliance. The legislature chose not to say that. Courts “cannot add words or clauses to an unambiguous statute when the

¹⁰ RCW 9.94A.737 authorizes the DOC to sanction an offender for violating any condition or requirement of community custody. RCW 9.94A.740 refers to community custody violators.

legislature has chosen not to include that language.” State v. Salavea, 151 Wn.2d 133, 144, 86 P.3d 125 (2004) (quoting Delgado, 148 Wn.2d at 727). “In giving effect to the plain meaning of the legislature’s words, we do not question the wisdom or the public policy behind the statute.” In re Pers. Restraint of Spires, 151 Wn. App. 236, 240, 211 P.3d 437 (2009).

Similarly, it is a well-settled principle of statutory construction that “[t]he Legislature ‘does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.’” In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000) (quoting John H. Sellen Constr. Co. v. Dep’t of Revenue, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976)). If the legislature intended to subject offenders to punishment for violating any requirement set forth in RCW 9.94A.760 in addition to the nonpayment of LFOs, then it would have no reason to single out the nonpayment of LFOs as a condition or requirement of a sentence that subjects the offender to punishment.

Furthermore, the legislature’s intent is unmistakable under the *expressio unius est exclusio alterius* rule of statutory construction.

“Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusio alterius* applies.” Washington State

Republican Party v. Washington State Public Disclosure Comm'n, 141 Wn.2d 245, 280, 4 P.3d 808 (2000). In such circumstances, “the silence of the Legislature is telling” and must be given effect. In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) (quoting Queets Band of Indians v. State, 102 Wn.2d 1, 5, 682 P.2d 909 (1984)).

Here, the legislature specifically included the nonpayment of a monthly sum as a condition or requirement of a sentence that subjects an offender to penalties for noncompliance. RCW 9.94A.760(10). The legislature deliberately chose not to include any other requirements of RCW 9.94A.760 as a basis to punish for noncompliance. “[S]pecific inclusions exclude implication.” Hopkins, 137 Wn.2d at 901.

In this case, the prior courts imposed the reporting, completion and notification requirements as conditions of Hurley’s sentences. But those courts lacked authority to impose these particular conditions. Since the sentencing conditions are unauthorized, the court below did not have the authority to sanction based on violations of the conditions. State v. Raines, 83 Wn. App. 312, 316, 922 P.2d 100 (1996).

Even if there is some ambiguity in RCW 9.94A.760, “in criminal cases the rule of lenity is a basic and required limitation on a court’s power of statutory interpretation whenever the meaning of a criminal statute is

not plain.” Hopkins, 137 Wn.2d at 901. The rule of lenity requires “any ambiguity in a statute must be resolved in favor of the defendant.” State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37–38, 593 P.2d 546 (1979). “The policy behind 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.” State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). The rule of lenity requires the statute be interpreted in Hurley’s favor. The court below lacked authority to punish him for noncompliance with the clerk’s office reporting requirements.

c. The issue is properly before this court. Defense counsel raised this issue below, at least in part. CP 43–49; RP 22–26, 28–32. Regardless, erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); State v. Hunter, 102 Wn. App. 630, 633–34, 9 P.3d 872 (2000). Sanctions imposed under RCW 9.94B.040 are criminal sanctions added to the original sentence. State v. Nason, 168 Wn.2d 936, 947, 233 P.3d 848 (2010). When a sentence has been imposed for which there is no authority in law, appellate courts have the power and the duty to correct the

erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33–34, 604 P.2d 1293 (1980).

d. Hurley did not waive legal errors predicated on lack of statutory authority. The State may claim Hurley waived appellate review of the prior courts' orders in which the clerk's office reporting, completion and notification requirements were imposed as part of the sentences because he somehow agreed to the modifications by his signature.

As an initial matter, this Court should take notice that the imposition itself took place—and continued on through subsequent modification orders—by insertion of boilerplate language purporting to expand on the general requirements of RCW 9.94A.760(7)(b). Hurley was also not represented by counsel for two of the prior orders. This Court cannot be satisfied that Hurley was therefore fully aware of the monetary responsibilities and confinement penalties he faced should he fail in jumping through the multiple hoops created by the court clerk's office.

Established authority further demonstrates any such waiver claim fails.

“[A] defendant cannot empower a sentencing court to exceed its statutory authorization.” State v. Eilts, 94 Wn.2d 489, 495–96, 617 P.2d 993 (1980) (although restitution order was based largely on defendant's

promise to pay, restitution ordered for uncharged crimes was in excess of trial court's statutory authority and needed to be vacated); *see also* State v. Wallin, 125 Wn. App. 648, 661–62, 105 P.3d 1037 (rejecting State's argument that defendant invited error when he agreed to previous court order that unlawfully extended community custody after defendant violated terms of release), *rev. denied*, 155 Wn.2d 1012, 122 P.3d 186 (2005); State v. Phelps, 113 Wn. App. 347, 354–55, 357, 57 P.3d 624 (2002) (reversing part of sentence extending statute of limitations as void: "Although Phelps agreed to the extension, he cannot grant the court authority to punish him more severely than the sentencing statutes allow.") (citing In re Pers. Restraint of Moore, 116 Wn.2d 30, 38–39, 803 P.2d 300 (1991) ("Since the sentence to which petitioner agreed and which he received exceeded the authority vested in the trial judge by the Legislature, we cannot allow it to stand.")); State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007) (defendant's request to receive mental health treatment as part of community custody does not give the court authority to impose it), *rev. denied*, 163 Wn.2d. 1025, 185 P.3d 1194 (2008), *overruled on other grounds by* State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

Inclusion of the clerk's office reporting, completion and notification requirements as conditions of the sentence without statutory authority is a legal error, not a factual one. When it comes to sentencing, a defendant may waive factual errors but cannot waive legal errors predicated on lack of statutory authority. State v. Wilson, 170 Wn.2d 682, 688–89, 244 P.3d 950 (2010).

e. This appeal is not moot and review is otherwise appropriate. A case is moot when a court can no longer provide effective relief. Westerman v. Cary, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994). Appeals presenting moot issues are generally dismissed. State v. G.A.H., 133 Wn. App. 567, 573, 137 P.3d 66 (2006).

Hurley may have served his confinement time for noncompliance with the reporting requirements by the time this appeal is resolved but his case is not moot. A case is not moot if the error complained of is capable of repetition yet evades review. In re Marriage of Irwin, 64 Wn. App. 38, 60, 822 P.2d 797 (1992). This case is a classic example of the phenomenon. The short duration of confinement as a sanction for violating a sentencing condition (60 days maximum) ensures an appellant will be released before any appeal can be adjudicated on its merits.

Further, review remains appropriate when “there is the possibility that [the court] can provide effective relief,” such as when it is unclear whether the appellant will suffer future adverse consequences if the issue is not decided. In re Interest of Mowery, 141 Wn. App. 263, 274, 169 P.3d 835 (2007). In Raines, for example, the court held an appeal was not moot even though the appellant had served his entire sentence because the appellant could potentially suffer adverse consequences in the future if the challenged sentence remained in effect. Raines, 83 Wn. App. at 315. The court reasoned “a future sentencing court could impose additional demanding conditions of community placement. Likewise, the modified sentence could sway a future sentencing court to impose the high end of the standard range. Finally, the modified sentence potentially affects Raines’ offender score.” Id.

In other words, the possibility that the appellant could suffer adverse consequences resulting from the error presented on appeal if convicted of a future crime is sufficient to avoid the mootness problem. The same rationale applies here. Hurley has been subject to multiple modification hearings in the past to address the ongoing problem of failing to pay legal financial obligations. If history is any guide, he will be subject to further penalties in the future. There is a grounded possibility that he

will be subject to the same violations in the future if the issue is not addressed now, and that the trial court may consider his previous violations to his detriment in crafting an appropriate sentence in the future.

Review is warranted even if this appeal is technically moot. This Court has the power to decide a technically moot case to resolve issues of continuing and substantial public interest. State v. Peterson, 145 Wn. App. 672, 675, 186 P.3d 1179 (2008), *aff'd*, 168 Wn.2d 763, 230 P.3d 588 (2010). Courts consider three criteria in determining whether the requisite degree of public interest exists: (1) the public or private nature of the question presented; (2) the need for a judicial determination for future guidance of public officers; and (3) the likelihood of future recurrences of the issue. G.A.H., 133 Wn. App. at 573.

The criteria favor review in this case. Most cases in which appellate courts use the exception to the mootness doctrine involve issues of statutory or constitutional interpretation. In re Pers. Restraint of Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002). These types of issues tend to be more public in nature, more likely to arise again, and the decisions helpful to guide public officials. Mines, 146 Wn.2d at 285.

This appeal squarely raises a statutory interpretation issue as a matter of first impression. And because this is a matter of first impression,

a decision from this Court will provide guidance to trial judges, prosecutors, and the defense bar regarding whether the court may impose the requirements of RCW 9.94A.760(7)(b) as a sentencing condition for which an offender may be violated. Indeed, the order from which this appeal arises is a generic and mass-produced form intended to be used in numerous LFO hearings. It contains boilerplate findings stemming from the clerk's office reporting requirements found in RCW 9.94A.760(7)(b)—which have only to be checked in the accompanying box (“[X]”). The order itself contains only a generic notification:

THE REQUIREMENTS OF THIS ORDER, unless modified by the Court, SHALL CONTINUE IN FULL FORCE AND EFFECT UNTIL THIS CASE IS PAID IN FULL. Defendant is to report, in person, ... within 48 hours of his release, or at the time of any change in circumstances, to provide a current address, to keep the Clerk advised of a current address at all times, to provide current financial information to the Clerk and to pay the legal financial obligations. Failure to do any of the above shall result in a bench warrant being issued for your arrest and additional sanctions may be imposed.

...

Defendant shall contact his/her Court Collection Deputy ... within 48 hours or release. ALL OTHER CONDITIONS OF THE JUDGMENT AND SENTENCE ARE TO REMAIN IN FULL FORCE AND EFFECT.

CP 42, 104, 167, 225, 289. (emphasis and bolding in original). Guidance from this Court as to what affirmative conduct may properly be required

from a debtor by the court clerk and hence subject him or her to loss of freedom through confinement is warranted.

Given the number of offenders subject to legal financial obligations now and in the future, it is more than likely this issue will reoccur in Spokane County and throughout the state.¹¹ Cf. City of Yakima v. Mollett, 115 Wn. App. 604, 606–07, 63 P.3d 177 (2003) (moot case reviewed due to absence of applicable case law interpreting court rule and corresponding need to provide judicial guidance; problem likely to recur given busy criminal docket). The likelihood of recurrence factor is not limited to the questions of whether the appellant himself would be subjected to the same violation. Likelihood of recurrence includes whether the issue would recur for *others* in the future. In re Pers. Restraint of Myers, 105 Wn.2d 257, 261, 714 P.2d 303 (1986); State v. Sansone, 127 Wn. App. 630, 637, 111 P.3d 1251 (2005). Review is warranted.

¹¹ A high number of offenders in Washington State are bound by LFOs. “In total, approximately 114,000 Washingtonians owe LFOs to the state. Collectively, those individuals are responsible for 450,792 LFO accounts. King County alone holds 116,498 LFO accounts, whereas Pierce County holds 73,314 and Spokane County holds 33,331. In dollar amounts, King County residents owe an estimated \$500 million compared to the \$125.5 million Spokane County residents owe.” Michael L. Vander Giessen, Note, LEGISLATIVE REFORMS FOR WASHINGTON STATE’S CRIMINAL MONETARY PENALTIES, 47 Gonz. L. Rev. 547, 551–52 (2011–2012).

2. RCW 9.94A.030(2) and RCW 9.94A.760(4), (7)(b), (8) and (13) violate the separation of powers doctrine because the legislation delegates the power to collect legal financial obligations to county clerks without providing standards or safeguards against arbitrary actions or discretionary abuse.¹²

a. Review is appropriate. This constitutional argument may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Ramos, 149 Wn. App. 266, 277 fn.2, 202 P.3d 383, 386 (2009); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

b. The county clerk's power is limited. The state constitution provides that the county clerk is "clerk of the superior court." Wash. Const. art. IV, § 26. Among other responsibilities authorized by the legislature, the court clerk has a duty "[t]o exercise the powers and perform the duties conferred and imposed upon him elsewhere by statute. RCW 2.32.050(8). A deputy clerk may only perform the acts which his principal is authorized to perform. RCW 36.16.070. In 2003, the legislature retained a court's authority to sanction an offender for noncompliance with the requirement to pay a monthly sum towards a legal financial obligation. RCW 9.94A.760(10). However, RCW 9.94A.760

¹² Assignment of Error 1, 2, 3.

was amended to specifically include superior court clerks in the process of collecting and enforcing the legal financial obligations. *See* Laws of 2003, c 379 §§ 13-27. As to a particular offender, the clerk's stated authority is limited to compiling and reviewing financial information, verifying employment or income, setting or changing a monthly payment amount, and collecting an unpaid LFO. RCW 9.94A.760 (1), (3), (4), (7)(b), (8), (9), (11)(d) and (13).

c. The legislation provides inadequate administrative delegation.

It is unconstitutional for the legislature to abdicate or transfer to others its legislative function. State ex rel. Namer Inv. Corp. v. Williams, 73 Wn.2d 1, 8, 435 P.2d 97 (1968), quoting Keeting v. Public Util. Dist. No. 1 of Clallam Cy., 49 Wn.2d 761, 767, 306 P.2d 762 (1957). The legislature may delegate administrative power to fill in the interstices of the law only if the legislature defines what is to be done, which administrative body is to accomplish the specified purposes, and what procedural safeguards are in effect to control arbitrary administrative action. Diversified Inv. Partnership v. Department of Social and Health Services, 113 Wn.2d 19, 25, 775 P.2d 947 (1989) (citations omitted).

In the cases where Washington courts have found legislative delegation to the executive branch proper, the legislature provided

adequate direction to the executive branch. For example, in Caffall Bros. Forest Prods. v. State, 79 Wn.2d 223, 228, 484 P.2d 912 (1971), the Court held that RCW 79.01.212 properly delegated legislative authority to the Commissioner of Public Lands to refuse to confirm sales of timber on public lands that were not in the "best interests" of the state because the statute contained criteria to guide the commissioner in determining the state's best interests. Those specified statutory criteria included evaluating whether the sale involved fraud or collusion, evaluating whether the offered bid was greater than the value of the land sold, and determining whether the bidder made payment as required by law. Ramos, 149 Wn. App. at 274. Similarly, in State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004), the court held that RCW 9.94.070 properly delegated legislative authority to the Department of Corrections (DOC) to adopt rules regarding prison misbehavior. Simmons further held that to properly delegate, "the legislature must provide standards to indicate what is to be done and designate the agency to accomplish it" and "procedural safeguards must exist to control arbitrary administrative action and abuse of discretionary power." 152 Wn.2d at 455, 98 P.3d 789.

Inadequate direction will be found where there are no standards to indicate what is to be done or designated criteria to control arbitrary or

abusive enforcement. State v. Ramos is instructive. In Ramos, the defendant, who had been classified as a Level II sex offender by the Thurston County Sheriff, was convicted of the offense of failing to report every 90 days as required by RCW 9A.44.130(7). Ramos, 202 P.3d at 385. Mr. Ramos contended that the sex offender classification statute (RCW 4.24.550(6)) improperly delegated authority to classify sex offenders to the county sheriffs and thereby violated the separation of powers principles. Ramos, 202 P.3d at 384. Under the statutory scheme at issue in Ramos, a local law enforcement agency determines the risk level of an offender already released into the community. RCW 4.24.550(6)(b). The agency’s assignment of a risk level is based on a review of “risk level classifications made by the department of corrections, the department of social and health services, and the indeterminate sentence review board” RCW 4.24.550(6)(a), (b).

On appeal, Division II determined that the legislature inadequately defined the element of the crime at question—the risk of reoffense. Further, referral to non-binding risk level classifications from other agencies did not provide any standards or methodology for a law enforcement agency to make a risk level assignment. 202 P.3d at 386-87. The Court held that “the legislature improperly delegated the task of

classifying Ramos as a sex offender under RCW 4.24.550(6)(b)” to the local law enforcement agency, and reversed the conviction. Ramos, 202 P.3d at 387¹³.

Here, the offense is the failure to pay. As in Ramos, the legislature has inadequately defined the element of the offense at issue—noncompliance with the requirement to pay. Yet the 2003 legislation authorizes county clerks to collect and enforce the unpaid LFOs. The administrative delegation is inadequate because the legislature has not identified the boundaries of the collection process nor has it provided controls against arbitrary action or abuse of discretionary powers in determining noncompliance. See State v. Simmons, 152 Wn.2d 450, 455, 98 P.3d 789 (2004).

To “collect” a debt or claim means “to obtain payment or liquidation of it, either by personal solicitation or legal proceedings”¹⁴ or

¹³ Cf. State v. Gilroy, 37 Wn.2d 41, 221 P.2d 549 (1950) (invalidating legislation conferring upon the Director of Social Security power to grant or refuse certificates to individuals caring for foster children, and requiring the director to be satisfied that ‘the methods used and the disposition made of the children will be in their best interests and that of society.’); Peterson v. Hagan, 56 Wn.2d 48, 351 P.2d 127 (1960) (invalidating, for lack of sufficient standards, legislation empowering the Director of the Department of Labor and Industries to promulgate regulations as to minimum wages and hours for women and children); United States Steel Corp. v. State, 65 Wn.2d 385, 397 P.2d 440 (1964) (invalidating legislation authorizing the Tax Commission to assess late payment penalty without prescribing standards).

¹⁴ “Collect.” Black’s Law Dictionary. 5th ed. 1979.

“to receive or compel payment of” the debt.¹⁵ The SRA defines “collect” for purposes of the Act as follows:

...
(2) "Collect," or any derivative thereof, "collect and remit," or "collect and deliver," when used with reference to the department, means that the department, either directly or through a collection agreement authorized by RCW 9.94A.760, is responsible for monitoring and enforcing the offender's sentence with regard to the legal financial obligation, receiving payment thereof from the offender, and, consistent with current law, delivering daily the entire payment to the superior court clerk without depositing it in a departmental account.

RCW 9.94A.030(2). Through the 2003 amendments, the legislature appears to have silently included county clerks as being directly “responsible for monitoring and enforcing” the unpaid monetary portion of an offender’s sentence. The question is: what conduct by the court clerk falls within [or outside] the legislatively delegated scope of monitoring or enforcing payment of a debt?

Regarding the mechanics of collection of a debt, the legislature has identified the legal processes the court clerks may use. These include seeking wage assignments (RCW 9.94A.760(13)), and contracting with collection agencies or using county collection services. RCW 36.18.190.¹⁶

¹⁵ “Collect.” Def. 3. Webster’s Encyclopedic Unabridged Dictionary of the English Language. Thunder Bay Press, Advantage Publishers Group, 2001.

¹⁶ See RCW 36.29.010(9) (county treasurers may provide collection services for county departments).

A clerk's conformance with this legislative delegation would be easily ascertainable.

However, the use of action words in the three definitions of “to collect” set forth above—“compel”, “solicitation”, “monitoring and enforcing”—reveals there is an additional “discretion” component to the collection of a debt. One would necessarily use individual judgment in deciding, for example, whether to collect from this debtor and not that debtor, whether to collect all or a portion of a debt, whether financial information provided by a debtor is simply inadequate or instead warrants delay or modification of a scheduled payment due to circumstances, what constitutes a change in circumstances sufficient to increase or decrease a required monthly payment, or even how to monitor and enforce repayment of a debt.

The legislative directive to “collect LFOs” without accompanying criteria of enforcement is subject to individual interpretation and inconsistent application by county clerks throughout the state of Washington.¹⁷ In this case, the Spokane County court clerks are

¹⁷ See, e.g. McAllister, Joel, Finance Division Manager, King County Clerk's Office on behalf of Washington Association of County Officials. “2008 Report to the Washington State Legislature on the Fiscal Impact of ESSB 5990, or Chapter 379, Laws of 2003 and SSB 5256, or Chapter 362, Laws of 2005”, page 4 ¶1, page 8 ¶1. November 2008. http://media.spokesman.com/documents/2009/05/study_collectingsuccess.pdf.

exercising discretion in ways far exceeding the specific statutory authority to contract with a collection agency or use county collection services. At a minimum, the clerks are determining adequacy (or not) of financial and change of circumstances information provided by an offender, and are apparently continuing to negotiate resolution of failure to pay offenses by meeting with individual pro se debtors to determine willfulness (or not) and negotiating current sanctions¹⁸ (the prosecutor herein represented that this negotiation with unrepresented offenders is ongoing (RP 34)).

The court remains the final arbiter of noncompliance with the requirement to pay and willfulness. But it clearly is the court clerk who gathers and interprets information in determining whether an offender's individual track record warrants notification and a subsequent hearing. The lack of guidelines to prevent arbitrary enforcement of the collection process has resulted in—at least in Spokane County—the creation of unconstitutional and unauthorized conditions of sentence requiring an offender to report to the clerk as directed, to complete and return financial

¹⁸ See the boilerplate language above Hurley's signature on the order currently under appeal (at CP 42, 104, 167, 225, 289): "I, Scott Hurley, being fully advised that I have the right to be brought before the Court for a hearing, and to have an attorney present to represent me, and that the Court will appoint an attorney to represent me if I cannot afford one, by my signature below hereby waive my right to a hearing and my right an attorney and having read the above modification(s) and having agreed to the punishment imposed, agree to the entry of this order."

assessment forms and to notify the clerk's office of a change in circumstances. *See* discussion *supra*. As a result Hurley, among unknown other debtors, has been confined as a sanction for failing to comply with these unconstitutional conditions of sentence.

Without question, the definition of "collect" in RCW 9.94A.030(2) grants discretionary authority to court clerks in the collection and enforcement process. That statute together with the delegation authorized by the 2003 amendments to RCW 9.94A.760 violates the separation of powers doctrine because the legislature has not defined "monitoring and enforcement" and has not provided any criteria to guide the county clerk in exercising discretion in a non-abusive and non-arbitrary manner in the collection process.

In contrast, the legislature fully regulates the business of collection agencies. Chapter 19.16 RCW. The legislation defines a "collection agency": "Any person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person." RCW 19.16.100(2)(a). The statutory scheme identifies unprofessional conduct. RCW 19.16.120; *see, e.g.,* RCW 18.235.130(10) and (11) (It is unprofessional conduct for employees of a collection agency to operate beyond the scope of the

business as defined by law, or to make misrepresentations in any aspect of their collection work). Prohibited practices during collection attempts include:

- making any statements that might be construed as indicating an official connection with any federal, state, county, or city law enforcement agency (RCW 19.16.250(4))
- performing any act, directly or indirectly, constituting the practice of law (RCW 19.16.250(5))
- giving a debtor any written form which represents or implies an outstanding debt is owed unless it indicates in clear and legible type the name and address of the collection agency, who is owed the debt, an itemization of the amount of debt currently being collected including interest, service and collection costs, or any other charges (RCW 19.16.250(8))
- communicating directly with a debtor after notice he is represented by an attorney (RCW 19.16.250(11))
- communicating with a debtor in such a manner as to harass, intimidate, threaten or embarrass, including threats of criminal prosecution (RCW 19.16.250(12))
- communicating with debtors through use of forms that simulate the form or appearance of judicial process (RCW 19.16.250(13))
- representing or implying in communication that the existing obligation may be or has been increased by addition of attorney, investigation, service or other fees when in fact such fees or charges may not legally be added to the existing obligation (RCW 19.16.250(14))
- threatening to take any action against the debtor which the collector cannot legally take at the time the threat is made (RCW 19.16.250(15))
- in any manner conveying the impression that the collector is an instrumentality of the state of Washington or any part thereof (RCW 19.16.250(17))

RCW 19.16.250.

It is apparent the legislature has highly regulated private collection agencies in the way they may lawfully go about collecting a debt. These restrictions define the types of discretionary tactics available for use in the collection process. Unlike in the regulation of the business of collection agencies, the legislature here has provided no standards or procedural safeguards to control arbitrary action and abuse of discretionary power by public county clerks when participating in the delegated authority to collect by monitoring and enforcing unpaid LFOs.¹⁹

As in Ramos, the legislature has inadequately defined the task to be done (collection through monitoring and enforcement) and does not provide any standards, methodology or guidance to county clerks for establishing constitutionally acceptable procedures for accomplishing that task. By enacting RCW 9.94A.030(2) and RCW 9.94A.760(4), (7)(b), (8) and (13), the legislature improperly delegated authority to collect unpaid LFOs to the county clerks, in violation of separation of powers principles.

¹⁹ Some of the prohibited practices itemized above regarding collection agencies are alleged to have been used by court clerks in Spokane County. *See generally*, Lawrence-Turner, Jody. "Debt to society." *The Spokesman Review* [Spokane, WA] 24 Mar. 2009. 6 Jun 2009.

<<http://www.spokesman.com/stories/2009/may/24/debt-to-society>>.

See also Lawrence-Turner, Jody. "High court takes criminal fees case." *The Spokesman Review* [Spokane, WA] 24 Mar. 2009. 6 Jun 2009.

<<http://www.spokesman.com/stories/2009/may/24/high-court-takes-criminal-fees-case>>.

The findings of violations by Hurley of alleged requirements other than failure to pay should be reversed. Ramos, 149 Wn. App. at 276.

3. Reversal on due process grounds is required where Mr. Hurley was found to have committed a condition of sentence violation without being notified in writing of the nature of the violation.^{20, 21}

The United States Supreme Court has set forth due process requirements for a probationer at a revocation hearing:

- (a) written notice of the claimed violations of [probation or] parole;
- (b) disclosure to the [probationer or] parolee of evidence against him;
- (c) opportunity to be heard in person and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);
- (e) a ‘neutral and detached’ hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and
- (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking [probation or] parole.

In re Boone, 103 Wn.2d 224, 231, 691 P.2d 964 (1984), quoting Gagnon v. Scarpelli, 411 U.S. 778, 786, 36 L.Ed.2d 656, 93 S.Ct. 1756 (1973). In Boone, the Washington Supreme Court reversed a probation violation

²⁰ This is submitted as an alternative argument. It is Appellant’s position that this purported condition of sentence and resulting sanction is unconstitutional as set forth in the arguments under sections 1 and 2.

²¹ Assignment of Error 4, 7. It is not clear from the oral ruling and ruling upon reconsideration whether the court intended to find Hurley guilty of this alleged violation. The argument is being made in an abundance of caution.

because the trial court relied on a secret probation report that was not provided to the defendant.

In Hurley's case, he was given written notice of three other purported violations of conditions of sentence. He was not provided notice in writing of this "failure to report as directed" allegation. His defense counsel timely objected to the lack of written notice. This is sufficient by itself to reverse.

In addition, Hurley was actually prejudiced by the error. RCW 9.94B.040(3)(c) provides that "if the court finds the violation has occurred, it may order the offender to be confined for a period not to exceed sixty days for each violation." Hurley was sanctioned with 60 days confinement for this alleged violation. Since Hurley was entitled to actual and written notice of the violation and this was not provided, the finding must be reversed.

4. The sentencing condition requiring an offender to notify the clerk’s office of any change in circumstances is unconstitutionally vague.^{22, 23}

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. 14, Const. art. I, § 3; City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 753.

The ruling in State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010) is instructive. Upon conviction for several drug-related crimes, the defendant was prohibited from “possess[ing] or us[ing] any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.” Valencia, 169 Wn.2d at 785. The

²² This is also submitted as an alternative argument. It is Appellant’s position that this purported condition of sentence and resulting sanction is unconstitutional as set forth in the arguments under sections 1 and 2.

²³ Assignment of Error 5, 7.

Washington Supreme Court determined that the phrase “any paraphernalia”—even with its modifiers—failed to limit the proscribed contact to drug paraphernalia. Thus, “[a]s in Bahl, the vague scope of proscribed conduct fails to provide the petitioners with fair notice of what they can and cannot do.” Id. at 795.

The court further determined the prohibition failed to provide ascertainable standards to protect from arbitrary enforcement:

Because the condition might potentially encompass a wide range of everyday items, it ‘ ’ does not provide ascertainable standards of guilt to protect against arbitrary enforcement.’ ” As petitioners note, ‘an inventive probation officer could envision any common place item as possible for use as drug paraphernalia, such as sandwich bags or paper. Another probation officer might not arrest for the same ‘violation,’ i.e. possession of a sandwich bag. A condition that leaves so much to the discretion of individual community corrections officers is unconstitutionally vague.

Valencia, 169 Wn.2d at 794–95 (internal citations omitted). The court held the prohibition was void for vagueness. Id. at 795.

The affirmative condition at issue here is even vaguer than that in Valencia, requiring notification to the clerk’s office of “any change in circumstances.” As defense counsel observed, the targeted information is undefined, is not a valid requirement of the clerk reporting provision in RCW 9.94A.760(7)(b)²⁴, and encompasses change in circumstances that

²⁴ See Issue 1 herein.

may include the serendipitous finding of a \$20 bill on the ground or simply innocuous life events that have no bearing on a debtor's financial situation, RP 23–25. The vague scope of the mandatory notification fails to provide fair notice of what a defendant can and cannot do *and* when he or she must do it.

Further, the prosecutor conflated the two distinct sentence conditions requiring notification of change in circumstances and reporting to the clerk's office by arguing Hurley's failures to report after incarceration and treatment also demonstrated his failure to notify the clerk of his change in circumstances "about three or four times". RP 21–22. Does this mean that the same conduct can or may or will be viewed as a violation of more than one sentence condition? Certainly the State's confusion demonstrates the condition has no ascertainable standards to protect against arbitrary enforcement. Under both prongs of Bahl, *supra*, the challenged sentence condition is void for vagueness and the finding of its violation must be stricken.

5. The finding that Hurley violated the requirement that he complete a financial assessment form is unsupported by the evidence and must be reversed.^{25 , 26}

The standard of review in a violation hearing is preponderance of the evidence. RCW 9.94B.040(3)(c). Here, the reason given by the court for its finding that Hurley violated this requirement is unsupported by the record. In its ruling on reconsideration, the court identified the evidence it relied upon: “The testimony presented was that Mr. Hurley did not sign the financial assessment form and was not going to sign the financial form.” RP 60, 122, 185, 243, 307.

Mr. Hurley did complete a financial assessment form and caused it to be returned to the clerk on January 4, prior to his hearing on January 6th 2012. A copy of it was produced at the hearing and provided to the court, which used information from the form to find Hurley guilty of not reporting a change in circumstance. It is irrational and inconsistent for the court to physically hold the declaration, read it and use it to find the alleged violation and at the same time find Hurley did not provide the form to the clerk.

²⁵ This is submitted as an alternative argument. It is Appellant’s position that this purported condition of sentence and resulting sanction is unconstitutional as set forth in the arguments under sections 1 and 2.

²⁶ Assignment of Error 6, 7.

Further, the clerk testified he only alleged this particular violation because Hurley did not sign the declaration. The clerk testified he did receive the declaration but was concerned because it was not signed by Hurley. Hurley testified he didn't sign it because he was not provided a pen from the jail and couldn't sign it. Hurley testified the information provided on the declaration was true and correct.

The court's conclusion that Hurley refused to sign the financial information form is unsupported by the evidence. The court's recollection of the actual testimony appears to be mistaken. Hurley *did* at first refuse to sign off on the order resulting from this violation hearing because it contained pre-printed boilerplate language above the signature line which stated that the person signing waives certain rights and agrees to the punishment imposed. Once the prosecutor explained that the language was meant for debtors who sign in the clerk's office who are not represented by an attorney and therefore it should just be scratched out, Hurley signed the document. RP 32–35; CP 42, 104, 167, 225, 289.

The reason given by this finding is not supported by the record. There is substantial evidence that the financial form was provided as required and its information used by the court during the hearing. The evidence is more than sufficient to meet the requisite burden of proof. The

court erred in finding that Hurley had violated this requirement and the finding should be reversed. State v. Myers, 86 Wn.2d 419, 431, 545 P.2d 538 (1976); *see* Standlee v. Smith, 83 Wn.2d 405, 408, 518 P.2d 721 (1974) and State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972).

D. CONCLUSION

For the reasons stated, Hurley requests that this Court vacate the trial court's orders sanctioning him for violating the reporting, completion and notification requirements and strike the sentencing conditions as void.

Respectfully submitted on September 10, 2012.

s/Susan Marie Gasch, WSBA
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

West's RCWA 9.94A.145
WEST'S REVISED CODE OF WASHINGTON ANNOTATED
TITLE 9. CRIMES AND PUNISHMENTS
CHAPTER 9.94A. SENTENCING REFORM ACT OF 1981

9.94A.145. Legal financial obligations (*Effective July 1, 2001*)

(1) Whenever a person is convicted of a felony, the court may order the payment of a legal financial obligation as part of the sentence. The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law. On the same order, the court is also to set a sum that the offender is required to pay on a monthly basis towards satisfying the legal financial obligation. If the court fails to set the offender monthly payment amount, the department shall set the amount. Upon receipt of an offender's monthly payment, restitution shall be paid prior to any payments of other monetary obligations. After restitution is satisfied, the county clerk shall distribute the payment proportionally among all other fines, costs, and assessments imposed, unless otherwise ordered by the court.

(2) If the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration, the court may require the offender to pay for the cost of incarceration at a rate of fifty dollars per day of incarceration. Payment of other court-ordered financial obligations, including all legal financial obligations and costs of supervision shall take precedence over the payment of the cost of incarceration ordered by the court. All funds recovered from offenders for the cost of incarceration in the county jail shall be remitted to the county and the costs of incarceration in a prison shall be remitted to the department.

(3) The court may add to the judgment and sentence or subsequent order to pay a statement that a notice of payroll deduction is to be issued immediately. If the court chooses not to order the immediate issuance of a notice of payroll deduction at sentencing, the court shall add to the judgment and sentence or subsequent order to pay a statement that a notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender if a monthly court-ordered legal financial obligation payment is not paid when due, and an amount equal to or greater than the amount payable for one month is owed.

If a judgment and sentence or subsequent order to pay does not include the statement that a notice of payroll deduction may be issued or other income-withholding action may be taken if a monthly legal financial obligation payment is past due, the department may serve a notice on the offender stating such requirements and authorizations. Service shall be by personal service or any form of mail requiring a return receipt.

(4) Independent of the department, the party or entity to whom the legal financial obligation is owed shall have the authority to use any other remedies available to the party or entity to collect the legal financial obligation. These remedies include enforcement in the same manner as a judgment in a civil action by the party or entity to whom the legal financial obligation is owed. Restitution collected through civil enforcement must be paid through the registry of the court and must be distributed proportionately according to each victim's loss when there is more than one victim. The judgment and sentence shall identify the party or entity to whom restitution is owed so that the state, party, or entity may enforce the judgment. If restitution is ordered pursuant to [RCW 9.94A.140\(6\)](#) or

[9.94A.142\(6\)](#) to a victim of rape of a child or a victim's child born from the rape, the Washington state child support registry shall be identified as the party to whom payments must be made. Restitution obligations arising from the rape of a child in the first, second, or third degree that result in the pregnancy of the victim may be enforced for the time periods provided under [RCW 9.94A.140\(6\)](#) and [9.94A.142\(6\)](#). All other legal financial obligations for an offense committed prior to July 1, 2000, may be enforced at any time during the ten-year period following the offender's release from total confinement or within ten years of entry of the judgment and sentence, whichever period ends later. Prior to the expiration of the initial ten-year period, the superior court may extend the criminal judgment an additional ten years for payment of legal financial obligations including crime victims' assessments. All other legal financial obligations for an offense committed on or after July 1, 2000, may be enforced at any time the offender remains under the court's jurisdiction. The department of corrections shall supervise the offender's compliance with payment of the legal financial obligations for ten years following the entry of the judgment and sentence, or ten years following the offender's release from total confinement, whichever period ends later. The department is not responsible for supervision of the offender during any subsequent period of time the offender remains under the court's jurisdiction.

(5) In order to assist the court in setting a monthly sum that the offender must pay during the period of supervision, the offender is required to report to the department for purposes of preparing a recommendation to the court. When reporting, the offender is required, under oath, to respond truthfully and honestly to all questions concerning present, past, and future earning capabilities and the location and nature of all property or financial assets. The offender is further required to bring all documents requested by the department.

(6) After completing the investigation, the department shall make a report to the court on the amount of the monthly payment that the offender should be required to make towards a satisfied legal financial obligation.

(7) During the period of supervision, the department may make a recommendation to the court that the offender's monthly payment schedule be modified so as to reflect a change in financial circumstances. If the department sets the monthly payment amount, the department may modify the monthly payment amount without the matter being returned to the court. During the period of supervision, the department may require the offender to report to the department for the purposes of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the department in order to prepare the collection schedule.

(8) After the judgment and sentence or payment order is entered, the department is authorized, for any period of supervision, to collect the legal financial obligation from the offender. Any amount collected by the department shall be remitted daily to the county clerk for the purpose of disbursements. The department is authorized to accept credit cards as payment for a legal financial obligation, and any costs incurred related to accepting credit card payments shall be the responsibility of the offender.

(9) The department or any obligee of the legal financial obligation may seek a mandatory wage assignment for the purposes of obtaining satisfaction for the legal financial obligation pursuant to [RCW 9.94A.2001](#).

(10) The requirement that the offender pay a monthly sum towards a legal financial obligation constitutes a condition or requirement of a sentence and the offender is subject to the penalties for noncompliance as provided in [RCW 9.94A.200](#), [9.94A.205](#), or [9.94A.207](#).

(11) The county clerk shall provide the department with individualized monthly billings for each offender with an unsatisfied legal financial obligation and shall provide the department with notice of payments by such offenders no less frequently than weekly.

(12) The department may arrange for the collection of unpaid legal financial obligations through the county clerk, or through another entity if the clerk does not assume responsibility for collection. The costs for collection services shall be paid by the offender.

(13) Nothing in this chapter makes the department, the state, or any of its employees, agents, or other persons acting on their behalf liable under any circumstances for the payment of these legal financial obligations.

CREDIT(S)

2001 Electronic Update

[2000 c 226 § 4; 2000 c 28 § 31; 1999 c 196 § 6. Prior: 1997 c 121 § 5; 1997 c 52 § 3; 1995 c 231 § 3; 1991 c 93 § 2; 1989 c 252 § 3.]

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 10, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Scott Thomas Hurley
1104 West 7th Avenue, #8
Spokane WA 99201

E-mail: kowens@spokanecounty.org
Mark E. Lindsey/Andrew Metts
Deputy Prosecuting Attorney
1100 West Mallon Avenue
Spokane WA 99260-2043

s/Susan Marie Gasch, WSBA #16485