

SUPREME COURT NO. 82089-9

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL PETERSON,

Petitioner.

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SUPREME COURT
STATE OF WASHINGTON

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

The Honorable Anita L. Farris, Judge

SUPPLEMENTAL BRIEF OF PETITIONER MICHAEL PETERSON

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
1. THE COURT OF APPEALS MISCONSTRUED THE ELEMENTS OF THE CRIME OF FAILING TO REGISTER DUE TO A FAULTY INTERPRETATION OF THE REGISTRATION STATUTE.....	2
a. <u>The Court Of Appeals Erred In Failing To Recognize The Registration Statute Defines The Elements Of A Crime That Can Be Committed By Alternative Means And That Those Elements Go Beyond A Simple Failure To Register.....</u>	3
b. <u>The Evidence Was Insufficient To Convict Peterson Of Failure To Register Because The State Did Not Prove The Necessary Facts Of The Crime Charged.....</u>	9
c. <u>The "To Convict" Instruction Omitted Elements Of The Crime And Counsel Was Ineffective In Agreeing To The Defective Instruction.....</u>	15
d. <u>Peterson's Right To Jury Unanimity Was Violated Because Substantial Evidence Did Not Support Each Alternate Means Of Proving He Failed To Register.....</u>	19
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Jenkins v. Bellingham Municipal Court,</u> 95 Wn.2d 574, 627 P.2d 1316 (1981).....	14
<u>Kilian v. Atkinson,</u> 147 Wn.2d 16, 50 P.3d 638 (2002).....	12
<u>State v. Aho,</u> 137 Wn.2d 736, 975 P.2d 512 (1999).....	15, 19
<u>State v. Ammons,</u> 136 Wn.2d 453, 963 P.2d 812 (1998).....	14
<u>State v. Bassett,</u> 97 Wn. App. 737, 987 P.2d 119 (1999).....	11
<u>State v. Birgen,</u> 33 Wn. App. 1, 651 P.2d 240 (1982).....	9
<u>State v. Castillo,</u> 144 Wn. App. 584, 183 P.3d 355 (2008).....	12
<u>State v. Cronin,</u> 142 Wn.2d 568, 14 P.3d 752 (2000).....	15
<u>State v. Delgado,</u> 148 Wn.2d 723, 63 P.3d 792 (2003).....	13, 14
<u>State v. DeRyke,</u> 149 Wn.2d 906, 73 P.3d 1000 (2003).....	19
<u>State v. Garvin,</u> 28 Wn. App. 82, 621 P.2d 215 (1980).....	4

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Heiskell</u> , 129 Wn.2d 113, 916 P.2d 366 (1996).....	13
<u>State v. Hundley</u> , 126 Wn.2d 418, 895 P.2d 403 (1995).....	9
<u>State v. Laico</u> , 97 Wn. App. 759, 987 P.2d 638 (1999).....	5
<u>State v. Linehan</u> , 147 Wn.2d 638, 56 P.3d 542 (2002).....	4, 5
<u>State v. Marko</u> , 107 Wn. App. 215, 27 P.3d 228 (2001).....	5
<u>State v. Ortega-Martinez</u> , 124 Wn.2d 702, 881 P.2d 231 (1994).....	20
<u>State v. Peterson</u> , 145 Wn. App. 672, 186 P.3d 1179 (2008).....	2, 4, 10, 11, 13
<u>State v. Pickett</u> , 95 Wn. App. 475, 975 P.2d 584 (1999).....	10-12
<u>State v. Shipp</u> , 93 Wn.2d 510, 610 P.2d 1322 (1980).....	9
<u>State v. Smith</u> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	6, 10
<u>State v. Smith</u> , 155 Wn.2d 496, 120 P.3d 559 (2005).....	8
<u>State v. Stratton</u> , 130 Wn. App. 760, 124 P.3d 660 (2005).....	10

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Taylor</u> , 97 Wn.2d 724, 649 P.2d 633 (1982).....	13
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	18
<u>State v. Vanderpool</u> , 99 Wn. App. 709, 995 P.2d 104 (2000).....	7
<u>State v. Ward</u> , 123 Wn.2d 488, 869 P.2d 1062 (1994).....	13
<u>State v. Watson</u> , 160 Wn.2d 1, 154 P.3d 909 (2007).....	12
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	8
 <u>FEDERAL CASES</u>	
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984).....	18
 <u>RULES, STATUTES AND OTHERS</u>	
Former RCW 9A.44.130 (Laws of 2003, ch. 215 § 1)	3
Former RCW 9A.44.130(10)(a).....	3
Former RCW 9A.44.130 (Laws of 2006, ch.129 § 2)	3
Former RCW 9A.56.010(7)	5

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS (CONT'D)</u>	
Laws of 1990, ch. 3, § 401.....	13
Laws of 1999, sp. s., ch. 6 § 1.....	12
RCW 9A.04.110	5
RCW 9A.44.130	4
RCW 9A.44.130(1)(a)	2, 4, 7, 9, 17
RCW 9A.44.130(4).....	9
RCW 9A.44.130(4)(a)	4, 16
RCW 9A.44.130(4)(a)(i).....	12
RCW 9A.44.130(4)(b)	4, 16
RCW 9A.44.130(5).....	9
RCW 9A.44.130(5)(a)	4, 6-13, 17-19
RCW 9A.44.130(6).....	9
RCW 9A.44.130(6)(a)	4, 6, 8-11, 13, 18, 19
RCW 9A.44.130(10)(a)	3, 4, 6, 7, 9
RCW 9A.44.130(11)(a)	3, 4
RCW 9A.56.020(1)(a)	5
U.S. Const. amend. VI.....	18

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS (CONT'D)

U.S. Const. amend. XIV 9

A. ISSUES

1. Must Peterson's conviction for failure to register as a sex offender be reversed and dismissed with prejudice because the state failed to prove every necessary fact of the crime as defined by statute?

2. Was defense counsel ineffective in agreeing to a "to convict" instruction that omitted elements of the crime?

3. Is reversal required because substantial evidence did not support each alternate means of proving Peterson failed to properly register as a sex offender?

B. STATEMENT OF THE CASE

In 1988, Peterson was convicted of third degree rape. 3RP 41. Peterson registered as a sex offender numerous times between 1991 and 2005, either as having an address or as homeless. 3RP 44-45, 69-74. He registered as homeless on September 6, 2005. 3RP 44-45, 69-70. Peterson subsequently moved into an Everett apartment and registered his address with the Snohomish County Sheriff's Office on September 12. 3RP 18-19, 45-46, 61. Peterson moved out of this apartment in late October. 3RP 32-33. On December 6, Peterson registered as homeless with the Snohomish County Sheriff's Office. 3RP 63. The state charged Peterson with failure to register as a sex offender and a jury found him guilty. CP 21, 41-42.

The Court of Appeals reversed conviction without prejudice because the information omitted the knowledge element of the offense. State v. Peterson, 145 Wn. App. 672, 675, 186 P.3d 1179 (2008). The Court of Appeals, however, further held failure to register is not an alternative means crime. Id. at 676-78. Instead, "there is only one means of committing the crime - knowingly failing to register as required by RCW 9A.44.130(1)(a)." Id. at 678. From this premise, the Court of Appeals rejected Peterson's arguments that the "to convict" instruction omitted elements of the crime and that there was insufficient evidence to prove all the elements. Id. at 676-78.

C. ARGUMENT

1. THE COURT OF APPEALS MISCONSTRUED THE ELEMENTS OF THE CRIME OF FAILING TO REGISTER DUE TO A FAULTY INTERPRETATION OF THE REGISTRATION STATUTE.

Three errors occurred in this case: (1) the state failed to prove every element of the crime beyond a reasonable doubt; (2) defense counsel was ineffective in agreeing to a "to convict" instruction that omitted elements of the crime; (3) Peterson's right to jury unanimity was violated because substantial evidence did not support an alternative means of committing the crime. The underlying issue is what facts the state must prove to convict Peterson for failure to register as a sex offender as charged.

Peterson's arguments all turn on the answer to this question. The Court of Appeals decision is flawed because it does not give proper effect to the language of the registration statute in construing the elements of the crime.

- a. The Court Of Appeals Erred In Failing To Recognize The Registration Statute Defines The Elements Of A Crime That Can Be Committed By Alternative Means And That Those Elements Go Beyond A Simple Failure To Register.

Former RCW 9A.44.130(1)(a)¹ provides in relevant part "Any adult or juvenile residing whether or not the person has a fixed residence . . . in this state who has been found to have committed or has been convicted of any sex offense . . . shall register with the county sheriff for the county of the person's residence." RCW 9A.44.130(10)(a) provides in relevant part: "A person who knowingly fails to register with the county sheriff or notify the county sheriff . . . *as required by this section* is guilty of a class C felony if the crime for which the individual was convicted was a felony sex offense." (emphasis added). According to the Court of Appeals, RCW 9A.44.130(10)(a)² established "the only punishable

¹ Former RCW 9A.44.130 (Laws of 2003, ch. 215 § 1) was the version in effect at the time of Peterson's alleged offense. All references to the registration statute are to this former version unless otherwise specified.

² The Court of Appeals cited subsection (11)(a) rather than (10)(a) based on the apparent misapprehension that the later version of the statute enacted by Laws of 2006, ch.129 § 2, which recodified former (10)(a) as (11)(a), applied to Petersen. The recodification is immaterial, as former

offense" and "there is only one means of committing the crime - knowingly failing to register as required by RCW 9A.44.130(1)(a)." Id. at 677-78.

Without citation to authority, the Court of Appeals claims subsections such as (4)(a), (4)(b), (5)(a) and (6)(a) "merely articulate the definition of continuing compliance" with the registration statute. Peterson, 145 Wn. App. at 678. This assertion disregards the distinction between statutes that define all the elements of a crime and statutes that merely define multiple meanings applicable to a single element of the crime. See State v. Linehan, 147 Wn.2d 638, 646, 648, 56 P.3d 542 (2002) (drawing the distinction); see also State v. Garvin, 28 Wn. App. 82, 85, 621 P.2d 215 (1980) (in defining threat with regard to the crime of extortion, legislature was not creating alternative elements of the crime but merely defining the meaning of an element of the crime). "Definition statutes do not create additional alternative means of committing an offense." Linehan, 147 Wn.2d at 646. But RCW 9A.44.130 is not a definition statute, a point readily illustrated by comparison to cases identifying such statutes.

RCW 9A.44.130 (11)(a) (2006) as cited by the Court of Appeals and former RCW 9A.44.130(10)(a) (2003) are substantively identical.

RCW 9A.04.110, which lists the definitions of various terms used in the criminal code, is an example of a definition statute. The multiple meanings attributable to "great bodily harm" as defined in RCW 9A.04.110 do not create alternative means of committing the crime of first degree assault, an element of which is infliction of great bodily harm. State v. Laico, 97 Wn. App. 759, 761, 764, 987 P.2d 638 (1999). The definitions of the term "threat" in RCW 9A.04.110 do not create alternative elements to the crime of intimidating a witness, an element of which is use of a threat. State v. Marko, 107 Wn. App. 215, 218-20, 27 P.3d 228 (2001).

RCW 9A.04.110, the definition statute, does not contain a definition of "registration" or any variant of that term. RCW 9A.44.130 is self-contained, and is thus unlike the statutes at issue in Laico and Marko, where the crime itself was defined in a statute separate from the statute that defined a word. Nor is the registration statute like the definition statute for theft at issue in Linehan, in which this Court held former RCW 9A.56.010(7), which defined the meaning of particular alternative elements of the crime of theft, did not itself create alternative means of committing that crime. Linehan, 147 Wn.2d at 647-49. The alternative means of committing theft were found in RCW 9A.56.020(1)(a), which is the statute that defines *the crime* of theft. Id. at 648. The latter statute, in

setting forth the alternative means of committing the crime, was "different in kind from those definition statutes that merely elaborate upon various terms or words" used in statutes that define the crime itself. Id.

The registration statute likewise does not merely elaborate upon various terms or words. As a general rule, alternative means crimes "are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). The registration statute articulates a single offense: failure to register as a sex offender. Numerous subsections detail the means by which the offense may be committed. Subsections (5)(a) and (6)(a) represent alternative means of committing the offense. See Smith, 159 Wn.2d at 784-85 (in construing assault statute, recognizing separate subsections within a statutory section proscribing an offense represent alternative ways to commit the same offense).

RCW 9A.44.130(10)(a), the statutory provision that the Court of Appeals cites as the touchstone of its wayward analysis, expressly refers to the requirements found elsewhere in the statute to determine whether one has committed the crime of failing to register - the same requirements that the Court of Appeals dismisses as merely definitional.

Contrary to the Court of Appeals' assertion, RCW 9A.44.130(1)(a) and (10)(a) do not encompass all the elements of the crime of failing to register. We know this in part because a person could be convicted of violating the statute even if the person registered with the "county sheriff for the county of the person's residence" as required by subsection (1)(a). For example, a person could move from Snohomish County to King County and register with the King County Sheriff's office. Yet under (5)(a), that person also has the obligation to "send written notice within ten days of the change of address in the new county to the county sheriff with whom the person last registered." The State understandably does not contend an offender could violate this requirement under (5)(a) yet still be in compliance with the statute and thereby avoid conviction.

Indeed, the offender in State v. Vanderpool, was convicted of violating this very requirement and the conviction was upheld on sufficiency grounds. State v. Vanderpool, 99 Wn. App. 709, 713-14, 995 P.2d 104 (2000). If the Court of Appeals is correct that all other sections besides (1)(a) or (10)(a) do not contain any elements of the crime, then the offender in Vanderpool could not have been convicted of violating one of those sections.

The Court of Appeals rejected Peterson's argument that one of the elements of the crime requires the state to prove the entity with whom the

person is supposed to register. This leads to absurd results that fly in the face of statutory requirements punishable by conviction if violated. Under the Court of Appeals' interpretation, an offender could live in a fixed residence in King County, register with the Snohomish County Sheriff, and not be convicted of an offense of failing to register even though the statute under subsection (5)(a) specifically directs such an offender to register with the King County sheriff. Similarly, an offender could become homeless and merely notify any sheriff's office except the sheriff's office with whom he last registered and not be convicted of a crime, even though subsection (6)(a) expressly requires registration with the sheriff's office with whom the person last registered. The particular county sheriff's office with which the offender is required to register is an element of the crime of failing to register.

"The purpose of statutory construction is to give content and force to the language used by the Legislature." State v. Wilson, 125 Wn.2d 212, 216, 883 P.2d 320 (1994). "In determining the elements of a statutorily defined crime, principles of statutory construction require the court to give effect to all statutory language if possible." State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). "Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by

due process." State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980). "Absent constitutional problems, the courts are required to apply penal statutes as written." State v. Birgen, 33 Wn. App. 1, 5, 651 P.2d 240 (1982). The Court of Appeals' analysis disregards these axiomatic principles of statutory interpretation.

The bottom line is that offenders cannot be convicted of violating statutory provisions that merely define terms. Offenders can only be convicted of violating statutes that define a crime. Unless this Court is prepared to hold an offender cannot be convicted of violating any requirements set forth in subsections (4), (5), and (6), then the Court of Appeals holding that all the elements of any possible offense are found only in (1)(a) and (10)(a) cannot stand.

b. The Evidence Was Insufficient To Convict Peterson Of Failure To Register Because The State Did Not Prove The Necessary Facts Of The Crime Charged.

The State sought to convict Peterson for violating either RCW 9A.44.130(5)(a) or (6)(a). CP 41-42, 3RP 13, 95. Due process under the Fourteenth Amendment of the United States Constitution requires the state to prove beyond a reasonable doubt all the necessary facts of the crime charged. State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, viewed in the light

most favorable to the state, a rational trier of fact could find each element of the crime beyond a reasonable doubt. Smith, 155 Wn.2d at 502.

The Court of Appeals recognized the State had no evidence that Peterson moved to a fixed address, stayed in the county, moved out of the county, or was homeless during the lapse in his registration. Peterson, 145 Wn. App. at 677. Peterson did not have a legal obligation to register under RCW 9A.44.130(6)(a) unless he lacked a fixed residence. He did not have an obligation to register under RCW 9A.44.130(5)(a) unless he moved from one residence to another. The state did not prove Peterson lacked a fixed residence or moved from one residence to another. He therefore could not be convicted of violating either subsection, although the state obtained conviction based on its theory that he violated one or the other.

Under (6)(a), the state needed to prove the fact that Peterson was homeless. See State v. Stratton, 130 Wn. App. 760, 766-67, 124 P.3d 660 (2005) (conviction reversed for insufficient evidence where state failed to prove defendant lacked a fixed residence but convicted for failure to register as transient under RCW 9A.44.130(6)(a)). Under (5)(a), the state needed to prove the fact that Peterson moved to a residential address without properly notifying authorities. See State v. Pickett, 95 Wn. App. 475, 478-80, 975 P.2d 584 (1999) (conviction reversed for insufficient

evidence where state charged homeless sex offender with failing to register a residential address); accord State v. Bassett, 97 Wn. App. 737, 739-40, 987 P.2d 119 (1999).

A person's residential status determines that person's legal obligations to register under the statute. Broadly speaking, those obligations include what must be done and the deadline for when it must be done. Residential status is a factual predicate underlying these legal obligations. If the state cannot prove residential status, it cannot prove an obligation to register within a certain deadline with certain authorities as required by either (5)(a) or (6)(a).

In claiming the evidence was sufficient to convict, the Court of Appeals nevertheless held it does not matter how or where Peterson lived because subsections 5(a) and 6(a) are merely definitional and therefore do not set forth elements of the crime that the state needs to prove beyond a reasonable doubt. Peterson, 145 Wn. App. at 678. Pickett and Bassett recognize the duty to register a "residence" is an element of the crime that must be proven to convict under (5)(a). But the Court of Appeals reduces the "residence" element to mere definition of the term "registration." This approach cannot be squared with Pickett and Bassett, which reversed for insufficient evidence due to the state's failure to prove the offender had a residence under (5)(a). Nor can the Court of Appeals' interpretation be

reconciled with other cases that recognize elements of the crime are located in those sections that the Court of Appeals maintains are definitional. See, e.g., State v. Watson, 160 Wn.2d 1, 8, 12, 154 P.3d 909 (2007) (affirming conviction for failure to register under RCW 9A.44.130(4)(a)(i)); State v. Castillo, 144 Wn. App. 584, 588-89, 183 P.3d 355 (2008) (affirming conviction for failure to provide written notice of the change of his address to the sheriff's department within 72 hours of moving as required by RCW 9A.44.130(5)(a)).

The Legislature chose to tie an offender's registration requirements to the status and living situation of the offender, and it adhered to this approach after amending the statute to account for homeless offenders in response to Pickett. Laws of 1999, sp. s., ch. 6 § 1. The Legislature could have chosen to write the statute in a different way. For example, it could have create a uniform registration requirement for all offenders regardless of whether the offender was homeless or lived in a fixed residence, stayed in the county or moved out of the county. It did not do so. Because the plain language of a statute is deemed an expression of legislative intent, the 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 Court of Appeals claimed it would be absurd to read 5(a) and 6(a) as anything more than definitional,³ but the courts will not "arrogate to [themselves] the power to make legislative schemes more perfect, more comprehensive and more consistent." State v. Taylor, 97 Wn.2d 724, 729, 649 P.2d 633 (1982). As long as the statute remains rational on the whole, the courts will not correct omissions or perceived errors in particular provisions. State v. Delgado, 148 Wn.2d 723, 730, 63 P.3d 792 (2003).

The registration statute remains rational as a whole even if Peterson's argument that living status is a fact that needs to be proven in order to convict under (5)(a) or (6)(a). The legislative purpose behind sex offender registration is to assist law enforcement agencies' protection efforts by keeping track of where sex offenders are living. State v. Heiskell, 129 Wn.2d 113, 117, 916 P.2d 366 (1996); Laws of 1990, ch. 3, § 401. The state claims Peterson's interpretation of the statute would frustrate this purpose. Answer to Petition at 3. The state's concern is misplaced.

The *affirmative* duty to register imposed by the statute furthers a regulatory purpose and is not punitive. State v. Ward, 123 Wn.2d 488, 507, 869 P.2d 1062 (1994). But criminal conviction for *failing* to follow the requirements of the statute is undeniably punitive. Peterson's

³ Peterson, 145 Wn. App. at 677.

interpretation of what constitutes the elements of the offense does not undermine the regulatory purpose of the statute because there is no dispute that Peterson, having previously been convicted of a qualifying sex offense, had a general duty to register as required by statute. But existence of a general duty to register does not answer the question of what elements the state must prove in order to convict for failing to register under a particular section of the statute.

Statutes will not be construed in a way that leads to unlikely, absurd, or strained results. State v. Ammons, 136 Wn.2d 453, 457, 963 P.2d 812 (1998). The absurdity the Court of Appeals claims to have found, however, amounts to nothing more than the "absurdity" of being unable to convict someone because the state failed to prove a necessary fact in a case where the police made absolutely no investigative effort to obtain the evidence to prove that fact. Peterson's case is no different than any other case where the state fails to prove an element of the crime for whatever reason. Instead of relieving the state of its burden of proving all the elements of the crime, the Court of Appeals should have given a literal and strict interpretation to this criminal statute. Delgado, 148 Wn.2d at 727. The court is not at liberty to supply legislative omissions or correct legislative oversight. Jenkins v. Bellingham Municipal Court, 95 Wn.2d 574, 580-81, 627 P.2d 1316 (1981).

It would be a curious rule of statutory interpretation that permitted appellate courts to relieve the state of its burden to prove elements of a statutorily defined crime based on the idea that conviction for the crime is made easier by ignoring those elements. Elements should not be ignored because, in a given case, the state is unable to prove them.

c. The "To Convict" Instruction Omitted Elements Of The Crime And Counsel Was Ineffective In Agreeing To The Defective Instruction.

The "to convict" instruction failed to set forth all the elements of the crime. Although Peterson's trial counsel agreed to the instruction,⁴ the invited error doctrine does not preclude review where, as here, defense counsel was ineffective in agreeing to the defective instruction. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). A conviction cannot stand if the jury instructions relieve the state of its burden of proving every element of the crime beyond a reasonable doubt. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

The "to convict" instruction states:

To convict the defendant of the crime of Failure to Register as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about February 5, 1988, the defendant was convicted of a sex offense;
2. That the defendant was required to register as a sex offender to the county sheriff;

⁴ 3RP 7.

3. That on or about the week of November 2, 2005 to the week of November 22, 2005, he did cease to reside at that residence where he had registered with the county sheriff;
4. That the defendant did knowingly fail to provide written notice to the county sheriff within 72 hours after ceasing to reside there; and
5. That these acts occurred in the State of Washington.

CP 33 (Instruction 7).

One of the things required by the statute is that those obligated to register must do so within a certain deadline and that the failure to do so constitutes a per se violation. RCW 9A.44.130(4)(a) and (b). Yet the Court of Appeals claims the deadline is not an element of the crime. Peterson, 145 Wn. App. at 676-78. This leads to the absurd result that an offender could register before the statutory deadline and still be guilty of failure to register because of an endless duty to re-register regardless of initial compliance with any deadline. Conversely, the Court of Appeals' interpretation leads to the absurd result that one could register after the statutory deadline and still not be guilty of a punishable offense, in contradiction to statutory mandate. Such results flow from the premise that the deadline is not an element of the crime that must be proven in order to convict.

There are several potentially applicable deadlines in Peterson's case. The deadline differs depending on Peterson's residential status

(homeless or fixed residence) and whether he moved to a new county. Under RCW 9A.44.130(5)(a), Peterson needed to send "written notice" of the change of address to the county sheriff within 72 hours if he remained in the same county. The "to convict" instruction indicates the jury must find Peterson failed to send written notice to the sheriff's office within 72 hours, but omits the element that the notification pertain to a "change of address." The instruction is silent on what information Peterson must give to the sheriff.

If Peterson moved to a new county, then the state needed to prove under RCW 9A.44.130(5)(a) that Peterson either (1) failed to send written notice of the change of address at least 14 days before moving to the county sheriff in the new county of residence; or (2) failed to send written notice within 10 days of the change of address in the new county to the county sheriff with whom he last registered. The "to convict" instruction does not include any of these elements.

As (5)(a) demonstrates, the law enforcement entity (sheriff in same county of residence or sheriff in new county of residence) that must be notified differs depending on whether a person remains in the county or moves to a different county. Under the plain language of the statute, failure to notify the correct law enforcement entity is a violation of the statute and a punishable offense. But the "to convict" instruction in

Peterson's case does not specify whether Peterson failed to give written notice to the sheriff within the same county or the sheriff within a new county.

The instruction is also defective under RCW 9A.44.130(6)(a). It omits the elements that Peterson did not provide written notice to (1) the sheriff of the county where he last registered; (2) within 48 hours; (3) of ceasing to have a "fixed" residence.

Indeed, the instruction fails to set forth Peterson's current residential status under either subsection, which triggers the obligation to comply with required notification procedures in the first place. Overall, the instruction is hopelessly muddled because it attempts to encompass a violation of subsections (5)(a) or (6)(a) but does neither.

Criminal defendants have the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 674 (1984). Reversal is required once Peterson shows (1) his attorney's performance was deficient and (2) he was prejudiced by the deficiency. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Counsel agreed to a "to convict" instruction that relieved the state of its burden of proving each element of the crime. No legitimate strategy

justified agreement to an instruction that made it easier to convict. See Aho, 137 Wn.2d at 745-46 (only legitimate trial tactics constitute competent performance). An erroneous "to convict" instruction is presumed prejudicial and that presumption is overcome only if the error could not have rationally affected the verdict beyond a reasonable doubt. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). As set forth in the preceding sufficiency of evidence argument, the state did not produce sufficient evidence of Peterson's residential status under either (5)(a) or (6)(a). Even assuming omission of other elements is harmless under the facts of this case, the elements should still be recognized for what they are. The Court of Appeals erred in failing to recognize this.

d. Peterson's Right To Jury Unanimity Was Violated Because Substantial Evidence Did Not Support Each Alternate Means Of Proving He Failed To Register.

As set forth above, this is an alternative means case. The state's theory was that Peterson either failed to register a new residence as required by RCW 9A.44.130(5)(a) or failed to register as homeless as required by RCW 9A.44.130(6)(a). Even if the state is correct and a reasonable inference could be drawn that Peterson ceased to have a fixed residence and remained homeless after leaving his apartment,⁵ reversal is

⁵ Brief of Respondent at 8.

still required because substantial evidence did not support the alternative means of committing the crime by failing to register after moving to a fixed residence. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 717, 881 P.2d 231 (1994). The "to convict" instruction, in referencing the 72 hour notification requirement, presented this means to the jury. CP 33. Peterson's right to jury unanimity was violated because there was no expression of unanimity on the means of proving Peterson unlawfully failed to register.

F. CONCLUSION

For the reasons stated, Peterson requests that this Court reverse the decision of the Court of Appeals on grounds of insufficient evidence, instructional error, and lack of jury unanimity.

DATED this 2nd day of April 2009.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	NO. 82089-9
)	
MICHAEL PETERSON,)	
)	
Petitioner.)	

DECLARATION OF SERVICE

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

THAT ON THE 2ND DAY OF APRIL 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER MICHAEL PETERSON** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
MISSION BUILDING
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201

SIGNED IN SEATTLE WASHINGTON, THIS 2ND DAY OF APRIL 2009.

x Patrick Mayovsky