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NO. ~~62048-7-I~~

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent/Cross Appellant,

v.

JAMES L. THOMPSON,

Appellant/Cross Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN J. CRAIGHEAD

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**BRIEF OF RESPONDENT/CROSS APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

Assignment of Error of Appellant/Cross Respondent James L.

Thompson –

1. There was insufficient evidence to support James L.

Thompson's conviction for Theft in the First Degree.

2. There was insufficient evidence to support James L.

Thompson's conviction for Witness Tampering.

Assignment of Error of Respondent/Cross Appellant State of

Washington –

1. The trial court erred in not imposing the mandatory \$100

DNA collection fee as part of the Defendant's sentence.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

On December 11, 2006, the State filed an Information charging Defendant James L. Thompson and his wife, Judith Thompson, with 29 counts of Theft, Money Laundering, Witness Tampering, and Criminal Profiteering. CP 1-18. On January 10, 2008, the State filed an Amended Information against the Defendant and his wife. The Amended Information charged only two counts: Count 1 charged both Defendants with Theft in the First Degree, in violation of RCW 9A.56.030(1)(a),

9A.56.020(1)(a), and RCW 9A.08.020, and Count 2 charged the Defendants with Witness Tampering, in violation of RCW 9A.72.120 and 9A.08.020. CP 19-20.

Count 1 of the Amended Information also charged that the Theft in the First Degree charge alleged there was aggravated in two respects. First, the State alleged that the victim of this Theft charge was someone the Defendants knew or should have known was “particularly vulnerable or incapable of resistance due to advanced age, disability, or ill health.” And second, the State charged that the Theft in the First Degree alleged in Count 1 was a “major economic offense.” CP 19-20.

The Defendants were tried before a jury in King County Superior Court, the Honorable Susan J. Craighead presiding, with testimony beginning on April 23, 2008. 4/23/08RP at 15.<sup>1</sup> After arguments from the attorneys and instructions from the trial court, the jury found Defendant James L. Thompson guilty of Theft in the First Degree and Witness Tampering. CP 170, 173. The jury also found that the victim of the Theft in the First Degree was a vulnerable victim, and that the Theft in question was a major economic offense. CP 171, 172.

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<sup>1</sup> The State will use the same system of reference to the trial transcript as that employed by Defendant James L. Thompson in his Opening Brief, that is, the date of the testimony followed by “RP,” and then the relevant page number of the trial transcript, e.g., 4/23/08RP at 15.

A sentencing hearing was held on July 17, 2008. Judge Craighead sentenced Defendant James L. Thompson to an exceptional sentence of 24 months' imprisonment on Count 1, and three months' imprisonment on Count 2, the terms to run concurrently. CP 216-23. Judge Craighead imposed the \$500 Victim Penalty Assessment, but refused to order the \$100 DNA collection fee. 7/17/08RP at 40. Judge Craighead set a restitution hearing for September 19, 2008.<sup>2</sup> 7/17/08RP at 45.

Defendant James L. Thompson filed a Notice of Appeal of his conviction and sentence with the Superior Court on July 18, 2008. CP 206-15. On August 13, 2008, the State of Washington filed a Notice of Cross-Appeal with the Superior Court. CP 224-33. The State's Notice of Cross-Appeal to the Court of Appeals referenced the Judgment and Sentence dated July 17, 2008, and in particular concerns the trial court's failure to order the Defendant to pay the \$100 DNA collection fee at sentencing.<sup>3</sup>

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<sup>2</sup> This restitution hearing was subsequently continued to December 17, 2008, and restitution is not a part of the instant appeal.

<sup>3</sup> On May 14, 2009, Commissioner William Ellis of this Court entered a notation ruling consolidating this appeal with that of his wife and Codefendant, Judith Thompson, in COA No. 61998-5. Because the State has already filed its Opening Brief in the latter appeal, it is filing its Opening Brief in Defendant James Thompson's appeal separately as well.

## 2. SUBSTANTIVE FACTS.

In 2001, Shirley Crawford was a widow who lived in Bellevue, Washington along with her only child, Anne Crawford. 4/23/08RP at 22. The two of them lived there alone: Shirley's husband (and Anne's father), Bill Crawford, had committed suicide in 1977. 4/23/08RP at 22; 5/8/08RP at 42. Anne, who was born on November 13, 1955, was born with Down Syndrome, and was severely mentally retarded. Ex. 16; 4/23/08RP at 18, 22. When Anne Crawford was born in November 1955, Shirley Crawford had the choice of placing her daughter in a state institution, or taking her home with her to raise on her own. 4/23/08RP at 25. Ms. Crawford chose to raise her daughter Anne herself, in spite of the fact that someone in Anne's condition requires 24-hour care. 4/23/08RP at 20, 25. Anne and Shirley Crawford were "very, very close." 4/23/08RP at 22.

In June 2001, Shirley Crawford fell, and had to be admitted to a hospital in Bellevue. 4/23/08RP at 28. Jeannette White, a Case Manager with the Washington State Department of Social and Health Services (DSHS), arranged for her daughter Anne to move in with Jill Campbell, who had worked with Anne Crawford when the latter was employed in a "supported vocational setting" in Bellevue. 4/23/08RP at 30, 32. As time

went by and Shirley Crawford was unable to return home, Jill Campbell became Anne's legal guardian. 4/23/08RP at 130.

Around this same time, Shirley Crawford consulted with an attorney, Craig Coombs, about some way to have her bills paid and to manage her affairs while she was still recuperating. 4/23/08RP at 75. Coombs first met with her either at Overlake Hospital or at Lake Vue Gardens, a long-term care facility in Kirkland where Shirley went after being released from the hospital and being deemed unfit to return home. 4/23/08RP at 74; 5/5/08RP at 96-99. Coombs, who was testifying pursuant to a waiver of the attorney-client privilege by the Administrator of the estate of Shirley Crawford (who died in February 2007), testified that Shirley's main concern was her daughter Anne. 4/23/08RP at 76.

Coombs and Shirley decided that a power of attorney would be the best way to handle the conduct of her affairs until she got back on her feet. 4/23/08RP at 77. Coombs drafted a power of attorney for Shirley, and brought it out to Lake Vue Gardens to review it with Shirley. 4/23/08RP at 81-83. This power of attorney named Codefendant Judith Thompson as Shirley's attorney-in-fact. 4/23/08RP at 84-85; Ex.1. Shirley signed the power of attorney on August 24, 2001, and Judith Thompson signed on August 27, 2001. 4/23/08RP at 83-85.

About six weeks after she signed this power of attorney, Codefendant Judith Thompson went to the Bellevue office of Merrill Lynch with a copy of the power of attorney, and met with Shirley Crawford's financial advisor there, Sean McGowan. 4/24/08RP at 70-72. She asked for a withdrawal of over \$8,000 from Shirley Crawford's Merrill Lynch account to pay Shirley's bills at "Lake Vue." 4/24/08RP at 73. Merrill Lynch eventually approved this request, and McGowan gave Judith Thompson a check in the amount of \$8,618 on October 12, 2001, which was deposited into Shirley's account at Wells Fargo bank, over which Judith Thompson had signatory authority. 4/24/08RP at 73-74; 5/6/08RP at 75.

About a month after this first visit to Merrill Lynch, Codefendant Judith Thompson returned and asked Sean McGowan for a withdrawal of more than \$9,000 from Shirley Crawford's account "as a gift to herself." 4/24/08RP at 74-75. McGowan referred this request to Merrill Lynch's management. Merrill Lynch's management concluded that the power of attorney that Judith Thompson had provided to Merrill Lynch for their review did not authorize Judith Thompson to make gifts to herself of the assets of Shirley Crawford, and Sean McGowan informed Judith Thompson of this decision. 4/24/08RP at 75-76.

Meanwhile, after Shirley Crawford moved from the hospital to Lake Vue Gardens, Medicare paid for her first 100 days of care there. 5/5/08RP at 105. When this 100-day period expired, the policy at Lake Vue Gardens was to have the resident or her power of attorney sign documents verifying that they had received notice that Medicare would no longer be paying for the client's continued stay at that facility. 5/5/08RP at 106. Federal law required, in fact, that the resident or power of attorney sign an acknowledgement that Medicare benefits were expiring and that bills were coming due. 5/5/08RP at 110. Andrea Fukumoto, a Social Worker at Lake Vue Gardens, contacted Judith Thompson to inform her that Medicare would no longer be paying for Shirley Crawford's care there.<sup>4</sup> 5/5/08 at 106. If a resident had a power of attorney, Lake Vue Gardens would send the resident's bills to the resident's power of attorney. 5/5/08RP at 106-07.

In spite of such notice, Shirley Crawford's bills at Lake Vue Gardens were not paid by Judith Thompson or the Defendant. 5/5/08RP at 106-07. In fact, her bills were not paid for a period of two-three months, and eventually accumulated to more than \$10,000. 5/5/08RP at 107-08. Shirley Crawford was confused and embarrassed that her outstanding bills

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<sup>4</sup> The trial transcript (for 5/5/08) continually refers to this witness as "Andrea Mieko-Fukamora," but her actual name is Andrea Fukumoto, and other witnesses use that name to refer to her. The State's brief will use her correct name.

had grown to such a large amount, and Andrea Fukumoto helped her contact Sean McGowan at Merrill Lynch to help her pay her Lake Vue Gardens bills. 5/5/08RP at 108. Sean McGowan asked Ms. Crawford to send him a letter of authorization to cover Merrill Lynch's spending funds from her account to pay her Lake Vue Gardens bills, and she did so. 4/24/08RP at 85.

Merrill Lynch did eventually cut a check for \$18,922 to pay Shirley Crawford's overdue account at Lake Vue Gardens in January 2002, using funds from her Merrill Lynch account. 5/6/08RP at 76-77; 4/24/08RP at 88; Ex. 20. Merrill Lynch then cut another such directly to Lake Vue Gardens in the amount of \$4,482.10 on February 8, 2002. A third such check for \$4,872.86 was issued on March 8, 2002. 5/6/08RP at 78-79; Ex. 20.

While Shirley Crawford's bills at Lake Vue Gardens were going unpaid, the Defendant and his wife were still exploring the gifting of funds from the Merrill Lynch account to Judith Thompson. Defendant James Thompson called Sean McGowan shortly after Merrill Lynch had denied Judith Thompson's request to gift herself over \$9,000 from Shirley Crawford's Merrill Lynch account. 4/24/08RP at 78-79. Defendant James Thompson asked McGowan why Merrill Lynch had not released the funds to Judith Thompson, and why Merrill Lynch was not honoring her power

of attorney. *Id.* Sean McGowan told the Defendant James Thompson that since he was not named in the power of attorney, McGowan could not give him any information about Shirley Crawford's Merrill Lynch account. 4/24/08RP at 80.

In the course of his conversation with Sean McGowan, Defendant James Thompson objected to McGowan's speaking directly with Shirley Crawford about her Merrill Lynch account, telling McGowan that she "wasn't coherent enough to have conversations regarding her own account." 4/24/08RP at 83. When McGowan told the Defendant that he could not discuss the matter with him, since James Thompson's name was not on the power of attorney, the latter accused McGowan and Merrill Lynch of trying to keep Shirley Crawford's funds at Merrill Lynch. *Id.* McGowan also discussed with James Thompson his obtaining of some kind of notice from a doctor or from Shirley Crawford's facility, attesting that she was truly incapacitated and "couldn't handle her own issues." 4/24/08RP at 84. Defendant James Thompson told McGowan he would procure such a letter, but never did so. 4/24/08RP at 84.

Andrea Fukumoto, the lead Social Worker at Lake Vue Gardens working with Shirley Crawford, became increasingly concerned about the management of Ms. Crawford's power of attorney by Judith Thompson and the Defendant because they were not paying Ms. Crawford's bills at

Lake Vue Gardens. 5/5/08RP at 98-99, 109. Andrea Fukumoto helped Shirley Crawford to communicate with her financial advisor. *Id.* Ms. Fukumoto had difficulty in reaching the Defendant and his wife. 5/5/08RP at 109.

When Andrea Fukumoto heard that there was some interest in moving Shirley Crawford from Lake Vue Gardens to another facility, she set up a “care conference” for April 11, 2002. 5/5/08RP at 110. The purpose of such a conference was to discuss “what needed to be put in place” to facilitate such a move, such as physical therapy, visiting nurse services, and the like. *Id.* Andrea Fukumoto invited Shirley Crawford and Codefendant Judith Thompson, and Shirley Crawford asked that Jill Campbell be invited as well. 5/5/08RP at 111.

Shirley Crawford told Andrea Fukumoto that she would like to stay at Lake Vue Gardens until the end of April 2002 before moving to another facility, in order to allow more time for Ms. Fukumoto and Shirley Crawford’s treating therapist to set up additional services for Ms. Crawford. 5/5/08RP at 112. Judith Thompson was not happy to hear this, and decided not to attend the care conference. 5/5/08RP at 113. The others did attend the care conference on April 11<sup>th</sup> as scheduled, and discussed changing Shirley Crawford’s power of attorney from Codefendant Judith Thompson to someone else. 5/5/08RP at 111.

After the care conference, Andrea Fukumoto decided to go forward with a relocation of Shirley Crawford at the end of April 2002. 5/5/02RP at 114. Two days after the care conference, however, Saturday, April 13<sup>th</sup>, Codefendant Judith Thompson, who was concerned that she was going to be forced out or removed as the power of attorney for Shirley Crawford, went to Lake Vue Gardens, picked up Shirley Crawford and told the staff, “We’re just going for a walk.” 5/8/08RP at 113, 118. Instead of going for a walk, she brought Shirley Crawford to another facility, the Issaquah Adult Family Home (AFH) in Issaquah. 4/24/08RP at 18-19; 5/8/08RP at 117-19. Judith Thompson took Shirley Crawford to the Issaquah AFH without her belongings, and left Ms. Crawford there while she returned to Lake Vue Gardens to retrieve them. 5/8/08RP at 119.

Andrea Fukumoto did not find out about this move until she returned to work the following Monday, April 15, 2002. 5/5/08RP at 115. She called the Issaquah AFH to speak with Shirley Crawford to “make sure Shirley had adequate services to support the transition.” *Id.* Andrea Fukumoto was able to reach Shirley Crawford, and the two had a brief conversation, in which the latter appeared to be “very hesitant, very careful, as if she were talking in code.” 5/5/08RP at 117. This conversation ended when they were disconnected. *Id.* Andrea Fukumoto called Shirley Crawford back right away several times after they were

disconnected, as well as several times later that week, but the phone kept on ringing until an answering machine was activated. 5/5/08RP at 117-18. Andrea Fukumoto then made a referral to Adult Protective Services (APS) of DSHS concerning Judith Thompson's possible financial exploitation of Shirley Crawford. 5/5/08RP at 118-19. This referral later ended without a finding of financial exploitation of Shirley Crawford by the Defendant and Judith Thompson, in part because the Thompsons' attorney called the APS investigator in May 2002, and told her that the Thompsons were setting up a Special Needs Trust for both Shirley and Anne Crawford. 4/24/08RP at 138-40. In fact, no such Special Needs Trusts were established. 5/6/08RP at 206-07.

Meanwhile, about this same time, Shirley Crawford's attorney, Craig Coombs, went to the Issaquah AFH to visit her. 4/23/08RP at 87. After this visit, he received a message from the Codefendant Judith Thompson on his office voice-mail. 4/23/08RP at 87. In this voice-mail, she told Mr. Coombs he was not to see Shirley Crawford without the permission of Judith Thompson. 5/8/08RP at 131. In response, Mr. Coombs sent a letter to Judith Thompson dated April 23, 2002, stating in part: "I do need to make one thing clear, especially after receiving your last voicemail. I represent Shirley, I do not work for you. What goes on between Shirley and I remains in confidence and is protected by

attorney/client privilege. I will not tell you what we discussed or ask permission from you to see her.” 4/23/08RP at 89; Ex. 3.

On April 27, 2002, exactly four days after Craig Coombs sent his letter, the Defendant and Judith Thompson brought Shirley Crawford into an office offering notary public services in Renton. 4/24/08RP at 168-70. The Defendant and his wife brought along a second Power of Attorney agreement that had been drafted by their attorney, Andree Chicha. 5/8/08 at 126; Ex. 2. They did not inform Shirley Crawford’s attorney, Craig Coombs, about this second power of attorney, and he did not know his client had signed another such document. 5/8/08RP at 129; 4/23/08RP at 90-91. This second power of attorney added Defendant James Thompson as a second attorney-in-fact, authorized gifts to the Defendant and his wife, and included a new provision entitling the Thompsons to “reasonable compensation” for their services under the power of attorney. 5/8/08RP at 126-28; Ex. 2.

Codefendant Judith Thompson also told Jill Campbell that she wanted to take over as Guardian for Shirley Crawford’s daughter, Anne Crawford. 4/24/08RP at 28. Judith Thompson told Jill Campbell that if she did not give up Guardianship of Anne Crawford, she and her husband James Thompson “would cause trouble.” 4/24/08RP at 28-29. The Defendant and his wife made “pretty heated” telephone calls to Anne

Crawford's DSHS case manager complaining about Jill Campbell's conduct as the Guardian of Anne Crawford. 4/23/08RP at 41-42. Defendant James Thompson made a referral of Jill Campbell to APS, alleging that she was financially exploiting Shirley Crawford. 4/24/08RP at 122. Eventually, Jill Campbell resigned as the Guardian. 4/23/08RP at 42. The Defendant and his wife were then appointed as Guardians for Anne Crawford. 5/12/08RP at 55-56, 60. When the Thompsons took over as Anne's Guardians, for the first time in her life, she went to live in an institution, an Adult Family Home, rather than with her mother or Jill Campbell. 4/23/08RP at 43; 5/12/08RP at 56.

Once the Defendant and his wife had the new power of attorney for Shirley Crawford and Guardianship of Anne Crawford, they acted to take over full control over Shirley Crawford's assets. Within a week of the second power of attorney, the Defendant and Judith Thompson caused the bulk of the funds left in Shirley Crawford's Merrill Lynch account, \$33,500, to be wired to her Cascade Federal Credit Union (CFCU) account. 5/6/08RP at 80; Ex. 20. This transfer left a little under \$4,400 in the Merrill Lynch account. *Id.* Judith Thompson had signatory authority over this account in Shirley Crawford's name at CFCU. 5/6/08RP at 81. The Defendant and his wife then transferred \$3,000 of Shirley Crawford's

funds to an account in their names on May 15, 2002, and another \$3,500 on June 14, 2002. 5/6/08RP at 82-83; Ex. 20.

Aside from the cash remaining in her account from the Merrill Lynch account, and her approximately \$950 a month net in Social Security benefits, Shirley Crawford's sole remaining asset in 2002 was her house in Bellevue. 5/12/08RP at 20-21. In August or September 2002, the Defendant and Judith Thompson put this house on the market in an attempt to sell it themselves, without a real estate agent. 5/6/08RP at 7-8. A neighbor of Shirley Crawford's who was a real estate agent, Joy Stewart, introduced herself to the Thompsons, and offered her help if they needed it. *Id.*

Codefendant Judith Thompson eventually called Joy Stewart, told her she and her husband had not had any luck in selling the house, and asked Ms. Stewart if she would list the property. 5/6/08RP at 8. Joy Stewart testified that when she came on board as the listing agent for the Shirley Crawford house in late September or early October 2002, the Defendant and his wife had not done very much to prepare the house for sale, save for a couple of garage sales to get rid of some of the old furniture from the house. 5/6/08RP at 8-10. Joy Stewart also testified that she recognized very quickly that the most likely prospect for the sale of

the house, given its age and condition, was as a “tear down,” with the construction of a new house on the lot. *Id.*

The house was sold shortly after Joy Stewart became the listing agent for a total price of \$360,000. 5/6/08RP at 14, 17. Although a purchaser agreed to buy the house for this price in October 2002, because of a dispute over the property line with a neighbor of Shirley Crawford’s, the sale did not actually close until February 2003. 5/6/08RP at 17. Joy Stewart testified that she had conversations with the Defendant and his wife on several occasions about how the proceeds from the sale of Shirley Crawford’s house were going to be used. The Thompsons assured Ms. Stewart that the sale proceeds would “go into a trust fund they set up for Shirley so she could live on it for the rest of her life with her daughter.” 5/6/08RP at 19.

The settlement statement for the sale of Shirley Crawford’s house in Bellevue is dated February 3, 2003. 5/6/08RP at 55-58; Ex. 6. This was the only document reflecting the disbursement of the proceeds from this sale. 5/6/08RP at 60. The buyer and seller would each get a copy of this document when they signed the closing documents. 5/6/08RP at 57-58.

The settlement statement reflects that \$15,000 went to the seller as an earnest money payment outside the escrow account. 5/6/08RP at 58;

Ex. 6. This settlement statement also reflects various smaller fees, taxes, and title insurance payments that were paid with the sale proceeds, as well as the 3% commission each to the agent for the seller and the agent for the purchaser, for a total of \$21,600. 5/6/08RP at 59-60; Ex. 6. In addition, the settlement statement reflects a payment “per agreement” to Scott East and Kathryn East for \$4,500. *Id.* The Easts were the next-door neighbors of Shirley Crawford, and this payment was for settlement of a property line dispute. 5/5/08RP at 58-68.

The settlement statement also shows a payment of \$54,000 from the escrow account “per instructions to James Thompson.” 5/6/08RP at 59-60; Ex. 6. Defendant James Thompson later attempted to justify this payment of 15% of the house sale proceeds to himself to a financial specialist for DSHS, Hanh Nguyen, by claiming it was proper reimbursement to him for, among other things, cleaning and painting Shirley Crawford’s house, and getting it ready for the market. 5/6/08RP at 140-41. He later gave Ms. Nguyen an itemized bill detailing all the work he had allegedly done to justify this 15% commission at the closing. 5/6/08RP at 146-47; Ex. 9.

The second largest disbursement of funds at the closing of the property was for \$103,147, distributed to Codefendant Judith Thompson “per instructions.” 5/6/08RP at 59-60; Ex. 6. The Defendant James

Thompson later explained to Hanh Nguyen of DSHS that this money represented a gift from Shirley Crawford to the Thompsons. 5/6/08RP at 140-41. At trial, Judith Thompson claimed that these funds were a gift from Shirley Crawford to her. 5/12/08RP at 22.

The single largest disbursement from the proceeds of the sale of Shirley Crawford's house was a payment of \$153,388.32, that went to the seller, Shirley Crawford. 5/6/08RP at 59-60; Ex. 6. Judith Thompson admitted in her testimony at trial that anyone reviewing this settlement statement would understand that Shirley Crawford was receiving this \$153,388.32 in cash from the closing. 5/12/08RP at 25. The Defendant and his wife waited one day before transferring \$152,113 of these funds to an account at CFCU in their names. 5/6/08RP at 85-86; Ex. 21.

In fact, all told, the Defendant and Judith Thompson ended up with \$309,260 of the total sale proceeds of \$360,000. 5/6/08RP at 87; Ex. 21. With this money, the Defendant and his wife paid off a number of outstanding loans they had, including loans secured by a Cadillac, a Dodge truck, and a motor home. 5/12/08RP at 30-31. They also paid down an outstanding Visa bill in the amount of \$7,109. 5/12/08RP at 32-33.

The Thompsons also refinanced their home mortgage, and used some of the proceeds from the new mortgage, along with the proceeds

from the sale of Shirley Crawford's house, to purchase a boat from Emerald Pacific Yachts for \$200,000 on February 19, 2003. 5/6/08RP at 94-99; Ex. 23. They named this boat the "Tongass Explorer," and used it in their charter cruise business, known as "Family Charters." 5/12/08RP at 69-70; Ex. 23. The Thompsons raved about their new 50-foot boat on the website they maintained for Family Charters, and declared it a "great improvement" over their former boat. 5/7/08RP at 33-35.

Eventually, the Thompsons had to apply to DSHS for Medicaid to pay Shirley Crawford's long-term care bills in January 2005. 5/6/08RP at 137. Hanh Nguyen of DSHS had handled a previous, unsuccessful application for Medicaid long-term care funds for Shirley Crawford, and was therefore somewhat familiar with the sale of Shirley Crawford's house and the Thompsons' claims of gifting and commissions from the sale proceeds. 5/6/08RP at 13-137. After examining documentation provided by Defendant James Thompson and hearing his explanations of the alleged gifting of Shirley Crawford's funds to the Defendant and his wife, Hanh Nguyen of DSHS concluded that, under the applicable Medicaid regulations, Shirley Crawford would be ineligible for Medicaid benefits from February 2003 through July 11, 2005. 5/6/08RP at 150-51. By early May 2005, the Thompsons were able to provide proof that they had paid another \$14,898 for Shirley Crawford's care, thus in effect

returning some of the funds allegedly gifted to the Thompsons, and thereby reducing Shirley Crawford's Medicaid ineligibility period, making her eligible for long-term care benefits as of May 10, 2005. 5/608RP at 154-56.

At trial, Codefendant Judith Thompson testified that Shirley Crawford's bill at The Talbot Center (the nursing home where she was living by 2005) had grown to the \$14,898 amount because it was overdue. 5/12/08RP at 48-50. This was because by early 2005, she and Defendant James Thompson had spent all the funds from the proceeds of the sale of Shirley Crawford's house in February 2003. *Id.* As a result, the Thompsons had to go out and borrow the \$14,898 that they used to pay down Shirley Crawford's outstanding bill at the Talbot Center, and thereby make her eligible for Medicaid long-term care benefits. *Id.*

Judith Thompson also agreed in her testimony at trial that once the proceeds from the sale of Shirley Crawford's house were all gone, there were no further assets in her estate. 5/12/08RP at 50-51. In fact, when Care Planning Associates was appointed Guardian of Shirley Crawford's person and estate in September 2005, they found a grand total of \$17.24 in her bank accounts. 5/8/08RP at 15. The Defendant and his wife indicated that all of Shirley Crawford's other assets were all gone. *Id.*

After hearing the Thompsons' attempted explanations of how they had ended up with so much of the assets of Shirley Crawford's, Hanh Nguyen of DSHS made a referral to APS regarding the Thompsons' possible financial exploitation of Shirley Crawford. 5/6/08RP at 205. Margaret Carson of DSHS was assigned to look into this allegation. *Id.* She reviewed the report that Denise Roth of DSHS had made in 2002, and saw the representation by the Thompsons' attorney about a Special Needs Trust to be established for Anne Crawford. 5/6/08RP at 206-07. Margaret Carson was unable to find any such Special Needs Trust for Anne Crawford. *Id.*

As part of her investigation, Margaret Carson went to the Talbot Center on April 27, 2005 to interview Shirley Crawford. 5/6/08RP at 17-19. Ms. Carson testified to her extensive training and experience in the field of mental competency, especially as it applies to the elderly population. 5/6/08RP at 21. She went on to ask questions of Shirley Crawford to gauge her mental capacity. *Id.* Ms. Carson concluded that Shirley Crawford "lacked the capacity to consent." 5/6/08RP at 25. She also decided to consult with the Attorney General's Office about filing a petition for Guardianship for Shirley Crawford. *Id.*

On August 19, 2005, Dr. Daniel Graves examined Shirley Crawford at the Talbot Center. 5/6/08RP at 188. She was then 87 years

old. *Id.* Dr. Graves concluded after his examination that Ms. Crawford suffered from “moderately severe dementia.” 5/6/08RP at 191-92.

The Attorney General’s Office did in fact file a petition for a Guardian to be appointed for Shirley Crawford. 5/6/08RP at 36-37. Margaret Carson also made a referral to the Attorney General’s Office to remove the Thompsons as the Guardians for Anne Crawford and appoint someone else in their place. *Id.* A hearing on these two Guardianship petitions was scheduled for September 14, 2005 at the King County Courthouse in downtown Seattle. *Id.*

At this hearing on September 14, 2005, the Defendant and his wife brought with them a videotape that they wanted to give to the Court Commissioner presiding over the hearing. 5/7/08RP at 39. The Thompsons indicated that the videotape showed them interviewing Shirley Crawford, and demonstrated that Shirley Crawford had wanted to gift them the proceeds from the sale of her house. *Id.* The Thompsons also indicated that the videotape had been made very recently, within the two prior weeks of the hearing. *Id.*

The Thompsons gave Margaret Carson a copy of the videotape. *Id.* This videotape was subsequently downloaded into a DVD format and admitted into evidence at trial. 5/7/08RP at 40-41; Ex. 45. The DVD was

played for the jury at trial, and was exactly as Margaret Carson first viewed it in September 2005. 5/7/08RP at 42-43.

Margaret Carson identified the woman in the wheelchair on the DVD as Shirley Crawford. 5/7/08RP at 43; Ex. 45. Margaret Carson also pointed out the lack of open-ended questions in the course of the Thompsons' interaction with Shirley Crawford in this DVD. *Id.* She also told the jury that someone with a cognitive disability like Shirley Crawford would be particularly desirous of expressing agreement with the many other people in the room with her during the filming of this video. 5/7/08RP at 43-44.

At the outset of this videotape/DVD, the Thompsons hand Shirley Crawford, who is seated in a wheelchair, a typed statement. Ex. 14 at 1; Ex. 45. Defendant James Thompson tells her, "I wrote this down from what some of what you said and some of what the DSHS have told us that you have said." Ex. 14 at 1; Ex. 45. Eventually, Judith Thompson takes the written statement from Shirley Crawford, and reads it for the video camera. Ex. 14 at 2-5; Ex. 45. Part of this statement is as follows: "Judy & Jim told me that I have told the DSHS or Adult Protection person that I did not want Jim & Judy to have any of my money, they have plenty. I do not remember saying that. This is not what I wanted. I wanted Jim and Judy to have my house." Ex. 14 at 3; Ex. 45. At the conclusion of the

reading of the prepared statement, the camera pans around the room to reveal various other members of the Thompson family who were present for the taping of the videotape. Ex. 14 at 5; Ex. 45. Defendant James Thompson says right at the end of the taping that: “No coercion. You don’t mind us video taping, so they can’t argue. They can’t argue with the video camera.” *Id.* In September 2005, the Thompsons were removed as attorneys-in-fact for Shirley Crawford and as Guardians for Anne Crawford, Care Planning Associates was appointed by the court as Guardians of the estate and person of Shirley Crawford, and a new Guardian was appointed for Anne Crawford. 5/7/08RP at 96-97, 138.

The jury found the Defendant James L. Thompson guilty of both counts as charged in both counts of the Amended Information. CP 170, 173. It also found that the Theft charge was a “major economic offense,” and that Shirley Crawford was a particularly vulnerable victim. CP 171-72. The Court set sentencing for July 17, 2008.

At sentencing, Judge Craighead found substantial and compelling reasons to justify the imposition of an exceptional sentence against both the Defendant and Judith Thompson. 7/17/08RP at 33-40. She sentenced the Defendant to a term of 24 months imprisonment on the Theft charge in Count 1, and a term of three months in custody on Count 2, said terms to run concurrently with one another. 7/17/08RP at 40. The trial court

declined to order that the Defendant pay the \$100 DNA collection fee because it was “concerned about the ex post facto implications.”

7/17/08RP at 40. The Defendant appealed, and the State cross-appealed the trial court’s refusal to order payment of the \$100 DNA collection fee. CP 206-15, 224-33.

**C. ARGUMENT**

**1. THE STATE’S RESPONSE TO THE DEFENDANT’S ARGUMENTS.**

- a. There Was Sufficient Evidence From Which The Jury Could Convict The Defendant Of Theft In The First Degree.

The Defendant James L. Thompson’s first argument on appeal is that there was not sufficient evidence from which the jury could have found him guilty of Theft in the First Degree. Before addressing the Defendant’s specific arguments on this point, it would be helpful to be mindful of some of the basic principles governing a challenge to the sufficiency of evidence on appeal. In assessing the sufficiency of the evidence, a reviewing court must view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205, *cert. denied*, 549 U.S. 978, 127

S. Ct. 440, 166 L. Ed. 2d 312 (2006); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). “A claim of insufficiency of the evidence admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A jury’s guilty verdict will be upheld if supported by substantial evidence in the record, viewing the evidence and the inferences flowing therefrom most favorably to the State. *Luther*, 157 Wn.2d at 78.

The Defendant’s first argument on this alleged insufficiency points to the fact that an investigation of the Defendant and Judith Thompson by Denise Roth of Adult Protective Services (APS) of DSHS “early in the period” of the Thompsons’ involvement with Shirley Crawford “specifically reached a conclusion that the transfer of funds from Ms. Crawford’s accounts were specifically not theft ....” Defendant’s Opening Brief at 15. This argument is less a legal argument on the alleged insufficiency of the evidence adduced at trial than a rehash of a closing argument to the jury. One obvious answer to this argument is the fact that Denise Roth’s investigation was completed by May 13, 2002, or more than eight months before the Defendant and his wife sold Shirley Crawford’s house in Bellevue in February 2003, and walked away with the lion’s share of the proceeds for themselves. 5/5/08RP at 31. The great

majority of the Theft alleged by the State had not even taken place at the time that Denise Roth investigated the Defendant and his wife in April and May 2002. Her investigation did not even touch on the sale of Shirley Crawford's most valuable asset, and the appropriation of the bulk of the sale proceeds by the Thompsons. Whatever rhetorical value this argument may have, it does not point up a legal insufficiency of the State's evidence at trial.

Moreover, even such rhetorical value as this argument might have in the abstract pales into insignificance in the face of the mass of incriminating evidence adduced at trial. That evidence demonstrated that within about three months of being named as Shirley Crawford's attorney-in-fact, Codefendant Judith Thompson was at Merrill Lynch attempting to make a gift to herself of \$9,000 from the funds in Shirley Crawford's account, or more than 10% of the funds there. When Merrill Lynch refused to release the funds because the power of attorney did not contain a gifting provision, it was Defendant James Thompson who called the account manager to berate him for not releasing the funds to his wife.

The Defendant and his wife subsequently bypassed Shirley Crawford's attorney, had their own attorney draft a new power of attorney naming both Thompsons as attorneys-in-fact, and with a limited gifting provision, and shortly thereafter liquidated almost all of the Merrill Lynch

account and had the funds (\$33,500) wired to a bank account they controlled. Shortly after that, they transferred \$6,500 of those funds to their own personal account. They forced the Guardian for Anne Crawford, Jill Campbell, to resign by threatening her son with criminal prosecution, and had themselves appointed Anne's new Guardians.

Having isolated Shirley Crawford from anyone who might interfere or question whether their actions were in the best interests of Shirley and Anne Crawford, the Defendant and his wife turned to Shirley Crawford's last, most valuable asset, her house in Bellevue. They sold that house in February 2003 for \$360,000, and took approximately \$309,260 of those funds for themselves. The fact that the Defendant and his wife used some of these funds to pay for Shirley Crawford's nursing home care does not detract from the fact that they effectively plundered the remaining assets of Shirley Crawford, leaving her with a total of \$17.24 in her bank account by the time the Thompsons were removed as her attorneys-in-fact (and as Anne's Guardians) in September 2005.

The Defendant and his wife not only stole most of Shirley Crawford's remaining wealth, they also effectively disinherited her daughter Anne as well. Shirley's will, drafted in 1978, provided that her estate would go to Anne Crawford by means of a testamentary trust. Ex. 16; 5/8/08RP at 13-14. Thus, the Defendant James L. Thompson not

only managed to violate the fiduciary duty he had toward Shirley Crawford under the power of attorney, but also violated his fiduciary duty as the Guardian of her only child, the profoundly retarded and completely vulnerable Anne Crawford.

Most of the Defendant's argument about the alleged insufficiency of the evidence comes down to what is in effect an argument that the jury was wrong to believe the evidence produced at trial by the State. He argues thus, for instance: "The State's case was built on the ill-informed allegations of other individuals who had their own interests in Crawford's finances and the outcome of the case." Defendant's Opening Brief at 15. It is well settled, however, that a reviewing court will defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. *State v. Elmi*, 138 Wn. App. 306, 313, 156 P.3d 281 (2007), *affirmed on other grounds*, \_\_ P.3d \_\_, 2009 WL 1444206 (May 21, 2009); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), *review denied*, 119 Wn.2d 1011 (1992). And while it is true that the State's case was largely based on circumstantial evidence, since Shirley Crawford was deceased by the time of trial, circumstantial evidence and direct evidence carry equal weight when reviewed by an appellate court. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

There was, in sum, an abundance of evidence from which a rational jury could find the Defendant guilty of Theft in the First Degree for his conversion of the majority of Shirley Crawford's assets to the benefit of himself and his wife while acting as her attorney-in-fact.

b. There Was Sufficient Evidence From Which The Jury Could Convict The Defendant Of Witness Tampering.

Count 2 of the Amended Information charged the Defendant and his Codefendant/wife with Witness Tampering, in violation of RCW 9A.72.120 and 9A.08.020.<sup>5</sup> The specific operative language of Count 2 alleged that the Defendant and Judith Thompson "on or about the 21<sup>st</sup> of August, 2005, did attempt to induce Shirley Crawford, a witness or a person the defendants had reason to believe was about to be called as a witness in any official proceeding, or a person whom the defendants had reason to believe may have had information relevant to a criminal investigation, to testify falsely." As the Defendant points out in his Brief (at 20-23), the trial court omitted the "a person whom the defendants had reason to believe may have had information relevant to a criminal investigation" language from its to-convict instruction as to Count 2. The

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<sup>5</sup> RCW 9A.08.020 is the statute defining accomplice liability in Washington.

State agrees that the trial court's to-convict instruction now defines the elements the State needed to prove in order to convict the Defendant of Witness Tampering. *State v. Willis*, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005). Rather than repeat the case law on a challenge to the sufficiency of the evidence, the State will simply incorporate its arguments from Section C (1) (a) of this brief, *supra*, by reference herein.

The Defendant's first point – that the State failed to prove that the Defendant sought to have Shirley Crawford testify falsely – is in turn premised on her argument that “the Thompsons had no reason to believe Crawford would be called as a witness. Crawford was not competent.” Defendant's Opening Brief at 25. There is, in fact, considerable evidence in the record that the Defendant James Thompson knew that Shirley Crawford was not competent. As early as late 2001, the Defendant berated Sean McGowan of Merrill Lynch for talking directly with Shirley Crawford about her Merrill Lynch account, telling him that “she wasn't coherent enough to have conversations regarding her own account.” 4/24/08RP at 83. In April 2002, the Defendant told Officer Bradley of the Bellevue Police that Shirley Crawford “has dementia and that she is easy to talk into doing things like signing papers.” 4/24/08RP at 161. His wife testified at trial about her and her husband's making of the video of Shirley Crawford: “We were rather desperate. We hoped that somehow –

we knew she had dementia, but we hoped somehow that, you know, she would want it so much that she would get across that she knew what we had done and understood what we had done.” 5/8/08RP at 87.

Although there is considerable evidence that the Thompsons were fully aware that Shirley Crawford was demented in August and September 2005, it is equally clear from the videotape that they were attempting to pass her off as someone who was perfectly lucid and competent so long as she had sufficient oxygen. Defendant James Thompson tells Shirley Crawford in the course of the videotape: “But you’re on your oxygen today so you sound better.” Ex. 14 at 1; Ex. 45. A little later in the course of the videotape he told Shirley Crawford: “Yeah, when you’re without oxygen, you start running short so your brains (sic) starts to mess up on you.” *Id.* The statement that the Thompsons prepared for Shirley Crawford begins: “I am Shirley Crawford sitting here with other witnesses, your family, that will sign below. I am on my oxygen and while my mind just wanders a little bit I am, I am ....” Ex. 14 at 2; Ex. 45.

In short, while the Thompsons were well aware that Shirley Crawford was seriously demented in August-September 2005, they attempted to portray her as someone whose only problem was occasionally insufficient oxygen. In making this videotape, and vouching for her sufficient supply of oxygen that day, the Defendant and his wife

were attempting to present the videotaped Shirley Crawford as someone who was now fully competent and able to speak reliably on her past history with the Defendant and Judith Thompson. At the same time, the Thompsons could discredit other statements made by Shirley Crawford that were unfavorable to the Thompsons as the ravings of an insufficiently oxygenated brain.

The Thompsons were well aware that APS was investigating their alleged financial exploitation of Shirley Crawford. They also could not fail to perceive that the key component of their alleged financial exploitation would be their conversion of the vast majority of the proceeds from the sale of Shirley Crawford's house to their own personal use. Their defense of their use of those sale proceeds, in turn, depended on proof that Shirley Crawford had in fact either given the Thompsons her house outright, or had authorized them to use the proceeds from its sale as they wished.

The Thompsons had nothing in writing to establish either of those propositions. 5/7/08RP at 82-83, 86. They therefore wrote out a statement for Shirley Crawford to read on videotape and, when she proved unable to do even that, Judith Thompson read the statement as Shirley Crawford listened and occasionally nodded in apparent acquiescence. The resulting videotape is what the Defendant and his Codefendant hoped

would persuade the court ruling on the Guardianship petition that Shirley Crawford had in fact given her informed consent to the Thompsons' appropriation of over \$300,000 of the proceeds from the sale of her house.

The evidence at trial also showed that the Defendant and Judith Thompson put statements they knew to be false in what were supposed to be the words of Shirley Crawford. In the videotape, they have Shirley Crawford say that the Thompsons informed her that they had used \$150,000 of the proceeds from the sale of her house to invest in Defendant James Thompson's trucking business. Ex. 14 at 3; Ex. 45. This was supposedly justified because the Defendant had been fired from his previous job with a trucking company in 2002 owing to the large amount of time he had had to devote to the care of Shirley Crawford and her affairs. *Id.* In reality, the evidence of the State's summary witness demonstrated that there was only one check for \$11,656.46 that was arguably related to that trucking business. 5/6/08RP at 104. Judith Thompson conceded on the stand that a lot more of the proceeds from the sale of Shirley Crawford's house went to the purchase of the Thompson's boat, the Tongass Explorer, than went into the trucking business. 5/12/08RP at 44. Yet there is no mention whatsoever of the boat on the videotape. Ex. 14; Ex. 45.

It is clear from the videotape and the transcript of the videotape that the Thompsons fully expected that it would win the day for them in the Guardianship/financial exploitation proceedings. Defendant James Thompson says to Shirley Crawford near the end of the video that: “No coercion. You don’t mind us video taping, so they can’t argue. They can’t argue with the video camera.” A little later, James Thompson says again that: “They can’t argue with the video camera.” Ex. 14 at 5; Ex. 45.

The Defendant and his wife brought copies of the videotape to the court hearing on September 14, 2005. Margaret Carson of APS testified as follows about the videotape they brought to court that day:

They had – they had made a video that they wanted to give it to the court commissioner, and they had given it to the guardian ad litem, and it wasn’t going to be reviewed in court, so they asked me if I wanted to have a copy of it, and I said I would.

5/7/08RP at 39. The jury could therefore have found that the Thompsons wrote up the statement that they intended for Shirley Crawford to read on the videotape, and fully intended to offer the videotape as evidence of Shirley Crawford’s informed consent in the Guardianship proceedings. When they failed to have the videotape “reviewed in court,” they offered copies to the King County Guardian Ad Litem and to Margaret Carson of APS, both of whom the Thompsons knew were investigating the Thompsons’ conduct as the attorneys-in-fact for Shirley Crawford.

In sum, there was sufficient evidence from which the jury could conclude that the Defendant arranged to videotape his wife reading a statement purporting to come from Shirley Crawford, whom the Defendant knew to be demented, as if Ms. Crawford was then sufficiently oxygenated, and therefore able to provide competent evidence. The statement the Defendant arranged to be read contained false and misleading statements, and the Defendant was fully aware of that fact. And the Defendant and his wife were confident, however erroneously, that the court would accept the statement that they had put into the mouth of Shirley Crawford as competent testimony. “Circumstantial evidence provides as reliable a basis for findings as direct evidence.” *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997); *accord State v. Silva*, 127 Wn. App. 148, 151 n.1, 110 P.3d 830 (2005). The circumstantial evidence here, as well as the direct evidence provided by the words of the Thompsons on the videotape, shows an attempt to manipulate a demented 87 year-old woman into providing favorable testimony for the Defendant and his codefendant. That is sufficient evidence from which a rational jury could find that the Defendant tampered with Shirley Crawford.

**2. THE STATE’S ARGUMENT AS CROSS-APPELLANT.**

- a. The Trial Court Erred In Not Ordering The Defendant To Pay The \$100 DNA Collection Fee.
  - i. Background.

Laws of 2008, Ch. 97, took effect on June 12, 2008, and amended RCW 43.43.753, 43.43.754, 43.43.7541, and 43.43.756. Formerly, these statutes required the collection of a DNA sample from all defendants convicted of a felony or various enumerated misdemeanors. When imposing a felony sentence, the court was to assess a \$100 DNA collection fee, but could waive the fee if it resulted in an undue financial hardship on the defendant. These requirements applied to any felony committed on or after July 1, 2002.

Laws of 2008, Ch. 97, changed the statutory DNA collection scheme in a number of ways. First, it expanded the class of defendants required to give samples – both in terms of the specific crimes<sup>6</sup> and the dates of conviction for which DNA collection is required. Laws of 2008, Ch. 97, §§ 2-3. Second, it made the imposition of the \$100 fee mandatory

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<sup>6</sup> Prior to Laws of 2008, Ch. 97, § 2, sampling was required for Stalking, Harassment, and Communicating with a Minor for Immoral Purposes. Section 2 adds the misdemeanors of Assault in the Fourth Degree with Sexual Motivation, Custodial Sexual Misconduct in the Second Degree, Failure to Register as a Sex Offender, Patronizing a Prostitute, Sexual Misconduct with a Minor in the Second Degree, and Violation of a Sexual Assault Protection Order. RCW 43.43.754(1).

for a felony sentence by removing the authority of a sentencing court to waive it. Laws of 2008, Ch. 97, § 3; *see also* 2SHB 2713, Final Bill Report Synopsis.

- ii. The Legislature intended that the \$100 DNA collection fee be assessed in any felony judgment and sentence imposed on or after June 12, 2008, regardless of the date of conviction.

The language and history of this statutory amendment make it clear that the legislature intended that both the DNA testing and the imposition of a mandatory \$100 fee apply to all felony sentences imposed on or after June 12, 2008. Laws of 2008, Ch. 97, § 2, amended RCW 43.43.754(6) to explicitly state that, in addition to defendants convicted after June 12, 2008, DNA samples must be collected from all defendants:

... who were subject to the previous version of the statute prior to June 12, 2008;<sup>7</sup>

... who were convicted of a listed offense prior to June 12, 2008, but who are still incarcerated on or after that date;<sup>8</sup>  
and

... who are required to register under RCW 9A.44.130 on or after June 12, 2008, regardless of when they were convicted.<sup>9</sup>

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<sup>7</sup> RCW 43.43.754(6)(a).

<sup>8</sup> RCW 43.43.754(6)(b)(ii).

<sup>9</sup> RCW 43.43.754(6)(c).

In other words, if a defendant was convicted of a listed offense prior to June 12, 2008, but is either in custody pending sentence *or* will be sentenced to a term in custody on or after June 12, 2008, DNA sampling is mandatory. Furthermore, if a defendant is required to register as a sex or kidnapping offender on or after June 12, 2008, DNA sampling is mandatory regardless of the date of conviction. Therefore, application of the amendment is triggered by the date of sentence, not by the date of crime or conviction.

Similarly, the legislature clearly intended that the mandatory \$100 DNA collection fee for a felony<sup>10</sup> is also to be imposed based on the date of sentence. After amendment, the statute states in part: "Every sentence imposed under chapter 9.94A RCW for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541. In amending this section, the Legislature excised language that indicated that the fee was only to be applied to crimes *committed* on or after July 1, 2002. Laws of 2008, Ch. 97, § 3. The removal of this specific trigger date of applicability, combined with the fact that the DNA fee applies to "every

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<sup>10</sup> Laws of 2008, Ch. 97, § 3 amended RCW 43.43.7541 to substitute the more general word "crime" for "felony." Thus, it might be argued that the \$100 DNA collection fee should also be imposed for misdemeanors. This would seem to be foreclosed, however, by the fact that the statute still refers to the fee being imposed only in sentences imposed under the SRA (RCW 9.94A). Since misdemeanor sentences are not subject to the SRA, it would appear that the fee cannot be imposed.

sentence" and the fact that the actual DNA sampling is required for all sentences imposed on or after June 12, 2008, illustrates that the mandatory fee for collecting the sample is to be triggered by the date of sentencing. Therefore, the statutory requirement of a mandatory \$100 DNA collection fee should apply to any felony sentenced after June 12, 2008, regardless of the date of conviction.

- iii. Application of the mandatory \$100 DNA collection fee to felony sentences imposed on crimes with a conviction date prior to June 12, 2008, does not violate the *ex post facto* clause.

The *ex post facto* clause of the federal and state constitutions forbids the State from enacting a law that imposes a punishment for an act that was not punishable when it was committed or that increases the "quantum of punishment" for the crime beyond that which could be imposed when it was committed. *See, e.g., State v. Ward*, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). But not every sanction or term of a criminal judgment and sentence constitutes a "criminal penalty" or "punishment." Imposition of such non-punitive terms on crimes committed before the effective date of the statute do not violate the *ex post facto* clause because they do not increase the "quantum of punishment." *Id.* And, because a statute is presumed constitutional, a defendant bears the burden of proving

it unconstitutional beyond a reasonable doubt. *Id.* Here, the Defendant must prove that the imposition of the \$100 DNA collection fee constitutes a criminal penalty or punishment. Such an argument would be without merit.

Determining whether a term of sentence imposes a punishment "can be 'extremely difficult and elusive of solution.'" *In re Personal Restraint of Metcalf*, 92 Wn. App. 165, 177, 963 P.2d 911 (1998) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)). The initial inquiry is one of legislative intent. If the Legislature intended the sanction as punishment, then the inquiry stops – it is punitive. *In re Metcalf*, 92 Wn. App. at 178. The Defendant cannot show a punitive effect here because it is clear that the Legislature did not intend either the collection of the DNA sample or the imposition of the \$100 DNA collection fee to be a criminal penalty. As the 2SHB 2713<sup>11</sup> Final Bill Report states, the purpose of the creation of a DNA database is to "help with criminal investigations and to identify human remains or missing persons." *See also* RCW 43.43.753. Similarly, the fee is simply intended to fund the creation and maintenance of the database. 2SHB 2713 Final Bill Report; RCW 43.43.7541. Additionally, it is worth noting

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<sup>11</sup> The Final Bill Report refers to "Second Substitute House Bill" as "2SHB."

that Ch. 97 of the Laws of 2008 neither created this fee nor changed the requirement of imposition. Rather, it merely removed the authority of sentencing courts to waive it – something that they were only supposed to be doing in limited circumstances anyway.

If the Legislature did not intend the term to be punitive, the Court still examines the effects of the legislation to make sure the effects are not so burdensome as to transform the terms into a criminal penalty. *In re Metcalf*, 92 Wn. App. at 180; *Ward*, 123 Wn.2d at 499. Where there is no explicit expression of intent, the court looks to the underlying purpose of the legislation. *In re Metcalf*, 92 Wn. App. at 178. The Court examines seven factors: (1) whether the sanction involves an affirmative restraint on the defendant; (2) whether it has historically been considered a criminal punishment; (3) whether its enforcement depends on a finding of scienter; (4) whether its imposition promotes the traditional aims of punishment (deterrence and retribution); (5) whether it applies to behavior that is already a crime; (6) whether it is rationally related to a purpose other than punishment; and (7) whether it appears excessive in relation to this other purpose. *In re Metcalf*, 92 Wn. App. at 180 (citing *Mendoza-Martinez*, 372 U.S. at 168-69). These factors must be considered "in relation to the statute on its face." *Hudson v. United States*, 522 U.S. 93, 99-100, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). In order to override a

non-punitive legislative intent, the factors "must on balance, demonstrate a punitive effect by the 'clearest proof.'" *In re Metcalf*, 92 Wn. App. at 180-81.

Application of the *Mendoza-Martinez* factors indicates that the legislation here does not have the effect of imposing a criminal penalty. First, a sanction "involves an affirmative restraint" only when it approaches the "infamous punishment of imprisonment." *In re Metcalf*, 92 Wn. App. at 181. The imposition of a \$100 fee is certainly not analogous to imprisonment.

Second, monetary fees and assessments have historically not been regarded as criminal penalties within the meaning of the second *Mendoza-Martinez* factor. *In re Metcalf*, 92 Wn. App. at 181. This fee is similar to fees approved in the past.<sup>12</sup> And third, while imposition of the fee certainly *follows* a finding of scienter (because it can only be imposed after a criminal conviction), the fee itself is not triggered by any particular finding of scienter and, thus, it does not violate the third *Mendoza-Martinez* factor. *In re Metcalf*, 92 Wn. App. at 181-82.

Fourth, the imposition of the collection fee does not have the primary effect of promoting the traditional aims of punishment (deterrence

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<sup>12</sup> See list, *infra*.

and retribution). *In re Metcalf*, 92 Wn. App. at 182; *Ward*, 123 Wn.2d at 508. The imposition of a \$100 fee as part of a felony sentence is a far cry from what is considered retributive. Nor can it be convincingly argued that such a nominal fee has a particularly deterrent effect, or that the fee is intended to be deterrent or retributive. RCW 43.43.7541 (purpose of fee is to reimburse agency responsible for collection of the sample and to pay to maintain the state database).

Fifth, whether the fee applies to behavior that is already a crime depends upon whether it applies specifically to the felony for which the defendant is convicted instead of to the status of having been convicted of a felony. While this may be a fine distinction, it is one drawn by the courts in examining analogous situations. In *In re Metcalf*, for example, the Court of Appeals reviewed a retroactively applied statutory change that required the deduction of funds received by inmates to pay for costs of incarceration. The court found that this sanction was not "applied to behavior that is already a crime" within the meaning of the fifth *Mendoza-Martinez* factor, because it was triggered by the status of having been convicted of a felony rather than by commission of the felony itself. *In re Metcalf*, 92 Wn. App. at 182. Similarly, here the collection fee is triggered by the status of having been convicted of a felony rather than by anything specific to the behavior that constituted the crime.

The sixth and seventh *Mendoza-Martinez* factors examine whether the sanction has a rational non-punitive purpose and whether the sanction is excessive in relation to that purpose. In the context of fines, courts draw a line between fees or assessments that are primarily intended to reimburse the State and those primarily intended to impose criminal punishment for the purposes of public justice. *In re Metcalf*, 92 Wn. App. at 177-78. Here, the fee is in the former category. It has the rational non-punitive purpose of reimbursing the State for the costs of collecting the DNA sample and maintaining the database. A fee of only \$100 appears proportionate to that purpose, and is thus not excessive.

Based on this analysis of all of the above-referenced factors, the \$100 DNA collection fee does not constitute a criminal penalty or punishment. Therefore, imposition of the fee does not violate the *ex post facto* clause because it does not impose punishment or change the quantum of punishment. Furthermore, this conclusion is consistent with prior decisions of Washington courts finding no punishment and/or no violation of the *ex post facto* clause in numerous analogous situations. These decisions involve legislation that:

... increased the victim penalty assessment from \$100 to \$500;<sup>13</sup>

... required that deductions be taken from prisoner's wages and funds from outside sources to pay for the costs of incarceration;<sup>14</sup>

... allowed courts to order convicted indigent defendants to pay appellate costs;<sup>15</sup>

... authorized civil forfeiture of property used to facilitate drug offenses;<sup>16</sup> and

... required that sex offenders register as such.<sup>17</sup>

When imposing sentence for a felony after June 12, 2008, therefore, trial courts must order the mandatory \$100 DNA collection fee regardless of the date of crime or conviction. Furthermore, the imposition of this fee does not violate the *ex post facto* clause. For all of the above

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<sup>13</sup> *State v. Humphrey*, 139 Wn.2d 53, 62, 62 n.1, 983 P.2d 1118 (1999). The Court of Appeals initially held that the legislation increasing the VPA from \$100 to \$500 applied based on the date of conviction, not of commission of the crime, and was not a violation of the *ex post facto* clause. *State v. Humphrey*, 91 Wn. App. 677, 959 P.2d 681 (1998). The Washington Supreme Court overturned this decision, based in large part on the finding that there was not clear legislative intent to apply the amendment that way. *State v. Humphrey*, 139 Wn.2d 53, 983 P.2d 1118 (1999). The Supreme Court, therefore, ostensibly did not reach the (therefore moot) *ex post facto* question. Despite this, however, the Court included a footnote that the legislation was not a "penalty" and "would not, therefore, constitute punishment for the purposes of an *ex post facto* determination." *Humphrey*, 139 Wn.2d at 62, 62 n.1.

<sup>14</sup> *In re Metcalf*, 92 Wn. App. 165, 963 P.2d 911 (1998).

<sup>15</sup> Division Two held that the retroactive imposition of this term did not violate *ex post facto* provisions. *State v. Blank*, 80 Wn. App. 638, 640-42, 910 P.2d 545 (1996). The Washington Supreme Court later noted that the *ex post facto* issue was not before it, but included a footnote indicating that Division Two had properly decided the issue. *State v. Blank*, 131 Wn.2d 230, 250 n.8, 930 P.2d 1213 (1997).

<sup>16</sup> *State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997).

<sup>17</sup> *Ward*, 123 Wn.2d at 488.

reasons, the State respectfully submits that trial court erred in not imposing the \$100 DNA collection fee when it sentenced the Defendant on July 17, 2008.

**D. CONCLUSION**

For the foregoing reasons, the State respectfully requests that the Court affirm the Defendant's convictions for Theft in the First Degree and Witness Tampering, reverse the trial court's refusal to impose the \$100 DNA collection fee, and remand the case to the trial court for resentencing.

DATED this 10<sup>th</sup> day of June, 2009.

Respectfully submitted,

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