

63562-0

63562-0

NO. 63562-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT WEBSTER,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. In sentencing the defendant for attempted murder in the first degree, the court imposed a sentence of 314.25 months; a sentence the court believed was at the top of the standard range. The court, however, and the parties were mistaken; the top of the standard range was 312 months. The State concedes that the defendant's judgment and sentence should be modified to properly reflect the correct standard range and a sentence of 312 months imposed.

2. Did the trial court properly impose the \$100 DNA collection fee?

B. STATEMENT OF THE CASE

On September 30, 2006, the defendant attempted to murder Ms. Terri L. Edwards. CP 1-9. As a result of his actions, the defendant was convicted by a jury of attempted murder in the first degree (count I), assault in the first degree (count II), felony violation of a court order (count III), and felony harassment (count IV). CP ____; Sub # 63-66.

The defendant was first sentenced on April 3, 2007. CP 16-24. The court and the parties calculated the defendant's

offender score as a seven; with a standard range of 253.5 to 337.5 months on the defendant's attempted first-degree murder conviction. CP 17. The court imposed a sentence of 337.5 months, a sentence at the top of the standard sentence range for attempted first-degree murder. CP 17, 19. The defendant appealed.

On June 9, 2008, this Court affirmed the defendant's attempted murder conviction. See CP 35-43 (includes the mandate and decision of this Court). This Court did find, however, that the defendant's conviction for violation of a court order was a misdemeanor, not a felony, as it was treated by the sentencing court. This Court remanded for resentencing, with the defendant's offender score lowered by one point; the point for the violation of a court order violation.

On May 5, 2009, the defendant returned to the Superior Court to be resentenced.¹ The prosecutor correctly informed the court that with an offender score of six, the standard sentence range for first-degree murder was 312 to 416 months. RP 3. The prosecutor also correctly informed the court that for an attempt

¹ The verbatim report of the sentencing proceeding is cited as RP--5/5/09.

crime, the standard sentence range is 75 percent of the standard range for the completed crime. RP 3. The prosecutor then incorrectly calculated the standard sentence range for attempted first-degree murder as 234 to 314.25 months. RP 3. This calculation was accepted by the court and defense counsel and is reflected in the judgment and sentence. RP 3, 7; CP 49. In reality, as appellate counsel correctly notes, 75 percent of 416 is 312.

In imposing sentence, the court stated that it was imposing a sentence at "the top end" of the standard range. RP 7. The court imposed a sentence of 314.25 months. RP 7; CP 51.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. REMAND IS APPROPRIATE TO CORRECT THE JUDGMENT AND SENTENCE.

When a person is convicted of the anticipatory offense of criminal attempt, rather than a completed offense, the standard sentence range is 75 percent of the range for the completed offense. RCW 9.94A.510(2). With an offender score of six and a seriousness level of XV, the standard sentence range for murder in the first degree is 312 to 416 months confinement. For attempted

murder in the first degree, the standard sentence range is 234 to 312 months. The State concedes that all parties below mistakenly believed that the standard sentence range was 234 to 314.25 months.

In imposing a sentence of 314.25 months, the court was explicit that it was imposing a sentence at the top of the standard sentence range. The defendant asks that the sentence on count I be vacated and the case remanded for resentencing within the standard sentence range. While the State concedes the court erred, the State disagrees on the remedy. Resentencing is not necessary. It is clear the court intended to sentence the defendant to the top of the standard sentence range, a correct range that now benefits the defendant by 2.25 months. This correction can be done by amending the judgment and sentence, noting the correct standard range and a sentence at the top of the correct standard range.

2. THE SENTENCING COURT WAS REQUIRED TO IMPOSE A \$100 DNA COLLECTION FEE.

The defendant contends that the \$100 DNA collection fee is not mandatory, and therefore either the trial court improperly

sentenced the defendant believing the fee was mandatory,² or his trial counsel was ineffective for failing to argue the fee was not mandatory. The defendant's argument rests on his belief that the imposition of the DNA collection fee is permissive; it is not. RCW 43.43.7541 requires the court impose the fee for all sentences occurring after enactment of the statute, regardless of the date of offense or conviction. The statute violates neither the savings clause, *ex post facto* clause, equal protection clause, nor the law of the case doctrine.

The statute under which the DNA collection fee was imposed is RCW 43.43.7541. In pertinent part the statute reads:

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 (emphasis added). This version of the statute took effect on June 12, 2008. See RCW 43.43.7541 (2008 c 97 § 3, eff. June 12, 2008). The defendant attempted to kill Terri

² When the court imposed the fee here, the prosecutor asked, "Your Honor, should I assume on the felony that you're waiving all nonmandatories?" Judge Ramsdell responded, "Yes. I apologize. I skipped over that. I'll waive all the nonmandatories and obviously the victim's assessment penalty and all other mandatory assessments are imposed. Waive everything else." RP 8. The Judgment and Sentence reflects that the \$100 DNA collection fee was imposed as a mandatory cost. CP 50 ("\$100 DNA collection fee (RCW 43.43.754) mandatory for crimes committed after 7/1/02").

Edwards on September 30, 2006. He was convicted on March 2, 2007, first sentenced on April 3, 2007, and resentenced on May 5, 2009.

The defendant asserts that because he committed his criminal acts in September of 2006, a former version of RCW 43.43.7541 is applicable, a version of the statute that made the imposition of the DNA fee permissive rather than mandatory.³ The defendant's arguments are not persuasive.

a. The Savings Clause.

In pertinent part, the savings clause reads as follows:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall

³ The former version reads in pertinent part:

Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

Former RCW 43.43.7541 (2002 c 289 § 4).

proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

RCW 10.01.040.

In short, the savings clause provides that a criminal or penal statute in effect on the date a crime is committed controls unless the amended or new statute declares otherwise. See State v. Kane, 101 Wn. App. 607, 612-13, 5 P.3d 741 (2000). The savings clause does not even apply to the situation here.

In State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007), a similar claim was made, that the savings clause prohibited the Legislature's new procedures to have juries determine the facts for purposes of imposing an exceptional sentence from applying to his case. The Supreme Court rejected this claim, holding that RCW 10.01.040 applies only to substantive

changes to the law, not to procedural ones. Pillatos, 159 Wn.2d at 472.

Even if the savings clause did apply, it is defeated here. In applying RCW 10.01.040, the Supreme Court does "not insist that a legislative intent to affect pending litigation be declared in express terms in a new statute"; rather, such intent need only be expressed in "words that fairly convey that intention." Kane, 101 Wn. App. at 612 (citing State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), overruled on other grounds, United States v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)); see also State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

In Zornes, the Supreme Court held that a newly enacted drug law controlled cases pending at the time of the enactment of the statute even though the law was not in effect at the time of the commission of the crime. The Zornes, a husband and wife, were convicted under a drug statute pertaining to "narcotic drugs," for their possession of marijuana. The particular amendment to the drug statute enacted while the Zornes' case was pending, stated that "the provisions of this chapter [the narcotic drug statute] shall not ever be applicable to any form of cannabis." Zornes, 78 Wn.2d at 11. The Court found it could be reasonably inferred that the

Legislature intended the amendment, by use of this language, to apply to pending cases as well as those arising in the future.

Zornes, at 13-14, 26.

In Grant, a new statute provided that "intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages." Grant, 89 Wn.2d at 682. The policy behind the statute was that alcoholics and intoxicated persons should receive treatment rather than punishment. Grant was convicted of being intoxicated on a public highway. The Supreme Court held that this new statute applied to Grant's case that was pending at the time of the enactment of the statute. The Court found that the language of the statute (cited above) fairly expressed the legislative intent to avoid the savings statute default rule. Grant, at 684.

Here, the statutory language clearly shows the Legislature intended RCW 43.43.7541 to apply to "every sentence" imposed after the effective date of the statute, regardless of the date the offense was committed. In the original version of RCW 43.43.7541, the Legislature put in specific language that indicated that the statute applied only to crimes "committed on or after July 1, 2002." In amending the statute, the Legislature removed any reference to

when the crime was committed. This in itself indicates that the Legislature did not intend the date a crime is committed to be a limiting factor. See In re Personal Restraint of Sietz, 124 Wn.2d 645, 651, 880 P.2d 34 (1994) (if the Legislature uses specific language in one instance and dissimilar language in another, a difference in legislative intent may be inferred); Millay v. Cam, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (if the Legislature thought such a provision necessary it would have included it within the statute's text).

In addition, the statute specifically says it applies to "[e]very sentence" imposed under the Sentencing Reform Act. The term "every" means "all." See State v. Smith, 117 Wn.2d 263, 271, 814 P.2d 652 (1991); State v. Harris, 39 Wn. App. 460, 463, 693 P.2d 750, rev. denied, 103 Wn.2d 1027 (1985).⁴

Finally, the amendment to the statute pertaining to the DNA collection fee is consistent with, was done in conjunction with, and refers directly to, the amendment to RCW 43.43.754, the statutory provision regarding the actual collection of DNA samples. Under RCW 43.43.7541, the DNA collection fee is mandatory for crimes

⁴ See also In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999) ("*Expressio unius est exclusio alterius*, 'specific inclusions exclude implication.' In other words, where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions.").

specified in RCW 43.43.754. The 2008 amendment to RCW 43.43.754 expanded the crimes for which a DNA sample is required to be taken. See RCW 43.43.754 (2008 c 97 § 2, eff. June 12, 2008). The Legislature stated, in pertinent part, that [t]his section applies to. . .[a]ll adults and juveniles to whom this section applied prior to June 12, 2008." RCW 43.43.754(6)(a). The former version of RCW 43.43.754 referred to by the 2008 amendment applied to "[e]very adult or juvenile individual convicted of a felony." Former RCW 43.43.754(1) (2002 c 289 § 2). Thus, the Legislature made it clear that RCW 43.43.7541 and RCW 43.43.754 applied to crimes committed both before and after June 12, 2008. The trial court here properly imposed the mandatory DNA collection fee.

b. The *Ex Post Facto* Clause.

The *ex post facto* clause of the federal and state constitutions⁵ forbids the State from enacting a law that imposes a punishment for an act that was not punishable when the crime was

⁵ U.S. Const. art. 1, § 10, cl. 1; WA Const. art. I, § 23.

committed, or that increases the quantum of punishment for the crime beyond that which could have been imposed when the crime was committed. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). Not every sanction or term of a criminal sentence constitutes a criminal penalty or punishment, and if a sanction or term is not a penalty or punishment, the *ex post facto* clause does not apply. Ward, 123 Wn.2d at 498-99; Johnson v. Morris, 87 Wn.2d 922, 928, 557 P.2d 1299; In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

For example, the Legislature's increase of the mandatory victim penalty assessment from \$100 to \$500 was held not to constitute punishment, and thus, imposition of the \$500 amount for crimes committed before the increase in the amount was not a violation of the *ex post facto* clause. State v. Humphrey, 91 Wn. App. 677, 959 P.2d 681 (1998), reversed on other ground, 139 Wn.2d 53, 62, 62 n.1, 983 P.2d 1118 (1999) (the Supreme Court stating that the assessment was not a "penalty" and "would

not, therefore, constitute punishment for the purposes of an *ex post facto* determination").⁶

In determining if a term of sentence imposes a "punishment," courts look first for legislative intent. If the Legislature intended the sanction as punishment, then the inquiry stops and the *ex post facto* clause applies. Metcalf, 92 Wn. App. at 178. The defendant cannot show a punitive effect here because the Legislature clearly did not intend either the collection of the DNA sample, or the imposition of the \$100 collection fee, to be a criminal penalty. As the 2SHB 2713 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." The fee is simply intended to fund the creation and maintenance of the database. See 2SHB 2713 Final Bill Report; RCW 43.43.7541.

⁶ See also State v. Blank, 80 Wn. App. 638, 640-42, 910 P.2d 545 (1996) (law requiring convicted indigent defendants to pay appellate costs not punishment and did not violate *ex post facto* provisions), cited with approval in, State v. Blank, 131 Wn.2d 230, 250 n.8, 930 P.2d 1213 (1997); Ward, 123 Wn.2d at 488 (law requiring sex offenders to register was not punishment and did not violate *ex post facto* provisions); In re Metcalf, 92 Wn. App. 165, 963 P.2d 911 (1998) (law requiring deductions from prisoner's wages and funds to pay for cost of incarcerations not punishment and did not violate *ex post facto* provisions); State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997) (law authorizing civil forfeiture of property used to facilitate drug offenses not punishment and did not violate *ex post facto* provisions).

If the Legislature did not intend a term to be punitive, courts still examine the effects of the legislation to make sure the effects are not so burdensome as to transform the term into a criminal penalty. Metcalf, at 180; Ward, at 499. The courts will consider seven factors: (1) whether the sanction involves an affirmative restraint on the defendant; (2) whether the term 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. Metcalf, at 180 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)). In order to override a non-punitive legislative intent, the factors "must on balance demonstrate a punitive effect by the clearest proof." Metcalf, at 180-81.

Application of these factors shows that the legislation here does not have the effect of imposing a criminal punishment. It is no different than the victim penalty assessment, found not to be

punishment in violation of the *ex post facto* clause. See Humphrey, supra.

First, a sanction "involves an affirmative restraint" only when it approaches the "infamous punishment of imprisonment." Metcalf, 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 factor. Metcalf, at 181.

Third, the imposition of the DNA fee can be imposed only after a person has been convicted, but the fee itself is not triggered by any particular finding of scienter and, thus, it does not violate the third factor. See Metcalf, at 181-82.

Fourth, the imposition of the fee does not have the primary effect of promoting the traditional aims of punishment (deterrence and retribution). Metcalf, at 182; Ward, at 508. It would be difficult to argue the nominal \$100 fee is retributive or could act as a deterrent. Rather, the purpose of the fee is to reimburse the agency responsible for the collection of DNA samples and to pay to maintain the State database. RCW 43.43.7541.

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. In Metcalf, the Court 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 this factor, because it was triggered by the status of having been convicted of a felony rather than by commission of the felony itself. Metcalf, at 182. Similarly, here the DNA 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 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. Metcalf, at 177-78. Here, the fee is the former. It has the rational non-punitive purpose of reimbursing the State for the costs of

collecting the DNA sample and maintaining the database.

A nominal fee of \$100 appears proportionate to that purpose.

c. The Defendant's Equal Protection Claim.

The defendant's argument that imposing the DNA collection fee violates the equal protection clause must be rejected in light of State v. Bryan, 145 Wn. App. 353, 185 P.3d 1230 (2008).

Like the defendant here, Bryan was convicted and then sentenced twice, his first sentence being reversed and remanded for resentencing. When Bryan was resentenced, he had additional criminal history that increased his standard sentence range and ultimate sentence. He claimed that this violated the equal protection clause, treating him (and others like him) who received a sentence that was later deemed incorrect, and then being resentenced and receiving a higher sentence. This Court denied the defendant's equal protection challenge.

First, this Court noted that the defendant was not a member of a "suspect or semi-suspect" class and therefore the statute need only survive a rational basis test. Bryan, 145 Wn. App. at 358-59. To satisfy this test, the challenged law must rest upon a legitimate state objective, and the law must be rationally related to, and not

wholly irrelevant to, achieving that objective. Bryan, at 359 (citing Madison v. State, 161 Wn.2d 85, 103, 163 P.3d 757 (2007)). The burden is on the party challenging the classification to show that it is "purely arbitrary." Bryan, at 359.

The DNA collection fee is statutorily tied to, and directly related to, the collection of DNA samples from convicted felons. The Legislature authorized the creation of the DNA database for a perfectly rational reason, to "help with criminal investigations and to identify human remains or missing persons." See 2SHB 2713 Final Bill Report; RCW 43.43.7541. The Legislature authorized the collection of the DNA for the rational reason that the database needs a funding source for the creation and maintenance of the database. Id. And it is perfectly reasonable and rational (and not wholly arbitrary as the defendant must prove), for the fee to attach to those convicted felons who must provide a DNA biological sample. This group includes the defendant.

d. The Defendant's Law Of The Case Claim.

The defendant claims the sentencing court had no authority to impose the DNA fee under the law of the case doctrine. This claim was never raised below, is not a rule of constitutional

magnitude, and is thus waived on appeal. RAP 2.5; State v. Wicke, 91 Wn.2d 638, 642-43, 591 P.2d 452 (1979) (failure to object waives review). In any event, the doctrine does not apply here.

The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all subsequent stages of the litigation. State v. Schwab, 163 Wn.2d 664, 672-73, 185 P.3d 1151 (2008). The defendant claims the sentencing court did not have the authority to impose the DNA collection fee because this Court did not authorize it. But this Court ordered that the defendant be resentenced after his first sentence was found to be in error. The Court did not order the mere correction of a scrivener's error or some error that had no impact on the substance of the defendant's original sentence. The sentencing court here did exactly as required; it resentenced the defendant.⁷

⁷ The defendant also claims the imposition of the DNA collection fee violated due process as it constituted vindictiveness. Def. br. at 9. It is clear from the record that all parties, including defense counsel who raised no objection, believed the DNA collection fee was mandatory. Under such a situation, no due process vindictiveness claim can be supported.

e. Additional Arguments.⁸

Defense arguments have been raised relying on the Supreme Court's opinion in State v. Humphrey, 139 Wn.2d 53, 983 P.2d 1118 (1999). However, the decision actually supports the State's position.

The legislative provision at issue in Humphrey, RCW 7.68.035(1)(a), reads as follows:

(1)(a) Whenever any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

RCW 7.68.035(1)(a).

The Court of Appeals in Humphrey held that the language of the subsection unambiguously indicated that the assessment is imposed upon the finding of guilt, and that a defendant's conviction

⁸ This issue has been raised piecemeal in a number of cases. The State has included additional argument in the desire to have an opinion based on all the arguments raised, and to prevent having to respond to any new arguments raised in a reply brief.

triggered the operation of the statute. The Supreme Court reversed.

In its opinion, the Supreme Court made much of the wording of RCW 7.68.035(1)(a):

The statute uses “whenever,” not “when,” and in so doing describes a relationship between a typical event and a necessary consequence. The statute does not use “when,” which specifies a precise point in time. The language of the statute does not say that the operative, precipitating, or triggering event is a person’s conviction. Unlike the attorney general opinion quoted above, this section does not use unambiguous language such as “operative event.” Instead, this provision directs that the victim penalty assessments for gross misdemeanors and felonies shall be \$500. This is a mandatory assessment which courts shall impose upon persons convicted of such crimes. Even if one were to read this passage as attempting to specify a triggering event, one cannot tell whether the event is supposed to be the date of conviction or the date of sentencing. The passage could just as easily make the imposition of the sentence, not the finding of guilt, the triggering event. Because “whenever” does not refer to a precise instant in time, we interpret this section as remaining silent as to a precipitating event.

Humphrey, 139 Wn.2d at 58-59.

Here, in stark contrast, is the first sentence of RCW 43.43.7541, as amended in 2008, “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.” In addition, as was noted in

the sections above, the Supreme Court also stated that the victim penalty assessment was not a "penalty" and "would not, therefore, constitute punishment for the purposes of an *ex post facto* determination." Humphrey, at 62, 62 n.1.

The Humphrey case has also been cited for the proposition that statutory amendments are presumed to be prospective. The State agrees that generally statutes "operate prospectively to give fair warning that a violation carries specific consequences." Pillatos, 159 Wn.2d at 470. A corollary to that proposition, however, is the axiom that "if the changes to the statute do not alter the consequences of the crime then there is likely no relevant lack of notice." Id.

In Pillatos, the Supreme Court held that application of a new procedure to have juries determine the facts for purposes of imposing an exceptional sentence could properly apply to defendants who had not pled guilty or had not gone to trial before the new law's effective date. The Court noted that all defendants were aware at the time they committed their alleged offenses of the possible consequences: "All of these defendants had warning of the risk of an exceptional sentence. At the time all of these defendants committed the crimes set forth above, Washington had

a seemingly valid exceptional sentencing system which gave fair notice of the risk of receiving such a sentence.” Pillatos, at 470.

The same principle applies here. Before June 12, 2008, RCW 43.43.7541 directed trial courts to impose the \$100 DNA collection fee for applicable offenses “unless the court finds that imposing the fee would result in undue hardship on the offender.” One of the effects of Laws of 2008, Ch. 97, was to remove the court’s discretion to find “undue hardship” and thereby to waive the \$100 DNA collection fee. But an offender who committed an offense before June 12, 2008 would be well aware that he or she would potentially be subject to the fee. The only difference after June 12, 2008 was that such a fee was mandatory, undue hardship or not. There was no change in the amount of the fee collected.

In Humphrey, the Supreme Court explained this distinction in more detail in considering whether the increase in the victim penalty assessment from \$100 to \$500 was remedial or substantive:

We find that the increase in the amount of the assessment from \$100 to \$500 is more in the nature of a new liability than a remedial increase in an already existing obligation. In Macumber we allowed retrospective application of an increase in the homestead exemption from \$10,000 to \$20,000 because the amendment was enacted in response to

a constant rise in the cost of living. We found the increased dollar amount to be remedial in nature. The increase in the amount of the victim penalty assessment from \$100 in 1989 to \$500 in 1996 cannot be explained as a cost-of-living increase. Because the 1996 amendment to RCW 7.68.035 appears to create a new liability, we find it is not remedial and will not construe it to apply retroactively.

Humphrey, at 63.

Here, there is no increase in the DNA collection fee.

RCW 10.01.040 therefore does not apply to the changes in Laws of 2008, Ch. 97, making the \$100 DNA collection fee mandatory, as that change is remedial in nature.

Finally, RCW 9.94A.345 does not bar the amended version of RCW 43.43.3451 from applying to the defendant's case. That statute reads simply, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." In Pillatos, the Supreme Court rejected a similar argument raised, noting that RCW 9.94A.345 had been enacted by the Legislature in response to the opinion in State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999). The Supreme Court went on to conclude: "In this case, both past and present law allows for exceptional sentencing. The 'law in effect when the current offense was committed,' reasonably read, includes the

possibility of exceptional sentences, and does not violate the letter or purpose of RCW 9.94A.345.” Pillatos, at 473; see also City of Spokane v. Rothwell, ___ Wn.2d ___, 215 P.3d 162, 164 (2009) (a more recent statute takes priority over an older statute).

The same logic applies to the case at bar. The law before June 12, 2008 mandated the imposition of the \$100 DNA collection fee, save where the court waived the fee upon a finding that its imposition would constitute an “undue hardship.” After June 12, 2008, even this minimal potential exercise of discretion has been disallowed, but the amount of the fee remains the same. Moreover, as the State has already argued, the specific intent of the Legislature, as evinced in its amendments in Laws of 2008, Ch. 97, would serve to override the general mandate of RCW 9.94A.345.

Based on the above, the \$100 DNA collection fee does not constitute a criminal penalty or punishment and was properly imposed.⁹

⁹ The State will not address the defendant's ineffective assistance of counsel claim. In the event this Court finds the DNA fee is not mandatory, the case should be remanded for the sentencing court to exercise its discretion. It is clear here, the sentencing court believed as the State does, that the fee is mandatory. The State will also not address the defendant's citation to State v. Theriot, 782 S.2c 1078 (La. Ct. App. 2001). That case, not authority in Washington, dealt with a “fine,” which constitutes punishment, not a “fee,” as we have here.

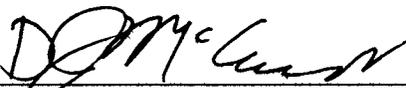
D. **CONCLUSION**

For the reasons cited above, this Court should remand for correction of the judgment and sentence to reflect a sentence of 312 months, and should affirm the sentence in all other respects.

DATED this 28 day of October, 2009.

Respectfully submitted,

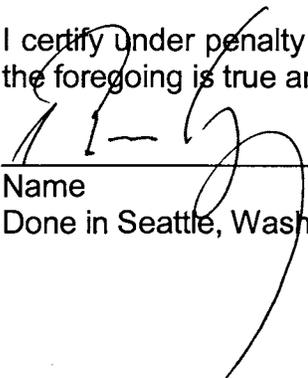
DANIEL T. SATTERBERG
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By: 
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Broman, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. WEBSTER, Cause No. 63562-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

10-29-2009
Date