

68615-1

68615-1

NO. 68615-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

**REC'D**  
OCT 23 2012  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RICHARD C. HOWARD,

Appellant.

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

The Honorable Harry J. McCarthy, Judge

BRIEF OF APPELLANT

ANDREW P. ZINNER  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	8
1. HOWARD’S ABSENCE FROM A DISCUSSION AND RESOLUTION OF A JURY INQUIRY VIOLATED HIS RIGHT TO BE PRESENT FOR TRIAL.....	8
2. THE INFORMATION IS CONSTITUTIONALLY INSUFFICIENT BECAUSE IT FAILS TO ALLEGE AN ELEMENT.....	14
a. <u>Introduction</u> .....	15
b. <u>The information and statutes</u> .....	16
c. <u>Elements as charged</u> .....	17
3. UNDULY PREJUDICIAL EVIDENCE OF THE CIRCUMSTANCES OF HOWARD'S ARREST WAS ERRONEOUSLY ADMITTED. ....	21
a. <u>Pretrial argument and admitted evidence</u> .....	22
b. <u>Application of “other acts” rule</u> .....	24
c. <u>Application in Howard’s case</u> .....	25

**TABLE OF CONTENTS (CONT'D)**

	Page
4. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY WHEN IT IMPOSED SEVERAL SPECIAL "SEX OFFENSE" COMMUNITY CUSTODY CONDITIONS. ....	30
D. <u>CONCLUSION</u> .....	355

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>City of Bellevue v. Acrey</u> 103 Wn.2d 203, 691 P.2d 957 .....	12
<u>City of Seattle v. Klein</u> 161 Wn.2d 554, 166 P.3d 1149 (2007).....	12
<u>In re Personal Restraint of Lord</u> 123 Wn.2d 296, 868 P.2d 835 (1994).....	9
<u>In re Personal Restraint of Pirtle</u> 136 Wn.2d 467, 965 P.2d 593 (1998).....	9
<u>State v. Bennett</u> 168 Wn. App. 197, 275 P.3d 1224 (2012).....	10
<u>State v. Besabe</u> 166 Wn. App. 872, 271 P.3d 387 <u>review denied</u> , 175 Wn.2d 1003 (2012).....	10, 13
<u>State v. Blackwell</u> 120 Wn.2d 822, 845 P.2d 1017 (1993).....	24
<u>State v. Brown</u> 169 Wn.2d 195, 234 P.3d 212 (2010).....	21
<u>State v. Bruton</u> 66 Wn. 2d 111, 401 P.2d 340 (1965).....	25
<u>State v. Campbell</u> 125 Wn.2d 797, 888 P.2d 1185 (1995).....	20
<u>State v. Carleton</u> 82 Wn. App. 680, 919 P.2d 128 (1996).....	28
<u>State v. Combs</u> 102 Wn. App. 949, 10 P.3d 1101 (2000).....	33

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. DeVincentis</u> 150 Wn.2d 11, 74 P.3d 119 (2003).....	25
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	24
<u>State v. Ford</u> 137 Wn.2d 472, 973 P.2d 452 (1999).....	30
<u>State v. Freeburg</u> 105 Wn. App. 492, 20 P.3d 984 (2001).....	21, 25, 26
<u>State v. Hagler</u> 74 Wn. App. 232, 872 P.2d 85 (1994).....	21, 26
<u>State v. Hickman</u> 157 Wn. App. 767, 238 P.3d 1240 (2010).....	33
<u>State v. Irby</u> 170 Wn.2d 874, 246 P.3d 796 (2011).....	9, 13
<u>State v. Jones</u> 118 Wn. App. 199, 76 P.3d 258 (2003).....	30, 32
<u>State v. Khlee</u> 106 Wn. App. 21, 22 P.3d 1264 (2001).....	15
<u>State v. Kilion-Garramone</u> 166 Wn. App. 16, 267 P.3d 426 (2011) review denied, 174 Wn.2d 1014 (2012).....	20
<u>State v. Kjorsvik</u> 117 Wn.2d 93, 812 P.2d 86 (1991).....	15, 21
<u>State v. Kosewicz</u> 174 Wn.2d 683, 278 P.3d 184 (2012).....	15

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Lough</u> 125 Wn.2d 847, 889 P.2d 487 (1995).....	25
<u>State v. Marcum</u> 116 Wn. App. 526, 66 P.3d 690 (2003).....	15
<u>State v. Mason</u> __ Wn. App. __, 285 P.3d 154 (2012).....	18
<u>State v. McCarty</u> 140 Wn.2d 420, 998 P.2d 296 (2000).....	16
<u>State v. McDaniel</u> 155 Wn. App. 829, 230 P.3d 245 <u>review denied</u> , 169 Wn.2d 1027 (2010).....	25, 26
<u>State v. Naillieux</u> 158 Wn. App. 630, 241 P.3d 1280 (2010).....	21
<u>State v. Nelson</u> 131 Wn. App. 175, 123 P.3d 526 (2005).....	31
<u>State v. Nonog</u> 169 Wash. 2d 220, 237 P.3d 250 (2010) .....	15
<u>State v. O'Cain</u> 144 Wn. App. 772, 184 P.3d 1262 (2008).....	32
<u>State v. Parramore</u> 53 Wn. App. 527, 768 P.2d 530 (1989).....	32
<u>State v. Peterson</u> 145 Wn. App. 672, 186 P.3d 1179 (2008) <u>aff'd.</u> , 168 Wn.2d 763 (2010).....	17, 18, 19, 20
<u>State v. Phelps</u> 113 Wn. App. 347, 57 P.3d 624 (2002).....	30

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Powell</u> 126 Wn.2d 244, 893 P.2d 615 (1995).....	25
<u>State v. Ratliff</u> 121 Wn. App. 642, 90 P.3d 79 (2004).....	10
<u>State v. Rivas</u> 168 Wn. App. 882, 278 P.3d 686 (2012).....	19
<u>State v. Saltarelli</u> 98 Wn.2d 358, 655 P.2d 697 (1982).....	24, 25
<u>State v. Smith</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	24
<u>State v. Thomson</u> 123 Wash. 2d 877, 872 P.2d 1097 (1994) .....	12
<u>State v. Tili</u> 148 Wn.2d 350, 60 P.3d 1192 (2003).....	31
<u>State v. Zillyette</u> 173 Wn.2d 784, 270 P.3d 589 (2012).....	15
<u>State v. Zimmer</u> 146 Wn. App. 405, 190 P.3d 121 (2008).....	32-33
 <u>FEDERAL CASES</u>	
<u>Glasser v. United States</u> 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942).....	12
<u>Kentucky v. Stincer</u> 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987).....	9
<u>Malloy v. Hogan</u> 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).....	9

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>Snyder v. Massachusetts</u> 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934).....	9
<u>United States v. Foutz</u> 540 F.2d 733 (4th Cir. 1976) .....	27
<u>United States v. Gagnon</u> 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985).....	9
<u>United States v. Myers</u> 550 F.2d 1036 (5th Cir. 1977) .....	26
<u>United States v. Silverman</u> 861 F.2d 571 (9th Cir. 1988) .....	26

**RULES, STATUTES AND OTHER AUTHORITIES**

CrR 6.15 .....	10
ER 404 .....	23, 24, 25, 27, 28
Former RCW 9.94A.030(42)(a)(v)(2010) .....	30
Laws 2010, Ch. 267, § 9 .....	30
Laws 2011 ch. 337, § 5. ....	16
Laws 2011, Ch. 337, § 3 .....	7
RCW 9.94A.010 .....	31
RCW 9.94A.703 .....	32
RCW 9A.44.130 .....	7, 12, 16, 17, 18, 19, 20, 21

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RCW 9A.44.132 .....	16, 20
Sentencing Reform Act.....	31
U.S. Const. Amend. VI.....	15
Wash. Const. Art. 1, § 22.....	9, 13, 15

A. ASSIGNMENTS OF ERROR

1. Richard C. Howard was denied his constitutional right to be present at a critical stage of trial when the trial court and counsel discussed and answered a jury question in Howard's absence.

2. The information is defective because it omits an element of the charged crime of failing to register as a sex offender.

3. The trial court erred by admitting evidence of the circumstances surrounding Howard's arrest on a Department of Corrections [DOC] arrest warrant.

4. The trial court erred by imposing conditions of community custody that are not authorized by statute.

Issues Pertaining to Assignments of Error

1. With the prosecutor and bailiff in the courtroom, the trial judge and defense counsel appeared telephonically to consider and answer a jury question on a critical point in the case. Howard was not present for this proceeding and his absence was not addressed. Did this violate Howard's constitutional right to be present?

2. Is reversal required where the state failed to allege the element that Howard was required to and failed to register with the county sheriff of his county of residence?

3. Did the trial court err by admitting evidence of the facts surrounding Howard's arrest and his resistance thereto when the resistance did not show consciousness of guilt of the charged crime of failure to register?

4. Did the trial court impose community custody conditions that were neither authorized by statute nor related to the conduct resulting in the conviction?

B. STATEMENT OF THE CASE

Registered sex offenders in Washington must notify the county sheriff within three days of changing addresses within the same county. Offenders who move from one county to another must notify both the former and new county sheriffs within three days of moving. Moving from a fixed residence to being homeless is also considered an address change. Homeless offenders must register as such and report to the county sheriff once a week. 4RP 36-37, 54-56.<sup>1</sup>

Richard Howard is a registered sex offender. 4RP 37-38. He was also on community custody at the time. 4RP 138-40. He registered in December 2011, reporting his address as 217 E. Russell in Kent. 4RP 46-

---

<sup>1</sup> Howard refers to the verbatim report as follows: 1RP – 3/13/12; 2RP – 3/14/12; 3RP – 3/19/12; 4RP – 3/20/12; 5RP – 3/21/12; 6RP – 3/22/12; 7RP 3/23/12; 8RP – 4/13/12.

47. This is a clean and sober transitional recovery house with 23 mandatory rules. 4RP 62-63, 77-80, 140.

Howard reviewed the rules when he moved in. 4RP 105, 109, 5RP 106-07. One rule required submission of a urine sample at any time upon request, in the presence of an observer. 4RP 80, 84, 86-87. Failure to comply results in immediate termination from housing. A different rule allows for termination from housing of any member absent from the house for 72 hours without notice. 4RP 84-85; 5RP 107.

Michael Parker was the resident manager at the house. 4RP 104. Early on the morning of March 4, 2011, Parker was awakened when he heard the entry door slam. He got out of bed and saw Howard coming in with a female guest. 4RP 110-11, 128-29. After allowing Howard to escort his guest to his room, Parker told Howard he needed to give a urine sample. 4RP 93-94, 111. Howard agreed, but refused to allow Parker to observe him urinate. He went into the bathroom and returned with a cup that Parker said was water. 4RP 112. Parker refused to accept the sample and an argument ensued. 4RP 96-97, 112-13.

Chad Hall, the manager of a nearby, associated recovery house was summoned, but Howard also refused to allow him to observe him urinate.

4RP 96, 113-15, 123-26. Howard did provide a sample, but Hall refused it. 4RP 126.

Parker and Hall told Howard he had to leave because he was terminated from the program for violating the urinalysis rule. 4RP 97, 114, 127. Howard grabbed some of his belongings and left with his guest. 4RP 114, 127. He left many of his things, including a television and stereo, at the house. 4RP 115. Howard spent the night at a friend's house. 5RP 97.

Howard and his wife<sup>2</sup> later called Parker's supervisor and left messages for her. The supervisor did not return the calls or messages because "once a client is terminated he is no longer my problem[.]" 4RP 98.

The supervisor notified Howard's community corrections officer (CCO) that Howard had been terminated. 4RP 97, 142-43. The CCO contacted Howard and told him to report the following day. 4RP 143-44. When Howard did not show up, the officer requested an arrest warrant. 4RP 144. The officer did not hear from Howard from March 4 through

---

<sup>2</sup> Howard was married at the time, but was divorced at the time of trial. Because this woman was Howard's wife at the time of the events giving rise to the crime, she is referred to throughout as his wife.

March 11, even though Howard had a regular reporting date of March 8. 4RP 144-45.

Howard was arrested on the DOC warrant after being found at his wife's residence in Tacoma on March 11. 5RP 24-28, 69-73, 75-79. Howard had been told by a CCO on March 1 that he could not stay at his wife's residence until a DOC investigation was conducted and approval given. 5RP 21.

The State charged Howard with failing to register as a sex offender between March 3 and March 11. CP 9. Howard stipulated he had twice been convicted of failing to register as a sex offender. He also stipulated he knew the registration rules. 5RP 81-82; Exs. 1A, 2A.

Howard testified he was arrested for failing to report to his CCO. He was unaware his had been charged with failing to register until a month later. The charge surprised him because he had never moved out of the recovery house. 5RP 104-05. He had tried repeatedly to contact Parker's supervisor because he questioned Parker's authority to request the urine sample. He also intended to speak with her about problems he had with Parker. 5RP 95-97.

During the week following his altercation with Parker, Howard stayed at several different places, including his wife's house. 5RP 97-103.

He spent March 8 – his reporting date with his CCO – in the hospital suffering from a gastritis attack. 5RP 101-02.

During closing argument, Howard's counsel said there was no evidence to show Howard moved into his wife's residence. To the contrary, counsel noted, Howard's belongings remained at the recovery house. "So the only other category that would apply to Mr. Howard," counsel argued, "is if he lacked a fixed residence." 5RP 146. Continuing, counsel said Howard was told to report weekly if he lacked a fixed address, but was not informed how soon he was to report after becoming homeless. 5RP 146. Counsel also contended Howard did provide a urine sample, "so he had a legitimate concern to actually hear from the person in charge that he was in violation, maybe he was actually being terminated." 5RP 146.

During deliberations, the jury asked the following questions:

How long does the registered sex offender have to register as transient once they have lost their housing? Can we please see the law as written?

CP 38. The prosecutor appeared in court and both the trial judge and defense counsel appeared by telephone conference call. Supp. CP \_\_\_ (sub. no. 68A, Clerk's Minutes, p. 19 of 20); 6RP 2-6. The bailiff read the question to the court and counsel. 6RP 2.

The court sought input from each party. The prosecutor read the applicable statute, RCW 9.A44.130(5)(a), stating anyone required to register who lacks a fixed residence must give written notice within three business days after ceasing to have a fixed residence. 6RP 2.<sup>3</sup> The court confirmed the jury instructions did not include language articulating this portion of the statute. 6RP 3.<sup>4</sup>

The prosecutor maintained the jury should receive a recitation of this portion of the law. 6RP 3. Howard objected, contending once the jury is instructed, the law contained in the instructions becomes the law of the case. He also argued the notifications Howard received did not include the statutory language directed at transient offenders. CP 41; 6RP 3.

Over objection, the trial court gave the following answer to the jury inquiry:

Any person required to register under [the law] who lacks a fixed residence shall provide signed notice to the

---

<sup>3</sup> The version of the statute in effect when Howard failed to register was RCW 9A.44.130(6)(a), and was changed to (5)(a) effective July 22, 2011. Laws 2011, Ch. 337, § 3. Because the 2011 amendment did not change the language pertinent to the issues herein, Howard cites to the current version of the statute.

<sup>4</sup> Instruction 4, which set forth the requirements of sex offender registration, failed to include the section applicable to homeless registered offenders. CP 28 (attached as appendix).

sheriff of the county where he or she last registered within three business days after ceasing to have a fixed residence.

CP 39.

This meeting occurred in Howard's absence. This is evident first because defense counsel was at his office computer at the time. 6RP 6. And second, unlike the minute entries for the other court days, which state "[d]efendant is present . . .," the minute entry for the day of the jury inquiry says nothing about Howard's presence. Only later that same day is there an entry noting Howard's presence, which preceded the reading of the jury's verdict. Supp. CP \_\_, p. 19 of 20.

C. ARGUMENT

1. HOWARD'S ABSENCE FROM A DISCUSSION AND RESOLUTION OF A JURY INQUIRY VIOLATED HIS RIGHT TO BE PRESENT FOR TRIAL.<sup>5</sup>

The trial court substantively answered a jury question that bore directly on the defense theory in Howard's absence. As this was a critical stage in Howard's trial, the court deprived Howard of his constitutional right to be present.

A criminal defendant has a due process right to be present for all critical stages of the prosecution. U.S. Const. amends. 5, 6, 14; Kentucky

---

<sup>5</sup> A closely related issue is pending a decision by the Supreme Court in State v. Sublett, No. 84856-4. The Court heard argument June 16, 2011.

v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). The Washington Constitution specifically provides for the right to "appear and defend in person." Const. art. 1, § 22.

The right to be present applies whenever the defendant's presence has a reasonably substantial relation to the fullness of his opportunity to defend against the charge. Irby, 170 Wn.2d at 880-81 (citing Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled in part on other grounds sub nom. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). But where a hearing involves purely legal matters that do not require a resolution of disputed facts, the criminal defendant has no right to be present. In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994).

Our Supreme Court has observed that "the wording of jury instructions" involved only legal matters. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). The Court did not, however, indicate all issues involving jury instructions are necessarily purely legal. Nor could it. "[T]here are occasions when disputed facts and evidence may be discussed in an effort to influence the trial court's choice

of jury instructions[.]" State v. Bennett, 168 Wn. App. 197, 206, 275 P.3d 1224 (2012). A trial court may also be asked to interpret the law as applicable to the facts and evidence in the case. Id.

Furthermore, a defendant has a constitutional right to be present during a trial judge's consideration of jury questions. State v. Ratliff, 121 Wn. App. 642, 646, 90 P.3d 79 (2004); see State v. Besabe, 166 Wn. App. 872, 882, 271 P.3d 387, review denied, 175 Wn.2d 1003 (2012) (noting CrR 6.15(f)(1), which requires trial court to "notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response[.]" "has both state and federal constitutional underpinnings in the defendant's right to be present at all critical stages of trial[.]").

The jury's inquiry in Howard's case implicated both a factual and legal question. Defense counsel objected by stating the registration rules Howard stipulated to knowing did not include the statutory language provided in response to the jury's question. CP 41; 6RP 3. Counsel's objection was well taken; the registration rules Howard stipulated to knowing state the following with respect to homeless offenders:

Any offender who lacks a fixed residence and enters and remains within a new county for twenty-four hours is required to register with the county sheriff not more than three business days after entering the county. Offenders

who lack a fixed residence and who are under the supervision of the department of corrections shall register in the county of their supervision. *A person who lacks a fixed residence must report weekly*, [i]n person, to the sheriff of the county where he or she is to register. The weekly report shall be on a day specified by the county sheriff's office, which shall occur during normal business hours.

Ex. 2A (emphasis added). In short, the rule – unlike the statute -- did not state offenders who become homeless must report within three days of losing their fixed residence.

Because an important jury question was discussed, the situation is readily distinguishable from the routine conference on proposed jury instructions. Such a conference is not a critical stage requiring the defendant's presence. State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000). The Bremer court reasoned that because the defendant was represented by counsel, "he would not have had an opportunity to speak." Id.

Unlike in that situation, Howard's presence would have been beneficial. He could have informed counsel whether he was aware of the three-day notification period after becoming homeless. He also could have emphasized to counsel that it was the prosecutor's proposed instruction that caused the jury's question. Supp. CP \_\_\_ (sub. no. 69, State's Revised Instructions, at 17, filed 3/21/12).

The trial court nevertheless instructed Howard's jury according to the language contained in RCW 9A.44.130(5)(a). At no point did the court inquire as to Howard's absence from the conference and no mention was made of him by counsel as he spoke over the telephone from his office. The State therefore cannot argue Howard somehow waived his right to be present for this critical stage of the proceedings. Any waiver of constitutional trial rights must be knowing, intelligent, and voluntary. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (waiver must be affirmative and unequivocal). Courts "must indulge every reasonable presumption against waiver of fundamental rights." Acrey, 103 Wn.2d at 207 (citing Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942)).

The right to be present at trial may be waived so long as the waiver is voluntary and knowing. State v. Thomson, 123 Wash. 2d 877, 880, 872 P.2d 1097 (1994); see also City of Seattle v. Klein, 161 Wn.2d 554, 559, 166 P.3d 1149 (2007) (quoting Webster's Dictionary and defining "waiver" as the "act of waiving or intentionally relinquishing or abandoning a known right . . ."). Before finding waiver, a trial court must explore the circumstances of a defendant's "disappearance." Thomson, 123 Wn.2d at 881.

Howard did not knowingly, intelligently, or voluntarily waive his right to be present for discussion of the jury's question. No one inquired into whether he should be present and in the courtroom with the bailiff and prosecutor when the trial court and defense counsel appeared telephonically. This is error.

A violation of the due process right to be present is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The same is true of the right to "appear and defend" under article 1, section 22. Irby, 170 Wn.2d at 885-86. The State must prove the error harmless beyond a reasonable doubt. Id. at 886.

A court's response to a jury inquiry will generally be deemed harmless if it conveyed no affirmative information. Besabe, 166 Wn. App. at 882. The trial court's response here conveyed affirmative information that went to the heart of Howard's defense, as made evident by trial counsel during closing argument. 5RP 146. And according to the prosecutor during closing argument, Howard was either homeless after being terminated from the recovery house or living with his wife in Pierce County. 5RP 142-43. The court's addition of the homeless portion of the registration requirement was thus crucial.

As well, Howard's belief that the recovery house remained his residence was certainly plausible because it still housed his TV, stereo, and most of his other possessions. Neither Parker nor Hall had independent authority to request a urine sample or terminate someone from the house. 4RP 107-08, 121-22. Parker could not specifically recall collecting Howard's house key. 4RP 117. Finally, both Howard and his wife left numerous messages for Parker's supervisor in an effort to clarify his housing status, but they were not answered.

Under these circumstances, the State cannot prove the constitutional error here was harmless. This Court should reverse Howard's conviction and remand for a new trial.

2. THE INFORMATION IS CONSTITUTIONALLY INSUFFICIENT BECAUSE IT FAILS TO ALLEGE AN ELEMENT.

The information charging Howard with failing to register did not allege he was required to register with the sheriff of his home county, or that he failed to register with that sheriff. Registering with the local sheriff is an essential element of the offense. Because the information fails to contain an essential element, reversal is required.

a. Introduction

The Sixth Amendment and article 1, section 22 guarantee to the accused the right to notice of the alleged crime the State hopes to prove. State v. Kosewicz, 174 Wn.2d 683, 691, 278 P.3d 184 (2012). Sufficient notice requires an information to include all essential elements of the crime. State v. Zillyette, 173 Wn.2d 784, 785, 270 P.3d 589 (2012). An "element" is a fact the State must prove beyond a reasonable doubt to show the accused committed the charged offense. State v. Khlee, 106 Wn. App. 21, 23, 22 P.3d 1264 (2001). The information must also allege the specific facts supporting the elements. State v. Nonog, 169 Wash. 2d 220, 226, 237 P.3d 250 (2010). This Court reviews the sufficiency of an information de novo. State v. Marcum, 116 Wn. App. 526, 533, 66 P.3d 690 (2003).

A defendant can challenge the sufficiency of a charging document for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). When the challenge to the information is made for the first time on appeal, the reviewing court determines if the elements "appear in any form, or by fair construction can they be found, in the charging document." Kjorsvik, 117 Wn.2d at 105. If the information as a whole reasonably informs the defendant of the elements of the crime

charged, the defendant may prevail only if he can show the unartful language actually prejudiced him. Id. at 106. But if the necessary elements are not found or fairly implied, courts presume prejudice "and reverse without reaching the question of prejudice." State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

b. The information and statutes

The State charged Howard in relevant part as follows:

That the defendant . . . during a period of time intervening between March 3, 2011 through March 11, 2011, having been convicted of Rape of a Child in the First Degree . . . for which he was required to register as a sex offender under RCW 9A.44.130 did knowingly fail to comply with the requirements of RCW 9A.44.130, and that the defendant has been convicted in this State of a felony failure to register as a sex offender or two or more prior occasions;

Contrary to RCW 9A.44.132(1)(b) . . . .

CP 9.

The version of RCW 9A.44.132(1)(b) applicable during Howard's charging period provided as follows:<sup>6</sup>

(1) A person commits the crime of failure to register as a sex offender if the person has a duty to register under RCW 9A.44.130 for a felony sex offense as defined in that

---

<sup>6</sup> The statute was amended effective eff. July 22, 2011. Laws 2011 ch. 337, § 5.

section and knowingly fails to comply with any of the requirements of RCW 9A.44.130.

...

(b) If a person has been convicted in this state of a felony failure to register as a sex offender on two or more prior occasions, the failure to register under this subsection is a class B felony.

Under RCW 9A.44.130, any qualifying sex offender who changes residence within the same county must notify that county's sheriff in writing or in person within three business days of moving. RCW 9A.44.130(4)(a).

If an offender moves to a new county, he must register with the new county's sheriff within three business days of moving. Also within three business days, the offender must notify his former county's sheriff of the change of address in the new county. RCW 9A.44.130(4)(b).

Finally, the offender who lacks a fixed residence must provide written notice to the sheriff of the county where he last registered within three business days after ceasing to have a fixed residence. RCW 9.94A.130(5)(a).

c. Elements as charged

These various requirements do not represent alternative means of committing the crime of failing to register. State v. Peterson, 168 Wn.2d

763, 771, 230 P.3d 588 (2010). Furthermore, an offender's residential status is not an element of failing to register. Id., 168 Wn.2d at 774.

The Supreme Court left for a future case, however, whether other facts may constitute elements of the crime, "such as the statutory deadline" and the "particular county sheriff to which one must give notice." State v. Mason, \_\_ Wn. App. \_\_, 285 P.3d 154, 158 (2012) (quoting Peterson, 168 Wn.2d at 771 n.7), petition for review filed, No. 87951-6 (9/27/12). Mason argued the information charging him with failing to register was insufficient because it did not allege he was required to register with the sheriff of the county in which he lived, or that he failed to register with that sheriff. Mason, 285 P.3d at 156.

As in Howard's case, the State alleged simply that Mason: 1) while having a duty to register as a sex offender; (2) knowingly failed to comply with the registration requirements of RCW 9A.44.130. Mason, 285 P.3d at 155. Also as in Howard's case, there was evidence Mason moved from one county to another. Id., 285 P.3d at 155-56.

The Mason court read Peterson narrowly, finding that case was limited to the single question of whether residential status was an element of failing to register. Id., 285 P.3d at 158. The court also observed that Mason's case "involves a cross-county move that may require greater

specificity in the information." *Id.* at 158.<sup>7</sup> Nevertheless, the court concluded Mason "fails to provide analysis or citation to authority supporting his conclusory arguments" regarding the "county sheriff" alleged elements of the crime. *Id.* at 159.

Because the specific question presented is a matter of first impression, Howard wonders to what "analysis or citation to authority" the court referred. The crucial "authority" in determining the sufficiency of an information is, of course, the statute. *See, e.g., State v. Rivas*, 168 Wn. App. 882, 889, 278 P.3d 686 (2012) ("[T]he plain statutory language compels the conclusion that a common scheme or plan is an essential element of second degree malicious mischief where the State aggregates the value of damages to more than one item of property to reach the \$750

---

<sup>7</sup> This language refers to the following observation in *Peterson*:

Peterson also seems to claim that the particular county sheriff to which one must give notice is an element of the crime because an offender's deadline is different depending on if he moves outside of his county or within it. *See id.* at 7–8. But because the jury instruction here included the 72-hour deadline, it is clear that the sheriff identified in the instruction was the sheriff of the county in which the trial took place. *See RCW 9A.44.130(5)(a). Where an allegation involves a cross-county move, greater specificity may be required.*

168 Wn.2d at 771 n.7 (emphasis added).

threshold."); State v. Kilonia-Garramone, 166 Wn. App. 16, 22, 267 P.3d 426 (2011) ("To determine the essential elements of the charged crime, we look first to the statutory language."), review denied, 174 Wn.2d 1014 (2012).

The State charged Howard with violating RCW 9A.44.132, which in turn sanctions the failure to knowingly comply with the registration requirements set forth in RCW 9A.44.130. Knowing compliance requires registration with the sheriff of the county of residence. As this Court recognized, "[t]he statute imposes one duty: to register with the sheriff." State v. Peterson, 145 Wn. App. 672, 677, 186 P.3d 1179 (2008) aff'd., 168 Wn.2d 763 (2010).

For these reasons, the requirement of registering with the county sheriff must be considered an element of the crime of failing to register as a sex offender. The State did not allege this element in charging Howard. But because Howard challenges the sufficiency of the information for the first time on appeal, the information is liberally construed. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995).

To determine whether he committed the crime of failing to register as charged, Howard would have to search out the requirements of RCW 9A.44.130. Although the information correctly referred to RCW 9A.44.130, citing to the correct statute is not enough. State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010); State v. Naillieux, 158 Wn. App. 630, 645, 241 P.3d 1280 (2010). "[D]efendants should not have to search for the rules or regulations they are accused of violating." Kjorsvik, 117 Wn.2d at 101.

Even under the liberal construction rule, the missing element here does not "appear in any form," and cannot be found by a fair construction of the information. The faulty information is presumed prejudicial and requires reversal of Howard's conviction. Brown, 169 Wn.2d at 198.

3. UNDULY PREJUDICIAL EVIDENCE OF THE CIRCUMSTANCES OF HOWARD'S ARREST WAS ERRONEOUSLY ADMITTED.

Other acts evidence purportedly admitted to show consciousness of guilt, such as resistance to arrest, must allow a reasonable inference of consciousness of guilt *of the charged crime* as opposed to a related possible crime. State v. Freeburg, 105 Wn. App. 492, 497-98, 20 P.3d 984 (2001); State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994). The trial court violated this rule by permitting the State to present evidence that

Howard resisted arrest at his wife's house, because the resistance was not relevant to the crime of failing to register.

a. Pretrial argument and admitted evidence

The prosecutor moved pretrial for admission of evidence of the facts surrounding Howard's arrest on the DOC warrant at his wife's Tacoma residence. 2RP 22. The prosecutor's theory was the evidence tended to prove Howard knew he should have registered within three business days of leaving the recovery house and did not register his wife's address as his own because he had been told by a CCO he could not live there. 2RP 23-26, 40-41, 75-77.

Howard maintained the evidence was relevant only to show his guilty conscience with respect to the DOC violation, not to the charged crime of failure to register. 2RP 72-75, 78.

The trial court found the DOC violation and the charged offense were "very closely tied together." 2RP 78. More specifically, the court found that "by living in a place not reported to the [DOC], there is a connection to the requirement to report your new address to the Sheriff so that you can make your registration under the new address." 2RP 79. The trial court admitted evidence of the facts of Howard's arrest. Id.

As a result of the trial court's ruling, the jury learned that after conducting surveillance on Howard's wife's residence on March 10, officers with the United States Marshals Service, Pacific Northwest Fugitive Apprehension Task Force, suspected Howard was staying at the residence. 4RP 132-33; 5RP 68-70, 75. The following day, approximately ten officers, including at least three Marshals Service officers and a Tacoma-based CCO, went to the residence to serve the DOC arrest warrant. 4RP 130-32, 136; 5RP 22-25, 71-72, 76-77. The officers knocked on the door and announced their presence, but received no response. 5RP 26, 71-72. So the officers broke the front and rear doors down with battering rams. 4RP 133-34; 5RP 28, 73, 77-78. The first officer inside the residence carried a ballistic shield for safety. 5RP 78. That officer ran upstairs, saw Howard in a bedroom, and arrested him without incident. 5RP 79.

Howard testified he had assumed the DOC would issue an arrest warrant because of his failure to report to his CCO on the day after the argument with Parker at the recovery house. 5RP 102. He "knew" he was being arrested on the warrant and did not learn until about 30 days later about a charge of failing to register as a sex offender. 5RP 104-05.

b. Application of "other acts" rule

The prosecution's attempts to use evidence of other crimes or acts must be evaluated under ER 404(b), which reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

Admission of evidence under this rule is reviewed for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

Before admitting evidence under ER 404(b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence is being admitted. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Second, the court must determine that the proffered evidence is logically relevant to an issue. The test is whether the evidence is relevant and necessary to prove an element of the charged crime. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is logically relevant if it is of consequence to the outcome of the action and tends to make the

existence of the identified fact more or less probable. Saltarelli, 98 Wn.2d at 361-62.

Third, assuming the evidence is logically relevant, the court must then determine whether its probative value outweighs any potential prejudice. Saltarelli, 98 Wn.2d at 362-63. "Evidence of prior misconduct is likely to be highly prejudicial, and should be admitted only for a proper purpose and then only when its probative value clearly outweighs its prejudicial effect." State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995).

In a doubtful case, the evidence should be excluded. State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615, 627 (1995). The State bears a substantial burden when attempting to introduce evidence of other bad acts under one of the exceptions to ER 404(b). State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

c. Application in Howard's case

Evidence that a suspect resists arrest may be admissible, but only if the jury can infer consciousness of guilt of the charged crime. State v. McDaniel, 155 Wn. App. 829, 855, 230 P.3d 245, review denied, 169 Wn.2d 1027 (2010). Even when such evidence is admissible, "it tends to be only marginally probative as to the ultimate issue of guilt or

innocence." Freeburg, 105 Wash. App. at 498. "[T]he circumstance or inference of consciousness of guilt must [thus] be substantial and real, not speculative, conjectural, or fanciful." Id., (citing State v. Bruton, 66 Wn. 2d 111, 112, 401 P.2d 340 (1965)).

[T]he probative value of evidence of flight as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt *concerning the crime charged*; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

Freeburg, 105 Wn. App. at 498, (citing United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977)) (emphasis added).<sup>8</sup>

Where more than one warrant or offense is in play, it is more difficult to show consciousness of guilt concerning the charged crime. In McDaniel, for example, evidence of the defendant's "unruly arrest" did not allow a substantial inference as to consciousness of guilt for the charged crime that occurred months earlier, in part because the defendant "was wanted on several warrants, not just the one related to" the charged crime. 155 Wn. App. at 855.

---

<sup>8</sup> The Ninth Circuit has cited the Myers four-step analysis with approval. United States v. Silverman, 861 F.2d 571, 581 (9th Cir. 1988).

In Hagler, this Court concluded the defendant's nervousness, use of a false name and flight did not support a substantial inference of intent to deliver drugs. This Court held the facts

beg the question of which of the two possible crimes Hagler felt guilty about—do his actions show that he knew he possessed cocaine or that he knew he intended to deliver it? The additional factor must be suggestive of sale as opposed to mere possession in order to provide substantial corroborating evidence of intent to deliver.

74 Wn. App. at 236. See also United States v. Foutz, 540 F.2d 733, 740 (4th Cir. 1976) (emphasizing "[t]he inference that one who flees from the law is motivated by consciousness of guilt is weak at best," court notes "[t]he danger of permitting the inference is further compounded in a case such as this one where the defendant is wanted for another infraction.").

The same situation applied in Howard's case. A warrant issued for Howard's arrest because he failed to report to his CCO as directed. The warrant provided the authority of law to arrest Howard. When Howard spoke with his CCO on the day after the argument with recovery house manager Parker, the CCO told him to report "so we can discuss the housing issues." 4RP 144. The CCO mentioned nothing about sex offender registration requirements. The same is true of the CCO supervisor, who discussed only Howard's supervision requirements and the

steps necessary to determine whether he could live at his wife's residence.  
5RP 18-21.

Given these facts, the State has failed to show the facts surrounding Howard's arrest provide substantial corroborating evidence to show he knew he failed to timely register as a sex offender. Stated in the language of the three-part test for admission of ER 404(b) evidence, the evidence was not shown to be logically relevant to an issue in the trial. And even if it had some minimal probative value, the relevance did not outweigh the prejudicial effect of the evidence. That effect is clear: jurors learned that 10 officers, including members of the U.S. Marshals Service Pacific Northwest Fugitive Apprehension Task Force, were summoned to execute a DOC warrant, that the officers battered the door down after receiving no response, and that the first officer in protected himself with a ballistic shield. These are damning facts that tended to portray Howard as a dangerous lawbreaker who was on the run from law enforcement authorities after failing to register as a sex offender.

The trial court abused its discretion by admitting this evidence. The erroneous admission of evidence under ER 404(b) requires reversal if, within reasonable probabilities, the evidence materially affected the

outcome at trial. Smith, 106 Wn.2d at 780; State v. Carleton, 82 Wn. App. 680, 686, 919 P.2d 128 (1996).

The evidence did that here. Howard's contention that he did not know he needed to register because it was not clear he had been removed from the recovery house was plausible. He validly questioned Parker's authority to kick him out of the house. Parker's supervisor testified that even had Howard submitted urine that was found to contain drugs or alcohol, Parker would still not have had authority on his own to order him removed from the house. 4RP 100. She also knew Howard tried to contact her, but never saw fit to listen to his messages. Id.

In addition, Howard still had valuable property at the house when he left after his argument with Parker. Furthermore, Parker acknowledged he became "pretty upset" and "voiced [his] opinion" when Howard woke him up by slamming the door to the house when he entered with his guest. 4RP 110-11.<sup>9</sup> When Parker called his supervisor, she said she could "hear in the background that Mr. Howard and [Parker] were having a disagreement." 4RP 96. Howard testified both he and Parker were calling

---

<sup>9</sup> One house rule prohibited "any emotional, mental, verbal, sexist, racial and/or inappropriate language[.]" 4RP 85.

each other names during the "volatile" argument. 5RP 93. He noted Parker violated a house rule by "acting out and yelling." 5RP 96-97.

These facts supported Howard's defense. The State's evidence was far from overwhelming, and the facts of the arrest were prejudicial enough to materially affect the jury's verdict. The court's erroneous admission of these facts was therefore not harmless. This Court should reverse Howard's conviction and remand for a new trial.

4. THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY WHEN IT IMPOSED SEVERAL SPECIAL "SEX OFFENSE" COMMUNITY CUSTODY CONDITIONS.

Whenever a sentencing court exceeds its statutory authority, its action is void. State v. Phelps, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002). Unauthorized conditions of a sentence may be challenged for the first time on appeal. State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003); see also State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

In addition to what it labeled "standard conditions" of community custody, the trial imposed a host of "special conditions" for "sex offenses."

CP 67-68.<sup>10</sup> Howard acknowledges his felony crime of failing to register as a sex offender is considered a "sex offense" for sentencing purposes. See former RCW 9.94A.030(42)(a)(v)(2010) (included within definition of "sex offense" is felony violation for failing to register if offender had previous failing to register conviction). Laws 2010, Ch. 267, § 9. But the offense differs from traditional "sex offenses" because its commission requires neither touching, viewing, orchestrating sexual contact, nor peeping. See, e.g., State v. Nelson, 131 Wn. App. 175, 179-80, 123 P.3d 526 (2005) ("Failing to comply with a registration statute does not implicate sexual gratification.").

For this reason, sentencing courts should view failing to register crimes differently than other "sex offenses" for purposes of imposing punishment. In this way, courts will better promote the goals of the Sentencing Reform Act (SRA), which include ensuring the punishment is proportionate to the seriousness of the offense, promoting respect for the law by providing just punishment, protecting the public, offering the offender an opportunity to improve himself, and making frugal use of

---

<sup>10</sup> The standard conditions are conditions set forth in RCW 9.94A.703(1)(a), (2), and (3)(a), as well as RCW 9.94A.704(3).

government resources. RCW 9.94A.010; State v. Tili, 148 Wn.2d 350, 368, 60 P.3d 1192 (2003).

The trial court's special community custody conditions here illustrate the illogic of treating the failure to register as a typical sex offense. The court ordered Howard to, among other things: (1) obtain a sexual deviancy evaluation, (2) notify the CCO and sexual deviancy provider "of any dating relationship" and refrain from any "[s]exual contact . . . until the treatment provider approves of such[;]" and (3) abide by a curfew of 10 p.m. to 5 a.m. CP 67 (conditions 4, 5, 7). The court prohibited entry into sex-related businesses and possession, use, access or viewing of any sexually explicit material. CP 67 (conditions 10 and 11).

None of these conditions bears any relation to Howard's criminal conduct. In this sense the conditions conflict with the court's authority to order: (1) participation in *crime-related* treatment or counseling services; (2) participation in *rehabilitative* programs; (3) performance of other affirmative conduct *reasonably related to the circumstances of the offense*, the offender's risk of reoffending, or the safety of the community; or (4) compliance with any *crime-related* prohibitions. RCW 9.94A.703(3).

Many cases have stricken conditions that run afoul of these statutory limitations. See, e.g., State v. Zimmer, 146 Wn. App. 405, 414,

190 P.3d 121 (2008) (prohibition on use of cell phone or data storage device stricken because there was no evidence defendant possessed or used phone or storage device in connection with possessing methamphetamine); State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (condition prohibiting internet use stricken because there was no evidence that internet use contributed to rape); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003) (trial court erred by imposing alcohol-related conditions because alcohol was not related to the crime); State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989) (trial court erred by imposing condition requiring submission to breathalyzer because there was no evidence of any connection between alcohol use and Parramore's conviction for delivering marijuana); cf. State v. Combs, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000) (prohibition on computer possession or use upheld where defendant used computer to show pornographic images to victims

These cases support Howard's position that the challenged conditions here are not authorized. As a practical matter, the crime of failing to register is a status offense. State v. Hickman, 157 Wn. App. 767, 776, 238 P.3d 1240 (2010). A sexual deviancy evaluation, and recommended treatment, does not rehabilitate an offender who fails to

register, or make the community safer. More generally, it certainly does not constitute just punishment that promotes respect for the law. The same is true for notifying a CCO and deviancy treatment provider of a dating relationship, or abiding by a curfew. This affirmative conduct simply does not reasonably relate to the circumstances of the offense.

Nor do the prohibitions on entering sex-related businesses or using sexually explicit material relate to the crime. There is no evidence that contact with sexually explicit material caused or contributed to Howard's failure to timely register with the county sheriff. For these reasons, this Court should reverse and remand with an order to strike the affirmative conditions enumerated as special conditions 4 (sexual deviancy evaluation), 5 (disclosing dating relationship and getting approval before sexual contact), and 7 (following curfew). This Court should also order the striking of special conditions 10 (not entering sex-related business), and 11 (not possessing sexually explicit materials).

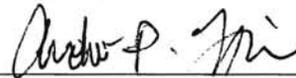
D. CONCLUSION

For the aforesaid reasons, this Court should reverse Howard's conviction and remand for retrial. Alternatively, this Court should reverse the sentence and remand with an order to strike the challenged community custody conditions.

DATED this 21 day of October, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



---

ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

## APPENDIX

No. 4

A person commits the crime of failure to register as a sex offender when that person, having been convicted of a sex offense for which he is required to register as a sex offender with the county sheriff's office, knowingly fails to comply with the requirements of sex offender registration.

A requirement of sex offender registration is that a sex offender must provide, by certified mail, with return receipt requested, or in person, signed written notice of the change of address within 3 business days of moving to a new residence within the same county or to the county sheriff with whom the defendant last registered if moving out of the county.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON

Respondent,

v.

RICHARD HOWARD,

Appellant.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

COA NO. 68615-1-I

**DECLARATION OF SERVICE**

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

THAT ON THE 22<sup>ND</sup> DAY OF OCTOBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD HOWARD  
DOC NO. 786304  
STAFFORD CREEK CORRCIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN , WA 98520

**SIGNED** IN SEATTLE WASHINGTON, THIS 22<sup>ND</sup> DAY OF OCTOBER 2012.

x Patrick Mayovsky

2012 OCT 22 PM 1:28  
COURT OF APPEALS  
STATE OF WASHINGTON