Supreme Court No. 101615-8
Court of Appeals No. 55881-5-II

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

RANDY RICHTER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Randy Richter, the petitioner, asks this Court to grant review of Court of Appeals' decision terminating review. The published opinion was issued on December 13, 2022.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

1. Whether RCW 69.50.435(1)(c), the school bus route stop zone enhancement statute, doubles the maximum penalty for a violation when the doubling language is found in RCW 69.50.435(1)(j)?

2. Whether enhancing a person's punishment under RCW 69.50.435(1)(c) for the *unknowing* conduct of being within 1,000 feet of a school bus route stop is constitutional under the due process requirement, as set out in Blake,[1] that all laws must have a reasonable and substantial relation to the

[1] State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021).

accomplishment of some purpose fairly within the legitimate range or scope of the police power?

3. Whether RCW 69.50.435(1)(c), the school bus route stop zone enhancement statute, is unconstitutionally vague when there are no readily available or ascertainable means by which to determine the existence of the zone and avoid committing a drug offense within it?

C. STATEMENT OF THE CASE[2]

For thrice selling small amounts of methamphetamine to the same government informant in a retail parking lot during the summer, Randy Richter received a sentence of 20 years—a sentence not unlike those given people convicted of a homicide.

This draconian sentence was based on the "controlled" buys occurring within 1,000 feet of an unmarked and indiscernible "school bus route stop." Due to this happenstance, the sentencing court imposed three consecutive 24 month

[2] A more detailed statement of the facts is set out in the opening brief.

sentences, increasing the total sentence by six years. 5/15/14 RP 164. Based on Mr. Richter's high offender score, the court imposed an exceptional sentence above the standard range on the counts. 5/15/14 RP 164. Because Mr. Richter had prior convictions for drug possession, RCW 69.50.408 doubled his maximum sentence on each conviction from 10 to 20 years' imprisonment. 5/15/14 RP 163.

Following an appeal, the three 24-month sentences were ordered to run concurrently rather than consecutively, reducing Mr. Richter's total sentence to 16 years. CP 34, 61; State v. Richter, No. 46297-4-II, noted at 192 Wn. App. 1009 (2016) (unpublished).

After this Court declared Washington's drug possession statute unconstitutional in 2021, Mr. Richter moved for resentencing. CP 87-91. Mr. Richter had five prior convictions for drug possession. CP 96. These prior convictions no longer triggered RCW 69.50.408, which had been the basis for doubling his maximum sentence to 20 years. CP 89.

The prosecution agreed that the prior convictions no longer triggered the doubling provision in RCW 69.50.408**Error! Bookmark not defined.**. But the prosecution argued for the first time that the school bus route stop findings doubled the maximum sentence on the delivery convictions under RCW 69.50.435(1)(c). CP 97-98. Mr. Richter argued the prosecution was incorrect in its interpretation of the statute. 5/13/21 RP 17-20, 30.

The court ruled the jury's special findings required the maximum sentence on the delivery convictions be doubled to 20 years. The court again imposed an exceptional sentence upward, but reduced the total sentence to 14 years in light of Mr. Richter's decreased offender score and Mr. Richter's betterment of himself during his lengthy incarceration. CP 49-50, 61-62; 5/13/21 RP 49-50.

On appeal, Mr. Richter argued RCW 69.50.435(1)(c) did not double the maximum penalty. He also argued this statute, which imposes a 24-month sentence enhancement, violated the

due process requirements that all laws be (1) reasonable and (2) not vague. The Court of Appeals rejected these arguments in a published opinion.[3]

D. ARGUMENT

1. Review should be granted to decide whether a violation of the school bus route stop zone statute, RCW 69.50.435(1)(c), doubles the maximum penalty.

By statute, an "additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827." RCW 9.94A.533(6). Based on the jury's special verdicts, this resulted in an additional 24 months being added to Mr. Richter's sentence. But based on RCW 69.50.435(1), the court ruled that the special verdicts also doubled the maximum sentence on the three delivery convictions. This statute reads:

> (1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing

[3] The Court additionally remanded for resentencing due a miscalculated offender score and for relief as to legal financial obligations.

with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:
(a) In a school;
(b) On a school bus;
(c) Within one thousand feet of a school bus route stop designated by the school district;
(d) Within one thousand feet of the perimeter of the school grounds;
(e) In a public park;
(f) In a public housing project designated by a local governing authority as a drug-free zone;
(g) On a public transit vehicle;
(h) In a public transit stop shelter;
(i) At a civic center designated as a drug-free zone by the local governing authority; or
(j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, but not including twice the imprisonment authorized by RCW 69.50.406, or by both such fine and imprisonment. The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.

RCW 69.50.435(1).

Where a statute is plain on its face, it must be given that meaning. In re Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 838, 215 P.3d 166 (2009). The court considers the text, the ordinary meaning of words, the basic rules of grammar, the context of the statute, related provisions, amendments, and the statutory scheme as a whole. Id. at 838-39.

By its plain language, the words "by imprisonment of up to twice the imprisonment otherwise authorized" only applies to subsection (j). The division of the statute into subsections and the use of semi-colons shows the language in subsection (j) applies only to that subsection. See Tateuchi v. City of Bellevue, 15 Wn. App. 2d 888, 902, 478 P.3d 142 (2020) ("A semicolon is used to show a stronger separation between the parts of a sentence than does a comma"). The provision applicable to Mr. Richter is subsection (c), not (j). Read with

RCW 9.94A.533(6), the jury's special findings result in a sentence enhancement of 24 months. The findings do not double the maximum punishment.

The Court of Appeals reasoned that under a plain reading of the statute, the doubling language would ordinarily only apply to subsection (j). Slip op. at 7-8. However, based on the notion that this would be an "absurd" result and its view of the legislative history, the Court rejected this reading. Slip op. at 8-10.

This was error. Although plain meaning interpretation may be departed from if it produces an absurd result, this rule is to be applied "sparingly." In re Dependency of D.L.B., 186 Wn.2d 103, 119, 376 P.3d 1099 (2016) (quoting Five Corners Family Farmers v. State, 173 Wn.2d 296, 311, 268 P.3d 892 (2011)). There is nothing absurd about the doubling language only applying to subsection (j) because a violation of the other subsections, including subsection (c), results in a 24-month enhancement under RCW 9.94A.533(6).

As for the legislative history, it was improper for the Court of Appeals to resort to this tool to resolve any ambiguity. Criminal statutes are strictly construed against the State and under the rule of lenity, any ambiguity in the statute must be resolved in Mr. Richter's favor. City of Seattle v. Winebrenner, 167 Wn.2d 451, 462, 219 P.3d 686 (2009). Turning to legislative history, rather than the rule of lenity, to resolve ambiguity in a criminal statute is improper. State v. A.M., 194 Wn.2d 33, 51, 448 P.3d 35 (2019) (Gordon McCloud, J., concurring) ("In reviewing the [drug possession] statute's legislative history, the court [in previous decisions] notably departed from the accepted methods of statutory interpretation in another way as well: it failed to apply the rule of lenity.").

This Court should grant review and reverse. Review is warranted because the issue is one of substantial public interest. RAP 13.4(b)(4). The doubling of the maximum penalty here is what permitted the trial court to impose a severe sentence that is out of step of the kind of sentence a person ordinarily receives

for selling small amounts of drugs. The Court of Appeals' mode of statutory interpretation is also contrary to precedent, further meriting review. RAP 13.4(b)(b)(1), (2).

2. The school bus route stop zone statute, RCW 69.50.435(1)(c), is a strict liability statute that punishes a person for delivering drugs while *unknowingly* being within 1,000 feet of a school bus route stop. Review should be granted to decide whether this statute violates the due process test set out in *State v. Blake*.

The State may not deprive people of liberty without due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. Both the state and federal guarantees of due process limit the reach of the State's police power. Blake, 197 Wn.2d at 181. The police power is broad, but it "is not infinite." Id. at 178. A criminal law or law implicating personal liberty "must have a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power and must not violate any direct or positive mandate of the constitution." Id. (cleaned up). "[T]he law shall not be unreasonable, arbitrary or capricious and the means selected

shall have a real and substantial relation to the object sought to be attained." Id. In other words, to comply with due process, the law must be a reasonable exercise of the police power. Id. at 181-82. Criminalizing passive or innocent conduct with no mens rea or guilty mind exceeds the State's police power in violation of due process. Id. at 182-83.

Applying these principles, this Court held that Washington's drug possession statute was unconstitutional. The statute criminalized the *unknowing* possession of drugs, which is innocent conduct. Id. at 183. This criminalization of unknowing conduct had "an insufficient relationship to the objective of regulating drugs." Id. at 185 (cleaned up).

Mr. Richter's punishment on the delivery convictions was enhanced significantly based on the jury's findings that the deliveries occurred within 1,000 feet of a school bus route stop. This finding was used to double the maximum punishment from 10 to 20 years' imprisonment and increase his sentence by two years. This occurred without the jury finding that Mr. Richter

knew, or even should have known, that he was in was within 1,000 feet of a school bus route stop. This is because "RCW 69.50.435 is a strict liability statute." State v. Silva-Baltazar, 125 Wn.2d 472, 482, 886 P.2d 138 (1994). Lack of knowledge is expressly not a defense. RCW 69.50.435(2).

RCW 69.50.435(1)(c) violates the due process test set out in Blake. It imposes significant increased punishment for committing a drug offense while unknowingly being within 1,000 feet of a "school bus route stop," which is defined as "a school bus stop as designated by a school district." RCW 69.50.435(6)(c).

This statute has the intended goal of keeping drug crimes away from children. However, there is "an unreasonable disconnect between the statute's intended goals and its actual effects." Blake, 197 Wn.2d at 184. It imposes enhanced punishment for happening to be in an unmarked zone that spans the length of over three football fields. These zones may blanket an area, making large areas "drug-free zones." If vast

parts of areas are in a "school bus route stop" zone, the incentive for drug transactions to occur elsewhere vanishes. See A. Kajstura, P. Wagner, & W. Goldberg, The Geography of Punishment: How Huge Sentencing Enhancement Zones Harm Communities, Fail to Protect Children, Section: Deterrence, in Theory and Practice (2008) (zone laws that do not alert people of the zone are a poor deterrent because "if an offender is expected to avoid the zones, he must have a reasonable idea of where they are").[4] It permits arbitrary enforcement by prosecutors and police, who may perversely set up "controlled" drug transactions in the protective zone so as to exact greater punishments.

This disparately impacts minorities and marginalized communities. In striking down Washington's drug possession statute, this Court recognized the criminalization of "nonconduct" created racially disparate effects. Blake, 197

[4] Available at: https://www.prisonpolicy.org/zones/deterrence.html.

Wn.2d at 182 n.10, 192. Here the same problem is created by simply being within 1,000 feet of a school bus stop. See State v. Peterson, 198 Wn.2d 643, 655 n.11, 498 P.3d 937 (2021) (recognizing disproportional harm that Washington's drug laws have had on different communities); Com. v. Bradley, 466 Mass. 551, 556, 998 N.E.2d 774 (2013) (recounting studies showing that drug-free zone laws are overbroad and that this "overbreadth has had an unfair impact on those living in urban communities"); L. Buckner Inniss, A Moving Violation? Hypercriminalized Spaces and Fortuitous Presence in Drug Free School Zones, 8 Tex. F. on C.L. & C.R. 51, 74-75 (2003).

This case illustrates the unreasonable disconnect between protecting children from drug transactions and enhancing the penalty for selling drugs within 1,000 feet of a school bus route stop. The record does not show that the two bus stops identified by the prosecution were marked in any fashion. They were created by the school district's transportation manager in consultation with others. 4/25/14 RP 47. In the words of the

manager, when he and others "determine there's a bus stop," "[t]hat's a bus stop." 4/25/14 RP 48. There is no certification process. 4/25/14 RP 48. In sum, the locations are subject to being changed on the whims of a school transportation manager and several other people. If the law is meant to incentivize drug transactions to occur away from children, it does a poor job by not alerting people to the existence of the bus stops.

There was no way for Mr. Richter or any person to reasonably ascertain the existence of these bus stops, which were not very near the Big Lots parking lot where the offenses occurred. Even if the bus stops had been marked, it is unlikely Mr. Richter could not have seen the stops from his location given the distance and geography. 4/24/14 RP 120 (testimony that detective who was surveilling transaction lost sight of informant when she went to corner of Big Lots). This is unsurprising because 1,000 feet, about the height of the Eiffel Tower, is a long distance. See Wagner & Goldberg, Section: 1,000 feet is further than you think (sidebar) (2008) (illustrating

through photos how far 1,000 feet distance is from a school and concluding "[i]t is not reasonable to assume that someone anywhere within 1,000 feet from school property intends to sell drugs to children at the school.").[5] Indeed, studies have shown that a 1,000-foot radius for drug-free zones are overbroad. Bradley, 466 Mass. at 556-58.

The law does not require that children be at the bus stop or even be using the bus stop regularly. Here, there was no showing that children were even present at the two bus stops on the days of the offenses. The offenses occurred during the summer, when children were out of school. Mr. Richter's presence in the school bus route stop zone was merely fortuitous on his part. He would not have been there but for the malicious acts of the informant and the police in deciding to conduct the drug transactions within the zone.

[5] available at https://www.prisonpolicy.org/zones/thousand_feet.html.

Significantly, Washington's draconian bus stop route stop zone enhancement law is unlike any other in the country. See Blake, 197 Wn.2d at 183 (recognizing that Washington's strict liability drug possession statute was unique in the nation). The federal statute that it is modeled after creates zones based on physical structures, not unmarked bus stops that can be changed on a whim. 21 U.S.C. § 860.

Only three other states appear to have laws akin to Washington's: Nevada, Virginia, and Arkansas. But Nevada's "school bus stop" enhancement is temporally limited "from 1 hour before school begins until 1 hour after school ends during scheduled school days." Nev. Rev. Stat. Ann. § 453.3345(1.)(d). Virginia's law is even more limited, requiring the act occur when children would be present and also that the act occur on property open to the public. Va. Code § 18.2-255.2 (A.)(4.). And Arkansas's law, while not as limited in its scope, has been interpreted to require proof of a culpable mental state.

French v. State, 2018 Ark. App. 502, 563 S.W.3d 582, 583-84 (2018).

In rejecting Mr. Richter's challenge, the Court of Appeals *failed* to acknowledge or apply the test set out in Blake. Instead, the Court of Appeals reasoned Blake did not apply because trafficking in drugs is not innocent conduct and requires intent or knowledge. Slip op. at 11-13.

True, drug trafficking requires guilty intent or knowledge. But the challenged law penalizes this conduct when it occurs within 1,000 feet of a "school bus route stop," *regardless of knowledge*.

The statute does not distinguish between knowing and unknowing violations. It punishes not merely a person who knowingly delivers drugs to children waiting for a school bus to arrive. It punishes people like Mr. Richter for delivering drugs to confidential informants in retail parking lots that are *unknowingly* within 1,000 feet of an unmarked and indiscernible school bus route stop. It does so at all hours of the

day, year-round, regardless of the presence of children or whether school is session. This is unreasonable and irrational. Blake, 197 Wn.2d at 178, 184. The legislature must provide a tighter fit between means and ends when it seeks to combat the problem of drug transactions occurring near or in the presence of children. The Court of Appeals erred by failing to apply the due process test that Blake reinvigorated and declare the law unconstitutional.

That the challenged statute is an enhancement rather than a singular criminal statute also does not matter. "[A]ny 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." Alleyne v. United States, 570 U.S. 99, 111, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (quoting Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). "[A] fact other than proof of a prior conviction that increases the minimum penalty authorized by law must be treated as an element, not a sentencing factor." State v. Allen, 192 Wn.2d

526, 539, 431 P.3d 117 (2018). As such due process principles apply.

This is particularly critical because the sentence under the school bus route stop zone statute may often be more serious than the underlying offense. For example, for a person with an offender score of 0 to 2, the punishment of 24 months on the enhancement will generally exceed the standard range sentence for the underlying offense. See RCW 9.94A.517, .518. And, assuming the statute doubles the maximum punishment as well, this is significant, as Mr. Richter's case shows. Colorfully put, the school bus route stop zone statute "is appropriately characterized as a tail which wags the dog of the substantive offense." Apprendi v. New Jersey, 530 U.S. at 495 (cleaned up)

Review of this issue is warranted because it involves a significant constitutional question that should be decided by this Court. RAP 13.4(b)(3). The validity of the school bus route stop zone statute also involves an issue of substantial public interest that should be decided by this Court. RAP 13.4(b)(4).

The Court of Appeals' failure to apply the relevant due process test from Blake is also contrary to this Court's precedents, further meriting review. RAP 13.4(b)(1).

3. There are no readily available or ascertainable means by which to determine whether one is within 1,000 feet of a school bus route stop. Review should be granted to decide whether the school bus route stop zone statute, RCW 69.50.435(1)(c), violates the due process prohibition against vague laws.

Beyond the due process requirement that legislation be reasonable, due process also forbids vague laws. Johnson v. United States, 576 U.S. 591, 595, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). This includes fair notice of the prohibited conduct. Id.

Under this principle, due process is violated if "there are no readily available or ascertainable means by which" to determine the existence of a fact makes one's conduct subject to enhanced punishment. State v. Becker, 132 Wn.2d 54, 62, 935 P.2d 1321 (1997). In Becker, this Court held it was unconstitutional to enhance the punishment for selling drugs

based on the act occurring within 1,000 feet of a school ground because a reasonable person could not determine the existence of the school at issue. Id. at 62-63; accord State v. Akers, 136 Wn.2d 641, 643-44, 965 P.2d 1078 (1998).

Over 30 years ago, the Court of Appeals held the school bus route stop zone statute violated due process vagueness principles. State v. Coria, 62 Wn. App. 44, 47-50, 813 P.2d 584 (1991), reversed, 120 Wn.2d 156, 839 P.2d 890 (1992). This Court reasoned the stops were unmarked, used intermittently, that a person within 1,000 feet of the school bus route stop may lack knowledge of its existence, and a reasonable person could not ascertain the distance of the zone. Id. at 49-50.[6]

In a 6-3 decision,[7] this Court reversed the Court of Appeals, rejecting the due process vagueness challenge. State v.

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[6] The Court did not consider the due process test later used in Blake because it had not been raised by the parties. Coria, 62 Wn. App. at 50 n.4.

[7] The dissent recognized Washington's statute was unique and that "[n]o other jurisdiction enhances punishments

Coria, 120 Wn.2d 156, 162, 839 P.2d 890 (1992). The Court acknowledged the difficulty in ascertaining the existence of a school bus route stop. Id. at 167-68. But the Court reasoned that it was possible to ascertain the existence of the stops. Id. at 167-68. This could be done by consulting the master map of bus route stops prepared by the director of transportation for the school district, which was submitted to the superintendent of public instruction. Id. at 168-69. Submitting a map was a requirement under the statute as originally enacted. Laws of 1989, ch. 271, § 112 (f)(3) ("'School bus route stop' means a school bus stop as designated on maps submitted by school districts to the office of the superintendent of public instruction.").

Following Coria, the legislature changed the definition of "school bus route stop" to eliminate the requirement of a map being submitted to the office of the superintendent of public

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for selling drugs near a location that is not visible." Coria, 120 Wn.2d at 176 (Durham, J., dissenting).

instruction. Laws of 1997, ch. 23, § 2. Now, "school bus route stop" means "a school bus stop as designated by a school district." RCW 69.50.435(6)(c). This change makes the law even more constitutionally problematic.

This Court has not overruled Coria. But Coria's holding on vagueness no longer applies given this change in the law. Moreover, Coria has been undermined by later precedents holding a school zone enhancement unconstitutional because the defendants could not readily ascertain the existence of the school. Akers, 136 Wn.2d at 643-44; Becker, 132 Wn.2d at 62-63.

The Court of Appeals reasoned that under Coria, the law was not unconstitutionally vague because a person could "reasonably" ascertain the location of the bus stops by observing where children gather to wait for the school bus or by contacting local school officials. Slip op. at 14-16. This conclusion is dubious. Further, given that the statute no longer requires a master map of stops, Coria's reasoning is no longer

controlling. The Court of Appeals' decision to apply Coria was incorrect.

To the extent Coria applies, this Court is free to overrule it. This Court "will overrule prior precedent when there has been a clear showing that an established rule is incorrect and harmful or when the legal underpinnings of our precedent have changed or disappeared altogether" State v. Pierce, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (cleaned up). This Court's subsequent precedents undermine Coria. Coria is also wrong for the reasons set out and is harmful given its impact on disadvantaged communities and people of color. It should be overruled.

Review of this issue should be granted because it involves both a significant constitutional question and is of substantial public interest. RAP 13.4(b)(3), (4).

E. CONCLUSION

The Court should grant review and declare RCW 69.50.435(1)(c) unconstitutional in violation of due process. If

not declared unconstitutional, the Court hold that RCW 69.50.435(1)(c) does not double the maximum penalty.

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Respectfully submitted this 6th day of January, 2023.

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Appendix

Filed
Washington State
Court of Appeals
Division Two

December 13, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RANDY GENE RICHTER, Appellant.	No. 55881-5-II PUBLISHED OPINION

GLASGOW, C.J.—Randy Gene Richter was convicted of three counts of delivery of a controlled substance within 1,000 feet of a school bus route stop and one count of possession of a controlled substance with intent to deliver. The trial court imposed an exceptional upward sentence of 168 months based in part on former RCW 69.50.435(1)(c) (2003), which allowed the trial court to double statutory maximum sentences for drug offenses that occurred in certain locations.

Richter appeals his sentence, arguing that under his interpretation of the statutory language, this doubling did not apply to offenses within the school bus route stop zone. He also contends that his sentence violates due process under the reasoning in *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021), and that the former doubling statute was unconstitutionally vague. Finally, Richter argues, and the State concedes, that his offender score was miscalculated and the trial court erroneously imposed community custody supervision fees.

We reject Richter's statutory interpretation and constitutional arguments, but we agree that his offender score was miscalculated. Accordingly, we remand for the trial court to resentence Richter with a corrected offender score and to strike the supervision fees, but we otherwise affirm.

FACTS

In summer 2013, Richter sold methamphetamine to a confidential informant in a series of three controlled buys. Richter was arrested in August 2013, and officers found methamphetamine and drug paraphernalia in his vehicle. The State charged Richter with three counts of delivery of a controlled substance, all with an aggravating factor that the delivery occurred within 1,000 feet of a school bus route stop, and one count of possession of a controlled substance with intent to deliver.

The transportation manager and district safety officer for the Longview School District testified during Richter's trial. He explained that in order to create school bus route stops, he and other school district staff "determine where needs are for bus stops and then . . . create bus stops and assign buses to them." Verbatim Report of Proceedings (VRP) (Apr. 25, 2014) at 48. He also identified two bus stops that were close to the controlled buy location, and another witness identified the locations of the controlled buy and the bus stops on a map.

A jury convicted Richter of all charges and made special findings that the three deliveries of a controlled substance occurred within 1,000 feet of a school bus route stop.

A. Original Sentencing and First Resentencing

The trial court calculated Richter's offender score as 28 due to multiple prior felony convictions and juvenile offenses. Thus, it imposed an exceptional sentence under the free crimes aggravator in RCW 9.94A.535(2)(c), which authorizes exceptional sentences when a defendant's high offender score would allow some of their current offenses to go unpunished. The trial court sentenced Richter to an exceptional upward sentence of 168 months for each of his four convictions, running concurrently.

The trial court added three 24-month school bus route stop zone enhancements for Richter's three delivery convictions, running consecutively to the other sentences and each other. The total confinement imposed was 240 months, which was double the statutory maximum sentence for each of Richter's crimes. *See* RCW 69.50.401(2)(b).[1] The trial court justified a doubling of the statutory maximum sentence based on former RCW 69.50.408 (2003), which authorized such doubling on drug offenses if there were prior drug-related convictions on a defendant's record. Richter had several drug possession convictions on his record at the time of his first sentencing.

Richter appealed his sentence, and we held that his three 24-month school bus route stop zone enhancements were not required to run consecutively to one another. *State v. Richter*, No. 46297-4-II, slip op. at 14 (Wash. Ct. App. Jan. 12, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2046297-4-II%20Unpublished%20Opinion.pdf; *see also State v. Conover*, 183 Wn.2d 706, 718-19, 355 P.3d 1093 (2015). We remanded for resentencing. *Richter*, No. 46297-4-II, slip op. at 23.

At Richter's first resentencing, the trial court adjusted his three 24-month school bus route stop enhancements to run concurrently to each other. The total confinement imposed was 192 months.

B. Second Resentencing

In 2021, the Washington Supreme Court held in *Blake* that Washington's strict liability drug possession statute, former RCW 69.50.4013(1) (2017), violated due process and was

[1] Sections of chapter 69.50 RCW have been amended since 2013. If the amendment did not affect the language of the section cited in this opinion, we cite to the current version of the statute.

therefore void. 197 Wn.2d at 174. As a result of this decision, the trial court vacated Richter's prior simple possession convictions and recalculated his offender score as 24. During resentencing, the State noted that Richter's offender score should be 24 rather than 23 because he "has a prior juvenile sex [offense] that counts as two points on these drug [convictions]." VRP (May 13, 2021) at 53.

Because Richter no longer had any prior drug convictions on his record, former RCW 69.50.408, which the trial court had previously used to double Richter's statutory maximum sentence, no longer applied. Instead, at this resentencing the trial court relied on former RCW 69.50.435(1)(c), the school bus route stop zone statute, to justify doubling Richter's statutory maximum sentence from 120 months to 240 months. When interpreting former RCW 69.50.435(1), the trial court acknowledged defense counsel's argument that this statute should not be read to allow doubling of the statutory maximum sentence in these circumstances. But the trial court ultimately determined that defense counsel's reading of the statute rendered much of the statutory language meaningless.

At this second resentencing, the trial court sentenced Richter to another exceptional sentence of 144 months for each of his three delivery convictions and 120 months on his possession with intent to deliver conviction, all running concurrently. In addition, it imposed three 24-month school bus route stop zone enhancements, running concurrently to each other. The total confinement imposed was 168 months. As in Richter's other sentencing hearings, the trial court justified the exceptional sentence under the free crimes aggravator. RCW 9.94A.535(2)(c). The trial court explained that the overall decrease in sentence was due to Richter's now lower offender score of 24 and his demonstrated efforts toward rehabilitation while imprisoned. The trial court

also stated that it would "not impos[e] any other fees or costs" outside of the required $500 victim assessment.

Richter appeals his sentence.

ANALYSIS

I. INTERPRETATION OF FORMER RCW 69.50.435(1)

RCW 69.50.401(1) provides that "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." We apply the relevant sentencing statutes in effect at the time Richter committed the offenses at issue. *State v. Schmidt*, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001). The version of former RCW 69.50.435(1) in effect in 2013 allowed the statutory maximum sentence for RCW 69.50.401 violations to be doubled if the violations occurred in sufficient proximity to certain places, such as schools and school bus route stops. Specifically, former RCW 69.50.435(1) in effect in 2013 provided:

> Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 . . .
>
> . . . .
>
> (c) Within one thousand feet of a school bus route stop designated by the school district;
>
> . . . .
>
> (i) At a civic center designated as a drug-free zone by the local governing authority; or
>
> (j) Within one thousand feet of the perimeter of a facility designated under (i) of this subsection, if the local governing authority specifically designates the one thousand foot perimeter
>
> *may be punished* by a fine of up to twice the fine otherwise authorized by this chapter . . . or *by imprisonment of up to twice the imprisonment otherwise authorized by this chapter* . . . or by both such fine and imprisonment.

(Emphasis added.) The italicized language begins on a new line in this version of the statute. Former 69.50.435(1).

Richter argues that under the plain language of former RCW 69.50.435(1), statutory maximum sentence doubling only applied to the locations listed in (j), and the trial court erred when it doubled the statutory maximum for his sentence based on earlier subsection (c). The State contends that such a reading of the statute would produce an absurd result because grammatically, there would be no purpose to listing locations (a) through (i) if the doubling language did not apply to those subsections. We agree with the State.

A. Relevant Principles of Statutory Interpretation

We review questions of statutory interpretation de novo. *State v. Wolvelaere*, 195 Wn.2d 597, 600, 461 P.3d 1173 (2020). The primary goal of statutory interpretation is to "determine the legislature's intent." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The plain language of the statute, the context of the statute, and the "'statutory scheme as a whole'" are all the "'surest indication'" of legislative intent. *Wolvelaere*, 195 Wn.2d at 600 (internal quotation marks omitted) (quoting *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010)). If, after an analysis of those sources, the plain meaning of the statute is unambiguous, we apply that meaning. *Id*. If there is more than one reasonable interpretation, the statute is "ambiguous and the court 'may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.'" *State v. Brown*, 194 Wn.2d 972, 976, 454 P.3d 870 (2019) (quoting *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)).

For statutes that contain lists, we generally apply the last antecedent rule, which posits that modifying or qualifying language usually modifies the phrase right before it—the last antecedent. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). If there is a comma before the qualifying language, we generally recognize the comma as evidence that the qualifier is intended

to apply to all of the previously listed antecedents "'instead of only the immediately preceding one.'" *Id*. (internal quotation marks omitted) (quoting *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006)). Semicolons are stronger indicators of separation than commas. *Dep't of Lab. & Indus. v. Slaugh*, 177 Wn. App. 439, 448, 312 P.3d 676 (2013).

However, we do not apply the last antecedent rule if "applying the rule would result in an absurd or nonsensical interpretation." *Bunker*, 169 Wn.2d at 578. In general, "[s]tatutes should be construed to effect their purpose and unlikely, absurd[,] or strained consequences should be avoided." *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). Additionally, all language in a statute must be given effect, "'with no portion rendered meaningless or superfluous.'" *Spokane County v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 458, 430 P.3d 655 (2018) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)). A syntactically incorrect result weighs against an offered statutory interpretation. *Berrocal v. Fernandez*, 155 Wn.2d 585, 592, 121 P.3d 82 (2005).

If all of these principles do not "resolve [an] ambiguity," the rule of lenity applies in criminal cases, requiring that we "interpret [an] ambiguous statute in favor of the defendant." *State v. Lake*, 13 Wn. App. 2d 773, 777, 466 P.3d 1152 (2020).

B. Plain Language and Grammar in Former RCW 69.50.435(1)

Richter relies on the punctuation of former RCW 69.50.435(1) to argue that the statute was ambiguous as to whether the statutory maximum sentence doubling language appearing in subsection (j) applied to subsections (a) through (j), or only to subsection (j).

There were semicolons separating each location in former RCW 69.50.435(1)'s list, indicating distinct separation between them. Additionally, there was no comma between the

location listed in subsection (j) and the doubling language that followed. Former RCW 69.50.435(1). Application of the last antecedent rule would usually mean that the doubling language only applied to subsection (j), which mentions civic centers and locations designated in subsection (i). *Id.* However, when the legislature adopted the version of the statute in effect in 2013, it put the doubling language on a new line after the location listed in subsection (j). *Id.* This new line, like a comma, suggests that the doubling language applied to all antecedents, not just subsection (j).

Moreover, if the doubling language did not apply to former RCW 69.50.435(1)(a) through (j), then section (1) as a whole did not contain a grammatically correct sentence. Without the doubling language found after subsection (j), the former statute as it relates to the school bus route stop zone reads, "Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance . . . (c) [w]ithin one thousand feet of a school bus route stop designated by the school district[.]" Former RCW 69.50.435(1). It is highly unlikely that the legislature intended subsections (a) through (i) not to make grammatical sense. Without "may be punished by . . . imprisonment of up to twice the imprisonment otherwise authorized by this chapter," the language in former RCW 69.50.435(1)(a) through (i) was nonsensical and had no purpose, and we must assume the legislature intended all of its language to have meaning. *Spokane County*, 192 Wn.2d at 458.

Richter asserts that in the context of the statutory scheme as a whole, his interpretation does not produce an absurd result; the statute still had purpose because controlled substance violations in all locations in subsections (a) through (j) were subject to a mandatory 24-month sentencing enhancement under RCW 9.94A.533(6). But this would require us to hold that the only purpose

for former RCW 69.50.435(1)(a) through (i) was to provide a list of locations where controlled substance violations incurred consequences from an entirely different and unreferenced statute. This is still an absurd result.

The State's interpretation of former RCW 69.50.435(1) is also consistent with *State v. Bennett*, 168 Wn. App. 197, 209, 275 P.3d 1224 (2012). Although Richter's interpretation was not specifically argued in *Bennett*, we concluded in the opinion that former RCW 69.50.435(1)'s maximum sentence doubling applied to controlled substance violations occurring within 1,000 feet of a school bus route stop. *Id.*

In sum, we construe statutes to avoid absurd results, and Richter's reading of former RCW 69.50.435(1) would be grammatically nonsensical. Therefore, it is not a reasonable alternative interpretation that creates ambiguity. Under the plain language of the statute, the trial court had discretion to apply the doubling language in former RCW 69.50.435(1) to raise Richter's statutory maximum sentence for his delivery convictions from 120 months to 240 months, thereby allowing the trial court to set a sentence of 168 months of total confinement.

C. Legislative History

Even if we were to find some ambiguity in the legislature's drafting, the legislative history of former RCW 69.50.435(1) reveals legislative intent that the statutory maximum sentence doubling applied to controlled substance violations committed in all locations in former RCW 69.50.435(1)(a) through (j), including those within 1,000 feet of a school bus route stop.

A prior version of RCW 69.50.435, adopted in 1991, contained several of the locations also in later versions of the statute, but the locations were separated by commas, and all were

clearly subject to the statutory maximum sentence doubling. This prior list included violations occurring within 1,000 feet of a school bus route stop:

> Any person who violates RCW 69.50.401(a) by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance . . . to a person in a school or on a school bus or within one thousand feet of a school bus route stop designated by the school district or within one thousand feet of the perimeter of the school grounds, in a public park or on a public transit vehicle, or in a public transit stop shelter may be punished by . . . imprisonment of up to twice the imprisonment otherwise authorized by this chapter.

Former RCW 69.50.435(a) (1991). In 1994, the Supreme Court applied this language and concluded that "RCW 69.50.401 enumerates the maximum penalties, in fines and imprisonment, for certain drug crimes, and [former] RCW 69.50.435 [(1991)] allows those penalties to be doubled when the crimes are committed in specified locations." *State v. Silva-Baltazar*, 125 Wn.2d 472, 476, 886 P.2d 138 (1994).

Then in 1996, the legislature amended the statute by allowing municipalities to designate certain new drug-free zones as qualifying locations on the statutory list. Former RCW 60.50.435(a) (1996). The 1996 bill report stated, "Publicly-owned and publicly-operated civic centers designated by a local governing authority as drug-free zones are *added as a new category to the current list of places where the penalties for drug-related crimes are doubled*. Local governing authorities may also designate a 1,000 foot perimeter around such facilities as drug-free zones." FINAL B. REP. ON SUBSTITUTE S.B. 5140, 54th Leg., Reg. Sess. (Wash. 1996) (emphasis added).

In 1996, the legislature began separating each location on the list with semicolons and numbered them (1) through (9).[2] Former RCW 69.50.435(1) (1996). The numbers in the statutory list of locations were later changed to letters (a) through (j). Former RCW 69.50.435(1) (2003). Nothing in the 1996 bill report, when the relevant amendments occurred, indicates the legislature intended to eliminate the doubling option for all but the newly-added civic centers. *See* FINAL B. REP. ON SUBSTITUTE S.B. 5140. Instead, the bill report demonstrates legislative intent that the new municipally-defined "drug-free civic centers" listed in former RCW 69.50.435(1)(j) (2003) were meant as additions to a list of existing locations for which maximum sentences could be doubled on controlled substances violations. *Id.* Thus, even if the statute were ambiguous, the legislative history makes it clear that the legislature intended former RCW 69.50.435(1)(a) through (j) to provide a list of multiple locations where the statutory maximum penalties for drug-related crimes could be doubled.

In sum, the trial court did not err when it applied former RCW 69.50.435(1)(c) (2003) to impose a sentence of up to double the statutory maximum sentence.

II. DUE PROCESS

A. Strict Liability

Richter contends that the application of former RCW 69.50.435(1)(c) violated due process under *Blake* because the statute authorized courts to double statutory maximum sentences for drug violations within 1,000 feet of a school bus route stop without requiring proof that the defendant

[2] The 1996 version is otherwise identical to the later 2003 version of the statute except for the 1997 addition of a last location, "In a public housing project designated by a local governing authority as a drug-free zone." Former RCW 69.50.435(6) (1997).

knew the violation occurred within this zone. 197 Wn.2d at 186. The State responds that *Blake*'s reasoning only applies to passive nonconduct, and Richter's affirmative criminal conduct of selling methamphetamine distinguishes this case. We review alleged due process violations de novo. *In re Welfare of M.B.*, 195 Wn.2d 859, 867, 467 P.3d 969 (2020).

In *Blake*, the Supreme Court declared Washington's statute criminalizing simple possession of a controlled substance to be unconstitutional because the statute allowed conviction even if the possession was unknowing. 197 Wn.2d at 186. The court explained, "[D]ue process clause protections generally bar state legislatures from taking *innocent and passive* conduct with no criminal intent at all and punishing it as a serious crime." *Id.* at 173 (emphasis added). The court emphasized that "active *trafficking* in drugs . . . is not innocent conduct. States have criminalized knowing drug possession nationwide, and there is plenty of reason to know that illegal drugs are highly regulated. The legislature surely has constitutional authority to regulate drugs through criminal and civil statutes." *Id.* at 183.

The *Blake* court then distinguished the unconstitutional simple possession statute from other valid strict liability crimes. *Id.* at 184. The difference hinges on whether the statutes penalize conduct or passive and innocent nonconduct. *Id.* at 195. For example, rape of a child is a valid strict liability crime that involves affirmative conduct. *Id.* at 194; *see also State v. Johnson*, 173 Wn.2d 895, 902, 270 P.3d 591 (2012). Moreover, RCW 2.48.180(2)(a), a statute punishing the unlawful practice of law, is a valid strict liability statute because it requires the affirmative conduct of practicing the law illegally, even though it applies regardless of ignorance that such conduct constituted the practice of law. *Blake*, 197 Wn.2d at 194; *see also State v. Yishmael*, 195 Wn.2d

155, 172-77, 456 P.3d 1172 (2020). It is the "intentional activity" of the practice that matters. *Blake*, 197 Wn.2d at 194.

The conduct addressed in former RCW 69.50.435(1) is "manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance." The statute imposed increased consequences for affirmative conduct, not the kind of passive nonconduct that the *Blake* court declared to be innocent. The *Blake* court specifically noted that "*trafficking* in drugs . . . is not innocent conduct," and the court explained that due process gives legislators wide latitude in their authority to regulate such conduct. 197 Wn.2d at 183. Here, although Richter may not have known that he was within a school bus route stop zone, he does not dispute that he intended to sell methamphetamine, and the delivery amounted to affirmative conduct. Therefore, the *Blake* court's reasoning does not apply to this case or to former RCW 69.50.435(1) more generally.

The application of former RCW 69.50.435(1)(c) to double statutory maximum sentences on certain drug trafficking violations did not punish unknowing innocent conduct, so it did not violate due process under *Blake*.

B. Vagueness

Richter argues that former RCW 69.50.435(1)(c) is unconstitutionally vague. Specifically, he contends that legal standards for the definition of "school bus route stops" have changed such that defendants are no longer reasonably able to ascertain where the school bus route stops are located. The State replies that despite these changes, Richter still had reasonably available means to seek out the location of school bus route stops, and former RCW 69.50.435(1)(c) was not unconstitutionally vague under applicable case law.

"A statute is unconstitutionally vague if . . . the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct it forbids." *State v. Becker*, 132 Wn.2d 54, 61, 935 P.2d 1321 (1997) (plurality opinion). In *State v. Coria*, the Supreme Court held that former RCW 69.50.435(1)(c) (1991) was not unconstitutionally vague. 120 Wn.2d 156, 159, 839 P.2d 890 (1992). In response to concerns about a defendant's ability to ascertain the location of school bus route stops, the majority in *Coria* concluded that "information regarding the locations of the stops was available through such means as observing the gathering of schoolchildren waiting for their school buses, or contacting local schools or the director of transportation for the school district." *Id.* at 167. The court was unconcerned with the unlikelihood that someone manufacturing or dealing drugs would take these steps to ascertain the location of school bus route stops, so long as there were reasonably available means for doing so. *Id.* ("It may be unrealistic, of course, to expect drug dealers to take these steps, but that is irrelevant to the question whether the statute is unconstitutionally vague.").

At the time *Coria* was decided, the law required school bus route stops to be "designated on maps submitted by school districts to the office of the superintendent of public instruction." Former RCW 69.50.435(f)(3) (1991). A school bus route stop under the current statutory scheme is now simply defined as "a school bus stop as designated by a school district." RCW 69.50.435(6)(c). Although the *Coria* court briefly discussed the availability of these school bus route stop maps to the public, it ultimately concluded that "[i]n any case, the defendants did not need to gain access to the master map in order to have determined the locations of the school bus route stops involved here because that information was readily available through other means," including those listed above. 120 Wn.2d at 168. Though standards have changed for defining

"school bus route stops"—school districts are no longer legally required to submit a map with the bus stop locations to the state superintendent—these changes do not render former RCW 69.50.435(1)(c) unconstitutional.

Based on *Coria*, other cases have held that the school bus route stop zone sentencing enhancement is not unconstitutionally vague across a broad range of situations. This court held that the school bus route stop enhancement was not vague where the school bus route stop was an unmarked public transit stop and public buses picked up children for transportation to school. *State v. Davis*, 93 Wn. App. 648, 652-53, 970 P.2d 336 (1999). Division One confirmed the constitutionality of a school bus route stop enhancement where a defendant was unaware of the school bus stop and conducted the drug offense by a nearby tavern. *State v. Johnson*, 116 Wn. App. 851, 863, 68 P.3d 290 (2003). Division Three concluded that a transportation director's designation of school bus stops, regardless of submission to the school board, was sufficient for the school bus route stop enhancement to apply. *State v. Sanchez*, 104 Wn. App. 976, 979, 17 P.3d 1275 (2001).

Richter relies on *Becker*, 132 Wn.2d at 63, and *State v. Akers*, 136 Wn.2d 641, 965 P.2d 1078 (1998) (per curiam), but those cases are distinguishable. In *Becker*, a four-justice plurality of the Supreme Court reasoned under the specific facts of that case that the defendant's drug trafficking within 1,000 feet of a building containing a youth education program could not be subject to former RCW 69.50.435(1)(d) (1996), because there was no viable way for someone of ordinary intelligence to determine the program was actually a school. 132 Wn.2d at 63. The general equivalency degree program was so nontraditional in nature that there was a "complete lack of information available regarding [its] status as a school." *Id.* at 62. Classes were held in an office

building where the only indication of scholastic activity was a sign describing the school as a "'Youth Education Program.'" *Id.* at 56, 58-59. Additionally, the school was not listed as a school by the superintendent's office, and one could not reliably determine the school's existence by calling the school district office. *Id.* at 58-59, 63. Then, in *Akers*, the Supreme Court reiterated this reasoning in a similar case involving the same youth education program in a per curiam opinion adopted by the entire court. 136 Wn.2d at 642.

Richter's case is unlike *Becker* and *Akers* because those defendants were not able to reasonably ascertain the location of the nontraditional school through objective means like calling the district office or observing schoolchildren. Richter, in contrast, had other reasonably available means identified in *Coria* to determine the location of school bus route stops within 1,000 feet of his drug offenses. We are not permitted to ignore *Coria*'s plain holding. *E.g.*, *Sluman v. State*, 3 Wn. App. 2d 656, 696, 418 P.3d 125 (2018).

The doubling of statutory maximum sentences for controlled substances violations within 1,000 feet of a school bus route stop is not unconstitutionally vague.

III. OFFENDER SCORE

Richter argues, and the State concedes, that the trial court erred in recalculating Richter's offender score as 24 instead of 23.

Former RCW 9.94A.510 (2002) assigned standard sentencing ranges based in part on the offender score. RCW 9.94A.530(1). Former RCW 9.94A.525(13) (2011) stated, "[I]f the present conviction is for a drug offense and the offender has a criminal history that includes a sex offense . . . count three points for each adult prior felony drug offense conviction and two points for each juvenile *drug* offense." (Emphasis added.)

Richter's offender score calculation contained an error. At Richter's resentencing in 2021, the State told the trial court the wrong offender store, claiming that two points should be added to Richter's offender score based on a prior juvenile *sex* offense, but former RCW 9.94A.525(13) called for two points for each juvenile *drug* offense where the offender has a prior sex offense. Thus, Richter's offender score was calculated as 24 on resentencing. The State now concedes that Richter's prior juvenile sex offense should have added only one point, and Richter's offender score should have been 23.

We agree. The State does not argue here that the erroneous offender score was harmless. We therefore remand for resentencing based on a proper calculation of Richter's offender score as 23.

IV. COMMUNITY CUSTODY SUPERVISION FEES

Richter argues that community custody supervision fees were inadvertently imposed. The State concedes this issue because the trial court expressly stated it would not impose fees that were not mandatory. Community custody supervision fees are not mandatory. *See* former RCW 9.94A.703(2)(d) (2009). It appears the trial court inadvertently imposed these fees, and the trial court should strike the community custody supervision fees on remand.

CONCLUSION

We accept the State's concessions and remand for the trial court to strike the supervision fees and resentence Richter using his correct offender score, but we otherwise affirm.

Glasgow, C.J.

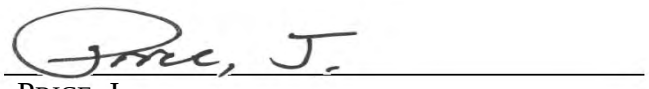
I concur:

Lee, J.

PRICE, J. (concurring) — I agree with the majority's well-reasoned opinion. I also agree with its decision to remand for resentencing even though Richter's offender score changed only slightly from 24 to 23. *See* majority at 16-17. But I agree to this portion of the opinion *solely* because the issue was conceded by the State. While I acknowledge there is arguably conflicting case law on this issue, there is a basis to hold against remanding for resentencing when only a slight change in the offender score does not change the standard range. But the State makes no such argument here.

With the State's decision to concede the issue, I do not disagree with the majority's decision to accept this concession and remand for resentencing.

I respectfully concur.



PRICE, J.

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