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Supreme Court No. 97624-4
(COA No. 51201-7-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY GLEN HOUCK,

Appellant.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 3

1. This Court should accept review of this important issue of first impression because the Court of Appeals' misinterpretation of the Medical Use of Cannabis Act (MUCA) leaves individuals on community custody without the ability to access their medication. 3

a. Humanitarian concerns compelled Washington voters to legalize the use of medical marijuana. 3

b. Contrary to our legislature's directive, the Court of Appeals' interpretation of medical marijuana legislation permits courts to subject individuals on community custody to arrest, prosecution, or other criminal sanctions if they use medical marijuana. 6

c. The Court of Appeals' decision implicates individuals on community custody who need medical marijuana to alleviate their chronic illnesses. 12

2. This Court should also accept review because the Court of Appeals' opinion upholds a condition of community custody that is unconstitutionally vague. 14

E. CONCLUSION 16

TABLE OF AUTHORITIES

Washington Cases
Duke v. Boyd, 133 Wn.2d 80, 942 P.2d 351 (1997) 7
State v. Delgado, 148 Wn.2d 723, 63 P.3d 792 (2003) 10
State v. Irwin, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015.............. 14
State v. James-Buhl, 190 Wn.2d 470, 415 P.3d 234 (2018) 6
State v. K.L.B., 180 Wn.2d 735, 328 P.3d 886 (2014)............................. 10
State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014) 6
State v. Reis, 183 Wn.2d 197, 251 P.3d 127 (2015) 4

Statutes
RCW 69.50.204(c)(22). 5
RCW 69.51A.005(1)(b) 4
RCW 69.51A.005(2)(a) 7, 9
RCW 69.51A.005(2)(b) 7
RCW 69.51A.010(19)(b) 9
RCW 69.51A.055(1)(a) 8
RCW 69.51A.130(1).. 10
RCW 69.51A.230(9)(c) 10
RCW 9.94A.010.. 12
RCW 9.94A.703(2)(c) 4, 13

Constitutional Provisions
U.S. CONST. XIV 14

Court Rules
RAP 13.4(b)(3) 1, 2, 16
RAP 13.4(b)(4) 1, 2, 14

Federal Cases
Conant v. Walters, 309 F.3d 629 (9th Cir. 2002) 5

Other Sources
About the Epidemic: The U.S. Opioid Epidemic, U.S. Dep't of Health & Human Serv 13
Drug Enforcement Agency, *Drug Fact Sheet: Marijuana* 13
Matrix Global Advisors, LLC, *Health Care Costs from Opioid Abuse: A State-by-State Analysis* (Apr. 2015)... 13
Medical Frequently Asked Questions, Norml... 5
Medical Marijuana: History in Washington, Wash. St. Dep't of Health ... 3
U.S. Dep't of Health & Human Serv., *The Opioid Epidemic by the Numbers* 13

Legislative Authorities

Laws of 2007, ch. 307 § 1 4
Laws of 2015, ch. 4, 2d Spec. Sess. 4
Laws of 2015, ch. 70 4

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(3) and RAP 13.4(b)(4), Anthony Houck, petitioner here and appellant below, asks this Court to accept review of a published Court of Appeals decision, issued on August 6, 2019, affirming several of his conditions of community custody. A copy of the Court of Appeals' opinion is attached to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. Citing humanitarian concerns, the people of our state voted in favor of legalizing the use of medical marijuana for individuals suffering from a range of debilitating conditions. In turn, our Legislature enacted legislation, the Washington Medical Use of Cannabis Act (MUCA), to ensure that individuals suffering from these conditions would not be subjected to arrest, prosecution, or other criminal sanctions for their use of medical marijuana, so long as their use of medical marijuana adhered to certain conditions. However, the Sentencing Reform Act (SRA) contains language that, if left unexamined in conjunction with MUCA, seemingly permits courts to impose conditions that forbid (and can ultimately punish) individuals for their use of medical marijuana—even if their use complies with the requirements of MUCA.

a. Should this Court accept review because the Court of Appeals' decision fails to properly interpret MUCA? RAP 13.4(b)(4).

b. Should this Court accept review in order to resolve this important issue of first impression? RAP 13.4(b)(4).

c. Should this Court accept review because the Court of Appeals' interpretation (1) permits individuals on community custody to use opiates, which are highly addicting and whose use can be fatal, yet (2) forbids individuals on community custody from using medical marijuana, which is not highly addicting and whose use alone has never caused any fatalities? RAP 13.4(b)(4).

2. Conditions of community custody cannot be unconstitutionally vague. To comport with both the federal and Washington constitutions, conditions of community custody must (1) provide ordinary people fair warning of proscribed conduct; and (2) have standards that are definite enough to protect against arbitrary enforcement. Here, the court imposed a condition of community custody forbidding Mr. Houck from associating with "known" drug users or sellers, and the Court of Appeals affirmed.

Should this Court accept review to assess whether this condition is unconstitutionally vague because it is unclear what constitutes a "known" drug user and because the condition fails to provide standards definite enough to protect against arbitrary enforcement? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

After a jury convicted Anthony Houck of two crimes,[1] the sentencing court imposed several drug related conditions of community custody. CP 156. The conditions forbid Mr. Houck from "associating with known drug users/sellers except in [treatment] settings" and from using or possessing controlled substances except pursuant to lawfully issued prescriptions. CP 154, 162.

D. ARGUMENT

1. This Court should accept review of this important issue of first impression because the Court of Appeals' misinterpretation of the Medical Use of Cannabis Act (MUCA) leaves individuals on community custody without the ability to access their medication.

a. Humanitarian concerns compelled Washington voters to legalize the use of medical marijuana.

In 1998, the people of Washington voted in favor of I-692 (MUCA), an initiative that grants people with terminal or debilitating illnesses access to marijuana without fear of criminal or civil consequences.[2] Because Washington voters recognized that marijuana

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[1] A jury convicted Mr. Houck of one count of unlawful manufacturing of a controlled substance and one count of unlawful possession of a controlled substance with intent to deliver with a school zone enhancement. CP 115, 117-18, 150-151;

[2] https://www.sos.wa.gov/elections/initiatives/text/i692.pdf; *see also Medical Marijuana: History in Washington*, Wash. St. Dep't of Health,

benefits individuals with conditions ranging from multiple sclerosis to epilepsy, the people found that "humanitarian compassion" necessitates that individuals with such conditions lawfully exercise their own judgment and use marijuana if needed to treat their conditions. RCW 69.51A.005(1)(b), (2).

Our legislature later crafted legislation to clarify the law on medical marijuana and ensure that the people's intent would come into fruition. Laws of 2007, ch. 307 § 1, 2. The legislature has amended the MUCA since this time. *See State v. Reis*, 183 Wn.2d 197, 205-07, 251 P.3d 127 (2015) (discussing legislative amendments to MUCA from the time period ranging from 2007 until April 2011); *see also* Laws of 2015, ch. 4, 2d Spec. Sess.; Laws of 2015, ch. 70 (legislative amendments to MUCA since 2015).

Per the Sentencing Reform Act (SRA), courts may impose conditions of community custody that forbid individuals from "possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." RCW 9.94A.703(2)(c). The sentencing court used this directive to issue a condition of community custody that forbids Mr.

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https://www.doh.wa.gov/YouandYourFamily/Marijuana/MedicalMarijuana/LawsandRules/HistoryinWashington (last visited May 30, 2018).

Houck from using and possessing controlled substances except pursuant to lawfully issued prescriptions. CP 162.

While, at first blush, it may appear as if this condition of community custody allows Mr. Houck to use medical marijuana, it does not. This is because pursuant to federal law, doctors cannot lawfully issue a prescription for medical marijuana. Instead, doctors may only issue an "authorization" for medical marijuana use which details the doctor's belief that the patient will benefit from marijuana use. *See Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (detailing the federal policy prohibiting doctors from issuing prescriptions for medical marijuana and also describing a doctor's first amendment right to express his or her belief that marijuana use may benefit the patient); *see also Medical Frequently Asked Questions*, Norml.[3] Moreover, marijuana is still categorized as a controlled substance. RCW 69.50.204(c)(22).

For the reasons stated below, the condition that prohibits Mr. Houck from using controlled substances except with a lawful prescription unlawfully prohibits him from using medical marijuana. The Court of Appeals misinterpreted MUCA, and consequently, it affirmed this

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[3] http://norml.org/marijuana/medical/item/medical-frequently-asked-questions (last visited May 30, 2018). T

unlawful condition of community custody. This Court should accept review.

b. Contrary to our legislature's directive, the Court of Appeals' interpretation of medical marijuana legislation permits courts to subject individuals on community custody to arrest, prosecution, and other criminal sanctions if they use medical marijuana.

State law shields medical marijuana users from arrest or criminal sanctions so long as (1) the individuals strictly adheres to the requirements provided in RCW 69.51A.040; and (2) the individual is not being actively supervised by a corrections agency of department that has previously determined, pursuant to a procedure, that medical marijuana use is inconsistent with the individual's supervision. Because the Court of Appeals misinterpreted this directive, it erred in arriving at a contrary conclusion. Op. at. 10.

Several principles guide this Court's analysis in determining the meaning of a statute. First, this Court must examine the plain meaning of the statute. *State v. K.L.B.*, 180 Wn.2d 735, 739, 328 P.3d 886 (2014). To determine the plain meaning of the statute, this Court examines the plain meaning of the text within the statute, the context of the term or phrase at issue, and the statutory scheme as a whole. *Budik*, 173 Wn.2d at 733; *Engel*, 166 Wn.2d at 579; *State v. James-Buhl*, 190 Wn.2d 470, 474, 415 P.3d 234 (2018). When the language of a statute is plain, this Court must

assume the legislature "meant exactly what it said and apply the statute as written." *HomeStreet, Inc. v. State Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (*quoting Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)). Where the language of a statute is susceptible to more than one interpretation, this Court applies the rule of lenity and interprets the statute in the defendant's favor. *State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015).[4]

With these principles in mind, RCW 69.51A.005(2)(a) plainly states that the legislature intended for "qualifying patients" who benefit from marijuana to not be subject to arrest, prosecution, or other criminal sanctions based on their use of medical marijuana. The statute reads as follows:

> Qualifying patients with terminal or debilitating medical conditions who, in the judgment of their health care professionals, may benefit from the medical use of marijuana, *shall not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences under state law based solely on their medical use of marijuana, notwithstanding any other provision of law.*

RCW 69.51A.005(2)(a) (emphases added).

RCW 69.51A.010(19) clarifies when a person is a "qualifying patient" subject to immunity from criminal sanctions or civil

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[4] Mr. Houck argued the rule of lenity also supported his interpretation, but the Court of Appeals did not reach the merits of this argument. Op. at 11.

consequences, and RCW 69.51A.040 reaffirms that such qualified patients are insulated from criminal consequences for their use of medical marijuana.

RCW 61.51A.040 provides:

> The medical use of marijuana in accordance with the terms and conditions of this chapter *does not constitute a crime* and a qualifying patient or designated provider *in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions* or civil consequences for possession, manufacture, or delivery of, or for possession with intent to manufacture or deliver, marijuana under state law.

(emphases added).

However, some limitations exist. RCW 61.51A.010(19)(a)(i)-(vii) details how an individual may meet the general criteria for becoming a "qualified patient," and RCW 61.51A.010(19)(b) carves out one exception. This exception reads as follows:

> "Qualifying patient" does not include a person *who is actively being supervised for a criminal conviction by a corrections agency or department that has determined that the terms of this chapter are inconsistent with and contrary to his or her supervision and all related processes and procedures related to that supervision.*

RCW 61.51A.010(19)(b) (emphasis added).

And RCW 69.51A.005(4) provides:

> Nothing in this chapter diminishes *the authority of correctional agencies and departments, including local governments or jails, to establish a procedure* for determining when the use of marijuana would impact community safety or the effective supervision of

> those on active supervision for a criminal conviction, nor does it create the right to any accommodation of any medical use of marijuana in any correctional facility or jail.

(emphasis added).

Additionally RCW 69.51A.055(1)(a) reads:

> (1)(a) The arrest and prosecution protections established in RCW 69.51A.040 may not be asserted in a supervision revocation or violation hearing by a person *who is supervised by a corrections agency or department, including local governments or jails, that has determined that the terms of this section are inconsistent with and contrary to his or her supervision.*

(emphasis added).

Read together, MUCA specifically provides that qualifying patients cannot be subject to arrest, prosecution, or other criminal sanctions. RCW 69.51A.005(2)(a). The only time a qualifying patient may be exempt from MUCA's protections is when a person is under active supervision by a corrections agency or Department that has determined, based on a procedure, that the person's use of medical marijuana is inconsistent with their supervision. RCW 69.51A.010(19)(b). Accordingly, courts do not possess the authority to impose conditions of community custody that can subject individuals to arrest, prosecution, criminal sanctions, or civil consequences based on their use of medical marijuana in conformity with MUCA.

Several other statutory principles support this conclusion. This Court adheres to the doctrine of *expresio unius est exclusio alterius*, which holds a Court must presume the Legislature's omission of a term used elsewhere within a statute was deliberate; therefore, the term cannot be "read in" to a portion of the statute that does not mention the term in question. *See State v. Delgado*, 148 Wn.2d 723, 728-29, 63 P.3d 792 (2003). Here, the term "court" explicitly appears in the MUCA in several sections. *See* RCW 69.51A.130(1), (2); RCW 69.51A.230(9)(c). However, the term "court" is conspicuously absent from the statutes that limit MUCA's protections. It therefore follows that the term "court" cannot be "read in" to other portions of the statute that fail to explicitly mention the term. Thus, courts possess no authority to impose conditions of community custody that can subject a qualified medical marijuana user to criminal sanctions.

This Court also adheres to the doctrine of *noscitur a socis*, "which provides that a single word in a statute should not be read in isolation;" instead, the words accompanying the term in question determine the term in question's meaning. *Roggenkamp*, 153 Wn.2d at 623. This doctrine is closely related to the established canon of *edjusem generis*: "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to

those objects enumerated by the preceding words." *see State v. K.L.B.*, 180 Wn.2d 735, 740-42, 328 P.3d 886 (2014).

RCW 69.51.A.005(4) and RCW 69.51A.055(1)(a) provide that "correctional agencies and departments, including local governments or jails" possess the authority to prohibit the use of medical marijuana, so long as these entities have previously determine that medical marijuana use is contrary to the individual's supervision. Because a court is dissimilar from a "jail" or "corrections agency," the term "local government" should not be interpreted to include courts. And even if the term "local government" could be interpreted to include a court, here, the sentencing court unlawfully failed to observe any procedure when it imposed a condition of community custody that subjects Mr. Houck to criminal sanctions for his use of medical marijuana. RCW 69.51A.005(4); RCW 69.51A.010(19)(b).

The Court of Appeals disagreed with this interpretation, believing only courts possessed the ability to impose this condition and opining supervising entities did not possess the power to restrict medical marijuana use. Op. at 10. However, in addition to MUCA's plain directive, RCW 9.94A.704(2) allows the Department of Corrections to establish *additional* conditions of community custody during the time the individual is on community custody.

Accordingly, the Court of Appeals' opinion fails to follow our legislature's directive.

c. The Court of Appeals' decision implicates individuals on community custody who need medical marijuana to alleviate their chronic illnesses.

Allowing qualified patients to use medical marijuana during community custody is consistent with both sound public policy and the purposes of the Sentencing Reform Act (SRA).

Permitting qualified patients to consume medical marijuana to treat their medical conditions is consistent with many of the purposes of the SRA. Some of the express purposes of the SRA include (1) promoting just punishments; (2) protecting the public; (3) using economic resources efficiently; and (4) reducing the risk of re-offense. RCW 9.94A.010.

Prohibiting offenders who suffer from conditions ranging from AIDS, multiple sclerosis, or Crohn's Disease from accessing needed medication would serve none of these purposes. Taking medication away from a sick person is inherently unjust. A qualified patient's private, personal, and lawful use of medical marijuana poses no threat to the public. In fact, prohibiting qualified patients on community custody or probation from accessing medication would require them to use other controlled substances to treat their conditions, like opiates. Notably, the

SRA allows individuals to use controlled substances, including opiates, during community custody if the individual has a prescription to use the substance. RCW 9.94A.703(2)(c).[5]

But the misuse of prescription opiates is a nationwide crisis, with thousands every year dying from overdose of prescription drugs and millions suffering from opioid use disorders. *See About the Epidemic: The U.S. Opioid Epidemic*, U.S. Dep't of Health & Human Serv;[6] *see also* U.S. Dep't of Health & Human Serv., *The Opioid Epidemic by the Numbers*.[7] In contrast, even the Drug Enforcement Agency acknowledges that no one in recorded history has ever overdosed from using marijuana. Drug Enforcement Agency, *Drug Fact Sheet: Marijuana.*[8] Moreover, by 2015, Washington spent close to a billion dollars in health care costs due to the opioid abuse. Matrix Global Advisors, LLC, *Health Care Costs from Opioid Abuse: A State-by-State Analysis* 2 (Apr. 2015).[9]

The humanitarian concerns our Legislature expressed in enacting MUCA are best expressed with a body of law that enables qualified

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[6] https://www.hhs.gov/opioids/about-the-epidemic/index.html#rx-abuse (last visited Jan. 30, 2018).

[7] https://www.hhs.gov/opioids/sites/default/files/2018-01/opioids-infographic.pdf (last visited Jan. 30, 2018).

[8] https://www.dea.gov/druginfo/drug_data_sheets/Marijuana.pdf (last visited Jan. 30, 2018).

[9] https://drugfree.org/wp-content/uploads/2015/04/Matrix_OpioidAbuse_040415.pdf.

medical marijuana users to use medical marijuana during periods of supervision.

This Court should accept review. RAP 13.4(b)(4).

2. This Court should also accept review because the Court of Appeals' opinion upholds a condition of community custody that is unconstitutionally vague.

This Court should accept review because the condition that prohibits Mr. Houck from associating with "known drugs users/sellers except in treatment settings" because the condition is unconstitutionally vague. The Due Process Clause of the Fourteenth Amendment and article I, section 3 of the Washington constitution forbid vague laws. U.S. CONST. amend. XIV; *Bahl*, 164 Wn.2d at 752-53. To comport with both the federal and Washington constitutions, laws must "(1) provide ordinary people fair warning of proscribed conduct; and (2) have standards that are definite enough to protect against arbitrary enforcement." *State v. Irwin*, 191 Wn. App. 644, 652-53, 364 P.3d 830 (2015). The same analysis applies when courts determine whether a community custody condition is unconstitutionally vague, and a community custody condition is unconstitutionally vague if it fails to do either. *Id*. at 652-53.

For example, in *Irwin*, the defendant was charged with second degree child molestation and second degree possession of depictions of minors engaged in sexually explicit conduct. 191 Wn. App. at 647. The

court imposed a community custody condition commanding the defendant not to "frequent areas where minor children are *known* to congregate as defined by the supervising CCO." *Id*. at 652 (emphasis added). The defendant challenged this condition, arguing it was unconstitutionally vague. *Id*. The defendant argued it was unclear if the condition included "public parks, bowling alleys, shopping malls, theaters, churches, hiking trails, and other public places where there may be children." *Id.* at 654.

In *Irwin*, the Court of Appeals struck this condition as void for vagueness under both prongs of the vagueness analysis. *Id*. at 654-55. The condition failed the first prong because it did not give ordinary people sufficient notice to understand what conduct was prohibited, as it was unclear what exactly constituted an area where children are "known" to congregate. *Id*. at 655. The court also found that allowing the CCO to determine locations "where children are known to congregate" would leave the condition vulnerable to arbitrary enforcement, which would "render the condition unconstitutional under the second prong of the vagueness analysis." *Id*. at 655.

Like in *Irwin*, the condition that prohibits Mr. Houck from associating with "known drug users/sellers except in treatment settings" is unconstitutionally vague and subject to arbitrary enforcement. This condition fails the first prong of the vagueness test because it is unclear

what exactly constitutes a "*known* user or seller of illegal drugs." Must it be "known" to Mr. Houck that a person is a "known user or seller of illegal drugs", or must it be "known" to Mr. Houck's CCO? Or, must the community share the collective knowledge that a person is a "known user or seller of illegal drugs?" Because this condition fails to give Mr. Houck any sort of warning as to what exactly constitutes a "known drug user," the condition fails the first prong of the vagueness test.

This condition also fails the second prong of the vagueness analysis because it is subject to arbitrary enforcement. For example, a CCO could punish Mr. Houck for associating with a "known" drug user that was "known" to the CCO but not to Mr. Houck.

This Court should accept review. RAP 13.4(b)(3).

F. CONCLUSION

Based on the foregoing, Mr. Houck respectfully requests that this Court grant review.

DATED this 5th day of September, 2019.

Respectfully submitted,

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Washington State
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANTHONY GLEN HOUCK, Appellant.	No. 51201-7-II PUBLISHED OPINION

CRUSER, J. — Anthony Houck appeals the trial court's imposition of two community custody conditions and certain legal financial obligations (LFOs) following his convictions for unlawful manufacture of a controlled substance and unlawful possession of a controlled substance with intent to deliver. Houck argues that the trial court abused its discretion when it imposed a condition of community custody that prohibited him from associating with known drug users and sellers and erred by imposing a condition of community custody that prohibited possession or consumption of medical marijuana under the Medical Use of Cannabis Act, ch. 69.51A RCW. Houck also challenges the trial court's imposition of LFOs and interest provision.

We hold that the trial court's imposition of community custody conditions was proper, but that the $200 criminal filing fee and interest provision must be stricken. We also hold that the State bears the burden of demonstrating that Houck's deoxyribonucleic acid (DNA) has not previously been collected and remand for the trial court to consider whether the DNA collection fee should be imposed. Accordingly, we affirm in part and remand for further proceedings.

FACTS

A jury convicted Anthony Houck of unlawful manufacture of a controlled substance and unlawful possession of a controlled substance with intent to deliver. The trial court sentenced Houck to a term of confinement and community custody. The trial court imposed the following relevant community custody conditions:

> (B) While on community placement or community custody, the defendant shall: . . . (4) not consume controlled substances except pursuant to lawfully issued prescriptions; . . . .
> . . . .
> [x] have no contact with known drug users/sellers except in [treatment] setting.

Clerk's Papers (CP) at 152.

As a part of Houck's sentence, the trial court ordered Houck to pay the $500 crime victim penalty assessment, $200 criminal filing fee, and $100 DNA collection fee. The trial court waived interest on all fees until 90 days following his release from custody.

Houck appeals the trial court's imposition of the aforementioned community custody conditions, the criminal filing fee, the DNA collection fee, and the interest provision.

ANALYSIS

I. Community Custody Conditions

Houck challenges the community custody conditions prohibiting him from association with known drug users and sellers and prohibiting him from consuming controlled substances except pursuant to lawfully issued prescriptions. Houck argues that the condition prohibiting association with known drug users and sellers is unconstitutionally vague. He further argues that the trial court did not have lawful authority to impose the condition prohibiting him from consuming controlled substances except pursuant to lawfully issued prescriptions because the condition subjects him to

criminal sanctions if he possesses or consumes marijuana for medical purposes in violation of the Medical Use of Cannabis Act. We disagree.

A. Legal Principles

When a prison term is imposed for a felony drug offense, a sentencing court must impose an additional term of community custody. RCW 9.94A.701(3)(c).[1] "Washington sentencing courts are required to impose certain community custody conditions in specified circumstances and may impose others." *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); RCW 9.94A.703.

RCW 9.94A.703 prescribes community custody conditions that are mandatory, waivable, or discretionary. A court *may* impose a condition requiring an offender to refrain from direct or indirect contact with a specified class of individuals. RCW 9.94A.703(3)(b). Unless specifically waived by the court, the court *must* order an offender to refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions as part of any term of community custody. RCW 9.94A.703(2)(c).

B. Association With Known Drug Users and Sellers

Houck argues that the community custody condition barring him from associating with known drug users and sellers is unconstitutionally vague.

[1] RCW 9.94A.701(3)(c) states that a court shall sentence an offender to community custody for one year when the court sentences the person to the custody of the Department of Corrections (DOC) for a felony offense under ch. 69.50 or 69.52 RCW. Houck's offenses include two felony offenses under RCW 69.50.401(1) and (2)(b).

1. *Standard of Review and Principles of Law*

The due process vagueness doctrine requires that citizens have fair warning of proscribed behavior. U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3; *Bahl*, 164 Wn.2d at 752. A community custody condition that does not provide fair warning is unconstitutionally vague. *Id.* at 753. A community custody condition does not provide fair warning if (1) "it does not sufficiently define the proscribed conduct so an ordinary person can understand the prohibition" or (2) "it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement." *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018).

A community custody condition is valid if a person of ordinary intelligence can understand what behavior a condition forbids, given the context in which its terms are used. *State v. Hai Minh Nguyen*, 191 Wn.2d 671, 679, 425 P.3d 847 (2018). A sufficiently clear condition can survive a vagueness challenge "'notwithstanding some possible areas of disagreement.'" *Bahl*, 164 Wn.2d at 754 (quoting *Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693 (1990)). Additionally, it is not necessary that a condition provide "'complete certainty the exact point at which his actions would be classified as prohibited conduct.'" *Padilla*, 190 Wn.2d at 677 (internal quotation marks omitted) (quoting *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 239 P.3d 1059 (2010)).

We review a community custody condition for abuse of discretion and will reverse only if the condition is manifestly unreasonable. *Sanchez Valencia*, 169 Wn.2d at 791-92. A trial court necessarily abuses its discretion by imposing an unconstitutionally vague community custody condition. *Padilla*, 190 Wn.2d at 677. We do not presume that a community custody condition is constitutional. *Sanchez Valencia*, 169 Wn.2d at 793.

2. *"Known" Drug Users and Sellers*

Houck argues that the community custody condition that prohibits him from "associating with 'known drug users/sellers, except in treatment settings'" is unconstitutionally vague because it is unclear who must have knowledge that a person is a "known" drug user or seller. Appellant's Opening Br. at 6-8. Houck contends that because it is unclear who must have the knowledge that a person is a "known" drug user or seller, the condition is subject to arbitrary enforcement.

Houck relies on *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015), which held that a community custody condition that prohibits "frequenting areas where minor children are known to congregate, as defined by the supervising CCO" is unconditionally vague. *Id.* at 652, 655. First, the court concluded that areas where "'children are known to congregate'" is sufficiently broad to require clarification. *Id.* at 654. The number of possible places where children may congregate, such as "'public parks, bowling alleys, shopping malls, theaters, churches, [and] hiking trails'" is so extensive and wide ranging that an ordinary person may not know what places to avoid. *See Id.* at 654. Second, a condition that explicitly requires further definitions from community corrections officers (CCOs)[2] leaves the condition vulnerable to arbitrary enforcement. *Id.* at 655. Therefore, the court held that the condition failed under both prongs of the vagueness doctrine. *Id.*

But Division One of this court recently held that a community custody provision that prohibits offenders from associating with known "'users or sellers of illegal drugs'" is not unconstitutionally vague. *In re Pers. Restraint of Brettell*, 6 Wn. App. 2d 161, 169, 430 P.3d 677

[2] During a period of court-ordered community custody, an offender is under the supervision of the DOC. RCW 9.94A.704(1). The DOC, through its CCOs, are responsible for the supervision of sentenced offenders and monitoring sentence conditions. RCW 9.94A.030(4).

(2018). The *Brettell* court relied on *United States v. Vega*, 545 F.3d 743, 749 (9th Cir. 2008), where the Ninth Circuit rejected a vagueness challenge to a similar condition that prohibited the offender from associating "'with any member of any criminal street gang.'" 6 Wn. App. 2d at 170. The *Vega* court acknowledged that "'incidental contacts'—such as those [an offender would] fear he would be punished for inadvertently engaging in—do not constitute 'association.'" 545 F.3d at 746 (quoting *United States v. Soltero*, 510 F.3d 858, 866-67 (9th Cir. 2007)). The *Vega* court held that the condition was constitutional but that the condition could be improved by adding the term "known" to limit its reach to people *known by the defendant* to be gang members. *Brettell*, 6 Wn. App. 2d at 170 (citing 545 F.3d at 749-50).

We agree with *Brettell*. Here, the condition prohibiting association "with known drug users/sellers" is not unconstitutionally vague. CP at 152. The condition does not explicitly require further definition or clarification from a CCO and the terms "known drug users/sellers" effectively notify a person of ordinary intelligence who needs to be avoided. CP at 152. The term "known" qualifies that the condition prohibits the *offender's knowing* contact with drug users and sellers. *Brettell*, 6 Wn. App. 2d at 170; *Vega*, 545 F.3d at 749-50. By limiting the condition's reach to those known by the offender, the condition provides fair warning of proscribed conduct and meaningful guidance to protect against arbitrary enforcement.

Accordingly, we hold that the trial court properly exercised its discretion by prohibiting Houck from associating with known drug users and sellers during his term of community custody because the condition is not unconstitutionally vague.

C. Marijuana Condition

Houck next argues that the trial court exceeded its statutory authority when it imposed the community custody condition prohibiting Houck from possessing or consuming medical marijuana because the Medical Use of Cannabis Act "(1) divest courts of any authority to impose conditions of community custody or probation that can subject a qualified medical marijuana user to criminal sanctions; and (2) directs supervising entities, like the [DOC], to establish a procedure before imposing a condition of community custody or probation that prohibits a qualified patient from using medical marijuana." Appellant's Opening Br. at 12-13. He bases this argument on public policy and three canons of statutory interpretation: expressio unius est exclusio alterius, noscitur a socis, and edjusdem generis, each of which we discuss below.

1. *Standard of Review and Principles of Law*

A trial court lacks authority to impose a community custody condition unless authorized by the legislature. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013). We review a trial court's statutory authority to impose a particular community custody condition de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

RCW 9.94A.703 states as follows:

> When a court sentences a person to a term of community custody, the court *shall* impose conditions of community custody as provided in this section.
>
> . . . .
>
> (2) **Waivable conditions**. Unless waived by the court, as part of any term of community custody, the court shall order an offender to:
>
> . . . .
>
> (c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.

(Emphasis added.) The definition of "controlled substance" is "a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or board

rules." Former RCW 69.50.101(2)(d) (2013). Marijuana is listed as a schedule I controlled substance. RCW 69.50.204(c)(22).

The Medical Use of Cannabis Act did not implicitly or explicitly repeal the statutory classification of marijuana as a schedule I controlled substance. *State v. Atchley*, 142 Wn. App. 147, 164-65, 173 P.3d 323 (2007); *State v. Hanson*, 138 Wn. App. 322, 330, 157 P.3d 438 (2007). Doctors are prohibited from issuing prescriptions for medical marijuana and are merely allowed to issue an "authorization" for medical marijuana use. Former RCW 69.51A.030(2)(a) (2011); former RCW 69.50.308 (2013).

2. *Statutory Interpretation*

Houck points out that former "RCW 69.51A.005(2)(b) [(2011)] explicitly states that the legislature intended for 'qualifying patients' who benefit from marijuana to not be subject to arrest, prosecution, or other criminal sanctions based on their use of medical marijuana" and argues that former RCW 69.51A.040 (2011) "reaffirms that such qualified patients are insulated from criminal consequences for their use of medical marijuana." Appellant's Opening Br. at 10-11. However, he concedes that both former RCW 69.51A.005(4) (2011) and RCW 69.51A.055(1) limit this protection. The statutes provide in relevant part,

> The arrest and prosecution protections established in RCW 69.51A.040 may not be asserted in a supervision revocation or violation hearing by a person who is supervised by a corrections agency or department, including local governments or jails, that has determined that the terms of this section are inconsistent with and contrary to his or her supervision.

RCW 69.51A.055(1)(a).

> Nothing in this chapter diminishes the authority of correctional agencies and departments, including local governments or jails, to establish a procedure for determining when the use of cannabis would impact community safety or the effective supervision of those on active supervision for a criminal conviction, nor

> does it create the right to any accommodation of any medical use of cannabis in any correctional facility or jail.

Former RCW 69.51A.005(4).

Houck argues that these provisions divest courts of any authority to impose community custody conditions that subject a qualified medical marijuana user to criminal sanctions, and direct supervising entities, like the DOC, to establish a procedure before imposing a condition of community custody that prohibits a qualified patient from using medical marijuana.

First, Houck relies on "expressio unius est exclusion alterius," which means that the "Legislative inclusion of certain items in a category implies that other items in that category [were] intended to be excluded." *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). He suggests that we must presume that the legislature's omission of the term "court" in former RCW 69.51A.005(4) and RCW 69.51A.055(1)(a) was deliberate, and therefore courts do not possess the authority to impose a condition of community custody that can subject a medical marijuana user to criminal sanctions for their use of medical marijuana in conformity with former RCW 69.51A.040.

Second, Houck relies on noscitur a socis. Noscitur a socis "provides that a single word in a statute should not be read in isolation, and that 'the meaning of words may be indicated or controlled by those with which they are associated.'" *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (internal quotation marks omitted) (quoting *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)).

Finally, Houck relies on edjusdem generis, which provides that "'[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding words.'" *Dep't of Soc. &*

Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003) (internal quotation marks omitted) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)). Houck argues that the term "'local government'" should be read narrowly to mean something similar to the other words associated with the term, namely, "'correctional agencies'" and "'jails.'" Appellant's Opening Br. at 17.

Houck's arguments rely on the assumption that former RCW 69.51A.005(4) and RCW 69.51A.055(1)(a) create an exhaustive list of which agencies or departments can impose community custody conditions regarding controlled substances. However, the language of the statutes indicate otherwise. "Nothing in this chapter diminishes the authority of correctional agencies and departments, including local governments or jails, to establish a procedure for . . . *the effective supervision* of those on active supervision for a criminal conviction." Former RCW 69.51A.005(4) (emphasis added). "The arrest and prosecution protections established in RCW 69.51A.040 may not be asserted *in a supervision revocation or violation hearing* by a person who is supervised by a corrections agency or department, including local governments or jails." RCW 69.51A.055(1)(a) (emphasis added). The statutes on which Houck relies apply to establishing procedures for "effective supervision" and to "supervision revocation or violation hearing[s]." Former RCW 69.51A.005(4); RCW 69.51A.055(1)(a). The imposition of community custody conditions fit into neither of these categories.

Houck also argues that RCW 69.51A.055(1)(a) grants supervising entities, not courts, exclusive authority to restrict medical marijuana use. However, a supervising entity has the authority to execute only the court-imposed sentence by supervising offenders *on the basis* of conditions imposed by the court. RCW 9.94A.030(4), .704(2)(b). Furthermore, the DOC may

exercise its authority only by imposing an additional community custody condition when it does not interfere or contradict conditions imposed by the court. RCW 9.94A.704(6). Therefore, although such agencies or departments may have authority to impose community custody conditions regarding controlled substances, their authority is limited by conditions imposed by the trial court.

Houck's argument also implies that the Medical Use of Cannabis Act supersedes RCW 9.94A.703. We disagree. A court is required to impose the following condition unless it exercises its discretion to waive it: an offender must "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." RCW 9.94A.703(2)(c). As noted above, the Medical Use of Cannabis Act did not implicitly or explicitly repeal the statutory classification of marijuana as a schedule I controlled substance. *Atchley*, 142 Wn. App. at 164-65; *Hanson*, 138 Wn. App. at 330. We conclude that the Act also does not supersede community custody conditions that trial courts "shall order" under RCW 9.94A.703(2). Therefore, we hold that Houck's argument fails and affirm the community custody condition.[3]

II. Legal Financial Obligations

The trial court ordered Houck to pay mandatory LFOs in the form of a $500 crime victim penalty assessment, a $200 criminal filing fee, and a $100 DNA collection fee. The trial court also ordered Houck to pay interest on his nonrestitution LFOs. Houck challenges the imposition of the $200 criminal filing fee and the $100 DNA collection fee, as well as the imposition of interest, on

[3] Because the Medical Use of Cannabis Act and the Sentencing Reform Act of 1981, ch. 9.94A RCW, can be harmonized, we do not reach Houck's rule of lenity or public policy arguments.

the basis that the trial court failed to consider his ability to pay those fees as required by RCW 9.94A.777(1) and based on recent statutory amendments that apply to his case.

The State concedes that the $200 criminal filing fee and the interest provision should be stricken from Houck's judgment and sentence, but the State maintains that the imposition of the DNA collection fee was proper because Houck failed to prove that the State has previously collected his DNA. *See* RCW 43.43.7541.

The legislature recently amended former RCW 36.18.020(2)(h) to prohibit the superior courts from imposing the $200 criminal filing fee and interest on the nonrestitution portions of LFOs on defendants found indigent under RCW 10.101.010(3)(a) through (c). LAWS OF 2018, ch. 269, § 17; RCW 36.18.020(2)(h); *State v. Ramirez*, 191 Wn.2d 732, 746, 426 P.3d 714 (2018). These statutory amendments apply to any case not yet final at the time of their passage. *Ramirez*, 191 Wn.2d at 747. Because the trial court found Houck to be indigent, we accept the State's concession and agree that the $200 criminal filing fee and imposition of interest should be stricken.

But we do not agree with the State's contention that the DNA collection fee was properly imposed. The State argues that we should not strike Houck's DNA collection fee because Houck fails to show that the State previously collected his DNA. A DNA collection fee is mandatory "*unless* the state has previously collected the offender's DNA as a result of a prior conviction." RCW 43.43.7541 (emphasis added); *Ramirez*, 191 Wn.2d at 747; *State v. Catling*, 193 Wn.2d 252, 257-58, 438 P.3d 1174 (2019). RCW 43.43.7541 requires the collection of a DNA sample from every adult or juvenile convicted of a felony. Houck has a prior felony conviction, but the record on appeal is silent as to whether the State previously collected his DNA. If such collection occurred, the trial court's imposition of the DNA collection fee was improper.

We remand to the trial court to determine whether the State has previously collected a DNA sample from Houck. The trial court, on remand, shall strike the DNA collection fee unless the State demonstrates that Houck's DNA has not been collected.[4]

Houck also contends that the trial court failed to inquire whether he had the means to pay LFOs based on his mental condition, relying on our opinion in *State v. Tedder*, 194 Wn. App. 753, 378 P.3d 246 (2016). At sentencing, Houck presented evidence that he suffers from chronic and severe mental health disorders. Before imposing any LFO, excluding restitution and the victim penalty assessment, the trial court must determine whether a defendant who suffers from a mental health condition has the ability to pay the obligations. RCW 9.94A.777(1); *Tedder*, 194 Wn. App. at 756-57. A defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents him from participating in gainful employment. RCW 9.94A.777(2). Based on the evidence Houck presented at sentencing, the trial court was required to consider, under RCW 9.94A.777(1), whether Houck has the means to pay LFOs. Because the trial court did not consider evidence of Houck's mental conditions before imposing LFOs, we hold that the trial court abused its discretion.

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[4] At oral argument, the parties disagreed about who should bear the burden of demonstrating whether a defendant's DNA has previously been collected when the defendant has a prior Washington felony conviction. The State urged us to hold it is the defendant's burden to demonstrate that the State has not previously collected his DNA. We disagree and hold that when a defendant has a prior Washington felony conviction, the State must show that the defendant's DNA has not previously been collected. *See State v. Van Wolvelaere*, ___ Wn. App. 2d ___, 440 P.3d 1005, 1007 (2019) (holding that the defendant's prior Washington State felony convictions give rise to a presumption that the State previously collected a DNA sample from the defendant).

On remand, if the trial court finds that the State has not previously collected Houck's DNA, the trial court must then consider whether the DNA collection fee should be waived after performing the necessary inquiry under RCW 9.94A.777.

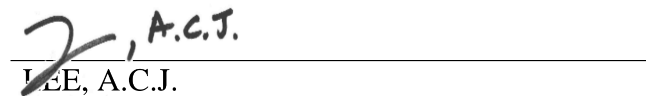
CONCLUSION

We affirm the trial court's imposition of a community custody condition that prohibits Houck from associating with known drug users and sellers during his term of community custody. We hold that the trial court had statutory authority to impose a community custody condition prohibiting Houck from possessing or consuming medical marijuana under the Medical Use of Cannabis Act during his term of community custody and affirm the condition. Finally, we remand to the trial court to strike the $200 criminal filing fee and interest provision and to reconsider the imposition of DNA collection fee consistent with this opinion.

CRUSER, J.

We concur:

WORSWICK, J.



LEE, A.C.J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 51201-7-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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