

NO. 45438-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MELANIE BALAO,

Appellant.

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

The Honorable Jennifer A. Forbes, Judge  
The Honorable Sally F. Olsen, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it found appellant had the current or future ability to pay legal financial obligations (LFOs). CP 91 (financial obligation finding 4.1).<sup>1</sup>

2. The trial court's conclusion appellant has the ability to pay LFOs is unsupported by the record.

3. Defense counsel was ineffective for failing to object to the trial court's imposition of discretionary LFOs.

Issues Pertaining to Assignments of Error

RCW 9.94A.753 and RCW 10.01.160 require the trial court to consider the defendant's present, past, and future ability to pay the amount ordered before imposing discretionary LFOs. The trial court ordered appellant to pay \$2,035 in legal financial obligations, including \$1,135 for court appointed attorney fees. In so ordering, the trial court included generic, pre-formatted language in the Judgment and Sentence that concluded appellant had the ability or likely future ability to pay this amount. There is nothing in the record, however, indicating that the trial court ever took into account appellant's financial resources or likely future resources.

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<sup>1</sup> The Judgment and Sentence is attached as an appendix.

1. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary legal financial obligations (LFOs) as part of appellant's sentence, thus, making the LFO order erroneous and challengeable for the first time on appeal?

2. Is appellant's challenge to the validity of the LFO order ripe for review?

3. Is the remedy to remand for resentencing?

4. Was appellant's trial attorney ineffective for failing to object to the trial court's imposition of discretionary legal financial obligations?

B. STATEMENT OF THE CASE

The Kitsap County prosecutor charged appellant Melanie Balao with one count each of third degree assault and fourth degree assault. CP 1-4, 7-9. Balao was convicted by a jury as charged. CP 47, 84; 2RP<sup>2</sup> 127-29.

The trial court imposed consecutive standard ranges of 30 days on each count, for a total of 60 months confinement. CP 85-95; 3RP 11-12. The court imposed \$2,035 in legal financial obligations, including \$1,135 for court appointed attorney fees. CP 91.

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<sup>2</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – May 6, 7, 8, and 9, 2013; 2RP – September 16, 17, and 18, 2013; 3RP – October 4, 2013.

Although there was no discussion of Balao's financial circumstances, the judgment and sentence includes a written "finding," which was pre-printed on the sentencing form:

The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations. The Defendant shall pay by cash, money order, or certified check to the Kitsap County Superior Court Clerk[.]

CP 91 (financial obligation finding 4.1).

Balao timely filed his Notice of Appeal. CP 97-102. Her motion for order of indigency lists a gross monthly income of \$2,030, but does not clarify whether she is currently employed, or was previously employed, as a medical assistance. Supp. CP \_\_\_\_ (Motion and Declaration for Order of Indigency, dated 10/17/13, at 3). Her motion for order of indigency shows she owns no real estate, owns no stocks or bonds, is not the beneficiary of any trust, has no savings or substantial income of any kind, and has two children who are financially dependent upon her. Supp. CP \_\_\_\_ (Motion and Declaration for Order of Indigency, dated 10/17/13, at 3-5). Balao was found to be indigent for purposes of appeal. Supp. CP \_\_\_\_ (Order of Indigency, dated 10/17/13).

C. ARGUMENT

1. THE TRIAL COURT'S FAILURE TO CONSIDER BALAO'S ABILITY TO PAY BEFORE IMPOSING LFOs CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL.

RCW 9.94A.760 permits the court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the ability, or likely future ability, to pay. The record here does not show the trial court in fact considered Balao's ability or future ability before it imposed LFOs. Because such consideration is statutorily required, the trial court's imposition of LFOs was erroneous and the validity of the order may be challenged for the first time on appeal.

- a. The Legal Validity of the LFO Order May Be Challenged For The First Time On Appeal As An Erroneous Sentencing Condition.

Although the general rule under RAP 2.5 is that issues not objected to in the trial court may not be raised for the first time on appeal, it is well established that illegal or erroneous sentences may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) (citing numerous cases where defendants were permitted to raise

sentencing challenges for the first time on appeal); see also, State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (holding erroneous condition of community custody could be challenged for the first time on appeal). Specifically, this Court has held a defendant may challenge, for first time on appeal, the imposition of a criminal penalty on the ground the sentencing court failed to comply with the authorizing statute. State v. Moen, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).<sup>3</sup>

In Moen, this Court held that a timeliness challenge to a restitution order could be raised for the first time on appeal. It looked at the authorizing statute, which set forth a mandatory 60-day limit, and the record, which showed the trial court did not comply with that statutory directive. Specifically rejecting a waiver argument, this Court explained:

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<sup>3</sup> See also, State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); In re Personal Restraint of Fleming, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining “sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional”); State v. Hunter, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding “challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal”); State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has “established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”).

We will not construe an uncontested order entered after the mandatory 60-day period of former RCW 9.9A.142(1) had passed as a waiver of that timeliness requirement; it was invalid when entered.

Id. at 541 (emphasis added). This Court concluded the restitution was not ordered in compliance with the authorizing statute and, therefore, the validity of the order could be challenged for the first time on appeal. Id. at 543-48.

The record shows the trial court failed to comply with the statutory requirements set forth in RCW 10.01.160(3). Balao may therefore challenge the trial court's LFO order for the first time on appeal.

In State v. Calvin, 176 Wn. App. 1, 302 P.3d 509 (2013), motion for reconsideration granted, 316 P.3d 496 (October 24, 2013), Division I originally held Calvin could challenge his LFO order for the first time on appeal, but later reversed course. The reasoning supporting Division I's course change in Calvin does not apply here.

Calvin's appeal involved a challenge to the factual basis supporting the trial court's LFO order, i.e. whether there was insufficient evidence to support the trial court's decision that he had the ability to pay LFOs. Calvin, 302 P.3d at 521. By contrast, Balao asserts the trial court failed to undertake the statutorily required factual analysis required under RCW 10.01.160.

The factual nature of Calvin’s argument drives Division I’s waiver analysis. Specifically, Division I states, “the imposition of costs under [RCW 10.01.160] is a factual matter ‘within the trial court’s discretion,’” and “[f]ailure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal.” Calvin, 316 P.3d at 507. Having framed the issue as a sufficiency challenge, rather than a legal one, Calvin goes on to cite this Court’s holdings in In re Personal Restraint of Goodwin<sup>4</sup> and In re Personal Restraint of Shale,<sup>5</sup> for the proposition that “[F]ailure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal.” Id.

Unlike Calvin, Balao’s challenge does not involve discretionary acts of the trial court. As discussed in detail below, compliance with the statutory directives of RCW 10.01.160 is not discretionary. Furthermore, the issue raised by Balao is legal, not factual. See, State v. Burns, 159 Wn. App. 74, 77, 244 P.3d 988 (2010) (explaining whether the trial court exceeds its statutory authority is an issue of law). Thus, Calvin’s waiver analysis is not on point. Cf. also, State v. Blazina, 174 Wn. App. 906,

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<sup>4</sup> 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002).

<sup>5</sup> 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007).

911, 301 P.3d 492, rev. granted, 178 Wn.2d 1010 (2013) (declining to consider an LFO challenge raised for the first time on appeal); State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), rev. denied, 175 Wn.2d 1014 (2012) (concluding for the first time on appeal that finding Bertrand had present or future ability to pay LFOs was unsupported by the record and therefore clearly erroneous). The issue raised in this case is analogous to that raised in Moen, not Calvin.

More recently, in State v. Duncan, Division III noted the discrepancy among the Court of Appeals divisions as to whether LFO's may be challenged for the first time on appeal. \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2014 WL 1225910 \*4 (citations omitted). Concluding, there was a "clear potential for abuse," the Court declined to allow Duncan to raise an LFO argument for the first time on appeal. 2014 WL 1225910 \*5. In so doing, Division III rejected portions of similar arguments made here. 2014 WL 1225910 \*4-5. Duncan recognized however, the forthcoming Supreme Court opinions in Blazina and State v. Paige-Colter, 175 Wn. App. 1010, 2013 WL 2444604, rev. granted, 178 Wn.2d 1018, 312 P.3d 650 (2013), would ultimately clarify the issue. 2014 WL 1225910 \*4, 6.

Here the record shows the trial court did not comply with RCW 10.01.160(3)'s mandatory requirements. Thus, the issue should be reviewable for the first time on appeal.

- b. Because The Sentencing Court Did Not Comply With RCW 10.01.160(3). Balao May Challenge the LFO Order For The First Time on Appeal

RCW 10.01.160(3) provides:

[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added). The word “shall” means the requirement is mandatory.<sup>6</sup> State v. Claypool, 111 Wn. App. 473, 475–76, 45 P.3d 609 (2002). Hence, the trial court was without authority to impose LFOs as a condition of Balao’s sentence if it did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court’s decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant’s individual financial circumstances and made an individualized determination he has the ability, or likely future ability, to pay. State v.

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<sup>6</sup> Comparatively, RCW 9.94A.753 (a statute which addresses restitution) merely provides:

The court should take into consideration the total amount of the restitution owed, the offender's present, past, and future ability to pay, as well as any assets that the offender may have.

(emphasis added).

Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); Bertrand, 165 Wn. App. at 393. If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

The record does not establish the trial court actually took into account Balao's financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. The State did not provide evidence establishing Balao's ability to pay or ask it to make a determination under RCW 10.01.160 when it asked that LFOs be imposed.<sup>7</sup> 3RP 5. The trial court made no inquiry into Balao's financial resources, debts, or employability.

The only part of the record that even remotely suggests the trial court complied with RCW 10.01.160(3) is the boilerplate finding in the Judgment and Sentence. CP 91. However, this finding does not establish compliance with RCW 10.01.160(3)'s requirements.

A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave

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<sup>7</sup> It is the State's burden to prove the defendant's ability or likely ability to pay. State v. Lundy, 176 Wn. App. 96, 105, 308 P.3d 755 (2013).

independent consideration of the necessary facts); Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir.2004) (explaining boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

The Judgment and sentence form used in Balao's case contained a pre-formatted conclusion that he had the ability to pay LFOs. It does not include a checkbox to register even minimal individualized judicial consideration. CP 91. Rather, every time one of these forms is used, there is a pre-formatted conclusion the trial court followed the requirements of RCW 10.01.160(3) – regardless of what actually transpired. This type of finding therefore cannot reliably establish the trial court complied with RCW 10.01.160(3).

In sum, the record fails to establish the trial court actually took into account Balao's financial circumstances before imposing LFOs. As such, it did not comply with the authorizing statute. Consequently, this Court should permit Balao to challenge the legal validity of the LFO order for first time on appeal, and it should vacate the order.

2. BALAO'S CHALLENGE TO THE LFO ORDER IS RIPE FOR REVIEW.

Alternatively, the State may argue the issue raised herein is not ripe for review because the State has not yet attempted to collect the costs.

This argument should be rejected, however, because it fails to distinguish between a LFO challenge based on financial hardship grounds (arguably not ripe) and a challenge attacking the legality of the order based on statutory non-compliance (ripe).

Although there is a line of cases that holds the relevant or meaningful time to challenge an LFO order is after the State seeks to enforce it, these cases address challenges based on an assertion of financial hardship or on procedural due process principles that arise in regard to collection.<sup>8</sup> By contrast, this case involves a direct challenge to the legal validity of the order on the ground the trial court failed to comply with RCW 10.01.160(3). As shown below, this issue is ripe for review.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. Bahl, 164 Wn.2d at 751. Additionally, when

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<sup>8</sup> See, e.g., Lundy, 176 Wn. App. at 107-09 (holding “any challenge to the order requiring payment of legal financial obligations on hardship grounds is not yet ripe for review” until the State attempts to collect); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003) (determining defendant’s constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce LFO order); State v. Phillips, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (holding defendant’s constitutional objection to the LFO order based on the fact of his indigence was not ripe until the State sought to enforce the order); State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (concluding the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id.

First, as discussed above, the issue raised here is primarily legal. Neither time nor future circumstances pertaining to enforcement will change whether the trial court complied with RCW 10.01.160 prior to issuing the order. As such, Balao meets the first prong of the ripeness test. State v. Valencia, 169 Wn.2d 782, 788, 239 P.3d 1059 (2010) (citing United States v. Loy, 237 F.3d 251 (3d Cir. 2001)).

Second, no further factual development is necessary. As explained above, Balao is challenging the sentencing court's failure to comply with RCW 10.01.160(3). The facts necessary to decide this issue (the statute and the sentencing record) are fully developed.

Although the Supreme Court, in Valencia, 169 Wn.2d at 789, previously suggested LFO challenges require further factual development, Valencia does not apply here. Valencia involved a constitutional challenge to a sentencing condition regarding pornography. In assessing the second prong of the ripeness test, the Court compared Valencia's challenge to the court-ordered proscription on pornography with a hypothetical challenge to a LFO order. The Court suggested the former did not require further factual development to support review, while the latter did.

It appears, however, the Supreme Court's hypothetical LFO challenge was predicated upon the notion that the order would be challenged on factual financial hardship grounds, rather than on statutory non-compliance grounds. For example, the Court stated:

[LFO orders] are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement.

Id. at 789. This statement certainly may be true if the offender is challenging the validity of the LFO order asserting current financial hardship. However, this statement is not accurate if an offender is challenging the legal validity of the LFO order based on non-compliance with RCW 10.01.160.

Either the sentencing court complied with the statute prior to imposing the order, or it did not. If it did not, the order is not valid, regardless of the particular circumstances of attempted enforcement. This demonstrates Valencia likely never contemplated the issue raised herein and, therefore, is distinguishable. As explained above, no further factual development is needed here, and the second prong of the ripeness test is met.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through the remission process does not change

the finality of the trial court's original sentencing order. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing that debt in the first place is not subject to change. In other words, while the defendant's obligation to pay off LFOs that have been ordered may be "conditional," the original sentencing order imposing LFOs is final.<sup>9</sup> As such, the third prong of the ripeness test is met.

Next, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate consequences and the burdens of the remission process. An LFO order imposes an immediate debt upon a defendant and non payment may subject him to arrest. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, she is immediately liable for that debt which begins accruing interest at a 12% rate. RCW 10.82.090.

The hardships that might result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State

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<sup>9</sup> Division I previously concluded a trial court's LFO order is "conditional," as opposed to final, because the defendant may seek remission or modification at any time (State v. Smits, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009)). However, it did so in the context of reviewing a denial of the defendant's motion to terminate his debt on the basis of financial hardship pursuant to RCW 10.01.160(4). Thus, Division I's analysis was focused on the defendant's conditional obligation to pay rather than on the legal validity of the initial sentencing order. Id.

Minority and Justice Commission looking into the impact of LFOs, concludes that for many people LFOs result in:

...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnaring some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008).<sup>10</sup>

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on the remission process to correct the error imposes its own hardships.

First, during the remission process, the defendant is saddled with a burden he would not otherwise have to bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. Lundy, 176 Wn. App. at 106. The defendant is

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<sup>10</sup> This report can be found at: [http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf)

not required to disprove this. See, e.g. Ford, 137 Wn. App. at 482 (stating the defendant is “not obligated to disprove the State’s position” at sentencing where it has not met its burden of proof). If the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4). Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains on the State.

Second, an offender who is left to fight his erroneously ordered LFOs though the remission process will have to do so without appointed legal representation. State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission). Given Balao’s financial hardships, she will likely be unable to retain private counsel and, therefore, have to litigate the issue pro se.

For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. See, Washington State Minority and Justice Commission, supra, at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some offenders are so overwhelmed, they simply stop

paying, subjecting themselves to further possible penalties. Id. at 46-47. Permitting a challenge to an erroneous LFO order on direct appeal would enable an offender to challenge her debt with the help of counsel and before the financial burden grows so overwhelming the person just gives up.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that will otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See, State v. Hathaway, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011) (reviewing the propriety of an order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial resources). Allowing the matter to be addressed on direct appeal will emphasize the importance of undertaking the necessary factual consideration in the first place and not rely on the remission process to remedy errors.

For the reasons stated above, this Court should hold Balao's challenge to the legal validity of the LFO is ripe.

3. BECAUSE THE RECORD DOES NOT EXPRESSLY DEMONSTRATE THE SENTENCING COURT WOULD HAVE IMPOSED THE LFOs HAD IT UNDERTAKEN THE REQUIRED CONSIDERATIONS, THE REMEDY IS REMAND.

Where the sentencing court fails to comply with a sentencing statute when imposing a sentencing condition, remand is the remedy unless the record clearly indicates the court would have imposed the same condition anyway. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)).

The record does not expressly demonstrate the trial court would have found the evidence sufficiently established Balao's ability to pay the LFOs. There was no evidence establishing Balao's future employment prospects. Indeed, the record suggests Balao was not presently employed and had no significant assets. Balao's motion for order of indigency indicates she owns no real estate, owns no stocks or bonds, is not the beneficiary of any trust, has no savings or substantial income of any kind, and has two children who are financially dependent upon her. Supp. CP \_\_\_\_ (Motion and Declaration for Order of Indigency, dated 10/17/13, at 3-5).

Based on the foregoing, it cannot be said this record expressly demonstrates the sentencing court would have imposed the same LFOs if it had actually taken into account Balao's individualized financial

circumstances. As such, the remedy is remand for resentencing. State v. Parker, 132 Wn.2d 182, 192-93, 937 P.2d 575 (1997).

4. BALAO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER TRIAL FAILED TO OBJECT TO THE IMPOSITION OF LFOs.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Thomas, 109 Wn.2d at 225-26 (adopting two-prong test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Balao's counsel was ineffective for failing to object to the imposition of discretionary LFOs. Reversal is required because failure to object to the LFOs prejudiced Balao. See Duncan, 2014 WL 1225910 \*6 (recognizing

ineffective assistance of counsel is “an available course for redress” when defense counsel fails to address a defendant’s inability to pay LFOs).

As discussed above, RCW 10.01.160(3) permits the sentencing court to order a defendant to pay LFOs, but only if the trial court has first considered her individual financial circumstances and concluded she has the ability, or likely future ability, to pay. Here, the discretionary LFO costs imposed included \$1,135 in court appointed attorney fees. Blazina, 174 Wn. App. at 911 (recognizing court appointed attorney fees are “discretionary legal financial obligations”).

Counsel’s failure to object to this discretionary LFO cost fell below the standard expected for effective representation. There was no reasonable trial strategy for not requesting the trial court to comply with the requirements RCW 10.01.160(3). Counsel simply neglected to object to the trial court’s failure to comply with the statutory requirements as required by existing case law. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

Counsel's failure to object to imposition of discretionary LFO's was also prejudicial. As discussed in argument two above, the hardships that can result from the erroneous imposition of LFOs are numerous. In a remission hearing to set aside the LFOs, Balao is not only saddled with a burden of proof she would not otherwise have to bear, but she will also have to do so with out appointed legal representation.

There is a reasonable probability the outcome would be different but for defense counsel's conduct. Balao's constitutional right to effective assistance counsel was violated.

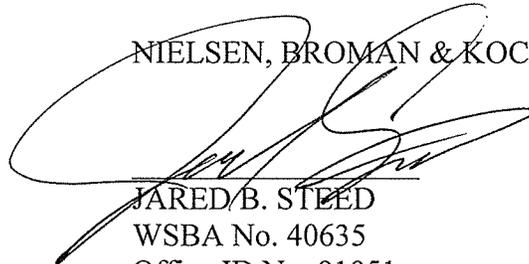
D. CONCLUSION

For the reasons stated above, this Court should permit Balao to challenge the legal validity of the LFO order, vacate the order, and remand for resentencing.

DATED this 9<sup>th</sup> day of May, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant

## **APPENDIX A**

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DAVID W. PETERSON  
KITSAP COUNTY CLERK

139-02361-7 ✓

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

MELANIE DENISE BALAO,  
Age: 35; DOB: 03/30/1976,

Defendant.

No. 12-1-00405-4

JUDGMENT AND SENTENCE

A sentencing hearing was held in which the Defendant, the Defendant's attorney, and the Deputy Prosecuting Attorney were present. The Court now makes the following findings, judgment and sentence.

The Defendant was found guilty, by  plea  jury verdict  bench trial  trial upon stipulated facts, of the following-

2.1 CURRENT OFFENSE(S) <i>Asterisk (*) denotes same criminal conduct (RCW 9.94A.525).</i>		RCW	Date(s) of Crime from to		The Special Allegations* listed below were pled and proved
I	Assault in the Third Degree	9A.36.031.1A1G 1H	02/19/2012	02/19/2012	
II	Assault in the Fourth Degree	9A.36.041(1)	02/19/2012	02/19/2012	

2.2 CRIMINAL HISTORY (RCW 9.94A.525) <i>Asterisk (*) denotes prior convictions that were same criminal conduct.</i>	Date of Crime	Date of Sentence	Sentencing Court	Juv (x)
No IID	11/14/11	Pending	Port Orchard Muni	
DWLS 2	01/08/07	Closed	Federal Way Muni	
DUI (active deferred prosecution)	12/03/06	Pending	Pierce County	
DUI	09/23/06	06/26/07	Kitsap County	
Theft 2 (attempt)	03/09/06	10/30/06	King County	

JUDGMENT AND SENTENCE; Page 1  
[Form revised January 29, 2010]



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2.3 CRIMINAL HISTORY (RCW 9.94A.525) <i>Asterisk (*) denotes prior convictions that were same criminal conduct.</i>	Date of Crime	Date of Sentence	Sentencing Court	Juv (x)
DUI	03/28/96		Bremerton Muni	
Minor Operating Vehicle after Consuming Alc.	03/12/96		Kitsap County	
Minor Consuming Alc. in Public	10/31/94		Bremerton Muni	
PSP 3	03/29/95		Kitsap County	

2.3 SENTENCING DATA									
Count	Offender Score	Seriousness Level	Standard Range	Days (x)	Mo. (x)	Special Allegations Type*	Mo.	Total Standard Range (Mo.)	Maximum Term
I.	0	III	1 to 3	-	X				5 years
II.	N/A	Misd	0 to 364	X	-				364 days

Defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.525.

\*SPECIAL ALLEGATION KEY (RCWs)- F=Firearm (9.94A.533), DW=Deadly Weapon (9.94A.602,533); DV=Domestic Violence (10.99.020); SZ=School Zone (69.50.435,533); SM=Sexual Motivation (9.94A.835 and/or 9.94A.533); VH=Vehicular Homicide Prior DUI (46.61.520,5055); CF=drug crime at Corrections Facility (9.94A.533); JP=Juvenile Present at manufacture (9.94A.533,605); P=Predatory (9.94A.836); <15=Victim Under 15 (9.94A.837); DD=Victim is developmentally disabled, mentally disordered, or a frail elder or vulnerable adult (9.94A.838, 9A.44.010); CSG=Criminal Street Gang Involving a Minor (9.94A.833); AE=Endangerment While Attempting to Elude (9.94A.834).

#### CONFINEMENT/STATUS

- 4.5-FIRST-TIME OFFENDER. RCW 9.94A.030, 9.94A.650. The Defendant is a First Offender. The Court waives the standard range and sentences the Defendant within a range of 0-90 days.
- CHEMICAL DEPENDENCY-The Court finds the Defendant has a chemical dependency that contributed to the offense(s). RCW 9.94A.030(9).
- 4.5-PRISON-BASED DOSA-SPECIAL DRUG OFFENDER SENTENCING ALTERNATIVE. RCW 9.94A.660. The standard range is waived and the Court imposes a sentence of one-half the midpoint of the standard range, or 12 months, whichever is greater.
- RESIDENTIAL CHEMICAL DEPENDENCY TREATMENT-BASED DOSA. RCW 9.94A.660. The standard range is waived and the Court imposes a sentence as outlined in the attached ADDENDUM RE: RESIDENTIAL DOSA.
- 4.7-WORK ETHIC CAMP. RCW 9.94A.690, 72.09.410. The Court finds that the Defendant is eligible and is likely to qualify for work ethic camp and the Court recommends that Defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, Defendant shall be released on community custody for any remaining time of total confinement, subject to conditions. Violation of the conditions of community custody may result in a return to total confinement for the balance of Defendant's remaining time of total confinement.
- 2.4-EXCEPTIONAL SENTENCE-Substantial and compelling reasons exist justifying a sentence  above  below the standard range,  within the standard range for Count \_\_\_ but served consecutively to Count(s) \_\_\_, or  warranting exceptional conditions of supervision for Count(s) \_\_\_\_\_. The Prosecutor  did  did not recommend a similar sentence.  The exceptional sentence was stipulated by the Prosecutor and the Defendant. Findings of Fact and Conclusions of Law entered in support of the exceptional sentence are incorporated by reference.
- 4.5-PERSISTENT OFFENDER-The Defendant is a Persistent Offender and is sentenced to life without the

JUDGMENT AND SENTENCE; Page 2

[Form revised January 29, 2010]



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possibility of early release. RCW 9.94A.570.

**COURT'S SENTENCE:**

COUNT I <u>30</u> Days <input type="checkbox"/> Mo.	COUNT II _____ Days <input type="checkbox"/> Mo.	COUNT _____ Days <input type="checkbox"/> Mo.
COUNT _____ Days <input type="checkbox"/> Mo.	COUNT <u>II 30</u> Days with <u>334</u> Days Suspended for <u>1</u> Years	
COUNT _____ Days <input type="checkbox"/> Mo.	COUNT _____ Days with _____ Days Suspended for _____ Years	
COUNT _____ 12 months + 1 day	COUNT _____ 12 months + 1 day	COUNT _____ 12 months + 1 day
PRISON-BASED DOSA- COUNT _____ Months Actual Time to be served- _____ Months		
PRISON-BASED DOSA- COUNT _____ Months Actual Time to be served- _____ Months		
PRISON-BASED DOSA- COUNT _____ Months Actual Time to be served- _____ Months		

IF MULTIPLE COUNTS-Total confinement ordered: 60 Days  Months. ( per DOSA sentence)  
 COUNTS SERVED- Concurrent  Consecutive  Firearm and Deadly Weapon enhancements served consecutive; the remainder concurrent.  Sexual Motivation enhancements served consecutive; the remainder concurrent.  
 VUCSA enhancements served  consecutive  concurrent; the remainder consecutive.

4.4-CONFINEMENT ONE YEAR OR LESS-Defendant shall serve a term of confinement as follows:

- JAIL ALTERNATIVES/PARTIAL CONFINEMENT. RCW 9.94A.030(31). If the defendant is found eligible, the confinement ordered may be converted to-Work Release, RCW 9.94A.731 (Note: the Kitsap County Jail has the discretion to have the Defendant complete work release at the Kitsap County Jail or Peninsula Work Release), Home Detention, RCW 9.94A.731, .190, or Supervised Community Service or Work Crew, RCW 9.94A.725 at the discretion of the Kitsap County Jail.
- STRAIGHT TIME. The confinement ordered shall be served in the Kitsap County Jail, or if applicable under RCW 9.94A.190(3) in the Department of Corrections.

4.5-CONFINEMENT OVER ONE YEAR-Defendant is sentenced to the above term of total confinement in the custody of the Department of Corrections.

- OTHER SENTENCES-This sentence shall be served  consecutive  concurrent to sentence(s) ordered in cause number(s) \_\_\_\_\_

- CREDIT FOR TIME SERVED. RCW 9.94A.505. Defendant shall receive credit for time served prior to sentencing solely for this cause number as computed by the jail unless specifically set forth- \_\_\_\_\_ days.

- 4.3-NO CONTACT ORDER-Defendant shall abide by the terms of any no contact order issued as part of this Judgment and Sentence.

**SUPERVISION**

- 4.6-COMMUNITY CUSTODY - SENTENCES OTHER THAN DOSA, SSOSA AND WORK ETHIC CAMP. RCW 9.94A.505, .701, .702, .704, .706. Defendant shall be supervised for the longest time period checked in the table below. Defendant shall report to DOC in person no later than 72 hours after release from custody and shall comply with all conditions stated in this Judgment and Sentence, including those checked in the SUPERVISION SCHEDULE, and other conditions imposed by the court or DOC during community custody (and supervised probation if ordered). *First Offenders-RCW 9.94A.650.* If Defendant is sentenced as First Offender, the Defendant may be supervised for up to 12 months; and if treatment is ordered, community supervision may include up to the period of treatment but not exceed 2 years.



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**Community Custody Is Ordered for the Following Term(s):**

For offenders sentenced to the custody of DOC (total term of confinement 12+ months or more):

- COUNT(S) \_\_\_\_\_ 36 months for: Serious Violent Offenses; Sex Offenses (including felony Failure to Register as a Sex Offender if the defendant has at least one prior felony failure to register conviction);
- COUNT(S) \_\_\_\_\_ 18 months for Violent Offense
- COUNT(S) I 12 months for: Crimes Against Person; felony offenses under chapter 69.50 or 69.52 RCW; felony Failure to Register as a Sex Offender (if the defendant has no prior convictions for failure to register)

For offenders sentenced to a term of one year or less :

- COUNT(S) \_\_\_\_\_ 12 months for: Violent Offenses; Crimes Against Persons; felony offenses under chapter 69.50 or 69.52 RCW; Sex Offenses; felony Failure to Register as a Sex Offender (regardless of the number of prior felony failure to register convictions ).

- \* Community custody for sex offenders may be extended for up to the statutory maximum term.
- \* For sex offenses, defendant shall submit to electronic home detention if imposed by DOC.

**Supervised Probation is Ordered for Gross Misdemeanor and Misdemeanor convictions in this Judgment and Sentence, to be administered by the DOC, for:**

- COUNT(S) II  12 months  24 months  \_\_\_\_\_ months

**4.6-WORK ETHIC CAMP-COMMUNITY CUSTODY.** RCW 9.94A.690, 72.09.410. Upon completion of the work ethic camp, the Defendant shall be on community custody for any remaining time of total confinement. Defendant shall comply with all conditions stated in this Judgment and Sentence, including those checked in the SUPERVISION SCHEDULE, and other conditions imposed by the court or DOC during community custody. Violation of the conditions may result in a return to total confinement for the balance of the Defendant's remaining time of confinement.

**4.6- PRISON-BASED DOSA-COMMUNITY CUSTODY.** RCW 9.94A.660. Defendant shall serve the remainder of the midpoint of the standard range in community custody. Defendant shall undergo and successfully complete a substance abuse treatment program approved by the division of alcohol and substance abuse of the Dept. of Social and Health Services. Defendant shall report to the DOC in person not later than 72 hours after release from custody and shall comply with all conditions stated in this Judgment and Sentence including those checked in the SUPERVISION SCHEDULE, and other conditions imposed by the court or DOC during community custody.

**4.7-ADDITIONAL CONFINEMENT UPON VIOLATION OF DOSA SENTENCE CONDITIONS-**If DOC finds that the Defendant has willfully violated the conditions of the drug offender sentencing alternative program, DOC may reclassify the Defendant to serve the remaining balance of the original sentence. In addition, as with any case, if the Defendant is subject to a first or second violation hearing and DOC finds that the Defendant committed the violation, the Defendant may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633. Further, as in any case, if the Defendant has not completed his or her maximum term of total confinement and is subject to a third violation hearing and DOC finds that the Defendant committed the violation, DOC may return the Defendant to a state correctional facility to serve up to the remaining portion of the Defendant's sentence. RCW 9.94A.714.

**4.7-ADDITIONAL TERM OF COMMUNITY CUSTODY UPON FAILURE TO COMPLETE OR TERMINATION FROM THE DOSA PROGRAM-**If the defendant fails to complete, or is administratively terminated



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from, the drug offender sentencing alternative program, the court imposes a term of community custody under RCW 9.94A.701, to begin upon the defendant's release from custody, and during this term of community custody, the defendant shall comply with all conditions stated in this Judgment and Sentence including those checked in the SUPERVISION SCHEDULE, and other conditions imposed by the court or DOC.

4.6—RESIDENTIAL CHEMICAL DEPENDENCY TREATMENT-BASED DOSA—COMMUNITY CUSTODY. RCW 9.94A.660. The Defendant shall serve a term of community custody as outlined in the attached ADDENDUM RE: RESIDENTIAL DOSA, and all of the conditions and requirements included in the ADDENDUM are hereby imposed.

**-ADDITIONAL CONFINEMENT UPON VIOLATION OF RESIDENTIAL CHEMICAL DEPENDENCY TREATMENT-BASED DOSA SENTENCE CONDITIONS**—If the court finds that the Defendant has willfully violated the conditions of the drug offender sentencing alternative program, the court may order the Defendant to serve a term of total confinement equal to one-half the midpoint of the standard range or a term of total confinement up to the top of the standard range. The court may also impose a term of community custody. In addition, as with any case, if the Defendant is subject to a first or second violation hearing and DOC finds that the Defendant committed the violation, the Defendant may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633. Further, as in any case, if the Defendant has not completed his or her maximum term of total confinement and is subject to a third violation hearing and DOC finds that the Defendant committed the violation, DOC may return the Defendant to a state correctional facility to serve up to the remaining portion of the Defendant's sentence. RCW 9.94A.714.

**COMMUNITY CUSTODY VIOLATIONS.** In any case in which community custody is imposed, if the Defendant is subject to a first or second violation hearing and DOC finds that the Defendant committed the violation, the Defendant may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633. Further, in any case, if the Defendant has not completed his or her maximum term of total confinement and is subject to a third violation hearing and DOC finds that the Defendant committed the violation, DOC may return the Defendant to a state correctional facility to serve up to the remaining portion of the Defendant's sentence. RCW 9.94A.714.



SUPERVISION SCHEDULE: The Defendant Shall-

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- STANDARD**
  - Obey all laws and obey instructions, affirmative conditions, and rules of the court, DOC and CCO.
  - Report to and be available for contact with assigned CCO as directed.
  - Obey all no-contact orders including any in this judgment.
  - Remain within prescribed geographical boundaries and notify the court and CCO in advance of any change in address or employment.
  - Notify CCO within 48 hours of any new arrests or criminal convictions.
  - Pay DOC monthly supervision assessment.
  - Comply with crime-related prohibitions.
- ~~**SERIOUS VIOLENT / VIOLENT OFFENSE, CRIME AGAINST A PERSON AND/OR DRUG OFFENSE (non-DOSA)**~~
  - ~~• Work only at DOC-approved education, employment and/or community service.~~
  - ~~• Possess or consume no controlled substances without legal prescription.~~
  - ~~• Reside only at DOC-approved location and arrangement.~~
  - ~~• Consume no alcohol, if so directed by the CCO.~~
- FIRST OFFENDER**
  - Obey all laws.
  - Devote time to specific employment or occupation.
  - Pursue a prescribed secular course of study or vocational training.
  - Participate in DOC programs and classes, as directed.
  - Undergo available outpatient treatment for up to two years, or inpatient treatment not to exceed standard sentence range.
- FINANCIAL GAIN**
  - Commit no thefts.
  - Possess no stolen property.
  - Have no checking account or possess any blank or partially blank checks.
  - Seek or maintain no employment or in a volunteer organization where Defendant has access to cash, checks, accounts receivable or payable, or books without the prior written permission of the CCO after notifying employer in writing of this conviction.
  - Use no names of persons other than the Defendant's true name on any document, written instrument, check, refund slip or similar written instrument.
  - Possess no identification in any other name other than Defendant's true name.
  - Possess no credit cards or access devices belonging to others or with false names.
  - Cause no articles to be refunded except with the written permission of CCO.
  - Take a polygraph test as requested by CCO to monitor compliance with supervision.

- PSI CONDITIONS**-All conditions recommended in the Pre-Sentence Investigation are incorporated herein as conditions of community custody, in addition to any conditions listed in this judgment and sentence.
- ALCOHOL/DRUGS**
  - Possess or consume no alcohol.
  - Enter no bar or place where alcohol is the chief item of sale.
  - Possess and use no illegal drugs and drug paraphernalia.
  - Submit to UA and breath tests at own expense at CCO request.
  - Submit to searches of person, residence or vehicles at CCO request.
  - Have no contact with any persons who use, possess, manufacture, sell or buy illegal controlled substances or drugs.
  - Install ignition interlock device as directed by CCO. RCW 46.20.710-.750.
- ~~**EVALUATIONS**-Complete an evaluation for-~~
  - ~~substance abuse~~  anger management  mental health, and fully comply with all treatment recommended by CCO and/or treatment provider.
- DOSA**
  - Successfully complete drug treatment program specified by DOC, and comply with all drug-related conditions ordered.
  - Devote time to a specific employment or training.
  - Perform community service work.
- 4.3-OFF-LIMITS ORDER (known drug trafficker) RCW 10.66.020.** The following "protected against drug trafficking areas" are off-limits to the Defendant while under county jail or DOC supervision:

---

- PROGRAMS / ASSAULT**
  - Have no assaultive behavior.
  - Successfully complete a certified DV perpetrators program.
  - Successfully complete an anger management class.
  - Successfully complete a victim's awareness program.
- TRAFFIC**
  - Commit no traffic offenses
  - Do not drive until your privilege to do so is restored by DOL.
- HAVE NO CONTACT WITH: DAVID BAXTER**
- OTHER:** *alcohol eval and treatment as recommended*



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**FINANCIAL OBLIGATIONS**

4.1-LEGAL FINANCIAL OBLIGATIONS-RCW 9.94A.760. The Court finds that the Defendant has the ability or likely future ability to pay legal financial obligations. The Defendant shall pay by cash, money order, or certified check to the Kitsap County Superior Court Clerk at 614 Division Street, MS-34, Port Orchard, WA 98366, as indicated-

<input checked="" type="checkbox"/> \$500 Victim Assessment, RCW 7.68.035 [PCV]	\$ _____ Sheriff service/sub. fees [SFR/SFS/SFW/SRF]
<input checked="" type="checkbox"/> \$1135 Court-appointed attorney fees [PUB]	\$ _____ Witness Costs [WFR]
<input checked="" type="checkbox"/> \$200 Filing Fee; \$110 if filed before 7/24/2005 [FRC]	\$ _____ Jury Demand fee [JFR]
<input checked="" type="checkbox"/> \$100 DNA / Biological Sample Fee, RCW 43.43.7541	\$ _____ Court-appointed defense fees/ other costs
<input type="checkbox"/> \$1,000 <input type="checkbox"/> \$2,000 Mandatory fine for drug crimes, RCW 69.50.430	\$100 Domestic Violence Assessment, RCW 10.99.080 <input type="checkbox"/> Kitsap Co. YWCA <input type="checkbox"/> Kitsap Sexual Assault Ctr.
\$ _____ Contribution to SIU- _____, RCW 9.94A.030, 9:94A.760.	<input checked="" type="checkbox"/> \$100 Contribution-Kitsap County Expert Witness Fund [Kitsap County Ordinance 139.1991]
\$100 Crime Lab fee, RCW 43.43.690(1)	\$500 Contribution-Kitsap Co. Special Assault Unit
\$3,000 Methamphetamine / amphetamine Cleanup Fine, RCW 69.50.440 or 69.50.401(2)(b)	\$100 Contribution-Anti-Profitereing Fund of Kitsap Co. Prosecuting Attorney's Office, RCW 9A.82.110
Emergency Response Costs - DUI, Veh. Homicide or Veh. Assault, RCW 38.52.430, per separate order.	\$200 DUC-DUI/DP Account Fee - Imposed on any DUI, Physical Control, Vehicular Homicide, or Vehicular Assault. RCW 46.61.5054.

RESTITUTION-To be determined at a future date by separate order(s). If the defendant has waived his or her presence at any future restitution hearing, either through the terms of any applicable plea agreement in this case or by voluntary waiver indicated on the judgment and sentence, the court hereby accepts that waiver by the defendant.

REMAINING LEGAL FINANCIAL OBLIGATIONS AND RESTITUTION-The legal financial obligations and/or any restitution noted above may not be complete and are subject to future order by the Court.

PAYMENT SCHEDULE - All payments shall commence  immediately  within 60 days from today's date, and be made in accordance with policies of the Clerk or DOC and on a schedule as follows: pay  \$100  \$50  \$25  \_\_\_\_\_ per month, unless otherwise noted- \_\_\_\_\_ RCW 9.94A.760.

12% INTEREST FOR LEGAL FINANCIAL OBLIGATIONS/ADDITIONAL COSTS-Financial obligations in this judgment shall bear interest from date of the judgment until paid in full at the rate applicable to civil judgments. An award of costs of appeal may be added to the total legal financial obligations. RCW 10.82.090, RCW 10.73.160. INTEREST WAIVED FOR TIMELY PAYMENTS-The Superior Court Clerk has the authority to waive the 12% interest if the Defendant makes timely payments under this payment schedule.

50% PENALTY FOR FAILURE TO PAY LEGAL FINANCIAL OBLIGATIONS- Defendant shall pay the costs of services to collect unpaid legal financial obligations. Failure to make timely payments will result in assessment of additional penalties, including an additional 50% penalty if this case is sent to a collections agency due to non-payment. RCW 36.18.190.

**OTHER**

4.2-HIV TESTING-The Defendant shall submit to HIV testing. RCW 70.24.340.

4.2-DNA TESTING-The Defendant shall have a biological sample collected for DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency or DOC shall obtain the sample prior to the defendant's release from confinement. RCW 43.43.754. If the defendant is out of custody, he or she must report directly to the Kitsap County Jail to arrange for DNA sampling.

FORFEITURE-Forfeit all seized property referenced in the discovery to the originating law



1 enforcement agency unless otherwise stated.

2  4.10-COMPLIANCE WITH SENTENCE-Defendant shall perform all affirmative acts necessary for DOC to  
3 monitor compliance with all of the terms of this Judgment and Sentence.

4  JOINT AGREEMENTS IN THE PLEA AGREEMENT-Are in full force and effect unless otherwise stated in  
5 this judgment and sentence.

6  EXONERATION-The Court hereby exonerates any bail, bond, and/or personal recognizance conditions.

#### 7 NOTICES AND SIGNATURES

8 5.1-COLLATERAL ATTACK ON JUDGMENT-Any petition or motion for collateral attack on this judgment  
9 and sentence, including but not limited to any personal restraint petition, state habeas corpus petition,  
10 motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest  
11 judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW  
12 10.73.100, RCW 10.73.090.

13 5.2-LENGTH OF SUPERVISION-The court shall retain jurisdiction over the offender, for the purposes of the  
14 offender's compliance with payment of the legal financial obligations, until the obligation is completely  
15 satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5).

16 5.3-NOTICE OF INCOME-WITHHOLDING ACTION-If the Court has not ordered an immediate notice of  
17 payroll deduction, you are notified that the DOC may issue a notice of a payroll deduction without notice to  
18 you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the  
19 amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW  
20 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

21 5.5-ANY VIOLATION OF JUDGMENT AND SENTENCE-Is punishable by up to 60 days of confinement per  
22 violation. RCW 9.94A.633. The court may also impose any of the penalties or conditions outlined in RCW  
23 9.94A.633.

24 5.6-FIREARMS-You must immediately surrender any concealed pistol license and you may not own,  
25 use, or possess any firearm unless your right to do so is restored by a court of record.

26 Clerk's Action Required-The court clerk shall forward a copy of the Defendant's driver's license, identicaid, or  
27 comparable identification, to the DOL along with the date of conviction or commitment. RCW 9.41.040, 9.41.047.

28 ~~Cross off if not applicable-~~

29 ~~5.7-SEX AND KIDNAPPING OFFENDER REGISTRATION. LAWS OF 2010, CHL 267 § 1, RCW 9A.44.130, 10.01.200.~~

30 ~~1. General Applicability and Requirements:~~

31 ~~Because this crime involves a sex offense or kidnapping offense involving a minor as defined in LAWS OF 2010,  
CHL 267 § 1 AND/OR RCW 9A.44.130, you are required to register.~~

~~If you are a resident of Washington, you must register with the sheriff of the county of the state of Washington  
where you reside. You must register within three business days of being sentenced unless you are in custody, in which  
case you must register at the time of your release with the person designated by the agency that has jurisdiction over  
you. You must also register within three business days of your release with the sheriff of the county of the state of  
Washington where you will be residing.~~

~~If you are not a resident of Washington but you are a student in Washington or you are employed in Washington  
or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of  
employment, or vocation. You must register within three business days of being sentenced unless you are in custody,  
in which case you must register at the time of your release with the person designated by the agency that has  
jurisdiction over you. You must also register within three business days of your release with the sheriff of the county  
of your school, where you are employed, or where you carry on a vocation~~

32 ~~2. Offenders Who are New Residents or Returning Washington Residents:~~

33 ~~If you move to Washington or if you leave this state following your sentencing or release from custody but later  
move back to Washington, you must register within three business days after moving to this state. If you leave this state  
following your sentencing or release from custody but later while not a resident of Washington you become employed  
in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three  
business days after starting school in this state or becoming employed or carrying out a vocation in this state.~~

34 ~~3. Change of Residence Within State:~~

35 ~~If you change your residence within a county, you must provide, by certified mail, with return receipt requested or  
in person, signed written notice of your change of residence to the sheriff within three business days of moving. If you~~



1 change your residence to a new county within this state, you must register with the sheriff of the new county within  
2 three business days of moving. Also within three business days, you must provide, by certified mail, with return  
3 receipt requested or in person, signed written notice of your change of address to the sheriff of the county where you  
4 last registered.

4 **4. Leaving the State or Moving to Another State**

5 If you move to another state, or if you work, carry on a vocation, or attend school in another state you must  
6 register a new address, fingerprints, and photograph with the new state within three business days after establishing  
7 residence, or after beginning to work, carry on a vocation, or attend school in the new state. If you move out of the  
8 state, you must also send written notice within three business days of moving to the new state or to a foreign country to  
9 the county sheriff with whom you last registered in Washington State.

6 **5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher  
7 Education or Common School (K-12):**

8 If you are a resident of Washington and you are admitted to a public or private institution of higher education, you  
9 are required to notify the sheriff of the county of your residence of your intent to attend the institution within three  
10 business days prior to arriving at the institution. If you become employed at a public or private institution of higher  
11 education, you are required to notify the sheriff for the county of your residence of your employment by the institution  
12 within three business days prior to beginning to work at the institution. If your enrollment or employment at a public or  
13 private institution of higher education is terminated, you are required to notify the sheriff for the county of your  
14 residence of your termination of enrollment or employment within three business days of such termination. If you  
15 attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are  
16 required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the  
17 sheriff within three business days prior to arriving at the school to attend classes. The sheriff shall promptly notify the  
18 principal of the school.

14 **6. Registration by a Person Who Does Not Have a Fixed Residence:**

15 Even if you do not have a fixed residence, you are required to register. Registration must occur within three  
16 business days of release in the county where you are being supervised if you do not have a residence at the time of your  
17 release from custody. Within three business days after losing your fixed residence, you must send signed written  
18 notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than  
19 24 hours, you will be required to register with the sheriff of the new county not more than three business days after  
20 entering the new county. You must also report weekly in person to the sheriff of the county where you are registered.  
21 The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business  
22 hours. You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff  
upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level  
and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

20 **7. Application for a Name Change:**

21 If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of  
22 your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If  
you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of  
your residence and to the state patrol within three business days of the entry of the order. RCW 9A.44.130(7).

23 **5.3 - PERSISTENT OFFENDER -**

24 **"Three Strike" Warning** You have been convicted of an offense that is classified as a "most serious offense"  
under RCW 9.94A.030. A third conviction in Washington State of a most serious offense, regardless of whether the  
first two convictions occurred in a federal or non-Washington state court, will render you a "persistent offender."

25 **"Two Strike" Warning** In addition, if this offense is (1) rape in the first degree, rape of a child in the first degree,  
26 rape in the second degree, rape of a child in the second degree, indecent liberties by forcible compulsion, or child  
27 molestation in the first degree; or (2) any of the following offenses with a finding of sexual motivation: murder in the  
28 first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second  
29 degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in  
the second degree, or a burglary in the first degree; or (3) any attempt to commit any of the crimes listed in RCW  
9.94A.030(32), and you have at least one prior conviction for a crime listed in RCW 9.94A.030(32) in this state,  
federal court, or elsewhere, this will render you a "persistent offender." RCW 9.94A.030(32).

30 **Persistent Offender Sentence** A persistent offender shall be sentenced to a term of total confinement for life  
without the possibility of early release, or, when authorized by RCW 10.95.030 for the crime of aggravated murder in  
the first degree, sentenced to death, notwithstanding the maximum sentence under any other law. RCW 9.94A.570.

31  **5.3 - DEPARTMENT OF LICENSING NOTICE**-The Court finds that Count \_\_\_\_\_ is a felony in the





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INTERPRETER'S DECLARATION - I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, the \_\_\_\_\_ language, which the Defendant understands. I interpreted this Judgment and Sentence for the Defendant into that language.

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

Translator signature/Print name \_\_\_\_\_  
Signed at Port Orchard, Washington, on \_\_\_\_\_, 201\_\_.

**IDENTIFICATION OF DEFENDANT**

Race: Asian or Pacific Islander      Sex: Female      DOB: 03/30/1976      Age: 35  
D/L: BALAOMD240DT      D/L State: Washington      SID: WA17512072      Height: 503  
Weight: 130      JUVIS: Unknown      Eyes: Hazel      Hair: Brown  
DOC: Unknown      SSN: 537-84-4422      FBI: 691794XA9

FINGERPRINTS—I attest that I saw the same Defendant who appeared in Court on this document affix his or her fingerprints and signature thereto.  
Clerk of the Court— [Signature], Deputy Clerk. Dated— 10/04/2013

DEFENDANT'S SIGNATURE— [Signature]

Left 4 fingers taken simultaneously	Left Thumb	Right Thumb	Right 4 fingers taken simultaneously

Prosecutor's File Number—12-110160-20

Prosecutor Distribution—Original (Court Clerk); 1 copy (Prosecutor), 1 copy (DOC), 1 copy (Defense Atty); 1 copy (Pros Stat Keeper)





**NIELSEN, BROMAN & KOCH, PLLC**

**May 09, 2014 - 1:37 PM**

**Transmittal Letter**

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Case Name: MElanie Balao

Court of Appeals Case Number: 45438-6

**Is this a Personal Restraint Petition?** Yes  No

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Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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**Comments:**

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