

NO. 49006-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CORY RANDON LEWIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 15-1-00348-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the sentencing court properly exercise its discretion in denying an exceptional sentence downward based on the evidence heard at trial?
2. Was defense counsel deficient when he provided the court with statutory and common law authority to support defendant's argument that he should be sentenced to an exceptional sentence downward?
3. Did the trial court properly impose a mental health evaluation as a condition of community custody where defendant's post-traumatic stress disorder was a factor in his crime?
4. Is the criminal filing fee a mandatory legal financial obligation under RCW 36.18.020(2)(h)?

B. STATEMENT OF THE CASE.

1. Procedure

Cory Lewis, hereinafter "defendant," was charged on an Amended Information of murder in the second degree, with a firearm enhancement, and unlawful possession of a firearm in the first degree. CP 12-13.

Defendant waived his right to a jury trial. CP 10-11. Following the bench trial, defendant was convicted as charged. CP 51-60; 3/24/16RP 6-7¹.

At sentencing the defendant argued for an exceptional downward sentence claiming provocation and that he was not the initial aggressor. 4/28/16RP 25-27. The State objected to an exceptional downward sentence and noted that the State had not been put on notice defendant was going to move for an exceptional downward sentence. 4/28/16RP 27. After considering the defendant's argument the court denied the motion. 4/28/16RP 28. Defendant was subsequently sentenced to a period of confinement, within the standard range, of 300 months with 60 months being hard time on the firearm enhancement. Defendant was also sentenced to 36 months of community custody. CP 27-40; 4/28/16RP 30-31. One of the conditions of community custody was that the defendant's Community Corrections Officer would consider having the defendant undergo a mental health evaluation and treatment. CP 27-40; 4/28/16RP 32.

Defendant timely appealed. CP 50.

¹ The Verbatim Reports of Proceedings are contained in fifteen volumes with new pagination for each volume. The volumes are referenced by date.

2. Facts

On December 7, 2014, defendant and Cory Page had been roommates for approximately one year. CP 51-60 (FoF 1)²; 3/17/16RP 20. That night the defendant and Page had a verbal argument. CP 51-60 (FoF 4). The argument subsided when Page retrieved his clothing from the defendant and left the defendant's room, returning to his own bedroom. *Id.* The defendant was left alone in his room. *Id.* When Page left the defendant's room, Page did not have a firearm in his hands. CP 51-60 (FoF 5). After Page left the defendant's room, he did not interact any further with the defendant and left him alone. CP 51-60 (FoF 6). Page was not in the defendant's face, was not pointing a gun at the defendant or waving a gun around, and was not physically threatening the defendant. *Id.* At that point, any threat to the defendant, if one even existed, had subsided. *Id.*

After Page left the defendant's room, the defendant retrieved his loaded .45 caliber Intratec firearm from a basket in his bedroom closet. CP 51-60 (FoF 7). He then proceeded to leave his room and enter the shared hallway. *Id.* The defendant then walked up to the threshold of Page's bedroom. CP 51-60 (FoF 8). Page had his back to the defendant. *Id.* When Page began to turn towards the defendant, the defendant raised his pistol, aimed at Page and fired two shots at him. *Id.* The defendant was within six

² (FoF #) refers to the trial court's Findings of Fact and the specific finding number. None of the court's factual findings are being challenged in this appeal.

feet of Page at the time he fired the shots. CP 51-60 (FoF 12). The defendant's view of Page was unobstructed when he shot Page. *Id.*

As the first shot was fired, Page's hand was up in the upper portion of his torso and the bullet went through his wrist, fracturing it. CP 51-60 (FoF 9). The bullet passed through Page's wrist and entered into his upper chest, lacerating the pulmonary vein and ultimately causing his death. *Id.* This bullet came from Page's right side. *Id.* At the time he was shot, Page was not facing the defendant. *Id.* After the first shot was fired, Page pled with the defendant to "stop playing" or "chill Peso (defendant's nickname)." CP 51-60 (FoF 13). The defendant then fired a second shot. *Id.* The second shot struck Page in the deltoid region of the right arm, fracturing his arm. CP 51-60 (FoF 14). Dr. Thomas Clark, the Pierce County Medical Examiner, determined that the shots fired by the defendant struck Page in critical portions of his anatomy and were thus fatal. CP 51-60 (FoF 15).

When the defendant fired the rounds at Page, Page was not holding a firearm in his hand. CP 51-60 (FoF 10). The gunshot wound which fractured Page's wrist would have prevented him from even gripping a firearm. *Id.* Immediately prior to murdering Page, the defendant did not make any statements to Page or warn him. CP 51-60 (FoF 11).

After shooting Page twice the defendant attempted to shoot him a third time. CP 51-60 (FoF 16). However, the weapon jammed and the

defendant was unsuccessful in shooting Page during this third attempt. *Id.*

When the firearm failed, the defendant fled the scene. *Id.*

Upon fleeing the scene, the defendant engaged in conduct in an attempt to deflect attention from himself. CP 51-60 (FoF 17). After visiting his children, the defendant disposed of the firearm and the clip he used to kill Page by tossing both into Snake Lake. CP 51-60 (FoF 18); 3/17/16RP 31. The defendant did not return to the apartment until December 11, 2016, four days after murdering Page. 3/17/16RP 33. Upon returning to the apartment, the defendant checked on Page and determined he was dead. 3/17/16RP 33-34. In order to further deflect attention from himself, the defendant then picked up the shell casings from the shooting, got into his car, began to drive, and, while driving, threw the casings out of the car window. 3/17/16RP 34. The defendant then continued to drive until he reached a payphone at a 76 gas station near the corner of Lakewood Drive and 66th Street in Tacoma. 3/17/16RP 35; 3/7/16RP 142. Upon reaching the payphone, the defendant called 911 and claimed that he saw Page's body appearing from a door and thought he was dead. 3/3/16RP 46-47. Upon responding to the scene, police found Page dead in his room. 3/3/16RP 49.

Police conducted a recorded interview in a car with the defendant at the 76 station. 3/7/16RP 145. During this interview, the defendant's conduct was described as "distraught," "sober," and "calm." *Id.*; 3/9/16RP 27. It appeared to at least one of the officers who interviewed the

defendant that his demeanor was no different from any other person that found their roommate dead. *Id.* At this time the defendant was not a suspect.

As the investigation into Page's murder continued, the defendant continued to engage in conduct in an attempt to deflect attention from himself. CP 51-60 (FoF 17). In one instance he suggested to Page's father that members of a gang in Lakewood may have killed Page. *Id.* In another instance, he told the police that the rumor on the street was either he had killed Page or he had hired someone to have him killed. 3/15/16RP 48. Eventually, the police were able to identify the defendant as a suspect. 3/9/16RP 120.

After identifying the defendant as a suspect, the police interviewed him and he confessed to having murdered Page. 3/15/16RP 36. After the defendant confessed and was arrested, he went with deputies to Snake Lake to show them where he had disposed of the gun. 3/15/16RP 57. Eventually, a member of the Pierce County Sheriff's Department's Metro Dive Team was able to recover the gun from the approximate location where the defendant stated he disposed of the gun. 3/8/16RP 16. The firearm was later tested by a member of the Washington State Patrol Crime Laboratory who determined it was a fully operational .45 caliber Intratec automatic pistol. CP 51-60 (FoF 20).

At trial, the defendant asserted he had acted in self-defense. 3/17/16RP 28. However, during the interview where he confessed to

murdering Page, the defendant did not claim that he acted in self-defense. 3/9/16RP 121. Rather, it was the detectives interviewing him who first broached the subject. *Id.* Based upon the testimony presented, the court was able to determine that the defendant did not have a reasonable belief of imminent danger of harm, injury, or death and hence, was not acting in self-defense. CP 51-60 (FoF 19).

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION, DENYING THE DEFENDANT AN EXCEPTIONAL SENTENCE BASED UPON THE EVIDENCE HEARD AT TRIAL AND THE COURT'S UNCHALLENGED FINDINGS OF FACT.

A sentencing court must impose a sentence within the standard range unless a statutorily defined mitigating circumstance applies. *State v. Graham*, 181 Wn.2d 878, 882, 337 P.3d 319 (2014). A sentence within the standard sentence range shall not be appealed. RCW 9.94A.585. This concept arises from the idea that so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as to the length of the sentence. *State v. Williams*, 149 Wn.2d 143, 146-147, 65 P.3d 1214 (2003). However, appellate review is still available for the correction of legal errors or abuses of discretion in which sentence applies. *Id.* at 147. A party can challenge the underlying legal conclusions and determinations by which a court comes to apply a

particular sentencing provision. *State v. Mail*, 121 Wn.2d 707, 712, 854, P.2d 1042 (1993).

When a defendant has requested an exceptional sentence below the standard range, an appellate court may only review the decision if the sentencing court refused to exercise its discretion at all or relied an impermissible basis for refusing to impose an exceptional sentence. *State v. Khanteechit*, 101 Wn. App. 137, 138, 5 P.3d 727 (2000). “[A] trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling.” *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). Here, defendant argues that the court made a legal error in failing to provide any reasons that support its denial of an exceptional downward sentence. *See* Brf. of App. at 16. However, defendant provides no authority to support his contention a trial court is required to do Findings of Fact and Conclusions of Law in denying defendant’s request for an exceptional sentence³.

The legislative intent of the Sentencing Reform Act’s (SRA) exceptional sentence provision is to authorize courts to tailor the sentence, for both the length and the type of punishment imposed, based upon the facts of each specific case. *State v. Manlove*, 186 Wn. App. 433, 439, 347

³ The State also was unable to find any case law stating that Findings of Fact and Conclusions of Law are required or not in denying a defendant’s motion for an exceptional sentence.

P.3d 67 (2015). The determination as to whether particular facts constitute legally sufficient mitigating or aggravating factors under RCW 9.94A.535 determines whether an exceptional sentence is an option. *State v. Mail*, 65 Wn. App. 295, 299, 828 P.2d 70 (1992) (referring to RCW 9.94A.390 prior to recodification as RCW 9.94A.535).

Here, the trial court exercised its discretion only after listening and considering defense counsel's argument and the applicable law. The court then declined to impose an exceptional sentence. In determining that the mitigating factors do not apply in this case the court stated:

I do not find under the provisions of RCW 9.94A.535 that there is a basis to depart from the standard range. And I am familiar with the authority that was cited by [defense counsel]. And I don't believe – although it is an intellectually sound argument by [defense counsel], I simply don't find there is a basis here.

4/28/16RP 28. As discussed above, defense counsel's argument was based upon both RCW 9.94A.535 and on previous precedent which had similar factual scenarios to the facts present here. 4/28/16RP 25-26. The sentencing court clearly rejected this argument. While the court even found the argument by defense counsel was "intellectually sound," the court disagreed with the factors defense counsel was relying on in making its argument for mitigating factors. *Id.*

In the written Findings of Fact and Conclusions of Law for the bench trial, the court made two specific findings: (1) that when Page left the defendant's room Page did not have a weapon on him; and (2) when Page left the defendant's room any threat to the defendant, if one ever existed, had subsided. CP 51-60. Further, the court explicitly noted that it did not find credible defendant's testimony that he was under fear from Page at the time he murdered Page. *Id.* When the court's statement at sentencing and the Findings of Fact are looked at together, it becomes clear that the specific mitigating factor the court rejected was that the defendant was under imminent danger of harm, injury, or death from Page.

Hence, the court made it clear that while it considered the arguments defense counsel made, it rejected the arguments because there was no rational basis and the defendant was not truly in fear for his life or from suffering great bodily harm. This is more than sufficient for a reviewing court to engage in meaningful appellate review. Thus, this court should affirm the sentencing court's imposition of a standard range sentence.

2. THE DEFENDANT WAS AFFORDED HIS CONSTITUTIONAL RIGHT TO COUNSEL WHEN, AT SENTENCING, DEFENSE COUNSEL VIGOROUSLY ARGUED FOR AN EXCEPTIONAL SENTENCE DOWNWARD BASED UPON BOTH STATUTORY AND COMMON LAW AUTHORITY.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such an adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) his or her attorney's performance was deficient, and (2) he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters going to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under

the second prong, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. 668 at 689. This court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance of counsel on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

An allegedly unsuccessful or poor quality sentencing argument alone is unlikely to result in demonstrable prejudice because of the near impossibility of showing a nexus between the argument and the eventual sentence. *State v. Goldberg*, 123 Wn. App. 848, 854, 99 P.3d 924 (2003).

In order to remand for new sentencing, the court must be persuaded the result and subsequent sentence would have been different. *Id.* Here, the results likely would not have been different as the court heard and rejected defense counsel's "intellectually sound" argument. 4/28/16RP 28. The court then imposed a standard range sentence. CP 27-40; 4/28/16RP 30-31.

In *State v. Hernandez-Hernandez*, 104 Wn. App. 263, 15 P.3d 719 (2001), defense counsel failed to cite mitigating factors and previously established case law during sentencing. 104 Wn. App. at 266. However, the court found that even though counsel did not cite the controlling case law, this did not rise to the requisite prejudice needed to establish a claim of ineffective assistance of counsel. *Id.* Rather, counsel still argued the appropriate mitigating factors in making a request for a low-end standard range sentence. *Id.* Even though no argument was made as to an exceptional sentence downward, the court still had the discretion to impose an exceptional downward sentence. *Id.* Because the mitigating factors were argued, even if the appropriate case law was not cited, the prejudice, if any, was slight and thus, Hernandez-Hernandez did not receive ineffective assistance of counsel. *Id.*

Here, counsel did considerably more to advocate for his client than did counsel in *Hernandez-Hernandez*. In this case, defense counsel provided the court with his client's background, history of being in counseling and suffering from Post-Traumatic Stress Disorder (PTSD),

employment information, and that he was currently enrolled in school. 4/18/16RP 24-25. After providing the background information on his client, defense counsel then argued to the court that there was both statutory and common law authority for the court to grant his client an exceptional downward sentence. 4/18/16RP 25. Counsel specifically provided the court with the exact statutory mitigating factors which would apply in this case. 4/18/16RP 25-26. Finally, counsel provided an analogous case where the court had properly granted an exceptional downward sentence for virtually the same reasons counsel was asking for here. 4/18/16RP 26. Counsel's performance and ability to provide the relevant statutory and common law authority clearly demonstrate that his performance was more than adequate.

Defendant cites *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002), in an attempt to demonstrate prejudice. *See* Brf. of App. at 13-14. *McGill* is clearly distinguishable from this case. In *McGill*, defense counsel cited no case law to the sentencing court. 112 Wn. App. at 101. Unlike *McGill*, here, counsel cited both statutory authority and case law. He was prepared to argue on behalf of his client for an exceptional downward sentence and made sure there was a legal basis for his argument. Counsel in *McGill* failed to do so. Defendant fails to demonstrate prejudice.

As noted above, the sentencing court found that counsel's argument was "intellectually sound." 4/28/16RP 28. An attorney who

makes an intellectual sound argument clearly has done their due diligence and has met the standards required for effective assistance of counsel. Just because a court does not agree with an intellectually sound argument does not mean counsel was ineffective. Rather, it simply shows that the court disagreed with the argument. Therefore, *McGill* should not be used to determine whether a lack of a written argument by itself amounts to ineffective assistance of counsel.

Because defense counsel adequately argued for his client to have an exceptional downward sentence and provided the sentencing court with statutory authority and case law, this court should reject defendant's claim of ineffective assistance of counsel as defendant fails to demonstrate deficient performance or the result of any prejudice towards the defendant.

3. THE TRIAL COURT IMPOSED A MENTAL HEALTH EVALUATION AS A CONDITION OF COMMUNITY CUSTODY BASED UPON THE TESTIMONY AND EVIDENCE HEARD AT TRIAL.

RCW 9.94B.080 provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation... *if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment may be based on a presentence report and, if applicable, mental*

status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity.

(emphasis added). A “mentally ill person” is defined in RCW 71.24.025 as a person whom has a condition, limited to a short-term severe crisis episode that is caused by a *mental disorder*, an individual being gravely disabled, or presents a likelihood of serious harm. RCW 71.24.025(1), (27) (emphasis added). Mental disorders, being gravely disabled, or presenting a likelihood of serious harm are defined in RCW 71.05.020. A mental disorder is “...any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions.” RCW 71.05.020(29). PTSD can cause negative alterations in cognition. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 271 (5th ed. 2013). Hence, under both the RCWs and the American Psychiatric Association’s definition, PTSD is a mental disorder.

Defendant’s Judgment and Sentence and Warrant of Commitment specifically states, “Per CCO... mental health treatment & [sic] anger management. Evid. [sic] in trial, D [sic] diagnosed w/ [sic] PTSD. CP 27-40. The evidence presented at trial was through the testimony of Regina Hicks. Hicks is employed by Greater Lakes Mental Healthcare as a clinical therapist. 3/16/16RP 66-67. Among Hicks’ clients was the

defendant. 3/16/16RP 68. During testimony, Hicks testified that the defendant suffers from PTSD. 3/16/16RP 77-78. She testified that as a result of the defendant's PTSD, he has an exaggerated sense of threats to him, which would have him to go into a defensive mode and react accordingly. 3/16/16RP 79-80. The end result of this was the defendant knowing he had issues with being aggressive and that the defendant's aggressiveness would result in both physical and verbal altercations. 3/16/16RP 81.

Based upon the totality of the defendant's mental health problems, Hicks referred him to anger management. 3/16/16RP 82. She testified that anger management counselling would help control the defendant's anger and get him to express his anger in an appropriate manner. *Id.* Part of the goal of referring the defendant to anger management was to help him learn how to deescalate situations where the defendant was engaging in either physical or verbal aggressions. *Id.* This was a constant issue the defendant was facing. *Id.*

During his sessions with Hicks, the defendant would become agitated when talking about Page. 3/16/16RP 86. During one particular session, the defendant "...was throwing a lot of cuss words around and he was very restless." *Id.* While the defendant did not express fear of Page, he did blame him for making his life difficult. *Id.* The defendant even

admitted he had no control over some of his corresponding responses to Page. 3/16/16RP 87.

Hicks testified that during a counseling session, the defendant explained how he suffered a broken arm as a result of a fight with Page over food. 3/16/17RP 72. Getting into a physical fight with Page about food would likely fall within the confines of the defendant's aggressive nature and issues that arose from living with Page. Based upon this testimony, the court was able to conclude the defendant suffered from a mental health condition, PTSD. As discussed above, PTSD is defined as mental disorder. Thus, it would fall within the parameters of a mental illness under RCW 9.94B.

The court also likely made its determination based upon the definition of RCW 71.05.020(27)(b) which, when defining "likelihood of serious harm," states such occurs when "The person has threatened the physical safety of another and has a history of one or more violent acts." Additionally, PTSD can cause "Irritable behavior and angry outbursts...typically expressed as verbal or physical aggression towards people or others." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 272 (5th ed. 2013). Because the defendant admitted he had no control over some of his responses, the court was able to determine that the defendant could have caused serious harm

to another individual in the future, such as a potential roommate. This is especially true considering that the defendant has now murdered his roommate and had previously been in a physical altercation with him. The defendant's physical aggression towards his roommate would be a hallmark of a PTSD diagnosis. *Id.*

During sentencing, the court stated it believed the defendant had anger management issues and, even while he is in custody, the Department of Corrections should do what it could to assist the defendant in getting into any programs which would help him. 4/28/16RP 32. When arguing for an exceptional downward sentence, defense counsel even stated how the defendant was in counseling and had been diagnosed with PTSD. 4/28/16RP 24. The defendant also made no objection to the mental health condition of community custody. 4/28/16RP 32.

Although, the court did not make an explicit determination on the record, it is clear from the record that the murder of Page was a direct result of the defendant's PTSD or anger management issues. It is true that the court did not order a mental health evaluation of the defendant, which is required under the law. *See State v. Shelton*, 194 Wn. App. 660, 676, 378 P.3d 230 (2016). Hence, while the court was clearly concerned with assisting the defendant in getting the mental health treatment he needs, this Court should remand only on the mental health condition of community

custody so the sentencing court can order a mental health evaluation. A mental health evaluation and subsequent treatment would greatly assist the defendant upon his eventual release into the community by ensuring he receives the treatment he needs to live a healthy life, free from the unfortunate consequences of PTSD, all while being a productive member of society.

4. STATUTORY LANGUAGE INDICATES THAT THE CRIMINAL FILING FEE IS A MANDATORY LEGAL FINANCIAL OBLIGATION.

RCW 36.18.020(2)(h) states:

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case *shall be liable* for a fee of two hundred dollars.

(emphasis added). This Court has consistently found that the \$200 criminal filing is a mandatory fee. See *State v. Lundry*, 176 Wn. App. 96, 102-103, 308 P.3d 755 (2013). Even in *State v. Blazina*, this Court noted in Blazina’s initial appeal that, “Blazina does not challenge the *mandatory fees*. These are the \$500 victim penalty assessment, the \$100 DNA (deoxyribonucleic acid) collect fee, and the *\$200 criminal filing fee*.” *State v. Blazina*, 174 Wn. App. 906, 911 fn. 3, 301 P.3d 492 (2013) (emphasis added).

The word “shall” creates a mandatory legal financial obligation (LFO) rather than a discretionary fee. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). *Black’s Law Dictionary* defines “shall” as “Has a duty to; more broadly, *is required to*... This is the *mandatory sense* that drafter’s typically intend...” *Black’s Law Dictionary* 1407 (8th ed. 2004) (emphasis added). This definition aligns with the common understanding and definition of “shall” which is “will have to: MUST.” *Webster’s Third New International Dictionary, Unabridged* 2085 (2002) (emphasis in original). Clearly, by noting how a convicted defendant “shall be liable” the legislature intended that a defendant must pay the criminal filing fee.

Defendant relies solely on the definition of the word “liable” and on a footnote in dicta in an unpublished case to argue that the criminal filing fee is not a mandatory LFO. *See* Brf. of App. at 19-21. However, *Black’s* defines liable as “1. Responsible or answerable in law; *legally obligated*. 2. (Of a person) *subject to* or likely to incur (a fine, penalty, etc.). *Black’s Law Dictionary* 934 (8th ed. 2004) (emphasis added). Even the definition defendant uses to support his argument demonstrates that the word “liable” makes an individual legally obligated and subject to a penalty. The unpublished case defendant cites simply lists the filing fee in a footnote as a discretionary LFO, but provides no basis for such a determination. Rather, it is simply included in a list of LFOs the court

imposed at sentencing. *See State v. Schechert*, 2016 WL 2654604 at 3 (unpublished).

Because of the unambiguous nature of the statute, the definition of the word “shall,” and prior precedent, this Court should affirm the sentencing court’s judgment and sentence requiring the defendant to pay the mandatory \$200 criminal filing fee.

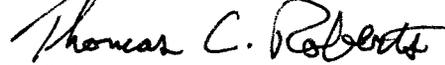
D. CONCLUSION.

This court should affirm the defendant’s standard range sentence of 300 months for the murder of his roommate, Cory Page. The sentencing court provided the proper rationale for rejecting an exceptional downward sentence by stating on the record how none of the mitigating factors for an exceptional sentence apply in this case. Defendant was ably represented by counsel who argued legal authority and applicable evidence in support of an exceptional downward sentence. Further, while the court had the best of intentions in imposing a mental health evaluation as a condition of community custody, the court did not follow the statutory requirements to impose a mental health evaluation condition. Finally, the use of the word “shall” in the criminal filing fee means that it is a mandatory legal financial obligation. For the aforementioned reasons, this court should affirm the defendant’s 300 month sentence and remanded for the limited

purpose of ordering the sentencing court to conduct a mental health hearing and evaluation prior to imposing a mental health evaluation and treatment as a condition of the defendant's community custody.

DATED: March 6, 2017

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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date (Signature)

PIERCE COUNTY PROSECUTOR
March 06, 2017 - 1:55 PM
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