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Court of Appeals  
Division II  
State of Washington  
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No. 50292-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID LOREN WALDECK,

Appellant.

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

The Honorable Michael Evans

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

A REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TO-CONVICT INSTRUCTIONS FAILED TO IDENTIFY THE CONTROLLED SUBSTANCE AND CONSEQUENTLY THE TRIAL JUDGE IMPOSED UNAUTHORIZED SENTENCES.

The State properly concedes that the three to-convict instructions failed to identify the controlled substances as heroin and agrees that the trial court therefore exceeded its authority when it imposed appellant David Loren Waldeck's sentences. Brief of Respondent at 2-3, citing *State v. Gonzales*, 2 Wn. App. 2d 96, 408 P.3d 743 (2018), *State v. Clark-El*, 196 Wn. App. 614, 384 P.3d 627 (2016). The State also agrees that the trial court failed to inquire about Waldeck's ability to pay before imposing legal financial obligations. Brief of Respondent at 3. This Court should accept the State's concessions.

As this Court held in *Gonzales*, 2 Wn. App. 2d at 113-14, at resentencing, the court must impose a misdemeanor sentence because the only authorized sentence is the lowest possible sentence for unlawful possession of a controlled substance where the jury's verdict did not specify the controlled substance.

Accordingly, this Court should remand for resentencing and for the court to conduct an individualized inquiry into Waldeck's ability to pay

legal financial obligations in accordance with *State v. Blazina*, 182, Wn.2d 827, 839, 344 P.3d 680 (2015).

B. CONCLUSION

For the reasons stated here and in appellant's opening brief, this Court should remand for resentencing and not impose appellate costs.

DATED this 9<sup>th</sup> day of May, 2018.

Respectfully submitted,

/s/ Valerie Marushige

VALERIE MARUSHIGE

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Attorney for Appellant, David Loren Waldeck

## **DECLARATION OF SERVICE**

On this day, the undersigned sent by email a copy of the document to which this declaration is attached to the Cowlitz County Prosecutor's Office at [Appeals@co.cowlitz.wa.us](mailto:Appeals@co.cowlitz.wa.us).

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

DATED this 9<sup>th</sup> day of May, 2018.

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