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No. 51201-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

State of Washington,

Respondent,

v.

Anthony Glen Houck,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

At Anthony Houck's sentencing, the court imposed an unconstitutionally vague condition of community custody. Additionally, the court imposed an unlawful condition of community custody. Citing humanitarian concerns, the people of Washington State voted in favor of legalizing the use of medical marijuana for individuals suffering from a range of debilitating conditions. In turn, our Legislature enacted legislation to ensure that individuals suffering from debilitating conditions would not be subjected to criminal sanctions for their use of medical marijuana, subject to some limitations. Our legislature also specifically divested courts from imposing any form of criminal sanction upon individuals on community custody or probation.

But here, the sentencing court imposed a condition of community custody that subjects Mr. Houck to jail time even if he uses medical marijuana in accordance with medical marijuana legislation. Because the sentencing court possessed no authority to impose such a condition, Mr. Houck asks this Court to strike this condition. He also asks this Court to strike the court's imposition of the clerk's fee and the DNA fee.

B. ASSIGNMENTS OF ERROR

1. The condition of community custody barring Mr. Houck from having direct or indirect contact with "known drug users/sellers except in [treatment] setting" is unconstitutionally vague and the sentencing court possessed no statutory authority to impose this condition. U.S. Const. amend. XIV; Const. art. I, § 3.

2. Contrary to RCW 69.51A.005(4) and RCW 69.51A.040, the sentencing court unlawfully imposed a condition of community custody that subjects Mr. Houck to criminal sanctions if he possesses or consumes medical marijuana.

3. The trial court erred when it failed to strike the DNA fee and the clerk's fee pursuant to RCW 9.94A.777(1).

4. The trial court erred when it imposed $800 in legal financial obligations.

C. ISSUES

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

with “known” drug users or sellers. Is this condition unconstitutionally vague because it is unclear who a “known” drug user is and because it fails to provide standards definite enough to protect against arbitrary enforcement?

2. A sentencing court abuses its discretion when it imposes a condition of community custody without lawful authority. The Washington State Medical Use of Cannabis Act (MUCA) shields medical marijuana users from arrest or criminal sanctions so long as the user strictly adheres to certain requirements. Moreover, MUCA provides that only certain supervising entities, like the Department of Corrections, can subject individuals on community custody or probation to criminal sanctions for their use of medical marijuana. Did the sentencing court lack the authority to impose a condition of community custody that subjects Mr. Houck to criminal sanctions if he uses medical marijuana?

3. If a court determines a person has a mental illness and deems the person indigent, a court must conduct an inquiry to determine whether the person can afford to pay the clerk’s fee and the DNA fee. Mr. Houck suffers from Post-Traumatic Stress Disorder (PTSD) and Delusional Disorder, and the court determined that Mr. Houck is indigent. However, the sentencing court failed to inquire as to whether Mr. Houck could pay

the clerk's fee and the DNA fee and instead imposed both fees. Did the court err when it imposed these fees?

4. The legislature recently amended our LFO statutory scheme, rendering the clerk's fee and the DNA fee discretionary (in most circumstances). Because these amendments are remedial, and because Mr. Houck's case is currently pending on direct review, should this Court strike the imposition of the clerk's fee and the DNA fee because this legislation applies to Mr. Houck?

D. STATEMENT OF THE CASE

After a jury convicted Anthony Houck of two crimes,[1] the sentencing court imposed several drug related conditions of community custody. CP 156. The conditions forbid Mr. Houck from "associating with known drug users/sellers except in [treatment] settings" and from "us[ing]/possess[ing] cont[rolled] substances." CP 154. Additionally, the court imposed $800 in legal financial obligations (LFOs). CP 153.

Mr. Houck appeals.

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

E. ARGUMENT

1. This Court should strike two conditions of community custody because one is unconstitutional, and the court possessed no authority to impose the other.

a. Courts can neither impose terms of community custody that are unconstitutionally vague nor impose conditions of community custody without legal authority.

A sentencing court abuses its discretion when it imposes an unconstitutional condition of community custody. *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). This Court does not presume that community custody conditions are constitutional. *Irwin*, 191 Wn. App. at 652 (referencing *State v. Sanchez Valencia*, 169 Wn.2d 782, 793, 364 P.3d 830 (2015)). When a sentencing court imposes a condition of community that is contrary to the constitution, this Court must reverse and remand so that the sentencing court can correct its error. *Bahl*, 164 Wn.2d at 762.

Additionally, a court abuses its discretion when it imposes a condition of community custody without lawful authority. *See State v. Petersen*, 47 Wn.2d 836, 839, 289 P.2d 1013 (1955); *see also State v. Lopez*, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007) (holding that a court's imposition of a condition of community custody that contradicted the legislature's directive constituted an abuse of discretion). This Court

reviews whether the sentencing court erroneously interpreted or misapplied the law *de novo*. *Lord*, 161 Wn.2d at 284.

b. The condition that prohibits Mr. Houck from associating with "known drug users/sellers except in treatment settings" does not provide fair warning of the proscribed conduct and is subject to arbitrary enforcement, rendering it unconstitutionally vague

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

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

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

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

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

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

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

Because this condition is unconstitutionally vague, this Court should remand with instructions for the court to strike the condition.

c. Without authority, the court imposed an unlawful condition of community custody that subjects Mr. Houck to criminal sanctions if he possesses or consumes medical marijuana.

The court possessed no authority to impose the condition of community custody that prohibits Mr. Houck from "consuming controlled substances except pursuant to lawfully issued prescriptions" because courts do no possess the authority to subject individuals to criminal sanctions if they possess or consume marijuana in accordance with the

Washington Medical Use of Cannabis Act (MUCA). Pursuant to federal law, doctors cannot lawfully issue a prescription for medical marijuana. Instead, doctors may issue an "authorization" for medical marijuana use which details the doctor's belief that the patient will benefit from the use of marijuana. *See Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (detailing the federal policy prohibiting doctors from issuing prescriptions for medical marijuana and also describing a doctor's first amendment right to express his or her belief that marijuana use may benefit the patient); *see also Medical Frequently Asked Questions*, Norml.[2] Thus, under the court's condition, Mr. Houck cannot consume medical marijuana.

In 1998, the people of Washington voted in favor of I-692 (MUCA), an initiative that grants people with terminal or debilitating illnesses access to marijuana without fear of criminal or civil consequences.[3] Because Washington voters recognized that marijuana benefits individuals with conditions ranging from multiple sclerosis to epilepsy, the people found that "humanitarian compassion" necessitates that individuals with such conditions lawfully exercise their own judgment

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

[3] https://www.sos.wa.gov/elections/initiatives/text/i692.pdf; *see also Medical Marijuana: History in Washington*, Wash. St. Dep't of Health, https://www.doh.wa.gov/YouandYourFamily/Marijuana/MedicalMarijuana/LawsandRules/HistoryinWashington (last visited May 30, 2018).

and use marijuana if needed to treat their conditions. RCW 69.51A.005(1)(b), (2).

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

d. Washington's Medical Marijuana Act shields medical marijuana users from criminal sanctions so long as users strictly adhere to the requirements of RCW 69.51A.040.

State law shields medical marijuana users from arrest or criminal sanctions so long as the user strictly adheres to the requirements provided in RCW 69.51A.040. RCW 69.51A.005(2)(b) explicitly states that the legislature intended for "qualifying patients" who benefit from marijuana to not be subject to arrest, prosecution, or other criminal sanctions based on their use of medical marijuana. RCW 69.51A.040 clarifies when a person is a "qualifying patient" subject to criminal immunity.[4]

[4] *See* RCW 69.51A.040.

RCW 69.51A.040 reaffirms that such qualified patients are insulated from criminal consequences for their use of medical marijuana. In relevant part, the statute provides:

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

RCW 69.51A.040 (emphasis added).

However, some limitations exist. The relevant statutes are as follows:

RCW 69.51A.005(4) provides:

> Nothing in this chapter diminishes the authority of correctional agencies and departments, including local governments or jails, to establish a procedure for determining when the use of marijuana would impact community safety or the effective supervision of those on active supervision for a criminal conviction, nor does it create the right to any accommodation of any medical use of marijuana in any correctional facility or jail.

(emphasis added).

And RCW 69.51A.055(1)(a) provides:

> (1)(a) The arrest and prosecution protections established in RCW 69.51A.040 may not be asserted in a supervision revocation or violation hearing by a person who is supervised by a corrections agency or department, including local governments or jails, that

> has determined that the terms of this section are inconsistent with and contrary to his or her supervision.

Thus, MUCA specifically provides that "correctional agencies," "departments," "local governments," and "jails" may establish a *procedure* to determine "when the use of marijuana would impact community safety or the effective supervision of those on active supervision for a criminal conviction." RCW 69.51A.005(4) (emphasis added). In turn, RCW 69.51A.055(1)(a) explains that the arrest and prosecution protections of MUCA cannot be invoked in a supervision or revocation violation hearing if the qualifying patient's supervising entity (a corrections agency or the Department of Corrections) previously determined that medical marijuana is contrary to the person's community supervision.

As set forth below, these provisions of MUCA (1) divest courts of any authority to impose conditions of community custody or probation that can subject a qualified medical marijuana user to criminal sanctions; and (2) direct supervising entities, like the Department of Corrections, to establish a procedure before imposing a condition of community custody or probation that prohibits a qualified patient from using medical marijuana.

For these reasons, the sentencing court erred in imposing a condition of community custody that bars Mr. Houck from consuming/possessing controlled substances under penalty of 60 days of confinement—even the lawful use of medical marijuana under RCW 69.51A.040; CP 159.

e. Per the canons of construction, courts possess no authority to impose conditions of community custody that subject qualified medical marijuana users to criminal sanctions.

Per the canons of statutory construction, superior courts possess no authority to impose conditions of community custody that subject qualified medical marijuana users to criminal sanctions. Instead, correctional agencies, like the Department of Corrections, possess the discretion to subject qualified medical marijuana users to criminal sanctions, but this discretion must be exercised in accordance with established procedures. This court reviews questions of statutory construction de novo. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005).

Interpretation of a statute begins with a reading of the text of the statutes or statutes in question. *Id*. at 621. If the language is unambiguous, this Court relies solely on the statutory language; however, if the language of the statute is susceptible to more than one reasonable interpretation, the

statute is ambiguous. *Id.* A statute is not ambiguous simply because two different interpretations are feasible. *Id*. To determine a statute's plain language, this Court examines the statute where the provision is found, provisions related to the statute in question, and the larger statutory scheme as a whole. *State v. Larson*, 184 Wn.2d 843, 365 P.3d 740 (2015).

Importantly, this Court's primary goal in interpreting a statute is to effectuate the legislature's intent. *In re Welfare of L.N.B.-L*, 157 Wn. App. 215, 238, 237 P.3d 944 (2010).

Each word of a statute must be accorded meaning, and "when the legislature uses two different terms in the same statute, courts presume the legislature intended the terms to have different meanings." *Densley v. Dep't of Retirement Systems*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). This is because the legislature is presumed to use no superfluous words. *Roggenkamp*, 153 Wn.2d at 624.

i. The doctrine of expressio unius est exclusio alterius compels an interpretation of the MUCA that prohibits courts from imposing conditions of community custody that can subject a qualified patient to criminal sanctions for their use of medical marijuana.

Because the term "court" does not appear in the statutes that both (1) limit a qualified medical marijuana's user ability to remain free of criminal sanctions for their use of medical marijuana; and (2) explicitly name the entities that can limit a person's ability to lawfully use medical marijuana,[5] courts possess no authority to impose a condition of community custody that can subject a medical marijuana user to criminal sanctions for their use of medical marijuana in conformity with RCW 69.51A.040.

In keeping with the presumption that the legislature acts purposefully when drafting legislation, this court adheres to the doctrine of *expressio unius est exclusio alterius*. *In re Hopkin*s, 137 Wn.2d 897, 976 P.2d 616 (1999). This doctrine holds that "the legislative inclusion of certain items in a category implies that other items in that category [were] intended to be excluded." *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d

[5] RCW 69.51A.005(4); RCW 69.51A.055(1)(a).

380 (1993). In other words, a Court must presume that the Legislature's omission of a term used elsewhere within a statute was deliberate; therefore, the term cannot be "read in" to a portion of the statute that does not mention the term in question.

Here, the term "court" explicitly appears in the MUCA in several sections. *See* RCW 69.51A.130(1), (2); RCW 69.51A.230(9)(c). However, the term "court" is conspicuously absent from the statutes in question. RCW 69.51.A.005(4); RCW 69.51A.055(1)(a). It therefore follows that the term "court" cannot be "read in" to other portions of the statute that fail to explicitly mention the term. Thus, courts possess no authority to impose conditions of community custody that can subject a qualified medical marijuana user to criminal sanctions.

ii. The doctrines of noscitur a socis and edjusdem generis also compel an interpretation that prohibits courts from imposing conditions of community custody that can subject a qualified patient to criminal sanctions for their use of medical marijuana.

The doctrines of *noscitur a socis* and *edjusdem generis* also compel the same interpretation. To discern the meaning of an undefined and ambiguous term in a statute, this Court also adheres to the doctrine of *noscitur a socis*, "which provides that a single word in a statute should not

be read in isolation;" instead, the words accompanying the term in question determine the term in question's meaning. *Roggenkamp*, 153 Wn.2d at 623. This doctrine is closely related to the established canon of *edjusem generis*: "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding words." *Washington State Dep't of Social and Health Services v. Guardianship Estate of Keffeler.* 537 U.S. 371, 384, 123 S. Ct. 1017, 154 L. Ed. 2d 972 (2003) (*citing Circuit City Stores Inc., v. Adams*, 532 U.S. 105, 114-15, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)); *see also State v. K.L.B.*, 180 Wn.2d 735, 740-42, 328 P.3d 886 (2014).

RCW 69.51.A.005(4) and RCW 69.51A.055(1)(a) provide that "correctional agencies and departments, including local governments or jails" possess the authority to prohibit the use of medical marijuana for individuals who conform with RCW 69.51A.040. The doctrine of *noscitur a socis* and *ejusdem generis* instructs this Court to read the term "local government" in RCW 69.51A.005(4) and RCW 69.51A.055(1)(a) to mean something similar to the other words associated with the term—"correctional agencies" and "jails." RCW 69.51A.005(4) provides:

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

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

(emphasis added).

And RCW 69.51A.055(1)(a) provides:

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

(emphasis added).

The dictionary defines "jail" as

> a place of confinement for persons held in lawful custody; *specifically* : such a place under the jurisdiction of a *local government* (such as a county) for the confinement of persons awaiting trial or those convicted of minor crimes.

Jail, Merriam Webster.[6]

While the dictionary does not define the term "corrections agency," one of the definitions of "correction" provides,

> the treatment and rehabilitation of offenders through a program involving penal custody, parole, and probation; also : the administration of such treatment as a matter of public policy — usually used in plural.

Correction, Merriam Webster.[7]

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[6] https://www.merriam-webster.com/dictionary/jail (last visited Jan. 30, 2018).
[7] https://www.merriam-webster.com/dictionary/corrections (last visited Jan. 30, 2018).

Thus, the term "corrections agency" should be read to mean an agency that supervises individuals on parole or probation.

It therefore follows that the term "local government" must be read narrowly to mean something similar to the terms "jail" and "corrections agency." Because a court is dissimilar from a "jail" or "corrections agency," the term "local government" cannot be interpreted to include courts.

iii. The rule of lenity shows courts lack any authority to impose conditions of community custody or probation conditions that can subject qualified medical marijuana users to criminal sanctions.

Even if this court were to believe that our legislatures' intent is unclear or that the statute is ambiguous, the rule of lenity requires that the statute be construed in favor of Mr. Houck. In a criminal case involving an ambiguous statute, this Court applies the rule of lenity and interprets the statute in the defendant's favor. *State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015). Courts will not interpret an ambiguous penal statute adversely to the defendant unless the statutory construction clearly establishes that the legislature intended such an interpretation. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013) "Otherwise, if the

indications of legislative intent are 'insufficient to clarify the ambiguity,' we will then interpret the statute in favor of the defendant." *Id.*

Disallowing courts from imposing conditions of community custody that can subject individuals to criminal sanctions for their use of medical marijuana (in accordance with RCW 69.51A.040) is in Mr. Houck's favor. Therefore, this Court should interpret the statute in a manner that divests courts from any authority to impose such conditions.

iv. Only supervising entities, like the Department of Corrections, possess the discretion to impose conditions of community custody that subject qualified medical marijuana patients to criminal sanctions, but this discretion must be exercised in accordance with a procedure.

While supervising entities, like the Department of Corrections, possess the authority to impose criminal sanctions on qualified patients who strictly adhere to the requirements of RCW 69.51A.040, this authority must be exercised in accordance with an established procedure. RCW 69.51A.005(4) provides,

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

(emphasis added).

And RCW 69.51A.055(1)(a) only prohibits qualified medical marijuana users from invoking RCW 69.51A.040's protections from criminal sanctions if the supervising agency *previously determined* that medical marijuana use is contrary to his or her supervision. RCW 69.51A.055(1)(a) provides,

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

(emphasis added).

Taken together, this means a supervising entity can only subject a qualified medical marijuana user to criminal sanctions if the entity established a procedure and has determined that the use of medical marijuana is detrimental to the offender's period of supervision.

Even if this Court determines that sentencing courts possess the authority to impose criminal sanctions on medical marijuana users, the sentencing court unlawfully failed to observe any procedure when it imposed a condition of community custody that subjects Mr. Houck to criminal sanctions for his use of medical marijuana.

e. Subject to some limitations, allowing offenders to use medical marijuana during community custody is consistent with the Sentencing Reform Act and sound public policy.

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

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

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

during community custody if the individual has a prescription to use the substance. RCW 9.94A.703(2)(c).[8]

But the misuse of prescription opiates is a nationwide crisis, with thousands every year dying from overdose of prescription drugs and millions suffering from opioid use disorders. *See About the Epidemic: The U.S. Opioid Epidemic*, U.S. Dep't of Health & Human Serv;[9] *see also* U.S. Dep't of Health & Human Serv., *The Opioid Epidemic by the Numbers*.[10] In contrast, even the Drug Enforcement Agency acknowledges that no one in recorded history has ever overdosed from using marijuana. Drug Enforcement Agency, *Drug Fact Sheet: Marijuana.*[11] Moreover, by 2015, Washington spent close to a billion dollars in health care costs due to the opioid abuse. Matrix Global Advisors, LLC, *Health Care Costs from Opioid Abuse: A State-by-State Analysis* 2 (Apr. 2015).[12]

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

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

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

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

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

medical marijuana users to use medical marijuana during periods of supervision. RCW 69.51A.005(1)(b), (2).

f. This Court should strike both conditions.

The sentencing court lacked the authority to order Mr. Houck to abstain from possessing or consuming all controlled substances—even the use of medical marijuana that is in conformity with RCW 69.51A.040—during his term of community custody. This Court should remand with instructions for the sentencing court to amend this term community custody/probation to except Mr. Houck from criminal sanctions if he uses medical marijuana in accordance with RCW 69.51A.040. *See also Reed-Kahiler v. Hoggart*, 237 Ariz. 119, 347 P.3d 136 (2015) (holding that a probationer could not be criminally sanctioned for possessing or using medical marijuana because the drafters of Arizona's medical marijuana act included an immunity clause to protect such individuals from being subject to criminal penalties for their lawful use of medical marijuana).

Additionally, this Court should remand with instructions for the sentencing court to strike the condition of community custody prohibiting Mr. Houck from "associating with known drug users/sellers" because the condition is unconstitutionally vague.

2. The sentencing court failed to make the required inquiry as to Mr. Houck's ability to pay pursuant to RCW 9.94A.777.

Despite ample evidence that Mr. Houck has a mental illness and despite the court's conclusion that Mr. Houck is indigent, the sentencing court failed to inquire as to whether Mr. Houck could afford to pay the DNA fee and the clerk's fee. If a defendant has a mental illness, a court must assess the defendant's ability to pay *all* LFOs (except restitution or the victim penalty assessment) before imposing LFOs. RCW 9.94A.777(1); *accord State v. Tedder*, 194 Wn. App. 753, 758, 378 P.3d 246 (2016).

For example, in *Tedder*, the defendant had an extensive history of mental illness, including diagnoses for schizoaffective disorder and bipolar I disorder. 194 Wn. App. at 754. Throughout his life, the defendant maintained numerous jobs, but he was hospitalized numerous times for mental health treatment, and he previously appeared in mental health court. *Id*. at 754-55. At sentencing, the defendant's trial counsel mentioned the defendant's past hospitalizations and admission into mental health court. *Id*. Although the trial court acknowledged the defendant's mental health history, the court made no inquiry into his ability to pay LFOs. *Id*. at 755-56. After sentencing, the trial court found the defendant indigent for purposes of appeal and entered an order of indigency. *Id*. at 756.

For the first time on appeal, the defendant argued the court failed to make the required inquiry into his ability to pay under RCW 9.94A.777. *Id*. at 756. Citing the same policy reasons outlined in *Blazina*,[13] this Court exercised its RAP 2.5 discretion, reached the merits of the claim, and reversed. In reversing, this Court reasoned that the defendant's numerous involuntary hospitalizations and treatment in mental health court demonstrated he suffered from a "mental health condition" pursuant to RCW 9.94A.777. *Id*. at 756-57. Moreover, although the defendant had a work history, his history in mental health court and the court's order of indigency highly suggested that the defendant possessed no assets. *Id*. at 757. Because the sentencing court did not fully inquire into the defendant's education, work history, outstanding debts, and ability to hold a job in the future, this Court remanded so that the court could fully assess these matters and determine whether the defendant possessed the ability to pay. *Id*. at 757-58.

While, here, the sentencing court inquired into Mr. Houck's ability to pay discretionary LFOs, it did not inquire as to whether Mr. Houck possessed the ability to pay the clerk's fee and the DNA fee, as RCW

[13] *See State v. Blazina*, 182 Wn.2d 827, 344 p.3d 680 (2015) (outlining numerous reasons for reaching the merits of an unpreserved challenge to the sentencing court's imposition of discretionary LFOs, including the barriers LFOs impose on individuals attempting to lawfully reenter society).

9.94A.777 requires. This was despite a wealth of evidence indicating Mr. Houck had a mental illness and limited financial resources. Counsel for Mr. Houck submitted a presentencing report to the court. 8/29/17RP 9. The letters detail the abusive home environment Mr. Houck grew up in and the trauma he endured due to his brother's suicide. Supp. CP __, sub. no. 92. The presentence report also contained a psychological evaluation, which the court read. 8/29/17RP 10, 12; Supp. CP__, sub. no. 84. The psychological evaluation revealed that Mr. Houck has experienced "limited occupational success" and suffers from "multiple severe mental health conditions," including Posttraumatic Stress Disorder due to his familial history and Delusional Disorder, Persecutory Type.[14] Supp. CP __, sub. no. 84 (pg. 10).

Trial counsel for Mr. Houck mentioned that he suffered from PTSD and that Mr. Houck's ability to earn money after his imprisonment will be "somewhat nonexistent," as he will be 60 years old when he leaves prison. 8/29/17RP 23. Ultimately, the sentencing court granted Mr. Houck an exceptional down sentence based in part on Mr. Houck's "mental health issues." 8/29/17RP 26. The court deemed Mr. Houck indigent and

[14] "This subtype applies when the central theme of the delusion involves the individual's belief that he or she is being conspired against, cheated, spied on, followed, poisoned, or drugged, maliciously maligned, harassed, or obstructed in the pursuit of long term goals." Am. Psych. Ass'n, *Diagnostics & Statistics Manual of Mental Disorders* 90 (5th Ed. 2013).

entered an order of indigency. 8/29/17 RP 28. But, contrary to RCW 9.94A.777, the court did not conduct the required inquiry into Mr. Houck's ability to pay the clerk's fee and the DNA fee and instead ordered Mr. Houck to pay both fees.

As in *Tedder*, this court should exercise its RAP 2.5 discretion and remand with instructions for the sentencing court to conduct the required inquiry.

3. Alternatively, this Court should strike the clerk's fee and the DNA fee due to new legislation that applies to Mr. Houck.

a. <u>The new legislation forbids courts from imposing the clerk's fee and the DNA fee in circumstances like the circumstances present in Mr. Houck's case</u>.

The legislature recently amended the LFO statutory scheme and clarified that LFOs, subject to few exceptions, may not be imposed on an indigent person. The amended statute clarifies that an indigent person lacks the necessary "ability to pay." Laws of 2018, ch. 269, §"6.

Under the new legislation, courts "shall not order a defendant to pay costs" if "the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." Laws of 2018, ch. 269, § 6. If a person is indigent, the court does not further examine the person's

financial resources or the nature of the burden payment of costs would impose. *Id*.

The amendments also clarify when several non-mandatory legal financial obligations may be imposed. *See* Laws of 2018, ch. 269, § 6; Laws of 2018, ch. 269, § 17. These include the clerk's filing fee and DNA fee. The sentencing court imposed both of these fees upon Mr. Houck. CP 153.

Under the new legislation, the $200 clerk's filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.020(3)(a) through (c)." RCW 36.18.020(2)(h). The sentencing court found that Mr. Houck was indigent; therefore, this fee should no longer be imposed. 8/29/17 RP 28.

The sentencing court also imposed a $100 DNA fee. CP 153. This fee should only be included when the government has not previously collected DNA from the defendant as the result of a prior conviction. RCW 43.43.7541. This fee is not mandatory for a person like Mr. Houck, who had prior convictions. *See* RCW 43.43.754; CP 151. This fee should not be collected.

The amendments to the statute also eliminate interest for non-restitution obligations. Laws of 2018, ch. 269, §1. Previously, courts imposed interest at a rate of 12%, making it extraordinarily difficult for

people like Mr. Houck to ever pay off this debt. RCW 10.82.090. Because the sentencing court did not impose any restitution upon Mr. Houck, this amendment also applies to him.

b. The legislative changes are retroactive and apply to Mr. Houck.

Under the common law, pending cases are decided according to the law in effect at the time of the decision. *State v. Rose*, 191 Wn. App. 858, 864, 365 P.3d 756 (2015). This rule applies when a case is pending on appeal. If "a controlling law changes" during the pendency of the case, "the appellate court should apply the new or altered law, especially where no vested rights are involved, and the Legislature intended retroactive application." *Marine Power & Equip. Co. v. Wash. State Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 620, 694 P.2d 697 (1985).

The legislature is not required to use explicit language to express its intent. *State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970). Instead, the question is whether the law fairly conveys the intent to apply to pending litigation. *Id*. When a statute reduces the penalty for a crime, "the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one." *Heath*, 85 Wn.2d at 98. Courts have consistently held that the presumption that statutes generally apply prospectively does not

control changes in the law enacted to reduce punishment or ease the harshness of criminal prosecutions. *Heath*, 139 Wn.2d at 198; *see also Rose*, 191 Wn. App.at 868. Because these rules apply here, this Court should hold that the amendments to the legal financial obligation statute are retroactive.

i. The legal financial obligations amendments are retroactive because they were enacted to reduce punishment and ease the harshness of criminal prosecution.

The LFO amendments are retroactive because they were enacted to reduce punishment. This Court should presume that remedial amendments apply retroactively to pending cases. *Heath*, 85 Wn.2d at 197-98. For example, in *Heath*, the trial court retroactively applied an amendment to the habitual traffic offender act that allowed judges to stay license revocations when a person was engaged in treatment. *Id*. The purpose of the amendment was to allow alcoholics to receive treatment rather than lose their driving privileges; thus, the legislature created the amendment to reduce the punishment for the crime. *Id*. at 198. Our Supreme Court held, "the presumption of retroactivity therefore applies." *Id*. When an amendment reduces the penalty for a crime, "the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one." *Id*.

ii. The legal financial obligations amendments are retroactive because they are remedial in nature and were intended to clarify an ambiguity.

Moreover, the amendments are retroactive because they were intended to clarify an ambiguity and are remedial in nature. The legislature is aware that statutory changes operate retroactively when they are remedial in nature or intended to clarify an ambiguity. *Humphrey*, 139 Wn.2d at 62. An amendment is remedial when it "applies to practice, procedure, or remedies and does not affect a substantive or vested right." *Id*. Here the amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h) are remedial and should be applied retroactively.

In *Humphrey*, the Court addressed whether an amendment increasing the victim penalty assessment from $100 to $500 applied to people who were charged before the increase but convicted after it. 139 Wn.2d at 55. The Court found the amendments were not remedial, and therefore could not be applied retroactively because they increased the financial penalty imposed on people convicted of crimes. *Id*. at 63.

The changes to the legal financial obligation statutory scheme here are remedial and should be applied retroactively because they provide guidance on how to apply existing liabilities. The language of RCW

10.01.160(3) previously directed the court should not order an individual to pay costs unless he "is or will be able to pay them." *See* Laws of 2018, ch. 269, § 6. The amendments eliminated this imprecise language and prohibited ordering costs against indigent persons pursuant to RCW 10.101.010(3).

Unlike *Humphrey*, the amendments to RCW 10.01.160(3) create no new liability. The changes to RCW 10.01.160(3) simply provide more concrete guidelines for the legislature's previous directive that individuals not be burdened with costs they cannot pay.

Similarly, the legislature's directive not to recoup the $200 filing fee from indigent individuals under RCW 36.18.020(2)(h) is also remedial. In fact, even though this Court has said the $200 filing fee is mandatory in some cases, some trial courts regularly waive the fee for indigent persons. *See, e.g., State v. Mathers*, 193 Wn. App. 913, 917, 376 P.3d 1163 (2016) (finding the DNA fee and Victim Penalty Assessment fee mandatory but noting the trial court "waived all other LFOs" because the individual was indigent); *but see State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (construing criminal filing fee as mandatory). These changes now reconcile this problem and should be applied retroactively.

Likewise, prohibiting a court from imposing multiple DNA collection fees where the state has the person's DNA sample is remedial. It remedies the punitive imposition of a fee when that fee was intended for a purely administrative purpose. *See State v. Brewster*, 152 Wn. App. 856, 860-61, 218 P.3d 249 (2009) (noting DNA collection fee serves administrative purposes and "is not punitive"). The change to RCW 43.43.7541 removes the unreasonable imposition of a fee when the purpose of the fee has already been satisfied.

iii. The legal financial obligation amendments apply to Mr. Houck because his case is pending on direct review.

Finally, this Court should apply the general rule that "a new rule applies prospectively to all cases pending on direct review or not yet final." *Hanson*, 151 Wn.2d at 790. Because Mr. Houck's case remains pending on direct review, this Court may apply the amendments to RCW 10.01.160(3) prospectively here.

F. CONCLUSION

Based on the foregoing, Mr. Houck asks this Court to remand with instructions for the sentencing court to strike the offending conditions of community custody and conduct the required inquiry into Mr. Houck's ability to pay the clerk's fee and the DNA fee. Alternatively, Mr. Houck asks this Court to strike the clerk's fee and the DNA fee pursuant to new legislation.

DATED this 21st day of June, 2018.

Respectfully submitted,

/s Sara S. Taboada
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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 51201-7-II
v.	)	
	)	
ANTHONY HOUCK,	)	
	)	
Appellant.	)	

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