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

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY GLEN HOUCK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 14-1-01366-5

Brief of Respondent

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

1. Should this Court affirm the challenged community custody conditions, where the condition prohibiting defendant's use and possession of controlled substances except pursuant to a lawfully issued prescription is authorized by statute, and the condition prohibiting defendant's association with known drug users and sellers is not unconstitutionally vague?
2. Should this Court strike the clerk's fee and non-restitution interest where defendant was found indigent and House Bill 1783's amendments apply to defendant's case, but affirm the DNA fee where no objection was made to it below, a mental health inquiry was not required, and there is no indication in the record that defendant previously submitted a DNA sample?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On April 10, 2014, the Pierce County Prosecuting Attorney's Office charged appellant Anthony Glen Houck, hereinafter "defendant," by information with one count of Unlawful Manufacturing of a Controlled Substance (methamphetamine) and one count of Unlawful Possession of a Controlled Substance with Intent to Deliver (methamphetamine) with school zone and firearm enhancements on both counts. CP 1-2.

Subsequently, on February 17, 2015, defendant was charged by amended information with one count of Unlawful Manufacturing of a Controlled Substance (methamphetamine), one count of Unlawful Possession of a Controlled Substance with Intent to Deliver (methamphetamine), and one count of Unlawful Possession of Ammonia with Intent to Manufacture Methamphetamine with firearm and school zone enhancements. CP 5-7; *See*, RCW 69.50.401(1)(2)(b); RCW 69.50.440(1); RCW 9.94A.533; RCW 69.50.435.

Trial commenced in Pierce County Superior Court before the Honorable Stanley J. Rumbaugh on March 23, 2015. 3/23/15 RP 5.¹

¹ The Verbatim Transcript of Proceedings in this case are contained in 10 volumes which are not consecutively paginated. The State will refer to each volume by date and page number.

Following jury selection, defendant failed to appear, and the court proceeded with the trial in absentia. 3/30/15 RP 6-11, 8/29/17 RP 3. The jury found defendant guilty of Unlawful Manufacturing of a Controlled Substance and Unlawful Possession of a Controlled Substance with Intent to Deliver with a school zone enhancement on the second count. CP 112, 116, 117.

The court issued a warrant for defendant's arrest, and he was subsequently taken into custody after shooting at two bail bondsmen, resulting in felony convictions in Thurston County for two counts of assault in the second degree, firearm enhanced; one count of attempted assault in the second degree; two counts of unlawful possession of a firearm in the first degree; and one count of unlawful imprisonment. 1/13/17 RP 1, 3-4; 8/29/17 RP 3-4; CP 147.

On August 29, 2017, defendant appeared for sentencing. 8/29/17 RP 3. Defendant told the court that trauma resulting from years of abuse as a child led to his involvement with drugs. 8/29/17 RP 24. A report from treatment concluded that defendant's tumultuous life and years of methamphetamine use resulted in various mental health diagnoses including posttraumatic stress disorder, delusional disorder, borderline personality disorder, and alcohol and stimulant use disorders. CP 183-184.

The court found that defendant had a chemical dependency that contributed to his offenses. CP 147. Defendant was sentenced to 120 months on Count I, to run concurrent with defendant's sentence in the Thurston County case, and 60 months on Count II to run consecutive to the Thurston County sentence, with an additional 12 months in community custody. CP 151-152. The court imposed crime related community custody conditions including the following:

(B) While on community placement or community custody, the defendant shall:

...

(4) not consume controlled substances except pursuant to lawfully issued prescriptions;

(5) not unlawfully possess controlled substances while in community custody;

...

(x) have no contact with known drug users/sellers except in [a treatment] setting.

CP 152-153; *see also*, CP 158.

The State requested the mandatory legal financial obligations (LFOs) of the \$500 crime victim penalty assessment, \$100 DNA testing fee, and the \$200 filing fee. 8/29/17 RP 8. The defendant did not request any deviation from the State's recommendation on the mandatory LFOs. 8/29/17 RP 23. The court found the defendant indigent and waived the discretionary LFOs. 8/29/17 RP 28. The court made the following inquiry into defendant's ability to pay, stating,

THE COURT: I suppose I should make inquiry. Mr. Houck, do you own any real estate?

MR. HOUCK: No.

THE COURT: Do you have a bank account?

MR. HOUCK: Nope.

THE COURT: When was the last time that you worked at a legal job?

MR. HOUCK: That would be just prior to the trial.

THE COURT: Do you have any savings?

MR. HOUCK: No.

THE COURT: Vehicles?

MR. HOUCK: No.

THE COURT: I find that he continues to be indigent, and whatever the mandatory ones are. Interest will be waived until 90 days following release.

8/29/17 RP 28.

The court imposed the mandatory crime victim assessment, DNA database, and criminal filing fees for a total of \$800 but waived interest on those fees until 90 days after defendant's release from confinement. *Id.* Defendant appeals the imposition of the two community custody conditions listed above, the DNA collection fee, clerk's fee, and non-restitution interest. *See*, Brief of Appellant 2-4.

2. FACTS

During the early morning of April 9, 2014, the Pierce County Sherriff's Department's clandestine lab team executed a search warrant at a residence in Parkland. 3/30/15 RP 42, 62, 91, 102. The house was located across the street from an elementary school, so the timing of serving a warrant in the morning lessened the officers' concerns that children would be present nearby. 3/30/15 RP 42, 62.

When police entered the residence, they located defendant and an adult female inside the master bedroom and detained them. 3/30/15 RP 93, 96. Defendant was identified as the owner of the house. 3/31/15 RP 55-56. A loaded shotgun was lying within reach of defendant on the dresser right next to the bed where he was located. 3/30/15 RP 122, 132. Various other firearms and ammunition were found in the bedroom including a pistol, a revolver, and another shotgun in the closet. 3/30/15 RP 124.

A baggie on the dresser in the master bedroom contained a white powder which tested positive for methamphetamine. 3/31/15 RP 15; 4/1/15 RP 63-65. Police also found lithium batteries, assorted pills, unused baggies, coffee filters, sodium metal, foil, a digital scale, and a police scanner. 3/30/15 RP 97-98; 3/31/15 RP 16-17, 23, 58-60, 103. Foil is one way to use methamphetamine. 3/30/15 RP 98. Sodium metal, lithium metal, and pseudoephedrine, which the pills tested positive for, are

ingredients used to manufacture methamphetamine. 3/30/15 RP 56; 3/31/15 RP 60-61; 4/1/15 RP 38, 63. The coffee filters, which are commonly used in the extraction phase of manufacturing methamphetamine, tested positive for methamphetamine. 4/1/15 RP 45, 48, 65-66.

Furthermore, drug sellers commonly use digital scales to weigh out portions of controlled substances for sale and small baggies to package them. 3/31/15 RP 60, 104. Police scanners allow someone to monitor law enforcement activity nearby. 3/31/15 RP 8-9. At the foot of the bed where defendant was located, officers also found crib notes, a common form of documentation that drug sellers use to track their sales. 3/31/15 RP 24-30, 58, 61. When defendant was detained, a large sum of cash was found on his person. 3/31/15 RP 96-98.

C. ARGUMENT.

1. THIS COURT SHOULD AFFIRM THE CHALLENGED COMMUNITY CUSTODY CONDITIONS, WHERE THE CONDITION PROHIBITING THE DEFENDANT'S USE AND POSSESSION OF CONTROLLED SUBSTANCES EXCEPT PURSUANT TO A LAWFULLY ISSUED PRESCRIPTION IS AUTHORIZED BY STATUTE, AND THE CONDITION PROHIBITING DEFENDANT'S ASSOCIATION WITH KNOWN DRUG USERS/SELLERS IS NOT UNCONSTITUTIONALLY VAGUE.

A criminal defendant's constitutional rights while under community custody are subject to the infringements authorized by the Sentencing Reform Act (RCW 9.94A). *State v. Llamas-Villa*, 67 Wn. App. 448, 455, 836 P.2d 239 (1992). A one-year community custody sentence is generally required when an offender is convicted of a felony offense under chapter 69.50 RCW and sentenced to the custody of the department. RCW 9.94A.701(3)(c).

When a court sentences an offender to a term of community custody, the court must sentence that offender to the community custody conditions listed in RCW 9.94A.703(1) and (2), including the condition that the defendant, "Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions." RCW

9.94A.703(2)(c).² Pursuant to RCW 9.94A.703(3), a court may elect to impose as part of community custody discretionary conditions including that the defendant, “(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals” and “(f) Comply with any crime-related prohibitions.”

A defendant may assert a challenge to an unlawful or vague condition of community custody for the first time on appeal. *State v. Warnock*, 174 Wn. App. 608, 611, 299 P.3d 1173 (2013) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)); *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A trial court lacks authority to impose a community custody condition unless authorized by the legislature. *Warnock*, 174 Wn. App. at 608. Furthermore, a community custody condition must be sufficiently definite that an ordinary person can understand what conduct is proscribed and worded to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53. Community custody conditions generally will be reversed only if their imposition is “manifestly unreasonable.” *State v. Valencia*, 169 Wn.2d at 791-92, 239 P.3d 1059.

² RCW 9.94A.703(2) states that “[u]nless waived by the court, as part of any term of community custody, the court *shall* order” the conditions listed in this section. (Emphasis added).

- a. The sentencing court properly exercised its discretion in imposing a condition prohibiting defendant's use and possession of controlled substances except pursuant to lawfully issued prescriptions, including medical marijuana, where the condition is authorized by statute.

Defendant argues the court imposed an unlawful condition that he “refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.” Br. of App 8; CP 152. Courts review de novo a trial court's statutory authority to impose a particular community custody condition. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). However, imposing a statutorily authorized condition of community custody is within the discretion of the sentencing court and is reviewed for abuse of discretion. *Bahl*, 164 Wn.2d at 753.

The Sentencing Reform Act specifically authorizes the court to impose and enforce crime related prohibitions and affirmative conditions as part of any sentence. *Warnock*, 174 Wn. App. at 612; *see*, RCW 9.94A.703; *see also*, RCW 9.94A.505(9). A court must exercise discretion in waiving the conditions listed in RCW 9.94A.703(2), including the one prohibiting the use and possession of controlled substances, because language of the statute states they “*shall*” be imposed. (Emphasis added).

Here, the trial court lawfully imposed community custody conditions prohibiting the defendant from “consum[ing] controlled

substances except pursuant to a lawfully issued prescription” and “unlawfully possess[ing] controlled substances while on community custody.” CP 152. Defendant and his counsel several times conceded to the fact that substance abuse contributed to his crimes. *See*, 8/29/17 RP 21-22, 24-25. The court found that defendant had a chemical dependency that contributed to his offenses. CP 147; *See*, RCW 9.94A.607.

A court is required to impose this condition unless it exercises its discretion to waive it. RCW 9.94A.703(2)(c). Furthermore, courts can impose a community custody condition prohibiting the use and possession of controlled substances where it relates to the crime. RCW 9.94A.703(3)(f) (“[T]he court may order an offender to...Comply with any crime-related prohibitions”). The court therefore indisputably had the authority to prohibit defendant’s use and possession of controlled substances where defendant’s crimes were manufacturing and possessing with intent to deliver a controlled substance. CP 146-47.

Defendant claims this condition unlawfully prohibits his use of medical marijuana. Br. of App. 8-9. Washington defines “controlled substance” as “a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws, or federal or commission rules.” RCW 69.50.101. Marijuana is listed as a Schedule I

controlled substance under federal and state law. United States Controlled Substances Act, 21 U.S.C. § 812; RCW 69.50.204(c)(22).

Based on the classification of marijuana as a controlled substance, courts have authority under RCW 9.94A.703(2)(c) to impose a community custody condition which prohibits the use and possession of marijuana.

State v. Loutzenhiser, No. 33136-9-III, 2016 WL 1182307, at *12-13 (Wash. Ct. App. March 24, 2016) (unpublished); *State v. Myers*, No. 32759-1-III, 2016 WL 181524 at *5 (Wash. Ct. App. January 12, 2016) (unpublished), as amended on denial of reconsideration (Feb. 11, 2016).³ In *Loutzenhiser*, the court rejected the same argument defendant presents here, because although medical marijuana is legalized, marijuana remains a controlled substance, and thus a court may prohibit its use as a community custody condition. 2016 WL 1182307, at *12-13.

The Washington State Medical Use of Cannabis Act, Chapter 69.51A RCW, does not implicitly repeal the classification of marijuana as a Schedule I controlled substance. *State v. Atchley*, 142 Wn. App. 147, 164-65, 173 P.3d 323 (2007); *State v. Hanson*, 138 Wn. App. 322, 330,

³ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decisions cited above have no precedential value, are not binding on any court, and are cited only for such persuasive value as the court deems appropriate.

157 P.3d 438 (2007). For the purposes of the Controlled Substances Act, marijuana currently has no accepted medical use. *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 492, 121 S. Ct. 1711, 1718, 149 L. Ed. 2d 722 (2001) (citing 21 U.S.C. § 812).⁴ Therefore, a community custody condition can lawfully prohibit the use and possession of marijuana, even in a medical context. *Loutzenhiser*, 2016 WL 1182307 at *12-13; *Myers*, 2016 WL 181524 at *5. Accordingly, defendant's argument that the condition unlawfully prohibits his medical marijuana use and possession is without merit.

A community custody condition which provides an exception for the use and possession of controlled substances "pursuant to lawfully issued prescriptions" nonetheless prohibits the use and possession of medical marijuana. *State v. Almborg*, No. 33314-1-III, 2016 WL 806192 at *3 (Wash. Ct. App. February 16, 2016) (unpublished)⁵; *Myers*, 2016 WL 181524 at *6. Such an exception does not encompass medical marijuana because one can never obtain a prescription for marijuana use. *Myers*, 2016 WL 181524 at *6 (citing RCW 69.50.308). A medical

⁴ A Schedule I drug or substance has no currently accepted medical use in treatment in the United States. U.S.C. § 812.

⁵ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

marijuana patient obtains “authorization,” not a prescription, from a health care provider. *Id.* (citing RCW 69.51A.030(2)(a)). A court is within its authority to prohibit the use and possession of medical marijuana, a nonprescribed controlled substance, as a community custody condition. *Almberg*, 2016 WL 806192 at *3.

Defendant correctly states that the clause in the community custody condition which makes an exception for use and possession of controlled substances “pursuant to a lawfully issued prescription” does not authorize his use or possession of medical marijuana, because medical marijuana cannot be lawfully prescribed in Washington. Rather, it is “authorized” by a doctor. *Myers*, 2016 WL 181524 at *6; RCW 69.51A.030(2)(a).

Defendant wrongly claims that this prohibition is unlawful, because the Washington State Medical Use of Cannabis Act, RCW 69.51A.040, shields qualified users from arrest, prosecution, or other criminal sanctions or civil consequences under state law based solely on their medical use of marijuana. Br. of App. 8-9. However, the Act provides an exception to these protections in circumstances where an individual is under supervision for a criminal conviction, stating,

RCW 69.51A.040 does not apply to a person who is supervised for a criminal conviction by a corrections agency or department, including local governments or jails,

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

RCW 69.51A.055(2). Offenders who are sentenced by a trial court to community custody as part of their criminal convictions are supervised by the Department of Corrections. *Grisby v. Herzog*, 190 Wn. App. 786, 789–90, 362 P.3d 763 (2015); *In re Pers. Restraint of Smith*, 139 Wn. App. 600, 161 P.3d 483 (2007); *see also*, RCW 9.94A.704(1); RCW 9.94A.030.⁶ Accordingly, offenders who are sentenced to community custody are not necessarily entitled to the legal protections that the medical marijuana act provides under RCW 69.51A.055.

Defendant argues, however, that the limitation in RCW 69.51A.055 does not apply to defendants under community custody sentences, because such sentences are imposed by a court, rather than a corrections department, agency, local government, or jail, which are named in the statute. *See*, Br. of App. 10. Courts impose the punishment for criminal convictions, including community custody sentences and their conditions. RCW 9.94A.505; RCW 9.94A.701; RCW 9.94A.703. However, RCW 69.51A.055 lists various entities that supervise persons

⁶“(5) ‘Community custody’ means that portion of an offender’s sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender’s movement and activities by the department...(17) ‘Department’ means the department of corrections.” RCW 9.94A.030.

under criminal convictions, not entities that impose them. It therefore makes sense that courts would not be named in the procession of supervising entities in the statutory language.

The Department of Corrections supervises community custody sentences. *State v. Bruch*, 182 Wn.2d 854, 868, 346 P.3d 724 (2015); *see*, RCW 9.94A.704(1), (6); RCW 9.94A.704(6). Courts, however, impose community custody sentences and conditions. RCW 9.94A.703.⁷ Hence, community custody sentences and conditions which the Department of Corrections supervises must have been imposed by a court.⁸ Accordingly, if the statute applies to “a person who is supervised for a criminal conviction by a corrections agency or department,” in the same way it applies to a person who is sentenced to community custody by a court, like the defendant in this case. RCW 69.51A.055.

As defendant argues, RCW 69.51A.055 indeed requires that the corrections department supervising a person under criminal conviction “has determined that the terms of this chapter are inconsistent with and

⁷ When a *court* sentences a person to a term of community custody, *the court shall* impose conditions of community custody as provided in this section. (Emphasis added). RCW 9.94A.703.

⁸ The Department of Corrections has authority to “assess the offender's risk of reoffense and may establish and modify *additional* conditions of community custody based upon the risk to community safety.” RCW 9.94A.704(2)(a) (Emphasis added). However, the offenders who the Department supervises are sentenced to community custody by a court. RCW 9.94A.703.

contrary to his supervision.” Here, the defendant was convicted of two controlled substance related charges. CP 112, 116-117, 146-147.

Defendant conceded the fact that substance abuse contributed to his crimes. 8/29/17 RP 21-22, 24-25. The court found that defendant had a chemical dependency that contributed to his offenses. CP 147. Based on those facts, the trial court had a reasonable basis to impose a community custody condition prohibiting defendant’s use and unlawful possession of controlled substances, which includes medical marijuana. CP 152.

The Department of Corrections is not merely within its authority but is required to uphold the conditions imposed by the trial court. RCW 9.94A.704(6). The Department of Corrections “*may not* impose conditions that are contrary to those ordered by the court and *may not* contravene or decrease court-imposed conditions.” *Id.* (emphasis added). The court did not exercise its discretion to waive the condition prohibiting use and possession of controlled substances. RCW 9.94A.703(2)(c). Accordingly, allowing defendant’s use or possession of controlled substances here, including medical marijuana, would directly contravene the conditions imposed by the court and therefore is inarguably inconsistent with and contrary to defendant’s supervision.

Defendant is under supervision by the Department of Corrections, therefore, he cannot assert the legal protections provided by the medical

marijuana act per the limitation in RCW 69.51A.055. The trial court had statutory authority to impose a community custody condition which prohibited defendant's use and possession of controlled substances except pursuant to legally issued prescriptions. That prohibition includes marijuana, even in a medical context, which is a controlled substance as defined by state and federal laws. Accordingly, this Court should affirm the conditions.

- b. The condition prohibiting the defendant's association with known drug users/sellers is not unconstitutionally vague.

Defendant also argues the condition prohibiting him from “[associating] with known drug users/sellers except in a treatment setting” is unconstitutionally vague. Br. of App. 6; *see*, CP 152. Generally, imposing community custody conditions is within the discretion of the sentencing court. *Valencia*, 169 Wn.2d at 791-93. Courts apply the abuse of discretion standard of review and if a condition is unconstitutionally vague, it is manifestly unreasonable and necessarily an abuse of discretion. *Id.*; *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015). A community custody condition is not unconstitutionally vague so long as it (1) provides ordinary people with fair warning of the proscribed conduct, and (2) has standards that are definite enough to “protect against arbitrary

enforcement.”” *State v. Magana*, 197 Wn. App. 189, 200-01, 389 P.3d 654 (2016) (quoting *Bahl*, 164 Wn.2d at 753).

Furthermore, “a provision is not vague when a person ‘exercising ordinary common sense can sufficiently understand’ it.” *State v. Padilla*, 190 Wn.2d 672, 680, 416 P.3d 712 (2018) (citing *Gibson v. City of Auburn*, 50 Wn. App. 661, 667, 748 P.2d 673 (1988)). In deciding whether a term is unconstitutionally vague, the term is not considered in a “vacuum,” rather, it is considered in the context in which it is used. *Bahl*, 164 Wn.2d at 754 (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990)).

When determining whether challenged language is sufficiently definite to provide fair warning, the reviewing court must read the language in context and give it a “sensible, meaningful, and practical interpretation.” *City of Spokane*, 115 Wn.2d at 180. “Impossible standards of specificity are not required since language always involves some degree of vagueness.” *Bahl*, 164 Wn.2d at 759.

In *Llamas-Villa*, the court rejected a vagueness challenge to a condition of community custody that the defendant “not associate with persons using, possessing, or dealing with controlled substances.” *Llamas-Villa*, 67 Wn. App. at 454. The defendant there argued that the condition should have been more narrowly limited to those who the defendant

“*knows* to use, possess, or deal with controlled substances.” *Id.* at 455 (emphasis in original). The court rejected his argument, finding that the condition as imposed provided “adequate notice of what conduct is prohibited” and was “neither overbroad or vague.” *Id.* at 456.

The court there noted that upon violation of the condition, Llamas-Villa would have the opportunity to argue that he did not know the individuals with whom he had associated were using, possessing, or dealing drugs, but the court did not find it warranted to remand the matter to add a knowledge requirement to the condition. *Id.*; *See*, RCW 9.94A.737 (offenders are entitled to an evidentiary hearing prior to the imposition of sanctions following a community custody condition violation).

In *Wright*, the sentencing court imposed a condition that the defendant “shall have no contact with drug possessors, users, [or] sellers.” *State v. Wright*, No. 41949-1-II, 2013 WL 1915059, at *8 (Wash. Ct. App May 7, 2013) (unpublished).⁹ The defendant there argued that the condition was impermissibly vague, because he had no way of knowing if

⁹ GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

the people he meets are drug users or sellers. *Id.* The court in *Wright* agreed that without a “knowing” requirement, the condition “too vague to provide meaningful guidance” as to the prohibited conduct. *Id.* at *9. The court remanded to the sentencing court for greater specificity. *Id.*

Here, the defendant argues that the community custody condition prohibiting him from “associating with known drug users/sellers except in [a treatment] setting” is unconstitutionally vague because the term “known” is unclear as to who must have knowledge that a person is a drug user/seller. Br. of App. 8. Defendant claims the condition is open to arbitrary enforcement, arguing, “must it be ‘known’ to Mr. Houck...or to Mr. Houck’s CCO...or, must the community share the collective knowledge” that a person is a drug user/seller? *Id.*

Considering the condition in context rather than a vacuum, it is clear who the knowledge requirement applies to: the defendant. *See, Bahl*, 164 Wn.2d at 754 (a term is considered in the context in which it is used). A community custody condition applies to “*the* offender” in a particular criminal case and is imposed specifically to prohibit the conduct of that offender, according to the circumstances of the case. RCW 9.94A.703. Therefore, it is reasonable to infer the legislature intended the language used in the condition to apply exclusively to the defendant.

Here, defendant was convicted of manufacturing and possessing with intent to deliver methamphetamine. CP 112-119, 146-147. The defendant therefore undoubtedly has a network of associates who are drug users/sellers who he has made with, sold to, bought from, and/or used controlled substances with whose status as drug users/sellers he would know. In context, the condition unambiguously refers to drug users/sellers who are known to the defendant specifically, because he admittedly is a drug user and convicted manufacturer and therefore likely often encounters other known drug users/sellers. 8/29/17 RP 25; CP 146-147.

In *Llamas-Villa*, a community custody condition prohibiting the defendant from associating with drug users and sellers survived a vagueness challenge, even though it did not have an explicit knowledge requirement in its language. 67 Wn. App. at 455. The condition in this case is even less vague than the condition in *Llamas-Villa*, because it explicitly requires knowledge. The court there upheld the condition without an express knowledge requirement because it gave adequate notice of the prohibited conduct, and the defendant could assert the defense that he lacked knowledge of a person's drug user/seller status upon violation of the condition. *Id.* at 465. The condition at issue here survives a vagueness challenge, because it goes beyond what the condition

in *Llamas-Villa* did, providing a knowledge requirement that makes more explicit what conduct is prohibited.

In *Wright*, alternatively, the court struck a community custody condition prohibiting conduct with drug users/sellers based on the lack of a “knowing” requirement. *Wright*, 2013 WL 1915059, at *8. The court there agreed that without a knowledge requirement, the condition was unclear as to the prohibited conduct and could not survive a vagueness challenge. *Id.* The condition here is clear as to the prohibited conduct, because it requires the defendant *know* that the people he is associating with are drug users/sellers in order to violate the condition. Following the reasoning in *Wright*, the court here should uphold the condition, because it explicitly includes the same “knowing” requirement that the court there said would give specific guidance as to the prohibited conduct.

Defendant cites to *Irwin* to support the argument that the term “known” makes the community custody condition unconstitutionally vague. Br. of App 6-71; *see, Irwin*, 191 Wn. App. 644. In that case, the condition prohibited the defendant from “frequenting areas where minor children are known to congregate, as defined by the supervising CCO.” *Id.* at 652. The court there found the condition was too vague, because it required further definition from the CCO. *Id.* at 655. The condition there could be remedied by “an illustrative list of prohibited locations.” *Id.*

The issue in this case is distinguishable from *Irwin*, first of all, because it does not explicitly require further definition from a CCO, as the condition in *Irwin* explicitly did, which the court there said opened it to arbitrary enforcement. *Id.* The condition in *Irwin* was vague because children commonly congregate in a great multitude of areas which could include “‘public parks, bowling alleys, shopping malls, theaters, churches, hiking trails’ and other public places,” so the defendant could not ascertain whether those areas were prohibited. *Id.* at 654.

In *Irwin*, an illustrative list was necessary because the multitude of places where children congregate is so great. Here, there is a finite number of people known to the defendant as drug users or sellers. In this case, it would be illogical and impractical to provide an illustrative list to clarify the condition in the same way the *Irwin* court did, because only the defendant knows who the prohibited persons are. *Id.* The court here cannot create an illustrative list of drug users/sellers who the defendant knows as it could have in *Irwin*. Therefore, it was adequate to simply prohibit association with persons who the defendant *knows* are drug users/sellers without providing further definition.

The condition in *Irwin* was broader because it prohibited the defendant from *frequenting* areas where children congregated. *Id.* at 652. The defendant could reasonably violate the condition unintentionally

without further clarification on the prohibited areas if he merely *frequented* one of the many areas where children congregate. The condition in this case is more narrow, prohibiting the defendant's *association* with *known* drug users/sellers. Here, there is not a possibility that the defendant will unintentionally violate the condition, because it requires *association* with someone the defendant actually *knows* is within the prohibited class of persons, rather than merely *frequenting* where they *may* be as in *Irwin. Id.* at 652.

The condition here does not require further clarification because it makes adequately clear what conduct is prohibited and leaves no room for arbitrary enforcement. Therefore, the condition is not unconstitutionally vague and should be affirmed.

2. THE STATE CONCEDES THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO STRIKE THE CLERK'S FEE AND NON-RESTITUTION INTEREST BASED ON THE RECENT STATUTORY AMENDMENTS. HOWEVER, THIS COURT SHOULD AFFIRM THE DNA FEE WHERE NO OBJECTION TO IT WAS MADE BELOW, A MENTAL HEALTH INQUIRY WAS NOT REQUIRED, AND THERE IS NO INDICATION IN THE RECORD THAT DEFENDANT HAS PREVIOUSLY SUBMITTED A DNA SAMPLE.

When a person is convicted in superior court, the court may order the payment of LFOs as part of the sentence. *State v. Kuster*, 175 Wn.

App. 420, 424, 306 P.3d 1022 (2013) (*citing* RCW 9.94A.760(1)). Courts review a sentencing court's decision on whether to impose LFOs for abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). A court abuses its discretion when it imposes an LFO based on untenable grounds or for untenable reasons. *Id.* A defendant who makes no objection to the imposition of LFOs at sentencing is not automatically entitled to review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680, 682 (2015). An “appellate court may refuse to review any claim of error which was not raised in the trial court.” *Id.* (*citing* RAP 2.5(a)).

- a. Defendant wrongly claims the sentencing court failed to make the required inquiry where the record does not show he suffers from a mental illness which prevents him from participating in gainful employment.

A sentencing court must fully inquire into a defendant’s “means to pay” any legal financial obligations (“LFOs”), mandatory or discretionary, other than restitution and the crime victim penalty assessment, where the defendant “suffers from a mental health condition.” *State v. Tedder*, 194 Wn. App. 753, 756, 378 P.3d 246 (2016); RCW 9.94A.777(1). For the purpose of this statute,

[A] defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a

public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777(2). Reversal is appropriate where the record shows a sentencing court failed to make a required inquiry into a defendant's ability to pay LFOs. *Blazina*, 182 Wn.2d at 838. However, courts retain the discretion to decline to review issues that are raised for the first time on appeal. RAP 2.5(a).

Defendant argues he suffers from a mental illness which is on record, therefore the court failed to make the required inquiry into his ability to pay LFOs, and this Court should remand the case to make the inquiry. Br. of App. 22. Defendant's mental health was evaluated by Mark B. Whitehill, a licensed psychologist. CP 174-185. Whitehill's evaluation, the report from treatment on record, lists various diagnoses in terms of defendant's mental health. CP 183. However, nowhere in the report from treatment does the expert suggest defendant's illnesses prevent defendant from "participating in gainful employment," as RCW 9.94A.777 requires to trigger the mental health inquiry.

In its conclusions, the report notes that defendant has had "limited occupational success," but at no point suggests he could not have occupational success moving forward. CP 184. The report acknowledges the various occupations defendant has had, including auto body work after high school, working as a warehouse worker, having his own painting

business, TNT Topcoats and Restorations, and being a certified Harley-Davidson motorcycle technician. CP 179-180. Before his trial in Pierce County, defendant was working for a construction company building casings. CP 180. At sentencing for this case, defendant told the court he was working a legal job “just prior to trial.” 8/29/17 RP 28. Defendant’s history of securing several job opportunities suggests he is capable of gaining employment in the future.

Furthermore, the report notes in various places defendant’s high intelligence which suggests he is more than capable of applying himself in order to successfully participate in gainful employment. CP 183-184. Defendant placed within the “superior range of intellectual accomplishment” on an IQ test and in the realm of “very low probability of impairment” on a Hooper test for neurological difficulties. CP 183. Defendant told the court at sentencing that he is “getting help for [his] mental issues,” and “things are going fairly well there.” 8/29/17 RP 25. Defendant’s high intelligence and ongoing treatment suggest he is capable of rehabilitation and reasonably could participate in gainful employment in the future.

The record is insufficient to show that defendant’s mental disability has been the basis for enrollment in any public assistance programs. In fact, defendant told the psychologist he did not receive any

assistance from the State and nonetheless “got by.” CP 177. Therefore, defendant cannot show he suffers from a mental illness which prevents him from participating in gainful employment pursuant to RCW 9.94A.777(2). Accordingly, the court was not required to inquire into defendant’s ability to pay before imposing mandatory fines.

Furthermore, even if the record sufficiently established defendant’s mental illness, because defendant did not raise an objection when the LFOs were imposed at trial, the court may decline to review this claim under RAP 2.5. In *Blazina*, the court noted that unpreserved LFO errors do not result in the type of ““illegal or erroneous sentences”” that may be reviewed as a matter of right.” 182 Wn.2d at 833. Remand on this basis is not required.

- b. The amendments to the LFO statutory scheme apply to the clerk’s fee and non-restitution interest in this case because the case was pending on appeal on the effective date of the amendments, June 7, 2018.

When a controlling law is amended while a case is pending on review, this Court has held, “it would be anomalous for an appellate court to apply an obsolete law where no vested right or contrary legislative intent is disturbed by applying a more current law.” *Marine Power & Equip. Co. v. Washington State Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 621, 694 P.2d 697 (1985). “[A] statute

operates prospectively when the precipitating event for [its] application...occurs after the effective date of the statute.” *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass 'n*, 83 Wn.2d 523, 535, 520 P.2d 162 (1974) (alterations in original).

In *State v. Blank*, 131 Wn.2d 230, 249, 930, P.2d 1213 (1997), the Supreme Court of Washington held that a statute imposing appellate costs applied prospectively to the defendants' cases on appeal. In *Blank*, the “precipitating event” for a statute “concerning attorney fees and costs of litigation” was the termination of the defendant's case and the statute therefore applied prospectively to cases that were pending on appeal when the costs statute was enacted. *Id.* at 249.

Defendant argues the recent amendments to the LFO statutory scheme require the court to reverse the imposition of the DNA collection fee, clerk's fee, and non-restitution interest. Br. of App. 28. Citing *Blank*, the Supreme Court in *State v. Ramirez* recently held that the LFO statutory amendments in Engrossed Second Substitute House Bill 1783, at issue here, apply to cases pending on appeal. *State v. Ramirez*, No. 95249-3, 2018 WL 4499761 (Wash. September 20, 2018); Laws of 2018, Ch. 269, §§1, 6, 17,18. Defendant filed this appeal on August 29, 2017. CP 164. Like the defendants in *Blank* and *Ramirez*, here, defendant's case

was pending on appeal when the amendments were enacted on June 7, 2018, therefore defendant is entitled to the benefit of the statutory change.

Accordingly, the State concedes that the statutory amendments apply to defendant's case. The amended legislation prohibits imposition of the \$200 clerk's fee on defendants who are indigent at the time of sentencing. RCW 36.18.020(2)(h). The court found defendant indigent at sentencing, so this court should remand for the trial court to strike the clerk's fee. 8/29/17 RP 29.

Similarly, the non-restitution interest should be stricken. The amended statute states "As of the June 7, 2018, no interest shall accrue on non-restitution legal financial obligations." *See*, Laws of 2018, Ch. 269. Defendant's interest was waived until 90 days following defendant's release. 8/29/17 RP 28. Defendant remains in custody based on the sentence imposed. *See*, CP 144-159. Defendant's interest therefore did not begin to accrue prior to June 7, 2018, and therefore remand is appropriate for the trial court to strike the non-restitution interest.

Defendant wrongly claims the DNA fee was not mandatory, because he had prior convictions. Amended RCW 43.43.7541 mandates the DNA collection fee but provides an exemption when "the state has previously collected the offender's DNA as a result of prior conviction." To support the argument that he should be exempt from the DNA fee,

defendant merely states that he had prior convictions. Br. of App. 29. Defendant then cites to the judgement and sentence order which lists a previous sentence from Thurston County. *Id. See*, CP 151.

Although defendant was previously sentenced for his case in Thurston County, at sentencing, counsel stated defendant was sentenced there only two days before sentencing in this case. 8/29/17 RP 4. With so little time lapsing between the two sentencing hearings, it is unclear based on the available record whether defendant had a chance to submit his DNA sample. The record fails to show that he has done so.

A party seeking review has burden of perfecting record so reviewing court has all relevant evidence before it and an insufficient record on appeal precludes review of the alleged errors. *Bulzomi v. Dep't of Labor and Industries*, 72 Wn. App. at 525, 864 P.2d 996 (1994). Although defendant may have submitted DNA following a prior conviction, the record here does not warrant striking this fee. Defendant is therefore subject to the mandatory DNA collection fee of one hundred dollars. RCW 43.43.7541.

The State concedes pursuant to House Bill 1783, that the statutory amendments apply to this appeal, so this court should remand for the trial court to strike the clerk's fee and non-restitution interest. Laws of 2018, Ch. 269, §§1, 6, 17,18. However, defendant fails to show he has submitted

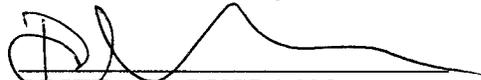
DNA to the State previously, so the DNA collection fee should be affirmed.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that this Court affirm the community custody conditions and the imposition of the mandatory DNA fee. The State concedes pursuant to the amended LFO legislation that remand is appropriate for the trial court to strike the clerk's fee and non-restitution interest.

DATED: October 10, 2018

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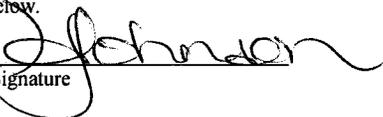
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Certificate of Service:

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.

10/10/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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