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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA NICHOLAS DELEON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold Johnson, Judge

No. 17-1-04458-1

Brief of Respondent

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

1. Is defendant's right to appeal waived where he expressly waived it in his plea agreement, and his plea was made knowingly, intelligently, and voluntarily?
2. Should the Court affirm the condition prohibiting contact with minors, which includes defendant's biological children, where the record shows it was reasonably necessary to further the State's compelling interest in preventing harm and protecting children?
3. Should this Court affirm the \$100 DNA database fee and remand for the trial court to strike the \$200 criminal filing fee and non-restitution interest where the amendments in House Bill 1783 apply to defendant's case?

B. STATEMENT OF THE CASE.

1. FACTS

Joshua Deleon, hereinafter, “defendant,” began raping and molesting his minor stepdaughters Sah.W (born October 12, 2001), Sat. W (born September 13, 2005), and Sh.W (born June 9, 2008), while he was married to their mother Stephanie Warwick. CP 1. Defendant started sexually abused Sah.W when she was 7 or 8 and they lived in North Carolina, and continued when they moved to Washington when she was 8 or 9. CP 2. Defendant began having sex with Sat.W. in 2012, and he began having sex with Sh.W. in 2015. *Id.*

After the couple divorced in 2017, the girls continued to live part-time with defendant, spending weekends with him pursuant to a parenting plan. CP 1. Defendant’s abuse continued after the divorce, occurring nearly every time the girls visited defendant. CP 2. In August 2017, Sat.W. garnered the courage to tell her mother about something that was bothering her. CP 1. Sat. W. revealed that defendant had been sexually abusing her and Sh.W for years. *Id.* Ms. Warwick reported the abuse to 911. *Id.*

Defendant had vaginal intercourse with Sat.W several times, including a time in which he held her arms down to the bed. CP 2. The intercourse hurt her vagina, and on one occasion, caused bleeding. *Id.* “A

medical examination of Sat.W. revealed that she has a healed transection of the hymen, which is indicative of penetrative trauma to her hymen and consistent with a history of vaginal-penile penetration.” *Id.* Defendant also had penile-anal intercourse with Sh.W. while Sat.W. was in the room. *Id.*

On multiple occasions, defendant locked Sh.W. in a room, forced her to perform oral sex on him, ignored her refusal to participate, and left her clutching the carpet in fear. *Id.* Sh.W. reported other incidents, including one in which defendant anally raped her in the shower and another in which he forced her to swallow his sperm. *Id.* She described being forced to watch as defendant sexually abused her sister Sat.W. *Id.* Defendant forced Sat.W. and Sh.W. to perform oral sex on each other on multiple occasions.

Sah.W. reported that defendant sexually abused her, starting when she was 7 or 8 and they lived in North Carolina and continuing when they moved to Washington when she was 8 or 9. *Id.* Defendant forced Sah.W. to perform oral sex on him on multiple occasions. *Id.* When she was 10 or 11 years old, defendant began rubbing his penis on her buttocks while she slept. *Id.* When she woke, defendant continued until he had ejaculated on her buttocks. *Id.* Defendant attempted to have penile-vaginal intercourse with Sah.W. when she was 12 years old, but it hurt. *Id.*

Defendant used his cell phone to record the sexual abuse. CP 1. He forced his stepdaughters to watch pornography with him, often while they masturbated him. CP 2. He assured their silence by threatening them, saying they would be taken away from their mother if they told anyone. CP 1-2. In 2015, a report that defendant sexually abused Sah.W. was made to CPS. CP 2. Sah.W. had reported an incident but then recanted her statement and refused to discuss it further. *Id.*

After the allegations in this case surfaced, Ms. Warwick asked her five year old daughter La.D. and 4 year old daughter Ly.D., defendant's biological children, if defendant had touched them. *Id.* La.D. said yes at first, then said no. Ly.D. said yes and that it hurt. *Id.* In a forensic interview on September 1, 2017, La.D. said defendant touched her, "Tee-Tee," which she uses to go pee, and took a picture with a blue and green camera when he did it. *Id.* She said one of defendant's friends was present, and they laughed at La.D. *Id.*

Defendant was never married or in a domestic partnership with any of the victims. CP 3.

2. PROCEDURAL HISTORY

On November 21, 2017, the Pierce County Prosecuting Attorney charged defendant with six counts of rape of a child in the first degree, four counts of child molestation in the first degree, one count of rape of a

child in the second degree, and three counts of sexual exploitation of a minor. CP 4-9.

On March 23, 2018, defendant pleaded guilty to an amended information which charged him with one count of rape of a child in the first degree, one count of child molestation in the first degree, and one count of child molestation in the second degree. CP 10-11. Defendant pleaded guilty to the elements of each charge and agreed that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea. CP 20. Defendant waived his right to appeal the sentence. CP 13, RP 9. The court found his plea knowing, intelligent, and voluntary. RP 15.

Defendant agreed to the State's recommendation of 162 months to life on Count I, 130 months to life on Count II, and 75 months to life on Count III, per the Indeterminant Sentencing Review Board, all to run concurrent, with lifetime community custody on Counts I and II, including the condition that he have no contact with minors. CP 16. The court sentenced defendant to 216 months on Count I, 130 months on Count II, and 75 months on Count III, to run concurrently for a total of 216 months with lifetime community custody on Counts I and II and 36 months of community custody on Count III. CP 35-36, RP 38-39.

Defendant asked the sentencing court to consider “the potential of Mr. Deleon having contact with his biological children only if -- and this may never happen -- but only if their mother consents to it and his sexual therapist consents to it.” RP 33-34. The court found defendant posed an “unreal” danger that counseling was not sure to overcome and imposed crime related community custody conditions including the following, “(x) Have no direct and/or indirect contact with minors.” CP 45-46; RP 39.

The court imposed the \$500 crime victim assessment fee, \$100 DNA database fee, and \$200 criminal filing fee. CP 33. The court found defendant indigent. CP 55-56. Defendant timely appealed. CP 53.

C. ARGUMENT.

1. DEFENDANT WAIVED HIS RIGHT TO APPEAL IN HIS PLEA AGREEMENT, WHICH HE MADE KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY.

A criminal defendant may waive his or her constitutional right to appeal. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998), (citing *State v. Perkins*, 108 Wn.2d 212, 218, 737 P.2d 250 (1987)). Waiver is valid so long as it is made intelligently, voluntarily, and with an understanding of the consequences. *Id.* A voluntary guilty plea acts as a waiver of the right to appeal. *Smith*, 134 Wn.2d at 852, (citing *State v. Johnson*, 104 Wn.2d 338, 342-43, 705 P.2d 773 (1985)). When a

defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *Smith*, 134 Wn.2d at 852, (citing *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982)).

Defendant expressly waived his right to appeal in his plea agreement. CP 13. At sentencing, defendant acknowledged that he understood his rights to appeal that he lost by pleading guilty. RP 8-9. When the court asked defendant if his plea was entered “freely and voluntarily,” he answered, “[Y]es, your Honor.” RP 15. The court found defendant’s plea knowing, intelligent, and voluntary. *Id.* Accordingly, his right to appeal was waived.

Waiver is valid so long as it is made intelligently, voluntarily, and with an understanding of the consequences. *Smith*, 134 Wn.2d at 852 (citing *Perkins*, 108 Wn.2d at 218). A voluntary guilty plea acts as a waiver of the right to appeal. *Smith*, 134 Wn.2d at 852, (citing *Johnson*, 104 Wn.2d at 342-43). Defendant’s plea was knowing, intelligent, and voluntary. RP 15. Thus, his waiver of the right to appeal is valid, and this Court should deny defendant’s appeal.

2. THE COURT SHOULD AFFIRM THE CONDITION PROHIBITING CONTACT WITH MINORS, WHICH INCLUDES DEFENDANT'S BIOLOGICAL CHILDREN, WHERE THE RECORD SHOWS IT WAS REASONABLY NECESSARY TO FURTHER THE STATE'S COMPELLING INTEREST IN PREVENTING HARM AND PROTECTING CHILDREN.

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 court may sentence an offender convicted of a sex offense listed in RCW 9.94A.507 to community custody for any period of time the person is released from total confinement before the expiration of the maximum sentence. RCW 9.94A.507(5).

When a court sentences an offender to a term of community custody, pursuant to RCW 9.94A.703(3), a court has authority to impose certain 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 “crime-related prohibition” prohibits “conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Any “crime-related prohibitions affecting fundamental rights must be narrowly drawn” and “[t]here must

be no reasonable alternative way to achieve the State's interest." *State v. Warren*, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008).

The Sentencing Reform Act authorizes courts to rely on facts that are admitted, proved, or acknowledged to determine any sentence. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005); RCW 9.94A.530(2)¹. Information, which is presented at sentencing and to which defendant does not make a timely and specific challenge to, is deemed acknowledged. *Id.*; *State v. Handley*, 115 Wn.2d 275, 796 P.2d 1266 (1990); *State v. Garza*, 123 Wn.2d 885, 872 P.2d 1087 (1994), *State v. Williams*, No. 50129-5-II, 2018 WL 2114053, at *4 (Wn. Ct. App. May 8, 2018) (unpublished)². By failing to demand an evidentiary hearing to refute information presented for consideration at a sentencing, a defendant acknowledges that he is unable to controvert the facts as set forth. *State v. Butler*, 75 Wn. App. 47, 876 P.2d 481 (1994).

Courts review the imposition of community custody conditions for an abuse of discretion. *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712

¹ In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. RCW 9.94A.530(2).

² 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.

(2018). A sentencing court abuses its discretion if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

The right to the care, custody, and companionship of one's children constitutes such a fundamental constitutional right. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). However, it is well established that when parental actions or decisions seriously conflict with the physical or mental health of the child, the State has a *parens patriae* right and responsibility to intervene to protect the child. *In re Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980), (citing *Parham v. J. R.*, 442 U.S. 584, 603, 99 S. Ct. 2493, 2504, 61 L. Ed. 2d 101, 119 (1979); *Wisconsin v. Yoder*, 406 U.S. 205, 230, 233-34, 92 S. Ct. 1526, 1542, 32 L. Ed. 2d 15 (1972)).

Crime-related prohibitions affecting fundamental rights must be imposed sensitively. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) (citing *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (1975)). "Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children." *State v. Corbett*, 158 Wn. App. 576, 598, 242 P.3d 52 (2010).

There must be no reasonable alternative way to achieve the State's interest. *Warren*, 165 Wn.2d at 34-35.

In cases where defendants were convicted of sexually abusing children within their households, courts affirm resulting restrictions on contact with their biological children. *See, State v. Corbett*, 158 Wn. App. at 600; *State v. Berg*, 147 Wn. App. 923, 941-44, 198 P.3d 529 (2008).

Here, the sentencing court was within its discretion to impose the condition which prohibits contact with defendant's biological children pursuant to RCW 9.94A.703(3). A court has authority to order defendant to refrain from contact with "the victim of the crime or a specified class of individuals." RCW 9.94A.703(3)(b). Defendant was convicted of sexually abusing his minor stepdaughters while they were in his care. Thus, his class of victims was minor children he parents. Accordingly, it was reasonable to impose the condition which protects his biological children, who are in the same class of persons as the victims in this case.

Furthermore, defendant stipulated the fact that La.D. reported during a forensic interview that defendant, with a friend present, touched her "Tee-Tee...which she uses to go pee," took a picture of it with a blue and green camera, and laughed at her. CP 2. When their mother asked 5-year-old La.D. and 4-year-old Ly.D. if defendant had touched their "Tee Tee," La.D. said yes, then no. *Id.* Ly.D. said yes, and that it hurt. *Id.* La.D.

and Ly.D. are defendant's biological children. CP 67. These facts indicate defendant sexually abused his two biological daughters. Accordingly, the no contact condition is necessary to protect defendant's biological children, who he also sexually abused.

The court was within its authority to consider that information in determining sentencing conditions because defendant stipulated to it. The real facts doctrine does not bar consideration of uncharged facts in a probable cause declaration that are undisputed and deemed acknowledged. *See, State v. Bell*, 116 Wn. App. 678, 684, 67 P.3d 527 (2003) (Court was within its discretion to consider facts in statement of probable cause where defendant failed to make specific objection to facts within it).

Defendant stipulated to the facts in the probable cause declaration on his guilty plea and at sentencing. CP 20; RP 4. The court stated it reviewed the probable cause declaration when it accepted his plea. RP 16. Accordingly, the facts within the probable cause declaration can be used to support the court's imposition of the challenged condition here.

Similarly, the imposition of the condition in this case was not an abuse of discretion because it was crime-related. *See, RCW 9.94A.703(3)(f)*. Defendant was convicted of sexually abusing his step-daughters, who lived with him. RP 27-28. Protecting defendant's biological children is sufficiently related to the crime because he parented

both the victims and his biological children in the same household. *Id.* Allowing defendant to have contact with his biological children would place them at the same risk as the victims in this case, because he was willing to victimize his stepdaughters, who were minor children and considered him their father.

The interest in protecting defendant's biological children is especially compelling here, because defendant has substantially the same relationship with all of the children: that of a parent. Even after divorcing their mother, defendant continued to parent his stepdaughters, maintaining weekend visits pursuant to a parenting plan. CP 1. The victims' mother testified at sentencing that defendant was "supposed to be their dad," and he referred to himself as "daddy" to his stepdaughters. RP 28. Defendant's step daughters lived in his household alongside his biological children, in which he held a position of utmost trust and authority over them. *Id.*

Moreover, defendant's biological daughters La.D. and Ly.D. also reported sexual abuse at the hands of the defendant. CP 2-3. Accordingly, it was reasonably necessary to protect defendant's biological children, who had substantially the same relationship with defendant as the victims in this case, from his contact, in order to further the State's compelling interest in preventing harm and protecting children.

Additionally, less restrictive alternatives were not appropriate considering the egregious facts of this case. Defendant abused multiple children, over several years. CP 1-3. Not only his step-daughters, but also the four and five year old daughters he now seeks to contact, reported sexual abuse at the hands of defendant. CP 2-3. He used his position as a parent to carry out the abuse, taking advantage of the instances when he was caring for the children alone, and he ensured its perpetuance by threatening the victims into silence. CP 1-2; RP 27.

Restricting all contact with defendant's biological children, even indirect or supervised, was necessary, because allowing defendant to foster a relationship of trust with them would facilitate the revictimization of La.D. and Ly.D.

Moreover, the court did not abuse its discretion because it articulated that it considered the no contact condition reasonably necessary based on the facts of the case. RP 38-39. At sentencing, counsel for defendant specifically requested that the court "entertain...the potential of Mr. Deleon having contact with his biological children only if -- and this may never happen -- but only if their mother consents to it and his sexual therapist consents to it." RP 34. The State argued the blanket condition was necessary considering the acts defendant committed, the number of times they occurred, and the number of victims. *Id.* The State noted that

defendant's other biological children could nonetheless choose to have contact with him when they are adults. *Id.*

When the sentencing court gave defendant's sentence, it noted the number of victims, repetitiveness and method of grooming defendant used in this case. RP 38. The court subsequently stated,

All the rest of the terms will be imposed... You will not have contact with children at all, including your own until they're old enough to petition the Court or make their own decisions, which will be age of majority. You are a danger. And I am not convinced at all that counseling is going to overcome that. I know they can do some wonderful things. I hope the best for you on that level. But I have to tell you, the danger here is unreal to society. It is almost something we cannot even speak, don't have the words for it. It's that serious. Consequently, that will be the sentence of this Court.

RP 39. The court clearly articulated its reasons in imposing the condition that prohibits contact with defendant's biological children. *Id.* The court also expressed that it considered alternatives when it stated it was doubtful that counseling would prevent defendant from recidivism. *Id.*

Courts have already held that restrictions such as the instant one are permissible. *See, Corbett*, 158 Wn. App. at 600; *Berg*, 147 Wn. App. at 941-44. In *Corbett*, 158 Wn. App. 576, a defendant convicted of sexually abusing his stepdaughter was prohibited from contact with his biological children. The court there stated, "The no-contact order is reasonably necessary to protect Corbett's children because of his history of

using the trust established in a parental role to satisfy his own prurient desire to sexually abuse minor children.” *Id.* at 599.

Similarly in *Berg*, 147 Wn. App. at 942-43, Division One upheld an order prohibiting contact with the defendant’s child as a reasonably necessary crime-related prohibition, because the victim also lived in the defendant’s home, where he acted as her parent, so the court reasonably feared that allowing contact would put his child in the same position of risk as the victim. The order was also sufficiently narrow because even though it restricted all forms of contact, it addressed the potential for the same kind of abuse at issue, which the defendant was able to achieve by exploiting a child's trust in him as a parental figure. *Id.* at 944

Similarly to *Berg* and *Corbett*, defendant’s victims lived in his household and considered him their parent. RP 27. Defendant used his position as a parent to carry out the abuse, so court was within its discretion to conclude that allowing any contact would place his biological children at the same risk as his stepdaughters. Although the condition restricts all contact, it prevents the fostering of trust that creates a potential for this type of abuse.

The facts here are even more compelling than similar cases, because defendant stipulated to victimizing the daughters with whom he now desires contact. CP 2-3. The court acted within its discretion by

imposing a complete prohibition of contact with defendant's biological children, which is reasonably necessary to further the State's compelling interest in preventing harm to and protecting La.D. and Ly.D.

In *Rainey*, 168 Wn.2d at 380, the Supreme Court of Washington held that considering the facts of the case, the trial court judge could have found a no contact order with the defendant's biological child reasonably necessary. Accordingly, the court held that it was not an abuse of discretion for the sentencing court to conclude that a no-contact order with the defendant's biological child of some duration was appropriate. *Id.* The court there struck down the *lifetime* no-contact order prohibiting Mr. Rainey from all contact with his child, because the sentencing court did not articulate any reasonable necessity for the *lifetime duration* of that order. *Id.* at 381-82 (*emphasis added*).

Rainey, on which defendant relies, is distinguishable from the instant case. Br. of Appellant 7. Unlike in *Rainey*, the court here did not impose a lifetime duration on the condition, stating, "You will not have contact with children at all, including your own until they're old enough to petition the Court or make their own decisions, which will be age of majority." *Id.* The record shows the court sensitively imposed the condition prohibiting contact with minors, which includes defendant's biological children while they are minors, which was reasonably necessary

to further the State's compelling interest in preventing harm and protecting children, based on the circumstances of this case.

Defendant also argues the court simply stated defendant was a danger and did not consider any less restrictive alternatives to the condition. Br. of App. 7. Defendant is wrong. Defendant points out that "the author of the pre-sentence investigation report also recommended that [defendant] be allowed contact with his biological children with 'written approval from a licensed therapist, the courts, and community corrections officer.'" The court made clear that it considered that alternative, stating,

I read this report over carefully. I do agree with the sentiment expressed by the DOC. This is a case where it's not a one-time occurrence, not just one victim. It was a pattern. It was a grooming. It went over a period of time. Plenty of opportunity for the defendant to say that's enough. I have to get help. I cannot do this to children. All the time, plenty of time to do that, and yet it continued and continued. You can talk about it being an addiction, and it undoubtedly probable [sic] was. That doesn't overcome the fear that I have that it will happen again, the concern that I have that it will happen again.

RP 38. The court then used its discretion to sentence defendant to a total of 216 months, a term that was higher than the recommendation of both parties, and imposed the condition prohibiting contact with minors, including defendant's biological children. RP 38-39.

Defendant's suggestion that contact be allowed with his children at the consent of their mother and his therapist was inappropriate considering

the unreasonable risk it would create. Defendant carried out the abuse of his stepdaughters using grooming techniques including the guise of playing games and bonding with their “daddy.” RP 27. The victims’ mother testified at sentencing that defendant would take Sat.W. to play yu-gi-oh, a card game, before he raped her. RP 27. When the victim’s mother would leave the home, defendant abused his position as their father to get them alone and rape them, asking “don’t any of you want to spend time with me? Don’t you love daddy?” *Id.*

Defendant undoubtedly used his position as their father and relationship of trust he had with his stepdaughters in order to commit his crimes. Defendant was also able to deceive his wife, the victims’ mother, to get his step daughters alone and carry out the abuse. Allowing defendant to contact his biological children would create the risk that he employ the same deception and grooming to abuse them as he has in this case.

Furthermore, when the court imposed the condition, it did not merely state that defendant was a danger, but also stated that it was doubtful that counseling would overcome the danger he presented to society. RP 39. The court called the danger “unreal,” saying, “It is almost something we cannot even speak [sic], don't have the words for it. It's that serious.” *Id.* The court made a fact-specific inquiry, considered the

alternatives to the challenged condition, and concluded it was reasonably necessary to further the State's compelling interest in preventing harm and protecting children, considering the court's comments on the repetitive and seriously dangerous nature of defendant's actions. RP 38-39.

The court was within its discretion to impose the crime-related condition prohibiting contact with any minors, which was reasonably necessary to further the State's compelling interest in preventing harm and protecting children. This Court should affirm the condition.

3. THIS COURT SHOULD AFFIRM THE \$100 DNA DATABASE FEE AND REMAND FOR THE TRIAL COURT TO STRIKE THE \$200 CRIMINAL FILING FEE AND THE NON-RESTITUTION INTEREST, WHERE THE AMENDMENTS IN HOUSE BILL 1783 APPLY TO DEFENDANT'S CASE.

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.*

The legislature recently enacted Engrossed Second Substitute House Bill 1783 (House Bill 1783), which amended the LFO statutory

scheme. *See*, Laws of 2018, Ch. 269, §§1, 17, 18. Effective June 7, 2018, courts may no longer impose the \$200 filing fee on defendants who are indigent at the time of sentencing. RCW 36.18.020(2)(h). The bill also eliminated non-restitution interest. *See*, Laws of 2018, Ch. 269, §1.

Additionally, the DNA fee statute was amended to state:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction.

RCW 43.43.7541 (*emphasis added*).

In *Ramirez*, the Washington Supreme Court held that the above LFO statutory amendments apply to cases that were pending on appeal when the amendments went into effect. *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). When a controlling law is amended while a case is pending on review, “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).

Defendant argues the \$200 criminal filing fee, non-restitution interest, and \$100 DNA collection fee should be stricken. Br. of App. 8-10. Defendant was sentenced on May 11, 2018. CP 29-44. Defendant filed his appeal on May 18, 2018. CP 53. Defendant’s case was pending on

appeal when the amendments in House Bill 1783 went into effect on June 7, 2018. *Id.* Accordingly, the State concedes that defendant is entitled to the benefit of these amendments.

RCW 36.18.020(2)(h) prohibits the imposition of the \$200 criminal filing fee on defendants who are found indigent at the time of sentencing. The court found defendant indigent, so he should be exempt from the filing fee. CP 55-56. Furthermore, the sentence order states that the imposed obligations shall bear interest. CP 34. House Bill 1783 eliminated non-restitution interest, so the non-restitution interest on defendant's LFO's should be stricken as well.

Defendant also challenges the imposition of the \$100 DNA collection fee. Br. of App. 8-10. In this case, defendant has not made any showing that a prior DNA collection occurred or even that he has a prior felony conviction. *See*, CP 32 (Defendant has no known or claimed criminal history). Even if the defendant can establish that a prior conviction resulted in a DNA collection fee being imposed, he has not provided any evidence that a DNA collection actually occurred. The statute mandates that waiver of the DNA collection fee is appropriate only when a prior DNA sample itself has been collected. *See*, RCW 43.43.754.

Without proof that a DNA collection occurred, the defendant is not entitled to relief under House Bill 1783 and his claim that the DNA

collection fee should be waived fails. The defendant is also not permitted to rely on evidence outside the record for this direct appeal. *See generally, State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If the defendant has evidence that a prior DNA sample was actually taken, he would need to pursue relief via a personal restraint petition, not by way of supplemental briefing on a direct appeal.

This Court should affirm the \$100 DNA database fee and remand for the trial court to strike the \$200 criminal filing fee and the non-restitution interest.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that this Court deny defendant's appeal. Even if defendant had not waived appeal here, this Court should affirm the challenged community custody

condition and \$100 DNA database fee, and remand for the trial court to strike the \$200 criminal filing fee and the non-restitution interest.

DATED: February 14, 2019

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Certificate of Service:

The undersigned certifies that on this day she delivered by efile 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.

2/15/19 Johnson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

February 15, 2019 - 9:46 AM

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