

326187-III
(Consolidated with 326608)

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

DIVISION III

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Nov 13, 2015
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

THOMAS RALPH LEVITON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The record does not support the finding Mr. Leviton has the current or future ability to pay the imposed legal financial obligations.

2. The trial court erred when it ordered appellant to submit to pay a \$100 DNA-collection fee.

3. The petitioner's sentence for escape runs consecutively to the sentence he was serving so the language in the judgment and sentence is redundant and should be removed.

II. ISSUES PRESENTED

1. Did the defendant fail to preserve any legal financial obligation (LFO) issue for appeal; are the LFOs imposed in his case mandatory financial obligations that are exempt from the inquiry required for discretionary LFOs under RCW 10.01.160(3); and in any event, did the trial court properly determine that the defendant has the ability to pay his LFOs?

2. Does the \$100 DNA fee imposition statute, RCW 43.43.7541, violate the due process clause?

3. Does RCW 43.43.7541 violate equal protection because a defendant may have to pay the fee each time he is sentenced?

4. Did the trial court abuse its discretion when it ordered the defendant to submit to a collection of his DNA with the proviso that the

order did not apply if the State Patrol already has a sample of the defendant's DNA?

5. Does the Petitioner's sentence run consecutively to the sentence he was serving when he escaped, and is he entitled to credit for time served on the escape charge from the time he was captured?

III. STATEMENT OF FACTS

Defendant Thomas Leviton was convicted of first degree escape. CP 21. He had one prior felony conviction from Washington dated 2002 or later. CP 124. At sentencing the Court imposed mandatory costs of \$800,¹ for a total Legal Financial Obligation (LFO) of \$800. CP 129-30.

Mr. Leviton's attorney, Mr. Reid, recommended a payment schedule:

Beyond that, the recommendation would be a standard recommendation in terms of costs. Ask the Court for \$25 a month payments to start January 15, 2015, and beyond that, Your Honor, I don't have anything to add unless the Court has any questions.

RP (Sentencing) 196.

After the trial court considered the recommendation by the defendant's attorney of a \$25 per month cost payment schedule, the trial court imposed a \$15 per month payment schedule starting on the date selected by the defendant's attorney.

¹ Crime Victim assessment, \$500; DNA fee, \$100, Filing Fee, \$200. CP 122.

THE COURT:

Fees and fines will include the 500, 200, 100, payable in an amount of \$15 per month. Start date?

MR. REID: January 15th.

RP (Sentencing) 201; CP 130.

The court also ordered DNA testing. CP 131. Additionally, the court ordered the 14-month sentence to run consecutive to the sentence from which the escape charge arose, as conceded by the defendant's attorney.

MR. REID: If he's a two, it's 12 and a day. That will run by statute consecutive to his previous trafficking in stolen property conviction. I believe he's served his time on that; ask the Court to calculate the – ask the Court to ask the jail to calculate that.

RP (Sentencing) 195-96; CP 128, 129.

“THE COURT: And it is consecutive. Thank you.” RP (Sentencing) 202.

IV. ARGUMENT

A. THE DEFENDANT FAILED TO PRESERVE ANY LEGAL FINANCIAL OBLIGATION (LFO) ISSUE FOR APPEAL; THE LFOS IMPOSED IN HIS CASE ARE MANDATORY FINANCIAL OBLIGATIONS; AND, THEREFORE, EXEMPT FROM INQUIRY UNDER RCW 10.01.160(3), AND, IN ANY EVENT, THE TRIAL COURT PROPERLY DETERMINED THAT THE DEFENDANT HAS AN ABILITY TO PAY HIS LFOS.

The defendant failed to object to the imposition of his LFOs. Therefore, he failed preserve the matter for appeal. RAP 2.5. In its

consideration of the issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court determined that the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity. *Blazina*, 182 Wn.2d at 830. No constitutional issue is involved. And, as set forth later, the statutory violation existing in *Blazina* applied to discretionary LFOs, not mandatory LFOs. However, the *Blazina* court exercised its discretion in favor of accepting review due to the nationwide importance of LFO issues, and to provide guidance to our trial courts. *Id.* at 830. That guidance has been provided. *Blazina* was decided after the June 2014 sentencing in the instant case. There is no nationwide or statewide import to this present case, and review should not be granted where the defendant failed to object and thereby give the trial court the ability to make further inquiry as to his ability to pay, if necessary. Statewide appellate procedural rules are of more import in the present case.

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177, 1180 (2013). This principle is embodied federally in Fed. R. Crim P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly

upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Therefore, policy and RAP 2.5 favor not allowing review of this statutory,² non-constitutional LFO issue.

Secondly, the LFOs ordered are mandatory LFOs. CP 122 (top of page), 116-17. The \$500 crime victim assessment, \$100 DNA (deoxyribonucleic acid) collection fee, and \$200 criminal filing fee are mandatory legal financial obligations, each required irrespective of the

² Assuming the RCW 10.01.160(3) applied to mandatory fees.

defendant's ability to pay. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The \$500 victim assessment is mandated by RCW 7.68.035, the \$100 DNA collection fee is mandated by RCW 43.43.7541, and the \$200 criminal filing fee is mandated by RCW 36.18.020(2)(h). These statutes do not require the trial court to consider the offender's past, present, or future ability to pay. To the extent that the trial court imposed mandatory LFOs, there is no error in the defendant's sentence.

Even assuming RCW 10.01.160(3) applied to the mandatory fees, and there was no waiver of the issue, the trial court made sufficient inquiry into the defendant's financial circumstances.

RCW 10.01.160(3) requires that the court make an individualized determination of the defendant's ability to pay *discretionary* LFOs at the time of sentencing. However, even if RCW 10.01.160(3) applied to mandatory fees the trial court was sufficiently informed of the defendant's ability to pay at the time of sentencing. The defendant's attorney, presumptively after conversing with the defendant regarding the financial obligations, informed the court that \$25 per month would be appropriate. The trial court lowered that request to \$15 per month. In *State v. Baldwin*, the court affirmed a trial court's finding that an offender had the present or likely future ability to pay LFOs where the only evidence to support it was a statement in the presentence report that the offender described himself as

employable. *State v. Baldwin*, 63 Wn. App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991). There was no error here.

B. THE COURT DNA FEE IMPOSITION STATUTE, RCW 43.43.7541. DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

The court DNA fee imposition statute, RCW 43.43.7541, mandates the imposition of a fee of one hundred dollars in every sentence imposed for a felony.³ The defendant claims this statute violates the *substantive* due process clause. Appellant Br., pp. 15-18. Defendant then argues an *equal protection violation* regarding an indigent defendant's inability to pay. Appellant Br., pp. 18-22.

First, it should be noted that monetary assessments that are mandatory may be imposed on indigent offenders at the time of sentencing without raising constitutional concern because “[c]onstitutional principles

³ RCW 43.43.7541 provides:

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94.A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

will be implicated ... only if the government seeks to enforce collection of the assessments at a time when [the defendant is] unable, through no fault of his own, to comply,” and “[i]t is at the point of enforced collection..., where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of his indigency.” *State v. Blank*, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (most alterations in original) (internal quotation marks omitted) (quoting *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992)); and see *State v. Thompson*, 153 Wn. App. 325, 336–38, 223 P.3d 1165 (2009) (DNA fee); *State v. Williams*, 65 Wn. App. 456, 460–61, 828 P.2d 1158, 840 P.2d 902 (1992) (victim penalty assessment).

As to the argument that RCW 43.43.7541 violates substantive due process, the defendant sets forth the correct standard of review: “Where a fundamental right is not at issue, as is the case here, the rational basis standard applies.” Appellant Br., p. 15, citing *Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013). “To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. *Id.*” Appellant Br, p. 15.

Applying this deferential standard, this court assumes the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged

law and a legitimate state interest. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006).⁴

The DNA fee imposition statute is rationally related to a legitimate state interest. These fees help support the costs of the legislatively enacted DNA identification system, supporting state, federal and local criminal justice and law enforcement agencies by developing a multiuser databank that assists these agencies in their identification of individuals involved in crimes and excluding individual who are subject to investigation and prosecution. See RCW 43.43.753 (finding “that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are subject of investigations or prosecutions...”). The legislation is supported by a legitimate financial justification. As this court recently held in *State v. Thornton*, 188 Wn. App. 371, 353 P.3d 642, 642 (2015):

The language in RCW 43.43.7541 that “[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars” plainly and unambiguously provides that the \$100 DNA database fee is mandatory for all such sentences. See *State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 581, 183 P.2d 813

⁴ See also *Parrish v. W. Coast Hotel Co.*, 185 Wash. 581, 597, 55 P.2d 1083 (1936) (statute must be unconstitutional “beyond question”), *aff’d*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Nebbia v. New York*, 291 U.S. 502, 537–38, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (every possible presumption is in favor of a statute’s validity, and that although a court may hold views inconsistent with the wisdom of a law, it may not be annulled unless “palpably” in excess of legislative power); cited with approval, *Amunrud*, 158 Wn.2d at 215.

(1947) (word “must” is generally regarded as making a provision mandatory); *see also State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (DNA collection fee is mandated by RCW 43.43.7541). The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton’s felony drug conviction.

Id. at 374-75.

Therefore, there is a rational basis for the legislation.

C. RCW 43.43.7541 DOES NOT VIOLATE EQUAL PROTECTION BECAUSE A DEFENDANT MAY HAVE TO PAY THE FEE EACH TIME HE IS SENTENCED.

1. Defendant lacks standing to assert an Equal Protection claim

The defendant lacks standing to assert his equal protection claim - that the imposition of this mandatory fee upon defendants who cannot pay the fee violates equal protection. Defendant has not established that he has paid the fee before. The general rule is that “[o]ne who is not adversely affected by a statute may not question its validity.” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987). This basic rule of standing “prohibits a litigant ... from asserting the legal rights of another.” *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 281, 937 P.2d 1082 (1997), citing *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994)). “It also mandates that

a party have a ‘real interest therein,’ *State ex rel. Gebhardt v. Superior Court*, 15 Wn.2d 673, 680, 131 P.2d 943 (1942).” *Dean v. Lehman*, 143 Wn.2d 12, 18-19, 18 P.3d 523, 527-28 (2001).

The defendant has failed to establish he is unable to pay the \$100 fee. His attorney suggested the sentencing court impose a \$25 per month payment. Defendant has not established the “constitutional indigence” necessary to raise this equal protection claim. The analysis of what constitutes “constitutional indigence” was recently set forth by our State Supreme Court in *State v. Johnson*, 179 Wn.2d 534, 315 P.3d 1090, *as amended* (Mar. 13, 2014), *cert. denied*, 135 S. Ct. 139, 190 L. Ed. 2d 105 (2014):

Considering the totality of the circumstances, we hold that Johnson was not constitutionally indigent. While we do not question that the State may not punish an indigent defendant for the fact of his or her indigence, these constitutional considerations protect only the constitutionally indigent. Johnson had substantial assets in comparison to the \$260 fine the district court ordered him to pay. Requiring payment of the fine may have imposed a hardship on him, but not such a hardship that the constitution forbids it. *Lewis*, 97 Cal.Rptr. at 422 (the constitution does not require the trial court to allow a defendant the same standard of living that he had become accustomed). Johnson is not constitutionally indigent and lacks standing for his claim. We decline to reach it.

Johnson, 179 Wn.2d at 555.

Moreover, equal protection of the law under state and federal constitutions requires that persons similarly situated with respect to the

legitimate purpose of the law receive like treatment. *Harmon v. McNutt*, 91 Wn.2d 126, 130, 587 P.2d 537 (1978); *Oestreich v. Department of Labor and Industries*, 64 Wn. App. 165, 170, 822 P.2d 1264 (1992). Equal protection requires only similar treatment, not identical impact, on persons similarly situated. *Oestreich*, 64 Wn. App. at 170.

Defendant bases his argument on hypotheticals. In *State v. Baldwin*, the court affirmed a trial court's finding that an offender had the present or likely future ability to pay LFOs where the only evidence to support it was a statement in the presentence report that the offender described himself as employable. *Baldwin*, 63 Wn. App. at 311.

In *State v. Blank*, *supra*, the Court held that appellate costs, including a repayment obligation for the costs of appointed counsel, could be awarded without an inquiry into the offender's ability to pay. Costs may be imposed upon individuals who are indigent without any per se constitutional violation, so long as ability to pay is considered at the time of *enforcement*. *Id.*, at 240-41. A person is "indigent" in the constitutional sense only when he lacks any assets and cannot meet his housing and food needs. *See Johnson*, 179 Wn.2d at 553-54. Indigency, moreover, is a relative term that must be considered and measured in each case by reference to the need or service to be met. *Id.*, at 555; *State v.*

Rutherford, 63 Wn.2d 949, 953-54, 389 P.2d 895 (1964). As the Court in *Johnson* noted:

Requiring payment of the fine may have imposed a hardship on him, but not such a hardship that the constitution forbids it. *Lewis*, 97 Cal.Rptr. at 422 (the constitution does not require the trial court to allow a defendant the same standard of living that he had become accustomed).” Johnson is not constitutionally indigent and lacks standing for his claim. We decline to reach it.

Johnson, 179 Wn.2d at 555.

This court should find that Defendant Leviton lacks standing to raise the equal protection claim, and, that under the rational basis test, the statute does not violate equal protection.

2. RCW 43.43.7541 does not violate equal protection because the fee is imposed each sentencing for all qualifying offenses.

Firstly, defendant has not established that he paid or has been ordered to pay the the DNA fee more than once. He speculates that a sample was already collected and submitted to the Washington State Patrol Crime Laboratory because of his convictions for numerous prior felony offenses. Appellant Br., p. 23. However, this speculation does not establish a fact. See *Bulzomi v. Dep’t of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994) (party seeking review has burden of perfecting record so reviewing court has all relevant evidence before it; insufficient record on appeal precludes review of the alleged errors).

Secondly, the defendant's argument "misses the mark." *Thornton*, 188 Wn. App. at 374. In *Thornton*, this Court noted that the statute requires the imposition of the DNA fee in every qualifying case:

The language in RCW 43.43.7541 that "[e]very sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars" plainly and unambiguously provides that the \$100 DNA database fee is mandatory for all such sentences. *See State ex rel. Billington v. Sinclair*, 28 Wn.2d 575, 581, 183 P.2d 813 (1947) (word "must" is generally regarded as making a provision mandatory); *see also State v. Kuster*, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (DNA collection fee is mandated by RCW 43.43.7541). The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton's felony drug conviction.

Thornton, 188 Wn. App. at 374-375.

All defendants sentenced for felonies receive the DNA assessment as part of their sentencing. Nothing is more equal than that.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED THE DEFENDANT TO SUBMIT TO A COLLECTION OF HIS DNA WITH THE PROVISO THAT THE ORDER DID NOT APPLY IF THE STATE PATROL ALREADY HAS A SAMPLE OF THE DEFENDANT'S DNA.

The defendant fails to cite to the record where the trial court ordered Defendant Leviton to submit to a DNA collection. That order is contained at page 8, provision 4.4, of the Felony Judgment and Sentence.

CP 131. That “order” contains the proviso that this DNA requirement “does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense.” This follows the statutory scheme set forth in RCW 43.43.754, where, under subsection (1) “a biological sample must be collected for purposes of DNA identification analysis from [a qualifying offender]”; then, under subsection (2), “[i]f the Washington State Patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted.”⁵

The order follows the operation of the statute. There is no abuse of discretion in the trial court ordering that which is required by law.

⁵ Again, this issue was laid to rest by this Court in its recent decision *State v. Thornton*:

The statute also furthers the purpose of funding for the state DNA database and agencies that collect samples and does not conflict with DNA sample collection and submission provisions of RCW 43.43.754(1) and (2). The court thus properly imposed the DNA collection fee under RCW 43.43.7541 for Ms. Thornton’s felony drug conviction.

State v. Thornton, 188 Wn. App. at 375.

E. THE PETITIONER WAS SENTENCED FOR ESCAPE, A CONVICTION COMMITTED WHILE HE WAS UNDER SENTENCE, IN FACT, SERVING HIS SENTENCE FOR HIS TRAFFICKING IN STOLEN PROPERTY CONVICTION. THEREFORE, THE ESCAPE SENTENCE RUNS CONSECUTIVELY TO THE PRIOR OFFENSE.

Defendant concedes in this Personal Restraint Petition (PRP) that RCW 9.94A.589(2) applies to his case. PRP at 3, ¶1. Therefore, his sentence on the present offense only begins to run when the prior offense (including good time) expires. DOC must make these calculations. Defendant also claims he should get credit for time on his escape charge from the time he was arrested on that charge. This is incorrect. That time was being credited to his prior offense. He was not entitled to begin to accrue credit on the escape charge until all of his time on the prior offense was served. Again, that is to be calculated by DOC and the jail.⁶ He cannot receive credit on the prior offense and the present escape offense at the same time, as that would make the sentences partially concurrent.

⁶ DOC, not the superior court, has statutory authority to grant good time credit to an offender. *In re Pers. Restraint of Mota*, 114 Wn.2d 465, 478, 788 P.2d 538 (1990); DOC “must ensure all offenders receive credit for their presentence detention and for the earned early release credits earned thereon.” *In re Pers. Restraint of King*, 146 Wn.2d 658, 665 n. 3, 49 P.3d 854 (2002). The institution in which the offender is actually incarcerated retains complete control over the good time credits granted to offenders within its jurisdiction. *In re Pers. Restraint of Erickson*, 146 Wn. App. 576, 584, 191 P.3d 917, 921 (2008).

Washington law requires that sentences be either fully consecutive to or fully concurrent with one another. *State v. Grayson*, 130 Wn. App. 782, 125 P.3d 169 (2005). An award of credit for time served on the 2002 convictions that would credit [defendant] with any days that are also credited to the sentence on his 2001 convictions would unlawfully render the sentences partially concurrent. The plain language of the judgment and sentence indicates that the sentencing court neither attempted nor intended to impose an unlawful sentence.

In re Costello, 131 Wn. App. 828, 834, 129 P.3d 827, 830 (2006).

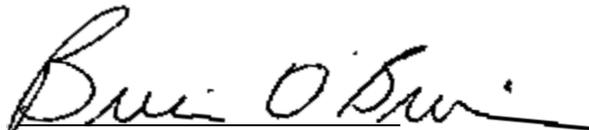
There is no error in the trial court including within the judgment and sentence language requiring this sentence to run consecutively to the prior sentence. Nor is the defendant entitled to credit from the time he was arrested on the escape charge, as he had the remainder of his prior offense to serve and is not entitled to partially concurrent sentences.

V. CONCLUSION

For the reasons stated above the defendant's LFO sentence requirements should be affirmed, and his personal restraint petition denied.

Dated this 13th day of November, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



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Attorney for Respondent

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

STATE OF WASHINGTON,
Respondent,

vs.

THOMAS RALPH LEVITON,
Appellant.

In Re Personal Restraint of:

THOMAS RALPH LEVITON
Petitioner.

NO. 32618-7-III
(Consol. w/32660-8-III)

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on November 13, 2015, I e-mailed a copy of Brief of Respondent to attorney for the defendant at, gaschlaw@msn.com; and mailed a copy to Thomas Ralph Leviton, 816 E Gordon, Spokane, WA 99207.

Dated this 13 day of November 2015, at Spokane, Washington

Kim Cornelius