

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34037-6-III

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Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

HERBERT AARON MARTIN II,

Defendant/Appellant

Respondent's Brief

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TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR.....5

B. ISSUES PRESENTED.....5

C. STATEMENT OF THE CASE.....7

D. ARUGMENT.....13

E. CONCLUSION.....

TABLE OF AUTHORITIES

Cases

<u>First United Methodist Church v. Hr'g Exam'r</u> , 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996).....	
<u>Giovani Carandola, Ltd. v. Fox</u> , 470 F.3d 1074, 1080 (4th Cir. 2006) ...	
<u>Jackson v. Virginia</u> , 443 U.S. 307 (1979).....	
<u>Kolender v. Lawson</u> , 461 U.S. 352 (1983)	
<u>Medina v. Pub. Util. Dist. No. 1 of Benton County</u> , 147 Wn.2d 303, 315, 53 P.3d 993 (2002).....	
<u>Spokane v. Douglass</u> , 115 Wn.2d 171, 180 (1990)	
<u>State v. Aver</u> , 109 Wn.2d 303, 310-11, 745 P.2d 479 (1987).....	
<u>State v. Bahl</u> , 164 Wn. 2d 739, 745 (2008).....	
<u>State v. Blazina</u> , 182 Wn.2d 827 (2015).....	
<u>State v. Brown</u> , 159 Wn. App. 1, 248 P.3d 518 (2010)	
<u>State v. Burns</u> , 114 Wn.2d 314, 318 – 20, 788 P.2d 531 (1990)	
<u>State v. Ford</u> , 137 Wn.2d 472, 477, 973 P.2d 452 (1999)	
<u>State v. Green</u> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980)	
<u>State v. Guloy</u> , 104 Wn.2d 412, 417, 705 P.2d 1182 (1985).....	
<u>State v. Hearn</u> , 131 Wn. App. 601, 128 P.3d 139 (2006)	
<u>State v. Llamas-Villa</u> , 67 Wn. App. 448, 836 P.2d 239 (1992).....	
<u>State v. Lua</u> , 62 Wn. App. 34, 42, 813 P.2d 588 (1991).....	

State v. Lynn 67 Wash. App. 339, 835 P.2d 251 (1992)

State v. Reyers-Brooks, 165 Wn. App. 193, 267 P.3d 465 (2011)

State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993)

State v. Sullivan, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001)

State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980).....

Statutes

RCW 9.94B.050 (4)

RCW 9.94B.050 (5)

RCW 69.50.401

Court rules

RAP 2.5 (a)

A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. The evidence was sufficient to establish a bus stop designated by a school district existed within 1000 feet of the site of the crime of possession with intent to deliver methamphetamine when the school district transportation director testified that looking at an undated map there were six bus stops within 1000 feet of the location of the drug buy, that it was a residential neighborhood, and that the map was representative of almost any location within the district regarding the number of stops at any given time.
- b. The defendant cannot raise an objection to the verdict form for the first time on appeal and the court properly imposed an enhanced penalty for committing the crime within a protected zone.
- c. The terms of community custody prohibiting associating with persons involved in the use, sales and/or possession of dangerous drugs, narcotics or controlled substances; prohibiting entering into or remaining in areas where dangerous drugs, narcotics, or controlled substances are being sold/purchase, possessed, and /or consumed; and prohibiting the purchase, possession, and or consumption

of any intoxicating liquors are legal and supported when a defendant is convicted of possessing methamphetamine with intent to distribute as they are all crime-related and authorized under statute.

- d. The court must inquire about a defendant's ability to pay discretionary LFOs but must impose mandatory LFOs regardless of the present or future ability to pay.
- e. A Scriver's error in the J&S regarding the name of the offense requires remand to correct.

B. ISSUES PRESENTED

- a. Can a jury answer a special verdict form "yes" on a school bus enhancement when the transportation director from a school district testifies that a map for the district shows six bus stops within 1000 feet of the location of the drug sale within a residential neighborhood without testifying how long any of the particular bus stops have been in existence?
- b. Can a defendant raise an objection to the language on a verdict form that does not affect a Constitutional right for the first time on appeal?
- c. Can the court impose the school bus enhancement, when the verdict form uses the crime "delivery of a controlled

substance” instead of the crime “possession with intent to deliver a controlled substance” within 1000 feet of a school bus stop when the defendant has been found guilty of the later?

- d. Is a defendant’s claim that conditions of community custody are unconstitutionally vague ripe when the defendant is still in custody, the terms have not been applied, and the conditions do not relate to First Amendment rights?
- e. Can a court impose as a condition of community custody that a defendant who has been found guilty of possession with intent to deliver methamphetamine not associate with persons involved in or entering areas where dangerous drugs, narcotics, or controlled substances are used, sold or possessed and not purchase alcohol/enter places primarily selling alcohol?
- f. Can the court impose mandatory LFOs when they make an inquiry into the defendant’s ability to pay and adjust the discretionary LFOs accordingly?

C. STATEMENT OF THE CASE

Herbert Aaron Martin was charged via Amended Information with one count of Delivery of a Controlled Substance.¹ (CP at 85). The charged count also included an aggravating circumstance: that the delivery occurred within one thousand feet of a school bus route (CP at 85).

Maria Ryan testified for the state that several years previously she had had a methamphetamine addiction with which she struggled for several years (RP at 91). She had several periods of time of use, sobriety and relapse until May, 2014 when she used for the last time and had been clean since then.² (RP at 92). She testified that there was a sort of comradery or shared cultural experience between drug users and she had been a part of that community while she was using drugs. (RP at 93).

Ms. Ryan testified that she was in jail on unrelated charges³ and a detective came to see her and told her she had new charges pending and asked her to contact the police when she was released from jail (RP at 94). She called the detective when released and

¹ The INFORMATION was originally filed on March 11, 2015; it was later amended. (CP at 2).

² She testified on January 5, 2016

³ Appellant argues in his motion that Ms. Ryan had her own charges for delivering drugs, but this claim is not supported by the record or Ms. Ryan's testimony. Her charges were only ever referred to as "serious," "different" and "unrelated" charges to this case. (RP at 94, 99).

they gave her the opportunity to work for them in exchange for them agreeing to dismiss her charges (RP at 94 – 95). Based on her prior drug use, she believed she had enough contacts in the drug community to sell her the drugs and she entered into a contract to purchase drugs from someone known to her as Diane McKelheer⁴, a target the police were interested in. (RP at 95).

She told the jury she knew a woman named “Diane” because she had previously dated Diane’s son and had known her for about five years. (RP at 94). She testified that she knew Diane was a drug user, but that they had previously never used together. (RP at 94).

Ms. Ryan contacted Diane on Facebook and asked her about getting some drugs from her. (RP at 96, 121). They arranged to meet at Diane’s house; Diane gave Ms. Ryan the address as she didn’t know where Diane was living or whom Diane was living with at that time (RP at 96, 121). Ms. Ryan went to the police department and they searched her and gave her money. (RP at 97). Officer Burson also testified for the police department that she worked as a female officer and assisted in the search of Ms.

⁴ Mr. Martin was originally charged via INFORMATION as principle or accomplice with his then girlfriend Elizabeth McKelheer who also went by the first name “Diane” to some people. (CP at 3; RP at 116 – 117).

Ryan during this case both before and after the buy (RP at 108, 109). Ms. Ryan told the jury she walked to the house, bought methamphetamine, and reconnected with the police (RP at 97).

Ms. Ryan told the jury she had never been in the house before, but when she went inside Diane and a man named “Herb” was there (RP at 97). She didn’t know Herb; had never met him before, but Diane referred to the male at the house as “Herb.” (RP at 98). She said when she handed Diane the money, Diane gave the money to Herb and Diane asked him if he would be able to go and get methamphetamine for Ms. Ryan (RP at 98). Although she also said she had never seen him since, she identified Mr. Martin in the courtroom as “Herb” who was at the house that day. (RP at 99). She did tell the jury that when police originally showed her a photographic montage of pictures including Mr. Martin’s picture, in May she was not able to identify Mr. Martin, but that at trial she was “100 percent” certain it was Mr. Martin who sold her the drugs (RP at 101 – 102, 104). Ms. Ryan said he left the house with her money, he came back and they handed Ms. Ryan the methamphetamine. (RP at 99). Officer Burson testified that she was helping with surveillance in this case while parked in the parking lot of a daycare and while watching the house at 310 W

10th, she saw the informant go inside, several minutes passed, and then a male subject left the residence in a truck; she also saw the male return. (RP at 111, 112). Officer Burson said a short time after the male went back inside the residence; Ms. Ryan came back out (RP at 111).

Ms. Ryan testified that she left, met back up with the detectives and went back to the police station where she was searched again and gave a statement to the police about the purchase of the methamphetamine. (RP at 99).

Elizabeth McKelheer testified for the state that she has struggled with a methamphetamine addiction and that she knew Ms. Ryan through her son. (RP at 117 – 118). She admitted she had previously sold methamphetamine and that in this case she has sold methamphetamine to Ms. Ryan and pleaded guilty to that charge before Mr. Martin's trial and had gotten no additional incentive from the state for testifying against Mr. Martin (RP at 118, 124 – 25). Ms. McKelheer testified that in February, 2015 she was in a dating relationship with the defendant and she was living at his house at 310 W 10th Avenue with him and no other people in the house (RP at 119). She testified that he drove a gray pickup truck at the time and that she didn't drive then because she

didn't have a valid license (RP at 120). Ms. McKelheer confirmed the details about the transaction for drugs between her and Ms. Ryan: that the sale was arranged via Facebook, that Ms. Ryan came to the house based on instructions from Ms. McKelheer, and that Ms. McKelheer and Mr. Martin were present at the house that day. (RP at 121). Ms. Ryan gave Ms. McKelheer \$40 and Ms. McKelheer gave the money to Mr. Martin who went and got the drugs; he left the house in his pickup truck. (RP at 122 – 123). When he came back, he put the methamphetamine on the table for Ms. Ryan, who took it and left (RP at 124).

Janice Wu from the Washington State Patrol crime lab testified that drugs she received from the Ellensburg Police Department in this case were tested and contained methamphetamine. (RP at 83 – 84).

Benjamin Mount, the transportation director from the Ellensburg School District testified that there were six designated school bus stops within 1000 feet of 310 W 10th Ave in Ellensburg (RP at 69). Mr. Mount testified that a map that was prepared by computer program used by the Ellensburg School District used showed the six bus stops. (Id.) Additionally Mr. Mount testified that this area of Ellensburg was a residential neighborhood with

quite a number of school bus stops. (RP at 70). The map was admitted as evidence for the jury's consideration (Id.; CP at 123). Under cross examination he testified that the map showed "active" stops, but that the routes are routinely reviewed. (RP at 72). Mr. Mount also testified that the map was a representation of nearly the whole town, in that from almost any location there are likely to be the same number of stops within 1000 feet. (RP at 73). Neither counsel asked him when the map was printed.

The jury found the defendant guilty on the charged offense and also answered "yes" on the special verdict form for the sentencing enhancements for delivery within 1000 feet of a school bus stop (RP at 150 – 51). The defendant was sentenced on January 19, 2016 to sixteen months on count and ordered the 24 month school bus enhancement to be consecutive for a total of 40 months (CP at 159, RP at 298). The court imposed an additional twelve months of community custody (CP at 160, RP at 299). Three specific terms of community custody that were ordered (among others) were: not to associate with persons involved in the use, sales and/or possession of dangerous drugs, narcotics or controlled substances; not to enter into to remain in areas where

dangerous drugs, narcotics, or controlled substances are being sold/purchased, posses

The court waived most of the discretionary costs: the attorney's fee, the crime lab fee, and the booking fee. (RP at 299, CP at 161). The court inquired about the defendant's ability to pay before imposing the mandatory fees: the victim assessment fee, the court costs⁵, and the DNA collection fee and set the payment schedule at \$50 per month instead of the standard \$100 per month (RP at 244, CP at 161).

D. ARGUMENT

- a. The evidence was sufficient to establish a bus stop designated by a school district existed within 1000 feet of the site of the crime of possession with intent to deliver methamphetamine when the school district transportation director testified that he had prepared a map and that the map showed six school bus stops within 1000 feet of the house where the drugs were sold and he testified this represented a typical map of almost any location within the city even though he did not testify to the date the map was printed.

⁵ The court did not specifically note, nor is it explicitly indicated on the J&S form that the \$200 is for the criminal filing fee (CP at 161).

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)); accord, e.g., State v. Aver, 109 Wn.2d 303, 310-11, 745 P.2d 479 (1987); State v. Guloy, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). This is also true for sentencing enhancements: "Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation which triggers the enhanced penalty." State v. Lua, 62 Wn. App. 34, 42, 813 P.2d 588, review denied, 117 Wn.2d 1025, 820 P.2d 510 (1991); see also State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980). On appeal, the standard of review is whether a rational trier of fact taking the evidence in the light most favorable to the State could find, *beyond a reasonable doubt*, the facts needed to support the enhancement.

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Here Mr. Mount testified that according to the map printed and admitted at trial there were six school bus stops within 1000 feet of the location where Mr. Ryan purchased methamphetamine from Mr. Martin and Ms. McKelheer. He also testified that this was typical of almost any location within Ellensburg and that this area was a residential area. Furthermore, the jury heard evidence that while Officer Burson was surveilling the home where the sale took place, she was parked at a daycare. Given all of these factors, even without Mr. Mount indicating the date on which the map was printed, the jury could have found the existence of a school bus stop within 1000 feet of the location. Looking at the evidence in the light most favorable to the state, the evidence is sufficient.

- b. The special verdict form was approved by the defendant at the time of trial and an issue regarding the wording of the form cannot be raised for the first time on appeal as it is not a manifest error that affects a constitutional right.

Per RAP 2.5 (a), an error cannot be raised on appeal for the first time unless it relates to trial court jurisdiction, involves a failure to establish facts upon which relief can be granted, or is a manifest error affecting a constitution right. RAP 2.5(a).

The court has developed a four step approach to analyzing whether an alleged constitutional error can be raised for the first time on appeal. State v. Lynn 67 Wash. App. 339, 835 P.2d 251 (1992). Accordingly:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Id. Some issues the court has found that do involve manifest errors affecting a constitutional right are: incorrect jury instructions regarding unanimity required to answer “no” on special verdict form for sentencing enhancement (State v. Reyers-Brooks, 165 Wn. App. 193,

267 P.3d 465 (2011)); and ineffective assistance of counsel (State v. Brown, 159 Wn. App. 1, 248 P.3d 518 (2010)).

The wording of a special verdict form that does not alter the required proof or elements of the offense is not a manifest error that affects a constitutional right. There is no right that is affected by the wording of the special verdict form: the defendant had opportunity at trial to raise an objection to the form and he did not do so; thus his objection to the form and its contents are waived.

Appellant is arguing with regard to the judgment and sentence, captioning the crime “Delivery of a Controlled Substance” was a Scriver’s error. It appears this is also a scrivener’s error that was not caught by the prosecution, the defendant, his attorney, or the judge. His opportunity for objecting has passed.

- c. If the wording of a special verdict form is a manifest error that affects a constitutional right, the error regarding the wording in this case is harmless because the crimes “delivering a controlled substance” and “possession of a controlled substance with intent to deliver” carry the exact same enhanced penalty.

If the court determines there is a Constitutional issue that affects a manifest right of the defendant, the analysis then becomes harmless error. RCW 69.50.401 criminalizes several offenses: manufacturing, delivering, or possessing with the intent to deliver a controlled substance. Possessing with the Intent to deliver is a different and distinct crime from delivering a controlled substance. State v. Burns, 114 Wn.2d 314, 318 – 20, 788 P.2d 531 (1990) (“holding the offense of delivery and the offense of possession with intent to deliver are separate crimes for purposes of RCW 9.94A.400 (1) (a) because they involve different criminal intents – an intent to deliver at the present versus an intent to deliver in the future.”) In this case, although it is clear there are different elements required to prove the elements of “delivery” of a controlled substance or “possession with intent to deliver” a controlled substance, with regard to the sentence enhancements, there is no difference. To take this argument to its logical conclusion, if the words on the verdict form said, “delivery of a controlled substance” or “possession with intent to deliver a controlled substance,” there would be no

functional difference to the defendant if the jury answered “yes” to either of those charges. They clearly found the defendant guilty of the crime charged in count one. They had the verdict form for the crime charged in count one. They were not asked to find any additional elements required for the special verdict form.

Additionally, the jury here was instructed to only use the special verdict form IF they found the defendant guilty of count one. This error is more like a clerical error and not a functional error and is harmless.

- d. The defendant’s request for the court to consider his terms of community custody are not ripe for consideration because they contain factual determinations and do not implicate first amendment considerations while he is still incarcerated.

“In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.” State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Specifically, vagueness challenges to conditions of community custody may be raised for the first time on appeal. State v. Bahl, 164 Wn.

2d 739, 745 (2008). A challenge regarding pre-enforcement vagueness must be ripe in order for a court to review. Id. at 749. “Three requirements compose a claim fit for judicial determination: if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.” First United Methodist Church v. Hr'g Exam'r, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996) (internal quotation marks omitted). The court must also consider “the hardship to the parties of withholding court consideration.” Id. at 255 (internal quotation marks omitted).

Here the defendant claims the requirements on community custody prohibit him from association with certain classes of people and from frequenting places where drugs are being sold. These questions are factual in nature and do not implicate any first amendment rights.

- e. The terms for community custody ordered in this case are proper, crime-related, and are not unconstitutionally vague when the defendant is found guilty of possession with intent to deliver methamphetamine and the terms imposed include: a prohibition against association with persons

involved in or entering into areas where dangerous drugs, narcotics or controlled substances are used, sold, or possessed; and a prohibition against purchasing alcohol/entering places primarily selling alcohol.

Washington's sentencing statutes mandate that the sentencing courts impose certain community custody conditions in specified circumstances and have discretion to impose other conditions. RCW 9.94B.050 (4) and (5). Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). In deciding whether a term is unconstitutionally vague, the terms are not considered in a "vacuum," rather, they are considered in the context in which they are used. Spokane v. Douglass, 115 Wn.2d 171, 180 (1990). When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. State v. Sullivan, 143 Wn.2d 162, 184-85, 19 P.3d 1012 (2001); see also Medina v. Pub. Util. Dist. No. 1 of Benton County, 147 Wn.2d 303, 315, 53 P.3d 993 (2002); Giovani Carandola, Ltd. v. Fox, 470

F.3d 1074, 1080 (4th Cir. 2006). If “persons of ordinary intelligence can understand what the [law] proscribes, notwithstanding some possible areas of disagreement, the [law] is sufficiently definite.” Douglass, 115 Wn.2d at 179. A statute is unconstitutionally vague if it “(1) ... does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) ... does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Id. (citing Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). If either of these requirements is not satisfied, the ordinance is unconstitutionally vague. Bahl, 164 Wn. 2d at 753.

In a possession of methamphetamine case, the trial court’s imposition of a condition of defendant’s community supervision that she refrain from associating with known drug offenders was not manifestly unreasonable, as associating with known drug offenders was conduct intrinsic to possession of methamphetamine and was directly related to the circumstances of the crime. State v. Hearn, 131 Wn. App. 601, 128 P.3d 139, 2006 Wash. App.

LEXIS 171 (Wash. Ct. App. 2006). In sentencing defendant for conviction of possession of cocaine with intent to deliver, trial court's order, as a condition of community placement, that defendant not associate with persons using, possessing, or dealing with controlled substances, was neither vague nor overbroad. *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992).

Here the prohibitions are rationally related to the offense charged: not to associate with people doing drugs or around drugs, not to enter establishments where drugs are sold, purchased, possessed and/or consumed, and to refrain from purchasing, possessing, or consuming any intoxicating liquor: a mind-altering addictive substance. Social science is riddled with information about addiction and sobriety. Whether the drug of choice is a narcotic or dangerous drug or alcohol, sobriety typically requires complete abstinence from mind-altering and addictive substances.

- f. The court is required to make an individualized inquiry into a defendant's ability to pay only with regard to

discretionary costs and may impose mandatory LFOs without regard to the defendant's ability to pay.

Consistent with State v. Blazina, the court is required to inquire about a defendant's ability to pay discretionary legal and financial obligations. 182 Wn.2d 827 (2015). Here, the court struck several discretionary obligations based on the court's understanding of the defendant's present or future ability to pay before imposing the mandatory fees imposed on the judgment and sentence form. At best, there is an unanswered question about whether the \$200.00 fee imposed was the criminal filing fee authorized by statute or a discretionary fee. This court should remand the case for the Superior Court to indicate the kind of fee the \$200.00 was intended to be.

The court did make an inquiry, albeit short, about the defendant's ability to pay. The defendant indicated he was disabled. The court inquired further and upon this information struck all of the discretionary LFOs. Although brief, this inquiry did have an impact on the court's discretion to impose LFOs and is sufficient.

The inquiry required in Blazina only applies to discretionary LFOs and although appellant urges this court to consider applying the standard to mandatory LFOs, the state rests on well-established law, precedent, and statute; the court should stand on existing precedent that imposition of mandatory LFOs does not require an individualized inquiry about present or future ability to pay.

- g. Remand is appropriate to correct a scrivener's error on the judgment and sentence.

The Felony Judgment and Sentence indicates the defendant was convicted of "Delivery of a Controlled Substance – Methamphetamine" which is not consistent with the jury's verdict. The jury found the defendant guilty of "Possession with Intent to Deliver a Controlled Substance – Methamphetamine." This is a clerical error and can be corrected on remand.

E. CONCLUSION

For the reasons stated, the judgment should be affirmed; the case should be remanded to Superior Court for the court to resentence the defendant based on his offender score to be proven by the state, the sentence enhancements, and to inquire about the defendant's ability to

pay discretionary LFOs or to strike them from the Judgment and Sentence.

Respectfully submitted June 17, 2016,

/s/

/s/ Jodi M. Hammond
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