

NO. 34655-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

DESHAWN ANDERSON,

Appellant.

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

The Honorable Alexander Ekstrom, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in failing to consider current case law and Mr. Andersons' youth at sentencing.

2. Defense counsel failed to provide effective assistance of counsel at sentencing by not presenting the court with relevant case law and argument.

3. The trial court erred in imposing a vague community custody condition prohibiting possession of "gang paraphernalia."

4. The trial court erred in imposing discretionary legal financial obligations Mr. Anderson has no chance of ever paying.

5. Defense counsel's failure to argue to the court Mr. Anderson's inability to pay discretionary LFOs denied Mr. Anderson effective assistance of counsel.

6. Judgment and Sentence section 2.1 incorrectly details that on Count II a special verdict was returned finding Mr. Anderson used a firearm in the commission of the offense.

7. Judgment and Sentence section 4.5 incorrectly details that a 60 month firearm enhancement was added to Count II.

8. If the state substantially prevails on appeal, any request for appellate costs should be denied.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in failing to consider youth as a mitigating factor in sentencing Mr. Anderson who was just 18 at the time of both incidents?

2. Whether defense counsel failed to provide effective assistance of counsel when, at sentencing, she failed to argue the court had authority to impose an exceptional sentence downward, and something less than a de facto life sentence, given the authority provided in *State v. O'Dell* and *State v. Graham*?

3. Whether the trial court erred by imposing a vague community custody condition that prohibited Mr. Anderson from possession of “gang paraphernalia including clothing, insignia, medallions, etc.”?

4. Whether the trial court abused its discretion under RCW 10.01.160(3) when it imposed discretionary LFOs with no consideration of Mr. Anderson’s future ability to ever pay them?

5. Whether Mr. Anderson’s trial counsel was ineffective for failing to object to imposition of the discretionary LFOs?

6. Whether Judgment and Sentence section 2.1 contains a scrivener’s error in specifying that a firearm special verdict was entered on Count II?

7. Whether Judgment and Sentence section 4.5 contains a scrivener's error in specifying that an additional 60 month firearm enhancement was added to Anderson's sentence on Count II?

8. Whether, if Anderson is unsuccessful in this appeal, this Court should refuse to impose appellate costs if the state requests costs?

C. STATEMENT OF THE CASE

On November 18, 2014, two people shot numerous gunshots into a car occupied by four young men who were preparing to smoke marijuana. RP¹ 1028-29, 1267, 1324. Each of the men were struck by bullets. RP 1217.

The next night, seemingly in retaliation for shooting the men in the car, shots were fired into a home striking three people, one of whom died from his wounds. The person who died was Mr. Anderson's friend, Anthony Guerrero. Mr. Anderson's cousin was also wounded in the shooting. RP 831, 891, 1007-08; RP Statement² 48.

On December 3, 2014, Lorenzo "Richie" Fernandez was shot several times while sitting in his car in front of the Stonegate apartments.

¹ "RP" in the Brief of Appellant refers to the verbatim report of proceedings prepared by court reporter Joseph King.

² "RP Statement" refers to the transcribed statement of Mr. Anderson's conversation with Detectives Aceves and Smith. The transcript was prepared by transcriptionists Reed, Jackson, and Watkins.

RP 405-06. He too died. RP 408, 415, 416. Two people were witnessed going over a fence and running from the area of the shooting. RP 444-45.

Pasco Police Department detectives identified Mr. Anderson, just 18 years old, as a suspect in the November 18 and December 3 shootings. RP 1129; CP 26-28.

Mr. Anderson was arrested and invoked his right to remain silent. RP 751. The next day, while in jail, Mr. Anderson's pregnant girlfriend beseeched Mr. Anderson to talk to the police and tell them about his involvement in the shootings. RP 755. Sobbing, Mr. Anderson agreed. RP 755.

Detectives Aceves and Smith audio and video recorded their interrogation of Mr. Anderson. RP Statement. From the outset, Mr. Anderson needed the detectives to know that he would not provide the name of anyone else involved with the two incidents. RP Statement 3. He acknowledged his participation in both instances. RP Statement 32, 33. He had sought out the men in the car in part because they laughed at him in a casino shortly beforehand. RP Statement 6, 7, 9. He was also angry with them for cracking a brick over his brother's head weeks earlier. Id. When he confronted them, they pulled guns on him and he had no alternative but to shoot. RP Statement 10. He subsequently targeted and

shot Richie because he felt pressured by family to retaliate for the shooting of his cousin and the death of his friend Anthony Guerrero. RP Statement 37, 42. Richie was a member of the Sureno gang. RP 813. The four men in the car were also affiliated with the Surenos. RP 1021.

Mr. Anderson had dropped out of school in the 10th grade, never pursued a GED, smoked marijuana and drank alcohol daily, never held a job, and was supported by family and friends. RP Supp. DCP, Pre-Sentence Investigation (PSI) at 3, 6, 7, 10; Supp. DCP Psychological Evaluation Summary at 3.

Mr. Anderson was convicted of four counts of assault in the first degree and one count of murder in the first degree. The jury also found firearm enhancements applied to each charge. CP 26-28, 116-27.

The state filed a sentencing memorandum but defense counsel did not. Supp. DCP, Sentencing Memorandum. Defense counsel did not argue to the court that Mr. Anderson's youth was a mitigating factor the court should consider in sentencing Mr. Anderson to something less than a de facto life sentence posited by the sentencing guidelines. RP 1573-1591; CP 140.

The court also imposed \$10,403.01 of discretionary legal financial obligations (LFOs) without objection and ordered Mr. Anderson to pay

\$100 per month toward all his LFOs. RP 1573-91; CP 137-38. The

judgment included the following preprinted, boilerplate language:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. This court finds: [x] That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 136. The court also ordered that the LFOs would bear interest until paid in full. CP 138.

The court ordered Mr. Anderson to serve 36 months on community custody at the completion of his prison sentence and required he possess no gang paraphilia while on community custody. CP 142.

In filling out the judgment and sentence, the court specified a firearm enhancement had been found on count II when it had not been. CP 116-27, 133.

On January 24, 2017, the court entered an agreed restitution order of \$75,430.49. Supp. DCP, Order Setting Restitution and Payments.

Mr. Anderson appeals all portions of his judgment and sentence and was declared indigent for appellate purposes. CP 147, 149-50.

D. ARGUMENT

Issue 1. The trial court abused its discretion when it failed to apply applicable case law to consider Mr. Anderson's youth at the time of the incidents as a mitigating factor at sentencing and requires remand for a new sentencing hearing.

The trial court erroneously believed it had no discretion to depart from the standard range. Defense counsel did nothing to correct the court's erroneous belief. On August 13, 2015, well before Mr. Anderson's August 1, 2016 sentencing, our supreme court recognized the immaturity of youth as a basis for the imposition of an exceptional sentence downward. *State v. O'Dell*, 183 Wn.2d 680, 695–96, 358 P.3d 359 (2015). Here the trial court erred in failing to recognize and apply the *O'Dell* factors to Mr. Anderson, who was described as “very young” by both defense counsel and Detective Aceves and committed the offenses just after his 18th birthday. CP 27; RP 12, 755, 1578. Consequently, this court should reverse and remand for resentencing.

A sentence within the standard range . . . for an offense shall not be appealed. RCW 9.94A.585(1); *State v. Williams*, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, “[a] defendant may appeal a standard range sentence if the sentencing court failed to comply with the procedural requirements of the Sentencing Reform ACT (SRA) or constitutional

requirements.” *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006). Although “no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered.” *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); *State v. McGill*, 112 Wn. App. 95, 100, 47 P.3d 173 (2002) (footnote omitted) (“When a court has considered the facts and concluded there is no legal or factual basis for an exceptional sentence, it has exercised its discretion, and the defendant cannot appeal that ruling.”) Failing to consider an exceptional sentence is reversible error. *Grayson*, 154 Wn.2d at 342.

The trial court did not recognize applicable case law when it failed to recognize Mr. Anderson’s youth at the time of the offenses as a valid basis to impose an exceptional sentence downward. The court instead noted,

The Sentencing Reform Act defines the purpose of sentencing and indicates that it is to ensure punishment that’s proportionate to the seriousness of the offense, and here the legislature had defined the ranges. Absent a reason to depart, and here there is none, the legislature determines what the reasonable bounds. . . .is The sobering fact here is that any legal sentence this Court can impose will likely be a sentence for the rest of your natural life. . . . [T]he absolute minimum before Mr. Anderson can begin accruing good time on his sentence, as the Court calculates

it, is 780 months or 65 years. The combined ranges for the standard ranges here are 1,010 months to 1224 months, or 84 years and two months at the bottom, and 103 years and six months at the top.

RP 1584-86.

The error in the court's reasoning – and what necessitates remand for resentencing – is the court's incorrect belief that there was no legal basis it could consider to depart from the standard range.

On August 13, 2015, *O'Dell* announced a substantial change in the law.

Today, we do have the benefit of those advances in the scientific literature. Thus, we now know that age may well mitigate a defendant's culpability, even if that defendant is over the age of 18. It remains true that age is not a per se mitigating factor automatically entitling every youthful defendant to an exceptional sentence. In this respect, we adhere to our holding in *Ha'mim*, 132 Wash.2d at 847, 940 P.2d 633. But, in light of what we know today about adolescents' cognitive and emotional development, we conclude that youth may, in fact, “relate to [a defendant's] crime,” *Id.* at 847, 940 P.2d 633 (quoting RCW 9.94A.340); that it is far more likely to diminish a defendant's culpability than this court implied in *Ha'mim*; and that youth can, therefore, amount to a substantial and compelling factor, in particular cases, justifying a sentence below the standard range.

For these reasons, a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like *O'Dell*, who committed his offense just a few days after he turned 18. To the extent that this court's reasoning in *Ha'mim* is inconsistent, we disavow that reasoning.

O'Dell, 183 Wn. 2d at 695–96. See also, *In the Matter of the Pers. Restraint of Kevin Light-Roth*, No. 75129-8-I, 2017 WL 3473644 (Wash. Ct. App. Aug. 14, 2017) holding “O'Dell announced a change in the interpretation of the SRA, specifically RCW 9.94A.535(1) and RCW 9.94A.535(1)(e). Sean O'Dell was convicted of second degree rape of a child and given a standard range sentence of 95 months. O'Dell committed this offense 10 days after his 18th birthday.” *O'Dell*, 183 Wn. 2d at 683. The trial court imposed the standard range sentence after concluding O'Dell's youth could not be considered a mitigating factor on which to base an exceptional sentence downward. Our State Supreme Court disagreed thereby establishing the precedent for youth diminishing culpability as a mitigating factor. *O'Dell*, 183 Wn.2d at 683.

Washington courts now acknowledge, “[C]hildren are different,” citing *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2470, 183 L.Ed.2d 407 (2012); *State v. Houston-Sconiers*, 188 Wn.2d 1, 21, 391 P.3d 409 (2017). That difference has constitutional ramifications: “An offender's age is relevant to the Eighth Amendment, and [so] criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.” *Graham v. Florida*, 560 U.S. 48, 76, 130 S.Ct. 2011, 176 L.Ed.2d 825(2010); U.S. Const. Amend. VIII; *Houston-Sconiers*, 188 Wn.2d at 21.

Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements. *Houston-Sconiers*, 188 Wn. 2d at 21.

Additionally, on November 13, 2014, *Graham* held, contrary to the strict statutory reading, trial courts can run multiple first degree assault sentences concurrent in imposing an exceptional sentence downward. *State v. Graham*, 181 Wn.2d 878, 883-84, 337 P.3d 319 (2014).

Here, Mr. Anderson, born on January 5, 1996, was just 18 years old when the charged incidents happened in November and December 2014. CP 26-28. Defense counsel described Mr. Anderson as a “very young man” who was young enough to feel pressure from his family. RP 12. Mr. Anderson attributed pressure from his family as the reason he shot Richie Fernandez. RP Statement 37, 42.

The record documents many incidents of Mr. Anderson’s immature thinking and behaving more like a youth than an adult. He was easily manipulated by his girlfriend’s urging him to talk to the police even though it was against his best interest. RP 754, 755. He was easily manipulated by Detective Aceves’ theme of justified retribution into making statements against his best interest. RP Statement 17-19, 23, 37, 47. He elicited help

from other similarly aged cohorts in committing his offenses. RP Statement 10, 17, 21, 26, 32, 33. By his own admission, he shot four people sitting in a car in part because they had laughed at him minutes earlier at the Wild Moose Casino. RP Statement 9. Because he did not want to be labeled a snitch, he would not give up the names of cohorts. RP Statement 3.

His immaturity was also demonstrated by his dropping out of school in 10th grade, never pursuing a GED, never having held a job, and relying on family and friends to support him. RP Supp. DCP PSI 6, 10. He used marijuana and alcohol daily and had done so for years. Supp. DCP PSI at 7, 8. By self-admission, he used substances to help him avoid feelings of sadness, anxiety, anger. Supp. DCP, Psychological Evaluation Summary at 3. A mental health provider diagnosed him with maladaptive personality characteristics such as impulsivity, irresponsibility, irritability, aggression, recklessness, depression and suicidal feelings, extreme mood swings, and paranoia. Supp. DCP, Psychological Summary at 3. Many of his issues likely stemmed from the trauma he suffered as a young child living first in a home where his father routinely assaulted his mother and then later in a home where his mother's boyfriend routinely assaulted him. Supp. DCP, Psychological Summary at 2.

The trial court erred in seemingly not being aware of relevant case law giving it the ability to consider imposition of something other than an SRA de facto life sentence given Mr. Anderson immaturity and youthful impulsiveness.

A second reason this court should review the issue is that Mr. Anderson was denied his right to the effective assistance of counsel. Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and art. I, § 22 of the Washington Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Matter of Lui*, 188 Wn.2d 525, 397 P.3d 90, 101 (2017). Effective counsel would have presented the court with relevant case law and supporting argument.

Issue 2. The sentencing court violated due process and exceeded its statutory authority by imposing a gang-related condition of community custody that is unconstitutionally vague.

One of Mr. Anderson's community custody conditions requires he not possess "gang paraphernalia including clothing, insignia, medallions, etc." CP 142. This court reviews community custody conditions for abuse of discretion, and will reverse them if they are "manifestly unreasonable." *State v. Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Imposing an unconstitutional condition will always be "manifestly unreasonable." *Id.*

at 791–92. This court does not presume that community custody conditions are constitutional. *Id.* at 793.

A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The guarantee of due process, contained in the Fourteenth Amendment to the United States Constitution and art. I, § 3 of the Washington Constitution, requires that laws not be vague. *Bahl*, 164 Wn.2d at 752–53. The laws must (1) provide ordinary people fair warning of proscribed conduct, and (2) have standards that are definite enough to “protect against arbitrary enforcement.” *Id.* A community custody condition is unconstitutionally vague if it fails to do either. *Id.* at 75. The prohibitions against Mr. Anderson not possessing gang paraphernalia “including clothing, insignia, medallions, etc” is unconstitutionally vague and impinge on protected First Amendment rights.

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. *Bahl*, 164 Wn.2d at 751–52. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness

standards. *Id.* at 752. See also *Valencia*, 169 Wn.2d at 786 (pre-enforcement challenges to community custody conditions are ripe for review when the issue raised is primarily legal, further factual development is not required, and the challenged action is final). In *Valencia*, the petitioner's vagueness challenge to their community custody condition prohibiting possession or use of "any paraphernalia that can be used for the ingestion or processing of controlled substances" was held to be ripe for review. *Valencia*, 169 Wn.2d at 786–91. Mr. Anderson similarly challenges certain sentencing conditions as unconstitutionally vague. The issue is ripe for review and should be considered on its merits.

The terms "gang paraphernalia including clothing, insignia, medallions, etc" are not defined. The conditions are no more acceptable from a vagueness standpoint than the conditions found vague in *Bahl*, which prohibited the possession of or access to pornography. As in *Bahl*, the vague scope of proscribed conduct fails to provide Mr. Anderson with fair notice of what he can and cannot do.

The breadth of potential violations under these conditions offends the second prong of the vagueness test, rendering the conditions unconstitutionally vague. Because the conditions might potentially encompass a wide range of everyday conduct, they "do[] not provide

ascertainable standards of guilt to protect against arbitrary enforcement.” *Bahl*, 164 Wn.2d at 753. Conditions that leave so much to the discretion of individual community corrections officers are unconstitutionally vague.

Other jurisdictions considering vagueness challenges to similar restrictions involving gang clothing have required specificity. See e.g. *United States v. Soltero*, 510 F.3d 858, 865–86 (9th Cir.2007) (condition forbidding the defendant from wearing, using, displaying or possessing apparel connoting affiliation upheld because it specifically referenced the Delhi gang and district court was entitled to presume the defendant - who had admitted to being a member of the gang - was familiar with the gang's paraphernalia); *United States v. Johnson*, 626 F.3d 1085, 1091 (9th Cir. 2010) (upholding release condition proscribing wearing clothing that “‘evidences affiliation’ with the Rollin' 30's gang”).

Choice of apparel involves fundamental freedoms that should not lightly be abrogated. The boilerplate constraints imposed upon Mr. Anderson are unconstitutionally vague. Because the conditions are manifestly unreasonable, the offending condition should be reversed. *Bahl*, 164 Wn.2d at 753.

Issue 3. The directive that Mr. Anderson pay \$10,403.01 in discretionary LFOs was based on an unsupported finding of ability to pay LFOs.

Trial courts may order payment of discretionary LFOs as part of a sentence. RCW 9.94A.760. However, RCW 10.01.160(3) forbids imposing LFOs unless “the defendant is or will be able to pay them.” In ordering the payment of LFOs, courts “shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

The trial court failed to make an adequate inquiry into Mr. Anderson’s ability to pay discretionary LFO’s before ordering him to pay \$10,403.01 of them. The discretionary LFOs are as follows: \$250 jury demand fee; \$700 court appointed counsel fee; \$8,953.01 court appointed defense expert and other [unspecified] defense costs; and a \$500 fine. CP 137.

The Washington Supreme Court recognizes the “problematic consequences” LFOs inflict on indigent criminal defendants. *State v. Blazina*, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue at a 12 percent interest rate so that even those “who pay[] \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” *Id.* at 836. This, in turn, “means

that courts retain jurisdiction over the impoverished offenders . . . because the court maintains jurisdiction until they completely satisfy their LFOs.” *Id.* at 836-37.

Blazina requires trial courts to first consider an individual’s current and future ability to pay before imposing discretionary LFOs. *Id.* at 837-39. This requirement “means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” *Id.* at 838. Instead, the “record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.” *Id.* The court should consider such factors as length of incarceration and other debts, including restitution. *Id.*

The *Blazina* court further directed courts to look to GR 34 for guidance. *Id.* at 838. This rule allows a person to obtain a waiver of filing fees based on indigent status. *Id.* If the individual qualifies as indigent, then “courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.* at 834.

Mr. Anderson is serving an 1126 month, or 93.8 year de facto life sentence. CP 140. The court found he was so impoverished that he could

not even contribute anything financially toward his appeal. CP 149-50. At sentencing, the court inquired of Mr. Anderson's ability "to pay costs and fines and fees." RP 1583. Defense counsel responded:

Your Honor, my client has the ability to work at this point in time. I always tell the Court when we have these types of cases I don't know what his ability, his future ability will be, so we'll have to address that at some point in time. Obviously if he's going to prison, he won't be working per se.

RP 1584.

Counsel added nothing more to the discussion. There was no discussion of whether Mr. Anderson, given the nature of his convictions, would be eligible to work at DOC, how much DOC pays, how many hours he could expect to receive, and how much DOC would take from his pay for commissary items such as soap, toothpaste, shaving supplies, telephone access, and stamps and envelopes. Mr. Anderson has a young child. RP 1582. There was no discussion of the prospect of the state taking money out of wages to contribute to child support. See generally RCW 72.09.111 (inmate wages).

The court and counsel was also aware of a looming award of sizeable restitution and ordered the state to set a restitution hearing. CP 138. Restitution was subsequently set at \$75,430.49. Supp. DCP, Order Setting Restitution and Payments. When a county clerk's office receives

money from a person convicted in superior court, restitution is paid prior to any payments of other monetary obligations. RCW 9.94A.760. Financial obligations on superior court judgments bear a 12 percent interest from the date of the judgment. RCW 10.82.090; RCW 4.56.110; RCW 19.52.010.

All of this notwithstanding, and with no objection from defense counsel, the court ordered Mr. Anderson to pay no less than \$100 monthly toward court costs. CP 138. Even if Mr. Anderson paid \$100 monthly starting with the August 1, 2016, entry of his judgment and sentence, with a mandatory 12% interest rate, he would never pay off even the \$11,203.01 in combined discretionary and mandatory LFOs, CP 137. <https://www.moneyunder30.com/loan-payoff-calculator>.

In fact, the discretionary and mandatory LFO's imposed at sentencing would never be paid on because it is completely eclipsed by the \$75,430.49 in restitution that, statutorily, must be recouped before all payment is received on any other costs. RCW 9.94A.760

The \$10,403.01 in discretionary LFOs should be vacated.

In response, the state may ask this Court to decline review of the erroneous LFO order in the absence of an objection to that LFO. The *Blazina* court held that the Court of Appeals "properly exercised its discretion to decline review" under RAP 2.5(a). *Blazina*, 182 Wn.2d at 834.

The court nevertheless concluded that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” *Id.* Asking this court to decline review would essentially ask this court to ignore the serious consequences of LFOs and the reality of LFOs imposed against a person who, practically speaking, may very well serve the remainder of his life in prison. This Court should instead confront the issue head on by vacating Mr. Anderson’s discretionary LFOs.

Issue 4. Defense counsel’s failure to oppose imposition of discretionary LFOs denied Mr. Anderson effective assistance of counsel.

A second reason this Court should review the issue is that, assuming it is otherwise waived, Mr. Anderson was denied his right to the effective assistance of counsel. Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and art. I, § 22 of the Washington Constitution. *Strickland* 466 U.S. at 685-86; *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney’s performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. Ineffective assistance claims are reviewed de novo. *State v. Shaver*, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Deficient performance

occurs when counsel's conduct falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. *Id.* at 705-06.

Counsel's failure to object to the discretionary LFOs fell below the standard expected for effective representation. Counsel understood Mr. Anderson's dire financial situation. He was, after all, being sentenced to a de facto life sentence. RP 1584; CP 140. There was no reasonable strategy for not insisting that the judge comply with the requirements of RCW 10.01.160(3) regarding discretionary financial liabilities. *See, e.g., State v. Killo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); *State v. Adamy*, 151 Wn. App. 583, 588, 213 P.3d 627 (2009) (counsel was deficient for failing to recognize and cite appropriate case law). Counsel's failure constitutes deficient performance.

Counsel's failure to object to the discretionary LFO was also prejudicial. Mr. Anderson remains hopeful his de facto life sentence will be reduced. He hopes that he will someday be released. The hardships that can result from LFOs are numerous. *Blazina*, 182 Wn.2d at 835-37. Even

without legal debt, those with criminal convictions have a difficult time securing stable housing and employment. LFOs exacerbate these difficulties and increase the chance of recidivism. *Id.* at 836-37. In any remission hearing to set aside LFOs, Mr. Anderson will have to prove manifest hardship, and he will have to do so without appointed counsel. RCW 10.01.160(4); *State v. Mahone*, 98 Wn. App. 342, 346, 989 P.2d 583 (1999).

Blazina demonstrates there is no strategic reason for failing to object. Mr. Anderson incurs no possible benefit from LFOs. Given his indigency (as established by undersigned counsel's appointment on appeal) there is a substantial likelihood the trial court would have waived all discretionary LFOs if defense counsel called upon the court to properly consider Mr. Anderson's current and future ability to pay. This Court should vacate his discretionary LFOs on this alternative basis.

Issue 5. Scrivener's errors in the judgment and sentence are correctible error.

a. Mr. Anderson's scrivener's errors are reviewable on appeal.

A defendant may challenge an erroneous sentence for the first time on appeal. *Bahl*, 164 Wn.2d at 744. CrR 7.8(a) provides that clerical errors in judgments, orders, or other parts of the record may be corrected by the

court at any time on its initiative or on the motion of any party. Scrivener's errors are clerical errors that result from mistake or inadvertence, especially in writing or copying something on the record. *In re Personal Restraint of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

b. The two scrivener's errors in Mr. Anderson's judgment and sentence should be remanded and corrected.

The first error is the statement that a special verdict for use of a firearm was returned on Count II. CP 133. Count II charges unlawful possession of a firearm in the first degree.³ CP 26-27. There was no special verdict alleged or returned. CP 26-27, 116-27. At sentencing, the court noted mistakes on counts and special verdicts and called for correction. RP 1583. But not all the corrections were made. CP 133, 140.

The second error is the statement that a 60 month firearm enhancement applies to Count II. CP 140. No firearm enhancement applies to Count II. Unlawful possession of a firearm cannot be enhanced with a firearm enhancement. CP 26-27, 116-27.

The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. CrR 7.8 (a); *State v. Naillieux*, 158

³ Second Amended Information.

Wn. App. 630, 646, 241 P.3d 1280 (2010). Mr. Anderson's case should be remanded for correction of the scrivener's errors.

Issue 6. If Mr. Anderson is unsuccessful in this appeal, this court should decline to impose appellate costs.

Anderson preemptively objects to any appellate costs should the state be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), and this Court's General Court Order issued on June 10, 2016.

Anderson was found indigent by the trial court and was represented by appointed counsel at trial and in these appellate proceedings. CP 137, 148-50. As argued in Issue 3, nothing supports a finding that Mr. Anderson, while serving his de facto life sentence, can pay the \$75,430.49 restitution plus the \$11,203.01 combined mandatory and discretionary LFOs. Supp. DCP Order Setting Restitution and Payments; CP 137.

The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same 12% compounded interest as trial court costs. Appellate costs negatively affect indigent appellants'

ability to move on with whatever remains of their lives in precisely the same ways the *Blazina* court identified for trial costs.

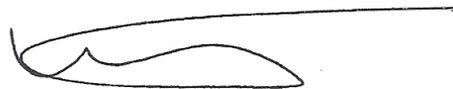
The record demonstrates Mr. Anderson cannot pay costs on appeal. He was found indigent by the trial court and remains indigent. CP 149-50. Mr. Anderson respectfully requests this court exercise its discretion by denying an award of appellate costs, if the state substantially prevails on appeal.

E. CONCLUSION

Mr. Anderson's case should be remanded for resentencing.

At the resentencing, the vague community custody condition should be stricken, all discretionary LFOs stricken and the noted scrivener's errors corrected. No appeal costs should be assessed.

Respectfully submitted August 30, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for Deshawn Anderson

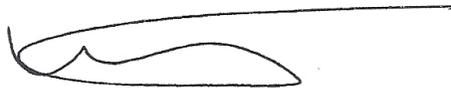
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Franklin County Prosecutor's Office, at appeals@co.franklin.wa.us; (2) the Court of Appeals, Division III; and (3) I mailed it to Deshawn Anderson/DOC#391633, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed August 30th, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Deshawn Anderson, Appellant

LAW OFFICE OF LISA E TABBUT

August 30, 2017 - 3:02 PM

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