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Division III
State of Washington
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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT
v.

BRENTEN MICHAEL MULROY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The information was insufficient to apprise Mulroy of the requirements to find that three of the four offenses were domestic violence offenses.

2. The judgment and sentence, when read in combination with the prison-based DOSA procedures set forth in former RCW 9.94A.660, allows Mulroy's combined term of incarceration and community custody to exceed the statutory maximum in the event of termination.

II. ISSUES PRESENTED

1. Was the State required to include the domestic violence (DV) designation in the information where such designation is not an element of the offense?
2. Did the defendant receive sufficient notification of the DV designation where he was advised by the trial court of the potential \$100 domestic violence fine before entering his plea, and where he acknowledged in his plea statement that the crimes were DV crimes and that such crimes were subject to the fine?
3. Because Mr. Mulroy was sentenced before July 26, 2009, is it the responsibility the Department of Corrections to assure that his combined term of incarceration and community custody do not exceed the statutory maximum sentence of 60 months?

III. STATEMENT OF THE CASE

Substantive Facts.

Jacqueline D. Sanger and Brenten M. Mulroy were in a significant dating relationship for six months prior to the evening of January 10, 2007.

CP 1.¹ That evening, Ms. Sanger and Mr. Mulroy stayed with Ashlie Brown and Michael Taylor at their residence. Ms. Sanger was pregnant² with Mr. Mulroy's child. At 5:00 a.m. the next morning, Ms. Sanger was awakened by Mr. Mulroy because he wanted to have sex with her. Ms. Sanger told Mr. Mulroy she did not want to have sex. Mr. Mulroy became very angry and left the room. He soon returned and confronted her about not wanting to have sex. He then jumped on top of her, sat on her waist and pinned her down on her back. He began punching her in her stomach and slapping and punching her face. Ms. Sanger struggled to free

¹ Because Mr. Mulroy plead guilty and stipulated to the affidavit of facts and police reports, the factual recitation is taken from the affidavit of facts at CP 1-3, except as otherwise noted.

² On the date of the plea, Mr. Mulroy's attorney, Mr. Reid, informed the court that Ms. Sanger was pregnant with his child and that she did not wish to have a no-contact order entered by the court.

MR. REID [Defendant's attorney]: Thank you, Your Honor. The Court has before it a joint recommendation but for the domestic violence no contact order. And I will also defer to Miss Sanger about that. I did speak to her very shortly before Court. It is my understanding that she is pregnant with Mr. Mulroy's child and does not want a no-contact order with Mr. Mulroy.

RP 12.

Because Mr. Mulroy was in jail between the offense date to the date of sentencing, the unborn child was conceived before he was arrested. He received 77 days of credit for time served when he was sentenced on March 28, 2007. He was not released from jail from the time of his arrest on January 11, 2007, until sometime after sentencing. *See* CP 2 (Deputy Ebel talking with defendant in jail on January 11, 2007).

herself and yelled for help at which time Mr. Mulroy placed both of his hands around her neck and started to squeeze very hard. Ms. Sanger was not able to breath or talk; she was choking on her own blood. She began to pass out and thought she was going die. She managed to get up, and ran to the Brown's room as Mulroy threatened to hurt her further if she called the police. He then attempted to stop her and Ms. Brown from leaving the residence. As Ms. Sanger and Ms. Brown were leaving, Mr. Mulroy broke Ms. Sanger's cell phone and stated he would harm them if they called the police. Ms. Brown drove Ms. Sanger to the Spokane Valley Emergency room.

Mr. Mulroy admitted to Mr. Brown that he forcefully struck Sanger in the face and admitted that he really beat her up. Mr. Brown saw that Mr. Mulroy had blood on his rings on his fingers.

Procedural Facts.

On January 30, 2007, an information was filed in the Superior Court for Spokane County charging the defendant with second degree assault, unlawful imprisonment, and two counts of intimidating a witness. CP 34-35 (Sub #5).³ The defendant was arraigned on that same date and a no contact order was entered advising him that “the court finds that the

³ State has filed a First Supplemental Designation of Clerk's Papers contemporaneously with this brief.

defendant has been charged with, for or convicted of a domestic violence case.” CP 36-37 (Sub #8). The order finding that this case was a domestic violence case was received and signed by the defendant and his attorney. *Id.*

On March 28, 2007, the defendant entered a plea to reduced charges, four class C felonies. CP 5-6, 7-14. He had a countable offender score of 9+. CP 38-39 (Sub #20). He was represented by counsel. *Id.*

The defendant informed the trial court that he was pleading guilty to a “3rd assault - **DV**,” “unlawful imprisonment,” “tampering with a witness - **DV**,” and “tampering with a witness - **DV**.” CP 13 (emphasis added). The guilty plea statement also contained his acknowledgment he was aware of his responsibility to “pay a domestic violence assessment of up to \$100” for the domestic violence crimes. RP 8; CP 11. The trial court discussed these acknowledgments with him.⁴ RP 8.

The defendant informed the court in writing that he had been provided with a copy of the information and fully understood the charges.

⁴ THE COURT: Sir, if this Court finds this is a crime of domestic violence, you may be ordered to pay domestic violence fees up to a hundred dollars and you may be required to participate in domestic violence perpetrator program. Do you understand?

THE DEFENDANT: Yes.

RP 8.

CP 7-8. He acknowledged he was realistically giving up all of his important rights by pleading guilty, and specifically agreed he was giving up the right to appeal a finding of guilt after trial. CP 8. He informed the trial court that he agreed to plead guilty in exchange for the amendment of the charges and the State's recommendation for a drug offender sentencing alternative sentence (DOSA). *Id.* Mr. Mulroy acknowledged he understood the plea, that he had a copy of the plea, and that he had no further questions for the court. His attorney informed the court that he had read and fully discussed the entire guilty plea statement with Mr. Mulroy and that Mr. Mulroy understood it in full. CP 14.

The trial court found that the defendant had plead guilty to domestic violence offenses. CP 17-18. The court sentenced Mr. Mulroy to a DOSA sentence as requested by Mr. Mulroy and as agreed to by the State. CP 17-30. The trial court entered a domestic violence fine of \$100. CP 21. No objection was made to any of these findings. The trial court found that Mr. Mulroy was:

knowingly, intelligently, and voluntarily entering his plea to this matter, that he does understand the consequences of the plea. He understands the charges against him. I have reviewed the affidavit of facts and will accept that as a factual basis for the plea.

CP 11.

IV. ARGUMENT

A. IN 2007,⁵ THE STATE WAS NOT REQUIRED TO INCLUDE THE DOMESTIC VIOLENCE DESIGNATION IN THE INFORMATION BECAUSE THIS DESIGNATION WAS NOT AN ELEMENT OF THE OFFENSE.

As above, the defendant was advised of the potential \$100 domestic violence fine by the trial court at the time of his plea. He also included that acknowledgement in his statement on plea of guilty. The defendant's belated claim of lack of knowledge regarding this fine is without factual or legal basis.

The defendant now claims that the domestic violence designation must be included in the information because it is an element of the offense. Additionally, he claims that the \$100 fine violates the *Apprendi*⁶ and

⁵ As explained by *State v. Hodgins*, 190 Wn. App. 437, 439-41, 360 P.3d 850 (2015), prior to 2010, RCW 9.94A.525 did not include any special provisions for calculating the offender score where conviction was for a felony domestic violence offense. Under the general offender score calculation provisions of the statute, misdemeanor convictions were not counted. In 2010, the statute was amended in ways that collectively allowed certain convictions, including some misdemeanor domestic violence offenses, to count toward the offender score, the key being whether, for the present offense, "domestic violence as defined in RCW 9.94A.030 was plead and proven." RCW 9.94A.525(21). Those amendments have no impact on the present case.

⁶ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d 435 (2000).

Blakely^{7,8} requirements that any additional punishment must be submitted to a jury or admitted by the defendant. Both claims are contrary to robust precedent in this area.

The domestic violence act, chapter 10.99 RCW, was designed to “recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse.” RCW 10.99.010. The legislature sought to correct “policies and practices of law enforcement agencies and prosecutors which

⁷ *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

⁸ As summarized by our State Supreme Court in *State v. Cubias*, 155 Wn.2d 549, 553, 120 P.3d 929 (2005):

In *Apprendi*, the United States Supreme Court held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348.

In *Blakely*, the court clarified its decision in *Apprendi* and concluded that the “‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely*, 542 U.S. at ----, 124 S.Ct. at 2537 (citations omitted). It went on to say: “In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” *Id.*

have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers.” *Id.*

Prior to *Blakely*, our courts had addressed Mr. Mulroy’s argument that the the domestic violence finding altered the essential elements of the charge, and therefore added an element to the nature of the charge. Those cases held that Washington’s domestic violence statutes do not create distinct crimes with separate elements. In *State v. O.P.*, 103 Wn. App. 889, 892, 13 P.3d 111 (2000), the court examined the stated purpose of the domestic violence act, and noted the legislature determined “the existing criminal statutes are adequate to provide protection for victims of domestic violence.”⁹ After examining the act’s purpose, the court held that the domestic designation of a crime “created no new crimes but rather emphasized the need to enforce existing criminal statutes in an evenhanded manner to protect the victim regardless of whether the victim was involved in a relationship with the aggressor.”¹⁰ Therefore, the designation of a crime

⁹ *O.P.*, 103 Wn. App. at 892 (citing RCW 10.99.010).

¹⁰ *Quoting Roy v. City of Everett*, 118 Wn.2d 352, 358-59, 823 P.2d 1084 (1992). There, our State Supreme Court stated:

RCW 10.99 created no new crimes but rather emphasized the need to enforce existing criminal statutes in an evenhanded manner to protect the victim regardless of whether the victim was involved in a relationship with the aggressor. As specifically stated by the Legislature, the purpose and intent of RCW 10.99 was to counteract the

as a domestic violence crime “does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced.” *O.P.*, 103 Wn. App. at 892.

Similarly, in *State v. Goodman*, 108 Wn. App. 355, 30 P.3d 516 (2001), the court rejected the identical claim raised here by Mr. Mulroy. That court held that the information was not required to include these alleged “elements” of domestic violence.¹¹

After *Blakely* was decided, our courts remained steadfast regarding the non-elemental designation of domestic violence. In *State v. Hagler*, 150 Wn. App. 196, 208 P.3d 32 (2009), a post-*Blakely* domestic violence case, the appellate court again held that the domestic violence designation

societal and historical tendency not to enforce laws against domestic violence, to emphasize the need for enforcement of existing laws, and to provide guidance to law enforcement agencies in how to go about enforcing them and to protect peace officers from suit when they, in good faith, attempt to enforce the law in an incident involving domestic violence.

¹¹ *Goodman*, 108 Wn. App. at 359:

We hold that the charging information here was sufficient because domestic violence is not a separate crime with elements that the State must prove. Identifying a crime as a domestic violence crime “does not itself alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced.” *State v. O.P.*, 103 Wn. App. 889, 892, 13 P.3d 1111 (2000). Thus, Goodman’s information was not insufficient for failing to state the “elements” of domestic violence.

does not itself alter the elements of the underlying offense. In doing so, the appellate court directly stated that: “[t]he designation need not be proven to a jury under *Blakely*.” *Id.* at 201. Moreover, the court determined that involving the jury in the determination of a domestic violence designation might actually be prejudicial:

The jury’s task is to decide whether the State has proved the elements of the charges beyond a reasonable doubt. A domestic violence designation under chapter 10.99 RCW is neither an element nor evidence relevant to an element. The fact of the designation thus does not assist the jury in its task. We can see no reason to inform the jury of such a designation, and we believe that prejudice might result in some cases.

Id. at 202; see also *State v. Hurtado*, 173 Wn. App. 592, 609, 294 P.3d 838 (2013).¹²

Mr. Mulroy’s additional argument that the \$100 domestic violence fine increases the punishment and therefore implicates *Blakely* has also been soundly rejected by our courts. In fact, Mr. Mulroy’s *total* financial assessments on the four felony convictions, including the DV fine, was only

¹² In *Hurtado*, 173 Wn. App. at 609, the court briefly discussed *Hagler*, *supra*, and reached the same result:

Here, the trial court made a finding of domestic violence. The parties do not dispute that the jury was not asked to determine whether the second degree assault was a crime of domestic violence. The trial court’s jury instructions and verdict forms did not address domestic violence. But the trial court’s finding did not increase Hurtado’s potential punishment. Thus, a jury finding was not required for the domestic violence designation.

\$800, an amount that is *below* the \$1,000 maximum financial penalty of a *simple misdemeanor*, never mind the \$10,000 for maximum for class C felonies. See RCW 9A.20.021(1)(c) and (3). In *State v. Winston*, 135 Wn. App. 400, 144 P.3d 363 (2006), a domestic violence case, the court held that the defendant's "DV" fines did not violate *Blakely* because they did not exceed the statutory maximum for the convictions.

We hold that Winston's fines do not violate *Blakely* because they do not exceed the statutory maximum based on the facts the jury found. The jury found that Winston violated a protection order with conduct that constituted an assault, that he attempted second degree assault, and that he committed first degree burglary.

Violation of a protection order is a class C felony when that violation is an assault. RCW 26.50.110(4). Attempted second degree assault is also a class C felony. RCW 9A.36.021(2)(a);¹² RCW 9A.28.020(3)(c). The statutory maximum fine that a court can impose for a class C felony is \$10,000. RCW 9A.20.021(1)(c). First degree burglary is a class A felony with a statutory maximum fine of \$50,000. RCW 9A.52.020(2); RCW 9A.20.021(1)(a).

Because the \$100 "DV fine" did not exceed the statutory maximum for the crimes for which Winston was convicted, *Blakely* is not implicated. Furthermore, our conclusion should not be interpreted to mean that *Blakely* necessarily applies to monetary fines. That issue is not before us and we do not address it. The exceptional sentence statute and sentencing guidelines at issue in *Blakely* addressed only a defendant's jail time, not his fines. See *Blakely*, 542 U.S. at 299-300, 124 S.Ct. 2531.

Winston, 135 Wn. App. at 410. The defendant's *Blakely* allegations are without merit.

B. THE DEFENDANT RECEIVED SUFFICIENT NOTIFICATION OF THE DV DESIGNATION WHERE HE WAS ADVISED OF THE POTENTIAL \$100 DOMESTIC VIOLENCE FINE BY THE TRIAL COURT BEFORE HIS PLEA WAS ACCEPTED, AND WHERE HE ACKNOWLEDGED IN HIS PLEA STATEMENT THAT THE CRIMES WERE “DV” CRIMES AND THAT SUCH CRIMES WERE SUBJECT TO THE FINE.

The defendant was advised of the DV designation and of the \$100 DV financial penalty prior to entry of his plea. The defendant affirmatively sought out an agreed plea bargain, and obtained that bargain on reduced charges with an affirmative DOSA sentencing recommendation. In doing so, he *acknowledged* both that he was pleading to “DV” offenses, and that he would be subject to a \$100 fine. He stipulated to the facts necessary for the trial court to find a domestic relationship in order to impose the \$100 fine. He cannot claim otherwise.¹³ Even if this \$100 fine were an aggravating circumstance, his stipulation prohibits him from belatedly raising the issue at this time. *See, e.g., State v. Ermels*, 156 Wn.2d 528, 131 P.3d 299 (2006) (defendant may stipulate to aggravating circumstances

¹³ Mr. Mulroy stipulated to the facts as contained in the affidavit of facts. CP 13 at #11 “Instead of making a statement, I agree 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.” The affidavit of probable cause establishes that they were in a dating relationship when he beat her. The first statement in the probable cause affidavit states that “Jacqueline D. Sanger can testify to the following, that she and Brenten M. Mulroy were in a significant dating relationship for six months” prior to the evening of January 10, 2007. CP 1.

justifying an exceptional sentence, and was not denied a jury trial on those issues); *State v. Dillon*, 142 Wn. App. 269, 174 P.3d 1201 (2007) (defendant who made agreed recommendation of exceptional sentence as part of his plea could not challenge his exceptional sentence without also challenging plea agreement); *and cf. State v. Moncrief*, 137 Wn. App. 729, 735, 154 P.3d 314 (2007) (there was no material distinction between the court’s reliance on the stipulation in the guilty plea in *Ermels* and the court’s reliance on Mr. Moncrief’s stipulation in his guilty plea in military court. Neither offended *Blakely*).

Therefore, Mr. Mulroy’s assertions of a *Blakely* violation is without merit.

C. BECAUSE MR. MULROY WAS SENTENCED BEFORE JULY 26, 2009, IT IS UP TO THE DEPARTMENT OF CORRECTIONS TO ASSURE THAT HIS TERM OF COMMUNITY CUSTODY ENDS WHEN HIS COMBINED TERMS OF CONFINEMENT AND COMMUNITY CUSTODY REACH HIS STATUTORY MAXIMUM SENTENCE OF 60 MONTHS. NO REMAND FOR A “BROOKS NOTATION” IS NECESSARY.

The defendant notes that his *potential* sentence may hypothetically exceed the 60-month statutory maximum for his convictions for third degree assault, unlawful imprisonment, and witness tampering.¹⁴ He requests

¹⁴ Assault in the third degree is a class C felony, RCW 9A.36.031(2), as are unlawful imprisonment 9A.40.040(2) and witness tampering 9A.72.120(2).

remand to the trial court to remedy this possibility through the entry of a “*Brooks* notation.”¹⁵ However, that notation was only required in those cases where the period of custody and community supervision facially exceed the statutory maximum for the crime. Here it does not. Mr. Mulroy would be required to fail in his DOSA sentence before he would *hypothetically* face the additional community custody time.¹⁶

Mulroy’s DOSA sentence is 27.75 months of incarceration followed by 27.75 months of community custody for a total of 55.5 months, which is less than the statutory 60-month maximum. CP 24. The State would agree that it is the trial court’s duty to correct such a sentence if the defendant had been sentenced *after* RCW 9.94A.701(9)¹⁷ became effective on July 26, 2009. *See* Laws of 2009, ch. 375, § 5; *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). However, in this case, petitioner was sentenced in

Class C felonies have a maximum sentence of five years and \$10,000. RCW 9A.20.021(1)(c).

¹⁵ In *In re Brooks*, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009), the Court held that when the trial court imposes an aggregate term of confinement and community custody that potentially exceeds the statutory maximum, it must include a notation clarifying that the total term of confinement and community custody actually served may not exceed the statutory maximum.

¹⁶ Nine to eighteen months. CP 26.

¹⁷ RCW 9.94A.701(9) states: “The term of community custody specified by this section shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.”

March 2007, so RCW 9.94A.701(9) does not apply here. As our Supreme Court explained in *Boyd*, 174 Wn.2d at 472-73,¹⁸ prior to the July 26, 2009 enactment of RCW 9.94A.701(9), it was the Department of Corrections' duty to ensure that the defendant's *actual* sentence served not exceed the statute:

but for those sentenced before the [2009] enactment of the statute (as was the case in *Franklin*), it is the responsibility of the Department of Corrections to reduce the term of community custody to bring the total term within the statutory maximum. *Franklin*, 172 Wn.2d at 839-41, 263 P.3d 585. Thus, we held that remand for resentencing was not necessary in that case. *See id.* at 840, 263 P.3d 585 (directive that court reduce term of community custody to avoid sentence in excess of statutory maximum only applies when court first imposes sentence).

Boyd, 174 Wn.2d at 472-73.

Presently, from the trial court record, we do not know if the defendant is still in custody under this 2007 sentence, how much credit for time served he has received, or whether his case is mooted by the completion of this sentence. However, because the judgment and sentence only imposes 27.75 months of total confinement and another 27.75 months of community custody, that combined sentence is less than 60 months. Any *potential* additional community custody (9-18 months) that *may* be added to the Mr. Mulroy's sentence due to a violation of the DOSA program, as

¹⁸ Discussing *State v. Franklin*, 172 Wn.2d 831, 263 P.3d 585 (2011).

well as the calculations for future good time, were hypothetical at the time of his sentencing. In any event, these calculations are now within the responsibility of the Department of Corrections - to be monitored by the Department, not the trial court, to ensure that the actual sentence of time served does not exceed the 60-month maximum.¹⁹ It is *Franklin* that controls this issue.

Because Mulroy was sentenced before July 26, 2009, it is up to the Department of Corrections to assure that his term of community custody ends when his combined terms of confinement and community custody reach his statutory maximum sentence of 60 months. No remand for a *Brooks* notation is necessary.

¹⁹ The *Franklin* Court noted requiring the trial courts to do what the legislature had previously determined was the post-sentencing responsibility of the Department of Corrections could have tragic results:

Indeed, carried to its logical extension, *Franklin*'s interpretation of RCW 9.94A.701 leads to absurd results. Not only would *Franklin*'s reading compel sentencing courts to retroactively reduce previously imposed terms of community custody in line with the statutory maximum, but it also would require trial courts to resentence every offender in Washington who was sentenced to a variable—but perfectly lawful—term of community custody prior to the 2009 amendments and who is currently incarcerated or serving community custody.

Franklin, 172 Wn.2d at 840.

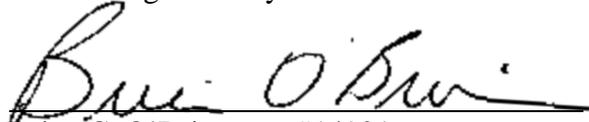
V. CONCLUSION

In 2007, the DV designation was neither an element of the crime, nor a designation that raised *Blakely* concerns requiring the jury to make a factual finding.

Because Mulroy was sentenced before July 26, 2009, it is up to the Department of Corrections to assure that his term of community custody ends when his combined terms of confinement and community custody reach his statutory maximum sentence of 60 months. Therefore, no remand for a *Brooks*' notation is necessary.

Dated this 14 day of June, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent/Appellant

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

STATE OF WASHINGTON,

Respondent,

v.

BRENTEN M. MULROY,

Appellant.

NO. 35472-5-III

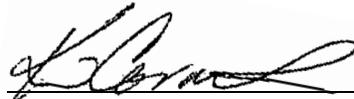
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 14, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@2arrows.net

6/14/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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