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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JEREMY ALVAREZ, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial, conviction, and sentence of the Appellant.

III. ISSUES

1. The officer testified that he passed along a message from the Defendant's father and then left. The Defendant had no expression and appeared to have just woken up. Where there was no evidence that the Defendant was questioned, that he was silent, or that he invoked his right to remain silent, and where the Defendant was not in custody, was testimony about the Defendant's bland affect reversible error?
2. As the Washington Supreme Court has approved in *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), may an expert witness testify as to consistency of statements?

3. Does the mere relation of the State's allegation, consistent with the WPIC, impart the judge's personal opinion of the evidence?

4. Should the Court refuse to review challenges to the community custody conditions in order to encourage the defense bar to participate in the timely and efficient drafting of conditions at the local level and where the prosecutor and judge made efforts to tailor these conditions and the defense counsel denied objection?

5. Did the court abuse its discretion in imposing appropriate and authorized community custody conditions?

IV. STATEMENT OF THE CASE

The Defendant Jeremy Alvarez appeals from his jury conviction of Rape of a Child in the Second Degree. CP 62-63, 115-26, 147.

On about April 15, 2017, Joseph Alvarez[1] posted bail for his 26 year old son, the Defendant. RP[2] 368-68, 371, 394, 397, 423-24. The Defendant had returned to Washington after graduating from Second

[1] To avoid confusion, Joseph Alvarez will be referred to herein as "Joseph"; and Jeremy Alvarez will be referred to as "the Defendant."
[2] "RP" indicates the transcript of the trial.

City in Chicago and then traveling for a few years. RPS[3] 10. Because the Defendant had been court-ordered not to contact his mother or grandmother, Joseph allowed the Defendant to stay with him for a few days until the Defendant could find his own place. RP 371-72, 394-95. The Defendant was expected to return to jail at the beginning of the next month in order to serve a sentence for violating an order of protection. CP 65, 98. At his father's house, the Defendant slept in the TV room on the main floor, while Joseph and his fiancé Melissa Porter slept in the basement, and Ms. Porter's 13 year old daughter J.M.P. slept in the upstairs loft/attic. RP 368, 422, 373, 395, 425.

On the afternoon of April 19, the Defendant tricked J.M.P. into taking a walk with him close to the railroad tracks and Union Gospel Mission without first obtaining her parents' permission. RP 340-41 (an area with a high crime rate and a lot of transient foot traffic), 427-28, 430-31, 542-43. As they walked, the Defendant took pictures of J.M.P. and tried to persuade her to enter an abandoned building with him. RP 387, 429-30. Eventually Joseph located them and ordered them to return home. RP 374-75, 430-31.

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[3] "RPS" refers to the transcript of the sentencing hearing on August 25, 2017.

Later than night, after the parents retired, the Defendant woke J.M.P. and asked her to come downstairs to watch a movie with him. RP 433. Although she asked him to respect her personal area, he pressed against her on the couch. RP 435. He pulled her by the hair and kissed her neck. RP 436. He touched her breast and vagina over her clothes. RP 435-36. He also put his hands under her clothes and inside her vagina. RP 534-35. J.M.P. felt scared, shocked, and violated; she eventually made an excuse and escaped upstairs. RP 436-38.

The Defendant followed her up to her room, kicked her dog down the stairs, and then choked her, lifting her off the ground by her neck. RP 439-40, 447, 453-55. He raped her digitally and orally. RP 448-51. He said obscene things to her that she did not want to repeat. RP 450-52. This time the penetration was painful and she asked him to stop, but she was afraid he would hurt her more if she called out for her mom. RP 452, 535. He was twice her age and twice her size. RP 368-69, 397, 424.

J.M.P. disclosed the assault at school the next morning. RP 458-59. She was questioned by the counselor, the school resource officer, the Pasco police officer, and later the child forensic

interviewer. RP 459-60.

Joseph was in Oregon on business when he learned the allegations. RP 377, 396. Joseph asked the police to tell the Defendant to leave his home, and he sent friends over to make sure the Defendant was gone before he arrived. RP 339-40, 377, 397-99. Then he "probably broke every speed law in the state" to get home. RP 397.

Pasco police officer Mike Nelson met the Defendant at his father's house. RP 341. He testified that the Defendant "appeared to be someone that had just or recently woken up from sleeping." RP 343. The officer told the Defendant about the allegation. *Id.* The defense objected to the prosecutor's question, "How did he react?" *Id.* At sidebar, the court instructed that the prosecutor should not elicit more than the facial expression. RP 344. The officer testified that the Defendant "had no expression whatsoever on his face, no. No shock or anything like that." RP 345. The officer relayed Joseph's message and left. RP 345. The Defendant was not arrested that day. RP 343.

Before the Defendant left the home, he ripped off all the stickers and detailing from J.M.P.'s longboard which he had helped her decorate earlier in the week. RP 426-27, 539. J.M.P. testified

that when she returned home, she also found that her bag had disappeared and that her mother's motorcycle helmet and feminine hygiene products had been moved into her room. RP 397, 539.

The Defendant chose to proceed to trial in less than 60 days, before the DNA evidence could be processed fully. RP 9, 300-12. The forensic scientist testified that the interior crotch area of J.M.P.'s panties tested positive for saliva and human male DNA. RP 521-23.

At sentencing, the prosecutor provided the court with extensive detail about the Defendant. CP 66-114, 127-42. The memorandum and attachments summarize the testimony (CP 65); the Defendant's previous related convictions (CP 65, 67-92, 98-114, 127-34); his refusal to acknowledge responsibility (CP 66); the family's inability to hold the Defendant accountable (CP 66); his competency evaluation (CP 93-97); and the Defendant's professional links (CP 66, 135-42).

V. ARGUMENT

A. THE COURT DID NOT ERR IN ADMITTING TESTIMONY REGARDING THE DEFENDANT'S DEMEANOR.

The Defendant claims that admitting evidence of his demeanor days before his arrest violates the right to remain silent and requires reversal. BOA at 12. The claim misrepresents both the record and

the law.

1. Demeanor is not silence.

The Defendant claims that the prosecutor elicited testimony which violated his pre-arrest right to remain silent. BOA at 16-17. In fact, there was no inquiry into the existence or non-existence of statements by the Defendant. The prosecutor elicited demeanor testimony only.

Throughout his testimony, first responder Officer Nelson was asked to describe the demeanor of witnesses. J.M.P. was withdrawn, quiet, and uncomfortable discussing the nature of her complaint with a male, authority figure. RP 333-35. When the mother learned about the assault, she began to hyperventilate and needed to be escorted to a chair. RP 339. When Joseph learned the nature of the allegations, it was over the phone, and his reaction was verbal. He directed the officer to make sure the Defendant had vacated the premises. RP 339-40, 397. The Defendant appeared to have just woken up and had no reaction. RP 343, 345.

When the prosecutor inquired about the Defendant's demeanor, the defense objected. RP 343. The court heard argument at sidebar and admitted the testimony limited to "facial presentation."

RP 343-44.

The prosecutor then quickly moved into other parts of the investigation. RP 345. There was no testimony about an arrest or an interrogation of the Defendant, because none of this took place at that time. The officer simply relayed Joseph's message and left.

Insofar as the Defendant characterizes the question and answer as implicating his invocation of his right to remain silent, the record does not bear that out. There was no question put to him and, if he said anything spontaneously or otherwise, this information was not elicited from the testimony. The record is that the Defendant had a blunt affect, perhaps because he had just woken up. He did however hear his father's message. This is apparent, because he vacated the premises before his father returned home, but not before vandalizing J.M.P.'s belongings.

Because there was no evidence offered that the Defendant was silent, there is no factual basis for the claim.

2. <u>There can be no violation of the Fifth Amendment in the absence of an explicit and unequivocal invocation of the right to remain silent</u>.

There is also no legal basis for the claim. Not only was there no testimony of silence, there is also no evidence that the Defendant invoked his right to remain silent.

The Defendant's claim is made under the Fifth Amendment in the federal constitution. BOA at 12. When the claim regards post-arrest silence, a claim may be brought under the Due Process Clause of the Fourteenth Amendment as well. Then a claimant might allege it is fundamentally unfair to admit post-arrest silence after a Miranda advisement. *State v. Easter*, 130 Wn. 2d 228, 236-37, 922 P.2d 1285 (1996). The Defendant makes no such claim here, where he was not under arrest or in custody so as to have received Miranda warnings.

There are no special protections afforded to such a claim under the Washington constitution. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991) ("the protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment") (citing *State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971)). Nor does the Defendant allege a broader protection under the state constitution. Therefore, insofar as opinions of Washington cases may conflict with more recent United States Supreme Court and Ninth Circuit opinions, the latter cases are controlling.

In *Salinas v. Texas*, 570 U.S. 178, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013), a plurality held that the prosecutor was permitted to admit the accused's silence as substantive evidence where he was not in custody and had not invoked. Those are also the facts of this case. Office Nelson did not mirandize the Defendant and did not arrest him. RP 344. The officer knocked on the door, imparted information, and left. The Defendant was not in custody, and no question was put to him. Detective Romero would not arrest the Defendant until days later. RP 486-90. Because no question was put to him, there is no record that he invoked.

It is quite clear that "mere silence does not qualify as an invocation of the right to remain silent." *Sessoms v. Grounds*, 776 F.3d 615, 624 (9th Cir. 2015). The invocation must be "express" and it must be unequivocal. *Id.*, 776 F.3d at 629; *United States v. Burns*, 276 F.3d 439, 441-42 (8th Cir. 2002). Simply remaining silent in response to certain questions and not others is not an unequivocal assertion of right to remain silent. *United States v. Mikell*, 102 F.3d 470, 476- 77 (11th Cir.1996); *State v. Hodges*, 118 Wn. App. 668, 77 P.3d 375 (2003). "A suspect who stands mute has not done enough

to put police on notice that he is relying on his Fifth Amendment privilege." *Salinas*, 570 U.S. at 188, 133 S.Ct. at 2182.

> ...To be sure, someone might decline to answer a police officer's question in reliance on his constitutional privilege. But he also might do so because he is trying to think of a good lie, because he is embarrassed, or because he is protecting someone else. Not every such possible explanation for silence is probative of guilt, but neither is every possible explanation protected by the Fifth Amendment. ...
> ... A witness' constitutional right to refuse to answer questions depends on his reasons for doing so, and courts need to know those reasons to evaluate the merits of a Fifth Amendment claim.

Salinas, 570 U.S. at 189, 133 S.Ct. at 2182-83. An officer may continue to question a silent suspect up until the moment he or she invokes. *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010) (silence throughout a three hour interrogation was not an invocation).

Insofar as the Defendant relies upon cases that are inconsistent with *Salinas* and *Berghuis* which to infer an invocation from silence alone, this is bad law.

3. <u>The legal authority offered by the Defendant is either irrelevant to his Fifth Amendment claim or no longer good law</u>.

The Defendant cites several cases in support of his Fifth

Amendment claim. BOA at 16. They are not persuasive.

Two of the four cases the Defendant cites are decided on post-arrest Fourteenth grounds. *State v. Terry*, 181 Wn. App. 880, 328 P.3d 932 (2014); *State v. Holmes*, 122 Wn. App. 438, 93 P.3d 212 (2004). Under the Fourteenth Amendment, it is fundamentally unfair to advise a person of the right to remain silent and then turn around and use that post-arrest silence against them.

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. [...] assurance that silence will carry no penalty [...] is implicit to any person who receives the warnings. In such circumstances it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used ...

Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240, 2244-45, 49 L.Ed.2d 91 (1976)). Such a claim only applies to statements (or silences) post arrest and post advisement. Because the Defendant has not and cannot claim a Fourteenth Amendment violation, the cases have no relevance here.

In *State v. Holmes*, the detective testified that the defendant was arrested, mirandized, and interrogated, after which he did not

appear surprised and did not deny the allegations. *State v. Holmes*, 122 Wn. App. at 441-42. The prosecutor then argued in closing that the defendant's post-arrest behavior was probative of guilt. *Id.* at 443. The court found that the facts demonstrated a fundamental unfairness in violation of the Fourteenth Amendment. *Id.* at 445 (citing *Doyle v. Ohio*).

Likewise, in *State v. Terry*, 181 Wn. App. 880, 328 P.3d 932 (2014) the challenge was to the admission of post-arrest silence on Fourteenth Amendment grounds. It is noteworthy that there was no challenge to the extensive pre-arrest silent, physical behavior of the defendant. *State v. Terry*, 181 Wn. App. at 883-84 (defendant repeatedly made rude finger gestures in response to deputy's orders, mooned the deputy, resisted arrest, and bit the deputy). The complaint regarded testimony elicited by a juror that the defendant failed to inquire why he was being arrested. *Id.* at 886. The prosecutor argued in closing that the defendant failed to ask why, because "he knew" why. *Id.* at 886-87. The decision relied upon Fourteenth Amendment post-arrest cases. *Id.* at 889 (comments on post-arrest silence are grounded in due process).

The Defendant offers cases which are no longer good law.

Under *Salinas*, *State v. Easter*, 130 Wn.2d 228, 231, 922 P.2d 1285 (1996) is wrongly decided. *Salinas v. State*, 368 S.W.3d 550, 557 n. 2 (Tex. App. 2011) (holding pre-arrest, pre-Miranda silence offered as substantive evidence does not implicate the Fifth Amendment and declining to follow *Easter*), *aff'd Salinas v. Texas*, 570 U.S. 178, 133 S.Ct. 2174, 186 L.Ed.2d 376 (2013) (holding that the use of non-custodial silence does not violate the Fifth Amendment and that an invocation of the right to silence must be explicit).

Easter is also distinguishable from our own case on its facts. In *Easter*, there was extensive testimony and argument that the defendant had refused to answer questions. *State v. Easter*, 130 Wn.2d at 232-33. The officer testified that he asked the defendant "what happened," but was "totally ignored." *Id.* at 232. The officer "continued to ask questions," but Easter just kept ignoring him. *Id.* The officer claimed Easter was purposefully refusing to converse so that the officer could not smell his breath or see his pupils – he was being a "smart drunk." *Id.* at 233. The state's closing argument was themed around the defendant being a "smart drunk." *Id.* at 234.

In our own case, there was no question put to the Defendant. And there was no evidence or argument that he was silent.

The Defendant cites several cases which follow the disfavored *Easter*. *See State v. Knapp*, 148 Wn. App. 414, 420, 199 P.3d 505 (2009); *State v. Burke*, 163 Wn.2d 204, 221, 181 P.3d 1 (2008); *State v. Romero*, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002). They are all similarly flawed.

In *Knapp*, the defendant summoned the detective to his home where he answered questions and gave a written statement denying involvement in a burglary. *State v. Knapp*, 148 Wn. App. at 417. Afterward, two eye witnesses identified the defendant as being the burglar. *Id.* at 417-418. The factual portion of the opinion does not indicate that the defendant ever invoked his right to remain silent much less whether this occurred before or after an arrest and a Miranda advisement. There is insufficient information in this record to interpret any rule. The opinion indicates that the detective testified that he confronted the defendant with the eyewitness identification, and the defendant responded alternately by hanging his head or with indifference. *Id.* at 419. For the court to find an invocation on these facts is contrary to controlling law.

4. <u>The single inquiry into the Defendant's demeanor is harmless beyond a reasonable doubt</u>.

For all of the reasons above, the Court need not reach the question of harmless error. There was no error where there was no evidence of silence in the face of a question. There was no invocation of the right to remain silent. Even were there evidence of both an invocation and subsequent silence in response to interrogation, the admission of pre-arrest silence in a non-custodial situation does not violate the Fifth Amendment.

And even if all of that were not the case, the single query into the Defendant's demeanor when advised that his father demanded he vacate the premises immediately, would be harmless beyond a reasonable doubt. Due process claims are reviewed for harmless error. *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1713, 123 L. Ed. 2d 353 (1993) (on direct appeal a due process claim regarding use of post-arrest silence will not require reversal if the error is harmless beyond a reasonable doubt). An error is harmless if any reasonable jury would have reached the same result on the untainted evidence. *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).

The evidence before the jury was J.M.P.'s testimony and the

DNA evidence. RP 660-81, 694-98. Male DNA and saliva was found in the crotch of her panties consistent with her allegation that the Defendant pulled back her panties and licked her vagina. RP 671, 673. There was no other reasonable explanation for this evidence. RP 670-73.

J.M.P. disclosed to several people within hours of the assault, consistently alleging unwanted sexual touching of private areas, and consistently naming the Defendant as her abuser.

The defense argued in closing that J.M.P. had related the events inconsistently. RP 685-88. There is nothing inconsistent about greater detail coming out with longer interviews and more questions. We also reasonably relate things differently depending on who the listener is and how they react. RP 668. As J.M.P. herself explained, she did not provide all the details in her earliest disclosures, because she felt embarrassed, shy, and ashamed to talk about the assault. RP 546. The Richland school resource officer Jory Parish recognized that it was difficult for J.M.P. to talk about. RP 506. He told her he did not need to hear every detail. RP 506. The Pasco officer also observed her discomfiture in discussing these intimate details with a male, authority figure dressed in a uniform and carrying

a weapon. RP 333-35, 667. Her affect was consistent with the contents of her disclosure. RP 333-34, 506-07.

It would have been easier to talk in a nice, safe room to Ms. Murstig who is gentle, small of stature, and female. RP 667. She is also an expert in interviewing children. As she testified, a child's shame and guilt, especially where the abuser is a family member, make it difficult for her to disclose. RP 349-50. A child will also not necessarily understand "the details that we need." RP 352-53. How the victim perceives trauma is distinct from how the law defines it. It is unremarkable that a victim may not have perfect recall of trauma organized by legal principles like elements and counts. RP 668. And each victim deals with the trauma differently. Some relive the details over and over, while others dissociate and distance themselves from details.

The assault also took place over many hours such that the exact details and chronology would be difficult for anyone to recount with perfect accuracy. The forensic interviewer's specialized training produces the most detailed, reliable information. RP 353-54, 364. Unlike a first responder's abbreviated inquiry, the forensic interview takes time. In this case, it lasted 45 minutes. RP 356.

The Defendant argued that J.M.P. was motivated by a desire to retaliate against him for getting her in trouble with her parents. RP 682. In fact, her behavior and testimony do not bear this out. RP 664-65, 679. They were buddies. He helped her with her longboard. He showed her his camera. RP 679.

The only punishment J.M.P. received for taking a walk with the Defendant without informing her parents was a talking to. RP 431, 543. J.M.P. readily admitted she was angry at the Defendant and her parents. RP 430-31. But she took some time to herself and calmed down. RP 433. By midnight, she was fine, and she joined the Defendant for a movie. RP 433.

It is not reasonable to believe that simply because she was unjustly scolded J.M.P. would invent this detailed allegation which she was deeply uncomfortable in sharing, maintain it throughout multiple interviews with strange adults, handing over soiled underwear, and go to trial knowing that her stepbrother-to-be would go to prison. RP 666-67, 697. This would be truly deranged, and there is no evidence to suggest that J.M.P. is a psychopath.

It was the Defendant who was behaving oddly. The morning after the assault, he tried to drive J.M.P. to school. He would have no

benign reason to do this when her mother was available to drive her and when he did not have a driver's license. RP 375-76, 395-96. However, it would have served to isolate J.M.P. from her mother so that he could further threaten her to prevent her from disclosing the assault. The Defendant also claimed that the dog Cosmo had parvovirus. RP 376. There was nothing wrong with the dog, but perhaps the Defendant was concerned that he may need to explain any lingering resentment or injury Cosmo may have after being kicked down the stairs. And then there was the property damage and theft that occurred after the Defendant was told he had to leave. After having helped J.M.P. decorate her longboard, why would he destroy it except to intimidate her?

The Defendant argues that because the jury did not find two counts, it must not have found J.M.P. entirely credible. BOA at 18. It is more likely that the jury was satisfied with a single count where arguably the assault was a single continuous event over several hours. The prosecutor had been satisfied to charge and offer a single count. CP 4; RPS 7.

The Defendant argues that the only reason the prosecutor elicited evidence of his demeanor was to suggest that it "was powerful

evidence of guilt." BOA at 18. This is demonstrably false. The prosecutor routinely elicited demeanor evidence of every family member. And, unlike the cases cited by the Defendant where the prosecutors capitalized on the challenged evidence in their closing arguments, in our own case, the prosecutor made no suggestion in closing that the Defendant's sleepy non-response was probative of anything. Indeed this testimony was not referenced at all. RP 660-81, 694-98. Instead, the prosecutor discussed the parents' reactions only. RP 669-70.

It is inconceivable that this single inquiry into the Defendant's characteristic blank affect should tip the scales. If there were error, which there is not, it would be harmless beyond a reasonable doubt.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE EXPERT WITNESS TO TESTIFY AS TO THE CONSISTENCY OF INTERVIEWS.

The forensic child interviewer Mari Murstig testified that J.M.P.'s disclosures to her were consistent with her preliminary disclosures to first responders. RP 356, 363-64. The Defendant's objection to this testimony was overruled. RP 357-63. The court's ruling admitting evidence is reviewed for abuse of discretion. *State v. Redmond*, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003).

The court found that the Ms. Murstig was providing expert testimony. RP 360. An expert is someone with specialized knowledge, skill, experience, training, or education. ER 702. Ms. Murstig testified at length about her expertise in interviewing children. RP 347-50 (two degrees, specialized and continuing training, and 17 years of experience conducting 5-10 interviews a week or 300 interviews a year tailored to children's developmental and cognitive abilities). An expert's opinion will be based both on the facts she perceives as well as her expert interpretation of those facts. ER 703.

The Defendant argues that whether victim statements are consistent requires no expert knowledge. BOA at 25. This is not the law. This question was squarely and definitively decided in *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007). An expert may opine on whether a child sexual assault victim's history is consistent internally and with the victim's affect. *Kirkman*, 159 Wn.2d at 929. In *Kirkman*, the defendant argued that such testimony invaded the province of the jury by intruding upon ultimate issues for the jury alone to decide. *Id.* at 929. The Washington Supreme Court disagreed.

> Dr. Stirling's statement that A.D.'s account was "clear and consistent" does not constitute an opinion on her credibility. A witness or victim may "clearly and

> consistently" provide an account that is false. The jury properly was instructed to determine the facts.

Id. at 930. Consistency is a proper area for expert testimony.

As Ms. Murstig testified, she is trained to recognize the challenges that sexually abused child must overcome in disclosing the details of an assault. RP 349-50. Understanding these factors helps her assess what is reasonable variation versus true inconsistency. RP 350.

The court's ruling was tenable and justified under precedent.

C. THE ACKNOWLEDGEMENT OF THE EXISTENCE OF AN ALLEGATION IS NOT AN OPINION AS TO ITS VERACITY.

Under the Washington constitution, a judge may not comment on the evidence in a jury trial. WASH. CONST. art. IV, § 16 (judges shall not charge juries with respect to matters of fact, nor comment thereon).[4] For the defendant to raise a constitutional claim for the first time on appeal, he must demonstrate manifest error. RAP 2.5(a)(3). Alleged error is only manifest if the proponent can make a plausible showing both that it was error and that there was actual prejudice.

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[4] *But c.f.* CAL. CONST., art. VI, § 10 (court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary); *Quercia v. United States*, 289 U.S. 466, 469, 53 S. Ct. 698, 699, 77 L. Ed. 1321 (1933) (it is within a federal judge's province to explain and comment upon the evidence to the jury and to express an opinion upon the facts).

Matter of Det. of Monroe, 198 Wn. App. 196, 201, 392 P.3d 1088, 1091 (2017)

The Defendant alleges that the judge commented on the evidence. To be more precise, the Defendant claims that acknowledging or advising the jury what the State alleges is equivalent to agreeing that the allegations are true. Because these are two entirely different things, the Defendant's claim is without merit. No manifest error is shown and the Court should decline review.

The Defendant claims the following acts conveyed the court's personal attitudes. First, the cover page of the jury instructions contains the State's caption. CP 40. The Defendant claims that this conveys that the Honorable Judge Shea-Brown believed that the Defendant was born on a particular day. Because the plaintiff files a case thereby creating the caption, the caption conveys the plaintiff's claim only, and not any attitude of the judge.

The Defendant claims that his date of birth is an element of the crime. It is not. CP 28-29. His identity is an element of the crime. The caption names two parties. The Defendant does not allege that use of the caption indicates the judge believed the person sitting at counsel table was Jeremy Alvarez. That remained a fact for the State

to prove, which it did by presenting witnesses who identified the Defendant under penalty of perjury. RP 341-42, 369, 393, 424.

The caption conveys that the matter is before the Franklin County court. This does not demonstrate that the judge believes that the acts which were alleged actually took place in Franklin County. That remains a fact for the State to prove, which it did by presenting witnesses to testify under penalty of perjury as to where the defendant and victim resided at the time of the offense. RP 340, 370-71, 392-93, 423-24, 490.

For a charge of second degree child rape, the State must prove that the Defendant is at least three years older than a child who was 12 or 13 at the time of the rape. CP 28-29. In other words, depending on the victim's age, a defendant must be 15 or 16 years old at a minimum. In this case, the uncontested evidence was that the Defendant was an adult.

In this household, the parents were very protective of the minor aged child. J.M.P.'s parents controlled what she wore, how far she strayed from the front door, who she spent time with, and whether she had access to a television or phone. RP 375, 431-32, 538. But the Defendant was not a child. J.M.P. considered him an adult that she

could trust to look out for her. RP 428.

After being bailed out of jail on conditions that he not contact his mother or grandmother, the Defendant bounced around from place to place, eventually ending up temporarily with his dad while working two night jobs. RP 371-72. His father expected him to find another place where he would "pay his own way." RP 394-95. This describes an adult.

And the jury could observe the Defendant in the courtroom– 5'9", 230-240 lbs, and 27 years old. CP 393. He was big and strong, capable of lifting J.M.P. off the ground simply by hooking his elbow around her neck. RP 454.

Both the Defendant's father and Ms. Porter testified as to the Defendant's precise age. RP 369, 393-94. The matter was uncontested. Not only did the defense call no witnesses, but the testimony as to the Defendant's age went unchallenged by any cross-examination on the topic.

If the court comments on the evidence, which it did not do here, it would not be error if the comment could not have prejudiced the outcome. *State v. Jackson*, 156 Wn.2d 736, 745, 132 P.3d 136 (2006). It is not possible that, absent this caption, the jury would have

believed the Defendant could have been 16 years old or younger.

Second, when a potential juror indicated that her sister had been sexually assaulted as a teenager, the court inquired whether her personal experience would interfere with her ability to be fair.

> And so appreciating that this case involves a charge, charges that are sex crimes against a child, a minor who is, I think, 12, 13 years of age approximately, are you able to follow the court's instructions, set aside any impact that case might have had on you and give a decision ***solely based on the evidence provided in court***?

RP 63 (emphasis added). The Defendant claims this record shows the judge "telling a potential juror that the court thought the alleged victim was 12 or 13 years old." BOA at 32. It does not. It shows the judge explaining the nature of the allegations. In order to insure a fair trial, the court was inquiring whether the juror would be able to separate her family experience from the evidence that would be presented. There is no reason to believe the judge knew J.M.P., knew her age, had any basis to form an opinion about her age, or was expressing an opinion. If this were manifest, as is necessary to obtain review, one would imagine that defense counsel would have removed this juror from the panel. He did not, because the court was merely describing the allegation, not any opinion. There is no manifest error.

Third, the court read the charging information to the jury. RP 206-07. The Pattern Instructions recommend this practice. WPIC 1.01 (recommending the court "insert elements from the information and supplement as appropriate with other facts that will help the jurors prepare for voir dire"); WPIC 1.03 (Comment). The judge prefaced this with explaining that the State, not the court, brought the charges. RP 205 ("This is a criminal action instituted by the State of Washington as plaintiff.") And immediately after reading the information, she added:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The first amended information in this case is only an accusation against the defendant which informs the defendant of the charges. You are not to consider the filing of the first amended information or its contents as proof of the matters charged. It is your duty to determine the facts in this case from the evidence produced in court.

RP 207. The Defendant claims that by reading the information in which the minor aged victim is identified by her initials and birthdate, the judge expressed that she believed the birthdate to be a proven fact. BOA at 33. This is not a rational reading of the record. The judge explicitly told the jury that *the prosecutors* drafted the charge, and that the jury should not consider its contents as proof of anything.

The evidence would be produced in court, not in the charging document.

In reading the information, the judge also read that the Defendant was alleged to have engaged in sexual intercourse with J.M.P., that they were not married, and that this happened on a date certain. The Defendant does not claim that the judge vouched for the truth of any of these allegations. There was no vouching, no commenting, and no implied expression of belief. There was only the reading of the charge. All of the elements remained to be proven.

At trial, J.M.P. testified that she was 13 years old and had been so on the date of the rape only two months earlier. RP 422. Her mother confirmed J.M.P's birthdate. RP 368. As with the Defendant's age, these facts were uncontested. Even were there a comment, which there is not, there can be no conceivable resulting prejudice.

D. WHERE THERE IS NO ERROR, THERE IS NO CUMULATIVE ERROR.

The Defendant argues that if the alleged errors do not demand reversal individually, then cumulative error demands it. The State denies any error.

E. THE COURT SHOULD EXERCISE ITS DISCRETION AND REJECT A CHALLENGE TO COMMUNITY CONDITIONS

WHERE TRIAL COUNSEL EXPLICITLY DENIED OBJECTION AND IN ORDER TO ENCOURAGE THE DEFENSE BAR TO PARTICIPATE IN THE TIMELY DRAFTING OF THESE CONDITIONS.

It is currently popular to challenge community custody conditions for the first time on appeal. As long as the courts allow this, there is no incentive for criminal defendants to consider community conditions prior to appeal. The Court could and should incentivize early review and cooperation in order to make efficient use of public resources. It can do this by exercising its authority to decline to review unpreserved challenges. RAP 2.5(a).

The facts of this case present an ideal opportunity for the Court to exercise its discretion.

Community custody conditions exist in two places in the judgment and sentence: in the Community Custody paragraph and in an appendix recommended by the Department of Corrections at the end of the presentencing investigation report (PSI). CP 176-92. The Pattern Forms Committee, in which the Washington State Public Defenders' Association is represented, created the judgment and sentence form.[5] The form includes provisions from RCW 9.94A.703.

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[5] http://www.courts.wa.gov/committee/content/PFCEstablishmentOrder12191978.pdf

See CR 84.0400, § 4.2. The Department's appendix is also largely a form which allows community corrections officers to check boxes depending on the facts of the particular offense or offender. It is drafted by the local office. The local defense bar is able and welcome to participate in the drafting of the form appendix.

In this case, the PSI was filed more than three weeks in advance of the sentencing hearing. CP 115, 176. This gave both parties plenty of time to review the proposed appendix in order to recommend changes or make timely objections.

The prosecutor drafted her own proposed appendix which removed conditions which were duplicative or not "crime-related or otherwise justified under RCW 9.94A.703." RPS 11. And she amended other conditions to address vagueness. RPS 11. As with all materials which the state proposes for entry, the proposed appendix must be provided to the defense well in advance of the hearing. CR 6(2)(d) (no later than 5 days prior to the hearing).

Defense counsel made no counter proposal and, when questioned by the court, advised that he was satisfied with the prosecutor's changes. RPS 24.

On this record, there is no good cause to permit review.

Because the defense bar is able to participate in the drafting of form conditions and to review both those form conditions and tailored conditions in advance of the hearing, it should be encouraged to do so. This will save the courts and public the costs of appeals, remands, and resentencing. Permitting an appeal of unpreserved error does the opposite. It discourages the defense bar from timely participating, reviewing, and objecting.

The Court should decline to review the remaining claims.

F. THE COURT DID NOT ABUSE ITS DISCRETION IN ORDERING THE VARIOUS COMMUNITY CUSTODY CONDITIONS

Sentencing conditions, including crime related prohibitions, are reviewed for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993). The existence of a relationship between the crime and the condition "will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge." *State v. Parramore,* 53 Wn. App. 527, 530, 768 P.2d 530 (1989); *State v. Riley,* 121 Wn.2d at 28. No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime. *State v. Llamas–Villa,* 67 Wn. App. 448, 456, 836 P.2d 239 (1992).

1. The court did not abuse its discretion by failing to take into consideration a fact which does not exist.

The Defendant challenges the condition 4 which restricts his contact with minor aged children "under the age of 18, to include biological family members who are minor aged, unless an exception is specifically specified by the sentencing court." BOA at 38. He argues that he may at a later date have a child with whom he would like contact.

The cases which the Defendant cites regard offenders with existing children. *In re Rainey*, 168 Wn.2d 367, 381-82, 229 P.3d 686 (2010) (addressing no contact provision with defendant's five year old daughter L.R.); *State v. Ancira*, 107 Wn. App. 650, 27 P.3d 1246 (2001) (remanding to permit supervised contact with offender's two children, ages twelve and four); *State v. Letourneau*, 100 Wn. App. 424, 427, 997 P.2d 436 (2000) (Mary Kay Letourneau had existing children fathered by her victim and her ex-husband).

Nothing prevents him from addressing this situation with the sentencing court, as offenders routinely do, when and if his situation were to change. Under the actual facts of this offender's life, where he does not have any children, there is no abuse of discretion.

The Defendant argues that the restriction should be either "limited to minors 16 years or younger" or "be rewritten to apply only to children under the age of 16." BOA at 38, 39. This request is inconsistent. One includes sixteen years old and one excludes them. This carelessness in formulating a claim is unhelpful to the Court.

The Defendant claims that one of these restrictions is required under *State v. Johnson*, 4 Wn.App.2d 352, 421 P.3d 969 (2018). In fact, this case offers no support for the claim. It does not distinguish minority under 16 versus minority under 18. In *Johnson*, the defendant claimed a condition restricting the offender from places "where children congregate" was vague. *State v. Johnson*, 4 Wn.App.2d at 360. The court disagreed. *Id.* at 361. The court found that while "the exact confines" of the condition were "not amenable to description", nevertheless it provided sufficient notice based on the non-exclusive list of locations and his offense which was defined as victimizing individuals under the age of 16.

In this case, the Defendant does not need to look to the statute of his conviction to interpret the term "children." The community custody conditions proscribe the exact confines of the term to mean individuals under 18. This number is not vague.

Nor is the choice of this age range an abuse of discretion. This is a meaningful condition based on the Defendant's criminal history and under the law. When the Defendant was 13, he victimized a six year old – a pedophilic act. CP 177. And at 26, he victimized a 13 year old – a hebephilic act. He chooses his victims not based on their ages, but based on their ages relative to his. He chose victims who were vulnerable, because they were smaller and younger than him and because they did not have the support of their parents. CP 65; RPS 6. The assaults occurred while the parties were watching videos at home, indicating that he groomed them with sexually suggestive material. RPS 6. While he assaulted J.M.P., he told her that she "could be a great porn star." RP 452.

The law criminalizes sexual conduct where victims are under the age of 18. RCW 9.68A.011(5) (criminalizing conduct regarding pornographic material with minors under 18); RCW 9A.44.093(1)(b), RCW 9A.44.096(1)(b) (criminalizing sexual conduct with minors 18 where defendant has supervisory position). Because the Defendant had a kind of supervisory position over his victims (babysitter and adult stepbrother) and because he suggested creating pornographic content with J.M.P., this age range is an appropriate limitation.

The court did not abuse its discretion in imposing this condition.

2. The court did not abuse its discretion in ordering the Defendant provide information about his sexual partners to his community corrections officer.

The Defendant challenges conditions which require him to disclose the names of his current or imminent sexual partner. He claims these conditions are improper, because they are not crime-related where he was not in a sexual relationship with J.M.P.'s mother.

A community custody condition must be authorized under RCW 9.94A.703. One justification for a condition is when it is a "crime-related prohibition." RCW 9.94A.703(3)(f). But it is only one basis for imposing a condition.

Because these challenged conditions are not "prohibitions" but requirements for affirmative conduct, one would not look to subsection (f) for authorization. The condition is authorized under RCW 9.94A.703(3)(c)-(d):

As part of any term of community custody, the court

> may order an offender to:
>
> ....
>
> (c) Participate in crime-related treatment or counseling services;
>
> (d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

It is important for persons supervising and treating a sex offender to be aware of the offender's romantic partners. An offender's mental health is important in preventing re-offense; and his mental health treatment provider needs to know about a patient's close relationships in order to provide care. A probation officer needs to know this information in order to insure that these persons are advised about the court-ordered restrictions with minors so that they may look out for their own children. Contrary to the Defendant's allegation, this condition is obviously "tailored to the goal of protecting the public." BOA at 42.

It is interesting that the Defendant claims for the conditions to be crime-related he would need to have raped "his paramour's child," rather than his paramour. BOA at 40. J.M.P. was the Defendant's sexual partner in this offense. The conditions are indeed crime-related (although not prohibitions) insofar as they would require him to

name his sexual partners, like J.M.P., which would allow the DOC to intervene and protect similarly situated victims. But the conditions serve the more obvious purpose of protecting the children of the Defendant's future adult sexual partners. By arguing that the condition relates to the sexual partner's *child*, the Defendant acknowledges that he well knows that this is the governmental purpose.

The Defendant argues that the conditions implicate the First Amendment. The Brief of Appellant can provide no case on point.

In *Wooley v. Maynard*, 430 U.S. 705, 705-06, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), the court held that the state "may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property." No one is requiring Mr. Alvarez to profess an ideological message of any kind.

In *State v. K.H.H.*, 185 Wn.2d 745, 374 P.3d 1141 (2016), the court considered whether a juvenile could be ordered to apologize. Mr. Alvarez has not been ordered to apologize.

In *Packingham v. North Carolina*, -- U.S. --, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017), the probationer was indicted for posting on

Facebook. The court allowed that the First Amendment was not offended by narrowly tailored prohibitions of speech on a probationer. *Packingham*, 137 S.Ct. at 1732. However, the condition which prohibited a sex offender from commenting about a positive traffic court experience on social media was not "narrowly tailored to serve a significant governmental interest." *Packingham*, 137 S.Ct. at 1732. Again, the case does not support the Defendant's interpretation. The case regards (1) prohibitions of (2) speech of any kind on social media. The challenged conditions are not prohibitions on speech. The conditions require the communication of narrowly tailored information, required to protect the children of the Defendant's romantic partners.

Mutter v. Ross, 811 S.E.2d 866 (W. Va. 2018) is nearly identical to *Packingham* in that it regards prohibitions of broad categories of speech and follows the same rule. There the sex offender was prohibited from possessing any device which allowed him internet access. That court found the First Amendment would allow restrictions on the speech of a parolee so long as the restriction was narrowly tailored to further a legitimate government interest.

None of these cases support the Defendant's claim. Where no

citation supports the argument, the court may assume that, after diligent search, counsel found no supporting authority. *State v. Arredondo*, 188 Wn.2d 244, 262, 394 P.3d 348 (2017). The conditions do not violate the First Amendment.

3. *State v. Cates* controls the Defendant's challenge to Condition 6.

The Defendant challenges the condition that he allow searches of his cell phone or computer. BOA at 43. Again, the Defendant presents the strawman argument of "crime-related prohibition" where the condition plainly is not a prohibition of any kind. This condition requires affirmative conduct. It falls under RCW 9.94A.703(3)(d) ("perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community").

He argues that the condition violates constitutional provisions as to warrantless searches. BOA at 43. The Washington Supreme Court has held that such a claim is not ripe for review. *State v. Cates*, 183 Wn.2d 531, 535, 354 P.3d 832 (2015). The Defendant argues that the condition in *Cates* is distinguishable. BOA at 44. There the offender was ordered to consent to DOC home visits which "include

computers which you have access to." *State v. Cates*, 183 Wn.2d at 537 (Fairhurst, J., dissenting). Both conditions require the offender to consent to the DOC accessing the offender's electronics. The matters are not distinguishable.

Also, any minor differences in language are not significant to the opinion's holding. The "condition will not be ripe until the State attempts to enforce the condition by conducting a home visit." *Cates*, 183 Wn.2d at 538 (Faihurst, J., dissenting).

Some warrantless searches of a probationer will be authorized regardless of a condition in the judgment requiring the probationer give consent. RCW 9.94A.631. But this will depend upon the particular facts of the case. There must be a nexus between the property searched and the alleged probation violation. *State v. Cornwell*, 190 Wn.2d 296, 305-06, 412 P.3d 1265 (2018); *State v. Livingston*, 197 Wn. App. 590, 596, 389 P.3d 753 (2017). When the state has enforced the condition, then there will facts for the court to review. *State v. Sanchez-Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (a pre-enforcement challenge to a community custody condition is not ripe if the issues require further factual development). Until then, the matter is not ripe.

4. The court did not abuse its discretion in prohibiting violations of law.

The Defendant objects to condition 5 in paragraph 4.6 of the judgment. These conditions were drafted by the Pattern Forms Committee.

> ... (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; ...

CR 84.0400 P, § 4.2(B)(4)-(5).

Once again, the Defendant challenges the condition under the "crime-related" provision. BOA at 45. Although it is apparent that condition is authorized under a different provision (RCW 9.94A.703(2)(c)), the Defendant cannot claim that his offense had no relation to substance use or abuse. He has a long and continuing history of drug abuse. Between 2009 and 2012, he was convicted of three different drug offenses. CP 95. The Defendant has used marijuana, methamphetamine, and cocaine. CP 95. He began using cannabis at 14 and was using it daily prior to his incarceration. CP 95. He has been diagnosed with Polysubstance Abuse in Partial Remission and Cannabis Use Disorder. CP 95. The medical professionals have not been able to rule out that his Anxiety Disorder

may be Substance Induced. CP 95. He has been prescribed antidepressants. CP 94. His family would like to believe that mental illness (or failing to take his antidepressants) contributed to his offense. CP 65-66; RPS 6, 17.

However, regardless of an offender's personal history, the court may require any probationer to obey the law by refraining from both the possession as well as the consumption of controlled substances unless lawfully prescribed under RCW 9.94A.703(2)(c).

The statute prohibits possession without a lawfully issued prescription. RCW 9.94A.703(2)(c). The challenged condition is more permissive. It prohibits unlawful possession. CP 121. Because it is lawful in Washington for an adult to possess marijuana in small amounts, a probationer may hold or possess small amounts of marijuana. RCW 69.50.4013. But he may not consume it without a lawfully issued prescription, which he acknowledges he cannot obtain under the current law. BOA at 46. Apparently the Forms Committee did not want to penalize a probationer for fleeting possession as possession becomes more common in this state.

The Defendant argues that the term "controlled substances" is vague. It is not. RCW 69.50.101(f). The controlled substances act is

"uniform," drafted by the Department of Justice in 1969 and adopted by Washington in 1971.

The Defendant claims that he cannot be sure if marijuana is still "controlled" after Initiative 502, but then refers to the very section which demonstrates this is so. BOA at 45 (citing RCW 69.50.4013).

The Defendant he claims that he does not know what "unlawful" means where different jurisdictions have different laws. This is not a question of vagueness but jurisdictions. Washington may only enforce Washington law. And Washington must confer full faith and credit to another jurisdiction's court order as to a violation of that jurisdiction's law. U.S. CONST., art. IV, § 1.

The condition is proper.

5. The court did not abuse its discretion in imposing the polygraph condition.

The Defendant challenges two aspects of the polygraph condition. First, he argues that it should indicate that polygraphs should be limited to monitoring compliance with other community custody conditions. BOA at 47.

However, the published cases which the Defendant cites found the identical condition was sufficient. In *State v. Combs*, the

defendant asked to strike the polygraph condition, because it was not sufficiently limited "to monitory his compliance with other conditions of community placement." *State v. Combs*, 102 Wn. App. 949, 951-52, 10 P.3d 1101 (2000). The court found this was not error, because the context within community other conditions provided the implicit limitations.

> Relying on *Riles,* we conclude that the language of Mr. Combs's judgment and sentence, taken as a whole, impliedly limits the scope of polygraph testing to monitor only his compliance with the community placement order and not as a fishing expedition to discover evidence of other crimes, past or present.

State v. Combs, 102 Wn. App. at 952–53 (citing *State v. Riles*, 86 Wn. App. 10, 16-17, 936 P.2d 11 (1997), *aff'd*, 135 Wn.2d 326, 957 P.2d 655 (1998). While remand was not required, the court opted to do so in order "to strongly encourage" the parties to tailor the form "to better inform offenders of their rights, ensure protection of those rights, and prevent confusion amongst judges, defendants and community corrections officers regarding the applicable legal standard." *Combs*, 102 Wn.App. at 953. Remand is not required here, as Benton and Franklin county prosecutors are currently working together on the local form and this provision will be noted.

Second, he contends that he should not made to pay for the polygraphs. BOA at 48. The defendant Combs challenged "unlimited polygraph testing" insofar as it would be "at his own expense." *Combs*, 102 Wn. App. at 951-52. The *Combs* court did not strike the provision requiring the Defendant pay for polygraphs. Two points inform this decision. First, because the Department may administer the polygraph only as needed to monitor compliance, the defendant need not fear that costs may be unlimited. Second, the "ability to pay" requirement is limited to those LFOs which relate to the exercise of the right to counsel and related costs of prosecution. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) (interpreting RCW 10.01.160(3) only). They do not apply to costs of supervision.

The "ability to pay" jurisprudence comes from *Fuller v. Oregon*, 417 U.S. 40, 51, 94 S. Ct. 2116, 2123, 40 L. Ed. 2d 642 (1974). There the United States Supreme Court considered that "a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed attorney and thus 'chill' his constitutional right to counsel." The court set forth criteria for testing the constitutionality of <u>costs</u> imposed on a criminal

defendant, including a requirement that a court may not order a convicted person to pay the costs of trial unless he is or will be able to pay them. *Fuller*, 417 U.S. at 44-46. RCW 10.01.160 satisfies all the *Fuller* criteria. *State v. Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976).

But the polygraph fee is not a cost of prosecution and does not touch on the right to counsel. RCW 10.01.160(2) ("costs" defined as limited to expenses incurred in prosecuting the defendant or in pretrial supervision programs). No finding of "ability to pay" is required in order to impose the condition.

G. IF THIS COURT REMANDS FOR RESENTENCING OR RETRIAL, THE DEFENDANT MAY ADDRESS THE CRIMINAL FILING FEE.

The Defendant asks that he be allowed to address a change in law "[i]f the Court remands." The scope of the remand is relevant. If the Court remands for the limited purpose of striking a community custody condition, there would be no authority to readdress LFOs.

However, if there is a retrial or a resentencing, the Defendant will be allowed to address LFOs which are a sentencing issue. In that circumstance, the Defendant would be allowed to argue that the amendment to RCW 36.18.020(2)(h) applies to him. And the State would be allowed to repeat the argument made at length below that

the Defendant is not indigent but between gigs and working two jobs. CP 66, 136-41; RP 372 (employed at two different 7-Eleven stores); RPS 9-11. The Defendant is a graduate of The Second City, a prestigious improvisational theater troupe in Chicago with alumni from Alan Arkin and Joan Rivers to Stephen Colbert and Tina Fey.[6] CP 66; RPS 10.

The court has previously found that the Defendant lacked the ability to pay LFO's. RP 20. However, ability to pay is not the dispositive issue under RCW 36.18.020(2)(h). There the criminal filing fee remains mandatory. The court shall impose the fee, unless the Defendant is indigent as defined by sections (a) through (c) of RCW 10.101.010(3). If the record indicates indigency under any of those subsections, then the court shall not impose the fee. The Defendant cannot demonstrate that subsections (a) or (b) are satisfied. He would need to demonstrate his annual income prior to incarceration. Absent sufficient proof of income, the fee shall be imposed.

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[6] https://en.wikipedia.org/wiki/List_of_alumni_of_the_Second_City

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: November 19, 2018.

Respectfully submitted:

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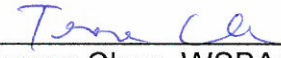

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