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Court of Appeals  
Division III  
State of Washington  
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No. 35933-6-III

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

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

TAMARA LOUISE COOKE,  
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT  
Honorable Jacqueline Shea Brown, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to support the conviction for first degree burglary.

2. The evidence was insufficient to support the conviction for first degree assault.

3. The trial court violated Ms. Cooke's right to a jury trial by finding Ms. Cooke used force or means likely to result in death or intended to kill and by imposing a five-year mandatory minimum sentence for count II, assault in the first degree.

4. The trial court erred by imposing the requirement that Ms. Cooke pay restitution of \$15,740.00 to the victim and \$3,683.23 to the Crime Victim's Compensation program, without requiring evidence establishing a factual basis for this amount.

5. The trial court erred in imposing \$200.00 in court costs.

6. The trial court erred in requiring that payments on the legal financial obligations (LFOs) "commence immediately."

*Issues Pertaining to Assignments of Error*

1. Whether the evidence was insufficient to establish an essential element of first degree burglary that Ms. Cooke entered or remained unlawfully in a building.

2. Whether the evidence was insufficient to establish an essential element of first degree assault that Ms. Cooke acted with intent to inflict great bodily harm.

3. The Sixth and Fourteenth Amendments require any fact that, if found, would increase the mandatory minimum sentence be found by a jury. Should this Court strike the finding that imposed a mandatory minimum term of confinement on the assault count because that finding was found by the court, not a jury?

4. Whether the State failed to prove the amount of restitution.

a. When no evidence was presented that Mr. Ahrens or the Crime Victim's Compensation program suffered any loss as a result of Ms. Cooke's entry into Mr. Ahrens' residence, was the imposition of restitution of \$15,730.00 and \$3,683.23, respectively, authorized by law.

b. Whether defense counsel rendered ineffective assistance of counsel when he failed to challenge the \$19,413.23 award at sentencing.

5. Whether the trial court erred in imposing \$200.00 in court costs, where Ms. Cooke was indigent.

6. Whether the trial court erred in requiring that payments on the legal financial obligations (LFOs) "commence immediately," where Ms. Cooke was indigent.

## **B. STATEMENT OF THE CASE**

Early one August evening, Timothy Ahrens returned to his house after work. RP<sup>1</sup> 74, 77–78. Upon opening the front door the first inside light he tried did not work. As he turned around to close the door Mr. Ahrens was hit in his upper back one time from behind. RP 78–79, 90–91. He turned around and saw the defendant, Tamara Louise Cooke, nearby, holding an ice pick a little bit behind her and off to the side. He described it as an 8 or 10 inch ice pick. RP 78–79, 92–93. Ms. Cooke’s stated intent in being in the house was that “she just wanted to talk to me.” RP 94. While they talked for one and one-half to two minutes Ms. Cooke retrieved her handbag. She left at Mr. Ahrens’ request and walked away down the street. RP 79, 94–95, 97–98.

Later, in the bathroom mirror Mr. Ahrens could see a poke hole in his shirt with some fluid around it. RP 80. After feeling an increasing soreness in his shoulder and beginning to get short of breath, Mr. Ahrens called some friends who gave him a ride to emergency care. RP 80. After a chest tube was put in, he was transported to a local hospital. RP 81. Mr.

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<sup>1</sup> References are made to the one volume transcript prepared by court reporter Joseph King, which covers the trial days (March 5–6, 2018) and the sentencing hearing (March 15, 2018) in sequentially numbered pages.

Ahrens testified he had a collapsed lung and was in the hospital five days. RP 81. He was cleared to return to work about one month later. RP 81.

Mr. Ahrens had people stay in the home while he was in the hospital. When he returned, Mr. Ahrens noticed two by fours boarding up the door to his laundry room were torn off and fishing gear, a laptop, personal mail, and some flashlights were missing. RP 82–84, 95.

Mr. Ahrens had known Ms. Cooke and her husband for twenty-five years and the husband had passed away five to six years earlier. RP75–76, 97. Ms. Cooke and he thereafter spoke every now and again. Several months prior to this incident, Mr. Ahrens gave Ms. Cooke permission to stay in the house because she was down and out. The relationship was not romantic or intimate. RP 76–77. One day Mr. Ahrens woke up and Ms. Cooke and his truck were gone. He hasn't seen his truck since. RP 76–77. They had no further contact before this incident. RP 77, 97.

Ms. Cooke was never charged with property damage or theft of the truck or the missing property.

The jury found Ms. Cooke guilty as charged of burglary in the first degree and assault in the first degree. CP 127–28. The jury did not complete the special verdict form, which inquired whether Ms. Cooke was

armed with a deadly weapon at the time of the commission of the crimes. RP 172–73; CP 130.

The trial court entered judgment and sentence, based upon the jury’s verdict, on March 15, 2018. RP 175–82. The State recommended the court impose the bottom of the standard range on the burglary (26 to 34 months) and assault (111 to 147 months) convictions. RP 175; CP 132. Defense counsel concurred with the State’s recommendation. RP 176.

The State averred although the low end of the standard range for the assault charge based on the offender score of 2 is 111 months, “there’s a minimum sentence for the assault charge of five years,” which he had noted on Page 5 of the proposed judgment and sentence. RP 176; CP 135. The court imposed a sentence of 26 months on the burglary conviction. The court imposed a concurrent sentence of 111 months on the assault charge and adopted the State’s provision indicated in paragraph 4.4 that there is a mandatory minimum of five years. RP 179; CP 135.

The trial court waived all discretionary fines and costs, due to Ms. Cooke’s age<sup>2</sup>, the length of incarceration, the crime victims compensation and restitution imposed totaling over \$19,400, and being on a government needs-based program of food stamps. RP 177–78.

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<sup>2</sup> Ms. Cooke was to turn 60 years old several days after sentencing. RP 178.

Ms. Cooke was indigent at the time of sentencing. CP 144–46. The trial court declined to adopt the boilerplate finding that the defendant had present or future ability to pay LFOs imposed at sentencing and declined to assess fees for sheriff’s service, jury demand and the court-appointed trial attorney. CP 133, 140. Stating they were mandatory, the court imposed a \$500 victim assessment fee, \$200 criminal filing fee and \$100 Felony DNA collection fee. RP 178; CP 133–34.

No evidence was presented at trial, or at the sentencing hearing, concerning any loss by Mr. Ahrens or the Crime Victims Compensation program (“CVC”) as a result of Ms. Cooke’s entry of his residence. Without discussion or a hearing or any supporting documentation, the trial court adopted the State’s representation that restitution amounts of \$15,370 and \$3,683.23 should be payable and imposed \$15,730.00 restitution to Mr. Ahrens and \$3,683.23 to CVC as a part of Ms. Cooke’s judgment and sentence. RP 175–78; CP 133. Defense counsel did not object.

The court also ordered Ms. Cooke to begin making monthly payments on the LFOs in an unspecified amount “commencing immediately.” CP 134.

Ms. Cooke now appeals. CP 143. The trial court entered an Order of Indigency, granting Ms. Cooke a right to review at public expense. CP 147–48.

### C. ARGUMENT

#### **1. There is insufficient evidence to support the conviction of first degree burglary when Ms. Cooke’s permission to be in Mr. Ahren’s dwelling had not been revoked.**

The Due Process Clause of the Fourteenth Amendment requires the government to prove every element of the crime charged beyond a reasonable doubt. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Proof beyond a reasonable doubt of all essential elements is an “indispensable” threshold of evidence the government must establish to garner a conviction. *Winship*, 397 U.S. at 364.

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

While reasonable inferences are construed in favor of the prosecution, they may not rest on speculation. *Jackson v. Virginia*, 443

U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Evidence is insufficient to support a verdict where “mere speculation, rather than reasonable inference, supports the government’s case.” *United States v. Nevils*, 598 F.3d 1158, 1167 (9th Cir. 2010). The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

To find Ms. Cooke guilty of first degree burglary, the jury had to find she entered or remained unlawfully in a building with the intent to commit a crime against a person or property inside the building, and also that she was armed with a deadly weapon while so entering or while in the building or in immediate flight from the building. CP 106; *see also* RCW 9A.52.020(1)(a)(first degree burglary).

Entry is unlawful if made without invitation, license, or privilege. RCW 9A.52.010(2); *State v. Gohl*, 109 Wn. App. 817, 823, 37 P.3d 293 (2001); CP 109. Unlawful remaining occurs when (1) a person has lawfully entered a building pursuant to invitation, license or privilege; (2) the invitation, license or privilege is expressly or impliedly limited; (3) the person's conduct violates such limits; and (4) the person's conduct

accompanied by intent to commit a crime in the building. *State v. Thomson*, 71 Wn. App. 634, 640–41, 861 P.2d 492 (1993).

Not every crime that occurs within a building qualifies as a burglary. *State v. Wilson*, 136 Wn. App. 596, 604, 150 P.3d 144 (2007). "A lawful entry, even one accompanied by nefarious intent, is not by itself a burglary. Unlawful presence and criminal intent must coincide for a burglary to occur." *State v. Allen*, 127 Wn. App. 125, 137, 110 P.3d 849 (2005). Courts decide on a "case-by-case basis" whether a defendant's presence becomes unlawful because of an implied limitation on or revocation of the privilege to enter. *State v. Collins*, 110 Wn.2d 253, 261–62, 751 P.2d 837 (1988).

Thus, evidence establishing a person enters with the intent to commit a crime is insufficient to establish unlawful entry or unlawful remaining. *Collins*, 110 Wn.2d 253 at 258; *Wilson*, 136 Wn. App at 604 (holding evidence insufficient to establish burglary where Wilson lawfully entered the residence even though his acts inside were unlawful). The State presents insufficient evidence of burglary where it fails to establish proof of this essential element. *Thomson*, 71 Wn. App. at 640–41.

Here, the State presented insufficient evidence to prove beyond a reasonable doubt that Ms. Cooke entered or remained unlawfully in Mr.

Ahren's house on August 7, 2017. RP 77. The evidence was uncontested that Ms. Cooke assaulted Mr. Ahrens. It was also clear that in April 2017 Mr. Ahrens gave Ms. Cooke permission to stay in the house because she was down and out. RP 76–77. One day Mr. Ahrens woke up and Ms. Cooke and his truck were gone. RP 77. There was no evidence that between this day and the day of the incident Mr. Ahrens revoked Ms. Cooke's invitation to live in or to be in the house. RP 75–98.

Since the State failed to establish that Ms. Cooke entered or remained unlawfully, no rational trier of fact could have found that essential element of the crime beyond a reasonable doubt. The evidence was insufficient to sustain the conviction for count I, first degree burglary. The remedy is reversal and remand for judgement of dismissal with prejudice. *State v. Hummel*, 196 Wn. App. 329, 359, 383 P.3d 592 (2016), *review dismissed*, 187 Wn.2d 1021 (2017); *State v. Vasquez*, 178 Wn.2d 1, 18, 309 P.3d 318 (2013).

**2. The evidence was insufficient to establish an essential element of first degree assault that Ms. Cooke acted with intent to inflict great bodily harm.**

The State must prove intent to inflict great bodily harm in order to establish first-degree assault. CP 112; *see also* RCW 9A.36.011(1)(a) (first degree assault). Under Washington assault law, the intent is a specific

intent: specific intent means intent to produce a specific result, as opposed to intent to do the physical act that produces the result. *State v. Elmi*, 166 Wn.2d 209, 215, 217, 207 P.3d 439 (2009). Thus, the State must show that the accused specifically intended to inflict a particular type of bodily injury, that is, an injury “that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c); CP 114. “ ‘Great bodily harm’ ... encompasses the most serious injuries short of death. No injury can exceed this level of harm” *State v. Stubbs*, 170 Wn.2d 117, 128, 240 P.3d 143 (2010).

Evidence of intent “ ‘is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.’ “ *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (internal quotation marks omitted) (quoting *State v. Ferreira*, 69 Wn. App. 465, 468, 850 P.2d 541 (1993)). Specific intent may not be presumed, but may be inferred “as a logical probability from all the facts and circumstances.” *Wilson*, 125 Wn.2d at 217. “Specific intent must be proved as an independent fact and cannot be presumed from the

commission of the unlawful act.” *State v. Louther*, 22 Wn.2d 497, 502, 156 P.2d 672 (1945).

To support Ms. Cooke’s conviction for assault in the first degree, the State thus had to prove that Ms. Cooke actually intended to kill Mr. Ahrens or that she intended to inflict injuries so serious that they would create a probability of death. The State did not meet this burden.

Other cases are instructive as to the nature of proof sufficient to support a finding of specific intent. For example, in *State v. Pedro*, the defendant and the victim had a history of animosity, and the defendant first assaulted the victim by hitting him over the head with a rock. 148 Wn. App. 932, 940, 201 P.3d 398 (2009). Some days later, the defendant and the victim found themselves on the same Metro bus. The victim exited through one door and began running away, while the defendant exited another door and gave chase. The defendant fired a gun at the victim several times as they ran. 148 Wn. App. at 940.

On appeal, the court found sufficient evidence of intent to inflict great bodily harm. *Pedro*, 148 Wn. App. at 951-52. The court noted: “Given the extensive testimony about the prior altercations between [the defendant and the victim], and the fact that [the defendant] was running after [the victim], a rational trier of fact could conclude beyond a

reasonable doubt that [the defendant] committed assault.” 148 Wn. App. at 951.

In *State v. Hoffman*, the evidence showed that the defendant lay in wait for approaching police officers who were searching the property of the defendant, and that the defendant and his accomplice fired multiple shots directly at two officers. 116 Wn.2d 51, 61-62, 804 P.2d 577 (1991). The court found sufficient evidence to prove intent to kill. 116 Wn.2d at 84-85.

And in *State v. Gallo*, the defendant verbally threatened to kill the victim, then “took careful aim” at her head before firing a fatal shot. 20 Wn. App. 717, 729, 582 P.2d 588 (1978). The court likewise found sufficient evidence of intent to kill. 20 Wn. App. at 729.

In *State v. Pierre*, the court held specific intent to cause great bodily harm could be inferred from evidence showing the defendant and his friends repeatedly kicked the victim’s head, using actions as if “stepping down or tromping” and also “like kicking a ball while standing in a horizontal position,” as victim lay on the ground bleeding, unresponsive, and defenseless. 108 Wn. App. 378, 381, 386-87, 31 P.3d 1207 (2001).

Similarly, in *State v. Alcantar-Maldonado*, the evidence showed the defendant told the victim he would blow his “f\*\$&!ing brains out,” and then struck the victim in the face with his metal gun as many as three times, hit and kicked him in the face, and pushed him into a door and through a doorway. Bystanders described the noise from the facial striking as sounding like bones breaking or a watermelon thrown to the ground. 184 Wn. App. 215, 226, 340 P.3d 859 (2014). The medical expert testified as a result of multiple fractures to his orbital bones, eye sockets, cheeks, and nose, and eye swelling, the victim’s sinuses and eyes sockets were displaced requiring surgical implants of two plates to fuse the facial bones together. *Id.* The court held the jury could properly find intent to inflict great bodily harm from the manner in which the defendant “carried out his melee” and the nature and extent of the victim’s injuries. *Id.* at 226.

There is no such evidence in this case. Ms. Cooke and Mr. Ahrens have no history of animosity. No threats were made at any time. Nothing about Ms. Cooke’s conduct supports the inference that she actually intended to kill Mr. Ahrens or inflict great bodily harm on him. As he entered the darkened house and turned around to close the door, Ms. Cooke struck Mr. Ahrens one time in the upper back with an ice pick. RP 78–79, 90–91. When Mr. Ahrens turned around Ms. Cooke held the ice

pick off to her side and did not engage in life-threatening behavior. RP 79, 92–93. The accidental infliction of injury, even if serious, is not sufficient to prove specific intent to inflict great bodily harm. *Elmi*, 166 Wn.2d at 215 (mens rea for assault in the first degree is specific intent to inflict great bodily harm). Ms. Cooke’s stated intent in being in the house was that “she just wanted to talk to me.” RP 94. While they talked for one and one-half to two minutes Ms. Cooke retrieved her handbag. She left at Mr. Ahrens’ request and walked away down the street. RP 79, 94.

There was no testimony elicited by the State that Mr. Ahrens’ single wound would have been life-threatening if not treated. There was no testimony that Mr. Ahrens’ wound created a probability of death, or that it caused significant permanent disfigurement or significant permanent loss or impairment of the function of any bodily part or organ.

In sum, “all of the circumstances of [this] case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats”, do not establish that Ms. Cooke intended to inflict an injury that would create a probability of death, cause significant serious permanent disfigurement, or cause a significant permanent loss or impairment of the function of any bodily part or organ. *See Wilson*, 125 Wn.2d at 217. The State did not meet its burden of proof

regarding this essential element of assault in the first degree. The conviction should be reversed and remanded for judgement of dismissal with prejudice. *Hummel*, 196 Wn. App. at 359; *Vasquez*, 178 Wn.2d at 18.

**3. The trial court violated Ms. Cooke's right to a jury trial when imposing a mandatory minimum sentence on the assault charge.**

Errors implicating a criminal defendant's Sixth Amendment right to a jury trial may be raised for the first time on appeal. *State v. Hughes*, 154 Wn.2d 118, 143, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006); *State v. O'Connell*, 137 Wn. App. 81, 89, 152 P.3d 349 (2007). Whether a sentence is legally erroneous is reviewed de novo. *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009).

The Due Process Clause and right to a jury trial together guarantee the right to have a jury find, beyond a reasonable doubt, every fact essential to punishment-whether or not the fact is labeled an "element." U.S. Const. amends. VI, XIV; *Blakely v. Washington*, 542 U.S. 296,298, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. at 364, 90S. Ct. 1068, 25 L. Ed. 2d 368. It violates the constitution "for a legislature to remove from the jury the assessment of

facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. The government must submit to a jury and prove beyond a reasonable doubt any "fact" upon which it seeks to rely to increase punishment. *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 2155, 186 L.Ed.2d 314 (2013). Mandatory minimum sentences increase the penalty of the crime. *Id.*

RCW 9.94A.540, Washington's mandatory minimum sentencing statute, prescribes, in relevant part:

(1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory

...  
....

(b) An offender convicted of the crime of *assault in the first degree* ... where the offender used force or means *likely to result in death or intended to kill the victim* shall be sentenced to a term of total confinement not less than five years.

....

(2) During such minimum terms of total confinement, no offender subject to the provisions of this section is eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave of absence from the correctional facility while not in the direct custody of a corrections officer.

(Emphasis added.)

Under RCW 9A.36.011(1)(a), a jury, in order to find a defendant guilty of assault in the first degree, must find beyond a reasonable doubt that the defendant assaulted another person “with a firearm or any deadly

weapon or by any force or means *likely to produce great bodily harm or death.*” (Emphasis added.) RCW 9.94A.540 requires additional evidence to impose the mandatory minimum sentence. Under the latter statute, the defendant must have employed force likely to result in death or intended to kill, not simply force likely to cause great bodily harm. Therefore, Washington courts have held that RCW 9.94A.540's five-year mandatory minimum does not automatically attach to a first degree assault conviction. *In re Pers. Restraint of Huy Khac Tran*, 154 Wn.2d 323, 329–30, 111 P.3d 1168 (2005), *State v. McChristian*, 158 Wn.App. 392, 402–03, 241 P.3d 468 (2010).

This court has held that mandatory minimum sentences the trial court imposed under RCW 9.94A.540 must be based on a finding by a jury, not the court. *State v. Dyson*, 189 Wn. App. 215, 226–27, 360 P.3d 25, 30 (2015) (plurality opinion), *review denied*, 184 Wn.2d 1038, 379 P.3d 957 (2016) (*citing Alleyne v. United States, supra*).

In convicting Ms. Cooke, the jury found that Ms. Cooke assaulted another with a deadly weapon or by force or means likely to produce great bodily harm or death. CP112, 127. The jury verdict does not specify among the alternative means of committing first degree assault. CP 127.

However, whether Ms. Cooke used force or means likely to result in death or intended to kill was not submitted to the jury. *See* CP 96–126. The judge, not the jury, made this finding at sentencing. RP 179; CP 135. Such judicial fact-finding is prohibited under *Alleyne* because it violates the Sixth Amendment and Ms. Cooke’s Fourteenth Amendment right to due process. 133 S. Ct. at 2155, 2158, 2164; *accord, Dyson*, 189 Wn. App. at 227–28.

The error is not harmless. The finding requires that during the first 60 months of Ms. Cooke’s confinement, she is not eligible for earned early release time. RCW 9.94A.540(2). As noted in *Dyson*, “the mandatory floor of [Ms. Cooke’s] sentence was as important to [her] as its ceiling . . . the error is not harmless since the trial court’s fact-finding could lead to [Ms. Cooke] missing early release and, conversely, serving a longer imprisonment.” *Dyson*, 189 Wn. App. at 228.

Because the court, not a jury, found the facts necessary to impose a mandatory minimum term of confinement, the sentence should be vacated and the matter remanded for resentencing. *See Alleyne*, 133 S. Ct. at 2164.

#### **4. The State failed to prove the amount of restitution.**

“Restitution is authorized only by statute, and a trial court exceeds its statutory authority in ordering restitution . . . when the statutory

provisions are not followed.” *State v. Vinyard*, 50 Wn. App. 888, 891, 751 P.2d 339 (1988). Restitution is appropriate to recoup physical and financial injury as a result of a crime only if the expense requested is actually incurred. *State v. Goodrich*, 47 Wn. App. 114, 733 P.2d 1000 (1987); *State v. Halsen*, 50 Wn. App. 30, 746 P.2d 1235 (1987).

“Restitution may not be based on acts connected with the crime charged, when those acts are not part of the charge.” *State v. Hartwell*, 38 Wn. App. 135, 141, 684 P.2d 778 (1984). The restitution statute provides a specific method for obtaining restitution for uncharged crimes in the case of plea bargains. RCW 9.94A.753(5). If restitution otherwise relates to uncharged crimes, or is based on crimes which do not result in conviction, the court has no authority to impose restitution. “The authority to impose restitution is not an inherent power of the court, but is derived from statutes.” *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).

Restitution must be a reasonably foreseeable consequence of the specific criminal act for which the defendant is convicted. *State v. Hunotte*, 69 Wn. App. 670, 851 P.2d 694 (1993); *State v. Harrington*, 56 Wn. App. 176, 782 P.2d 1101 (1989). “A restitution order must be based on the existence of a causal relationship between the crime charged and proven, and the victim’s damages.” *State v. Blair*, 56 Wn. App. 209, 214–

15, 783 P.2d 102 (1989). A trial court's attempt to impose restitution for damages based on other alleged crimes, or because of the defendant's "general scheme", is void. *State v. Miszak*, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993); *State v. Tettters*, 81 Wn. App. 478, 914 P.2d 784 (1996); *State v. Woods*, 90 Wn. App. 904, 953 P.2d 834 (1998).

*a. When no evidence was presented that Mr. Ahrens or the Crime Victims Compensation program suffered any loss as a result of Ms. Cooke's entry into Mr. Ahrens' residence, the imposition of restitution was not authorized by law.*

Generally, a party may not raise issues for the first time on appeal. RAP 2.5(a). But illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744–45, 193 P.3d 678 (2008) (internal quotations omitted). Citing this rule, the court in *State v. Moen* held that the defendant could raise his challenges to the timeliness of restitution for the first time on appeal. 129 Wn.2d 535, 547–48, 919 P.2d 69 (1996). The same principle should apply here.

A sentencing court's restitution award is reviewed for an abuse of discretion. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

The amount of restitution may not be based on conjecture or speculation. Restitution must be based upon easily ascertainable damages, in other words, the court finds there is a causal connection between the crime proved and the injuries suffered. RCW 9.94A.753(3); *State v. Fleming*, 75 Wn. App. 270, 274, 877 P.2d 243 (1994); *State v. Johnson*, 69 Wn. App. 189, 190, 847 P.2d 960 (1993) (*per curiam*). Restitution “need not be established with specific accuracy,” but due process requires it be “supported by substantial credible evidence.” *Griffith*, 164 Wn.2d at 965. Such evidence “must not subject the trier of fact to mere speculation or conjecture.” *State v. Awawdeh*, 72 Wn. App. 373, 379, 864 P.2d 965 (1994). A causal connection exists if “but for” the offense, the loss or damages to the victim would not have occurred. *State v. Tobin*, 161 Wn.2d 517, 519, 524-25, 166 P.3d 1167 (2007). The State must prove this causal connection between the expenses and the offense by a preponderance of the evidence. *State v. Kinneman*, 122 Wn. App. 850, 860, 95 P.3d 1277 (2004) *aff’d*, 155 Wn.2d 272, 119 P.3d 350 (2005).

A causal connection is not established simply because a victim or insurer submits proof of expenditures. *State v. Dennis*, 101 Wn. App. 223, 226, 6 P.3d 1173 (2000). “This is because it is often not possible to

determine from such documentation whether all the costs incurred were related to the offender's crime." *Id.*

Here, no evidence was presented at either trial or sentencing to establish that Ms. Cooke's entry into Mr. Ahrens' residence resulted in losses to him or the Crime Victims Compensation program. The court simply adopted the State's undocumented proposed restitution amounts of \$15,730.00 and \$3,683.23, respectively, without discussion and without stating any basis for these figures in the record. Under these circumstances, an award of restitution was clearly inappropriate. *State v. Kisor*, 68 Wn. App. 610, 844 P.2d 1038 (1993).

The amount awarded to Mr. Ahrens and to the Crime Victims Compensation program was wholly speculative and not based upon proof in the record. The court's award was not supported by the proof provided and was erroneous. The restitution award should be reversed and remanded for deletion. *See Kinneman*, 122 Wn. App. at 861–62 (usual remedy for the State's failure to prove amount of restitution is vacation of the award of restitution).

*b. Defense counsel rendered ineffective assistance of counsel when he failed to challenge the \$19,413.23 award at sentencing.*

Ms. Cooke was entitled to effective assistance of counsel during the trial court's establishment of restitution, as "the setting of restitution is an integral part of sentencing." *State v. Milton*, 160 Wn. App. 656, 657, 252 P.3d 380 (2011); *Kisor*, 68 Wn. App. at 620. Should this Court refuse to review Ms. Cooke's claim that the trial court lacked statutory authority to impose restitution due to failure of proof, on the basis Ms. Cooke's counsel failed to object below, it should vacate the restitution order because Ms. Cooke was denied effective assistance of counsel.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063–64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527,

156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”), quoting *Strickland*, 466 U.S. at 688. While an attorney’s decisions are treated with deference, his actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533–34.

If there is a reasonable probability that but for counsel’s inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A reasonable probability “is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the “more likely than not” standard. *Thomas*, 109 Wn.2d at 226.

A claim of ineffective assistance of counsel presents a mixed question of fact and law [and is] reviewed de novo.” *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P. 3d 916 (2009).

Here, the evidence showed that several months before this incident Ms. Cooke left Mr. Ahrens’ residence and he hasn’t seen his truck since. RP 76–77. There was evidence Mr. Ahrens was assaulted and in the hospital for five days to address a collapsed lung. RP 78, 80–81. There

was also evidence Mr. Ahrens had people stay in the home while he was in the hospital and when Mr. Ahrens returned, he noticed two by fours boarding up the door to his laundry room were torn off and fishing gear, a laptop, personal mail, and some flashlights were missing. RP 82–84, 95. Ms. Cooke was never charged with property damage or theft of the truck or the missing property.

Unless a defendant agrees to the restitution amount, the State must prove the losses by a preponderance of the evidence. *Tobin*, 161 Wn.2d at 524. There is no evidence in the record to support the trial court's award of restitution amounts of \$15,730.00 and \$3,683.23, to Mr. Ahrens and the CVC program, respectively. The State did not prove that Mr. Ahrens or the Crime Victims Compensation program suffered any loss and thus the State failed to prove by a preponderance of the evidence that losses actually were incurred and, if so, in what amount.

Because there was no evidence, and certainly no substantial credible evidence, to support the \$19,413.23 restitution award, counsel should have objected to that award. There was no conceivable tactical reason not to object. Accordingly, defense counsel was deficient in this respect. Further, defense counsel's failure to object prejudiced Ms. Cooke because if counsel had pointed out the State's failure to sustain its burden

of proving the \$19,413.23 loss, the trial court could have corrected its error either by inquiring into the factual basis for the restitution amount or by scheduling a restitution hearing. *See, e.g. Moen*, 129 Wn.2d at 537–38 (noting that the purpose of requiring an objection at the trial level was to give the sentencing court the opportunity to correct its error). Additionally, given the particular facts of this case, such factual inquiry or hearing would have prevented the possible but impermissible imposition of restitution for an uncharged crime.

Defense counsel’s representation was ineffective regarding the restitution award. The remedy for a lawyer's ineffective assistance is to put the defendant in the position in which he or she would have been had counsel been effective. *State v. Crawford*, 159 Wn.2d 86, 107–08, 147 P.3d 1288 (2006). Thus, reversal would ordinarily be required to give Ms. Cooke the opportunity to contest the imposition of restitution at a new hearing. However, at this restitution hearing, no new evidence may be admitted. *Griffith*, 164 Wn.2d at 967, n.6 (“[i]ntroducing new evidence on remand would conflict with the statutory requirement that restitution be set within 180 days after sentencing”).

Here, restitution was set at the sentencing hearing held March 15, 2018. At the time of preparing this opening brief, more than 180 days has

passed since restitution was set. As argued above, the State presented no evidence whatsoever during trial or at sentencing to establish Mr. Ahrens or the Crime Victims Compensation program suffered any loss and thus the State failed to prove by a preponderance of the evidence that losses actually were incurred and if so, in what amount. In light of the State's complete failure of proof that cannot be rectified by anything other than "new evidence," Ms. Cooke asks this Court to vacate the award of restitution in the amount of \$19,413.23.

**5. The trial court erred in imposing \$200 in court costs, where Ms. Cooke was indigent.**

The trial court imposed \$200 in court costs on Ms. Cooke. The law now prohibits trial courts from imposing this \$200 fee on defendants who are indigent at the time of sentencing. This change in the law applies prospectively to cases on direct appeal at the time the law changed. Therefore, the \$200 in court costs imposed here should be stricken.

At the time of Ms. Cooke's March 15, 2018, sentencing, the trial court was authorized to impose a \$200 criminal filing fee:

Clerks of superior courts shall collect the following fees for their official services . . . [u]pon conviction . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars.

RCW 36.18.020(2)(h) (2017).

By House Bill 1783 effective June 7, 2018, the Washington State Legislature amended this statutory provision to prohibit the imposition of this \$200 criminal filing fee on indigent defendants:

(2) Clerks of superior courts shall collect the following fees for their official services . . . (h) Upon conviction . . . an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, *except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).*

Laws of 2018, ch. 269, § 17 (emphasis added).

Our Supreme Court recently held this statutory amendment applies prospectively to cases on direct appeal at the time the amendment was enacted. *See State v. Ramirez*, No. 95249-3, 2018 WL 4499761, at \*6–8 (Wash. Sup. Ct. Sept. 20, 2018).

In *Ramirez*, following his convictions in Superior Court, the court imposed \$2,900 in LFOs on the defendant, including a \$200 criminal filing fee and discretionary LFOs of \$2,100 in attorney fees. *Ramirez*, 2018 WL 4499761, at \*2. Following sentencing, the trial court issued an order of indigency. *Id.*

On appeal, the defendant argued “the trial court failed to make an adequate individualized inquiry into his ability to pay before imposing discretionary LFOs, contrary to [*State v.*] *Blazina*, 182 Wn.2d [827,] 837–38, 344 P.3d 680 [2015].”

*Id.* After Division Two of the Court of Appeals rejected this argument, our Supreme Court granted review. *Id.* at \*3.

The Court first held the trial court did not conduct an adequate individualized inquiry into the defendant's current and future ability to pay before imposing discretionary LFOs. *Id.* at \*3–6. The Court noted that “[n]ormally, this *Blazina* error would entitle [the defendant] to a full resentencing hearing on his ability to pay LFOs.” *Id.* at \*6. The Court further observed that after it granted review, the legislature passed House Bill 1783. *Id.*

The Court next considered the defendant's argument that House Bill 1783's amendments applied to his case, because he qualified as indigent at the time of sentencing and his case was not yet final when House Bill 1783 was enacted. *Id.* The Court held “House Bill 1783 applies prospectively to [the defendant] because the statutory amendments pertain to costs imposed on criminal defendants following conviction, and [the defendant's] case was pending on direct review and thus not final when the amendments were enacted.” *Id.* The Court concluded the defendant was entitled to benefit from the statutory changes in House Bill 1783. *Id.* at \*8.

The Court acknowledged that House Bill 1783 made the following statutory changes:

House Bill 1783 amends former RCW 10.01.160(3) to expressly prohibit courts from imposing discretionary costs on defendants

who are indigent at the time of sentencing: “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” LAWS OF 2018, ch. 269, § 6(3).

....

House Bill 1783 also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17.

*Id.* at \*7.

Accordingly, the Court held “the trial court impermissibly imposed discretionary LFOs of \$2,100, as well as the \$200 criminal filing fee, on [the defendant].” *Id.* at \*8. The Court remanded the case for the trial court to strike these two amounts from the defendant’s judgment and sentence. *Id.*

Here, this direct appeal was not yet final when House Bill 1783’s statutory amendments were enacted. *See* Laws of 2018, ch. 269, § 17. Therefore, Ms. Cooke is entitled to benefit from the statutory changes in House Bill 1783. *See Ramirez*, WL 4499761, at \*6–8.

Ms. Cooke was indigent at the time of sentencing. CP 144–46; *see also* RCW 10.101.010(3)(a)-(c) (defining indigent). Therefore, the trial court erred in imposing \$200 in court costs. *See* RCW 36.18.020(2)(h). The matter should be remanded to strike the \$200 in court costs from Ms. Cooke’s judgment and sentence.

**6. The trial court erred in requiring that payments on the legal financial obligations (LFOs) “commence immediately,” where Ms. Cooke was indigent.**

The implied finding that Ms. Cooke has the current or future ability to pay LFOs is not supported in the record and the directive to begin payments “commencing immediately” must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). “In determining the amount and method of payment of costs, the court 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).

*Curry* concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." 118 Wn.2d at 916. *Curry* recognized, however, that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915–16.

Here, the court considered Ms. Cooke's "past, present and future ability to pay legal financial obligations" (CP 133 at paragraph 2.5) but made no express finding that she had the present or likely future ability to pay those LFOs. *Id.* However, the finding is implied because the court ordered that all payments on the LFOs be paid "commencing immediately" after it had 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. *Id.*; CP 134 at paragraph 4.1.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006)

(citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A finding that is unsupported in the record must be stricken. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Ms. Cooke’s financial resources and the nature of the burden of imposing LFOs before ordering that payments towards the LFO balance begin immediately. The record contains no evidence to support the trial court's implied finding in paragraphs 2.5 and 4.1 that Ms. Cooke has the present

or future ability to pay LFOs. The record instead supports the opposite conclusion: the trial court explicitly stated it was waiving all discretionary fines and costs due to Ms. Cooke's age, the length of incarceration, the amount of mandatory LFOs totaling over \$19,400, and Ms. Cooke's being on a government needs-based program of food stamps. RP 177–78. Moreover, the court found Ms. Cooke continued to be indigent for purposes of pursuing this appeal.

The implied finding that Ms. Cooke the present or future ability to pay LFOs that is implicit in the directive to make payments commencing immediately is simply not supported in the record. It is clearly erroneous and the directive must be stricken from the Judgment and Sentence. *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517.

This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. *State v. Lohr*, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); *State v. Schelin*, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of “fixing”

it with the taking of new evidence. *Cf. State v. Souza* (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); *Lohr* (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof). 164 Wn. App. 414, 263 P.3d at 1289–92.

Ms. Cooke is not challenging *imposition* of the LFOs. Rather, the trial court made the implied finding that she has the present and future ability to pay them and, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Ms. Cooke until after a future determination of her ability to pay. It is at a future time when the government seeks to collect the obligation that “ ‘[t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to

*judicial scrutiny* of [her] obligation and [her] *present ability to pay at the relevant time.*” *Bertrand*, 165 Wn. App. at 405, citing *Baldwin*, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court’s added emphasis and omitting footnote).

### **7. Appeal costs should not be awarded.**

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.

*State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual’s other debts including restitution and child support

(*Blazina*, 182 Wn.2d at 838) and circumstances including the individual’s age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant “cannot contribute anything toward the costs of appellate review.” *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

The court appointed trial counsel due to Ms. Cooke’s indigency, and found she remained indigent for purposes of this appeal and was entitled to appointment of counsel and costs of review at public expense. CP 145–46, 147.

In light of her indigent status, and the presumption under RAP 15.2(f), that Ms. Cooke remains indigent “throughout the review” unless the appellate court finds her financial condition has improved “to the extent [she] is no longer indigent,”<sup>3</sup> this court should exercise its discretion to waive appellate costs.<sup>4</sup> RCW 10.73.160(1).

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<sup>3</sup> *Accord*, RAP 14.2, which provides in pertinent part:

**D. CONCLUSION**

For the reasons stated, the convictions should be reversed and dismissed with prejudice and/or the matter remanded for resentencing on the assault charge and to strike the restitution award, \$200 in court costs, and the directive to make LFO payments “commencing immediately.” Should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on October 11, 2018.

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When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances **have significantly improved since the last determination of indigency**. (Emphasis added).

<sup>4</sup> Appellate counsel anticipates filing a report as to Ms. Cooke’s continued indigency no later than 60 days following the filing of this brief.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on October 11, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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