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COA NO. 36867-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

ISAAC S. SPRAUER,

Appellant.

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

The Honorable Brian Huber, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in imposing an exceptional sentence, in violation of appellant's Sixth Amendment right to a jury trial.

2. Appellant received ineffective assistance of counsel in violation of the Sixth Amendment because defense counsel agreed that the court could impose the exceptional sentence in the absence of a jury finding.

3. Appellant was not given notice that the State would seek an exceptional sentence, in violation of due process.

4. The court erred in entering the following "finding of fact" in support of the exceptional sentence: "The exceptional sentence is justified by the following (aggravating) circumstances: (a) unscored misdemeanors and washed felonies of an assaultive and harassing nature." CP 72.

5. The court erred in entering the following "conclusions of law" in support of the exceptional sentence:

a. "There are substantial and compelling reasons to impose an exceptional sentence pursuant to RCW 9.94A.535." CP 72 (CL I).

b. "The unscored misdemeanors and washed felonies create a sentence that is clearly too lenient." CP 72 (CL II).

6. The court erred in imposing the following conditions of community custody:

a. "undergo an evaluation for, and fully comply with, treatment for . . . mental health . . . and fully comply with all recommended treatment." CP 67.

b. "not associate nor have contact with persons with felony convictions, except as approved by the Department." CP 67.

7. The court erred in imposing collection costs in the judgment and sentence.

8. The court erred in imposing the cost of supervision in the judgment and sentence.

9. The interest provision in the judgment and sentence is unauthorized by statute.

Issues Pertaining to Assignments of Error

1. Whether imposition of an exceptional sentence based on the court's finding that the presumptive sentence was "clearly too lenient" violated appellant's Sixth Amendment right to a jury trial because whether a sentence is "clearly too lenient" is a factual finding that must be found by the jury beyond a reasonable doubt?

2. Alternatively, where precedent established a "clearly too lenient" determination is a factual finding that must be made the jury to

comply with the Sixth Amendment, whether counsel was ineffective in agreeing the judge had authority to make such a finding?

3. Whether appellant's due process right to notice of aggravators was violated because the State did not notify appellant of its intent to seek an exceptional sentence before trial?

4. Whether the court erroneously ordered mental evaluation and treatment as a condition of community custody because it did not find a statutorily defined mental illness contributed to the offense?

5. Whether the community custody condition prohibiting association with felons must be stricken or modified because (a) it is not directly related to the circumstances of the crime; (b) violates appellant's First Amendment right to free association; or (c) is vague in violation of due process?

6. Whether the court erred in ordering appellant to pay the cost of collecting legal financial obligations and the cost of supervision because (a) they are clerical errors; (b) the statute prohibits imposition of discretionary costs on indigent defendants; or (c) the court failed to make an adequate inquiry into appellant's ability to pay them?

7. Whether all non-restitution interest on legal financial obligations must be stricken and the provision in the judgment and sentence directing accrual of interest amended to conform to the law?

B. STATEMENT OF THE CASE

Isaac Sprauer stood trial on charges of first degree assault committed against Tammy Myers and fourth degree assault committed against Jacob Myers. CP 16-18.

Tammy Myers lived in a trailer on property owned by another. RP¹ 244-45. She previously had a dating relationship with Sprauer and shared her residence with him. RP 244-45. They were no longer in a dating relationship come September 30, 2017, the day at issue. RP 246-47. Sprauer was living in a house on the property at this point. RP 247.

Myers testified to her version of events at trial. According to Myers, she was eating some pizza in her trailer while Sprauer was in the bedroom. RP 250. Sprauer angrily confronted Myers, thinking she had people try to rob him. RP 251, 284. Myers sarcastically asked what Sprauer had that people would want to steal. RP 251. Her attitude "set him off." RP 251. He ripped off his shirt and puffed up like he was going to fight her. RP 252. Myers started laughing and made fun of him, saying "Oh, a big man, you're gonna fight a woman?" RP 252. Sprauer grabbed her ankle, pulled her off the recliner, and dragged her to the front porch

¹ The verbatim report of proceedings is cited as follows: RP - two consecutively paginated volumes consisting of 10/10/18, 2/4/19, 5/6/19, 5/9/19, 5/10/19, 5/13/19, 5/22/19.

outside. RP 252. Myers got back inside and tried to close the door on Sprauer, but Sprauer made it back in. RP 252-53.

The argument tapered down but then Myers threw her pizza at him, calling him "a little bitch." RP 253. Sprauer got mad again and dragged her toward her bedroom using a chokehold, his arm around her throat. RP 254-55. She pleaded with him not to hurt her. RP 255. Once in the bedroom, he applied more pressure and put her face down on the bed. RP 255. She could not get any air and thought she was going to die. RP 256.

Myers heard Jesse Sanford, who lived in the main house, pounding on the door, asking if everything was all right. RP 246, 257. Sprauer told Sanford that they were having a "little domestic" and everything was okay. RP 258-59. Myers said he was killing her, to which Sprauer responded by applying more pressure to her throat. RP 259. Sanford pounded on the door again and then opened it. RP 259. Sprauer let Myers go. RP 259.

Myers tried to make it to the main house, but Sprauer intercepted her and put his hands around her throat. RP 259-60. Myers urinated on herself. RP 260. Sprauer let go after being coaxed by Sanford to do so. RP 260-61. Myers made it to the house and had no further interaction with Sprauer. RP 262. She called her adult son, Jacob Myers, and told him what happened. RP 263, 323. Photos of her appearance were taken. RP 266-79. There was petechial hemorrhaging in her eyes. RP 265, 279-

80, 300, 304, 330. She delayed contacting police because she had a warrant for failure to appear in court for child support. RP 266. She also said it was hard because she loved Sprauer. RP 266.

Jacob Myers testified that he went over to the house after his mother called and told him what happened. RP 324-25. He confronted Sprauer and an altercation ensued. RP 327. Jacob claimed that Sprauer grabbed his neck and choked him. RP 328. Jacob disengaged from Sprauer after 30 seconds. RP 328-29. He did not call law enforcement. RP 331.

Sanford testified that he had known Tammy Myers for 19 years. RP 309. Upon hearing screaming, he went to the trailer and knocked on the back door, which opens into the bedroom. RP 310-11. He asked if everything was all right. RP 312. Sprauer said it was. RP 312. Sanford heard what sounded like Myers's mouth being muffled. RP 312. Sanford opened the door and Myers ran toward the front door. RP 312-13. Sprauer met her outside, where it looked like he choked her with his hands. RP 313. Myers peed herself. RP 314. Sanford told Sprauer that the owner of the house would be upset with him because he had known Myers for a long time. RP 314-15. Sprauer eventually let her go. RP 315. Myers went into the house. RP 316. Sanford and Sprauer went to the kitchen. RP 316. Sanford asked Sprauer what made him so mad. RP 316.

Sprauer told him that Myers threw a slice of pizza at him. RP 316. Myers's son came in and angrily confronted Sprauer. RP 317. Sanford did not see an altercation but heard scuffling in the laundry room and something hitting the ground. RP 317-18.

Sprauer testified in his own defense. On the day at issue, he got into a verbal argument with Tammy Myers about Sprauer not wanting her to hang around heroin users. RP 342-43. He did not tolerate heroin use and they had gotten into arguments over the subject in the past, causing difficulties in their relationship. RP 364. After she told him to leave so that she could use heroin with her friends, he grabbed her leg and pulled her off the recliner. RP 343-44. He was frustrated. RP 366. At some point she threw pizza in his face and ran to her bedroom. RP 344, 362. She started screaming. RP 345. He got on top of her but did not constrict her throat or mouth in any way. RP 345. He restrained her "so that she couldn't run off and go do smack." RP 366. She went outside after Sanford intervened. RP 345. He got in her way but did not choke her. RP 345. He denied choking her at any point. RP 344-45. While Sprauer was inside talking to Sanford, Jacob Myers came in and threatened him. RP 346. Sprauer engaged him but there was no physical altercation. RP 346-47. Sprauer theorized police caused Tammy Myers's injuries. RP 348-49, 365.

The court instructed the jury on second degree assault and fourth degree assault as lesser offenses of first degree assault. CP 40-47. The jury acquitted Sprauer of fourth degree assault against Jacob Myers. CP 57. The jury acquitted Sprauer of committing first degree assault against Tammy Myers but found him guilty of committing second degree assault against her and returned a special verdict that the two were members of the same household. CP 53-55. The court imposed an exceptional sentence upward of 30 months in confinement based on its finding that a presumptive sentence would be clearly too lenient. CP 66. It also imposed 18 months of community custody with attendant conditions. CP 66-67. This appeal follows. CP 74-84.

C. **ARGUMENT**

1. **THE COURT'S IMPOSITION OF AN EXCEPTIONAL SENTENCE BASED ON "CLEARLY TOO LENIENT" AGGRAVATOR FACTORS VIOLATED THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL.**

The exceptional sentence must be vacated because the trial court violated Sprauer's Sixth Amendment right to a jury trial in finding aggravating factors. The court imposed an exceptional sentence based on RCW 9.94A.535(2)(b) and (d), which require a finding that the presumptive sentence is "clearly too lenient" due to unscored misdemeanor history or prior criminal history omitted from the offender

score. Under established law, the question of whether a presumptive sentence is "clearly too lenient" is a factual determination that must be made by a jury and proven beyond a reasonable doubt to comply with the Sixth Amendment right to a jury trial. The court, mistakenly believing these aggravators were not subject to Sixth Amendment protection, erred in making its own "clearly too lenient" finding to impose the exceptional sentence. Alternatively, defense counsel was ineffective in not alerting the trial court to case law showing "clearly too lenient" aggravators are subject to the jury trial right.

- a. **The court found the presumptive sentence was "clearly too lenient" based on unscored misdemeanors and washed out felonies.**

The State sought an exceptional sentence upward of 36 months based on RCW 9.94A.535(2)(d), citing State v. Saltz, 137 Wn. App. 576, 154 P.3d 282 (2007). CP 96-97; RP 438. RCW 9.94A.535(2)(d) provides:

(2) Aggravating Circumstances--Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances: . . .

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

At the May 13 sentencing hearing, the State asked the court to find the presumptive sentence was "clearly too lenient" because Sprauer's prior felonies washed out of his criminal history and therefore did not contribute to the offender score. RP 438-45. Citing Saltz and State v. Hughes, 154 Wn.2d 118, 137, 110 P.3d 192 (2005), the State asserted the "clearly too lenient" determination is "really a conclusion" and the court would need to make findings to support that conclusion. RP 439. In addressing the nature of previous offenses and culpability, the State spoke about felony history as well as misdemeanor history. RP 440.

Defense counsel said he did not receive the State's sentencing memo until he "showed up here." RP 450. Counsel expressed uncertainty over whether "these things need to be proven in front of a jury" under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). RP 450-51. The State said its understanding was that Blakely did not apply to a "leniency" determination. RP 452. Sentencing was continued to enable counsel to look into the matter further. RP 454-58.

Defense counsel submitted a sentencing memo in which he recommended a standard range sentence. CP 59-62. The memo noted RCW 9.94A.535(2)(d) authorized the court to consider and impose an exceptional sentence based on prior history omitted from the offender

score, in contrast with RCW 9.94A.535(3), which listed aggravators that needed to be found by a jury. CP 60.

The sentencing hearing resumed on May 22. RP 459. By this time, the State's argument for an exceptional sentence had fully morphed into reliance on two distinct aggravating factors: washed out felonies and unscored misdemeanors. RP 459. Under RCW 9.94A.535(2)(b), it is an aggravating circumstance that "[t]he defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010." The State focused on the history of assaults and harassment not reflected in the standard range. RP 459-60.

Defense counsel told the court that he no longer had Blakely concerns. RP 462. According to counsel, the jury needed to find "factual issues," but the statute clearly permitted the judge to make the requisite finding here, "which is just offender score." RP 462. The court responded, "I see." RP 462.

The court asked whether it was appropriate to consider misdemeanor history. RP 463. Counsel said it was appropriate to consider misdemeanor history in setting a standard range sentence, while

acknowledging RCW 9.94A.535(2)(b) allowed the court to consider unscored misdemeanors. RP 463-64.

Defense counsel argued three prior felonies washed out, and if they had been counted, the standard range would have been 13-17 months. RP 460-62. The State agreed. RP 467, 482. The defense requested a standard range sentence of 9 months. RP 477.

The court found a standard range sentence would be "clearly too lenient" and imposed an exceptional sentence of 30 months. RP 483-84. It was troubled by the severity of the assault on Myers. RP 483. It thought three factors supported an exceptional sentence: (1) "free crimes," (2) egregious effects of multiple offenses, and (3) culpability in relation to the nature of prior offenses. RP 483-84. The court was worried about community safety. RP 484. It entered written findings and conclusions in support of the exceptional sentence, relying on two aggravating circumstances: "unscored misdemeanors and washed felonies." CP 72.

b. The exceptional sentence is invalid because the trial court violated Sprauer's Sixth Amendment right to a jury trial in imposing it.

Defense counsel opposed imposition of an exceptional sentence but did not advance a Sixth Amendment claim. Established case law, however, "holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d

452 (1999). Sentencing errors affecting the Sixth Amendment right to a jury trial may thus be considered for the first time on appeal. State v. O'Connell, 137 Wn. App. 81, 89, 152 P.3d 349, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007); State v. Dyson, 189 Wn. App. 215, 224, 360 P.3d 25 (2015), review denied, 184 Wn.2d 1038, 379 P.3d 957 (2016). Constitutional issues are reviewed de novo. State v. Clarke, 156 Wn.2d 880, 887, 134 P.3d 188 (2006).

Under the Sixth Amendment, any fact that increases the penalty for a crime beyond the prescribed statutory maximum other than the fact of a prior conviction must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The statutory maximum is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 303.

"When a court imposes an exceptional sentence predicated on an unstipulated fact not found by a jury beyond a reasonable doubt, the court violates the defendant's Sixth Amendment (Blakely) right." In re Pers. Restraint of Beito, 167 Wn.2d 497, 503, 220 P.3d 489 (2009). "After Blakely, a jury must find beyond a reasonable doubt that factual bases for establishing the aggravating factor existed." Id.

In Sprauer's case, the judge, not a jury, found a fact used to impose the exceptional sentence. The aggravating factors relied upon by the court in imposing the exceptional sentence both required a determination that the presumptive sentence was "clearly too lenient." CP 72; RCW 9.94A.535(2)(b), (d). This is a factual determination that must be made by a jury, as required by Blakely and the Sixth Amendment. Sprauer did not stipulate that the presumptive sentence was clearly too lenient. The judge's factual determination therefore violated Sprauer's Sixth Amendment right to a jury trial under Blakely.

The statute authorizes the judge to impose an exceptional sentence based on these aggravators without a finding of fact by a jury. RCW 9.94A.535(2). The statute, however, is unconstitutional.

State v. Saltz, 137 Wn. App. 576, 154 P.3d 282 (2007) shows why. In that case, the trial court imposed an exceptional sentence based on the RCW 9.94A.535(2)(b) aggravator involving unscored misdemeanor history. This Court held RCW 9.94A.535(2)(b) violates the Sixth Amendment because it allows a judge rather than a jury to find whether a sentence would be "clearly too lenient." Saltz, 137 Wn. App. at 583-84. While the fact of a misdemeanor history is an objective determination, the "clearly too lenient" language calls for a subjective determination because of the serious harm or culpability given the number or nature of unscored

misdemeanors, which would not be accounted for in calculating the sentencing range. Id. at 582. That factual determination must be made by a jury rather than a judge. Id. at 583-84.

The same reasoning applies to the aggravating factor in RCW 9.94A.535(2)(d), which likewise requires a "clearly too lenient" finding. Whether prior criminal history is omitted from the offender score calculation pursuant to RCW 9.94A.525 is an objective fact that does not implicate Blakely. But like subsection (2)(b), the "clearly too lenient" language in (2)(d) requires a subjective factual determination of the serious harm or culpability given the number or nature of unscored convictions that are not accounted for in calculating the sentencing range.

The conclusion in Saltz, and the conclusion here, rests on settled law. "It is well established that the 'clearly too lenient' factor cannot support an exceptional sentence when found by the judge." State v. Flores, 164 Wn.2d 1, 20, 186 P.3d 1038 (2008). The Supreme Court "has outlined specific factual findings a court must show to support a too lenient conclusion – it is not merely a legal conclusion, nor does it entail solely the existence of prior convictions. Blakely did not authorize such additional judicial fact finding." State v. Hughes, 154 Wn.2d 118, 137, 110 P.3d 192 (2005), overruled in part on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

The Supreme Court in State v. Alvarado, 164 Wn.2d 556, 565-67, 192 P.3d 345 (2008) addressed the significance of the "clearly too lenient" language in the statutory aggravators, contrasting it with the "free crime" aggravator codified at RCW 9.94A.535(2)(c), which lacks such language. The trial court is permitted to impose an exceptional sentence under (2)(c) without a jury finding because "the only factors the trial court relies upon in imposing an exceptional sentence under RCW 9.94A.535(2)(c) are based on criminal history and the jury's verdict on the current conviction." Id. at 566-67. "Both fall under the Blakely prior convictions exception, as no judicial fact finding is involved." Id. at 567. "This provision was designed to codify the 'free crimes' factor as an automatic aggravator without the need for additional fact finding as to whether the existence of 'free crimes' results in a 'clearly too lenient' sentence." Id. In contrast, "Saltz held that RCW 9.94A.535(2)(b) is unconstitutional under the Sixth Amendment because while the fact of a misdemeanor history is an objective determination, the 'clearly too lenient' language calls for a subjective determination because of the serious harm or culpability given the number or nature of unscored misdemeanors, which would not be accounted for in calculating the sentencing range." Id. at 565.

Based on this authority, any aggravator that requires a "clearly too lenient" determination is subject to the Sixth Amendment under Blakely.

As in Saltz, Sprauer acknowledged his criminal history but did not stipulate to the fact that the presumptive sentence was too lenient. Saltz, 137 Wn. App. at 583. "The trial court then had to make additional factual findings above and beyond the admitted facts to support the exceptional sentence." Id. at 583-84.

What is bizarre about this case is that the State cited Saltz in support of its exceptional sentence request while ignoring what Saltz held. Defense counsel did not alert the court to the constitutional problem, erroneously believing there was none, despite the clear holding in Saltz. And the court, apparently without reading Saltz or grasping its import for the Sprauer's case, imposed an exceptional sentence in direct violation of this precedent. RCW 9.94A.535(2)(b) and (d) are unconstitutional under Blakely.

For this reason, the court's findings and conclusions in support of the exceptional sentence are infirm as a matter of constitutional law. CP 72. The court had no constitutional authority to enter these findings and conclusion under Blakely. The exceptional sentence must be vacated and this case remanded for resentencing.

c. Alternatively, counsel was ineffective in agreeing that the trial court could find the aggravating circumstances without violating the Sixth Amendment right to a jury trial.

Defense counsel ultimately agreed that the court had statutory authority to impose an exceptional sentence under RCW 9.94A.535(2)(d) and did not believe the statute violated Blakely. RP 462; CP 60. Despite this agreement, the error is not waived for appeal. In the context of sentencing, legal errors, as opposed to factual errors, cannot be waived for appeal. State v. Wilson, 170 Wn.2d 682, 688-91, 689, 244 P.3d 950 (2010). Whether the statute relied on by the court to impose the exceptional sentence violates the Sixth Amendment is a pure legal question.

But if this Court disagrees, then it will be necessary to address an ineffective assistance of counsel claim. "Invited error is not a bar to review of a claim of ineffective assistance of counsel." State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). Every defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to

the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Ineffective assistance claims are reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Counsel has a duty to know the relevant law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The relevant law here is Saltz and those cases holding an aggravating factor requiring a "too lenient" finding must be found by a jury to comply with the Sixth Amendment. It is objectively unreasonable to interpret Saltz as permitting a "clearly too lenient" finding to be made by the court rather than the jury. Saltz plainly holds the opposite. Saltz, 137 Wn. App. at 583-84. Competent counsel, reading relevant precedent, would know RCW 9.94A.535(2)(b) and (d) are unconstitutional insofar as they authorize the judge to find these aggravators. Here, counsel opposed the exceptional sentence, so it cannot be said that counsel consented to the judicial fact finding as some sort of legitimate strategy. Counsel could and should have shut down the State's pursuit of an exceptional sentence

by simply arguing that one could not be imposed in the absence of a jury finding that the presumptive sentence was clearly too lenient.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Sprauer shows prejudice because, had counsel cited the holding of Saltz on the Sixth Amendment issue, then the judge, following the law, would have been unable to impose the exceptional sentence based on its own fact-finding.

2. THE EXCEPTIONAL SENTENCE MUST BE VACATED BECAUSE THE STATE DID NOT GIVE NOTICE OF ITS INTENT TO SEEK ONE PRIOR TO TRIAL.

The court erred in imposing an exceptional sentence for another reason: the State did not provide notice that it would seek an exceptional sentence before trial.

The State did not provide notice in the charging document that it was seeking an exceptional sentence. CP 16-18. The first time the State mentioned anything about seeking an exceptional sentence was after the jury verdict was entered and there was discussion about whether sentencing should be continued. RP 432. The court remarked it was concerned about "not knowing whether the state would ask for an

exceptional -- sentence." RP 433. The State subsequently filed a sentencing memorandum in which it expressed its intent to seek an exceptional sentence based on one aggravating factor: that criminal history was not scored, resulting in a presumptive sentence that was clearly too lenient under RCW 9.94A.535(2)(d). CP 96-97. It was not until the sentencing hearing itself that the State suggested another aggravating factor was available: misdemeanor history resulting in a presumptive sentence that was clearly too lenient under RCW 9.94A.535(2)(b). RP 459.

In State v. Siers, 174 Wn.2d 269, 276-77, 274 P.3d 358 (2012), the Supreme Court held a defendant's rights under article I, section 22 of the Washington Constitution, the Sixth Amendment to the United States Constitution, and due process are not violated where the charging information does not allege an aggravating circumstance, but only "so long as [the] defendant receives constitutionally adequate notice of the essential elements of [the] charge."

"[T]he state and federal constitutions require that a defendant receive adequate notice of the nature and cause of the accusation in order to allow him or her to prepare a defense in response to charges that he or she committed a crime." Id. at 277 (citing U.S. Const. amend. VI, Wash. Const. art. I, § 22). "Accordingly, to allow the defendant to 'mount an

adequate defense' against an aggravating circumstance listed in RCW 9.94A.535(3), the defendant must receive notice prior to the proceeding in which the State seeks to prove those circumstances to a jury." Id.

Consistent with constitutional requirements, RCW 9.94A.537(1) provides "[a]t any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based." Siers, 174 Wn.2d at 277. This statute "permits the imposition of an exceptional sentence *only* when the State has given notice, prior to trial, that it intends to seek a sentence above the standard sentencing range." State v. Womac, 160 Wn.2d 643, 663, 160 P.3d 40 (2007).

Siers's due process rights were not violated because, although the aggravating circumstance was not alleged in the information, he "was given notice prior to trial of the State's intent to seek an aggravated sentence." Id. at 271. The record showed "Siers's attorney acknowledged that the State had provided notice to Siers prior to trial that it intended to prove an aggravator that could result in an exceptional sentence. In our judgment, this prior notice satisfied state and federal constitutional notice requirements." Id. at 277.

In contrast to Siers, Sprauer was not given notice of the State's intent to seek an exceptional sentence prior to trial. The first time the State expressed any such intent was after the jury returned its verdicts. RP 432-33. The Siers court referred to the aggravating circumstances listed in RCW 9.94A.535(3) because those must be found by a jury. Siers, 174 Wn.2d at 277. As argued in section C.1., supra, aggravating circumstances based on a "clearly too lenient" determination listed in RCW 9.94A.535(2) must also be found by a jury to comply with Blakely and the Sixth Amendment. It follows that Sprauer had the constitutional right to receive notice of the State's intent to rely on those aggravators. The exceptional sentence is infirm due to lack of notice. Prejudice is presumed when the constitutional right to notice of an accusation is violated. State v. McCarty, 140 Wn.2d 420, 428, 998 P.2d 296 (2000); State v. Schaffer, 120 Wn.2d 616, 620, 845 P.2d 281 (1993) (notice requirement exists as a means to allow the defendant to "mount an adequate defense").

This is a manifest constitutional error that can be raised for the first time on appeal under RAP 2.5(a)(3). Under that rule, "[t]he defendant must make a plausible showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial." State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). "[T]o determine whether an error is practical and identifiable,

the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015) (quoting State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009)). An error is manifest if the trial court could have foreseen the potential error and the record on appeal contains sufficient facts to review the claim. Id.

RCW 9.94A.537(1), which codifies the constitutional requirement, required the State to notify Sprauer before trial that it would seek an exceptional sentence. The Siers decision clearly articulated this as a constitutional requirement prior to Sprauer's trial. Siers, 174 Wn.2d at 277. The record shows the State did not give Sprauer notice before trial of its intent to seek an exceptional sentence based on RCW 9.94A.535(2)(b) and (d). On the contrary, the record shows the State first expressed its intent to seek an exceptional sentence after the jury verdict. RP 432-33. Imposition of an exceptional sentence without the requisite pre-trial notice is an error of law that the trial court should have known based on binding precedent, and the error is manifest from the record.

3. THE COURT ERRED IN REQUIRING MENTAL HEALTH EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered Sprauer to "undergo an evaluation for, and fully comply with, treatment for . . . mental health . . . and fully comply with all recommended treatment." CP 67. This condition can only be imposed when specific statutory prerequisites are followed. The court's failure to find Sprauer suffers from a statutorily defined mental illness that contributed to the offense bars imposition of this condition.

Sprauer's competency was litigated at an evidentiary hearing before trial. CP 6-8; RP 6-128. The State's expert witness opined Sprauer was malingering. RP 78, 83-84, 89-90. The State argued Sprauer was faking his delusions and trying to "game the system." RP 124. The court found Sprauer competent. CP 91-95. The court believed Sprauer "has some mental health issues, most likely as a result of or contributed to by methamphetamine use," but had the ability to assist in his own defense. CP 94. No diminished capacity defense was presented at trial. RP 154-57.

At sentencing, the defense opposed imposition of the mental health evaluation. RP 472. The prosecutor said the experts who evaluated Sprauer for competency believed he had mental health issues. RP 474. The prosecutor argued Sprauer's mental health issues had a direct

correlation to his assaultive behavior. RP 474-75. The prosecutor, playing doctor, drew that correlation. No expert did. The experts who evaluated Sprauer's competency gave mental diagnoses, but not one opined that a mental illness contributed to the offense. See Competency Ex. 1 at 22-24 (Hunter report); Ex. 4 at 1-2, 6-7 (Sellers report).

Returning to sentencing, the court recalled evidence from trial that Sprauer accused Tammy Myers of "setting him up with someone to rob him or something to that effect, which, as I recall her testimony was that she thought that may be there was a -- mental health issue going on, there." RP 475. In point of fact, Myers did not testify that she thought Sprauer's actions were related to a mental health issue. She merely testified that Sprauer thought she had people try to rob him. RP 251, 284.

Returning to sentencing, the court inquired whether treatment could include forced medication, and the State said it could. RP 475. The court later stated, "the court will require a mental health -- evaluation and - - that the defendant will comply with any required treatment." RP 485.

RCW 9.94B.080 authorizes a trial court to order mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008) (addressing former RCW 9.94A.505(9), now codified at RCW 9.94B.080). RCW 9.94B.080 provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment may be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

A court cannot order an offender to participate in mental health treatment unless "the offender suffers from a mental illness which influenced the crime." State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003). The court must also find that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025. RCW 9.94B.080; Brooks, 142 Wn. App. at 851. The term "mentally ill person" is specifically defined under RCW 71.24.025(28) (referencing definitions contained in subsections 1, 10, 36, 37). Only those who meet that definition are subject to mental health conditions as part of community custody under the plain language of the statute. State v. Shelton, 194 Wn. App. 660, 676, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002, 386 P.3d 1088 (2017).

The court, in sentencing Sprauer, did not make the statutorily mandated finding that he was a "mentally ill person" as defined by RCW 71.24.025 and that this mental illness influenced a crime for which he was convicted. It simply ordered imposition of the condition. RP 485. The court therefore erred in imposing the condition. Shelton, 194 Wn. App. at 676. The condition pertaining to mental health evaluation and treatment must be stricken from the judgment and sentence. State v. Lopez, 142 Wn. App. 341, 354, 174 P.3d 1216 (2007).

4. THE COMMUNITY CUSTODY CONDITION PROHIBITING ASSOCIATION WITH FELONS IS NOT CRIME-RELATED, VIOLATES THE FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION, OR IS VAGUE, IN VIOLATION OF DUE PROCESS.

As a condition of community custody, the court ordered Sprauer to "not associate nor have contact with persons with felony convictions, except as approved by the Department." CP 67. This condition is infirm for several reasons. First, it has no relationship to the crime and thus violates the statutory requirement that conditions be crime-related. Second, the condition violates Sprauer's First Amendment right to free association because it is not reasonably necessary to accomplish the essential needs of the state and public order. Third, the condition is unconstitutionally vague because it omits a knowledge requirement.

a. The condition is not crime-related under the statutory standard and violates Sprauer's First Amendment right to freedom of association.

Whether the court had statutory authority to impose a sentencing condition is reviewed de novo. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). The trial court's decision is reviewed for abuse of discretion only if it had statutory authorization. Id. at 326. Defense counsel did not object to this condition. "Conditions of community custody may be challenged for the first time on appeal and, where the challenge involves a legal question that can be resolved on the existing record, preenforcement." State v. Wallmuller, __ Wn.2d __, 449 P.3d 619, 621 (2019).

RCW 9.94A.703(3)(f) authorizes the court to impose crime-related prohibitions. A condition is "crime-related" only if it "directly relates to the circumstances of the crime." RCW 9.94A.030(10). The condition need not be causally related to the crime, but it must be directly related to the crime. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). Substantial evidence must support this determination. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

The court may also order a person to "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.94A.703(b). The Supreme Court has interpreted the

"specified class of individuals" aspect of this provision "to require some relationship to the crime." State v. Riles, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).

The First Amendment right to freedom of association, meanwhile, protects a person's right to enter into and maintain human relationships. State v. Moultrie, 143 Wn. App. 387, 399 n. 21, 177 P.3d 776, review denied, 164 Wn.2d 1035, 197 P.3d 1185 (2008); United States v. Reeves, 591 F.3d 77, 82 (2d Cir. 2010). A convicted defendant's constitutional rights are subject to infringement. State v. Ross, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). But the infringements themselves must be constitutional. "The extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny." In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374, 229 P.3d 686 (2010).

Restriction on an offender's freedom of association with a specified class of individuals must be "reasonably necessary to accomplish the essential needs of the state and public order." Moultrie, 143 Wn. App. at 399 (internal quotation marks omitted) (quoting State v. Riley, 121 Wn.2d 22, 37-38, 846 P.2d 1365 (1993)). Prohibitions affecting fundamental rights must be narrowly tailored. State v. Padilla, 190 Wn.2d 672, 683, 416 P.3d 712 (2018). "There must be no reasonable alternative way to

achieve the State's interest." State v. Warren, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008).

The condition imposed on Sprauer is not crime-related and, under the constitutional standard, is unnecessary to accomplish the essential needs of the state and public order. Association with felons did not have anything to do with Sprauer's crime against Myers. He did not have an accomplice. The evidence is that he got in an argument with Myers while the two were alone in the trailer and then assaulted her. RP 250-60. No one else was involved in the attack. No one, let alone a convicted felon, encouraged him to do it.

Comparison with other cases shows why the condition in Sprauer's case cannot stand. In Riley, the Supreme Court upheld a sentencing condition that prohibited a computer hacker convicted of computer trespass from "associating with other computer hackers" and "communicating with computer bulletin boards." Riley, 121 Wn.2d at 36. The Court upheld the prohibition because it was reasonably related to the crime of computer trespass, as it helped to "prevent Riley from further criminal conduct" and "discourage[ed] his communication with other hackers." Id. at 38.

In State v. Hearn, 131 Wn. App. 601, 607, 128 P.3d 139 (2006), the defendant, convicted of drug possession, challenged the

constitutionality of a community custody placement restriction that she refrain from "associating with known drug offenders." Relying on Riley, Hearn held the restriction on the ability to associate with known drug offenders was constitutional because the condition would help prevent further criminal conduct and was reasonably related to the drug crime for which the defendant was convicted. Id. at 608-09.

In Moultrie, the defendant, convicted of raping a developmentally delayed woman, challenged a condition that prohibited unsupervised contact with vulnerable and disabled adults as unconstitutionally overbroad. Moultrie, 143 Wn. App. at 390, 398. The court upheld the condition because "vulnerable" and "disabled" adults accurately described the class of people victimized by the crime for which Moultrie was convicted. Id. at 399. "Thus, an order prohibiting contact with such individuals is reasonably related to the State's essential need to protect such adults and is not overbroad." Id.

In State v. Johnson, 184 Wn. App. 777, 781, 340 P.3d 230, 231 (2014), on the other hand, the court struck down a prohibition on contact with physically mentally vulnerable individuals because it was not crime-related, as the defendant did not offend against such individuals.

In Riles, petitioner Gholston was convicted of raping a nineteen-year-old woman but the trial court ordered him not to have contact with

"any minor-age children." Riles, 135 Wn.2d at 349. The Supreme Court struck the condition because "[i]t is not reasonable . . . to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime." Id. at 350, 353.

In State v. Munoz-Rivera, 190 Wn. App. 870, 876, 892-93, 361 P.3d 182 (2015), the defendant, convicted of assault and harassment, challenged a community custody condition that stated he "shall not associate with any known user or dealer of unlawful controlled substances nor frequent any places where the same are commonly known to be used, possessed or delivered." This Court struck the condition because it was not sufficiently crime-related, as there was no evidence of drug use. Id. at 893.

The common thread in these cases is that a condition restricting association with a specified class of people will be upheld against constitutional and statutory challenge if contact with a class of individuals bears a relationship to the crime. If there is no such relationship, the condition will fall. Sprauer did not associate with any convicted felons in committing his crime against Myers. Convicted felons bear no relationship to the crime. The condition must therefore be stricken either because it is not crime-related or because it violates Sprauer's First Amendment right to freedom of association.

b. The condition is unconstitutionally vague.

If this Court does not simply strike the condition for the reasons set forth above, then it will be necessary to address Sprauer's vagueness challenge. The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the Washington Constitution requires the State to provide citizens with fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008); Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). The doctrine also protects from arbitrary, ad hoc or discriminatory enforcement. State v. Halstein, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). A prohibition is therefore void for vagueness if it does not (1) define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited; or (2) provide ascertainable standards of guilt to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 752-53.

The condition here is vague because it does not require that Sprauer know that he is associating with a person who has a felony conviction. Without this knowledge requirement, Sprauer is subject to sanction despite having no notice that he is in fact violating the condition. See State v. Houck, 9 Wn. App. 2d 636, 643-45, 446 P.3d 646 (2019) (condition prohibiting defendant from "associating with 'known drug

users/sellers, except in treatment settings" not vague because "the terms 'known drug users/sellers' effectively notify a person of ordinary intelligence who needs to be avoided."). Further, the condition permits arbitrary enforcement because a community corrections officer, knowing that a certain person is a convicted felon, could determine Sprauer violated the condition even if Sprauer himself did not know the person was a convicted felon.

This Court recently held an identical condition was vague in State v. Knott, 8 Wn. App. 2d 1017, 2019 WL 1422675, at *4, review denied, 193 Wn.2d 1028, 445 P.3d 564 (2019) (unpublished).² Knott concluded conditions that prohibit association with a class of people survive vagueness challenge when the condition requires the offender to know that the person being contact is a member of the prohibited group. Id. at *4-6. Knott held "the verbs 'associate' and 'have contact' pass constitutional muster provided the object of the association and contact is known." Id. at *6. It further held "a condition may not restrict the defendant from contact with a felon regardless of whether the defendant knows the person holds a felony conviction. The condition must be limited to precluding contact with one that the defendant knows has been convicted of a felony." Id.

² GR 14.1(a) permits citation to unpublished decisions. An unpublished decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

Assuming the condition imposed on Sprauer is crime-related and survives First Amendment challenge (see section C.4.a., supra), the condition should be modified to read: "not associate nor have contact with any person *whom defendant knows* to have a felony conviction, except as approved by the Department." Knott, 2019 WL 1422675, at *6.

5. IMPOSITION OF DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS IS A CLERICAL ERROR OR THE COURT OTHERWISE ERRED IN IMPOSING THEM.

The judgment and sentence imposed a supervision cost and the cost of legal financial obligation (LFO) collection, both of which are discretionary. CP 66, 68. These costs represents a clerical error in need of correction, as the court at sentencing expressed its intention to impose only mandatory obligations, the "minimum." RP 486. Alternatively, these discretionary costs must be stricken due to indigency or because the court failed to adequately inquire into Sprauer's ability to pay them.

a. Legal financial obligations were addressed at sentencing.

At sentencing, the State argued that, according to a federal probation officer, Sprauer was employed in the past when not on drugs and was employable despite his mental health issues. RP 479. Still, Sprauer had not been employed in a year and a half. RP 479-80. The State did not know if there had been any "disability findings." RP 480.

Defense counsel argued Sprauer's earning ability was speculation, especially since he now had a second degree assault conviction on his record. RP 480-81. Sprauer, speaking on his own behalf, was unsure how potential employers were going to view his "new charge." RP 481. The court addressed LFOs as follows:

Mr. Sprauer, the court is going to waive financial -- legal/financial obligations other than the mandatory \$500 victim assessment fee that I have to impose. And the reason is because I don't want you tangled up in financial obligations that will make it harder for you to do what you need to do in terms of -- if there are any costs associated with mental health evaluation, mental health treatment, these kinds of things, I don't want you tangled up in financial issues more than you absolutely need to. So I am cutting that to the minimum. RP 486.

The court found Sprauer indigent and allowed this appeal at public expense. CP 87-89. According to the declaration in support of his indigency motion, Sprauer "has very little, if any, ability to earn income while in prison. He was found indigent at the outset of his case, and his indigency status continues. While Mr. Sprauer will be released from prison shortly, it is anticipated that he will not have substantial gainful employment for a while." CP 86; see State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) (relying on financial statement in declaration of indigency as evidence of indigency at time of sentencing).

- b. The challenged costs are clerical errors because the record shows the court did not intend to impose them.**

The pre-printed legal financial obligations portion of the judgment and sentence provides: "The defendant is subject to an annual assessment of \$100.00 for collection services which shall be paid to the Douglas County Superior Court." CP 68.

RCW 36.18.190 states "The superior court *may*, at sentencing or at any time within ten years, assess as court costs the moneys paid for remuneration for services or charges paid to collection agencies or for collection services." (emphasis added). Collection costs are discretionary. State v. Clark, 191 Wn. App. 369, 374, 362 P.3d 309 (2015); see also State v. Gonzalez-Gonzalez, 193 Wn. App. 683, 691, 370 P.3d 989 (2016) (use of the word "may" in LFO statute shows the court has discretion).

A boilerplate condition of community custody also requires Sprauer to "pay supervision fees as determined by DOC." CP 66. RCW 9.94A.703(2)(d) states "*Unless waived by the court*, . . . the court shall order an offender to: . . . (d) Pay supervision fees as determined by the Department." (emphasis added). Given the language authorizing the court to waive the cost, the cost of community custody is discretionary. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), review denied, 193 Wn.2d 1007, 443 P.3d 800 (2019).

The court's explanation of its LFO ruling shows it did not intend to impose these discretionary LFO collection costs on Sprauer. The court only intended to impose mandatory LFOs. RP 486. It waived all other LFOs. RP 486. It did not want to see Sprauer "tangled up in financial issues more than you absolutely need to" and so cut the LFOs "to the minimum." RP 486.

"In deciding whether an error is 'judicial' or 'clerical,' a reviewing court must ask itself whether the judgment, as amended, embodies the trial court's intention, as expressed in the record at trial." State v. Hendrickson, 165 Wn.2d 474, 479, 198 P.3d 1029 (2009) (quoting Presidential Estates Apartment Assocs. v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). An error is clerical if language in the judgment "did not correctly convey the intention of the court." Presidential, 129 Wn.2d at 326. "[W]here the record demonstrates that the court intended to take, and believed it was taking, a particular action only to have that action thwarted by inartful drafting, a nunc pro tunc order stands as a means of translating the court's intention into an order." Hendrickson, 165 Wn.2d at 479. "The remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction." State v. Sullivan, 3 Wn. App. 2d 376, 381, 415 P.3d 1261 (2018). The court's remarks at sentencing addressing LFOs plainly show it did not intend to impose any discretionary LFOs,

including the cost of collection and cost of supervision. RP 486. Imposition of these costs in the judgment and sentence is therefore a clerical error. The judgment and sentence should be corrected to remove these costs.

- c. The challenged costs must be stricken because they cannot be imposed due to indigency or because the court did not adequately inquire into Sprauer's ability to pay.**

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary. The statute states the court "*may* require the defendant to pay costs." RCW 10.01.160(1) (emphasis added). Recent amendments to the LFO statute prohibit the imposition of costs on indigent defendants. "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)." RCW 10.01.160(3). The statute defines "indigent" as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, or (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines. RCW 10.101.010(3).

Indigency is measured "at the time of sentencing." RCW 10.01.160(3). The costs of collection and supervision must be stricken

from the judgment and sentence because Sprauer is indigent. Sprauer was not employed as of sentencing and had not been for one and a half years prior. RP 479-80. His annual income was less than 125% of the federally established poverty guidelines, making him indigent under RCW 10.101.010(3)(c).³ The remedy is to strike these cost provisions from the judgment and sentence. Ramirez, 191 Wn.2d at 749-50.

Even if these costs are not subject to being outright stricken under RCW 10.01.160(3), they are still improper in the absence of an adequate inquiry into ability to pay. The collection cost and supervision cost are LFOs by statutory definition.⁴ Discretionary LFOs can be waived. "Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations, such as court costs and fees, as a sentencing condition, it must consider the defendant's present or likely

³ The current federal poverty level for a family of one is \$12,490. See U.S. Dep't Of Health & Human Servs., Office Of The Asst. Sec'y For Planning & Evaluation, Poverty Guidelines (2019), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited October 24, 2019).

⁴ See RCW 9.94A.030(31) (defining "legal financial obligation" as "a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or interlocal drug funds, court-appointed attorneys' fees, and costs of defense, fines, and *any other financial obligation that is assessed to the offender as a result of a felony conviction.*").

future ability to pay." State v. Lundy, 176 Wn. App. 96, 103, 308 P.3d 755 (2013).

Per State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015), "RCW 10.01.160(3) requires the record to reflect that the sentencing judge make an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs." The requirement of inquiry into ability to pay LFOs, however, is not limited to costs under RCW 10.01.160. According to Ramirez, "the statute requires trial courts to conduct an individualized inquiry into the financial circumstances of each offender before levying *any discretionary LFOs*." Ramirez, 191 Wn.2d at 739 (emphasis added).

In State v. Leonard, 184 Wn.2d 505, 507-08, 358 P.3d 1167 (2015), for example, the Supreme Court recognized the discretionary costs of incarceration under RCW 9.94A.760(2) and medical care under RCW 70.48.130 were not costs under RCW 10.01.160, but still held an individualized assessment of ability to pay them was mandated by the concerns animating Blazina. The trial court must therefore inquire into a defendant's ability to pay all discretionary LFOs, regardless of whether they qualify as a "cost" under RCW 10.01.160.

Employment history, income, assets and other financial resources, monthly living expenses, and other debts are relevant to determining a

defendant's ability to pay discretionary LFOs. Ramirez, 191 Wn.2d at 744. "[T]he record must reflect that the trial court inquired into all five of these categories before deciding to impose discretionary costs." Id. The record does not reflect the requisite inquiry here. The court inquired into employment history and arguably income but did not inquire into assets and other financial resources, monthly living expenses, and other debts. RP 479-81, 486.

6. THE COURT LACKED AUTHORITY TO IMPOSE INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS

The judgment and sentence states: "The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090." CP 68. This mandate does not comply with current law.

The current version of RCW 10.82.090(1), effective June 7, 2018, provides in relevant part that "restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations."

This statute was amended as part of HB 1783's overhaul of the LFO system. State v. Catling, 193 Wn.2d 252, 259 n.5, 438 P.3d 1174 (2019); Laws of 2018, ch. 269 § 1. The judgment and sentence must be

modified to reflect that no interest shall accrue on non-restitution legal financial obligations in accordance with RCW 10.82.090(1). Catling, 193 Wn.2d at 259 n.5. Imposition of unauthorized interest must be stricken. Houck, 9 Wn. App. 2d at 651.

D. CONCLUSION

For the reasons stated, Sprauer requests the exceptional sentence be vacated, the challenged conditions of community custody be stricken or modified, the challenged LFOs be stricken, the interest provision in the judgment and sentence corrected, and unauthorized interest be stricken.

DATED this 21st day of November 2019

Respectfully Submitted,

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