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

STATE OF WASHINGTON, Appellant, v. ANSEL W. HOFSTETTER, Respondent. *consolidated with* IN RE PERSONAL RESTRAINT PETITION OF ANSEL W. HOFSTETTER, Petitioner.	NO. 92329-9 CoA No. 45614-1-II 46836-1-II PETITION FOR REVIEW; MOTION FOR DISCRETIONARY REVIEW

I. IDENTITY OF MOVING PARTY

Ansel Hofstetter, Respondent in the appeal and Petitioner in the PRP, seeks review by this Court.

II. COURT OF APPEALS DECISION

The Court of Appeals issued a decision on July 21, 2015, reversing Mr. Hofstetter's sentence and dismissing his PRP. The court denied reconsideration on September 4, 2015. A copy of the opinion and the order denying reconsideration are both attached.

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III. ISSUES PRESENTED FOR REVIEW

In 1991, when he was 16 years old, Mr. Hofstetter committed an aggravated murder and was later sentenced to life without parole (LWOP). After the decision in *Miller v. Alabama,* 567 U.S. __ (2012), but before the adoption of the so-called *Miller*-fix legislation, Hofstetter argued that his *Judgment and Sentence* should be vacated and a new sentence imposed. The State opposed Hofstetter's motion and urged the trial court to delay a decision pending possible new legislation. The court granted Hofstetter's motion. The State did not timely appeal the order for relief from judgment.

At resentencing, both parties agreed that the sentencing court had the authority to impose any sentence between 20 years (the mandatory minimum for first degree murder) and life without parole. The court imposed a 40 year sentence.[1]

The State appealed arguing that the sentencing court lacked the authority to impose any sentence. The Court of Appeals agreed, reversing and remanding for another resentencing hearing. This case presents the following issues:

A. Where the sentencing court concluded that *Miller's* prohibition against mandatory LWOP sentences applied to Hofstetter and where the SRA and RCW chapter 10.95 have severability clauses, did the sentencing court err when it agreed *with both*

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[1] DOC has denied Hofstetter the ability to earn good time on the first 20 years of his sentence, despite the fact that the applicable law was passed *after* Hofstetter's crime.

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Hofstetter and the State that the statute could be severed and saved by making LWOP discretionary, rather than mandatory?

B. Is Mr. Hofstetter entitled to earn good time on the entirety of his sentence?

C. Was the imposition of lifetime community custody improper where no findings were made to justify the exceptional term of supervision?

IV STATEMENT OF THE CASE

In 1991, Mr. Hofstetter committed an aggravated murder. He was 16 years old. He was later sentenced to LWOP.

On June 25, 2012, the United States Supreme Court held that a mandatory LWOP sentence for juveniles violated the Eighth Amendment. *Miller, supra.*

On October 12, 2012, Hofstetter filed a *Motion for Relief of Judgment* in Pierce County Superior Court. CP 40-44. The State opposed the motion, arguing *Miller* is not retroactive and that Hofstetter should wait until new legislation is adopted to be resentenced.

On September 30, 2013, the court issued a written order, finding that *Miller* was retroactive and that a *Miller-compliant* sentence must be imposed. CP 157. The State did not timely file an appeal from this order. Resentencing was held October 18, 2013. RP (10-18-13) 1. At sentencing, the State alternatively argued that the court use its discretion and impose either LWOP or 50 years. Hofstetter argued for a 30 year term. CP 144-151. The court sentenced Hofstetter to 40 years.

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IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court Should Review the Court of Appeals Decision that the Sentencing Court was Powerless to Sentence Hofstetter Where Both Parties at Sentencing Correctly Argued the Trial Court Could Sever the Mandatory LWOP Provision, Making it Discretionary.

Introduction

When *Miller* made mandatory LWOP unconstitutional for juveniles, it did not—as the Court of Appeals held—leave Washington judges without any sentencing authority. *Opinion* at 6 ("We hold that Hofstetter's new sentence is invalid because the trial court did not have statutory authority to impose a determinate sentence."). Instead, *Miller* only invalidated the "mandatory" nature of the LWOP provision for juveniles, resulting in what *both parties at sentencing* agreed was a discretionary range of 20 years to life. The Court of Appeals erred when it found that the mandatory LWOP provision was not severable.

The State Does Not Assign Error to the Conclusion that Miller is Retroactive

It is important to identify what is not at issue in this appeal.

The State did not assign error to the trial court's finding that the holding of *Miller* is retroactive. The State also does not assign error to the sentencing court's denial of its motion to continue the sentencing date. Indeed, if the State had wanted to challenge the sentencing court's order vacating the judgment, it could have filed an appeal which would have resulted in Hofstetter's sentencing being delayed until the issue of *Miller's*

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retroactivity was decided on appeal. RAP 2.2 (a)(9)-(11); (b)(3).[2] The State did not do so. Instead, the State only challenged whether the sentencing court had the authority to impose a sentence prior to the passage of the *Miller*-fix legislation.

The Sentencing Court Correctly Severed the Unconstitutional Statutory Provision

The Court of Appeals concluded "at the time of resentencing, the sentencing statute only gave the trial court authority to impose a life sentence. Former RCW 10.95.030. Although *Miller* rendered that statute unconstitutional, the trial court had no statutory basis for imposing a different sentence." *Opinion* at 4.

The holding of the Court of Appeals overlooks the authority of courts, granted by the legislature, to sever an unconstitutional provision of the law. RCW chapter 10.95 has a severability clause. The SRA has three. The Court of Appeals opinion makes no mention of any. As a result, the Court of Appeals reasoning fails to show deference to the legislative decision-making reflected by the inclusion of multiple severability clauses.

RCW 10.95.900 provides: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." See also 9.94A.910 ("If any provision of this act or its application to any person or circumstance is held invalid, the

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[2] The Court of Appeals apparently overlooked these provisions when it mistakenly held that the State was unable to file an appeal until after Hofstetter was resentenced. *Opinion* at 5 ("In any event, a final judgment—including the sentence—is a prerequisite to a direct appeal in a criminal case.").

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remainder of the act or the application of the provision to other persons or circumstances is not affected."); RCW 9.94A.922 (same); RCW 9.94A.924 (same).

A legislative act is not unconstitutional in its entirety unless the invalid provision(s) cannot be severed and it cannot be reasonably be believed that the legislative body would have passed one without the other. *Gerberding v. Munro,* 134 Wash.2d 188, 197, 949 P.2d 1366 (1998); *State v. Crediford,* 130 Wash.2d 747, 760, 927 P.2d 1129 (1996). A severability clause may provide the assurance that the legislative body would have enacted remaining sections even if others are found invalid. *Gerberding,* 134 Wash.2d at 197.

When a statute contains a severance clause, Washington courts are required to attempt to give effect to the clause as an indication the legislature would have passed the remainder of the statute without the invalid portion. *Lynden Transp., Inc. v. State,* 112 Wash.2d 115, 124, 768 P.2d 475 (1989). The lower court did not do so.

The Court of Appeals reasoning also conflicts with United States Supreme Court:

> The inquiry into whether a statute is severable is essentially an inquiry into legislative intent. [....] We stated the traditional test for severability over 65 years ago: "Unless it is *evident* that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law."

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 173, 191 (1999) (citation omitted, emphasis added).

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"A court should refrain from invalidating more of the statute than is necessary." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). See also *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (observing that a statute should be "declared invalid to the extent it reaches too far, but otherwise left intact").

The conclusion of the Court of Appeals that the sentencing court was powerless to act also disregards RCW 9.94A.505 (1), which provides that "(w)hen a person is convicted of a felony, the court shall impose punishment as provided in this chapter." It also overlooks 9.94A.345, which provides: "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed."[3]

It is easy to sever the unconstitutional (as applied to juveniles) mandatory LWOP provision while leaving courts with statutorily-derived authority to impose a constitutional sentence. The solution is to make LWOP a discretionary, rather than mandatory sentence. In fact, Hofstetter agreed with *the State's arguments* to the sentencing court:

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[3] The Court of Appeals failed to cite or consider the requirement of RCW 9.94A.505(1) when it stated "once the legislature enacted the *Miller* fix to define the level of punishment for juveniles convicted of aggravated first degree murder, the trial court's new sentence was inconsistent with its statutory authority. After the *Miller* fix, the trial court could only impose an indeterminate sentence with at least a 25–year minimum sentence. RCW 10.95.030(3)." While many juvenile defendants may choose to be resentenced under the current law, it is entirely consistent with the SRA to demand application of the sentencing law existing at the time of the crime consistent with the protections of the Constitution. The statutory provisions that the Court of Appeals held must be applied did not exist when Hofstetter committed the crime or even when he was resentenced to 40 years.

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> Keeping in mind that *Miller* did not hold juvenile life sentences unconstitutional per se, and the maximum penalty for a class A felony is life in prison, it appears the maximum sentence for a post-*Miller* juvenile aggravated murderer is still life in prison, under either 9A.20.021 or 10.95.030(1) as modified by *Miller*.
>
> Given that the definition of aggravated first degree murder includes that the person committed murder in the first degree, the minimum sentence would appear to be controlled by RCW 9.94A.540(1)(a), which states, "An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years." RCW 9.94A.540(1)(a). Accordingly, the minimum sentence for a post-*Miller* juvenile aggravated murderer appears to be twenty years total confinement and the maximum sentence is life without the possibility of parole.

CP 144-151. The State then argued that the sentencing court "should impose a discretionary sentence of life in prison," but that if the court felt that was too harsh of a sentence, "the State would suggest fifty years (600 months)." CP 144-151.

The Court of Appeals decision fails to explain why this reasoning is incorrect.

There is a difference between severing an unconstitutional provision and judicially creating new procedural provisions, a distinction that the lower court failed to take into account. When the sentencing law conflicted with the constitutional requirements, this Court severed the statutory provision making juveniles eligible for the death penalty in *State v. Furman,* 122 Wash.2d 440, 858 P.2d 1092 (1993). This Court recognized that a trial court's sentencing authority is limited to that expressly found in the statutes, but then struck the death penalty as a possible punishment, leaving the lesser punishment of life without parole. This Court should now strike the mandatory life without parole statutory provision as it applies to juveniles, leaving courts with the discretionary authority to

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impose up to life without parole sentences. Likewise, when the federal sentencing guidelines violated a defendant's Sixth Amendment right to a jury trial because a judge, not a jury, determines facts which could increase the defendant's sentence beyond the sentence which could be imposed based on jury fact finding, the United States Supreme Court severed the unconstitutional provisions from the Sentencing Reform Act making the guidelines advisory, rather than mandatory. *United States v. Booker,* 543 U.S. 220 (2005).

The lower court cited only to *State v. Davis,* 163 Wn.2d 606, 610–11, 184 P.3d 639 (2008); and *State v. Pillatos,* 159 Wn.2d 459, 469–70, 150 P .3d 1130 (2007), to support its conclusion that the sentencing court was powerless to act until new legislation was passed.[4] *Davis* and *Pillatos* are the conceptual opposites of this case. *Davis* and *Pillatos* involve the judicial creation of statutorily-unauthorized procedures. The case at bar does not require the creation of a new procedure; only the severance and removal of an old, now-unconstitutional provision.

This Court should accept review because this case the Court of Appeals decision conflicts with decisions of the United States Supreme Court and this Court. In addition, this case raises a significant constitutional issue, as well as an issue of substantial public interest. RAP 13.4.

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[4] Assuming the lower court was correct, if no corrective legislation was passed, Hofstetter presumably would have been forced to serve the entirety of his unconstitutional sentence.

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B-C. Mr. Hofstetter is Entitled to Earn "Good Time" on the Entirety of His 40 Year Sentence. The Exceptional Term of Community Custody was Not Supported by Any Factual Findings.

Because the Court of Appeals reversed and remanded for a new sentencing, it did not reach either of the issues raised in Mr. Hofstetter's PRP. This Court should accept review and decide the two issues raised. Both are simple.

The Department of Corrections has concluded that Mr. Hofstetter is entitled to earn "good time," but not on the first 20 years of his sentence. It is true that *current* law contains a provision eliminating the possibility of good time for individuals convicted of first-degree murder. However, that provision, which was passed in 1994, was later struck in *State v. Cloud,* 95 Wash.App. 606, 976 P.2d 649 (1999). Hofstetter committed this homicide in 1991—prior to the creation of the statutory limitation. It cannot be applied to Hofstetter without violating RCW 9.94A.505(1) and the federal and state prohibitions against *ex post facto* laws.

At the time of the instant crime, the law specified imposition of a term of community placement of 2 years or the period of earned early release, whichever term is longer. Former RCW 9.94A.120(8)(b); amended and currently codified at RCW 9.94A.710(1). The imposition of a lengthier term requires a finding of exceptional, aggravating circumstances. *In re Smith,* 139 Wn.App. 600, 161 P.3d 483 (2007). In this case, the exceptional term of community placement was not supported by any factual findings. As a result, this Court should reverse and remand with instructions to

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impose the statutorily required term.

V. CONCLUSION

This Court should grant review, reverse, and remand for imposition of a standard term of community placement. This Court should also direct DOC to Make Hofstetter eligible to earn early release for the entire term of his sentence.

DATED this 27th day of September, 2015

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis, certify that I e-filed the attached motion and caused a copy to be sent to opposing counsel at: PCpatcecf@co.pierce.wa.us

September 27. 2015//Portland, OR /s/Jeffrey Ellis

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Appellant, v. ANSEL W. HOFSTETTER, Respondent.	No. 45614-1-II Consolidated With No. 46836-1-II UNPUBLISHED OPINION
In the Matter of the Personal Restraint Petition of: ANSEL W. HOFSTETTER, Petitioner.	

MAXA, P.J. — The State of Washington appeals from a resentencing hearing in which the trial court changed Ansel Hofstetter's sentence of life in prison without the possibility of early release, imposed when he was a juvenile, to a 40-year determinate sentence. The resentencing occurred pursuant to the United States Supreme Court's holding in *Miller v. Alabama* that sentencing a juvenile defendant to imprisonment of life without the possibility of release violated the Eighth Amendment proscription against cruel and unusual punishment unless the sentencing court specifically considered the juvenile's youthfulness before imposing the sentence. 132 S. Ct. 2455, 2460, 183 L. Ed. 2d 407 (2012). However, at the time of resentencing the legislature had not yet amended the sentencing statute to comply with *Miller*.

We hold that Hofstetter's new sentence is invalid because the trial court did not have statutory authority to impose a determinate sentence. Accordingly, we vacate Hofstetter's sentence and remand for resentencing. We also deny Hofstetter's personal restraint petition (PRP) as moot.

FACTS

In 1992, a jury convicted Hofstetter, a juvenile, of aggravated first degree murder. Former RCW 10.95.030 (1981) required, and the trial court imposed, a sentence of life without the possibility of early release. In 1994, we affirmed Hofstetter's conviction and sentence. *State v. Hofstetter*, 75 Wn. App. 390, 878 P.2d 474 (1994).

After the United States Supreme Court decided *Miller*, Hofstetter sought relief in superior court by means of a motion for relief of judgment, relying on *Miller*. The State opposed the motion, arguing that *Miller* did not apply retroactively and, even if it did, the trial court would need to wait for the legislature to amend the sentencing statute. Hofstetter advocated for a determinate sentence between the mandatory minimum for first degree murder (20 years) and life.

Despite the State's request to take no action, the trial court ruled that *Miller* applied retroactively[1] and that Hofstetter should be resentenced. The State requested that the trial court again impose a sentence of life without the possibility of early release or, alternatively, a

[1] The United States Supreme Court has granted certiorari on whether *Miller* applies retroactively in *Montgomery v. Louisiana*, 135 S. Ct. 1546, No. 14-280 (Mar. 23, 2015). We do not address this issue.

determinate sentence of 50 years or more. The trial court imposed a 40-year determinate sentence with a lifetime of community custody.

The State appeals. Hofstetter also filed a PRP, which we consolidated with this appeal.

ANALYSIS

A. AMENDMENT OF SENTENCING STATUTE

Before the parties filed their appellate briefs, the legislature amended the applicable sentencing statute, now codified at RCW 10.95.030(3). This legislation is commonly called the "*Miller* fix." *In re Pers. Restraint of McNeil*, 181 Wn.2d 582, 586, 334 P.3d 548 (2014). RCW 10.95.030(3)(b) requires the sentencing court to "take into account mitigating factors that account for the diminished culpability of youth," restricts life sentences to older juvenile offenders and then only based on an individualized determination, and requires the court to impose an indeterminate sentence with at least a 25-year minimum term if life without the possibility of parole is not imposed.

The legislature applied its amendment retroactively. Any juvenile who was given a mandatory sentence of life without the possibility of early release before the *Miller* fix became effective automatically is entitled to resentencing consistent with the new guidelines. *Id.*; *see also McNeil*, 181 Wn.2d at 589.

Our Supreme Court decided in *McNeil* that the *Miller* fix did not violate the ex post facto clauses of the Washington Constitution and the United States Constitution.[2] 181 Wn.2d at 593.

[2] Article I, section 23 of the Washington Constitution provides, "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." Article I, section 10, clause 1 of the United States Constitution provides in relevant part, "No State shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

B. SENTENCING WITHOUT STATUTORY AUTHORITY

The State asks us to remand for resentencing because the trial court lacked statutory authority to resentence Hofstetter before the legislature enacted the *Miller* fix. It argues that fixing legal punishments is a legislative function and that the superior court does not have authority to impose a sentence not based on statute. We agree, and hold that Hofstetter's sentence is unlawful and that a new resentencing hearing is necessary.

1. Invalid Sentence

In *State v. Guzman Nunez*, our Supreme Court reiterated the longstanding constitutional principle that fixing penalties and punishments for criminal offenses is a legislative function. 174 Wn.2d 707, 711, 285 P.3d 21 (2012); *see also State v. Ammons*, 105 Wn.2d 175, 180, 718 P.2d 796 (1986); *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937). A sentence that is beyond the trial court's statutory authority is an invalid sentence. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 136, 267 P.3d 324 (2011); *State v. Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985).

Here, at the time of resentencing, the sentencing statute only gave the trial court authority to impose a life sentence. Former RCW 10.95.030. Although *Miller* rendered that statute unconstitutional, the trial court had no statutory basis for imposing a different sentence. Further, once the legislature enacted the *Miller* fix to define the level of punishment for juveniles convicted of aggravated first degree murder, the trial court's new sentence was inconsistent with its statutory authority. After the *Miller* fix, the trial court could only impose an indeterminate sentence with at least a 25-year minimum sentence. RCW 10.95.030(3). There is not and never

has been statutory authority to impose a 40-year determinate sentence for aggravated first degree murder.

Because the trial court had no statutory authority to impose Hofstetter's new sentence, it is invalid and must be corrected. *See In re Pers. Restraint of Finstad*, 177 Wn.2d 501, 510 n.9, 301 P.3d 450 (2013). Therefore, we hold that Hofstetter's sentence must be vacated.

2. Timeliness of Appeal

Hofstetter argues, without discussion or citation of authority, that the State's appeal is untimely because it was filed more than 30 days after he claims the trial court vacated the judgment on September 30, 2013. However, on September 30 the trial court did not vacate Hofstetter's existing sentence, but simply issued a written decision applying *Miller* retroactively. In any event, a final judgment – including the sentence – is a prerequisite to a direct appeal in a criminal case. *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 949-50, 162 P.3d 413 (2007). Here, the trial court did not enter its judgment and sentence until October 18, 2013. The State's notice of appeal was filed within 30 days of the judgment and sentence.

We hold that the State's appeal was not untimely.

3. No Invited Error

Hofstetter argues that the invited error doctrine prevents the State from complaining that the trial court imposed a determinate sentence when it proposed such a sentence below. We disagree.

The invited error doctrine prohibits a party from setting up an error at trial and then challenging that error on appeal. *In re Pers. Restraint of Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). Here, the State repeatedly asked the trial court to delay resentencing Hofstetter until

the legislature amended the sentencing statute. However, the trial court decided that further delay implicated Hofstetter's speedy sentencing right and that resentencing was necessary before the legislature acted. The State supported a determinate sentence only after the trial court decided to go forward with resentencing.

This was not invited error. The trial court had ruled against the State and the State had no choice but to offer a sentencing recommendation. Therefore, we hold that the State is not precluded from challenging the imposed sentence.

4. Sentencing Authority Before Amendment

Hofstetter argues that a trial court should have authority to correct a sentence based on an unconstitutional statute if the legislature has not yet acted to fix the statute. Otherwise, if the legislature never acted, a person subject to such a sentence would never have a remedy.

However, our Supreme Court consistently has held that a trial court does not have the authority to adopt a different sentencing procedure when the statutory procedure has been found unconstitutional. *State v. Davis*, 163 Wn.2d 606, 610-11, 184 P.3d 639 (2008); *State v. Pillatos*, 159 Wn.2d 459, 469-70, 150 P.3d 1130 (2007). We hold that the same rule applies when a sentencing statute has been declared unconstitutional.

We hold that because the trial court had no statutory authority for its new sentence, the sentence must be vacated and the case must be remanded for a new resentencing hearing.

C. PERSONAL RESTRAINT PETITION

In his PRP, Hofstetter argues that the trial court erred in imposing a lifetime of community custody placement because such a condition makes his sentence an exceptional sentence unsupported by any factual findings. We need not address this issue because our

remand for resentencing renders this issue moot. *In re Interest of Rebecca K.*, 101 Wn. App. 309, 313, 2 P.3d 501 (2000).

Hofstetter also argues that the Department of Corrections (DOC) is denying him earned early release time. This issue too may be rendered moot by our decision. In addition, DOC has responded that it is not denying Hofstetter early release but that its computer system was unable to make such calculations. DOC avers that it has remedied the problem. There is no remedy this court can provide at this time, making this issue moot. *In re Pers. Restraint of Huffman*, 34 Wn. App. 570, 572, 662 P.2d 408 (1983).

We vacate Hofstetter's sentence, remand for a new resentencing hearing, and deny Hofstetter's PRP.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, P.J.

We concur:

LEE, J.

SUTTON, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

ANSEL W. HOFSTETTER,

Respondent/Petitioner.

No. 45614-1-II
Consol. with
PRP No. 46836-1-II

ORDER DENYING MOTION FOR RECONSIDERATION

RESPONDENT, Ansel W. Hofstetter, moves for reconsideration of the Court's **July 21, 2015** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Sutton

DATED this 4th day of September, 2015.

FOR THE COURT:

Maxa, J.
PRESIDING JUDGE

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