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**I. IDENTITY OF RESPONDENT**

The State of Washington is the respondent.

**II. SHORT ANSWER**

Issue I - The State proved beyond a reasonable doubt that the home was a residence under State v. J.P., 130 Wash. App. 887 (2005) The owner was immediately contacted and the resident sister and son could secure the house after the defendant was apprehended.

Issue II – Strickland's “benchmark” of an ineffective assistance of counsel claim, an unreliable trial result, is not present in petitioner’s case.

Issue III – The alleged harm, repayment of non mandatory fees, of the defendant is not ripe for review as the defendant has not been sanctioned for non-payment of his financial obligations State v. Blank, 131 Wash.2d 230, 242 (1997) and claiming indigence alone should not relieve a defendant of his financial obligations. State v. Gropper, 76 Wash. App. 882, 887 (1995).

**III. STATEMENT OF THE CASE**

On July 5, 2009, Woodland Police Officers arrested Dennis Brooks, the appellant, for Driving with License Suspended in the Third Degree and outstanding warrants. (RP at 27) During the stop the officers

observed in plain view a bag full of jewelry in the back of the defendant's vehicle which appeared to be stolen property. (RP at 29) The passenger, Scott Petersen, told the officers that the jewelry was stolen property from a residential burglary he had committed with Dennis Brooks on or about July 1, 2009. Mr. Peterson said he didn't know the exact address but could show the officers where the home was located. Officers contacted the dispatch as the location appeared to be in Cowlitz County, rather than the City of Woodland. (RP at 34) Deputy Cory Robinson responded. (RP at 34) Mr. Peterson took the deputy to a house located at 225 Duncan Road, Kelso, WA. (RP at 76) The home's listed owner was Robert Hebner of Milwaukie, Oregon. (RP 13, 14) When contacted, Mr. Hebner revealed that his sister, Elaine Sheppard, resided in the home for 8 years until she took ill and went into the hospital. (RP at 13, 14 and 118) Her son moved in while she was in the hospital in 2007. After she recovered, Mrs. Sheppard left the residence again and was temporarily staying with and caring for her son in Oregon due to his having suffered a stroke. (RP at 118) Mrs. Sheppard said that the last time she had resided there was either in 2007 or February 2008 (RP at 122) Mrs. Sheppard still considers the residence her home and plans on returning there when her son gets better (RP at 118). Mrs. Sheppard identified the jewelry as hers and stated that

neither Mr. Brooks nor Mr. Petersen had permission to be in her home for any reason.

#### IV. ARGUMENTS

##### 1. **PETIONER HAS FAILED TO SHOW THAT THE RESIDENCE WAS NOT A DWELLING AS DEFINED BY LAW.**

A dwelling means any building or structure or a portion thereof which is used or ordinarily used by a person for lodging. RCW 9A.52.010 Notwithstanding the officer's characterization of the house as "abandoned" when the deputy could immediately contact the owner to secure the house and identify the property an unoccupied residence is not "abandoned." State v. J.P., 130 Wash.App. 887 at 895. Further, the abandonment defense set forth in the criminal-trespass statute does not apply to a charge of second degree burglary. State v. Jensen, 149 Wash.App. 393 at 396. Similarly, the State argues that it would not apply to Residential Burglary.

As the Court observed in Jensen, "...because burglary and criminal trespass share the same unlawful entry element, the plain language of the statutory defense nevertheless applies that defense only to prosecutions for first degree criminal trespass. (RCW 9A.52.090) . . . applying the statute

as written the abandonment defense is not available regarding Jensen's charged offense of Second Degree Burglary."

Furthermore, unlike the facts in McDonald, the defendant testified that he had never seen the jewelry bag that was discovered in his truck. (RP at 146) When he was arrested and speaking to law enforcement he also didn't remember Jimmy's last name. (RP at 32) However, during direct examination, Mr. Brooks testified that "Jimmy Smith might have got it cleaning a house." (RP at 137) Alternatively Mr. Brooks suggest that law enforcement "Ask Scott. It's not mine." (RP at 32) The State contends that the trial strategy was that some other guy did it. (RP at 141) Therefore, the theory of abandonment as a defense is not applicable.

**2. PETITIONER HAS FAILED TO SHOW THAT THE OUTCOME OF HIS TRIAL WAS UNRELIABLE, WHICH IS THE BENCHMARK OF AN INEFFECTIVE ASSISTANCE CLAIM**

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." Id. at

691-692. In Strickland, the Supreme Court laid the foundation for analyzing claims of ineffective assistance of counsel; a two-prong test requiring a showing of both deficient performance and resulting prejudice.

Proof of prejudice is an essential prerequisite to relief under Strickland. Proof of prejudice normally and logically focuses on the proceeding that resulted in the determination of the defendant's guilt or sentence. The prejudice test adopted in Strickland reflects that focus: "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. In most cases, the court is examining the effect of deficient performance in a trial or sentencing hearing.

The court has applied Strickland to a plea hearing context when the defendant seeks to withdraw his plea on the basis of ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). When a defendant is represented by counsel and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct 1441, 25 L. Ed. 2d 763 (1970). A defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he

received from counsel was not within the standards set forth in McMann.” Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct 1602, 36 L. Ed. 2d 235 (1973). To prove the “prejudice” prong of Strickland in the plea process “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. at 59. The decisions of the United State Supreme Court dealing with effective assistance during the plea process stem from cases where the defendant entered a plea. Wright v. Van Patten, \_\_\_ U.S. \_\_\_, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008); Hill v. Lockhart, supra. The State could find no Supreme Court decision which examined the effectiveness of counsel during plea negotiations once the case had proceeded to trial and conviction.

The Court in Strickland emphasized that the “ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged” and instructed courts to be concerned with whether the “result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” Strickland, 466 U.S. at 696. Once a case has gone to trial and the determination of the defendant’s guilt has been rendered by a fact finder, the question under Strickland is whether that determination of guilt is reliable. When guilt has been determined by trial, the Strickland test

focuses on how deficient performance affected the outcome of the trial and not the plea negotiations.

Additionally, Strickland's concept of constitutional prejudice requires something more than simply a probability of a "different result." Strickland specifically indicated that certain types of "different results" would not qualify as a basis for relief:

An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 695. The court went on to state that while "idiosyncrasies of the particular decision maker" might affect trial counsel's tactics and be relevant to the performance prong assessment, such factors were irrelevant to the prejudice prong and that "evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination." Id.

In Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986), the Court gave another example of a “different result” that would not raise a constitutional concern under the Sixth Amendment. In that case, trial counsel persuaded the defendant not to commit perjury by threatening to expose the perjury if he did. The defendant testified truthfully, was convicted, and on appeal claimed ineffective assistance and denial of his right to present a defense by his attorney’s refusal to allow him to testify falsely. The Supreme Court dismissed this claim stating that constitutional right to testify does not extend to testifying falsely and the “the right to counsel includes no right to have a lawyer who will cooperate with planned perjury.” Nix, 475 U.S. at 173. The Court held that as a matter of law, defense counsel’s conduct could not establish the prejudice required for relief under the second strand of the Strickland inquiry as there was no possibility that Nix’s truthful testimony negatively affected the fairness of the trial; it reiterated that it is the lack of fairness in an adversary proceeding which is the “benchmark” of an ineffective assistance of counsel claim. *Id.* at 175. Thus, even if the court were to assume Nix’s defense counsel acted incompetently and even if that action had the requisite effect on outcome, counsel’s behavior still would not have been prejudicial because the reliability of the judgment was untouched. As Justice Blackmun stated in a concurring opinion for four

Justices: “Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.” 475 U.S. at 186-187.

In Lockhart v. Fretwell, 506 U.S. 364, 368, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), the Court reemphasized that the Sixth Amendment right to counsel exists to protect the fundamental right to a fair trial. The Lockhart Court reiterated that “prejudice” incorporates more than outcome determination; the reviewing court must determine whether the result of the proceeding was fundamentally unfair or unreliable. 506 U.S. at 368. Fretwell was convicted of capital felony murder and sentenced to death. He sought habeas relief from his sentence arguing that his attorney had been ineffective in failing to object to the use of an aggravating factor based on a decision by the Eighth Circuit in Collins v. Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985). Collins was good law at the time of Fretwell’s trial, direct appeal, and state habeas proceedings, but had been overruled by the time he sought habeas relief in the federal courts. Nevertheless, he obtained relief from the federal district court and his case went before the Eighth Circuit for review. A divided court affirmed the grant of relief finding that the Arkansas court would have been bound by Collins at the time of trial and any objection to use of the aggravator would have been sustained if it

had been made, thereby precluding the jury from using that aggravating factor to support a death verdict. Under this scenario Fretwell had shown prejudice under Strickland as he has shown the probability of a different result at the time the error was committed. The Supreme Court took review and reversed. The Supreme Court noted that the Eighth Circuit had overruled Collins in light of the Court's decision in Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), therefore the Arkansas sentencing hearing had been conducted under the correct standard of the law, in retrospect, although at the time, the proceeding was contrary to the Eighth Circuit's decision in Collins. In view of the change in the law, the failure to comply with Collins did not render the sentencing proceeding unreliable or fundamentally unfair. Had an objection been made and sustained at Fretwell's sentencing hearing, he would have received a benefit to which he was not entitled under the law.

To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 506 U.S. at 369-370. The Court held that "[u]nreliability or unfairness does not result *if* the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." 506 U.S. at 372(emphasis added). It

concluded that Fretwell suffered no prejudice from his counsel's deficient performance.

This limitation on the type of prejudice that will support an ineffective assistance of counsel claim was explored by Justice Powell in his concurring opinion in Kimmelman v. Morrison, 477 U.S. 365, 392, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Morrison was convicted of rape after his attorney failed to object to admission of an illegally seized bed sheet. While the Court held that Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), did not bar this ineffective assistance claim, Justice Powell wrote separately to clarify that the Court was not resolving a Strickland prejudice issue as it had not been argued:

The admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. . . . Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall. Because the fundamental fairness of the trial is not affected, our reasoning in Strickland strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment. . . . It would shake th[e] right [to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall. Kimmelman, 477 U.S. at 396-397.

Strickland, Nix, Lockhart, and Kimmelman illustrate that when a defendant, who has been convicted following a trial, claims a denial of his

Sixth Amendment right to counsel, the reviewing court must focus on whether the claimed error affected the fundamental fairness of the trial such that there has not been a fair and reliable determination of the defendant's guilt. If the court concludes the determination of defendant's guilt is unreliable, then defendant has succeeded in showing prejudice under the Strickland test. If the claimed error does not affect the reliability and fairness of the trial proceeding, then the error will not serve as a basis for a Sixth Amendment claim.

In petitioner's case, he has never shown that the fundamental fairness of his trial was affected by his attorney's deficient performance

When petitioner's case was on direct review, his appellate attorney did not raise any assignments of error pertaining to the trial process. State v. Crawford, 128 Wn. App. 376, 378, 115 P.3d 387 (2005), *reversed*, 159 Wn.2d 86, 147 P.3d 1288(2006). There has never been any challenge to petitioner's trial that calls into to doubt its reliability in determining the petitioner's guilt. Thus, Strickland's "benchmark" of an ineffective assistance of counsel claim, an unreliable trial result, is not present in petitioner's case. His claim of ineffective assistance of counsel must fail.

Under Strickland, since petitioner was found guilty at trial, he needs to show that his attorney was deficient in his performance at trial so as to create a reasonable probability that that the outcome of his trial

would have been different in order to show prejudice. He has not shown this type of prejudice.

For the above reasons, the court should reject petitioner's claim of ineffective assistance of counsel as the prejudice he claims is not the kind recognized by the Supreme Court as affecting the fairness or reliability of the outcome of his trial, which is the "benchmark" of a Sixth Amendment violation.

**3. APPELLANT'S APPEAL SHOULD BE DENIED BECAUSE THE UNCONSTITUTIONALITY OF A LAW IS NOT RIPE FOR REVIEW WHEN HE IS NOT HARMED BY THE PART OF THE LAW ALLEGED TO BE UNCONSTITUTIONAL.**

The United States Supreme Court held that recoupment statutes must satisfy several conditions to be constitutional. Fuller v. Oregon, 417 U.S. 40 (1974). The Washington State Supreme Court identified the requirements articulated in Fuller that a recoupment statute must follow to be constitutional. The requirements are:

- (1) Repayment must not be mandatory;
- (2) Repayment may be imposed only on convicted defendants;
- (3) Repayment may only be ordered if the defendant is or will be able to pay;
- (4) The financial resources of the defendant must be taken into account;

(5) A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;

(6) The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;

(7) The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Barklind, 87 Wash.2d 814, 817-818 (1976).

In Barklind, the court found these requirements were met and that the Washington recoupment statute was constitutional. *Id.* 818. The court stated, "We fail to perceive the constitutional deficiency in the system which allows the trial court discretion to grant probation and in effect, as a condition, tell the defendant that he should recognize some obligation to society for the crime which he voluntarily committed." *Id.* 816.

A trial court's discretion and authority to impose legal financial obligations in the State of Washington is governed by RCW 10.01.160. The superior court has discretion to impose legal financial obligations pursuant to RCW 9.94A.760. Statutes are presumed to be constitutional and appellant does not challenge their constitutionality. In State v. Curry, the Supreme Court of Washington stated, "imposition of fines is within the trial court's discretion. Ample protection is provided from an abuse of that discretion. The court is directed to consider ability to pay, and a

mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified.” State v. Curry, 118 Wash.2d 911, 916 (1992). “The imposition of the penalty assessment, standing alone, is not enough to raise constitutional concerns.” *Id.* 918.

“The unconstitutionality of a law is not ripe for review unless the person seeking review is harmed by the part of the law alleged to be unconstitutional.” State v. Ziegenfuss, 118 Wash.App. 110, 113, (2003). In Ziegenfuss, the defendant was convicted of possessing cocaine, *Id.* 112, and sought a waiver of all her “legal financial obligations on grounds that she is disabled, has never been employed, and is unlikely ever to have the means to satisfy any such obligations.” *Id.* 113. The court found that defendant’s due process challenge was not ripe for review because defendant had not failed to make any payments, had not been incarcerated or sanctioned for violating the terms of her community custody, and had not suffered any harm. *Id.* 113-115.

Here, the Appellant was convicted for Residential Burglary and ordered to pay court costs. The Appellant has not failed to make payments as he is currently incarcerated at the Airway Heights Correction Center and has not been incarcerated or sanctioned for non-payment of his financial obligations. Therefore, Appellant has not suffered any harm and his equal protection and constitutional challenges are not ripe for review.

The Appellant's appeal should be denied and the decision of the Cowlitz County superior court should be affirmed.

**4. THE COURT DID NOT ABUSE ITS DISCRETION AND CORRECTLY DENIED APPELLANT'S MOTION TO TERMINATE HIS FINANCIAL OBLIGATIONS**

In the alternative, should this court find that the Appellant's appeal be ripe for review, the Appellant's appeal should nevertheless be denied because the Appellant is not indigent for purposes of his legal financial obligations and the Cowlitz County Superior Court did not abuse its discretion in denying his motion to terminate his financial obligations.

In State v. Blank, the Supreme Court of Washington noted that "common sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer. However, we hold that before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." State v. Blank, 131 Wash.2d, 230, 242 (1997). "The Constitution does not require an inquiry into ability to pay at the time of sentencing. Instead, the relevant time is the point of collection and when sanctions are sought for nonpayment." *Id.* 242.

In Blank, the defendant sought a waiver of his legal financial costs based on his indigent trial and appellate status, incarceration, and potential difficulties in finding housing and obtaining steady employment upon his release. *Id.* 251-253. The court held that the defendant “failed to offer any compelling argument,” *Id.* 253, and found that “there is no reason at this time to deny the State’s cost request based upon speculation about future circumstances.” *Id.* 253. In State v. Mayer, the court held that the impact that incarceration would have on the defendant’s earning capacity alone is an insufficient ground to waive his financial obligation. State v. Mayer, 120 Wash.App. 720, 728 (2004).

In State v. Gropper, the court held that merely claiming indigence alone would not relieve a defendant of his financial obligations. State v. Gropper, 76 Wash.App. 882, 887 (1995). “Rather, an offender must show that he or she has made a real effort to fulfill the financial obligation, but was unable to do so,” *Id.* 887. In State v. Woodward, the court held that “a defendant who claims indigency must do more than simply plead poverty in general terms.” State v. Woodward, 116 Wash.App. 697, 704 (2003). A defendant “should be prepared to show the court his actual income, his reasonable living expenses, his efforts, if any, to find steady employment, his efforts, if any, to acquire resources from which to pay his court-ordered obligations.” *Id.* 704.

In the present case, the Appellant is currently incarcerated at the Airway Heights Correction Center and there is no evidence that he is currently required to make payments on his financial obligations. Appellant seeks to waive his financial obligations because he is incarcerated, has no money or assets, and will face difficulties in obtaining any meaningful employment upon release. The courts in Blank, Gropper, Woodward, and Mayer rejected the reasons articulated by the Appellant because merely claiming indigency alone is an insufficient basis to waive his financial obligations.

The Appellant's argument and reliance on the third, fourth, and fifth factors listed in Curry are misplaced. The factors listed in Curry are used to analyze the constitutionality of the recoupment statute and not used to determine whether or not the court abused its discretion in denying the appellant's motion to terminate his financial obligations. The constitutionality of the Washington statute is not in dispute.

The superior court correctly denied the Appellant's motion to terminate his legal financial obligations because merely claiming indigency alone is an insufficient basis to waive his financial obligations. The Appellant has made no efforts to repay his financial obligations and "nothing...precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law." 118 Wash.2d at 918.

“[Appellant’s] poverty in no way immunizes him from punishment.” Id.  
918.

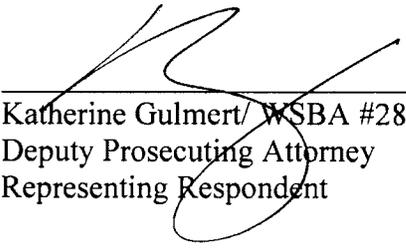
**V. CONCLUSIONS**

For the above reasons, the court should reject petitioner’s claim of ineffective assistance of counsel as the prejudice he claims is not the kind recognized by the Supreme Court as affecting the fairness or reliability of the outcome of his trial, which is the “benchmark” of a Sixth Amendment violation. Also, the Appellant’s appeal should be denied because the Washington statute is constitutional and the superior court did not abuse its discretion in denying to terminate his financial obligations.

Respectfully submitted this 7<sup>th</sup> day of January, 2011

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