**FILED**

**March 13, 2012**

**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **STATE OF WASHINGTON,** | ) | **No. 29512-5-III** |
| **Respondent,** | ) | |
| | ) | **Division Three** |
| **v.** | ) | |
| | ) | |
| **ERIC H. HUFFERD-OUELLETTE,** | ) | |
| | ) | **UNPUBLISHED OPINION** |
| **Appellant.** | ) | |
| | ) | |

Siddoway, J. — Eric Hufferd-Ouellette challenges a firearm enhancement applied to his conviction for possession of cocaine. He used a handgun in an attempted robbery and had a small amount of cocaine in his pocket at the same time. While he concedes that his possession and use of the handgun supported a firearm enhancement for his armed robbery conviction, he argues that the handgun lacked the nexus to the small amount of cocaine he was carrying necessary to support an additional firearm enhancement.

We need not resolve the question of whether the circumstances of his crime are

sufficient to constitute "armed" possession of a controlled substance because the trial court's imposition of the firearm enhancement was supported by the second basis it announced for its decision: that he pleaded to the charge and the enhancement. While he earlier sought to withdraw his plea, he now seeks only reversal of the enhancement and remand for resentencing. Because his plea was indivisible, partial reversal is unavailable. We affirm.

## FACTS AND PROCEDURAL BACKGROUND

On August 6, 2006, Eric Hufferd-Ouellette burglarized a home in Stevens County, stealing a handgun. He used it to commit a robbery later that day. Three days later, he used the handgun in an attempted carjack from Patti Irish in Wenatchee. Ms. Irish struggled and called for help when he tried to pull her from her car. Mr. Hufferd-Ouellette abandoned the attempt and fled on foot, tossing the handgun in a nearby alley. When arrested a few blocks from the location of the attempted carjack, he was found to have a small quantity (less than one-half gram) of cocaine in his pocket, but no weapon.

Mr. Hufferd-Ouellette pleaded guilty in Chelan County to attempted first degree robbery with a firearm (count 2), unlawful possession of a firearm second degree (count 3), unlawful possession of a controlled substance—cocaine (count 4), and possession of a stolen firearm (count 5). Firearm enhancements were applied to counts 2 and 4. In his statement on his plea of guilty, he declared:

> On August 9, 2006, in Chelan County, I attempted to take a car belonging to Patti Irish, by attempting to remove her from the car. I pointed a hand gun that was stolen from Stevens County at Ms. Irish during my attempt to take her car. At this time, I also possessed a small amount of cocaine. At this time, I had previously been convicted of a felony. At the times I committed counts 2 and 4 I was armed with a firearm.

Clerk's Papers (CP) at 159.

Mr. Hufferd-Ouellette was sentenced in August 2007 for these crimes in Chelan County. Almost a year later, he filed a motion to vacate the judgment and sentence, arguing that his sentence was in excess of the statutory maximum and seeking to withdraw his plea. The superior court transferred the motion to this court for consideration as a personal restraint petition. The State agreed that the sentences for counts 2 and 4 exceeded the maximum penalties but argued that the proper remedy was to remand for the limited purpose of correcting the judgment and sentence, failing to consider Mr. Hufferd-Ouellette's argument that the parties' mutual mistake as to the sentencing range supported withdrawal of his plea. Both this court and the Supreme Court remanded the matter to the superior court to resolve the merits of his motion to vacate the judgment and sentence.

Counsel was appointed to represent Mr. Hufferd-Ouellette. By the time of hearing on the remanded matters, Mr. Hufferd-Ouellette did not ask the trial court to grant the originally-requested permission to withdraw his guilty plea. Br. of Appellant at 3 (citing

Report of Proceedings (RP) at 38). He did raise several challenges to his original sentence. The parties agreed that the original judgment and sentence included a miscalculated offender score and imposed a sentence beyond the statutory maximums; those errors were corrected. The trial court rejected Mr. Hufferd-Ouellette's other challenges, including his argument that the nexus between the cocaine possession and the firearm was insufficient to uphold the firearm enhancement. In addition to rejecting Mr. Hufferd-Ouellette's argument that there was an insufficient nexus, the trial court justified imposing the enhancement on the fact that Mr. Hufferd-Ouellette had entered into a plea bargain, yet was not seeking to withdraw his entire plea. RP at 28-30, 38.

Mr. Hufferd-Ouellette timely appealed.

## ANALYSIS

Mr. Hufferd-Ouellette assigns error only to the trial court's rejection of his challenge to the firearm enhancement to the cocaine possession count. The relief he requests on appeal is not to withdraw his plea, but that we reverse the imposition of the firearm enhancement and remand for resentencing on grounds of an insufficient basis for his plea to the firearm enhancement; he argues specifically that there was an insufficient nexus between the crime of possession of cocaine and the firearm. RP at 10-11. He emphasizes the fact that he had no handgun at the time officers discovered his possession of the cocaine and the handgun was unrelated to his possession of what was only a small

amount.

CrR 4.2(f) provides that a court shall allow a defendant to withdraw the defendant's plea of guilty "whenever it appears that the withdrawal is necessary to correct manifest injustice." Among injustices recognized as manifest under the rule is holding a defendant to a plea that was involuntary. *Id.* A plea cannot be considered voluntary in the absence of a sufficient factual basis for the plea. *In re Pers. Restraint of Evans*, 31 Wn. App. 330, 331, 641 P.2d 722, *cert. denied*, 459 U.S. 852 (1982).

We review, in turn, his argument of an insufficient factual basis and the trial court's remedy-based refusal to grant relief.

I

CrR 4.2(d) provides, with respect to voluntariness, that

> [t]he court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. *The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.*

(Emphasis added.)

In *In re Personal Restraint of Taylor*, 31 Wn. App. 254, 640 P.2d 737 (1982), this court cited *In re Personal Restraint of Keene*, 95 Wn.2d 203, 622 P.2d 360 (1980) to explain the requirement that the court be satisfied of a factual basis for the plea:

> "The judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment or information. . . .

> Requiring this examination protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."

31 Wn. App. at 257 (internal quotation marks omitted) (quoting *Keene*, 95 Wn.2d at 209). The factual basis requirement "helps guarantee a truly knowledgeable and voluntary plea," and "allow[s] a thorough and final check on the understanding of the defendant." *Id.* at 258.

Former RCW 9.94A.602 (1983) authorizes an enhanced sentence if a defendant is armed with a deadly weapon at the time of the commission of the crime:

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime.[1]

A firearm is a deadly weapon. Former RCW 9.94A.602.

Over time, Washington decisions have clarified what it means to be "armed" for purposes of the statute in response to statutory amendments increasing the number of crimes subject to the enhancement and with due regard for the right to bear arms provided by the Washington Constitution. Wash. Const. art. I, § 24. To be "armed" means more than having a weapon that is "readily available and accessible to his use for either

[1] Former RCW 9.94A.602 was recodified as RCW 9.94A.825 in 2009. Mr. Hufferd-Ouellette was originally sentenced in 2007.

offensive or defensive purposes" (a definition that this court adopted in *State v. Sabala*, 44 Wn. App. 444, 448, 723 P.2d 5 (1986) and which the Washington Supreme Court embraced in *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)), and requires a nexus between the weapon and the defendant, and between the weapon and the crime. *State v. Schelin*, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002). The nexus between the weapon and the defendant implicates issues of time and space. The nexus between the weapon and the crime implicates issues of intent and willingness to use the weapon.

Whether a person is armed is a mixed question of law and fact. *Id*. at 565. Here, there are no disputed facts, so the trial court was required to determine whether the facts that Mr. Hufferd-Ouellette admitted are sufficient to prove that he was armed as a matter of law. *Id.*; *Taylor*, 31 Wn. App. at 259 (where court relies only on the written statement of the defendant on the guilty plea form, "it must ensure the facts admitted amount to the violation charged. Anything less endangers the finality of the plea"). The parties' arguments focus principally on Mr. Hufferd-Ouellette's admission in his statement on plea of guilty that "I pointed a hand gun that was stolen from Stevens County at Ms. Irish during my attempt to take her car. At this time, I possessed a small amount of cocaine." CP at 159. His separate admission that "[a]t the times I committed count[ ] 4 I was armed with a firearm," *id.*, must be read either to use the word "armed" in a colloquial sense—his meaning for which we do not know, but likely was only that the weapon was

on his person—or as a conclusion of law. Either way, it is not helpful. *See, e.g.*, *Taylor*, 31 Wn. App. at 259 (statement that defendant "was directly involved in the planning, carrying out the plan, and aftermath" of a specified murder was not a factual basis indicating awareness of the nature of the charge);[2] *State v. Powell*, 29 Wn. App. 163, 165, 627 P.2d 1337 (1981) (statement that "I did participate in the 1 (degree) murder" of a victim was a mere conclusion of law and insufficient); *Evans*, 31 Wn. App. at 332 (admission that "I escaped from the Tri-Cities Work Release Facility in Pasco" on a given date an insufficient factual basis).

We review issues of law de novo.

*Nexus between the weapon and the defendant: temporal requirement*

We first address Mr. Hufferd-Ouellette's argument that a defendant "must be armed with a deadly weapon at the time of the commission of *the* crime" and that he had discarded the handgun before being arrested and found to possess the cocaine. Br. of Appellant at 10. As earlier noted, however, his statement on plea of guilty admitted that at the time he attempted to take Ms. Irish's car using the handgun "I also possessed a small amount of cocaine." CP at 159. The possession admitted was on the charging date;

[2] As further explained in *Taylor*, "a knowledge of the statute the defendant is accused of violating does not satisfy the constitutional requirement that the record contain a factual basis for the plea. If knowledge of the offense coupled with a plea of guilty 'as charged in the information' was enough to support a voluntary plea, there would be no necessity for the record to show a factual basis for the guilty plea." 31 Wn. App. at 258.

count 4 of the amended information charged that Mr. Hufferd-Ouellette "on or about the 9th day of August, 2006, did then and there unlawfully and feloniously possess a controlled substance, to wit: cocaine, and in the commission of the crime the defendant or an accomplice was armed with a firearm." CP at 241.

In *State v. Simonson*, 91 Wn. App. 874, 881, 883, 960 P.2d 955 (1998), *review denied*, 137 Wn.2d 1016 (1999), the court held that the evidence supported a special finding that the defendant was armed with a deadly weapon at the time he committed unlawful manufacture of a controlled substance even though he was in jail when officers discovered evidence of his and an accomplice's unlawful manufacture of methamphetamine in a mobile home where firearms were also found. The court concluded that evidence showed that the defendant and his girl friend were committing a continuous offense over a six-week period of time and "[d]uring some or all of that time, they kept seven guns on the premises." 91 Wn. App. at 883. *Simonson*'s reasoning was rejected a year later in *State v. Johnson*, 94 Wn. App. 882, 895-96, 974 P.2d 855 (1999), *review denied*, 139 Wn.2d 1028 (2000), in which a different division of the court held that the deadly weapon inquiry should not include the entire span of alleged criminal activity, but only the time when it furthers the purpose of enhancing officer safety during Fourth Amendment searches and seizures.

The *Simonson* and *Johnson* courts' conflicting views on the temporal requirement

was presented to the Supreme Court in *Schelin*, 147 Wn.2d 562, in which the majority opinion appeared to make some concession to each position. On the one hand, it characterized the *Johnson* court as failing to recognize that the finding that Simonson was armed could be explained by the presence of his accomplice at the scene when the meth lab exploded and the crime was discovered. *Id.* at 572. It analyzed the issue in the case before it with respect to the defendant's proximity to the weapon at the time police entered his home, not any earlier time. *Id.* at 573. Finally, it declined the State's request to revisit the temporal requirement, which the State contended "will result in less protection for the general public and will exclude the use of the deadly weapon enhancement in cases involving continuing crimes." *Id.* at 575. Yet in addressing the Court of Appeals' focus in *Schelin* on whether the "critical time for analysis" should be determined by the time when the offense is committed or when police discover it, it characterized the focus as "misdirected," because "there is no reason to believe the Legislature intended the statute to solely protect police." *Id.* at 573.

Any ambiguity was clarified by *State v. O'Neal*, 159 Wn.2d 500, 504, 150 P.3d 1121 (2007), in which the court held that "[t]he defendant does not have to be armed at the moment of arrest to be armed for purposes of the firearms enhancement." It held that the State could establish the required nexus between the defendant and the weapon by presenting evidence that a deadly weapon was easily accessible and readily available at

the time of the crime, and need not establish "with mathematical precision the specific time and place that a weapon was readily available and easily accessible." *Id.* at 504-05.

In light of Mr. Hufferd-Ouellette's admission that he possessed the handgun and the cocaine at the same time on the charging date, the mere fact that he discarded the weapon before being caught does not negate the nexus between him and the weapon.

*Nexus between the weapon and crime*

Mr. Hufferd-Ouellette argues that the evidence was insufficient to establish the required nexus between the handgun and the possession of a small amount of cocaine. He argues that there is no substantial evidence that he was using the gun to protect the cocaine.

Here, our guidance from the Supreme Court has been divided and increasingly refined, making it important to heed the court's most recent decisions. In *Valdobinos*, decided before the nexus requirement was articulated, a unanimous court found that the trial court should not have instructed the jury on a deadly weapon charge based solely on evidence that officers searching the defendant's mobile home found an unloaded rifle under his bed in addition to 846 grams of cocaine.

In *Schelin*, officers executing a search warrant for the defendant's home found substantial evidence of a marijuana grow operation as well as a loaded revolver located 6 to 10 feet away from where the defendant was standing when police entered the home.

Mr. Schelin made no attempt to use the weapon against the officers. He was charged with possession of a controlled substance with intent to manufacture, possession with intent to deliver, and with deadly weapon enhancements on both counts. A four-member plurality held that while the defendant's right to bear arms in his home was constitutionally protected, "that right ceases when the purpose of bearing arms is to further the commission of a crime." 147 Wn.2d at 575. Justices in the plurality affirmed the conviction where "[t]he jury was entitled to infer that he was using the weapon to protect his basement marijuana grow operation." *Id.* at 574. The fifth vote to affirm was based on different reasoning, however; Chief Justice Alexander's concurring opinion expressed his view that the jury instruction was flawed because it provided no guidance on the nexus requirement. Nonetheless, because the jury instruction was not challenged on appeal, he too would affirm. *Id.* at 577 (Alexander, C.J., concurring).

The dissent found the evidence insufficient to establish the required nexus between the defendant and the crime, stating "merely establishing a firearm was present on premises where an ongoing crime was committed is insufficient as a matter of law to justify enhancing the sentence for the substantive crime." *Id.* at 586 (Sanders, J., dissenting). Two justices concurring in the dissent agreed that the evidence was insufficient under *Valdobinos* and progeny, observing that "[t]he question whether Schelin *could* have armed himself with the seized firearm is irrelevant" in light of the

absence of any evidence that he used it in any manner likely to produce death. *Id.* at 578 (Johnson, J., concurring in the dissent) (emphasis added).

In *State v. Easterlin*, 159 Wn.2d 203, 209, 149 P.3d 366 (2006), the Supreme Court accepted review in a case remarkably similar to this one, primarily to address the conclusion of the Court of Appeals that in an actual possession case, the protections of the nexus requirement become redundant. *State v. Easterlin*, 126 Wn. App. 170, 174, 107 P.3d 773 (2005). Mr. Easterlin was discovered sitting in his car, asleep and high, with a 9 mm pistol in his lap and a loaded 9 mm magazine on the seat next to him. 159 Wn.2d at 207. He admitted in connection with a plea bargain that he had simultaneous possession of a firearm and rock cocaine. The case is also similar in that Mr. Easterlin sought only to withdraw his plea to the firearms enhancement, not to withdraw his plea entirely, a remedy whose availability the court observed was "far from clear." *Id.* at 208 n.1. The court was not required to reach "these perplexities," however. *Id.*

A majority of the *Easterlin* court rejected the appellate court's conclusion that in cases of actual possession, the State is never required to establish nexus, although it granted that "in actual possession cases it will rarely be necessary to go beyond the commonly used 'readily accessible and easily available' instruction." *Id*. at 209. Examples it provided of when a defendant actually possessing a deadly weapon might nonetheless not be armed were where he or she possessed a ceremonial weapon, a prop, a

knife in a picnic basket, or a rifle carried in a farmer's gun rack, but it did not attempt to identify the defining characteristic of its examples. It concluded in Mr. Easterlin's case, that "[s]o long as the facts and circumstances support an inference of a connection between the weapon, the crime, and the defendant, sufficient evidence exists," and "[i]n this case that inference is clearly supportable." *Id.* at 210.

It was the Supreme Court's 2007 decision in *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007) that gave the trial court the greatest pause in resentencing Mr. Hufferd-Ouellette. In *Brown*, as characterized by the dissenters, the majority identified "a new condition to the nexus requirement, holding that [the required nexus] is not satisfied unless there is evidence that the defendant intended to or was willing to use the weapon in furtherance of the offense." *Id.* at 438 (Madsen, J., dissenting).

*Brown* involved a burglary during which the defendant took guns out of a closet, laid them on the bed, and then left the home without them. But the majority's stated reasoning for concluding that the defendant was not armed was not specific to the gun being loot of a burglary; it was more general. It reasoned that whether the defendant handled the gun during the crime "in a manner indicative of an intent or willingness to use it in furtherance of the crime" was a necessary part of the nexus analysis. Responding to a dissent argument that its concern with a defendant's intent or willingness to use the gun was unprecedented, the majority insisted that "the defendant's intent or

willingness to use [the deadly weapon] is a condition of the nexus requirement that does, in fact, appear in Washington cases," relying on *Schelin* and *State v. Eckenrode*, 159 Wn.2d 488, 150 P.3d 1116 (2007) and characterizing *Simonson*, as well, as explained by the reasonable inference that the defendant had a large number of loaded weapons for a reason: "'to defend the manufacturing site in case it was attacked.'" *Brown*, 162 Wn.2d at 434 & n.3 (quoting *Simonson*, 91 Wn. App. at 883). The Supreme Court's decision a year later in *State v. Neff*, 163 Wn.2d 453, 181 P.3d 819 (2008) similarly held, with respect to a continuing crime, that a nexus obtains if the weapon was "'there to be used,'" which it held is a fact-specific inquiry. 163 Wn.2d at 462 (quoting *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005)).

Here, Mr. Hufferd-Ouellette had the gun at the same time he had a small amount of cocaine in his pocket. He tossed the gun away after the armed robbery went bad. It is undisputed that he was criminally culpable in having and using the handgun; indeed, he was convicted of, and does not challenge, four charges related to his possession and use of the gun: he was convicted in Stevens County for first degree burglary, for stealing the gun; he pleaded guilty in the action below to both unlawful possession of a stolen firearm and unlawful possession of a firearm in the second degree; and he pleaded guilty below to a firearm enhancement for the armed robbery. He challenges only the fifth punishment sought by the State: the additional 18 months' confinement for being armed in connection

with his possession of cocaine.

Had Mr. Hufferd-Ouellette been tried, the trier of fact might well have heard fleshed-out evidence from which it could draw reasonable inferences. We have only Mr. Hufferd-Ouellette's bare admission that he had a small amount of cocaine and the gun at the same time, but also tossed the gun away while possessing and retaining the cocaine. "In determining whether a factual basis exists for a plea, the trial court need not be convinced beyond a reasonable doubt that the defendant is guilty." *State v. Saas*, 118 Wn.2d 37, 43, 820 P.2d 505 (1991). "Rather, a factual basis exists if there is sufficient evidence for a jury to conclude that the defendant is guilty." *Id*.

Under *Brown*, it is a condition of the nexus requirement that Mr. Hufferd-Ouellette's possession of the handgun was with the intent and willingness to use it to protect his possession of the half gram of cocaine. The State argues that Mr. Hufferd-Ouellette "used the weapon to prevent his apprehension because possessing cocaine would cause additional criminal punishment." Br. of Resp't at 6. But given the evidentiary standard as articulated in *Brown*, we question whether the admitted facts support that use of the gun, or whether it is speculation. It violates the Washington Constitution to draw an adverse inference from a defendant's mere possession of a weapon. *State v. Rupe*, 101 Wn.2d 664, 707, 683 P.2d 571 (1984).

We addressed this sufficiency of the evidence issue first because it was the issue

briefed by the parties. But we find we can more clearly resolve this case by addressing the second basis for the trial court's decision and the issue the Supreme Court did not reach in *Easterlin*: whether a defendant who is not seeking to withdraw a plea in its entirety can challenge whether there was a sufficient basis for his plea to the deadly weapon enhancement. Mr. Hufferd-Ouellette's request that we reverse the trial court presents both of the bases for the trial court's decision for review.

II

The second basis for the trial court's decision to impose the firearm enhancement in resentencing Mr. Hufferd-Ouellette was the fact that he had not moved to withdraw the plea, an argument the court recognized was also raised in *Easterlin*. RP at 38.

We begin our review of this issue with *State v. Turley*, 149 Wn.2d 395, 400, 69 P.3d 338 (2003), noted by the Supreme Court in touching on this issue in *Easterlin*;[3] *Turley* holds that a plea agreement is a package deal, and generally a defendant is not entitled to change only one part of that bargain. In *Turley*, the defendant had pleaded guilty to two counts and sentenced to concurrent terms without community placement, only to have the State move to amend the judgment and sentence upon discovering that community placement was mandatory for one of the charges. The trial court refused to allow the defendant to withdraw his entire plea; on appeal, it was the State that contended

[3] 159 Wn.2d at 208 n.1.

that a plea could be partially rescinded and that the trial court properly limited the defendant to withdrawing only the plea that the State recognized as a problem. The Supreme Court disagreed, holding that "a trial court must treat a plea agreement as indivisible when pleas to multiple counts or charges were made at the same time, described in one document, and accepted in a single proceeding." *Id.*

After *Turley*, the Supreme Court decided *State v. Bisson*, 156 Wn.2d 507, 518-20, 130 P.3d 820 (2006), in which the Court of Appeals had allowed a defendant to partially withdraw his plea based on involuntariness; in *Bisson*, it was the defendant's misunderstanding of the consequences of his plea that rendered it involuntary for purposes of CrR 4.2(f). Again the Supreme Court reversed, holding:

> In light of the bright-line rule stated in *Turley*, we hold that, if Bisson initially elects the remedy of withdrawal of the plea agreement, the remedy is restricted to the withdrawal of the plea in its entirety. Under *Turley*, Bisson's plea agreement can be regarded as "indivisible"—"a 'package deal'"—since the pleas to the eight counts and the five weapon enhancements were made contemporaneously, set forth in the same document, and accepted in one proceeding.

*Id.* at 519. The court noted that a decision of Division One of the Court of Appeals in *State v. Zumwalt*, 79 Wn. App. 124, 901 P.2d 319 (1995) had allowed a defendant to enter a new plea based on the factual inadequacy to support a deadly weapon enhancement under CrR 4.2(d) while at the same time it let stand the plea to the underlying charge. To the extent inconsistent with *Turley*, the court disapproved

*Zumwalt*. *Id.* at 520 n.5.

Mr. Hufferd-Ouellette's pleas to the four counts, with two firearm enhancements charged in the information and set forth in his statement on plea of guilty, were set forth in the same document and accepted in one proceeding. As such, we regard the agreement as indivisible. Since Mr. Hufferd-Ouellette was not seeking to withdraw his entire plea, the trial court's alternative basis for imposing the firearm enhancement on the possession count—that he was no longer seeking to withdraw his plea agreement—was a sufficient one.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Sweeney, J.

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Brown, J.