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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN MATIAS TORRES, Defendant and Appellant.	H032441 (Santa Clara County Super. Ct. Nos. CC591335, CC629776)

Appellant pleaded no contest to all charges in two separate informations, one related to an assault on a peace officer with a deadly weapon and one related to a stabbing of two people in downtown San Jose. Appellant also admitted the enhancing allegations in both informations. The trial court sentenced appellant to a total state prison term of 36 years, eight months, with a consecutive term of 25-years-to-life. Appellant contends that two of the serious prior felony conviction enhancements imposed pursuant to Penal Code section 667, subdivision (a), must be stricken and that the trial court erred in imposing certain fines. We modify the judgments and affirm.

Case No. CC591335/ Assault on an Officer

On May 6, 2005, a San Jose police officer pulled up next to appellant in his vehicle and noticed "exceptionally loud music." Although appellant turned the music down, the officer stopped appellant's vehicle. When the officer walked up to appellant's

vehicle, it sped away. The officer followed, saw the vehicle parked erratically, and saw appellant walking away at a "hurried pace." The officer followed appellant and ultimately apprehended him after appellant took a combative stance and was tasered and hit with the officer's baton. Appellant threw something at the officer who had to duck, and the officer later determined that it was a curved knife. Appellant's blood alcohol level, an hour and a half later, was .06.

As a result of these events appellant was charged with three felonies and five misdemeanors. The felonies charged were assault on a peace officer (Pen. Code, § 245, subd. (c)), exhibition of a deadly weapon at a peace officer (Pen. Code, § 417.8), and carrying a concealed dirk or dagger (Pen. Code, § 12020, subd. (a)(4)). The misdemeanors were flight from an officer (Veh. Code, § 2000.1, subd. (a)); driving under the influence (Veh. Code, § 23152, subd. (a)), driving with a blood alcohol level of .08 or more, (Veh. Code, § 23152, subd. (b)), delaying a peace officer (Pen. Code, § 148, subd. (a)(1)), and resisting a peace officer by threat (Pen. Code, § 69). The information also contained enhancing allegations including that appellant had suffered two prior prison term convictions (Pen. Code, § 667.5, subd. (b)), two prior serious felony convictions (Pen. Code, § 667, subd. (a)) and two prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). The prior serious felony convictions that were alleged to have been "brought and tried separately" were brandishing a firearm at a peace officer (Pen. Code, § 417.8) in Santa Clara County Superior Court docket no. EE117692 and accessory in furtherance of gang activity (Pen. Code, § 32/186.22, subd. (b)(1)) in Santa Clara County Superior Court docket no. EE117692.

Case No. CC629776/Downtown Stabbing

In the early morning hours of May 14, 2006, appellant was in downtown San Jose when he became involved in an altercation after someone made an apparently offensive comment about gloves that the man who was with appellant was wearing. Appellant stabbed a woman once in the abdomen and stabbed a man seven times in his upper body.

Appellant fled when police officers attempted to apprehend him and was struck three times with an officer's baton before he stopped running. As a result of this incident, appellant was charged with two counts of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)) and one count of resisting arrest (Pen. Code, § 148). The information also alleged enhancing allegations including two prior serious felony convictions (Pen. Code, § 667, subd. (a)(1)). The prior serious felony convictions alleged to have been brought and tried separately were brandishing a firearm at a peace officer (Pen. Code § 417.8) in Santa Clara County Superior Court docket no. EE117692 and brandishing a firearm at a peace officer (Pen. Code, § 417.8) in Santa Clara County Superior Court docket no. EE117692.

Trial Court Proceedings

On April 25, 2007, as to both informations, appellant pleaded no contest to all of the charges and admitted all of the enhancing allegations. As for the serious felonies conviction allegations in the assault on an officer case, the trial court asked appellant if he admitted "the five year prior under 667 of the Penal Code one for the personal use or brandishing a firearm at an officer?" Appellant answered, "Yes." The court said, "and you admit that another serious felony of 667A for accessory and furtherance of gang activity?" Appellant answered, "Yes." In the stabbing case, the court asked appellant as to his brandishing a firearm at a peace officer prior conviction, "And you admit the five years serious felony prior on that same offense under 667A?" Appellant answered, "Yes." The trial court also asked appellant if he "admit[ted] the second prior to accessory in furtherance of gang activity? . . . And for that same offense five year prior under 667A of the Penal Code, you admit that?" Appellant answered, "Yes."

The trial court further advised appellant, "at the time of sentencing we will have you . . . complete a statement of assets, pay a $10 fine, actual restitution to the victims; a restitution fund fine of not less than $200 no more than $10,000 and an equal amount imposed but suspended. General funds fine not to exceed ten thousand."

Appellant's case was set for a motion to dismiss prior strike convictions pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. Under consideration were the brandishing a firearm at a peace officer conviction and the accessory in furtherance of gang activity conviction. In support of this motion, defense counsel argued that appellant's "strike priors were committed only six days apart. Although the cases were plead separately, they were sentenced at the same time." The prosecutor's opposition to this motion acknowledged, "The defendant's strike priors were originally charged in separate docket[s], but were consolidated for purposes of trial." At the hearing on the motion, defense counsel told the court that the two prior convictions had been consolidated for sentencing and the prosecutor corrected him and stated that they were "consolidated for trial." The probation report included appellant's arrest history which showed that both prior convictions are listed under one District Attorney case no. 010409242.

On December 18, 2007, the trial court granted appellant's motion to dismiss one prior strike conviction alleged in one count of case no. CC629776 **(**the stabbing case) and one prior strike conviction as to each of three counts in case no. CC591335 (the assault on an officer). The court said it was "going to base that on the family support the defendant has, his age, the fact that he had stable employment and some prospects." The court denied the motion to dismiss as to one of the prior strike convictions in. case no. CC629776.

In case no. CC629776 (the stabbing) the trial court imposed a total state prison term of 25-years-to-life consecutive to a 24-year term. This included two consecutive five-year terms for the prior serious felony allegations imposed pursuant to Penal Code section 667, subdivision (a). In case no. CC591335 (the assault on an officer), the court imposed a total term of 12 years, eight months, including two consecutive five-year terms for the prior serious felony allegations imposed pursuant to Penal Code section 667, subdivision (a).

The court said, "Two hundred dollar restitution fund fine with an equal amount imposed but suspended." The court then asked, "Actually, did we do the restitution fund right?" The probation officer said, "It would be the maximum amount." The court said that on case no. CC629776 **(**the stabbing), "it's 10,000 with an equal amount imposed but suspended rather than 200." The court then said that on case no. CC591335 (the assault on an officer), "it's the same . . . except that on twelve [years], eight [months] the restitution fund fine would be—" The probation officer interjected, "4,800." The court said, "4,800 with an equal amount imposed but suspended." Thus, pursuant to Penal Code sections 1202.4 and 1202.45, the court imposed restitution fines and suspended parole fines totaling $14,800.

Penal Code Section 667, Subdivision (a)

Appellant contends, "The court's imposition of two of the five-year enhancements imposed pursuant to Penal Code section 667, subdivision (a), was error because the prior felonies upon which the enhancements were based had not been brought and tried separately."

Respondent, citing *People v. Wrice* (1995) 38 Cal.App.4th 767, contends that "Appellant has forfeited his claim because defense counsel did not object to imposition of the serious felony prior enhancements." Respondent asserts that, because of the lack of an objection, "the parties and this Court are relegated to divining facts from an incomplete record and making determinations based on inferences therefrom."

Wrice said that the advisement of the penal consequences of admitting a prior conviction is a judicially declared rule of criminal procedure and thus any claim of error in failing to advise a defendant of the penal consequences of an admission is forfeited if not raised at sentencing. (*Wrice, supra,* 38 Cal.App.4th at pp. 770-771.) Appellant does not claim that there was error in the advisements about the consequences of admitting his prior convictions. Rather, appellant's contention is that his sentence was unauthorized.

This is a claim we may review in the absence of an objection. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

Penal Code section 667, subdivision (a) provides in pertinent part that "any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." In *In re Harris* (1989) 49 Cal.3d 131, the California Supreme Court ruled that "the requirement in section 667 that the predicate charges must have been 'brought and tried separately' demands that the underlying proceedings must have been formally distinct, from filing to adjudication of guilt." (*Id.* at p. 136.)

Here, the record shows that both defense counsel and the prosecutor recognized that the prior convictions were charged separately but consolidated for trial. Furthermore, the arrest report history shows one district attorney case number and one court case number for both convictions. Respondent acknowledges, "Crediting appellant's inferences from the record that the convictions were not brought and tried separately because the convictions were consolidated for trial, respondent agrees that two of the four five-year enhancements, pursuant to Penal Code section 667, subdivision (a)(1), should be stricken." We agree with respondent that "the trial court erred by implicitly finding two separate and distinct prior serious felony convictions in each case, and, therefore, only one of the prior serious felony allegations may remain. Accordingly, one five-year enhancement should be stricken in each of appellant's cases and his sentence reduced by 10 years."

Fines

At the time appellant entered his unconditional plea to two informations at one hearing, the trial court advised him that one consequence could be "a restitution fund fine of not less than $200 no more than $10,000 and an equal amount imposed but

suspended." The probation department prepared one report and, at the one sentencing hearing, the trial court, pursuant to Penal Code sections 1202.4 and 1202.45, imposed a restitution fund fine of $10,000 with an equal amount imposed but suspended in case no. CC629776 **(**the stabbing), and on case no. CC591335 (the assault on an officer), a restitution fund fine of $4,800 with an equal amount imposed but suspended. Appellant contends, "The trial court was without authority to impose restitution and parole revocation fines in excess of $10,000."

Respondent argues that appellant had forfeited his claim to "an otherwise authorized sentence" because he "was adequately informed of the consequences of his plea – including the restitution fund fines and suspended parole revocation fines – and his sentence was in conformity with his unconditional plea." However, the actual fines imposed exceeded what the trial court had advised appellant of at the time of appellant's plea. Although appellant did not object to the imposition of the fines in excess of $10,000, he did not forfeit his right to challenge them as unauthorized.[1] (*People v. Smith* (2001) 24 Cal.4th 849, 851-852.)

Penal Code section 1202.4, subdivision (a)(3)(A) provides that, in addition to any other penalty provided or imposed under law, the court shall order a person convicted of a crime to pay a restitution fine in accordance with Penal Code section 1202.4, subdivision (b). Penal Code section 1202.4, subdivision (b) provides, "In every *case* where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (Italics added.)

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[1] Although one need not object to an unauthorized sentence to challenge it on appeal, it is settled that when a defendant has pleaded guilty in return for a specified sentence, he or she may not challenge that sentence on appeal, even if it might otherwise be statutorily unauthorized, as long as the trial court had fundamental jurisdiction. (*People v. Hester* (2000) 22 Cal.4th 290, 295.) Here, appellant pleaded no contest with no conditions.

In *People v. McNeely* (1994) 28 Cal.App.4th 739 (*McNeely*), the court addressed a claim similar to appellant's claim here. There, at separate hearings, the defendant pleaded guilty to eight burglaries charged in one information and two burglaries charged in another. At the next hearing, the court imposed sentence on all charges and also ordered the defendant to pay $93,000 in restitution to the various victims under former Government Code section 13967, subdivision (c), which applied at that time.[2] On appeal, the defendant claimed that restitution was limited to $10,000. (*Id*. at pp. 742-744.) The reviewing court agreed. It explained that the statute "did not give the court authority to order restitution up to $10,000 for each victim or on each count. *Nor did it allow a restitution order exceeding $10,000 where, as here, a defendant is sentenced in one hearing on two or more cases*." (*Id*. at p. 743, italics added.) Noting cases limiting restitution fines to $10,000 limit regardless of the number of victims or counts, the court observed that "[w]hile a trial court can separately sentence a defendant on different cases at a single hearing [citation], here the court combined the charges in both cases in imposing the prison term and ordering restitution. We do not believe this creates separate sentencing proceedings on the two cases. When a penal statute is ambiguous, it must be construed in the light most favorable to the defendant. [Citation.] When section 13967 is construed in this light, a restitution order on a crime committed in 1989 is limited to $10,000." (*Id*. at pp. 743-744.)[3]

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[2] The applicable version of former Government Code section 13967, subdivision (c) provided, in pertinent part, "In cases in which a victim has suffered economic loss as a result of the defendant's criminal conduct, and the defendant is denied probation, in lieu of imposing all or a portion of the restitution fine, the court shall order restitution to be paid to the victim. Notwithstanding subdivision (a), *restitution shall be imposed in the amount of the losses, but not to exceed ten thousand dollars ($10,000)."* (Stats.1988, ch. 975, § 1, pp. 3151-3152; italics added.)

[3] It has long been judicial policy in California to give the defendant " 'the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute.' " (*People v. Ralph* (1944) 24 Cal.2d 575, 581, quoting from *Ex parte Rosenheim* (1890) 83 Cal. 388,

In *People v. Ferris* (2000) 82 Cal.App.4th 1272 (*Ferris*), the court addressed a similar claim concerning restitution fines under sections 1202.4 and 1202.45. As in *McNeely*, the defendant was charged in two cases with crimes committed on different occasions. After the defendant pleaded not guilty, the prosecutor moved to join the cases for trial under section 954. The court granted the motion but did not formally consolidate the two cases under a single information and case number. Thereafter, the jury returned separate verdicts of guilt in each case, and separate probation reports were prepared. At sentencing, the court imposed $10,000 restitution and matching parole revocation fines in each case. On appeal, the defendant claimed that the imposition of separate fines totaling more than $10,000 was unauthorized because the two cases had been consolidated, and sections 1202.4 and 1202.45 limited fines to $10,000 "[i]n every case" where a person is convicted of a felony and the sentence includes a period of parole. (*Id*. at pp. 1274-1276.) To resolve the defendant's claim, the court construed the meaning of the phrase "in every case."[4]

391; accord, *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312; see *United States v. Bass* (1971) 404 U.S. 336, 347 [92 S.Ct. 515] [" '[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity' "].) Thus, " '[w]hen language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute.' " (*People v. Snyder* (2000) 22 Cal.4th 304, 314, quoting *People v. Overstreet* (1986) 42 Cal.3d 891, 896.)

[4] The phrase "in every case" was apparently taken from the 1982 voter initiative called the Victim's Bill of Rights. The initiative added article I, section 28, subdivision (b) to the California Constitution, which established the right of crime victims to receive restitution directly from the persons convicted of the crimes for losses they suffer. (Cal. Const., art. I, § 28, subd. (b).) The new provision stated, "It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer. [¶] Restitution shall be ordered from the convicted persons *in every case*, regardless of the sentence or disposition imposed, in which a crime victim

Observing that "joinder" and "consolidation" are terms often used interchangeably, the court first opined that under the facts of the case, any linguistic distinction was irrelevant because clearly, the defendant was "substantively tried and sentenced in one joint case." (*Ferris, supra*, 82 Cal.App.4th at p. 1277.) Finding the case similar to *McNeely*, the court noted that sections 1202.4 and 1202.45 "do not specify whether the phrase 'every case' means every separately charged and numbered case or every jointly tried case." (*Ferris, supra*, 82 Cal.App.4th at p. 1277.) Given this ambiguity, the court adopted the construction more favorable to the defendant and concluded that the phrase in " 'every case' " "includes a jointly tried case although it involves charges in separately filed informations." (*Ibid*.) The court noted that the charges had been joined for trial, which "effectively" joined the two cases despite the fact that they retained separate case numbers. Accordingly, the court held that it was error to impose restitution exceeding the statutory maximum of $10,000. (*Ibid*.) The court further observed that allowing separate restitution fines in a case involving separate informations but joint trials and sentencing could lead prosecutors to seek numerous fines by filing multiple informations that allege a single offense. The court declined to condone such an exercise of form over substance. (*Id*. at p. 1278 & fn. 10.)

In *People v. Enos* (2005) 128 Cal.App.4th 1046 (*Enos*), at a single hearing, the defendant entered into a negotiated disposition and pleaded guilty to charges alleged in three separate cases. The trial court imposed separate restitution and parole revocation fines in each case, totaling $1,800. Citing *Ferris*, the defendant claimed that the imposition of three separate restitution fines was unauthorized because the three separate cases were resolved in a comprehensive plea agreement at a single sentencing hearing. The court disagreed, finding *Ferris* inapplicable for two reasons. (*Id*. at pp. 1048-1049.)

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suffers a loss, unless compelling and extraordinary reasons exist to the contrary." (*Ibid.*, italics added.)

"First, the facts are different. Here, there was never a motion to join or consolidate the three cases, and, even though there was a combined sentencing hearing, the cases were not tried together, as they were in *Ferris.* Here, throughout the proceedings, the trial court and the parties treated the cases as separate. In addition, three separate appellate records were prepared, each corresponding to its own number. Separate minute orders and separate notices of appeal were filed in each case." (*Enos, supra*, 128 Cal.App.4th at p. 1049.)

"Second, we think the *Ferris* court's primary concern was not with the trial court's imposition of more than one section 1202.4, subdivision (b) restitution fine and more than one suspended section 1202.45 parole revocation fine but rather with the resulting total of the fines that exceeded the $10,000 statutory limit. [Citation.] The court cited its earlier decision in [*McNeely*] where it held that a restitution order cannot exceed $10,000 if the defendant is sentenced in multiple cases at a single hearing. [Citation.] Thus, in our view *Ferris* stands for the proposition that a trial court cannot impose multiple section 1202.4, subdivision (b) restitution fines and multiple section 1202.45 parole revocation fines in nonconsolidated cases where the total fines exceed the statutory maximum; the opinion does not address the question whether separate fines are proper where the total does not exceed the statutory maximum. [Citation.]" (*Enos, supra*, 128 Cal.App.4th at p. 1049.)

Last, the court opined that nothing in the statutes prohibits multiple fines "in consolidated cases disposed of at a single sentencing hearing. To read these statutes as precluding separate fines *that do not exceed the statutory maximum* would result in a rule of law with no practical effect, because a defendant could never show prejudice. A trial court sentencing a defendant in consolidated cases would simply calculate the amount of the restitution fines as a whole instead of breaking them down separately for each case. This is in essence exactly what the trial court did here; it expressed an intention to impose a *total fine* of $1,000, and then allocated that fine among the three cases so that the

statutory minimum fine was imposed in each. Because the total fine would be the same, whether imposed in the aggregate or portioned and separately imposed in each case, there cannot be any prejudice to appellant." (*Enos, supra*, 128 Cal.App.4th at pp. 1049-1050, fn. omitted, former italics added.)

In *People v. Schoeb* (2005) 132 Cal.App.4th 861 (*Schoeb*), the defendant entered a negotiated settlement to five separate cases, pleading guilty to nine charges in exchange for dismissal of the others. At a single sentencing hearing, the court imposed five separate restitution fines, totaling $2,600. (*Id*. at p. 863.) On appeal, the court upheld the separate fines. It distinguished *Ferris*, noting that the defendant's cases were never consolidated for trial and that there were separate abstracts and minute orders in each case. Moreover, applying *Enos*, the court found no error because the total amount of restitution did not exceed $10,000. (*Id*. at p. 865.)

This case, like *Enos* and *Schoeb*, is distinguishable from *Ferris* because appellant's two cases were not jointly tried. However, this distinction does not necessarily mean that appellant's fines were authorized. The phrase "in every case" is no less ambiguous here than it was under the circumstances in *Ferris*. In *Ferris*, the court's interpretation of the phrase "in every case" was not controlled by the fact that the cases were not formally consolidated, they retained separate numbers, and various administrative procedural details reflected the separate status of the cases—e.g., separate jury verdicts and probation reports in each case. Rather, focusing on substance rather than form, the court viewed the phrase in a practical rather than technical way and considered it reasonably susceptible of an interpretation based on *how* the numerous charges in multiple cases were resolved. Implicitly, the court reasoned that a single trial on all the charges would be the same regardless of whether the charges were alleged in one case or multiple cases. In effect, therefore, the unified resolution of the charges consolidated the three technically separate cases into one for the purpose of restitution under sections 1202.4 and 1202.45.

Here, we do not consider the fact that appellant's two cases were not formally consolidated under a single information or jointly tried controlling on the meaning of the phrase "in every case." Moreover, the resolution of the two cases through an unconditional no contest plea at a single hearing is functionally identical to the resolution of multiple cases in a joint trial, and in each instance the resolution would have been the same regardless of whether the charges had been alleged in one case or multiple cases. Thus, we find no material basis to distinguish this case from *Ferris*. Moreover, we cannot conceive a policy reason why a defendant who foregoes trial and resolves two cases at once should be subject to restitution fines exceeding $10,000 when a defendant whose multiple cases are joined for trial is not. In our view, the unified resolution of all charges through an unconditional no contest plea to both informations at a single hearing effectively consolidated appellant's cases into one case for purposes of restitution just as a joint trial does.

Under the circumstances, we hold that the phrase "in every case" may reasonably be construed to include two cases that are fully and completely resolved at the same time through an unconditional no contest plea.

As noted, in construing ambiguous restitution statutes, the courts in *McNeely* and *Ferris* adopted the construction more favorable to the defendant. Here, even if we assume that the phrase "in every case" reasonably may be interpreted to limit restitution fines to $10,000 *only* where there is one accusatory pleading and case number or where multiple cases are jointly tried, we shall adopt the interpretation more favorable to appellant. Thus, we hold that sections 1202.4 and 1202.45 limit fines to $10,000 not only where there is one case number or where multiple cases jointly tried but also where the charges in two cases are fully and completely resolved at the same time through an unconditional no contest plea.

Finally, we note that in *Enos,* the court read *Ferris* to mean that "a trial court cannot impose multiple section 1202.4, subdivision (b) restitution fines and multiple

section 1202.45 parole revocation fines in *nonconsolidated* cases where the total fines exceed the statutory maximum . . . ." (*Enos, supra*, 128 Cal.App.4th at p. 1049, italics added.) Thus, even under the *Enos* court's view of *Ferris*, the imposition here of two fines totaling $14,800 would be unauthorized.

We conclude that at sentencing, sections 1202.4 and 1202.45 permitted the imposition of restitution and parole revocation fines up to $10,000. Thus, the imposition of restitution fines and parole revocation fines totaling $14,800 was unauthorized.

Disposition

In Santa Clara County Superior Court case no. CC591335, the trial court is directed to modify the abstract of judgment by striking one of the five-year Penal Code section 667, subdivision (a), enhancements, thus reducing the term to seven years, eight months. In Santa Clara County Superior Court case no. CC629776 the trial court is directed to modify the abstract of judgment by striking one of the five-year Penal Code section 667, subdivision (a), enhancements, thus reducing the determinate part of the term imposed to 19 years. The trial court is directed to modify the judgments to reflect a total restitution fine of $10,000 and total suspended parole revocation fine of $10,000.

The superior court shall forward the amended abstracts of judgment to the Department of Corrections and Rehabilitation. As modified, the judgments are affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.