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State v. Fry Respondent's Brief Dckt. 43812

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43812
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR-2014-1275
)	
JENNIFER ANN FRY,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Fry failed to establish that the district court abused its discretion by imposing an underlying unified sentence of 14 years, with two and one-half years fixed, upon the jury's verdict finding her guilty of grand theft?

Fry Has Failed To Establish That The District Court Abused Its Sentencing Discretion

A jury found Fry guilty of grand theft (in violation of I.C. § 18-2407(1)(b)(1)) and the district court imposed a unified sentence of 14 years, with two and one-half years fixed, suspended the sentence, and placed Fry on supervised probation for 14 years. (R.,

pp.54-56, 190-96.) Fry filed a notice of appeal timely from the judgment of conviction. (R., pp.200-02.)

Fry asserts her underlying sentence is excessive in light of her status as a first-time felon, health concerns, depression, employment as a bookkeeper, and support from family and friends. (Appellant's brief, pp.3-5.) The record supports the sentence imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The maximum prison sentence for grand theft in violation of I.C. § 18-2407(1)(b)(1) is 14 years. I.C. § 18-2408(2)(a). The district court imposed an underlying unified sentence of 14 years, with two and one-half years fixed, which falls well within the statutory guidelines. (R., pp.190-96.) At sentencing, the district court articulated the

correct legal standards applicable to its decision and also set forth in detail its reasons for imposing Fry's sentence. (Tr., p.601, L.19–p.616, L.1.) The state submits that Fry has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm Fry's conviction and sentence.

DATED this 17th day of August, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of August, 2016, served a true and correct copy of the attached RESPONDENTS BRIEF by emailing an electronic copy to:

ELIZABETH ANN ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

1 So, again, I would ask you to grant her a
 2 withheld judgment, I would the leave the period of
 3 probation up to you, that would give you the ability to
 4 give her the full amount of time should she come back
 5 her for a probation violation, I would ask you not to
 6 incarcerate her today but fashion a sentence that at
 7 least envisions if she has to serve time she can keep
 8 her employment. The employers are well aware of what is
 9 going on here, they have made their own judgments and
 10 decided they are going to continue to keep her employed.
 11 And frankly we need employers who are willing to employ
 12 felons or else we are going to have a hugely
 13 disenfranchised population. Thank you, Judge.

14 THE COURT: Thank you.

15 MS. AKAMATSU: Can I respond to the court's
 16 question about ordering restitution. I would just point
 17 out that she owes \$150,000 in bills right now, so I'm not
 18 aware of Judge Copsey's cases where she's ordered, I know
 19 she's ordered people to stop smoking, so that stuff is
 20 available, but in the situation that we have here, we
 21 have a person that is largely in debt already, and I know
 22 criminal restitution cannot be discharged in bankruptcy,
 23 but from my perspective, basically he's asking the court
 24 to be the probation officer in this case and in a pretty
 25 futile situation. I would point out the fact that she

1 made no effort to take care of this before this hearing
 2 today. She didn't sell the motorcycles, she didn't do
 3 all of these things to get ready herself to show up with
 4 a substantial portion of restitution. So we would oppose
 5 that. Thank you.

6 THE COURT: Ms. Fry, do you wish to make a
 7 statement to the court prior to sentencing?

8 THE DEFENDANT: I'm sorry? I didn't hear you.

9 THE COURT: Would you like to make a statement
 10 to the court prior to sentencing?

11 THE DEFENDANT: Yes. I would.

12 I'm more than willing to do whatever I
 13 have to do on probation or what have you, whatever you
 14 decide. I have made steps to decrease our outflow of
 15 cash, because obviously with courts and fines and
 16 everything of that sort, I had to sell the horses and
 17 sell everything that -- sorry -- pretty much everything
 18 that mattered to my daughter. So that was hard.

19 The motorcycles are gone. We can't sell
 20 them, they have to go back to the bank. We're getting
 21 rid of our truck because we can't afford that. So the
 22 possibility of me paying restitution is very high, and I
 23 would do what I need to do, of course, to stay with my
 24 family.

25 I have a 14 year old that relies on me

1 greatly. It's not an option for her to go live with her
 2 dad. Actually, it's been expressed by her she will not
 3 go live with her dad because of his abuse. So I'm
 4 pretty much her only parent. And the repercussions it
 5 would have on my daughter would be detrimental, I feel,
 6 to her. It's a very hard time of her life at 14, 15, a
 7 very important time of her life, obviously, but --
 8 sorry, we're very close so it's very hard.

9 I've made every attempt to cooperate with
 10 the court, to be here when I'm supposed to be here, even
 11 through cancer, even through breaking arms, whatever.
 12 I'm not supposed to roller-skate anymore. I've done
 13 nothing but cooperate and do my best to follow the law.
 14 I've always felt that it's good to be a good example to
 15 my children. And so -- I'm getting emotional, sorry.

16 I do ask if you decide on jail that I am
 17 able to do work release so that I can maintain my job
 18 and maintain my household for my daughter, my other kids
 19 that are there. Losing my job isn't going to help
 20 anything. So I guess, like I said, I'll do whatever I
 21 need to do as far as probation and paying restitution.
 22 Whether I feel it's fair or not, you know, I'll still
 23 follow the rules and do what I need to do to take care
 24 of that.

25 We are trying to get financially under

1 control. Right now we are in the middle of paying a
 2 civil attorney because of the civil suit that has been
 3 charged on us, so that's been a huge drain for us
 4 financially as well. We also had to get an attorney for
 5 Patrick's daughter so we can get her at the house
 6 full-time and away from her poor environment with her
 7 mother and so we can get her a stable environment, more
 8 stable environment than she had before.

9 So we have had a lot of financial drain on
 10 us lately it's caused. Hopefully we can come out of
 11 that. I don't have a problem, like I said, paying
 12 restitution, whatever amount that you set forth, what I
 13 can afford or not afford, you know, whether it's \$300,
 14 \$500 a month, I mean I'll do what I can. If I need to
 15 get a second job, I'll get a second job. It takes me
 16 away from my family more, but I'll do what I need to do.
 17 So I don't real know what else to say.

18 THE COURT: Okay. Thank you.

19 All right. Ms. Fry, on the jury's finding
 20 that you are guilty of the crime of grand theft, I find
 21 you guilty. In an exercise of my discretion in
 22 sentencing, I have considered the Toohill factors,
 23 including the nature of the offense and the character of
 24 the offender, the information in mitigation and in
 25 aggravation.

1 In fashioning a sentence, I do so mindful
2 of the objectives of protecting society, achieving
3 deterrence, the potential for rehabilitation and the
4 need for retribution or punishment.

5 I have considered the PSI materials, I've
6 considered the recommendations and arguments of counsel,
7 I've considered the statement of the defendant today,
8 I've considered Dr. Murphy's statement today as well.

9 I wish I had some Solomon-like wisdom that
10 would take care of all the problems that I see here in
11 this case. Unfortunately, I'm not sure that's exists
12 and if it does, I certainly don't have it.

13 The defendant comes before the court with
14 appreciably no criminal record. However, the defendant
15 engaged in a course of criminal conduct spanning over
16 multiple months over a year of blatant theft from the
17 person who placed trust in her, her employer, in a small
18 business, a business that it appears to the court, at
19 least, was generous with its employees in terms of loans
20 and helping out with personal situations of employees,
21 to have that trust completely disregarded.

22 The evidence, in my view, at trial frankly
23 was overwhelming that the defendant committed this
24 crime. I think the state is right these crimes because,
25 as in most embezzlement cases, it wasn't a single theft,

1 it was a course of conduct that was planned, that was
2 committed, and then was as part of that plan covered up.

3 The checks, I think, speak volumes. The
4 writing a check to herself and yet then forging the
5 duplicate to lead Dr. Murphy, and others that may look
6 at those, to believe that they were written for
7 legitimate business sources or business expenses. It
8 was clearly an act designed to cover up the crime.

9 I think it is also aggravating that there
10 appears to have been no sort of compelling need to --
11 not that there's ever a justifiable need to steal -- but
12 no compelling need that put the defendant at sort of a
13 Catch-22 decision-making. It appears to be that it was
14 simply the desire to live a lifestyle beyond the means
15 to which she was able to otherwise legitimately earn an
16 income. And much of that may have been driven to give
17 her daughter a childhood that she felt her daughter
18 deserved. And I can appreciate that, that's certainly
19 any parent's desire, but the lesson that you are giving
20 your daughter when you do that, the hurt that you are
21 inflicting when you daughter has to come to a sentencing
22 hearing of her mother, I suspect she would trade all the
23 time with her horse and all the ability to ride her
24 horse and all the other things you tried to provide to
25 her to not have to be here today, to not have to see her

1 mother in this position, to have avoided this. It was
2 selfish, it was inexcusable.

3 I'm concerned, and recognize and I
4 absolutely wholeheartedly would be the first to stand up
5 and defend the right of any defendant to go to trial on
6 a case and make the state prove their case, that's what
7 our system of justice is built upon, that is the
8 foundation of our justice system that the state may not
9 take the liberty of a person without proving beyond a
10 reasonable doubt to the satisfaction unanimously of the
11 jury that the crime was committed and all elements of
12 the crime were committed. That's always the state's
13 obligation no matter how damning the evidence, and the
14 defendant has he every right to put the state to that
15 burden. But that inevitably places the defendant in the
16 position where the defendant is today where it makes it
17 difficult to accept responsibility. It puts the court
18 in the position where I am today where I hear from the
19 defendant literally almost no empathy for the loss
20 occasioned to Dr. Murphy for the time and expense and
21 the problems and losses that he has occasion and his
22 office has occasioned, and think what you will about
23 Dr. Murphy's business acumen or lack thereof, or even
24 what you think about him as a person, no person should
25 have to have their property, their livelihood stolen

1 from them, particularly by someone who they entrust and
2 pay to help protect them.

3 I don't know if the defendant has -- the
4 state talks about the likelihood of committing this
5 crime again in the future. I don't know whether the
6 defendant will ever be motivated to act this way again.
7 The lack of responsibility gives me some concern.

8 Frankly, it's not uncommon that we see
9 this type of behavior repeatedly from embezzlers, in
10 part because it's rooted from unfortunately a belief
11 system, criminal thinking that somehow they are
12 entitled, that why shouldn't they be entitled to this
13 money and it becomes embedded in this sort of repeated
14 justification of the actions: Well, he would loan me
15 the money anyway. Well, he won't miss it, I'll pay it
16 back. Well, I work harder than this and he doesn't pay
17 me enough. Well, he is wasting his money anyway.
18 Whatever the justification, there always seems to be a
19 justification that is advanced in one's mind to
20 wrongfully think that this is okay.

21 I hope that you can see that at some
22 point, and I hope that you can come to realize that what
23 you did was wrong and is not justifiable, not just
24 because that you are going to be punished as a result
25 and that you have been punished for what you have been

1 through throughout the course of this case. Frankly, I
2 suspect there's little that I could do to you that would
3 be likely more hurtful than -- at least that I could
4 imagine -- having one's child have to watch their parent
5 be sentenced. That seems to me to be about as great as
6 it gets in terms of punishment that pulls at one's soul.

7 So then the question is what do I do with
8 you, Ms. Fry. It would certainly be easy to simply send
9 you to prison and in a sense to accept the state's
10 argument that, well, restitution is not going to be paid
11 anyway, that this crime is, though not a repeated crime
12 in that there's no prior criminal record, but that it is
13 significant enough, given the impact and given the
14 number of acts that were engaged in that culminated in
15 this single conviction, to justify a period of
16 incarceration in the penitentiary. And I understand
17 that argument.

18 I note that the defendant's LSI is low. I
19 should address that, probably. I think that that is not
20 atypical in embezzlement cases because people who
21 embezzle start with a position, first of all, where they
22 are employed to be able to do what it is they do, which
23 will get you a lot of points in the LSI screening
24 evaluation to begin with. They are often pro-social.
25 Ms. Fry is clearly very pro-social, she has many people

1 who support her, many people who love her, many people
2 who stand up for her. It's that pro-social ability and
3 traits that allow them to fool their employer and others
4 to believe that they are not stealing from them or to
5 lead them to not suspect that they will steal from them.

6 So the low LSI when you look at the
7 factors that make that up, it's not surprising she has a
8 low LSI. Frankly even the lack -- and I'm suggesting
9 this is present in this case so don't take this general
10 comment to be that be way -- even the lack of criminal
11 history is not necessarily indicative of a lack of prior
12 criminal behavior, because as is often the case,
13 employers when stolen from by an embezzler don't press
14 charges, they simply say repay me and you're fired, and
15 they don't pursue law enforcement and so we don't learn
16 it. There is nothing to indicate in this record that
17 that is the case and I don't believe that is the case in
18 this case and I'm not considering that, I'm stating that
19 as it relates to the low LSI in general.

20 I hope that regardless of what happens to
21 Ms. Fry today, whether she be placed on probation or
22 whether she serve a period in the penitentiary and be
23 paroled that she will have learned her lesson from this,
24 that she will have recognized that this is not worth the
25 material gain that she had, the lifestyle she was able

1 to enjoy because of it, and that she will recognize that
2 she should never engage in this kind of behavior again,
3 even if she believes, wrongfully, that it's somehow
4 justified.

5 There is certainly information in
6 mitigation. Ms. Fry is a beloved mother, wife, and a
7 friend who has engaged in charitable work in the
8 community, who has even after this been able to maintain
9 employment, who has no prior criminal record, who has
10 the ability, if she puts her mind to it, to lead a
11 productive, pro-social life going forward. She has the
12 ability, though it will be hard, to make restitution.
13 Those are some of the mitigating factors the court has
14 considered. That's not all of them, there are others,
15 but I'm not going to spend all day listing them all, nor
16 am I going to list all of the aggravating factors,
17 because there are more of those also. But I have
18 considered them.

19 The question that weighs in my mind is
20 what can I do to appropriately punish this conduct.
21 What can I do to deter the defendant from ever doing
22 something like this again. What can I do to help ensure
23 that restitution is paid and can I do that in a way that
24 avoids the need for incarceration in the penitentiary.

25 I think the statutes are clear that should

1 be sort of the last resort, unless the factors indicate
2 that clearly needs to be done. And I think there's a
3 good argument, and the state has made that argument,
4 that that exists in this case.

5 I am not going to try to do something that
6 is so black or white, this is or that, prison or
7 probation. I'm going to try to fashion something that I
8 hope will address the need for restitution, the need for
9 punishment, the need for deterrence, the hope for
10 rehabilitation, something that will hopefully protect
11 the community.

12 I'm going to sentence you to the custody
13 of the Idaho State Board of Corrections under the
14 Unified Sentencing Laws of the State of Idaho for an
15 aggregate term of 14 years. The court specifies a
16 minimum period of confinement of two-and-a-half years
17 fixed and a subsequent indeterminate period of custody
18 of 11-and-a-half years. It is further ordered that
19 execution of the sentence will be suspended for those
20 years, during which time you'll be on probation under
21 the supervision and direction of the Idaho Director of
22 Probation and Parole under their standards conditions of
23 probation and the following terms and conditions of
24 probation.

25 The first of which is that you enter into

1 an agreement of supervision with the Department of
2 Corrections Probation and Parole. I don't know if you
3 have a copy of that there or not. I don't see one so --

4 MR. LOSCHI: She was provided one.

5 THE COURT: Did you see those terms and
6 conditions?

7 THE DEFENDANT: Yes.

8 THE COURT: Do you understand those terms and
9 conditions?

10 THE DEFENDANT: Yes.

11 THE COURT: Those terms and conditions will
12 apply, and you're ordered as a terms and condition of
13 probation to execute that agreement of supervision with
14 the Department, and those terms will also be my terms.
15 In addition, the following terms and conditions of
16 probation will apply.

17 That the probationer serve 210 days in the
18 Ada County Jail in addition to those already served,
19 forthwith, with work release option. That will
20 hopefully have a measure of punishment and deterrence
21 that will hopefully allow you to continue your
22 employment and be able to make payments towards
23 restitution, which I'll talk about here in a moment.

24 Probationer then will serve an additional
25 90 days in the Ada County Jail at the discretion of the

1 probation officer without prior approval of the court.
2 Probation officer is to have all options available.

3 Probationer, upon request of the probation
4 officer, will agree to submit to polygraph examinations
5 administered by qualified examiners and limited in scope
6 to those matters calculated to determine whether the
7 probationer is complying with the lawful conditions of
8 probation.

9 Probationer shall advise all employers and
10 future employers, and any organizations at which she has
11 any responsibility in handling their monies or their
12 accounts, credit cards, checking accounts, any kind of
13 money, in writing, with a copy to the probation officer,
14 that she has been convicted of this theft crime for
15 embezzlement from her employer.

16 Probationer must make substantial payments
17 each month towards restitution, which the court
18 considers to be payments of at least \$500 a month, or
19 the probationer must show cause why she cannot pay that
20 amount each month. She must show cause to the court
21 each month why she cannot make that payment that month
22 and what the minimum amount is she can make towards
23 restitution that month.

24 MR. LOSCHI: Just, just to clarify, show cause
25 directly to the court or to the probation officer? In

1 other words --

2 THE COURT: To the court.

3 MR. LOSCHI: So I would notice up a hearing?

4 THE COURT: Right. And I could certainly deal
5 with that on a multi-month basis, depending on where
6 we're at, I can look and say, okay, for the next six
7 months let's make this amount and come back and see what
8 else you can do, what you can sell, what you can do,
9 etcetera.

10 Probationer shall also establish a budget
11 with her probation officer and verify income and
12 expenses.

13 Probationer shall not incur any new
14 indebtedness unless approved by the probation officer.

15 Probationer shall perform 200 hours of
16 community service and pay any fee required, including 60
17 cents an hour for workers' compensation.

18 The court is going to affirmatively note
19 in the judgment that it does not recommend that the
20 defendant be placed in the limited supervision unit
21 until restitution has been paid.

22 MS. AKAMATSU: Okay.

23 THE COURT: The court recognizes, however, that
24 that, under the Justice Reinvestment, is not the court's
25 determination, it is the probation department's

1 determination as to the level of supervision but the
2 court will make that affirmative recommendation.

3 Do you accept these terms and conditions
4 of probation?

5 THE DEFENDANT: Yes.

6 MR. LOSCHI: Judge, could I clarify the
7 condition about the work release? If you don't mind can
8 we put in there she would have the option to do that in
9 Canyon County if that can be arranged? She lives in
10 Canyon County, she works in Eagle. I don't know which
11 location --

12 THE COURT: To do the jail time?

13 MR. LOSCHI: I know she's going forward with you
14 said with work release options. I was asking for a
15 parenthetical that said okay to --

16 THE COURT: Okay to work in Canyon County?

17 MR. LOSCHI: To do the work release via the
18 Canyon County Work Release. She lives in Canyon County
19 and works in Eagle. I think where she works is closer to
20 Canyon County than Ada County. My only thought that
21 would be easier for family to visit here.

22 MS. AKAMATSU: They're not going to be able to
23 visit her. It's Telmate.

24 MR. LOSCHI: I don't know if it's Telmate.

25 THE COURT: I don't know if it's Telmate in

1 Canyon County. The court is aware of the limited space
 2 Canyon County has, frankly --
 3 MR. LOSCHI: It may not be doable.
 4 THE COURT: You can always come and petition the
 5 court for some change in that, but I'm not going to put
 6 that the in there.
 7 MR. LOSCHI: One other thing I wanted to ask,
 8 counsel is present, is if I file a motion for a furlough
 9 for a medical appointment --
 10 MS. AKAMATSU: No.
 11 MR. LOSCHI: -- and I have some documentation,
 12 can I attempt initially to do that through email and if
 13 Ms. Akamatsu has objection, I can set it for a hearing or
 14 would you rather just set it for a hearing?
 15 THE COURT: I understand she has the need for
 16 medical appointments and treatments, and certainly the
 17 court is not opposed to allowing furlough for that. And
 18 if you want to talk to Ms. Akamatsu and if she has some
 19 objection, then set it for a hearing. Otherwise, submit
 20 it with an indication there's no objection and I'll sign
 21 the order.
 22 MR. LOSCHI: Thank you, your Honor.
 23 THE COURT: All right. Ms. Fry you have the
 24 right to appeal -- before we get to that, I am going to
 25 order that the defendant provide a DNA sample and right

1 thumbprint impression and comply with the DNA Database
 2 Act.
 3 I'm going to order she pay court costs.
 4 I'm not going to order she pay a fine
 5 simply because I don't want any fine to take away from
 6 her ability to pay restitution to the victim in this
 7 case. I would rather see Dr. Murphy get his payment
 8 than the state get a fine.
 9 I'm going to in order the restitution in
 10 the amount of \$28,383.54.
 11 Ms. Fry, you have the right to appeal. If
 12 you cannot afford an attorney, you can request to have
 13 one appointed at public expense. Any appeal must be
 14 filed within 42 days the date of this order or the entry
 15 of the written order of judgment of conviction and order
 16 suspending that sentence.
 17 As I said when I started, there's no black
 18 and white right answer. How to do this, I think, is
 19 subject to argument either way. I recognize that there
 20 could be an easier way or certainly a less time-involved
 21 way of the court to do it, but I think hopefully at the
 22 end of the day this will achieve the results that the
 23 court hopes to achieve and that the Toohill factors
 24 suggest and that will hopefully get Dr. Murphy repaid
 25 and hopefully, as much as possible, keep in tact an

1 otherwise loving family.
 2 Good luck to you, ma'am.
 3 It's going to take a few days to get the
 4 work release set up and approved, I recognize that. I
 5 know your employer knows this potential was coming.
 6 Hopefully that is not going to cause too much
 7 interruptions. I'll try to get this judgment out as
 8 quickly as possible to facilitate matters.
 9 Thank you.
 10 (Proceedings concluded.)
 11 * * *

1 REPORTER'S CERTIFICATE
 2 STATE OF IDAHO)
 3 COUNTY OF ADA)
 4
 5 I, CHRISTIE VALCICH, Certified Court
 6 Reporter of the County of Ada, State of Idaho, hereby
 7 certify:
 8 That I am the reporter who transcribed the
 9 proceedings had in the above-entitled action in machine
 10 shorthand and thereafter the same was reduced into
 11 typewriting under my direct supervision; and that the
 12 foregoing transcript contains a full, true, and accurate
 13 record of the proceedings had in the above and foregoing
 14 cause, which was heard at Boise, Idaho.
 15 IN WITNESS WHEREOF, I have hereunto set my
 16 hand this 7th day of March, 2016.
 17
 18
 19
 20 CHRISTIE VALCICH, CSR-RPR
 21 Ada County Courthouse
 22 200 West Front Street
 23 Boise, Idaho
 24
 25