SUPREME COURT NO. 92796-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ALAN SINCLAIR, JR.,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jeffrey Ramsdell, Judge

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT AND COURT OF APPEALS DECISION

Alan Sinclair, Jr., the appellant below, answers the State's petition for review following the Court of Appeals decision in State v. Sinclair, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 393719 (Jan. 27, 2016).

B. COUNTERSTATEMENT OF ISSUES

1. Do RCW 10.73.160(1), RAP 14.2, and case law indisputably provide the appellate courts with discretion to impose or deny appellate costs?

2. Should this court reject the State's belated submission of various materials it found on the internet in an attempt to show Sinclair can pay $6,983.19 (plus interest) in appellate costs, when the State could have submitted the same or similar materials to the Court of Appeals or the trial court but chose not to?

3. If this court grants review, should it also consider the efficacy of Division Two's alternative practice of remanding cases for ability-to-pay determinations prior to imposing appellate costs?

4. If this court grants review, should it also consider the perverse and unethical conflict of interest created by the current appellate cost scheme and its negative impact on the relationship between appellate defender and client?

5. If this court grants review, should it also consider whether the imposition of vast sums in appellate costs fails to rationally serve a legitimate state interest, thereby violating substantive due process?

6. If this court grants review, should it invite the real party in interest and beneficiary of the appellate cost scheme, the Washington State Office of Public Defense, to file an amicus brief on the issues presented in this litigation?

C. STATEMENT OF THE CASE

When Sinclair lost his appeal on the merits, the State filed a cost bill seeking $6,983.19 in appellate costs. Cost Bill at 2 (Dec. 9, 2015). Sinclair objected, arguing that the Court of Appeals should exercise its discretion to deny appellate costs or alternatively remand to the trial court for a hearing on Sinclair's ability to pay appellate costs. Objection to Cost Bill at 2-17 (Dec. 21, 2015). Sinclair contemporaneously moved for reconsideration, asserting, "To the extent that a challenge to appellate costs must be raised in the briefs so that the court can exercise discretion in the decision terminating review, Sinclair asks this court to reconsider and amend its decision terminating review so that it can exercise this discretion." Mot. for Reconsideration at 3 (Dec. 21, 2015).

The Court of Appeals promptly called for an answer to Sinclair's motion for reconsideration, which the State filed a few weeks later. Order

Calling for Answer to Mot. for Reconsideration (Dec. 22, 2015); Answer to Motion for Reconsideration (Jan. 15, 2016).

On January 27, 2016, the Court of Appeals granted Sinclair's motion for reconsideration and substituted a published opinion that exercised the discretion Sinclair requested. Sinclair, 2016 WL 393719, at *7. The court determined that costs should not be imposed because it was not reasonable to conclude that Sinclair would ever be able pay costs considering his age and indeterminate term of incarceration: "Sinclair is a 66-year-old man serving a minimum term of more than 20 years. There is no realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs." Id. Thus, the court struck the State's cost bill and Sinclair's objection. Id.

The State filed a petition for review, attaching various materials outside the appellate record as appendices.

D. ARGUMENT

1. APPELLATE COURTS PLAINLY HAVE DISCRETION OVER THE IMPOSITION OF APPELLATE COSTS, AND REVIEW IS NOT NECESSARY TO ESTABLISH THIS

The appellate courts have a choice to impose or deny appellate costs. RCW 10.73.160(1) ("The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs." (emphasis added)); RAP 14.2 (permitting the Court of Appeals to

direct that costs not be awarded in decision terminating review). Here, the Court of Appeals merely acknowledged and exercised the discretion that RCW 10.73.160 and RAP 14.2 provide. Sinclair, 2016 WL 393719, at *4, 6-7.

The State's petition for review suggests that appellate courts should never exercise discretion. In essence, the State wants the courts to rubber stamp its cost bills, thereby perpetuating the exact same harms this court recently identified in State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015), on the typically much larger appellate monetary scale. The State's arguments against the exercise of discretion do not merit this court's review.

The State first asserts that the Court of Appeals' exercise of discretion "nullifies the legislative directive," contending that appellate costs should always be imposed "absent compelling circumstances." Petition for Review at 11. But RCW 10.73.160(1) does not state that appellate costs should always be imposed; it states that the courts "may require an adult offender convicted of an offense to pay" them. RCW 10.73.160 is not rendered a nullity by virtue of the courts exercising the precise discretion the statute gives them.

RCW 10.73.160(3) further states that such costs "shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure . . . ." Under RAP 14.2, a commissioner or clerk awards

costs to the substantially prevailing party "unless the appellate court directs otherwise in its decision terminating review." Thus, under RAP 14.2, the decision terminating review may deny costs. In the decision terminating review at issue here, the Court of Appeals directed that costs not be imposed. Sinclair, 2016 WL 393719, at *7. The Court of Appeals cannot at once nullify the legislative directive and follow it to a T.[1] Contrary to the State's claims, the Court of Appeals' decision does not conflict with RCW 10.73.160. Review is not warranted on this basis.

The State also incorrectly contends that Sinclair is in conflict with State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000), and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997). Petition for Review at 12-14. In Nolan, this court's recognition of the discretion to award or deny appellate costs could not have been clearer:

> This award is a matter of discretion for the appellate court, consistent with the appellate court's authority under RAP 14.2 to decline to award costs at all. We do not agree with the Court of Appeals that this authority to impose costs is required except in 'compelling circumstances.' The authority is permissive as the statute specifically indicates.

141 Wn.2d at 628 (emphasis added). Nolan does not conflict with the Court of Appeals' exercise of discretion; Nolan supports it.

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[1] As the Court of Appeals succinctly surmised, "The statute vests the appellate court with discretion to deny or approve a request for an award of costs. Under RAP 14.2, that discretion may be exercised in a decision terminating review." Sinclair, 2016 WL 393719, at *4.

The State's reliance on Blank to support review is also dubious. While Blank upheld the constitutionality of RCW 10.73.160, it did not hold that courts may not exercise discretion to avoid the problematic consequences associated with legal financial obligations. And, in light of the many concerns the Blazina court identified, Blank should not be read in a vacuum to foreclose the meaningful exercise of appellate court discretion on the issue of appellate costs.

Finally, the State repeatedly posits that courts should not exercise discretion because RCW 10.73.160(4) provides a remissions process. Petition for Review at 11-12. This process allows those against whom costs have been imposed to seek remission on the basis of manifest hardship.[2] RCW 10.73.160(4). That courts might exercise discretion in a future remission proceeding does not excuse them from exercising the legislative grant of discretion on whether to impose appellate costs in the first place.

The meaningful exercise of appellate court discretion is what title 14 RAP and RCW 10.73.160(1) contemplate. The Court of Appeals' decision

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[2] Although the statute allows for remission, the existence of this process is not necessarily meaningful because indigent persons seeking remission do not have the benefit of counsel. Without counsel, indigent persons might not know to move for remission in times of significant hardship and would also likely struggle to make coherent records supporting a manifest hardship determination. Moreover, Sinclair finds no authority that defines "manifest hardship" in RCW 10.73.160(4) or discusses its meaning. Because lawyers would necessarily have to litigate its meaning, the remissions process in the eyes of a pro se litigant affords an illusory remedy at best.

to exercise this discretion does not conflict with legislative directives, court rules, or decisional law. The State's arguments supporting a blanket refusal to exercise discretion before appellate costs are imposed fail to satisfy RAP 13.4(b) review criteria.

2. THIS COURT SHOULD NOT CONSIDER THE STATE'S BELATED EXTRAJUDICIAL SPECULATION REGARDING SINCLAIR'S FINANCES

If the State wished to challenge judicial findings on Sinclair's indigency, it need not have waited to do so until it received an adverse decision on appellate costs. The State does not base its arguments on any actual evidence showing that Sinclair is able or will be to pay nearly $7,000 in appellate costs (plus interest). Instead, it attaches internet materials to its petition for review never before considered by courts or counsel in this case, asking this court to use these materials to speculate about Sinclair's financial circumstances. Because the State passed on the opportunity below to attempt to establish facts supporting its arguments, this court should pass on the State's uncorroborated assertions now.

The State never disputed Sinclair's indigency or qualification for appointed counsel in the trial court or in the Court of Appeals. The trial court made specific findings that Sinclair was "'unable by reason of poverty to pay for any of the expenses of appellate review'" and "'cannot contribute anything toward the costs of appellate review.'" Sinclair, 2016 WL 393719,

at *6 (quoting indigency order). The State had an opportunity to question these findings, especially after Sinclair objected to the cost bill and moved for reconsideration, where he argued there was no reason, based on the record, to believe he is or will be able to pay nearly $7,000 in appellate costs.[3] Indeed, the Court of Appeals called for an answer to Sinclair's motion for reconsideration, providing the State with ample opportunity to dispute Sinclair's claims. While the State asserted for the first time in the answer that it was "likely" Sinclair had undisclosed retirement funds, the State did not request fact-finding on this issue or mention any other aspect of Sinclair's finances. Id. at *7.

Only when the Court of Appeals exercised discretion to deny appellate costs did the State present materials about the value of Sinclair's former home or his alleged ownership of an RV, truck, or boat. The State did not move to make these materials part of the appellate record, as RAP 9.11 requires, and the State acknowledges as much. Petition for Review at

[3] The State seems to suggest it should be excused from its inaction, indicating that "the Rules on Appeal do not authorize a reply to [a cost bill] objection." Petition for Review at 3 n.1. Just because the rules of appellate procedure do not expressly call for a response to a cost bill objection does not mean that such a response is not authorized. As the State points out when it asks this court to accept its belated materials, "RAP 1.2 provides that the rules on appeal 'will be liberally interpreted to promote justice and facilitate decision of cases on the merits.' RAP 18.8(a) permits the appellate court to waive rules in order to serve the ends of justice." Petition for Review at 6 n.3. These same provisions would almost certainly have allowed the State to respond to Sinclair's cost bill objection if it truly wished.

6-7 & n.3. This court should not permit the State to gamble on a favorable ruling and then present additional materials to support its position after it receives an adverse one. The State could have presented the same materials and made the same assertions about them in the Court of Appeals but chose not to. The State's extrajudicial submissions regarding Sinclair's finances come too late, and this court should not consider them.

3. IF THIS COURT GRANTS REVIEW, IT SHOULD ADDRESS THE EFFICACY OF DIVISION TWO'S APPROACH TO APPELLATE COSTS

As the State acknowledges, Division Two remands cases to the superior courts to conduct fact-finding on an indigent person's ability to pay before appellate costs are imposed. Petition for Review at 17; see also Sinclair, 2016 WL 393719, at *4-5 (discussing and rejecting Division Two's approach). Under Division Two's procedure, before imposing appellate costs, the parties have an opportunity to litigate ability to pay in the courts that are best equipped for fact-finding, the trial courts. This approach would enable the State to submit the very materials and arguments it submits here in an actual forum designed to receive such evidence.

Though it notes the conflict Sinclair creates between Division One and Division Two, Petition for Review at 17, the State fails to appreciate that Division Two's procedure would eviscerate its arguments about being deprived of a fair opportunity to litigate the factual issues inherent in the

award of appellate costs. Under Division Two's approach, the State's various concerns about the lack of fact-finding all but evaporate. Thus, if this court grants review, it should consider whether Division Two's procedure is preferable, particularly in cases where there appear to be significant factual disputes.

Ultimately, Divisions One and Two are of like mind in recognizing their discretion to deny appellate costs and choosing to do so in appropriate cases. The only "conflict" between the divisions is the best method for seeing that indigent litigants are not unduly burdened by these costs.

4. IF THIS COURT GRANTS REVIEW, IT SHOULD ADDRESS HOW THE CURRENT APPELLATE COST SCHEME CREATES A PERVERSE CONFLICT OF INTEREST THAT UNDERMINES THE ATTORNEY-CLIENT RELATIONSHIP

The Washington courts inform every indigent appellant of his or her right to appeal at public expense. This case is no exception: the trial court determined Sinclair could not "'by reason of poverty'" "'contribute anything toward the costs of appellate review.'" Sinclair, 2016 WL 393719, at *6-7 (quoting indigency order). Any reasonable person reading this order would believe that Sinclair was entitled to an attorney to represent him on appeal at public expense and that Sinclair would pay nothing due to his indigency, win or lose. Under the current appellate cost scheme, however, this reasonable belief is incorrect and trial court indigency orders are falsehoods.

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not prevail, their clients will be assessed, at minimum, thousands of dollars in appellate costs. Unlike other lawyers whose clients pay them, the client's ability to pay does not factor into an appellate defender's representation of his or her client. Yet appellate defenders must still play the role of financial planner, hedging the strength of their arguments against the vast sums of money their clients will owe and attempting to advise their clients accordingly. This undermines the appellate defender's important role in advancing all issues of arguable merit on clients' behalf and thereby undermines the relationship between attorney and client.

This relationship is further undermined when clients see that the Office of Public Defense is the primary beneficiary—to the tune of thousands of dollars—of their unsuccessful arguments.[4] This creates a perverse incentive: the Office of Public Defense, which pays the salaries of all appellate defenders and through which all appellate defenders represent their clients, collects money only when the appellate defender is unsuccessful. This is readily apparent as a conflict of interest and undermines any appearance that the appellate cost scheme is fair. See RPC

[4] The cost bill filed in this case would apportion 99.1 percent of the $6,983.19 in appellate costs to the Office of Public Defense. See Cost Bill at 2.

1.7(a)(2) (a conflict exists where "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer"); Wood v. Georgia, 450 U.S. 261, 268-70, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (acknowledging conflict when interest of third party paying lawyer is at odds with client's interest); Winkler v. Keane, 7 F.3d 304, 308 (2d Cir. 1993) (contingent fee in criminal case created actual conflict of interest); United States v. Horton, 845 F.2d 1414, 1419 (7th Cir. 1988) (conflict of interest arises when defense attorney must "make a choice advancing his own interest to the detriment of his client's interests").

The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the organization that funds their attorneys when they lose. In any other context, this court would readily recognize the ethical problems of such a Kafkaesque design. If this court grants review, it should address this issue, which implicates both the constitutional right to conflict-free counsel and, given its impact on the entire statewide system of indigent appeals, pertains to an issue of substantial public interest that should be determined by this court. RAP 13.4(b)(3)–(4).

5. IF THIS COURT GRANTS REVIEW, IT SHOULD CONSIDER WHETHER THE IMPOSITION OF APPELLATE COSTS WITHOUT CONSIDERING ABILITY TO PAY VIOLATES SUBSTANTIVE DUE PROCESS

No person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV; CONST. art. I, § 3. "Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006). Deprivations of property must be substantively reasonable and are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

Where a fundamental liberty interest is not at stake, as here, courts review substantive due process claims for rational basis. Id. at 53-54. To survive rational basis scrutiny, the provisions in question must be rationally related to a legitimate state interest. Id.

Sinclair does not quarrel with the proposition that funding the Office of Public Defense is a legitimate state interest. But attempting to fund it on the backs of indigent persons when their public defenders lose their appeals, without first ascertaining their ability to pay, does not rationally serve this interest. This court recently recognized that "the state cannot collect money

from defendants who cannot pay." Blazina, 182 Wn.2d at 837. It is simply irrational to mandate that appellate courts impose appellate costs upon indigent litigants without even inquiring into whether they have the ability or likely future ability to pay them.

For this precise reason, the legislature directed the courts to exercise discretion in RCW 10.73.160(1). No rational legislation would expressly grant discretion to courts that fail or refuse to exercise it. If this court grants review, it should consider whether an ability-to-pay determination is necessary before imposing appellate costs in order to comport with the due process clauses. This issue presents a significant question of constitutional law under RAP 13.4(b)(3).

6. IF IT GRANTS REVIEW, THIS COURT SHOULD INVITE THE REAL PARTY IN INTEREST—THE OFFICE OF PUBLIC DEFENSE—TO WEIGH IN

The King County prosecutor has no significant legitimate interest here given that it stands to recover only $59.98, less than one percent of the total costs it seeks. Because it stands to recover less than $60, King County's true purpose in seeking appellate costs is to punish Sinclair for exercising his rights to counsel and to appeal under article I, section 22 of the Washington Constitution.

The real party in interest is not King County but the Washington State Office of Public Defense, which will stand to collect $6,923.21 from

Sinclair if the requested appellate costs are awarded. Because the Office of Public Defense is the real beneficiary of the appellate costs at issue (and therefore adverse to Sinclair's interests), if this court grants review, it should expressly invite the Office of Public Defense to weigh in on the various issues this litigation presents. See RAP 10.6(c) ("The appellate court may ask for an amicus brief at any stage of review, and establish appropriate timelines for the filing of the amicus brief and answer thereto."). Doing so would particularly assist this court in considering the conflict of interest and substantive due process claims Sinclair advances.

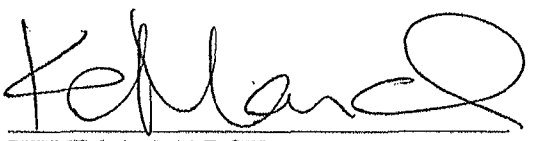
E. CONCLUSION

The State's arguments in support of a blanket refusal to exercise discretion on appellate costs and its belated extraevidentiary submissions do not merit this court's review. Sinclair therefore asks this court to deny the State's petition. In the event that this court grants review, Sinclair asks that it grant review on all additional issues Sinclair presents in this answer.

DATED this 10th day of March, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 92796-1
	)	
ALAN SINCLAIR, JR.	)	
	)	
Petitioner.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF MARCH 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **ANSWER TO PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALAN SINCLAIR, JR.
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1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF MARCH 2016.

X Patrick Mayovsky

OFFICE RECEPTIONIST, CLERK

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Attached for filing today is an answer to state's petition for review for the case referenced below.

State v. Alan Sinclair, Jr.

No. 92796-1

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