72965-9

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Court of Appeals
Division I
State of Washington

NO. 72965-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LEE OLSON,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant's right to due process was violated due to the government's destruction of 911 recordings.

2. The trial court erred in not dismissing the charges under CrR 8.3(b) due to government mismanagement.

3. RCW 43.43.7541's DNA-collection fee and RCW 7.68.035's Victims Penalty Assessment (VPA) violate substantive due process when applied to defendants who do not have the ability – or likely future ability – to pay.

4. The trial court failed to comply with RCW 10.01.130(3) and, thus, erred in imposing Legal Financial Obligations (LFOs).

Issues Pertaining to Assignments of Error

1. Defense counsel made a discovery request for 911 recordings just two weeks after the incident forming the basis of the charges, because the recordings were potentially useful to the defense. Police contract with a company that has an express and clearly stated policy of purging all 911 recordings after 90 days unless they are affirmatively preserved by law enforcement. The State never took steps to preserve the requested recordings, and they was destroyed under this policy. Was appellant's right to due

process violated?

2. The prosecutor mismanaged the discovery process, which resulted in the destruction of 911 recordings that were material to appellant's defense. This resulted in appellant's inability to present a complete defense. Did the trial court err in denying appellant's motion to dismiss under 8.3(b)?

3. RCW 43.43.7541 requires trial courts impose a DNA-collection fee each time a felony offender is sentenced.[1] This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile. RCW 7.68.035 requires trial courts to impose a VPA of $500. The purpose is to fund victim-focused programs. These statutes mandate that trial courts order these LFOs even when the defendant has no ability to pay. Do the statutes violate substantive due process when applied to defendants who do not have the ability – or the likely future ability – to pay the DNA collection fee?

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[1] RCW 43.43.754 and 43.43.7541 require the courts to impose a mandatory $100 DNA-collection fee on any offender convicted of a felony or of a specifically designated misdemeanor. For clarity and ease of reading, appellant will refer only to felony defendants in this brief, but the arguments apply equally to defendants sentenced to other qualifying crimes.

4. The Supreme Court recently emphasized that, "a trial court has a statutory obligation [under RCW 10.01.160(3)] to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Here, the trial court was informed as to appellant's homelessness and lack of resources, but it imposed so-called "mandatory" LFOs without any consideration of his ability to pay. Should this Court remand with instructions to strike the LFOs and undertake a proper inquiry?

B. STATEMENT OF THE CASE

1. Procedural History

On January 29, 2014, the King County prosecutor charged appellant Thomas Olson with one count of felony driving under the influence (DUI) and one count of driving with a suspended license. CP 1-7. The information was later amended, and the prosecutor added one count of possession of a controlled substance. CP 18-19. A jury found Olson guilty as charged. CP 193-96. Olson was sentenced to 41 months of incarceration and 12 months of community custody. CP 261. The trial court also imposed a $100 DNA-collection fee and a $500 VPA, believing these to be "mandatory" fees. CP 260. Olson appeals. CP 275-76

2. Substantive Facts

On January 22, 2014, the Bellevue Police Department (BPD) received several 911 calls regarding a traffic incident. 2RP 67. Witnesses observed a blue pick-up truck swerve across lanes while traveling down Lakemont Boulevard in Bellevue, crash into a guardrail, ricochet back across lanes, knock down a lamp post, and eventually come to a stop at the bottom of the hill. 5RP 8-9, 42-43, 66.

When police arrived, one officer saw Olson in the driver seat of the parked car with the door open and another saw him standing outside the car. 2RP 68; 6RP 69. Olson appeared confused and dazed. 2RP 71. When he started to step backward, one officer grabbed his arm to make sure he did not run, and escorted him out of traffic. 2RP 97. At this point, officers observed a needle and baggie in the pouch pocket of Olson's hoodie. 2RP 98. Olson was placed under arrest and read his Miranda rights. 2RP 75; 6RP 43.

Olson admitted to smoking heroin an hour before the incident, but told police he was not driving. 6RP 43-44, 46, 81. Officers did not see anyone else driving or get out of the truck. 6RP 79, 8. However, Olson explained that a friend was driving and he was in the passenger seat. 6RP 44. He said they were

following another friend who was traveling in front of them. 6RP 44. When the front car suddenly swerved, the driver of Olson's vehicle reacted, lost control, and crashed. 6RP 44. At the bottom of the hill, the first car stopped. 6RP 44. The driver of the truck got out, jumped in the first car with his friend, and left. 6RP 44. Olson said he was waiting for the driver to return. 6RP 82. Police did not follow-up on this. 6RP 52-53, 83.

3. Facts Relating To The Unpreserved Evidence

The incident occurred on January 22, 2014, and charges were filed one week later. On January 30, 2014, Olson's counsel filed a notice of appearance and discovery request that specifically asked for all "audio recordings... that relate to the circumstances surrounding the arrest." Supp. CP __ (sub no. 3, Notice of Appearance, 1/30/14) at p. 5. This included a request for 911 recordings. Id.; CP 48. The State never obtained these recordings, and the tapes were destroyed by the BPD after 90 days as per the standard protocol of NORCOM (the company BPD contracts with to record and manage 911 recordings). 2RP 23, 26; CP 48.

Olson moved to have the case dismissed, arguing that he was denied due process and prejudiced by government mismanagement of his case. Defense counsel explained that the

CAD report indicated there could have been as many as seven different 911 callers, three of whom would testify for the State, and others whose identity was somewhat murky from the limited information on the CAD report. Defense counsel stated that it was crucial to have the spontaneous witness statements to determine what the witnesses were seeing at the moment and to expose contradictions in their accounts. Defense counsel indicated the recordings were a vital defense tool for effective cross-examination. Moreover, the CAD report indicated that at least one caller had observed that multiple cars were involved. Defense Counsel explained this was potentially significant defense evidence because it supported Olson's statement that another car was involved and ended up taking the actual driver away. CP 47-54; 2RP 23-29, 32-33.

The State argued that the defense had comparable evidence through the CAD log and live witness testimony. 2RP 31-32. Defense counsel countered that these were inadequate substitutes for the contemporaneous and detailed observations of those watching the events unfold. 2RP 27, 32. The State also argued there was no bad faith because the State never had the 911 recordings and the tapes were merely destroyed per standard

protocol. 2RP 31-32.

The trial court denied the motion to dismiss, finding the 911 calls were potentially useful for impeachment purposes but were not destroyed in bad faith. 2RP 34.

C. ARGUMENT

I. OLSON'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN THE GOVERNMENT DESTROYED 911 RECORDINGS OF EYE-WITNESS ACCOUNTS.

"Under both the state and federal constitutions, due process in criminal prosecutions requires fundamental fairness and a meaningful opportunity to present a complete defense." State v. Burden, 104 Wn. App. 507, 511, 17 P.3d 1211, 1214 (2001). Due process imposes certain duties on law enforcement and investigatory agencies to insure that every criminal trial is a "'search for truth, not an adversary game.'" State v. Wright, 87 Wn.2d 783, 786, 557 P.2d 1, 4 (1976) (quoting United States v. Perry, 471 F.2d 1057, 1063 (D.C.Cir.1972). This includes a responsibility to preserve material evidence. CrR 4.7.

To comport with due process, the prosecution must disclose and preserve material exculpatory evidence. State v. Wittenbarger, 124 Wn.2d 467, 474–75, 880 P.2d 517 (1994). The State's failure

to preserve such evidence requires dismissal of criminal charges. State v. Groth, 163 Wn. App. 548, 557, 261 P.3d 183(2011).

Where the government fails to preserve evidence whose exculpatory value is indeterminate and only "potentially useful" to a defendant, failure to preserve the evidence constitutes a due process violation if the defendant demonstrates bad faith on the part of the government. Burden, 104 Wn. App. at 512. A showing of bad faith turns on whether the government knew of the potential value of the evidence when it failed to preserve it and thus allowed its destruction. Groth, 163. at 558.

Here, the 911 calls were potentially useful to the defense. First, as the trial court recognized, the 911 tapes had impeachment value (2RP 34), permitting Olson to challenge the testimony of eye-witnesses that might be inconsistent with their contemporaneous impressions as recorded on the 911 tapes.

Second, the 911 recordings had the potential of revealing driver distraction. Even if a caller was distracted for merely 30 seconds, this would have supported the defense's theory that in the chaos of the event, and while witnesses were navigating traffic or attending to their children, the driver of the truck quickly left the scene in a different car. 7RP 51-65. Without the recordings,

however, it was impossible for the defense to be able to effectively examine the eye-witnesses as to the distractibility of surrounding events.

Third, the fact that one of the witnesses reported that multiple vehicles were involved was particularly significant because it supported Olson's story that another car was involved. Hence, the recordings were potentially useful. Without the recordings, however the defense could not determine which witness observed the multiple cars or what exactly was said at the moment the witness was reporting the involvement of other vehicles.

The facts surrounding Olson's arrest put the prosecutor on notice as to the potential usefulness of this evidence to the defense. Given the defendant's statements to police that he was not the driver and there was another car involved in the incident, it was obvious that the 911 recordings would be potentially useful to the defense, especially where the CAD indicated that one of the witnesses had seen multiple cars involved. This was underscored when, two weeks after the incident, the defense made its discovery request that included the 911 recordings. This request alerted the State as to the potential usefulness of the 911 records nearly two and half months before they were destroyed.

Bad faith existed when the State ignored the defense's request for the 911 recordings and let the 90-day retention period run. The government was in a unique position to know of NORCOM's purge policy and the need to quickly preserve this evidence. This is because the "Participant Records Request Form" – which can only be accessed by a participating agency – expressly states: "NORCOM's 911 ... recordings are automatically purged after 90 days. If you need the tapes held for this incident until further notice, check the box." See, http://www.norcom.org/docs/misc/PDR%20form.pdf.[2] Certainly, the State and BPD are aware of this policy as the use of 911 recordings is commonplace in criminal prosecutions.

Given that the prosecutor had ample notice the 911 tapes were material and useful to Olson's defense and given the government's unique awareness that there was a 90-day automatic purge policy in place if it did not take affirmative steps to preserve the evidence, the failure to preserve this evidence amounts to an act of bad faith. As such, this Court should find Olson's due

[2] By contrast, NORCOM's "Public Records Request Form," which is used by those who are not "participants", does not include a statement warning about the purge policy. See, http://www.norcom.org/docs/misc/PDR%20form.pdf

process rights were violated, reverse the conviction, and dismiss the charges.

II. THE TRIAL COURT ERRED WHEN IT DID NOT DISMISS THE CASE DUE TO GOVERNMENT MISMANAGMENT.

CrR 8.3(b) authorizes a court to "dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's rights to a fair trial." Dismissal is justified when the following factors exist: (1) arbitrary action or governmental misconduct and (2) prejudice affecting the defendant's right to a fair trial. State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Governmental misconduct can be something as basic as simple mismanagement. Id. at 239.

The record establishes the prosecutor mismanaged Olson's case by not preserving the 911 recordings after the defendant's discovery request was made. The prosecutor told the trial court that the State could not have acted in bad faith because it never possessed the 911 tapes. 2RP 31-32. However, that is precisely the point. The State mismanaged the discovery process such that neither it nor the defense would ever have the recordings in hand when preparing for and trying this case.

The State's mismanagement prejudiced Olson's constitutional right to present a complete defense to the charges. Sixth Amendment; Washington Const. art. I, § 22. As explained above, the 911 tapes were material to Olson's defense and potentially useful for impeachment purposes. The only reason they were not available was because the prosecutor did not act to preserve the evidence.

The State cannot hide behind the excuse that the reason it did not have the 911 tapes was because NORCOM has an automatic purge policy. The BPD contracts with NORCOM and thus adopts this purge policy as its own. This is a per se policy that functions to destroy all unpreserved evidence, regardless of whether it is material to a person's defense or whether there has been a discovery request. The State has a responsibility to understand this policy and protect requested recordings from being destroyed. CrR 4.7. Here, it the prosecutor had a duty to act promptly to preserve this evidence so that Olson could use it to present a complete defense. The State's failure to do so constituted government misconduct that prejudiced Olson's right to present a complete defense. As such, the trial court erred when it did not dismiss the charges under CrR 8.3(b).

III. RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY LFOS.

RCW 9.94A.760 permits the trial court to impose costs "authorized by law" when sentencing an offender for a felony. RCW 43.43.7541 authorizes the collection of a $100 DNA-collection fee. RCW 7.68.035 provides that a $500 VPA "shall be imposed" upon anyone who has been found guilty in a Washington Superior court. However, these statutes violate substantive due process when applied to defendants, like Olson, who are not shown to have the ability or likely future ability to pay the fine. Hence, this Court should find trial court erred in imposing those fees without first determining Olson's ability to pay.[3]

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571

[3] The record here contains significant evidence showing Mr. Olson was homeless, indigent, and would likely remain so given his employment and criminal history. CP 239-253; 8RP 11-20

(2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218–19. It requires that "deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221, 1225 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130, 1135 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, the United States Supreme

Court has cautioned the rational basis test "is not a toothless one." Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining the statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Turning first to RCW 43.43.7541, the statute mandates all felony defendants pay the DNA-collection fee. This ostensibly serves the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752-7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

As for RCW 7.68.035, it mandates that all convicted defendants pay a $500 VPA. This ostensibly serves the State's interest in funding "comprehensive programs to encourage and

facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). Again, while this may be a legitimate interest, there is nothing reasonable about requiring sentencing courts to impose the VPA upon defendants regardless of whether they have the ability – or likely future ability – to pay.

Imposing these fees does not further the State's interest in funding DNA collection or victim-focused programs. For as the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." Blazina, 344 P.3d at 684. Hence, there is no legitimate economic incentive served in imposing these LFOs.

Likewise, the State's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he does not have the ability to do so. In order to foster accountability, a sentencing condition must be something that is achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable.

The Supreme Court also recognized that the State's interest in deterring crime via enforced LFOs is actually undermined when LFOs are imposed on people who do not have the ability to pay. Id.

This is because imposing LFOs upon a person who does not have the ability to pay actually "increase[s] the chances of recidivism." Id. at 836-37 (citing relevant studies and reports).

Likewise, the State's interest in uniform sentencing is not served by imposing mandatory LFOs on those who do not have the ability to pay. This is because defendants who cannot pay are subject to an undeterminable length of involvement with the criminal justice system and often end up paying considerably more than the original LFOs imposed (due to interest and collection fees), and in turn, considerably more than their wealthier counterparts. Id. at 836-37.

When applied to indigent defendants, not only do the so-called mandatory fees ordered under RCW 43.43.7541 and RCW 7.68.035 fail to further the State's interest, they are utterly pointless. It is simply irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue appellant's due process challenge is foreclosed by the Washington Supreme Court's rulings in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), which conclude due process was not violated with the imposition of the VPA

regardless of whether there was an ability-to-pay inquiry. However, the "constitutional principles" at issue in those cases were considerably different than those implicated here. Hence, any reliance on these cases would be misplaced.

Olson's constitutional challenge to the statute authorizing the DNA-collection fee and VPA is fundamentally different from that raised in Curry. In Curry, 118 Wn.2d at 917, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. Hence, Curry's constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate the incarceration of people simply because they are poor. Id.

By contrast, Olson asserts there is no legitimate state interest for requiring sentencing courts to impose a mandatory DNA-collection fee without the State first establishing the defendant's ability to pay. In other words, rather than challenging the constitutionality of the LFO statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in Curry and Blank), Olson challenges the statute as an

unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants who have not been shown to have the ability to pay. As such, the holdings in Curry and Blank do not control.

The State's reliance on Curry and Blank would also be misplaced because when those cases are read carefully and considered in the light of the realities of Washington's current LFO collection scheme, they actually support Olson's position that an ability-to-pay inquiry must occur at the time any LFO is imposed. Indeed, after Blazina's recognition of the Washington State's "broken LFO system," 182 Wn.2d at 835, the Washington Supreme Court's holdings in Curry and Blank must be revisited in the context of Washington's current LFO scheme.

Currently, Washington's laws set forth an elaborate and aggressive collections process which includes the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the

Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay).

Washington's legislatively sanctioned debt cycle does not conform to the necessary constitutional safeguards established in Blank. In Blank, the Washington Supreme Court held that "monetary assessments which are mandatory may be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns only arise if the government seeks to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

The Washington Supreme Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times. It emphasized the following triggers for this inquiry:

- "The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment." Id. at 242.

- "[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point. Id.

- "[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." Id.

Blank thus makes clear that in order for Washington's LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry before: (1) the State engages in any "enforced" collection; (2) any additional "penalty" for nonpayment is assessed; or (3) any other "sanction" for nonpayment is imposed.[4] Id. Unfortunately, neither the Legislature nor the courts are currently complying with Blank's directives.

Given Washington's current LFO collection scheme, the only way to regularly comply with Blank's safeguards is for sentencing

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[4] "Penalty" means: "a sum of money which the law exacts payment of by way of punishment for... not doing some act which is required to be done." Black's Law Dictionary, Sixth Edition, at 1133.

"Sanction" means: "Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations." Id., at 1341.

"Enforce" means: "To put into execution, to cause to take effect, to make effective; as to enforce ... the collection of a debt or a fine." Id. at 528.

courts to conduct a meaningful ability-to-pay inquiry at the time the DNA-collection fee is imposed. Although Blank says that prior case law suggests that such an inquiry is not required at sentencing, the Supreme Court was not confronted with the realities of the State's current collection scheme in that case. As shown below, Washington's LFO collection scheme provides for immediate enforced collection processes, penalties, and sanctions. Consequently, Blank actually supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing when the DNA-collection fee is imposed.

First, under RCW 10.82.090(1), LFOs accrue interest at a compounding rate of 12 percent – an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See, Harris, supra at 1776-77 (explaining that

"those who make regular payments of $50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, there is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order a "payroll deduction." RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry occur before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant's

failure to pay the monthly sum ordered. RCW 9.94A.7701. Again, employers are permitted to charge a "processing fee." RCW 9.94A.7705. Contrary to Blank, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collections agencies or county collection services to actively collect LFOs. RCW 36.18.190. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

The examples set forth above show that under Washington's currently "broken" LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgement and sentence is entered. If the constitutional requirements set forth in Curry and Blank are to be met, trial courts must conduct a thorough ability-to-pay inquiry at

the time of sentencing when the LFOs are imposed. As such, any reliance on holdings of Curry and Blank by the State would be specious because Washington's current LFO system does not meet the constitutional safeguards mandated in those holdings.

In sum, Washington's LFO system is broken in part because the courts have not followed through with the constitutional requirement that LFOs only be imposed upon those that have the ability – or likely ability – to pay. It is not rational to impose a fee upon a person who does not have the ability to pay. Hence, when applied to defendants such as Mr. Olson who do not have the ability to pay LFOs, the mandatory imposition of the DNA-collection fee and VPA does not reasonably relate to the State interests served by those statutes. Consequently, this Court should find RCW 43.43.7541 and RCW 7.68.035 violate substantive due process and vacate the LFO order.

IV. THE LFO ORDER SHOULD BE STRICKEN BECAUSE THE TRIAL COURT FAILED TO COMPLY WITH RCW 10.01.160(3).

RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if the trial court has first considered his individual financial circumstances and concluded he has the

ability.[5] As noted above, the record shows Olson was homeless and indigent, but the trial court imposed legal financial obligations with no analysis of ability to pay. The judgment and sentence includes a boilerplate finding that "the defendant has the present or likely future ability to pay the legal financial obligation imposed." CP 260. Yet, the parties and the court did not discuss this finding at all. 8RP. As such, the trial court did not comply with RCW 10.01.160(3) and the LFO order should be stricken.

The Supreme Court recently emphasized that, "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." Blazina, 182 Wn.2d at 827. There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." Id. at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to

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[5] RCW 10.01.160(3) provides: "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."

pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. Id. at 836. In turn, this causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." Id. at 837; All of these problems lead to increased recidivism. Blazina, 182 Wn.2d at 837. Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. See RCW 9.94A.010.

The State may argue that the court properly imposed these costs without regard to Olson's poverty, because these are so-called "mandatory" LFOs and the authorizing statutes use the word "shall" or "must." RCW 7.68.035; RCW 43.43.7541; State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). However, these statutes must be read in tandem with RCW 10.01.160(3), which, as explained above, requires courts to inquire about a defendant's financial status and refrain from imposing costs on those who cannot pay. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not

be ordered for indigent defendants. See, State v. Jones, 172 Wn.2d 236, 243, 257 P.3d 616 (2011) (explaining that statutes must be read together to achieve a harmonious total statutory scheme).

When the legislature means to depart from a presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that, "the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts.

See, State v. Conover, ___Wn.2d__, __P.3d __, No. 90782-0, 2015 WL 4760487, at *4 (filed Aug. 13, 2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[6]

Although Curry states the VPA was mandatory notwithstanding a defendant's inability to pay, as explained above, it was only presented with the argument that the VPA was unconstitutional. Curry, 118 Wn.2d at 917-18. In the context of that argument, the Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." Id. at 917 (citation omitted). That portion of the opinion is arguably dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not. Moreover, it does not appear that the Supreme

[6] The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. Compare RCW 43.43.7541 (2002) with RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

Court has ever held that the DNA fee is exempt from the ability-to-pay inquiry.

In response, the State may argue that this issue has been waived and should not be considered for the first time on appeal. Even though defense counsel did not object to the imposition of these LFOs below, this Court has the discretion to reach this issue consistent with RAP 2.5. Id. at 681. As shown below, given the trial court's failure to conduct any semblance of an inquiry into Olson's ability to pay and given his indigent status, this Court should exercise its discretion under RAP 2.5(a) and consider the issue.

First, Blazina provides compelling policy reasons why trial courts must undertake a meaningful inquiry into an indigent defendant's ability to pay at the time of sentencing and why, if that is not done, the problem should be addressed on direct appeal. The Supreme Court discussed in detail how erroneously imposed LFOs haunt those who cannot pay, not only impacting their ability to successfully exit the criminal justice system but also limiting their employment, housing and financial prospects for many years beyond their original sentence. Blazina, 344 P.3d at 683-85. Considering these circumstances, the Supreme Court concluded

that indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in reducing recidivism. Id.

As a matter of public policy, courts must do more to make sure improperly imposed LFOs are quickly corrected. As Blazina shows, the remission process is not an effective vehicle to alleviate the harsh realities recognized in that decision. Instead, correction upon remand is a far more reasonable approach from a public policy standpoint.

Second, there is a practical reason why appellate courts should exercise discretion and consider, on direct appeal, whether the trial court complied with RCW 10.01.160 (3). As the Supreme Court recognized in Blazina, the fact is "the state cannot collect money from defendants who cannot pay." Id. at 684. There is nothing reasonable about requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal. Remanding back to the same sentencing judge who is already familiar with the case so he may actually make the ability-to-pay inquiry is more efficient, saving the defendant and the State from a wasted layer of administrative and

judicial process.

Finally, the erroneous ability-to-pay finding entered here is representative of a systemic problem that requires a systemic response.

The pre-formatted language used here, and in the majority of courts around the state, is simply inadequate to meet the requirements of RCW 10.01.160(3). The systemic misuse of this boilerplate finding requires a systemic response. Part of this response must come from appellate courts through the immediate rejection of such boilerplate and remand for the trial court to follow the law. For these reasons, this Court should exercise its discretion and consider the merits of Olson's challenge.

In sum, RCW 10.01.160(3) requires that the trial court conduct an ability-to-pay inquiry for all LFOs. While other statutes purport to impose mandatory fees, these must be harmonized with RCW 10.01.160(3). As such, unless the statute specifically says that an LFO must be paid regardless of a defendant's financial situation, there must be an ability-to-pay inquiry. Consequently, this Court should exercise its discretion, consider the issue, and remand with instructions that the sentencing court conduct a meaningful, on-the-record inquiry into Olson's ability to pay LFOs.

D. CONCLUSION

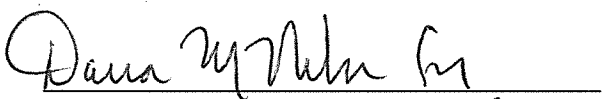
For reasons stated above, this Court should find appellant's right to due process was violated due to the bad faith destruction of potentially useful evidence. It should also find the trial court erred when not dismissing the case under CrR 8.3(b) due to government mismanagement that prejudiced Olson's right to present a defense.

Alternatively, this Court should strike the trial court's order that Olson pay LFOs and remand for a hearing on his ability to pay.

Dated this 9th day of October, 2015.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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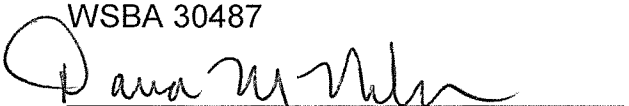

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 72965-9-I
	)	
THOMAS OLSON,	)	
	)	
Appellant.	)	

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 8TH DAY OF OCTOBER 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS OLSON
DOC NO. 860239
OLYMPC CORRECTIONS CENTER
11235 HOH MAINLINE
FORKS, WA 98331

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF OCTOBER 2015.

X Patrick Mayovsky