324761

WASHINGTON COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON, RESPONDENT V. PAUL HAROLD KALAIKOSKY, PETITIONER,	NO. 88-1-00341-7 OPENING BRIEF OF PETITIONER

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AUTHORITIES

(1) BLAZINA/Paige-COLTER No. 89028-5 (Consol. w/No. 89109-5)

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(3) RCW 9.94A.145

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STATE OF WASHINGTON, RESPONDENT V. PAUL HAROLD KALAKOSKY, PETITIONER	NO. 88-1-00341-7 OPENING BRIEF OF PETITIONER

1. ASSIGNMENT OF ERROR

(A) Did The Court Err in not Finding That it had lost Jurisdiction to Collect LFO's ON MR. Kalakosky's 1989 Conviction when he was Sentenced under the laws in effect in "June" of 1989 For his 1987 crimes which provided That The Court had 10 years to Collect From the time of Sentencing and The Presiding Judge clearly indicates Such was the law and his inTent by writing it into the J+S ? (See ATTach. #2, J+S,

4.1 (j).

(B) Did The Court err Again on April 11, 2014 when it again disregarded my Ability To pay while at the same time taking notice of this issue in The Letter of April 11, 2014?

2. STATEMENT OF THE CASE

I was arrested on December 22, 1987 and sentenced on June 19, 1989 To 645 months. Consistent With the laws in effect at the time of my arrest and my Sentencing, the Judge wrote into my J+S that the Court would retain Jurisdiction For a period of 10 years.

There has never been an order to Extend that Jurisdiction. (See Attach.# 1+3).

Upon Filing a motion to terminate my LFO's in March of 2014, instead of a motion Hearing I recieved instead a letter of denial "decision in Memorandum" on April 11, 2014, stating that the LFo's did not Represent any more of a HArdship on me than any other prisoner. (See Attach# 5, Pg. 2).

3. ARGUMENT

The Prosecutor's office informed Judge Cozza That it retains jurisdiction For LFo's according to

RCW 9.94A.760(4), (See ATTACH. #4, Letter From John Mueller To Judge Cozza). The Judge (repeating the prosecutor) Stated the law had been changed several times and the "Current" version specifically indicates the jurisdictional period For LFO Collection does not Commence until a defendant is released, (See ATTACH. #3, 1ST PARAGRAPH). He also cites RCW 9.94A.760(4).

RCW 9.94A.760 was amended From RCW 9.94A.145 Which took effect July 1, 1990 and operated Pro-spectively. In 1991 it was amended and made the Sections Retroactive and applicable To any actions "Commenced <u>But Not Final</u> before the MAY 9, 1991 EFFECTIVE DATE". The action in my case was Finalized on June 19, 1989 which was 23 months Prior to This amendment.

In the Judge's memorandum response of April 11, 2014 He stated..."With respect of any allegation of HARDSHIP", and compares me with other DOC inmates. Since his response, There has been a significant decision concerning this by the WASHINGTON STATE Supreme Court on MARCH 12, 2015. See STATE V. BLAZINA & Paige-Colter, (ATTACH. #6) No. 89028-5 (Consol w/No. 89109-5). The Court(s) in those cases Did not hold a Hearing on Their ability To Pay but rather used the available boiler plate Language. In my J+S There is no boiler plate langnage addressing my

ability to pay. There was no inquiry as to my ability to pay and no hearing was held as mandated by RCW 10.01.160(3).

The comparison Judge Cozza made between myself and other inmates being the same is mis-placed and unrealistic due to the fact that the majority of inmates upon their release will be between 20 and 50 years old allowing them years if not decades to pay LFO's, gain employment, enjoy family support and build toward their retirement & investments.

My circumstances upon release are;

(1) AGE - 70+ years old.

(2) Financial support - Limited SS or SSI (if any).

(3) Hireability - almost non-existant due to advanced age, declining health, status as a convicted felon with a lengthy (36yr.) prison history.

(4) Plus all the hardship issues outlined in Blazina/Paige-Colter.

4. CONCLUSION

The sentencing court erred by not following the statutory mandate in 10.01.160(3), and holding an individualized hearing to assess the likelihood of my

Past, Present and Future ability to PAY the LFO's.
The Court Lost Jurisdiction to Collect according To the effective dates and LimiTATion(s) OF RCW 9.94A.145 which Post-DATED my Sentencing.

I ask This Court in the interest of Justice and Fairness to issue an order To Terminate/ Quash The LFO'S For CAuse No. 88-1-00341-7.

DATED THIS ___ DAY OF December, 2015.

Paul Kalakosky

Paul KalaKosky #237085
Coyote Ridge Correction Center
PO Box 769
Connell, WA. 99326

32476-1

DECLARATION OF MAILING

GR 3.1

I, Paul Kalakosky on the below date, placed in the U.S. Mail, postage prepaid, 3 envelope(s) addressed to the below listed individual(s):

Prosecuting Atty.'s Office
County-City Pub. Safety Bldg.
1100 W. Mallon
Spokane, WA. 99260-0270

Court of Appeals
Division III
N. 500 Cedar
Spokane, WA. 99201

Judge Salvatore F. Cozza
ANX-3
1116 W. Broadway Ave.
Spokane, WA. 99260-0350

I am a prisoner confined in the Washington Department of Corrections ("DOC"), housed at the Coyote Ridge Correctional Complex ("CRCC"), 1301 N. Ephrata Avenue, Post Office Box 769, Connell, WA 99326-0769, where I mailed said envelope(s) in accordance with DOC and CRCC Policies 450.100 and 590.500. The said mailing was witnessed by one or more staff and contained the below-listed documents.

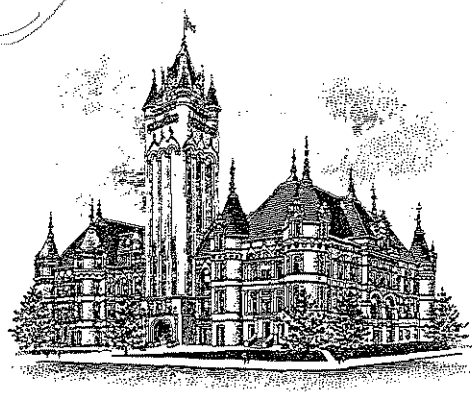
1. _____
2. _____
3. _____
4. _____
5. _____
6. _____

I hereby invoke the "Mail Box Rule" set forth in General Rule ("GR") 3.1, and hereby declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

DATED this 29 day of December 2015, at Connell WA.

Signature Paul Kalakosky

#1



SPOKANE COUNTY COURT HOUSE

SPOKANE COUNTY

THOMAS R. FALLQUIST
County Clerk
Clerk of the Superior Court

10-12-11

(LTRISS)

Paul H. Kalakosky # 237085
Coyote Ridge Correction Center
1301 N. Ephrata Ave (F-A-I)
Connell, WA. 99326

Re: State of Washington vs. Paul Harold Kalakosky
Spokane County Superior Court Cause # 88-1-00341-7

Dear Mr. Kalakosky:

In response to your request for public records: Enclosed you will find information concerning your Superior Court Case and an information card instructing you upon your release from incarceration.

The Clerk's Office is the keeper of the court files. We do not have attorneys on staff. If you require legal assistance you will need to contact an attorney.

If you need information mailed to you from your court file; you are required to send a self address stamped envelope and $.25 per page of documentation.

Per your request for disclosure, the clerk could not find an Order to Extend LFO Collection or an Order of Termination of LFO's in your Superior Court Case File.

Sincerely,

Vicky Rice

Vicky Rice, Collection Deputy
Collections Department

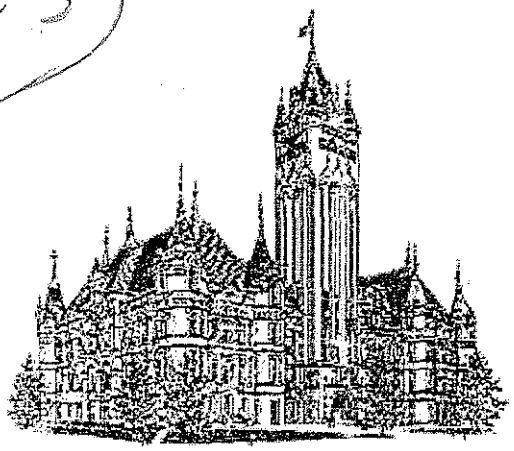
#2

(i) Payments shall be made in the following manner: according to a schedule as set up by his CCO. that the DOC shall monitor said payments while the defendant is in prison

(j) This court shall retain jurisdiction over the defendant for a period of 10 years to assure payment of the above monetary obligations and the defendant shall report to the Department of Corrections to monitor compliance, to obey conditions as provided by RCW 9.94A.120(11)).

4.2 ( ) The Court DISMISSES Count(s) _____

#3



Spokane County Court House

Superior Court of the State of Washington for the County of Spokane

Department No. 6

Salvatore F. Cozza

Judge

ANX-3
1116 W. BROADWAY AVE,
SPOKANE, WA 99260-0350
(509)477-4795 • FAX:(509)477-5714 • TDD:(509)477-5790
dept6@spokanecounty.org

April 3, 2014

Mr. Jack Driscoll
Chief Deputy
Spokane County Prosecutor Ofc.
1100 West Mallon
Spokane, WA 99260

Mr. Paul Kalakosky #237085
Coyote Ridge Corr. Ctr. F-A-1
1301 North Ephrata Ave.
Connell, WA 99326

Re: State v. Paul Kalakosky,
88-1-003417

Dear Mr. Driscoll & Mr. Kalakosky:

Attached you will find Mr. Kalaksky's Motion to Terminate Legal Financial Obligations. I do not believe that he needs to file a new case and obtain a waiver of fees. Basically, Mr. Kalakosky has been in custody since 1989 when he was convicted. Restitution and standard LFO payments were imposed which appear to have been subject to DOC collection from his inmate account.

Mr. Kalakosky has asserted that the court did not extend the 10 year jurisdiction to collect LFO. The documents from the Clerk attached to his motion have been checked by this court. They indicate no extension has ever taken place.

I wish to permit the State an opportunity to examine whether there is a basis to oppose his motion. I will hold off on setting a motion hearing as it may end up being unnecessary. I will give the State until May 1, 2014 to determine whether they wish to formally oppose the motion. If that is the case, I can schedule a motion hearing with Mr. Kalakosky participating by telephone.

Cozza, Sam

From: Mueller, John
Sent: Wednesday, April 09, 2014 11:47 AM
To: Cozza, Sam
Subject: FW: Letter re Paul Kalakosky 881000341-7

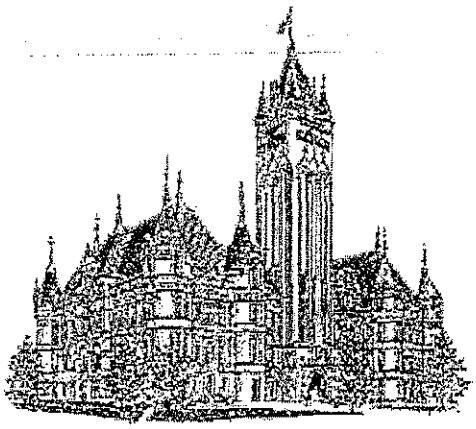
FYI

From: Doran, Mary
Sent: Wednesday, April 09, 2014 11:46 AM
To: Mueller, John
Cc: Driscoll, Jack; Sterett, Rachel
Subject: Letter re Paul Kalakosky 881000341-7

John,
Judge Cozza sent a letter regarding Mr Kalakosky's motion to terminate his legal financial obligations.
Mr Kalakosky has been in prison continuously since his conviction on this case 07/07/89. The first 10 years does not start until Mr. Kalakosky is released from custody. The ten year extension if necessary will be done before the first 10 year period has passed. RCW 9.94A.760 (4).
Mr. Kalakowsy's motion is untimely.
Please let me know if any further action is necessary.
Thank you,
M

WORKING COPY

#5



Spokane County Court House

Superior Court of the State of Washington for the County of Spokane

Department No. 6

Salvatore F. Cozza

Judge

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dept6@spokanecounty.org

April 11, 2014

Ms. Mary Doran
Spokane County Prosecutor's Office
1100 West Mallon
Spokane, WA 99260

Mr. Paul Kalakosky #237085
Coyote Ridge Corr. Ctr. F-A-1
1301 North Ephrata Ave.
Connell, WA 99326

Re: State v. Kalakosky, # 88-1-00341-7

Dear Ms. Doran & Mr. Kalakosky:

After my last letter of April 3, 2014, I received a response from the Prosecutor's Office which is attached. I was reminded that the law had been changed a few times, and that the current version specifically indicates that the ten year jurisdictional period for collection of Legal Financial Obligations does not commence until a defendant is released. It further indicates that DOC can collect LFO obligations from a defendant in custody:

RCW 9.94A.760 (4)

...All other legal financial obligations for an offense committed prior to July 1, 2000, may be enforced at any time during the ten-year period following the offender's release from total confinement or within ten years of entry of the judgment and sentence, whichever period ends later.

...

The department may only supervise the offender's compliance with payment of the legal financial obligations during any period in which the department is authorized to supervise the offender in the community under RCW 9.94A.728, 9.94A.501, or in which the offender is confined in a state correctional institution or a correctional facility pursuant to a transfer agreement with the department, and the department shall supervise the offender's compliance during any such period.

#5

It therefore appears that DOC is fully allowed to collect LFO obligations from Mr. Kalakosky while he is in custody.

With respect to any allegation of hardship, it does not appear that Mr. Kalakosky's deductions are any different from deductions made in the cases of other DOC inmates.

At this point, the matter is closed.

Sincerely,

Salvatore F. Cozza
Superior Court Judge

cc: Court file

#6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NICHOLAS PETER BLAZINA, Petitioner.	No. 89028-5 (consol. w/No. 89109-5) En Banc
STATE OF WASHINGTON, Respondent, v. MAURICIO TERRENCE PAIGE-COLTER, Petitioner.	Filed MAR 12 2015

MADSEN, C.J.—At sentencing, judges ordered Nicholas Blazina and Mauricio Paige-Colter to pay discretionary legal financial obligations (LFOs) under RCW 10.01.160(3). The records do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. Neither defendant objected at the time. For the first time on appeal, however, both argued that a trial judge must make an individualized

inquiry into a defendant's ability to pay and that the judges' failure to make this inquiry warranted resentencing. Citing RAP 2.5, the Court of Appeals declined to reach the issue because the defendants failed to object at sentencing and thus failed to preserve the issue for appeal.

Although a defendant has the obligation to properly preserve a claim of error, an appellate court may use its discretion to reach unpreserved claims of error consistent with RAP 2.5. In this case, we hold that the Court of Appeals did not err in declining to reach the merits. However, exercising our own RAP 2.5 discretion, we reach the merits and hold 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. Because the trial judges failed to make this inquiry, we remand to the trial courts for new sentence hearings.

FACTS

A. *State v. Blazina*

A jury convicted Blazina of one count of second degree assault, and the trial court sentenced him to 20 months in prison. The State also recommended that the court impose a $500 victim penalty assessment, $200 filing fee, $100 DNA (deoxyribonucleic acid) sample fee, $400 for the Pierce County Department of Assigned Counsel, and $2,087.87 in extradition costs. Blazina did not object, and the trial court accepted the State's recommendation. The trial court, however, did not examine Blazina's ability to pay the discretionary fees on the record. Instead, Blazina's judgment and sentence included the following boilerplate language:

> 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defend[ant]'s past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

Clerk's Papers at 29.

Blazina appealed and argued that the trial court erred when it found him able to pay his LFOs. The Court of Appeals declined to consider this claim because Blazina "did not object at his sentencing hearing to the finding of his current or likely future ability to pay these obligations." *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013). We granted review. *State v. Blazina*, 178 Wn. App. 1010, 311 P.3d 27 (2013).

B. *State v. Paige-Colter*

The State charged Paige-Colter with one count of first degree assault and one count of first degree unlawful possession of a firearm. A jury convicted Paige-Colter as charged. The trial court imposed the State's recommended 360-month sentence of confinement. The State also recommended that the court "impose . . . standard legal financial obligations, $500 crime victim penalty assessment, $200 filing fee, $100 fee for the DNA sample, $1,500 Department of Assigned Counsel recoupment . . . [, and] restitution by later order." Paige-Colter Verbatim Report of Proceedings (Paige-Colter VRP) (Dec. 9, 2011) at 6. Paige-Colter made no objection. The trial court accepted the State's recommendation without examining Paige-Colter's ability to pay these fees on the record. Paige-Colter's judgment and sentence included boilerplate language stating the court considered his ability to pay the imposed legal fees.

Paige-Colter appealed and argued that the trial court erred when it imposed discretionary LFOs without first making an individualized inquiry into his ability to pay. The Court of Appeals concluded that Paige-Colter waived these claims by not objecting below. *State v. Paige-Colter*, noted at 175 Wn. App. 1010, 2013 WL 2444604, at *1. We granted review on this issue and consolidated the case with *Blazina*. *State v. Paige-Colter*, 178 Wn.2d 1018, 312 P.3d 650 (2013).

ANALYSIS

A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review.[1] It is well settled that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond. *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012), *cert. denied*, ___ U.S. ___, 134 S. Ct. 62, 187 L. Ed. 2d 51 (2013). The text of RAP 2.5(a) clearly delineates three exceptions that allow an appeal as a matter of right. *See* RAP 2.5(a).[2]

Blazina and Paige-Colter do not argue that one of the RAP 2.5(a) exceptions applies. Instead, they cite *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999)

[1] The State argues that the issue is not ripe for review because the proper time to challenge the imposition of an LFO arises when the State seeks to collect. Suppl. Br. of Resp't (Blazina) at 5-6. We disagree. "'Three requirements compose a claim fit for judicial determination: if the issues are primarily legal, do not require further factual development, and the challenged action is final.'" *State v. Bahl*, 164 Wn.2d 739, 751, 193 P.3d 678 (2008) (quoting *First United Methodist Church v. Hr'g Exam'r*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). A challenge to the trial court's entry of an LFO order under RCW 10.01.160(3) satisfies all three conditions.

[2] By rule, "a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a).

and argue that "it is well established that illegal or erroneous sentences may be challenged for the first time on appeal," suggesting that they may challenge unpreserved LFO errors on appeal as a matter of right. Suppl. Br. of Pet'r (Blazina) at 3. In *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014), a recent unanimous decision by this court, we said that *Ford* held unpreserved sentencing errors "may be raised for the first time upon appeal because sentencing can implicate fundamental principles of due process if the sentence is based on information that is false, lacks a minimum indicia of reliability, or is unsupported in the record." *Jones*, 182 Wn.2d at 6. However, we find the exception created by *Ford* does not apply in this case.

Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny. As stated in *Ford* and reiterated in our subsequent cases, concern about sentence conformity motivated our decision to allow review of sentencing errors raised for the first time on appeal. *See Ford*, 137 Wn.2d at 478. We did not want to "'permit[] widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court.'" *Id.* (quoting *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993)). Errors in calculating offender scores and the imposition of vague community custody requirements create this sort of sentencing error and properly fall within this narrow category. *See State v. Mendoza*, 165 Wn.2d 913, 919-20, 205 P.3d 113 (2009) (prior convictions for sentencing range calculation); *Ford*, 137 Wn.2d at 475-78 (classification of out of state convictions for offender score calculation); *State v. Bahl*, 164 Wn.2d 739, 743-45, 193 P.3d 678 (2008) (community custody conditions of sentence). We thought it justifiable to review these challenges

raised for the first time on appeal because the error, if permitted to stand, would create inconsistent sentences for the same crime and because some defendants would receive unjust punishment simply because his or her attorney failed to object.

But allowing challenges to discretionary LFO orders would not promote sentencing uniformity in the same way. The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case. *See* RCW 10.01.160(3). The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances. Though the statute mandates that a trial judge consider the defendant's ability to pay and, here, the trial judges erred by failing to consider, this error will not taint sentencing for similar crimes in the future. The error is unique to these defendants' circumstances, and the Court of Appeals properly exercised its discretion to decline review.

Although the Court of Appeals properly declined discretionary review, RAP 2.5(a) governs the review of issues not raised in the trial court for all appellate courts, including this one. While appellate courts normally decline to review issues raised for the first time on appeal, *see Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005), RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right.[3] *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). Each

[3] RAP 2.5(a) states, "The appellate court may refuse to review any claim of error which was not raised in the trial court."

appellate court must make its own decision to accept discretionary review. National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.

At a national level, organizations have chronicled problems associated with LFOs imposed against indigent defendants. These problems include increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. In 2010, the American Civil Liberties Union issued a report that chronicled the problems associated with LFOs in five states—including Washington—and recommended reforms to state and to local officials. AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010) (ACLU), *available at* https://www.aclu.org/files/assets/InForAPenny_web.pdf. That same year, the Brennan Center for Justice at New York University School of Law published a report outlining the problems with criminal debt, most notably the impediment it creates to reentry and rehabilitation. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy /Fees%20and%20Fines%20FINAL.pdf. Two years later, the Brennan Center followed up with "A Toolkit for Action" that proposed five specific reforms to combat the problems caused by inequitable LFO systems. ROOPAL PATEL & MEGHNA PHILIP, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A TOOLKIT FOR ACTION (2012), *available at* http://www.brennancenter.org/sites/default/files/legacy/publications /Criminal%20Justice%20Debt%20Background%20for%20web.pdf. As part of its second

proposed reform, the Brennan Center advocated that courts must determine a person's ability to pay before the court imposes LFOs. *Id.* at 14.

Washington has contributed its own voice to this national conversation. In 2008, the Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. KATHERINE A. BECKETT, ALEXES M. HARRIS & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE (2008) (WASH. STATE MINORITY & JUSTICE COMM'N), *available at* http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf. This conversation remains important to our state and to our court system.

As amici[4] and the above-referenced reports point out, Washington's LFO system carries problematic consequences. To begin with, LFOs accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time. RCW 10.82.090(1); Travis Stearns, *Legal Financial Obligations: Fulfilling the Promise of* Gideon *by Reducing the Burden*, 11 SEATTLE J. SOC. JUST. 963, 967 (2013). Many defendants cannot afford these high sums and either do not pay at all or contribute a small amount every month. WASH. STATE MINORITY & JUSTICE COMM'N, *supra*, at 21. But on average, a person who pays $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed. *Id.* at 22.

[4] This court received a joint amici curiae brief from the Washington Defender Association, the American Civil Liberties Union of Washington, Columbia Legal Services, the Center for Justice, and the Washington Association of Criminal Defense Lawyers.

Consequently, indigent offenders owe higher LFO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount that they owe. *See id.* at 21-22. The inability to pay off the LFOs means that courts retain jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs. *Id.* at 9-11; RCW 9.94A.760(4) ("For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime."). The court's long-term involvement in defendants' lives inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs. ACLU, *supra*, at 68-69. This active record can have serious negative consequences on employment, on housing, and on finances. *Id.* at 69. LFO debt also impacts credit ratings, making it more difficult to find secure housing. WASH. STATE MINORITY & JUSTICE COMM'N, *supra*, at 43. All of these reentry difficulties increase the chances of recidivism. *Id.* at 68.

Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs. *See* RCW 9.94A.030. For example, for three quarters of the cases sentenced in the first two months of 2004, less than 20 percent of LFOs had been paid three years after sentencing. WASH. STATE MINORITY & JUSTICE COMM'N, *supra*, at 20.

Significant disparities also exist in the administration of LFOs in Washington. For example, drug-related offenses, offenses resulting in trial, Latino defendants, and male defendants all receive disproportionately high LFO penalties. *Id.* at 28-29. Additionally, counties with smaller populations, higher violent crime rates, and smaller proportions of their budget spent on law and justice assess higher LFO penalties than other Washington counties. *Id.*

Blazina and Paige-Colter argue that, in order to impose discretionary LFOs under RCW 10.01.160(3), the sentencing judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay. Suppl. Br. of Pet'r (Blazina) at 8. They also argue that the record must reflect this inquiry. We agree. By statute, "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3) (emphasis added). To determine the amount and method for paying the 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." *Id.* (emphasis added).

As a general rule, we treat the word "shall" as presumptively imperative—we presume it creates a duty rather than confers discretion. *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985). Here, the statute follows this general rule. Because the legislature used the word "may" 11 times and the word "shall" eight times in RCW 10.01.160, we hold that the legislature intended the two words to have different meanings, with "shall" being imperative.

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.*, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

CONCLUSION

At sentencing, judges ordered Blazina and Paige-Colter to pay LFOs under RCW 10.01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at

sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings.

Madsen, C.J.

WE CONCUR:

Johnson, J.

Chambers, J.

Owens, J.

Gonzalez, J.

Fairhurst, J.

Stephens, J.

J. M. Johnson

Wiggins, J.

McCloud, J.

O.P.T.

No. 89028-5

FAIRHURST, J. (concurring in the result)—I agree with the majority that RCW 10.01.160(3) requires a sentencing judge to make an individualized determination into a defendant's current and future ability to pay before the court imposes legal financial obligations (LFOs). I also agree that the trial judges in these cases did not consider either defendant's ability to pay before imposing LFOs. Because the error was unpreserved, I also agree that we must determine whether it should be addressed for the first time on appeal. RAP 2.5(a).

I disagree with how the majority applies RAP 2.5(a). RAP 2.5(a) contains three exceptions on which unpreserved errors can be raised for the first time on appeal. While the majority does not indicate which of the three exceptions it is applying to reach the merits, it is likely attempting to use RAP 2.5(a)(3), "manifest error affecting a constitutional right."[1] However, the majority fails to apply the three part test from *State v. O'Hara*, 167 Wn.2d 91, 98-100, 217 P.3d 756 (2009), that established what an appellant must demonstrate for an appellate court to reach an unpreserved error under RAP 2.5(a)(3).

[1]The other two exceptions, "(1) lack of trial court jurisdiction" and "(2) failure to establish facts upon which relief can be granted," are not applicable. RAP 2.5(a).

In *O'Hara*, we found that to meet RAP 2.5(a)(3) and raise an error for the first time on appeal, an appellant must demonstrate the error is manifest and the error is truly of constitutional dimension. *Id.* at 98. Next, if a court finds a manifest constitutional error, it may still be subject to a harmless error analysis. *Id.*

Here, the error is not constitutional in nature and thus the unpreserved error cannot be reached under a RAP 2.5(a)(3) analysis. In analyzing the asserted constitutional interest, we do not assume the alleged error is of constitutional magnitude but instead look at the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error. *Id.*

The trial court judges in *Blazina* and *Paige-Colter* did not inquire into the defendants' ability to pay LFOs, which violates RCW 10.01.160(3). 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.

Failing to determine a defendant's ability to pay LFOs violates the statute but does not implicate a constitutional right.

Although the unpreserved error does not meet the RAP 2.5(a)(3) standard from *O'Hara*, I would hold that this error can be reached by applying RAP 1.2(a),

which states that the "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a) is rarely used, but this is an appropriate case for the court to exercise its discretion to reach the unpreserved error because of the widespread problems, as stated in the majority, associated with LFOs imposed against indigent defendants. Majority at 6.

The consequences of the State's LFO system are concerning, and addressing where courts are falling short of the statute will promote justice. In *State v. Aho*, 137 Wn.2d 736, 740-41, 975 P.2d 512 (1999), we held that the supreme court "has the authority to determine whether a matter is properly before the court, to perform those acts which are proper to secure fair and orderly review, and to waive the rules of appellate procedure when necessary 'to serve the ends of justice.'" (quoting RAP 1.2(c)). I agree with the majority that RCW 10.01.160(3) requires sentencing judges to take a defendant's individual financial circumstances into account and make an individual determination into the defendant's current and future ability to pay. In order to ensure that indigent defendants are treated as the statute requires, we should reach the unpreserved error.

For the foregoing reasons, I concur in the result only.

Fairhurst. J.

Stephens. J.