No. 33329-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ANTHONY RAY AGUILAR,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Cameron Mitchell, Judge (CrR 3.5 hearing)
Honorable Carrie L. Runge, Judge (Trial and Sentencing hearing)

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in concluding Aguilar's statement to the officer following his arrest was admissible and concluding the officer's comment prompting the response was not *Miranda*[1] interrogation.

2. The court erred in entering its Conclusions of Law that "The defendant's statement to Detective Trujillo is admissible because it was made spontaneously and was not in response to a custodial interrogation or direct questioning from law enforcement." CP 41.

3. The record does not support the finding Aguilar has the current or future ability to pay the imposed legal financial obligations.

4. The court erred by imposing discretionary costs.

5. In the unlikely event appellate costs become an issue in this appeal, this court should exercise its discretion and decline to impose them given that Aguilar is indigent and has no ability to pay them.

Issues Pertaining to Assignments of Error

1. Was Aguilar's statement to the police inadmissible because it was obtained as a result of custodial interrogation without *Miranda* warnings?

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[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).

2. Should the finding of ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where the finding is not supported in the record?

3. Does a trial court abuse its discretion in imposing discretionary costs where it does not take Defendant's financial resources into account nor consider the burden it would impose on him as required by RCW 10.01.160?

4. Under this court's current approach to appellate costs, any objection to such costs must be made prior to a decision on the merits and before the prevailing party is even known. Therefore, in the event this court erroneously affirms Aguilar's conviction, should this court exercise discretion in the decision terminating review by declining to impose appellate costs on Aguilar based on his indigence?

B. STATEMENT OF THE CASE

A CrR 3.5 hearing was held the week prior to trial to determine admissibility of a statement made by Aguilar. 1RP[2] 2–11. The evidence showed at 8:50 pm on March 11, 2015, Kennewick Police Detective Roman Trujillo was driving in Kennewick when he found his path blocked

[2] The transcript of the trial and sentencing, which took place on May 11, 2015, will be cited to as "2RP __." The transcript of the earlier CrR 3.5 hearing, which took place on May 6, 2015, will be cited to as "1RP __."

by Anthony Ray Aguilar, who was standing in the middle of the road with his cell phone over his head and looking up into the sky. 1RP 2–3. Aguilar was trying to get a Wi-Fi signal on his cell phone to provide musical entertainment for him and his girlfriend, who was sitting in a car parked nearby. 1RP 3–5.

The officer ran Aguilar's identification through the data system, which showed an outstanding arrest warrant. 1RP 3–4. Aguilar was detained, handcuffed and escorted to the patrol car. In the presence of a backup officer Aguilar was asked whether he had anything illegal on his person and was told he'd be searched once the arrest warrant was confirmed and then transported to jail. 1RP 4–5. Aguilar denied having anything illegal. 1RP 6. After the warrant was confirmed Aguilar was arrested. The officer wouldn't allow Aguilar to turn his jacket over to his girlfriend and asked Aguilar if he had any sharp objects that might stick, poke or hurt the officer while searching. 1RP 6–7. The officer inquired if there was any reason Aguilar would have a hypodermic needle on him and then asked if Aguilar did have one on him. Aguilar said no to each of these questions. 1RP 6–7. The officer found a needle in the jacket pocket. As Aguilar and the backup officer stood there, the searching officer pulled a plastic baggie containing a white crystal substance out of the same

pocket and said loudly, "This looks like meth to me." 1RP 7, 9. Aguilar responded, "It is, sir." 1RP 7. At no time had Aguilar been advised of his *Miranda* warnings. 1RP 5, 8, 9; CP 11, Finding of Fact 10.

The court agreed the situation was custodial but found Aguilar's statement was admissible because it was spontaneous and the officer's comment was not a question and thus not interrogation. 1RP 11; CP 41, Conclusions of Law.

Aguilar was convicted of unlawful possession of a controlled substance—methamphetamine following a stipulated facts trial before a different judge. 2RP 2–3; CP 6–8, 28. The court imposed a low end standard range sentence of twelve months and one day confinement and 12 months of community custody. CP 5. The court imposed discretionary costs of $2,660[3] and mandatory costs of $800[4], for a total Legal Financial Obligation ("LFO") of $3,460. In part, the Judgment and Sentence stated:

> ¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant'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.

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[3] $2,000 fine*, $60 sheriff service fee; and $600 fees for court-appointed attorney. CP 32, 38; **State v. Clark*, 362 P.3d 309, 311–12 (Wash. Ct. App. 2015).

[4] $500 victim assessment; $200 criminal filing fee; and $100 felony DNA collection fee. CP 32, 38.

CP 31. Aguilar did not object to the imposition of the LFOs.

The court did not inquire into Aguilar's financial resources or consider the burden payment of LFOs would impose on him. 2RP 3–6. The court asked Aguilar, "How do you normally support yourself, sir?" and Aguilar responded, "I work, Ma'am." 2RP 5. The court ordered Aguilar to pay unspecified payments towards the LFOs "commencing immediately." CP 33. The court also ordered that "[a]n award of costs on appeal against the defendant may be added to the total financial obligations. RCW 10.73.160." CP 32, 33.

Aguilar timely appeals. CP 23–24. The court found Aguilar indigent for purposes of defending against the charge. CP 25. Because of his continued indigency, Aguilar was entitled to counsel on appeal and the costs of preparing the appellate record at public expense. CP 27.

C. ARGUMENT

1. Aguilar's statement to the police was inadmissible because it was obtained as a result of custodial interrogation without *Miranda* warnings.

In order to protect a defendant's Fifth Amendment right against compelled self-incrimination, the United States Supreme Court determined

in *Miranda v. Arizona*, that a suspect must be given the right to remain silent and the right to the presence of counsel during any custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). The Washington State Constitution provides the same protection as the Fifth Amendment. Article 1, § 9, *State v. Warness*, 77 Wn. App. 636, 893 P.2d 665 (1995) (citing *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979)).

Miranda warnings are designed to protect a defendant's right not to make incriminating statements while in the potentially coercive environment of custodial police interrogation. *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S.Ct. 1592, 94 L.Ed.2d 781 (1987). The *Miranda* rule applies when "the interview or examination is (1) custodial (2) interrogation (3) by a state agent." *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992) (citing *State v. Sargent*, 111 Wn.2d 641, 649-53, 762 P.2d 1127 (1988)). Unless a defendant has been given the *Miranda* warnings, his statements during police interrogation are presumed to be involuntary. *Sargent*, 111 Wn.2d at 647-48, 762 P.2d 1127.

Miranda interrogation is not limited to express questioning. It includes words or conduct by the police "that the police should know are

reasonably likely to elicit an incriminating response from the suspect." *State v. Pejsa*, 75 Wn. App. 139, 147, 876 P.2d 963 (1994) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 1690, 64 L.Ed.2d 297 (1980)). The test for the latter category focuses primarily on the suspect's perceptions, rather than the officer's intent. *In re Cross*, 180 Wn.2d 664, 685, 327 P.3d 660 (2014). "This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *Id.* at 685 (quoting *Innis*, 446 U.S. at 301, 100 S.Ct. 1682). On the other hand, incriminating statements that are not responsive to an officer's remarks are not products of interrogation. *Cross*, 180 Wn.2d at 685, citing *State v. Bradley*, 105 Wn.2d 898, 904, 719 P.2d 546 (1986). A trial court's factual determination that remarks are not interrogation is reviewed under the "clearly erroneous" standard. *State v. Walton*, 64 Wn. App. 410, 414, 824 P.2d 533 (1992).

In *Cross*, the trial court concluded an officer's comment that "sometimes we do things we normally wouldn't do and feel bad about it later" was not an interrogation. *Cross*, 180 Wn.2d at 684. The Washington State Supreme Court noted the comment to Cross was the

functional equivalent of questioning where it was made after that morning's recent, brutal and emotional killings of members of his family and implied that Cross committed the murders. *Id.* at 686. Cross responded by asking, "[H]ow can you feel good about doing something like this." *Id.* at 686. The Court further noted that

> [w]hile there are several possible responses to [the officer's] comment, all are incriminating. … For example, Cross could have remained silent, which could be evidence of his guilt; Cross could have denied committing the murders or feigned ignorance, which could have cast doubt on his character for honesty; or Cross could have done as he did and responded with what was essentially a confession.

Cross, 180 Wn.2d at 686. The Supreme Court ultimately concluded that when a suspect's choice of replies to that comment are all potentially incriminating, then "an officer's comment is designed to elicit an incriminating response." *Id.* And even though a remark is not phrased as a question, when the suspect's actual statement is relevant and responsive to the comment then the comment in fact reasonably elicited an incriminating response. *Id.*

Here, Aguilar was detained, handcuffed and escorted to the patrol car. In the presence of a backup officer Aguilar was asked whether he had anything illegal on his person and was told he'd be searched once the arrest warrant was confirmed and then transported to jail. 1RP 4–5.

Aguilar denied having anything illegal. 1RP 6. After the warrant was confirmed Aguilar was arrested. The officer wouldn't allow Aguilar to turn his jacket over to his girlfriend and asked Aguilar if he had any sharp objects that might stick, poke or hurt the officer while searching. 1RP 6–7. The officer inquired if there was any reason Aguilar would have a hypodermic needle on him and then asked if Aguilar did have one on him. Aguilar said no to each of these questions. 1RP 6–7. The officer found a needle in the jacket pocket. As Aguilar and the backup officer stood there, the searching officer pulled a plastic baggie containing a white crystal substance out of the same pocket and said loudly, "This looks like meth to me." 1RP 7, 9. Aguilar responded, "It is, sir." 1RP 7. At no time had Aguilar been advised of his *Miranda* warnings. 1RP 5, 8, 9; CP 11, Finding of Fact 10.

The trial court agreed the situation was custodial but found Aguilar's statement was admissible because it was spontaneous and the officer's comment was not a question and thus not interrogation. 1RP 11; CP 41, Conclusions of Law. However, as previously noted, *Miranda* interrogation is not limited to express questioning. The statement by the officer was obviously intended to elicit an incriminating response, since it communicated to Aguilar something akin to, "Hey, we the police already

know you tried to prevent us from searching the jacket and denied having needles or anything illegal on you so you might as well come clean now." As in *Cross*, Aguilar's choice of replies to the officer's comment were all potentially incriminating—Aguilar could have remained silent, which could be evidence of his guilt; Aguilar could have denied possessing the illegal contraband or feigned ignorance of its presence, which could have cast doubt on his character for honesty; or Aguilar could have done as he did and responded with what was essentially a confession. *Cross*, 180 Wn.2d at 686. And because Aguilar's actual statement was relevant and directly responsive to the officer's comment, the comment in fact reasonably elicited an incriminating response. *Id.*

The trial court erred in concluding the officer's comment was simply a statement of what he believed he had found and not part of an interrogation or likely to elicit an incriminating response. 1RP 11; CP 41, Conclusions of Law. The officer's comment was interrogation conducted while Aguilar was in custody without having been advised of his *Miranda* rights. This Court should find the trial court's determination that Aguilar's statement and any follow-up statements were admissible was clearly erroneous.

2. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Aguilar's current and future ability to pay before imposing present discretionary LFOs and authorizing future discretionary LFOs.

a. This court should exercise its discretion and accept review.

Aguilar did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand … reach[ing] the merits … ." *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d

at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is "the state cannot collect money from defendants who cannot pay." *Blazina*, 344 P.3d at 684. 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 is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court's remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court's decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d

199, 189 P.3d 139 (2008) (The principle of stare decisis—"to stand by the thing decided"—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Aguilar's case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259–60, 255 P.3d 696, 701 (2011) ("Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.") (Citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685. Aguilar's May 11, 2015, sentencing occurred two months after the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect trial courts to make the appropriate ability to pay inquiry on the record. The court below did not inquire. Aguilar respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 182 Wn.2d 827, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. Substantive argument.

There is insufficient evidence to support the trial court's finding that Aguilar has the present and future ability to pay legal financial obligations. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915–16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitutuion, Article 1, § 12 and United States Constitutuion, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia,* 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by

the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[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). 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. *Blazina*, 344 P.3d at 685. "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." *Id*. The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. *Id*.

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id*. 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. *Id*. (citing 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.* (citing comment to GR 34 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, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id*.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id*. at 915–16. The individualized inquiry must be made on the record. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685.

Here, the judgment and sentence contains a biolerplate statement that the trial court has "considered" Aguilar's present or future ability to pay legal financial obligations. A finding, express or implied, must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165

Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, although there was boilerplate language in the judgment and sentence, the record does not show the trial court took into account Aguilar's financial resources and the potential burden of imposing discretionary LFOs including the potential "award of costs on appeal" on him. RP 3–6. Despite finding him indigent for this appeal, the court failed to "conduct on the record an individualized inquiry into [Aguilar's] current and future ability to pay in light of such nonexclusive factors as the circumstances of his incarceration and his other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under CR 34" as is required by *Blazina*. Washington Supreme Court orders dated August 5, 2015, pp. 1–2, in *State*

v. Mickle (90650-5/31629-7-III) and *State v. Bolton* (90550-9/31572-6-III) (granting Petitions for Review and remanding cases to the superior court "to reconsider the imposition of the discretionary legal financial obligations consistent with the requirements" of *Blazina*.).

The boilerplate finding that Aguilar has the present or future ability to pay LFOs is not supported by the record. The matter should be remanded for the sentencing court to make an individualized inquiry into Aguilar 's current and future ability to pay before imposing discretionary LFOs including the potential "award of costs on appeal." *Blazina*, 344 P.3d at 685

3. <u>This court should exercise discretion to waive appellate costs and so state in its decision terminating review</u>.

In the event the State erroneously substantially prevails in this appeal, this court should exercise discretion and decline to impose appellate costs. This court should state as much in its decision terminating review.[5]

[5] This court's commissioners have refused to exercise any discretion with regard to appellate costs when the issue is raised in a post-decision objection to cost bill. In so refusing, they have referenced RAP 14.2, which reads in part, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." In *State v. Nolan*. 141 Wn.2d 620, 626, 8 P.3d 300 (2000), the court stated, albeit in dictum, RAP 14.2 "appears to remove any discretion from the operation of RAP 14.2 with respect to

a. The trial court informed Aguilar prior to appeal that appellate costs, including the cost of an appellate defender, would be provided at public expense, but this was untrue.

Because Aguilar was indigent, the trial court appointed appellate counsel and provided preparation of the appellate record "at public expense." CP 27. Any reasonable person reading this order would believe (1) Aguilar was entitled to an attorney to represent him and the preparation of an appellate record at public expense and (2) "at public expense" means Aguilar would pay nothing due to his indigency, win or lose. Any imposition of appellate costs would convert this indigency order into a falsehood. This alone is a sound reason for this court to exercise discretion and deny appellate costs.

b. Attempting to fund the Office of Public Defense on the backs of indigent persons when their public defenders lose their cases undermines the attorney-client relationship and creates a perverse conflict of interest.

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not win the day in the Court of Appeals, their clients will have to pay, at minimum, thousands of dollars in appellate costs. In this manner, appellate defenders become more than just their clients' lawyers, but also their financial planners.

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the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision." If this is so, the only mechanism available to avoid the imposition of

Appellate defenders must hedge the strength of their arguments against the vast sums of money their clients will owe and advise their clients accordingly. This undermines attorneys' fundamental role in advancing all issues of arguable merit on their clients' behalf and thereby undermines the relationship between attorney and client.

Not only do appellate defenders have to explain to clients they will face substantial appellate costs if their arguments are unsuccessful, they also have to explain that the Office of Public Defense gets most of the money. Many clients immediately see the perverse incentive this creates: the Office of Public Defense, through which all appellate defenders represent their indigent clients, collects money only when the appellate defender is unsuccessful. This is readily viewed as a conflict of interest and undermines the appearance of fairness of the appellate cost scheme. 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. This court should exercise its discretion and deny costs in this case.

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appellate costs is assigning contingent error to the imposition of appellate costs to enable this court to direct in its decision terminating review that costs not be imposed.

c. County prosecutors seek costs to punish the exercise of constitutional rights.

Prosecutors in Eastern Washington are inconsistent internally and between counties in the filing (or not) of cost bills. County prosecutors have no real interest in imposing costs. They typically are allocated only a small portion of ordered appellate costs. Given the small sum, it is not unreasonable to question whether a given county prosecutor's real purpose in filing cost bills may be to punish those who exercise their rights to counsel and to appeal under article I, section 22 of the state constitution. This court should deny costs in this case.

d. The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this court should accordingly exercise its discretion to deny appellate costs in the cases of indigent appellants.

The *Blazina* court recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 836–37. LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $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 836. This in turn "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they

completely satisfy their LFOs." *Id*. at 836–37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." *Id*. (citing AM. CIVIL LIBERTIES UNION, *In for a Penny: The Rise of America's New Debtors' Prisons*, at 68-69 (2010) (available at https://www.aclus.org/files/assets/InForAPenny_web.pdf); KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS. WASH STATE MINORITY & JUSTICE COMM'N, *The Assessment and Consequences of Legal Financial Obligations in Wash. State*, at 9–11, 21–22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_ report.pdf.

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "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." *Blazina*, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id*.

While the *Blazina* court addressed trial court LFOs, the "problematic consequences" of trial court LFOs are every bit as

problematic in the context of appellate costs. The appellate cost bill, which generally totals thousands of dollars, imposes a debt for not prevailing on appeal which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). This debt results in the same compounding of interest and prolonged retention of court jurisdiction. Appellate costs negatively impact indigent persons' ability to move on with their lives in precisely the same ways the *Blazina* court identified.

Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel): RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342. 346–47, 989 P.2d 583 (1999) (holding that because motion tor remission of LFOs is not appealable as matter of right "Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic.

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise

that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The *Blazina* court also stated, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839.

This court receives orders of indigency "as part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the "court of appeals ... *may* require an adult ... to pay appellate costs." (Emphasis added). "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). If this court errs by affirming, this court should nonetheless embrace and soundly exercise its discretion by denying the

award of any appellate costs in its decision terminating review in light of the serious concerns recognized in *Blazina.*

> e. Imposing costs on indigent persons without assessing whether they have the ability to pay does not rationally serve a legitimate state interest and accordingly violates substantive due process.

Both the state and federal constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV; 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 (2006).

"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. Deprivations of life, liberty, or property must be substantively reasonable and are constitutionally infirm if not "supported by some legitimate justification." *Nielsen v. Washington Dep't of Licensing*, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (2013).

The level of scrutiny applied to a substantive due process challenge depends on the nature of the right at issue. *Johnson v. Dep't of Fish & Wildlife*, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a

fundamental right is not at issue, as is the case here, courts apply rational basis scrutiny. *Nielsen*, 177 Wn. App. at 53–54.

To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. *Id*. Although this is a deferential standard, it is not meaningless. *Mathews v. DeCastro*, 429 U.S. 18L 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976) (cautioning rational basis standard "is not a toothless one").

The bulk of the money awarded in an appellate cost bill is earmarked for indigent defense funding and goes to the Office of Public Defense. Although funding the Office of Public Defense is a legitimate state interest, the imposition of costs on appellants who cannot pay them does not rationally serve this interest.

As the Washington Supreme Court recently recognized, "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 83 7. Imposing appellate costs under RCW 10.73.160 and RAP 14.2 on indigent persons who cannot pay them fails to further any state interest. There is no rational basis for appellate courts to impose this debt upon indigent persons who lack the ability to pay.

Likely intending to avoid such a result, the legislature expressly granted discretion to deny a request to impose costs on indigent litigants:

"The court of appeals, supreme court, and superior courts may require an adult or a juvenile convicted of an offense or the parents or another person legally obligated to support a juvenile offender to pay appellate costs." RCW 10.73.160(1) (emphasis added). "The authority is permissive as the statute specifically indicates." *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). No rational legislation would expressly grant discretion to courts that refuse to exercise it. Washington courts must, at minimum, require an ability-to-pay determination *before* imposing costs to comport with the due process clauses.

The state also has a substantial interest in reducing recidivism and promoting postconviction rehabilitation and reentry into society. *Blazina*, 182 Wn.2d at 836–37. As discussed, appellate costs begin accruing interest at 12 percent at the moment of imposition, making this reentry unduly onerous if not impossible to achieve. See *id.*; RCW 10.82.090(1). This important state interest cuts directly against the discretionless imposition of appellate costs.

When applied to indigent persons who do not have the ability or likely future ability to pay, as here, the imposition of appellate costs under title 14 RAP and RCW 10.73.160 does not rationally relate to the state's interest in funding indigent defense programs. In the unlikely event the

issue arises, Aguilar asks this court to conclude, in its decision terminating review, that any imposition of appellate costs without a preimposition determination of his ability to pay would violate his substantive due process rights.

> f. Based on Aguilar's continued indigence, this court should exercise its discretion and decline to award appellate costs.

In a recent published decision terminating review, *State v. Sinclair*, No. 72102-0-I, 2016 WL 393719 (Wash. Ct. App. Jan. 27, 2016), Division I recognized its discretion to direct that appellate costs would not be awarded to the State as the "substantially prevailing party on review" based on a determination from the record that Mr. Sinclair remained indigent with no realistic possibility of future ability to pay. *Sinclair*, 2016 WL 393719 at *2–*8.

> To summarize, we are not persuaded that we should refrain from exercising our discretion on appellate costs. Nor are we attracted to the idea of delegating our discretion to a trial court. We conclude that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief.

Sinclair, 2016 WL 393719 at *5.

Here, there are several reasons this court should exercise its discretion not to impose costs. Aguilar is nearly 45 years old.[6] CP 1. The

[6] Aguilar's date of birth is March 29, 1971.

trial court made no determination that Aguilar was able to pay any amount in trial court legal financial obligations and in fact simply required him to report (presumably upon release) as directed by the Benton County Clerk and provide financial information as requested. CP 13. The trial court authorized Aguilar to seek review wholly at public expense and to have appointment of appellate counsel and preparation of the record at State expense. CP 27.

The *Sinclair* court noted that, "[i]mportant to our determination, the Rules of Appellate Procedure establish a presumption of continued indigency throughout review." *Sinclair*, 2016 WL 393719 at *7 (citing RAP 15.2(f)). As in *Sinclair*, because there is no trial court order finding that Aguilar's financial condition has improved or is likely to improve, this court should presume Aguilar remains indigent. *Id.* Under the circumstances, there is no reason to believe Aguilar is or ever will be able to pay the accrued appellate costs, let alone any interest that compounds at an annual rate of 12 percent. This court should accordingly exercise discretion and deny the award of appellate costs in the decision terminating review in this matter.

g. Alternatively, this court should require superior court fact-finding to determine Aguilar's ability to pay.

In *Sinclair*, Division I declined to delegate its discretion to determine the appropriateness of awarding appellate costs to the trial court. *Sinclair*, 2016 WL 393719 at *4–*5. In the event this court wishes to delegate the determination or to impose appellate costs but believes there is insufficient information, it should first require a fair preimposition fact-finding hearing to determine whether Aguilar can pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. If it erroneously affirms and is inclined to impose appellate costs, this court should first direct the superior court to allow Aguilar to litigate his ability to pay before appellate costs are imposed.

If the State is able to overcome the presumption of continued indigence and support a factual finding that Aguilar has the ability to pay, then either this court or the superior court could fairly exercise discretion to impose appellate costs depending on Aguilar's actual and documented ability to pay.

Blazina signals that the time has come for Washington courts and prosecutors to stop punishing the poor for their poverty. Aguilar asks that this court deny all appellate costs or at least require the trial court on

remand to conduct a fair fact-finding hearing to determine his actual ability to pay appellate costs.

D. CONCLUSION

For the reasons stated, the conviction should be reversed. Alternatively, the matter should be remanded to make an individualized inquiry into Aguilar's current and future ability to pay before imposing discretionary legal financial obligations.

Respectfully submitted on February 20, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 20, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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