No. 33326-4-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

RICHARD E. CORNWELL, JR.,
Defendant/Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to consider whether Cornwell's payment of legal financial obligations (LFOs) would impose manifest hardship on him or on his immediate family, as RCW 10.01.160 (4) requires.

2. The trial court erred in finding that "requiring the payment of the legal financial obligations by the defendant will not impose a manifest hardship on the defendant or the defendant's immediate family." CP 95.

3. The trial court erred in finding "none of the grounds for granting relief in RCW 9.94A.7605 or otherwise apply in this case." CP 95.

4. The trial court erred in finding "the defendant has failed to meet his burden of proof in this matter." CP 95.

B ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 10.01.160(4) explicitly permits Cornwell to move for remission of LFOs at any time for manifest hardship. Does the failure to hold a fact hearing on whether there is manifest hardship render RCW 10.01.160(4)'s remissions process a nullity and violate due process?

2. Is Cornwell aggrieved under RAP 3.1 by the complete denial of consideration of his LFO remission motion on its merits?

3. What superior court procedures or standards should be established to ensure LFOs are remitted when they impose manifest hardship?

4. Because there is no standard or procedure to assess manifest hardship under the remission statute, should counsel be appointed to assist in the remissions process?

C. STATEMENT OF THE CASE

In June 2013, Mr. Cornwell was sentenced to numerous offenses involving drugs and stolen property. CP 6-7. At sentencing the Court imposed discretionary costs of $5346.22 and mandatory costs of $600[1], for a total Legal Financial Obligation (LFO) of $5946.22. CP 11-12.

The Judgment and Sentence contained the following language:

> ¶ 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. (RCW 9.94A.760) The court has considered 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. The court specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein.

CP 9.

[1] $500 Victim Assessment, $100 DNA fee. CP 11-12. The $200 in court costs imposed herein was not labeled as the criminal filing fee by the trial court, and therefore, it cannot be considered as mandatory. *See State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013).

The Court did not inquire into Mr. Cornwell's financial resources or consider the burden payment of LFOs would impose on him. 6/24/13 RP 35-36. The Court ordered Mr. Cornwell to begin making payments of $100 per month 90 days after his release from custody. CP 12.

On April 1, 2015, Mr. Cornwell filed a motion to vacate his LFO's. CP 82-84. The superior court ruled on the merits and summarily denied the motion without a hearing and with only the prosecutor present in the courtroom. 4/20/15 RP 1-2; CP 95-96. The Court found in its written order "that requiring the payment of the legal financial obligations by the defendant will not impose a manifest hardship on the defendant or the defendant's immediate family, that none of the grounds for granting relief in RCW 9.94A.7605 or otherwise apply in this case, and the defendant has failed to meet his burden of proof in this matter." CP 95.

This appeal followed. CP 101-03.

D. ARGUMENT

1. RCW 10.01.160(4) explicitly permits Cornwell to move for remission of LFOs at any time for manifest hardship. The failure to hold a fact hearing on whether there is manifest hardship renders RCW 10.01.160(4)'s remissions process a nullity and violates due process.

RCW 10.01.160(4) provides the LFO remission procedure in Washington:

> A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.[2]

This statute's meaning is clear: if LFOs are imposed on a defendant, that defendant "may at any time petition the sentencing court for remission." RCW 10.01.160(4); *State v. Bertand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011) ("The defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial*

[2] RCW 10.01.170 allows the court to set a time period or specify installments for LFO payments.

scrutiny of his obligation and *his present ability to pay at the relevant time.*" (alteration in original) (quoting *State v. Baldwin*, 63 Wn. App. 303, 310–11, 818 P.2d 1116, 837 P.2d 646 (1991)), *review denied*, 175 Wn.2d 1014 (2012)).

Because defendants may move for remission at any time, it follows that they must be given some process on the subject of remission when they so move. The second sentence of RCW 10.01.160(4) reads, "If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs . . . ." Without some fact finding process, no court could satisfy itself that payment will or will not impose a manifest hardship. That is, no manifest hardship determination can be made unless and until the moving party is able to present evidence and arguments to the trial court demonstrating why the LFOs cause manifest hardship. A commonsense reading of RCW 10.01.160(4) requires a hearing on the issue of manifest hardship.

Washington courts interpreting the remissions statute have recognized that the actual merits of a remission petition must be considered. In *State v. Smits*, 152 Wn. App. 514, 524, 216 P.3d 1097 (2009), *as amended* (Dec. 14, 2009), Division One rejected the

appealability of an order denying a RCW 10.01.160 (4) remission motion because, in its view, orders denying remission are neither final judgments nor amendments to judgments under RAP 2.2 (a)(1) or (9). This was so, according to the court, because the plain language of the statute makes the "amount imposed [in LFOs] . . . always subject to modification." *Smits*, 152 Wn. App. at 524. The court explained,

> A decision to grant or deny a motion to remit LFOs is a determination of whether the defendant should be required to pay *based on the conditions as they exist when the request is made*. It does not alter or amend the judgment but rather changes the requirement of payment based on *a present showing* that payment would impose manifest hardship.

Id. (emphasis added) (footnote omitted). *Smits* supports the conclusion that trial courts must actually consider the issue of manifest hardship based on the defendant's present circumstances. Indeed, that is precisely what the trial court did in *Smits*: "The court held a hearing and entered separate orders denying the 'Defendant's Motion to terminate Legal Financial Obligations.'" *Id.* at 518. Cornwell, like *Smits*, needs a factual hearing on his motions to remit LFOs based on the consideration of his current circumstances.

The consideration of presently available facts is especially warranted in indigent cases. Whether a motion to remit requires a hearing

was decided by this court in *State v. Crook*, 146 Wn. App. 24, 28, 189 P.3d 811 (2008), which concluded that the defendant failed to show that the superior court "erred in denying his motion without a facts hearing." Nevertheless, this issue warrants additional review at this time. Prior to *Crook*, Division Two noted that "additional fact finding from the bench is probably warranted in low income cases." *State v. Campbell*, 84 Wn. App. 596, 600, 929 P.2d 1175 (1997). The *Campbell* court, somewhat incredulous toward the trial court for determining Campbell could pay LFOs, stated, "Although it is difficult to comprehend how a person supporting himself and a child on $700 per month would have *any* disposable income, Campbell indicated that he did, so we uphold the trial court's finding." *Campbell*, 84 Wn. App. at 600. Therefore, "under these facts," "the trial court did not abuse its discretion by denying" Campbell's motion. *Id.* at 600-01. *Campbell*'s marked reservations in the context of low income cases, however, foreshadowed the need for enhanced judicial scrutiny of an indigent person's actual, present ability to pay LFOs when the indigent person moves for remission based on manifest hardship.

Furthermore, although *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), concerned former RCW 10.01.160(3),[3] the Court emphasized

[3] Subsection 3 states:

that a superior court, in assessing a defendant's ability to pay LFOs, must conduct an individualized inquiry and consider factors "such as incarceration and a defendant's other debts, including restitution." 182 Wn.2d at 838. In light of *Blazina*, this court should reconsider its decision in *Crook* and determine that a motion to remit requires a factual hearing.

Moreover, an adequate remissions process—one where a defendant's financial circumstances are actually considered—is necessary to the constitutionality of the LFO system as a whole. In *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), the United States Supreme Court rejected Fuller's equal protection challenge because Oregon's statute, like Washington's, provided a remissions process. "The convicted person from whom recoupment is sought thus retains all the exemptions accorded to other judgment debtors, in addition to the opportunity to show at any time that recovery of the costs of his legal defense will impose 'manifest hardship[.]'" *Id.* at 47. The Court concluded "The legislation before us, therefore, is wholly free of the kind of discrimination that was held [previously] . . .to violate the Equal Protection Clause." *Id.* at 47-48.

> 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 payments of

Other federal courts have interpreted *Fuller* as requiring examination of a defendant's financial circumstances whenever the issue of hardship arises. *See Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984) (holding that, under *Fuller*, courts must give a defendant notice and opportunity to be heard on the issue of repayment of counsel fees and "the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required"); *Olson v. James*, 603 F.2d 150, 155 (10th Cir. 1979) (construing *Fuller*'s constitutional requirements to mean that a person against whom LFOs were imposed "ought at any time to be able to petition the sentencing court for remission of the payment of costs or any unpaid portion thereof. The court should have the power to issue remittitur if payment will impose manifest hardship on the defendant or his immediate family").

Washington courts have also recognized that a robust remissions process is constitutionally required. This recognition began in *State v.*

> costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Former RCW 10.01.160(3).

Barklind, 87 Wn.2d 814, 817, 577 P.2d 314 (1977), where the Washington Supreme Court recited what is constitutionally required under *Fuller*:

> [A] convicted person under obligation to repay may petition the court for remission of the payment of costs or of any unpaid portion thereof. The trial court order specifically allows the defendant to petition the court to adjust the amount of any installment or the total amount due to fit his changing financial situation.

Likewise, in *State v. Curry*, 118 Wn.2d 911, 915, 829 P.2d 166 (1992), the court listed one of the seven requirements that "must be met" for Washington's LFO scheme to be constitutional: "The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion." RCW 10.01.160 was constitutional, in part, because the "court is directed to consider ability to pay, and a mechanism is provided for a defendant who is ultimately unable to pay to have his or her sentence modified." *Curry*, 118 Wn.2d at 916.

In *State v. Blank*, 131 Wn.2d 230, 244, 930 P.2d 1213 (1997), the Washington Supreme Court upheld the constitutionality of the appellate cost scheme under RCW 10.73.160, because it "allows for a defendant to petition for remission at any time." The court noted that an obligation to pay "without opportunity for a hearing in which the defendant may dispute the amount assessed or the ability to repay, and which lacks any procedure

to request a court for remission of payment violates due process." *Blank*, 131 Wn.2d at 244. More recently, in *Utter v. Dep't of Soc. & Health Servs.*, 140 Wn. App. 293, 303–04, 165 P.3d 399 (2007), the court "delineated the salient features of a constitutionally permissible costs and fees structure" to include a requirement that the "convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion . . . ."

The constitutional lesson of all these cases and the plain language of RCW 10.01.160(4) is that defendants must be given a fair hearing of the subject of their LFO remission motions so that trial courts can make a manifest hardship determination based on the facts. A statute allowing a party to move for a remission at any time based on manifest hardship while at the same time disallowing that party to present evidence and arguments germane to the manifest hardship determination makes no sense. Indeed, such a restricted reading renders RCW 10.01.160(4) meaningless and thereby impermissibly undercuts the constitutionality of Washington's overall LFO scheme.

Here, when Mr. Cornwell was sentenced in June 2013, the court found, via the boilerplate language of paragraph 2.5 in the judgment and sentence, that Cornwell "has the ability or likely future ability to pay the

legal financial obligations ordered herein." CP 9. However, the Court did not inquire into Mr. Cornwell's financial resources or consider the burden payment of LFOs would impose on him. 6/24/13 RP 35-36.

After Cornwell filed his motion to vacate his LFO's, the trial court again made no inquiry and held no hearing. Yet the court found "that requiring the payment of the legal financial obligations by the defendant will not impose a manifest hardship on the defendant or the defendant's immediate family[4], that none of the grounds for granting relief in RCW 9.94A.7605 or otherwise apply in this case[5], and the defendant has failed to meet his burden of proof in this matter."[6] CP 95. However, a finding 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)).

Here, there is no evidence to support the Court's finding that requiring the payment of LFO's will not impose a manifest hardship on Cornwell or his immediate family, since the Court has never inquired into Mr. Cornwell's financial resources or consider the burden payment of

[4] Assignment of error 2.
[5] Assignment of error 3.
[6] Assignment of error 4.

LFOs would impose on him. 6/24/13 RP 35-36. Second, the Court's reliance on RCW 9.94A.7605 is incorrect. That statute addresses payroll deductions[7], which could not have occurred in this case, since Cornwell's first payment was not due until 90 days after his release. RCW 10.01.160(4) is instead the applicable statute here. Finally, the Court's finding that Cornwell failed to meet his burden of proof is disingenuous at best, since he was not afforded the opportunity to do so at a hearing.

As a matter of constitutional and statutory law, Cornwell was entitled to a hearing, at which the trial court actually considered whether the amount owed in LFOs caused a manifest hardship to Cornwell and to his family. The Court's findings are not based on substantial evidence. The Court afforded Cornwell no process whatsoever. By refusing to meaningfully consider Cornwell's motions for remission, the trial court failed to comply with the plain commands of RCW 10.01.160(4) and

[7] RCW 9.94A.7605 is titled "Motion to quash, modify, or terminate payroll deduction--Grounds for relief" and provides in pertinent part: "(1) The offender subject to a payroll deduction under this chapter, may file a motion in superior court to quash, modify, or terminate the payroll deduction. The court may grant relief if:
(a) It is demonstrated that the payroll deduction causes extreme hardship or substantial injustice; or
(b) In cases where the court did not immediately order the issuance of a notice of payroll deduction at sentencing, that a court-ordered legal financial obligation payment was not more than thirty days past due in an amount equal to or greater than the amount payable for one month . . ."

thereby failed to provide the minimum process due under the constitution. This court should therefore reverse and give Cornwell a fair hearing.

2. Cornwell is aggrieved under RAP 3.1 by the complete denial of consideration of his LFO remission motion on its merits.

RAP 3.1 provides, "Only an aggrieved party may seek review by the appellate court." "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." *In re Guardianship of Lasky*, 54 Wn. App. 841, 848, 776 P.2d 695 (1989). To be aggrieved, a party must have a present and substantial interest, rather than a mere expectancy or contingent interest in the subject matter. *State v. Mahone*, 98 Wn. App. 342, 347, 989 P.2d 583 (1999). For the purposes of determining whether a party has standing to appeal the superior court order as an aggrieved party, "aggrieved" has been defined to mean denial of some personal or proprietary right, legal or equitable, or the imposition upon a party of a burden or obligation. *Mestrovac v. Department of Labor & Indus.*, 142 Wn. App. 693, 704, 176 P. 3d 536 (2008), *as amended on denial of reconsideration*, (Feb 29, 2008), *aff'd on other grounds sub nom. Kustura v. Dep' t of Labor& Indus.*, 169 Wn.2d 81, 233 P. 3d 853 (2010). The complete denial of any process to Cornwell regarding his remission motions qualifies him as an aggrieved party.

In *Smits*, the defendant was given the precise remedy Cornwell is asking for—a full evidentiary hearing on his remission motion. *Smits*, 152 Wn. App. at 518 ("The court held a hearing and entered separate orders denying" LFO termination motions). Though the trial court ultimately disagreed with Smits that payment of the amount due for LFOs caused a manifest hardship, it made this determination by holding a hearing and assessing the actual evidence before it. *Smits* supports Cornwell's claim that he is aggrieved by the trial court's failure to hold any semblance of a hearing on the issue of manifest hardship. Similarly, in *Mahone* "the [trial] court determined that Mahone did not show how payment would constitute a manifest hardship." 98 Wn. App. at 346. This demonstrates that the trial court in *Mahone* actually considered whether the imposed LFOs would cause manifest hardship and determined they would not. *Mahone* therefore also supports Cornwell's claim that the trial court must consider motions for remission on their merits. Under both *Mahone* and *Smits*, Cornwell has a present interest in obtaining a manifest hardship determination and is therefore aggrieved.

The time-of-enforcement rule, cited in *Smits* and *Mahone*, reasons that the courts need do nothing about the enormous sums imposed on

indigent defendants until the State actually seeks to collect. The *Mahone* court, for instance, stated,

> Before Mahone is aggrieved . . . two things must happen. It must be determined that he has the ability to pay and the State must proceed to enforce the judgment for costs. Until such time as the State determines he has the ability to pay and enforces payment of the costs assessed against him, any attempt to determine whether payment will create a hardship is mere speculation.

98 Wn. App. at 348. The *Smits* court essentially recited *Mahone's* RAP 3.1 reasoning to conclude that Smits would not be aggrieved until the State sought to enforce collection. 152 Wn. App. at 525. Other cases also hold that challenges to LFOs are not ripe for review until the State attempts to collect the money. *See State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013) (collecting cases); *Crook*, 146 Wn. App. at 27 ("Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's indigent status at the time of sentencing does not bar an award of costs.").

Any assertion that Cornwell is not an aggrieved party under the time-of-enforcement rationale conflicts with *Blazina*. In *Blazina* the State argued that the LFO issue should not be reviewed because the proper time to challenge the imposition of an LFO arises when the State seeks to

collect. *Blazina*, 182 Wn.2d at 832 n. 1. Although *Blazina* was concerned with ripeness, and not appellate standing under RAP 3.1, the fact that *Blazina* reached the merits of the LFO issue despite no attempt by the State to collect the obligations, suggests that Cornwell has standing to proceed here. Although Cornwell is in a different procedural position because he challenges uncollected costs through the remissions process, he finds himself owing uncollected costs just like Blazina and Paige-Colter and is just as aggrieved as they were. *Blazina*, 182 Wn. 2d at 832 n. 1.

The *Blazina* court recognized the significant harms unpaid LFOs cause to indigent defendants, regardless of collection status. First, the court discussed the high interest rate attached to LFOs and the possibility of collection fees accumulating when LFOs are not paid on time. *Blazina*, 182 Wn.2d at 836. The court explained that

> [m] any defendants cannot afford these high sums and either do not pay at all or contribute a small amount every month . . . . 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 . . . . Consequently, indigent offenders owe higher LEO sums than their wealthier counterparts because they cannot afford to pay, which allows interest to accumulate and to increase the total amount they owe.

Blazina, 182 Wn.2d at 836. The court further explained that the inability to pay LFOs means that the court system retains jurisdiction over impoverished offenders long after they are released from prison. *Blazina*,

182 Wn. 2d at 836–37. This long- term involvement inhibits reentry and can have serious negative consequences on employment, housing, and finances. *Blazina*, 182 Wn.2d at 837. LFO debt also impacts credit ratings. *Blazina*, 182 Wn. 2d at 837.

Cornwell experiences some or all of the harms identified in *Blazina*. Cornwell currently owes or will owe a substantial amount of interest on his LFO's after his release in approximately ten years. See CP 14-15; 6/24/13 RP 39-40. This interest will continue to rise, compounding at twelve percent per year. See, *Blazina*, 182 Wn.2d at 836–37 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid). As identified by the Supreme Court in *Blazina*, Cornwell's inability to address the increasing interest will prolong his involvement with the criminal justice system. *Id*. This long-term-involvement will inhibit Cornwell's reentry, impacting his credit, housing, and employment opportunities. *Blazina*, 182 Wn.2d at 837. The effects of the compounding interest on Cornwell's LFOs substantially alter the status quo. Therefore, Cornwell is an aggrieved party.

3. The evidentiary hearing must employ some standard to meaningfully assess whether LFOs impost a "manifest hardship," and consistent with *Blazina*, GR 34 provides an appropriate standard.

When faced with motions for remission, trial courts must determine whether "it appears to the[ir] satisfaction . . . that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family," and, if so, decide whether to "remit all or part of the amount due in costs." RCW 10.01.160(4). This is a subjective and vague standard. "Manifest hardship" is not defined in Title 10 RCW. Nor does the case law interpreting RCW 10.01.160(4) say what "manifest hardship" means. In order to provide needed guidance, this court should instruct trial courts on how to assess manifest hardship when reviewing indigent parties' motions to remit LFOs.

Blazina provides helpful direction on how best to do so. The *Blazina* court stressed the need for an "individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." 182 Wn.2d at 838. To assist the courts in making this determination, *Blazina* instructed that "[c]ourts should also

look to the comment in court rule GR 34 for guidance." 182 Wn.2d at 838.

> 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. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a need-based, means-tested assistance program, such as Social Security or food stamps. In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. 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. at 838-39 (emphasis added) (citations omitted).

Under GR 34, a person is considered indigent when he or she receives assistance through a governmental needs-based, means-tested program such as TANF, Supplemental Security Income, poverty-related veteran's benefits, state-provided general assistance for unemployable individuals, or food stamps. GR 34(a)(3)(A). Indigency is presumed when a person's household income is below 125 percent of the federal poverty guideline or when a person, despite being above the 125-percent threshold, has recurring living expenses that render him or her unable to pay fees and surcharges. GR 34(a)(3)(B)–(C). Courts may also determine a person is indigent based on "other compelling circumstances" "that

demonstrate an applicant's inability to pay fees and/or surcharges." GR 34(a)(3)(D).

In addition, the Washington Supreme Court promulgated GR 34 based on "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. The goal is to "ensure[] that meaningful access to judicial review is available to the poor as well as to those who can afford to pay." *Id.* GR 34 is particularly useful because it provides needed uniformity when it comes to determining ability to pay. *See Jafar v. Webb*, 177 Wn.2d 520, 523, 303 P.3d 1042 (2013) ("GR 34 provides a uniform standard for determining whether an individual is indigent and further requires the court to waive all fees and costs for individuals who meet this standard.").

Although the *Blazina* court proposed GR 34 as an appropriate standard to assess whether to impose LFOs at sentencing, there is no reason it is not also an appropriate standard to assess whether the payment of the outstanding balance of already assessed LFOs present a manifest hardship under RCW 10.01.160(4). If courts should "seriously question" a person's ability to pay LFOs if he or she meets the GR 34 standard, why

should they not also "seriously question" whether continuing to carry an outstanding criminal debt causes manifest hardship?

GR 34, in the remissions context, would best be employed as a rebuttable presumption, much like the *Blazina* court suggested. If a person meets the GR 34 indigency standard, courts should presume "that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family." RCW 10.01.160(4). Then the State may attempt to rebut this presumption by presenting evidence that the payment of the outstanding balance of LFOs will not impose a manifest hardship because of the person's current or likely future ability to pay. Employing the GR 34 standard in this manner would allow trial courts to make meaningful manifest hardship assessments under the remission statute. This court should use this case as a vehicle to adopt GR 34 as a meaningful standard and procedure for assessing manifest hardship under RCW 10.01.160(4).

4. Because there is no standard or procedure to assess manifest hardship under the remission statute, counsel should be appointed to assist in the remissions process.

As this case demonstrates, indigent persons lack counsel during the remissions or collections process. Instead, indigent persons must appear pro se at payment review hearings before a trial court judge, even though the State is represented by a prosecutor and, often, a county collections officer. See RCW 10.73.150 (no provision for appointment of counsel); *Mahone*, 98 Wn. App. at 346–47 (holding no right to counsel in remissions process).

Indigent persons enjoy the assistance of counsel at sentencing and on appeal when courts impose LFOs. Yet, until *Blazina* was decided, many public defenders did not object to the imposition of considerable LFOs. *See State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) (declining to consider LFO claim on appeal because Blazina "did not object at his sentencing hearing to the finding or his current or likely future ability to pay these obligations"). Most trial courts were issuing judgments and sentences with boilerplate findings stating they had considered indigent defendants' ability to pay, without actually taking "account of the financial resources of the defendant and the nature of the

burden that payment of costs will impose," as RCW 10.01.160(3) requires. *See Blazina*, 182 Wn.2d at 838 ("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").

In light of these past substantial shortcomings and recent significant changes to the LFO landscape, counsel should be provided to assist indigent persons in the remissions process because currently it is unclear what must be shown to qualify for remission. An indigent defendant, unskilled in the law, should not be forced to navigate this landscape alone. To ensure that LFOs are not retained despite the manifest hardship they impose on an indigent person, this important issue should be litigated and the manifest hardship determination made, when counsel is presently appointed. This will allow for the most meaningful advocacy on the indigent person's behalf and the most accurate assessment of an indigent defendant's current circumstances and ability to pay.

E. CONCLUSION

For the reasons stated, the case should be remanded for Appellant's motion for remission of LFOs to receive fair and just consideration.

Respectfully submitted on March 24, 2016,

_____

s/David N. Gasch, WSBA #18270
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on March 24, 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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