No. 72467-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

D'ANGELO SALOY,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

D'Angelo Saloy was charged with first degree murder and attempted first degree murder after two of his fellow gang members reported he had claimed responsibility for a shooting committed against two rival gang members. Although Saloy was only 16 at the time of the shooting, the State delayed charging him for years, running the clock past his eighteenth birthday in order to obtain a recording of the statements Saloy had made to his friends. Because the State failed to demonstrate normal investigative methods had failed or were unlikely to succeed, its application to intercept and record Saloy's private conversation was legally insufficient and the trial court erred when it permitted the recording to be admitted at trial. The delay in charging Saloy was intentional and prejudiced him by eliminating the possibility that his case would remain in juvenile court, violating his right to Due Process.

In addition, the trial court wrongly denied Saloy's motion for a mistrial after the State commented on Saloy's right not to testify and improperly suggested defense counsel acted unethically by interviewing State witnesses. The court also improperly admitted highly prejudicial evidence at trial.

For all of these reasons, reversal of Saloy's convictions are required. Saloy is also entitled to a new sentencing hearing because the

trial court failed to fulfill its obligations under *Miller v. Alabama* when it imposed a de facto life sentence against Saloy without considering the mitigating circumstances related to his youth. At that new hearing, the trial court should also consider whether Saloy has the ability to pay any legal financial obligations before imposing such obligations at sentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it made the findings of fact under 3(c) and concluded the application to intercept and record Saloy's private conversations was legally sufficient in its Order Denying Defendant's Motion to Suppress Recordings Made Pursuant to RCW 9.73.130. CP 699.

2. The trial court erred when it found the misstatements and omissions in the application were not material in 2(b)-2(f) and denied Saloy a *Franks*[1] hearing in 3(a) of its Order Denying Defendant's Motion to Suppress Recordings Made Pursuant to RCW 9.73.130. CP 697-98.

3. When the trial court denied Saloy's motion to suppress the recordings made pursuant to RCW 9.73.130, it erred.

4. Prosecutorial delay denied Saloy his right to Due Process.

5. The automatic decline statute, RCW 13.04.030, is unconstitutional under the Eighth Amendment and article I, section 14.

[1] *Franks v. Delaware*, 438 U.S. 154, 164, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

6. Saloy was denied his constitutional right to a fair trial when the prosecuting attorneys suggested to the jury that defense counsel had acted unethically and when a prosecuting attorney commented on Saloy's decision not to testify at trial.

7. The trial court erred when it admitted highly prejudicial evidence, with minimal relevance or probative value, over the defense's objection.

8. The trial court violated the Eighth Amendment and article I, section 14, when it imposed a de facto life sentence without fulfilling its obligations under *Miller v. Alabama*.[2]

9. The trial court erred when it imposed legal financial obligations upon Saloy at sentencing.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Washington Privacy Act requires a police officer make a showing that normal investigative procedures have failed or are unlikely to succeed before the State is permitted to intercept and record a private conversation. Where the State failed to make this necessary showing because witnesses had come forward and were willing to testify to Saloy's statements, did the trial court err when it denied his pre-trial motion to suppress the wire recording?

[2] *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 2464, 183 L.Ed.2d 407 (2012).

2. Where a defendant makes a substantial showing that misstatements or omissions in an application to intercept and record a private conversation impact the finding of probable cause, a hearing is required. Where Saloy demonstrated these misstatements and omissions were material, did the trial court err when it refused to suppress the recording or hold an evidentiary hearing?

3. A defendant's right to Due Process may be violated when a prosecutor intentionally or negligently delays charging and the defendant is prejudiced. If, upon a weighing of the prejudice to the defendant and the reasons offered by the State, the delay violates "the fundamental conceptions of justice," Due Process has been violated. Where the State delayed charging Saloy in order to obtain a wire recording of his private statements to friends, and Saloy lost the opportunity to be tried as juvenile as a result, is reversal required?

4. For purposes of sentencing, children are constitutionally different from adults, and a court violates the Eighth Amendment when it fails to account for these differences during the prosecution of a defendant who is alleged to have committed the crime as a youth. Where the difference between adult criminal court and the juvenile system is the severity of the possible punishment, is the automatic decline statute, which requires some criminal cases against children be *automatically* transferred

to adult court without judicial consideration of the youth's individual circumstances, unconstitutional?

5. A defendant may be denied his constitutional right to a fair trial when the prosecuting attorney acts improperly and the defendant is prejudiced. Where the prosecuting attorneys improperly suggested defense counsel acted unethically by interviewing State's witnesses, and later commented on Saloy's right to remain silent at trial, must this Court reverse?

6. Evidence must be excluded where it is irrelevant or the danger of unfair prejudice exists. The trial court erroneously admitted photos, images, and a video recording that were highly prejudicial and only demonstrated Saloy was a gang member, which was a fact undisputed at trial. It also admitted irrelevant evidence that Saloy had urinated on a memorial for one of the victims. Where these errors were not harmless, is reversal required?

7. A trial court must consider a youth's mitigating circumstances before imposing a de facto life sentence. Where Saloy was only 16 years old at the time of the shooting, is reversal and remand for a new sentencing hearing required because the trial court failed to comply with its obligation under *Miller* before imposing a sentence that confines Saloy to prison until close to his 80th birthday?

8. A trial court must consider a defendant's ability or likely future ability to pay legal financial obligations before imposing them at sentencing. Where the court imposed $600 in LFOs against Saloy without determining whether he could pay them, should this Court order the trial court to consider Saloy's ability to pay at a new sentencing hearing?

D. STATEMENT OF THE CASE

Five teenagers affiliated with Central District gangs were hanging out on the steps of Garfield High School on Halloween night in 2008. 7/22/14 RP 16-18, 24. A car drove by and multiple shots were fired at the teens. 7/22/14 RP 28. One of the teenagers, Quincy Coleman, was struck by two bullets and killed. 7/21/14 RP 84. Another teenager, Demario Clark, suffered two gunshot wounds but survived. 7/15/14 RP 124.

Police were immediately called to the scene, and although there were a lot of people around, there were no witnesses able and willing to identify the shooters. 7/15/14 RP 67, 88. Dana Duffy, a homicide detective with the Seattle Police Department, was assigned to the case. 7/28/14 RP 151. Her investigation initially pointed her to a man named Monroe Ezell. Pretrial Ex. 1 at 4. Rumor on the street was that Ezell had fired at least some of the shots with another young man, Ramsey Fola, who had driven the car. Pretrial Ex. 1 at 10. Prior to the shooting, Ezell had left a threatening voicemail message for Coleman, telling him he

would shoot him. 7/31/14 RP 15. At trial, one of the teens on the steps that night testified he had seen the driver and believed it was Ramsey Fola. 7/22/14 RP 31.

Detective Duffy soon learned Ezell was upset people were saying he had participated in the shooting and pointed the finger at D'Angelo Saloy. Pretrial Ex. 1 at 21. Over the next several months, two individuals told police Saloy had told them he committed the shooting with Ramsey Fola. Pretrial Ex. 1 at 23, 26. This information conflicted with the only information provided at the scene, which described the passenger shooter as having a dark complexion. 7/30/14 RP 95; Pretrial Ex. 1 at 1 (showing photograph of Saloy, who has a light complexion).

One of the individuals who came forward, Wendall Downs, provided detailed information about Saloy's account of the shooting, even leading police to the part of Lake Washington where Saloy allegedly said he discarded the weapons. Pretrial Ex. 1 at 27. While four weapons were recovered from the lake in 2010 and 2011, none could be tied to the shooting. 7/24/14 RP 159, 174.

In October 2009, Detective Duffy completed the certification of facts and forwarded it to the prosecuting attorneys. Pretrial Ex. 1 at 26. Despite having strong evidence that Saloy was making incriminating statements to his friends, the State waited to file charges and sought to

obtain a wire recording of Saloy's private conversation. CP 75. After a trial court initially granted the State this authority, Downs was unable to record Saloy making these statements. CP 87-88. Later, Juan Sanchez, one of Saloy's closest friends and a fellow South End gang member, agreed to assist the State after he was informed by Immigration and Customs Enforcement (ICE) that he and his parents faced deportation unless he cooperated.[3] 7/28/14 RP 119.

The State obtained a second authorization to intercept and record Saloy's private conversations, however the application misstated some facts and omitted others. CP 697. Sanchez successfully recorded Saloy making statements similar to those he and others had heard Saloy make before, in which Saloy claimed responsibility for the shooting. Exs. 49, 51. After the State obtained this recording, it moved forward with the charges against Saloy, alleging he committed first degree murder and first degree assault, with a firearm enhancement and gang aggravator attached to both charges. CP 1. Following Saloy's decision to go to trial, the State amended the first degree assault charge to attempted first degree murder. CP 585.

[3] At trial, the ICE agent who initiated contact with Sanchez, and who was later fired from the government agency for lying to his employer, admitted Sanchez's offenses did not actually put him at risk for deportation. 7/22/14 RP 73, 84.

At trial, the State introduced extensive evidence about gangs. Benjamin Hughey, a gang unit detective with the Seattle Police Department, testified that in 2008 and 2009, there was a large feud between the Central District and South End gangs, which resulted in a number of teens being killed. 7/17/14 RP 86, 88. The gang with which Saloy affiliated was originally formed in the South End so that the young men in the neighborhood could protect themselves from Bloods and Crips moving into Seattle from California. 7/31/14 RP 119. Detective Hughey explained young boys in the South End join "start-up gangs" at an early age – sometimes as young as nine years old – and then move into a recognized gang as they grow into their teens. 7/17/14 RP 102; 7/31/14 RP 119-20. The most common way to become part of a gang is to get "jumped in," or assaulted by other boys in the neighborhood, though some kids commit a crime to gain membership or are "blessed in" if a parent is a gang member. 7/17/14 RP 101. Detective Hughey testified that Saloy, like so many other young boys in his neighborhood, joined a "start-up gang" when he was very young. 7/31/14 RP 121.

Detective Hughey further testified that respect and power are earned in gangs by engaging in criminal activity. 7/31/14 RP 104. Thus, it is important for gang members to brag to each other about crimes they have committed. 7/31/14 RP 106. While Detective Hughey was quick to

say it could be dangerous to take credit for another gang member's crime, he acknowledged that this culture leads gang members to embellish their participation in criminal activity in order to gain respect from peers. 7/17/14 RP 107.

The gang evidence provided the State's theory on Saloy's motive. 5/27/14 RP 113 (trial court ruling it admissible for the same). Coleman and Clark were both members of Central District gangs and Garfield High School was a common place for Central District gang members to meet. 7/31/14 RP 112, 117, 129. Sanchez testified Saloy told him he committed the shooting for a friend, who had earlier been killed by Central District gang members. 7/28/14 RP 38.

Saloy did not dispute his membership in a South End gang at trial. 7/31/14 RP 100. Despite the fact his gang membership was not contested, the State sought to admit a voluminous amount of "gang evidence," which the court granted over the defense's objections that it proved nothing more than Saloy's undisputed affiliation with the gang, and was highly prejudicial. 7/31/14 RP 107; 7/30/14 RP 12.

Three Central District gang members testified for the State. 7/21/14 RP 125, 155; 7/22/14 RP 14. Of the three, only one witness was cooperative. 7/21/14 RP 125, 155; 7/22/14 RP 14. In each instance where the witness was uncooperative, the prosecuting attorney pointedly asked

the witness if he had received a visit from defense counsel. Ex. 103 (Graves at 1, 4 Jimerson at 3). After the State rested, Saloy moved for a mistrial, explaining that this questioning, particularly as contrasted against the omission of this questioning of the cooperative witness, suggested defense counsel had acted unethically. 8/4/14 RP 11-12. The trial court denied Saloy's motion, as well as his motion in the alternative to strike the questions and answers and instruct the jury to disregard. 8/5/14 RP 9. Saloy elected not to testify at trial. During closing argument, the State commented that only Saloy could tell the jury how many individuals were in the car the night of the shooting. 8/6/14 RP 64. Once again, Saloy moved for a mistrial, explaining the State had improperly commented on his right to remain silent. 8/6/14 RP 74. The court denied this motion. 8/6/14 RP 65.

The jury convicted Saloy of first degree murder and attempted first degree murder. CP 678, 680. It found him guilty of the firearm enhancements, but not the gang aggravators. CP 679, 681, 683, 685. At sentencing, the trial court imposed a standard range sentence of 712 months, committing Saloy to prison until around his 80th birthday. CP 689. Before imposing this de facto life sentence, the trial court did not consider whether it was appropriate to commit Saloy to prison for the

remainder of his life, given that the shooting occurred when Saloy was only 16 years old. 1 RP 242.

E. ARGUMENT

1. The affidavit for the intercept order, which allowed police to record Saloy without his consent, was legally insufficient under the Washington Privacy Act and the wire recording must be suppressed; absent suppression, the trial court erred when it denied Saloy a *Franks* hearing.

a. The Washington Privacy Act requires a police officer present a particular statement of facts showing that normal investigative procedures have failed, reasonably appear to be unlikely to succeed, or are too dangerous to employ before a court may authorize the interception and recording of a private conversation.

The Washington Privacy Act "is considered one of the most restrictive in the nation." *State v. Kipp*, 179 Wn.2d 718, 724, 317 P.3d 1029 (2014) (citing *State v. Townsend*, 147 Wn.2d 666, 672, 57 P.3d 255 (2002)). It prohibits the recording of any "[p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030(1)(b). "Evidence obtained in violation of the act is inadmissible for any purpose at trial." *Kipp*, 179 Wn.2d at 724; RCW 9.73.050.

This statute provides greater protection than either the state or federal constitutions. *Kipp*, 179 Wn.2d at 725. "Washington is 1 of only 11 states that require that *all* parties to a private communication consent to its recording and disclosure." *Id*. (emphasis original). Although the legislature has amended the act twice, it has continued "to tip the balance in favor of individual privacy at the expense of law enforcement's ability to obtain information in criminal proceedings." *Id.* (citing *State v. Christensen*, 153 Wn.2d 186, 198-99, 103 P.3d 789 (2004)).

The Privacy Act permits a police officer to intercept and record a conversation to which one party has given consent, but only when the officer obtains court approval in advance and the officer's application satisfies several statutory conditions. *Id.*; RCW 9.73.090(2); RCW 9.73.130. In part, the statute requires the officer provide:

> A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.

RCW 9.73.130(3)(f). A boilerplate recitation which "merely support[s] the truism that having a recording to play at trial is advantageous to the State in obtaining a conviction" is not sufficient for a trial court to authorize the interception and recording of a private conversation. *Id*. at 720. *State v. Manning*, 81 Wn. App. 714, 718, 915 P.2d 1162 (1996).

Where the facts are undisputed, as they are here, this Court reviews Privacy Act violations de novo. *Kipp*, 179 Wn.2d at 728 (citing *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) ("as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal")).

b. The State failed to present the required particularized showing in its application to intercept and record Saloy's conversation with Juan Sanchez.

Prior to trial, Saloy moved to suppress the wire recording of a conversation between him and a close friend, Juan Sanchez. CP 63; 5/20/14 RP 67; 5/27/14 RP 117. Detective Duffy's application for the authority to intercept and record Saloy's conversation with Sanchez included the boilerplate assertion that "[n]ormal investigative techniques have been tried and failed and reasonably appear to be unlikely to succeed if tried." CP 93. She justified this assertion with the following claims: (1) it was unlikely any witnesses would come forward and testify against a gang member; (2) there was no eye witness placing Saloy at the scene of the crime; and (3) it was unlikely there would be any physical or documentary evidence at trial. CP 93-94.

Detective Duffy's first assertion – that it was unlikely any witnesses would come forward to testify against a gang member – directly contradicts the claims she made earlier in the application, and the trial

court's finding in support of this first assertion was error. CP 699 (paragraph 3(c)). In Detective Duffy's affidavit, she asserted Saloy had already confessed to Sanchez, and Sanchez had "self initiated to assist" in the investigation in an attempt to prevent his family from being deported from the United States. CP 90. She also stated there were other individuals who had provided information to the police about Saloy. She asserted two individuals, Dewaun Miller and Wendell Downs, reported to police that Saloy had told them he committed the shooting. CP 84-85.

In her affidavit, Detective Duffy described how Downs made repeated contacts with the police and provided extensive information. CP 85-87. In fact, Downs previously agreed to participate in a recorded conversation with Saloy but this did not occur before the court's prior order, authorizing this recording, expired. CP 87-88. In addition, Detective Duffy explained that the police had spoken with a "confidential witness" who Saloy had allegedly confessed to the night of the shooting. CP 88.

Thus, not only did her affidavit demonstrate Sanchez was ready and willing to testify against Saloy at trial, but that at least one additional witness, Wendall Downs, was willing to do so as well. That the State preferred to have Saloy's statements recorded, rather than rely on the testimony of witnesses, does not satisfy RCW 9.73.130(3)(f). "The

desirability of avoiding a 'one-on-one' swearing contest" is not sufficient to justify the involuntary interception and recording of a private conversation under RCW 9.73.130(3)(f). *Manning*, 81 Wn. App. at 721.

The State's remaining justifications – that the evidence was otherwise too weak – "merely support the truism that having a recording to play at trial is advantageous to the State in obtaining a conviction." *Id.* at 720. This is insufficient, as it does not satisfy the requirement of informing the court of the reasons why, in this specific case, other procedures would not successfully resolve the investigation. *Id*. The trial court's finding that these reasons made the recording necessary was error. CP 699 (paragraph 3(c)).

"The requirement for a 'particular statement of facts' reflects the Legislature's desire to allow electronic surveillance under certain circumstances but not to endorse it as routine procedure." *Manning*, 81 Wn. App. at 720. If all that was required from the State was a showing that a recorded statement from the suspect would be advantageous at trial, electronic surveillance would become the norm, rather than the exception. The Privacy Act explicitly seeks to prevent this outcome by requiring the State show other normal investigative procedures cannot be utilized. RCW 9.73.130(3)(f). Detective Duffy's affidavit failed to satisfy this provision.

c. Reversal is required.

When the State's showing of need for the intercept is inadequate, reversal is required unless there is a reasonable probability that the erroneous admission of the evidence did not materially affect the outcome of the trial. *State v. Porter*, 98 Wn. App. 631, 636, 990 P.2d 460 (1999) (reversing where the intercept affidavit did not allege any other investigative methods had been tried or were unlikely to succeed). The State cannot credibly claim that the court's erroneous admission of the recording did not materially affect the outcome of Saloy's trial, given that it was a recording of Saloy confessing, in his own words, to the actions of which the State accused him. Indeed, as Detective Duffy's affidavit makes clear, the State sought this evidence precisely because it significantly increased the State's ability to obtain a conviction. Before the trial court, the State referred to the wire recording as a "damning piece of evidence." CP 269.

The trial court's error was not harmless. This Court should reverse the trial court's order denying the suppression of Saloy's statements. CP 699 (paragraph 3(c)).

d. In the alternative, the trial court should have granted Saloy's request for a *Franks* hearing.

The warrant clause of the Fourth Amendment requires that, absent certain exceptions, police must obtain a warrant based upon probable cause from a neutral and disinterested magistrate before embarking on a search. *Franks v. Delaware*, 438 U.S. 154, 164, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). It is axiomatic that the required showing for a warrant to issue must be a truthful showing. *Id*. at 164-65. Thus,

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Id. at 155-56. The same is true under the Washington Constitution. *State v. Chenoweth*, 160 Wn.2d 454, 478-79, 158 P.3d 595 (2006); Const. art. I, § 7.

Just as with statements made with intentional or reckless disregard for the truth, "[b]y reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw." *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985). Therefore, where material facts are deliberately or recklessly omitted from a warrant application in a manner that tends to mislead, an accused person will be entitled to a

Franks hearing unless, if the omitted facts were included, the warrant would still establish probable cause. *Id*. at 780-81.

The warrant here suffered from both defects under *Franks*. First, in the State's application, Detective Duffy made several false statements: (1) that Saloy told Sanchez he admitted using a .38 caliber firearm during the shooting; (2) that Saloy told Sanchez that Ramsey Fola was armed with a .40 caliber semi-automatic weapon during the shooting; and (3) that Saloy told Sanchez he and Fola had used Fola's sister's car during the shooting. CP 696. Detective Duffy also omitted: (1) Sanchez's criminal history and (2) the fact that another individual identified Monroe Ezell as the shooter. CP 696. The trial court agreed with Saloy that this information had been omitted, misstated, or could be interpreted as misstated, but ruled the misstatements and omissions were not material. CP 697; 5/27/14 RP 120-21. The court's legal conclusion regarding materiality was made in error. CP 697-98 (Findings 2(b)-(f), Conclusions of Law 3(a)); 5/27/14 RP 124.

The misstatements gave the false impression that important details about the shooting, such as the weapons and car used, had been provided directly by Saloy to Sanchez. The omissions prevented the trial court from understanding Sanchez's background and the conflicting accounts of who was responsible for the shooting. The misstated and omitted facts, taken

together, were material to a finding of probable cause and the trial court wrongly denied Saloy a *Franks* hearing. CP 698. If this Court does not order suppression based upon the insufficiency of the affidavit under the Privacy Act, the Court should reverse and direct a *Franks* hearing be conducted.

2. Saloy's right to Due Process was violated by prosecutorial delay.

Saloy was only 16 years old at the time of the shooting, but was 20 years old when the State charged him. Pretrial Ex. 1 at 1; CP 1. Where a defendant is alleged to have committed a crime before age 18, but is charged after his eighteenth birthday, his right to Due Process is implicated where the State's delay was intentional or negligent. *State v. Salavea*, 151 Wn.2d 133, 138, 86 P.3d 125 (2004); U.S. Const. amends. V, XIV; Const. art. I, § 3. To determine whether a claim for unconstitutional prosecutorial delay succeeds, this Court must apply a three-prong test: (1) the defendant must show the charging delay caused prejudice; (2) once prejudice is shown, this Court must examine the State's reasons for the delay; (3) this Court must then balance the State's reasons for the delay against the prejudice suffered by the defendant to determine if the delay violates "the fundamental conceptions of justice." *Id.* at 139; *State v.*

Oppelt, 172 Wn.2d 285, 295, 257 P.3d 654 (2011); *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935).

"The core question is whether the action by the government violates fundamental conceptions of justice." *Oppelt*, 172 Wn.2d at 292. The three-pronged test provides the analytical framework to assist in answering this question. *Id.* at 293. This Court reviews whether Saloy's due process rights were violated de novo. *State v. Maynard*, 183 Wn.2d 253, 259, 351 P.3d 159 (2015).

a. Saloy suffered actual prejudice because the automatic decline statute is unconstitutional under the Eighth Amendment and article I, section 14.

A defendant demonstrates he was actually prejudiced when the prosecutorial delay causes a loss of juvenile court jurisdiction. *Maynard*, 183 Wn.2d at 259; *Salavea*, 151 Wn.2d at 139. In *Salavea*, the defendant was 13-15 years of age when he allegedly committed his crimes, but was charged after he turned 18. *Id*. at 137. The defendant argued intentional or negligent prosecutorial delay caused him to lose juvenile court jurisdiction, but the court rejected his claim, finding there was no prejudice because the age of automatic decline was based on the defendant's age at the time he was charged, rather than his age at the time of the alleged crime. *Id*. at 145. Finding the earliest the State could have charged the defendant was after he turned 16, the court held the automatic

decline statute prevented him from suffering any prejudice since he would not have been tried in juvenile court regardless of the State's additional delay. *Id*. at 146; RCW 13.04.030.

To reach its conclusion, the court relied on *In re Boot*, 130 Wn.2d 553, 570-71, 925 P.2d 964 (1996). In *Boot*, our Supreme Court examined, and upheld, the automatic decline statute's constitutionality almost 20 years ago. 151 Wn.2d at 140. In rejecting the defendants' substantive due process challenge to the statute, *Boot* distinguished *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), in which the Court set aside a death sentence imposed against a 15-year-old. The *Boot* court declared there was "no analogy between the death penalty and life imprisonment without parole," finding the former qualitatively different from the latter and upholding the statute. *Id.* at 572 (quoting *State v. Grisby*, 97 Wn.2d 493, 489, 647 P.2d 6 (1982)).

The court also rejected the defendants' Eighth Amendment challenge outright, finding that because the defendants had not yet stood trial or faced sentencing, they were required to demonstrate adult court jurisdiction is punishment in and of itself. *Boot*, 130 Wn.2d at 569. In doing so, it relied on *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1990), which affirmed a 13-year-old's sentence of life imprisonment without parole. *Boot*, 130 Wn.2d at 569. However, following a series of

United States Supreme Court cases which recognize the grave unfairness in treating children as though they are adults, the holding in *Massey* and reasoning in *Boot* is no longer valid.

i. *Our Supreme Court's rationale for upholding the automatic decline statute is invalid after Miller.*

The Eighth Amendment prohibits cruel and unusual punishment and "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Central to this guarantee is the concept of proportionality. *Graham v. Florida*, 560 U.S. 48, 59, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). In order for justice to prevail, the Eighth Amendment requires that punishment be "graduated and proportioned to the offense." *Graham*, 560 U.S. at 59 (quoting Weems v. United States, 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). Our state constitutional provision provides even greater protections to criminal defendants, eliminating the requirement that the punishment be "unusual," and barring simply "cruel punishment." Const. art. I, § 14; *State v. Witherspoon*, 180 Wn.2d 875, 887, 329 P.3d 888 (2014) (citing *State v. Rivers*, 129 Wn.2d 697, 712, 921 P.2d 495 (1996)).

In a series of cases decided over the last ten years, the United States Supreme Court has held that when it comes to administering

punishment, children are constitutionally different from adults. *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455, 2464, 183 L.Ed.2d 407 (2012) (citing *Graham*, 560 U.S. at 48; *Roper*, 543 U.S. at 558). The Court reached this conclusion relying on scientists' improved understanding of the adolescent brain as well as "common sense." *Miller*, __ U.S. at __, 132 S.Ct. 2464. Roper, 543 U.S. at 569.

Juveniles are different from adults in several critical respects. *Roper*, 543 U.S. at 569. First, because juveniles lack maturity and have an underdeveloped sense of responsibility, they are more prone to to make "impetuous and ill-considered… decisions." *Id*. Second, juveniles are more likely to be impacted by negative influences and outside pressures and, because their freedoms are limited, they are less culpable than adults for failing to escape a bad environment. *Id*. at 569-70. Finally, because a juvenile's character and personality are more transitory than that of an adult, they are far better candidates for rehabilitation and reintegration into the community. *Id*. 570. For these reasons the Court has repeatedly concluded "that the imposition of a State's most severe penalties on juvenile offenders *cannot proceed as though they were not children*." *Miller*, __ U.S. at __, 132 S.Ct. at 2466 (emphasis added) (citing this as *Graham*'s and *Roper*'s foundational principle).

Thus, as the dissenting justice found in *State v. Houston-Sconiers*, the holding in *Massey*, and reasoning in *Boot*, has been undone by *Roper*, *Graham*, and *Miller*, which prohibit a court from "clos[ing] off a life… as though by the workings of a machine" with no regard to whether, given the offender's youth, the sentence is proportioned to the offense. __ Wn. App. __, 2015 WL 7471791 at *30 (No. 47085-3, November 24, 2015) (Bjorgen, J. dissenting); *see also Massey*, 60 Wn. App. at 145-46; *Boot*, 130 Wn.2d at 569. In *Houston-Sconiers*, Division II of this Court, in a split decision, rejected a post-*Miller* challenge to the automatic decline statute despite finding that its holding in *Massey* was no longer valid. __ Wn. App. __, 2015 WL 7471791 at *3. Instead, the majority found the defendants were required to show that automatically transferring a case from juvenile to adult court was punishment in and of itself, and the defendants had failed to make this showing. *Id*. Framing the issue as the exercise of jurisdiction, rather than the imposition of punishment, the majority simply urged the legislature to reconsider the statute. __ Wn. App. __, 2015 WL 7471791 at *4.

As the dissent pointed out in *Houston-Sconiers*, the majority's decision failed to appreciate that "the declining of juvenile court jurisdiction faces the defendant with a much harsher world of potential punishment." __ Wn. App. __, 2015 WL 7471791 at *33 (Bjorgen, J.

dissenting). Because of the age and vulnerability of juveniles, lesser penalties are imposed in the juvenile justice system than in the adult criminal system, and a juvenile adjudication is not deemed a conviction of a crime. *State v. Kuhlman*, 135 Wn. App. 527, 531, 144 P.3d 1214 (2006) (citing *State v. J.H.*, 96 Wn. App. 167, 172-74, 978 P.2d 1121 (1999)). As this Court previously recognized "[t]he penalty, rather than the criminal act committed, is *the* factor that distinguishes the juvenile code from the adult criminal justice system." *Kuhlman*, 135 Wn. App. at 531 (quoting *State v. Schaaf*, 109 Wn.2d 1. 7-8, 743 P.2d 240 (1987)) (emphasis added).

Given that punishment is the only factor that distinguishes these two systems, *Boot* cannot stand in light of the foundational principle articulated in *Miller*, *Graham*, and *Roper*, that a court may not impose the most severe penalties on juvenile offenders without regard for the fact that they are children. *Miller*, __ U.S. at __, 132 S.Ct. at 2466.

ii. *This Court should find the automatic decline statute violates the Eighth Amendment and article I, section 14.*

Saloy was initially charged with one count of first degree murder and one count of first degree assault. CP 1-2. The State further alleged that for each offense, Saloy was armed with a firearm. CP 1-2. Pursuant to RCW 13.04.030(1)(e)(v)(A), the juvenile court was required by law to

decline jurisdiction and permit Saloy to be tried in adult criminal court instead. After Saloy elected to proceed to a trial, rather than accept the State's plea offer, the State amended the charge of first degree assault to attempted first degree murder. 7/15/14 RP 4; 1 RP 242; CP 584-85.

Had Saloy been tried in juvenile court, he would have faced 180 weeks on the first degree murder charge and 103-29 weeks on the attempted murder charge. RCW 13.40.0357. In adult court, he faced a maximum penalty of life in prison, and was sentenced to consecutive terms of 382 months and 210 months, respectively. CP 687, 689. In addition, pursuant to RCW 9.94A.533(3), the trial court was obligated to impose an additional five years of incarceration for the two firearm enhancements found by the jury, to run consecutively with each other and the sentences for the underlying crimes.[4]

To find that the automatic decline statute falls outside the purview of *Miller* because it governs nothing more than jurisdiction, as the majority did in *Houston-Sconiers*, is to ignore the fact the only purpose for the change in jurisdiction is to impose punishment on a child as if that child were an adult. Some crimes, including the one allegedly committed

[4] The statute requires this time be "served in total confinement" and "run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." RCW 9.94A.533(3)(a), (e).

by Saloy, may warrant a forfeiture of the protections of the juvenile justice system. However,

> [t]he lesson of *Miller*… is that the Eighth Amendment does not allow the possibility of forfeitures of such magnitude to be raised automatically from crimes committed by children, as though by the touch of gear on gear. Instead, the forfeiture must be allowed through the exercise of human discretion, taking into account all that law and science tells us about the nature of juveniles and the possibility for amendment of life.

Houston-Sconiers, __ Wn. App. __, 2015 WL 7471791 at *34 (Bjorgen, J. dissenting).

The automatic decline statute operates to deny a defendant like Saloy, who is alleged to have committed the crime as a child, that opportunity. This Court should hold the statute invalid under the Eighth Amendment and article I, section 14, and find Saloy suffered actual prejudice from the State's intentional or negligent delay.

b. <u>The State intentionally delayed charging Saloy in order to gain a tactical advantage at trial.</u>

Once the defendant establishes prejudice, the burden shifts to the State to justify the delay. *State v. McConnell*, 178 Wn. App. 592, 606, 315 P.3d 586 (2013). Detective Duffy's "Follow-Up Report" details her actions from October 31, 2008, the night of the shooting, to March 11, 2014, shortly before the start of trial. Pretrial Ex. 1. This report indicates her investigation initially focused on Monroe Ezell. Pretrial Ex. 1 at 4-21.

Detective Duffy appears to have first heard of Saloy on December 12, 2008, when a witness reported Ezell had blamed Saloy for the shooting. Pretrial Ex. 1 at 21. By December 23, 2008, Detective Duffy discovered Ezell's cell phone records supported his alibi, placing him in the South End of Seattle near the Union Gospel Mission at the time of the shooting, rather than near Garfield High School. Pretrial Ex. 1 at 22.

A few months later, on March 9, 2009, Dewaun Miller came forward and stated Saloy had confessed directly to him. Pretrial Ex. 1 at 23. By March 11, 2009, Ramsey Fola, who Saloy implicated in his statements to Miller, had failed a polygraph test and indicated to Detective Duffy he needed to talk to Saloy before speaking with her again. Pretrial Ex. 1 at 23-24.

On September 29, 2009, a second witness came forward and told Detective Duffy that both Saloy and Fola were taking responsibility for the shooting. Pretrial Ex. 1 at 26. According to this witness, Saloy and Fola provided a number of details about that night, including how and why they did it. Pretrial Ex. 1 at 26. Detective Duffy initially kept his identity confidential after learning "how much information he knew" and the fact that he agreed to assist with the investigation.[5] Pretrial Ex. 1 at 26.

[5] In Detective Duffy's application for the wire intercept, discussed in section 1(b) of this brief, this witness is identified as Wendall Downs.

Detective Duffy attempted to make contact with the second witness again on October 1, 2009, but after discovering he had been released from juvenile detention, she completed the certification of facts in this case and forwarded it to two prosecuting attorneys on October 6, 2009. Pretrial Ex. 1 at 26. On December 10, 2009, the witness took Detective Duffy down to Lake Washington and showed her where, just the day before, he said Saloy had demonstrated discarding the weapons used in the shooting. Pretrial Ex. 1 at 27.

All of this occurred prior to Saloy's eighteenth birthday. Pretrial Ex. at 1 (showing Saloy's birthday as April 15, 1992). Despite having at least one cooperative witness who could provide detailed information about the incriminating statements made by Saloy and Fola, and despite the fact Detective Duffy had completed her statement of facts and forwarded it to prosecuting attorneys, the State delayed charging until it could record the statements Saloy was known to be making to fellow gang members through the use of a wire.[6] CP 75. Seven months after Saloy

[6] During pre-trial arguments involving the suppression of the wire recording, defense counsel represented she had attempted to obtain Detective Duffy's statement of facts in discovery. 5/20/14 RP 70. However, the State responded first by claiming work product privilege and second by claiming that although Detective Duffy specifically referred to it in her follow-up report, the statement of facts did not actually exist. 5/20/14 RP 70.

turned 18, the State applied for authority to intercept and record Saloy's private conversation with a close friend on November 22, 2010. CP 96.

Although prosecuting attorneys are given broad discretion in determining when to prosecute a case, this Court must evaluate the investigation for deliberate or negligent delay when a Due Process violation is raised. *Salavea*, 151 Wn.2d at 146. Here, the crime was reported immediately and, through the utilization of normal procedures, the State obtained solid evidence Saloy had told fellow gang members he participated in the shooting. Obtaining a wire recording of Saloy's statements to friends was *advantageous* to the State, but as explained supra, the Washington Privacy Act does not permit the recording of a private conversation simply because it will assist the State in securing a conviction. *Manning*, 81 Wn. App. at 718. Indeed, the Privacy act prohibits this tactic in the absence of a showing that normal investigative procedures have failed or are likely to be unsuccessful. RCW 9.73.130(3)(f).

Here, the normal investigative procedures resulted in exactly what the State hoped to obtain with a wire recording: Saloy's incriminating statements to friends. The State's intentional delay of the case to obtain a wire recording, causing Saloy to be charged after his eighteenth birthday, was not justified given that the State sought this recording only to secure

an additional advantage at trial. While the State did not seek the delay *itself* in order to secure a tactical advantage, it intentionally delayed charging Saloy in order to obtain a tactical advantage at trial. *See United State v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) (where the Government delays indicting a defendant in order to gain a tactical advantage over the accused, Due Process is violated).

c. Reversal is required.

Reversal is required where the delay violated "the fundamental conceptions of justice." *Oppelt*, 172 Wn.2d at 292. Assuming the unconstitutionality of the automatic decline statute, the prejudice to Saloy is unrefuted, as he was denied his right to have the juvenile court make a determination about whether it was appropriate to retain jurisdiction. *Salavea*, 151 Wn.2d at 139. The only remaining question is whether, balancing the State's reasons for the delay against this considerable prejudice against Saloy, our fundamental conceptions of justice are violated. *Oppelt*, 172 Wn.2d at 292; *Mooney*, 294 U.S. at 112.

Here, the balance tips in favor of Saloy. The State sought to delay charging Saloy simply to obtain an advantage at trial. Under the Privacy Act, this advantage was impermissible. Denying Saloy the opportunity have his case heard in juvenile court in order to obtain an impermissible

advantage at trial violates our fundamental conceptions of justice and this Court should reverse.

3. Saloy was denied a fair trial when the deputy prosecutors suggested defense counsel acted unethically and when a deputy prosecutor commented on Saloy's exercise of his constitutional right not to testify.

A prosecutor is obligated to perform two functions: "enforce the law by prosecuting those who have violated the peace and dignity of the state" and serve "as the representative of the people in a quasijudicial capacity in a search for justice." *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Because the defendant is among the people the prosecutor represents, the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." *Id*.; *see also Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22.

"[W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones." *Berger*, 295 U.S. at 88. "It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id*. A prosecutor's misconduct may deny a defendant his right to a fair trial and is grounds for reversal if the conduct was improper and prejudicial. *State v. Swanson*, 181 Wn. App. 953, 327 P.3d 67, 69-70

(2014) (citing *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *Monday*, 171 Wn.2d at 675).

a. The prosecuting attorneys improperly suggested, through their direct questioning of three witnesses, that defense counsel had acted unethically.

A prosecutor is prohibited from impugning the role or integrity of defense counsel. *State v. Lindsay*, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014). "Prosecutorial statements that malign defence counsel can severely damage an accused's opportunity to present his or her case and are therefore impermissible." *Id*. (citing *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983)). When a prosecuting attorney makes statements that suggest defense counsel acted with deception or dishonesty, this directly impugns defense counsel's integrity and reversal is warranted. *Id*. at 433.

Three Central District gang members testified at trial for the State: Cleden Jimerson, Frank Graves, and Gary Thomas. 7/21/14 RP 125, 155; 7/22/14 RP 14. Both Jimerson and Graves were uncooperative. Jimerson testified he was on the stairs with Coleman and Clark the night of the shooting but saw nothing. 7/21/14 RP 128, 136. He denied any gang affiliation or that he had ever heard Clark's gang nickname. 7/21/14 RP 127. Graves was exceptionally uncooperative. He refused to be sworn in, testified he could not recall his father's name, denied knowing people other evidence established as his closest friends, refused to identify his

own voice on a recording, and said he lied to detectives when he previously admitted to being present the night of the shooting. 7/21/14 RP 155-57, 159-60, 163, 166.

During the direct examinations of Jimerson and Graves, a prosecuting attorney asked whether each witness recalled receiving a visit from defense counsel and her investigator. Ex. 103 (Graves at 1, Jimerson at 3). During Graves' testimony, the prosecuting attorney asked this question *twice*. Ex. 103 (Graves at 1, 4). In none of these instances did the prosecuting attorney follow this inquiry with questions that would explain her reasoning behind asking the question.

In direct contrast, the prosecuting attorney did not ask this question of Gary Thomas, the only cooperative Central District gang member who testified at trial. 7/22/14 RP 14. After the State rested, Saloy moved for a mistrial based on these questions, or in the alternative, a strongly-worded instruction to the jury striking the State's improper questions and the witnesses' answers and reminding the jurors of defense counsel's duty to interview witnesses. 8/4/14 RP 5, 9, 15. Defense counsel explained the questions suggested that she had somehow acted improperly by interfering with the State's witnesses, a claim for which there was absolutely no evidence. 8/4/14 RP 11-12. Doing so improperly put her credibility at issue before the jury. 8/4/14 RP 14.

The trial court denied Saloy's motion, finding there was no error and an instruction would be confusing. 8/5/14 RP 9. However, in order to facilitate review on appeal, the parties put together an exhibit with excerpts from the transcript. 8/5/14 RP 10; Ex 103.

The Ninth Circuit has reversed in similar circumstances. In *Bruno v. Rushen*, the prosecutor implied during his opening and closing statements that a government witness's recantation was the result of her consultation with defense counsel. 721 F.2d at 1194. "[I]n hopes of destroying the credibility of [the witness's] testimony on the stand, the prosecutor had labelled defense counsel's actions as unethical and perhaps even illegal without producing one shred of evidence to support his accusations." *Id*. The Ninth Circuit found that although such expressions are intended only to impute guilt to the accused, they are invalid both for that purpose and because they severely damage a defendant's ability to present his case before the jury. *Id*. at 1195. It held that such remarks "strike at the jugular" of the defendant's story, denying a defendant his right to a fair trial and requiring reversal. *Id*. at 1195.

Like in *Bruno*, the prosecuting attorneys' repeated inquiry of the uncooperative witnesses about receiving a visit from defense counsel suggested Saloy's counsel had acted unethically. This signaled to the jurors both that she could not be trusted and that the defense was resorting

to such tactics because Saloy was guilty. But "lawyers in criminal cases are necessities, not luxuries," and a suggestion that defense counsel acted unethically by performing one of her fundamental duties, investigation of her client's case, "unquestionably tarnish[es] the badge of evenhandedness and fairness that normally marks our system of justice." *Id*. at 1194-95 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963)). The prosecutor's questions were improper, and the trial court erred when it denied Saloy's motion for a mistral or curative instruction.

b. The prosecuting attorney improperly commented on Saloy's exercise of his constitutional right not to testify

The Fifth Amendment and article I, section 9 guarantee a defendant the right to remain silent. *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). It is well-settled that when a prosecutor comments on, or otherwise exploits, the defendant's exercise of this right the State violates the defendant's right to Due Process. *State v. Romero*, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002) (citing *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *State v. Fricks*, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979)).

A "[c]omment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice.'" *State v. Ramirez*, 49 Wn. App.

332, 336, 742 P.2d 726 (1987) (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964)). A defendant's Fifth Amendment rights have been violated where "the prosecutor's statement was of such character that the jury would 'naturally and necessarily accept it as a comment on the defendant's failure to testify.'" *Ramirez*, 49 Wn. App. at 336 (quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)); *see also State v. Brett*, 126 Wn.2d 136, 176, 892 P.2d 29 (1995) (finding a prosecutor's comments are improper where they indicate that certain testimony is undenied *and* the defendant is the one in position to deny it).

In her closing argument, the deputy prosecuting attorney told the jury:

> So it's possible that there was a third gun there. We can't say that one way or the other. And since no one *except for the defendant* can conclusively say or has conclusively said how many people were in the car it isn't a possibility that can necessarily be ruled out.

8/6/14 RP 64 (emphasis added). When the deputy prosecutor made this statement, she directly commented on Saloy's failure to testify. So as not to highlight the State's improper comment, defense counsel made the strategic decision to object and move for a mistrial outside the presence of the jury immediately after the State completed its closing argument. 8/6/14 RP 74.

The State argued it corrected its error when it added "has conclusively said," after making the improper statement. 8/6/14 RP 75. Citing the "context" of the statement and defense counsel's failure to make a contemporaneous objection, the court denied Saloy's motion. 8/6/14 RP 75. The trial court's ruling was made in error, as nothing in the State's comment indicated to the jurors that the reference to a past statement *negated* its comment that only Saloy could conclusively tell them how many people were in the car the night of the shooting. 8/6/14 RP 65. By its own language, the prosecuting attorney's comment was stated in the alternative ("no one except for the defendant can conclusively say *or* has conclusively said"), rather than as a misstatement and correction. 8/6/14 RP 64 (emphasis added).

In addition, the trial court improperly relied on the fact defense counsel decided not to risk exacerbating the prejudice to Saloy by objecting immediately after the State's argument, rather than at the time the prosecuting attorney made the statement. *Lindsay*, 180 Wn.2d at 441 (finding issue properly preserved where defense counsel made a motion for mistrial directly following the prosecutor's rebuttal argument); *United States v. Prantil*, 764 F.2d 548, 555, n.4 (9th Cir. 1985). Defense counsel's decision to wait to make the objection outside the presence of the jury was

acceptable and properly preserved the record on appeal. *Lindsay*, 180 Wn.2d at 441.

c. These errors were not harmless beyond a reasonable doubt.

When the prosecuting attorneys improperly impugned defense counsel's integrity and commented on Saloy's failure to testify, they committed constitutional errors. *Bruno*, 721 F.2d at 1195 (attacks on the integrity of defense counsel is an error of constitutional dimension); *State v. Ramirez*, 49 Wn. App. at 339 ("Drawing attention to the defendant's failure to testify is constitutional error.") (citing *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)). Such error is presumed prejudicial, and the State bears the burden of proving it was harmless beyond a reasonable doubt. *Id*.; *Chapman v. California*, 386 U.S. 18, 22, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967).

The State cannot meet this burden here. The State presented a wire recording of Saloy's inculpatory statements, but there was no physical evidence tying him to the shooting and a gang unit detective testified gang members sometimes brag about participating crimes they did not commit in order to gain power and respect. 8/4/14 RP 116. When the State implied the witnesses were uncooperative because of defense counsel's influence, it suggested Saloy's counsel could not be trusted and had resorted to witness tampering in order to achieve an acquittal. When it

commented on Saloy's decision not to testify, it emphasized to the jurors that he had not taken the stand to dispute the wire recording and signaled they could use Saloy's silence against him. Each instance of improper conduct by the State resulted in prejudice to Saloy, denying him a fair trial. This Court should reverse.

4. The trial court erred when it admitted the photographs and images in exhibit 98, Saloy's taped "monologue," and evidence that Saloy urinated on the memorial for Quincy Coleman.

a. Evidence must be excluded where the danger of unfair prejudice exists.

In order for evidence to be admissible at trial, it must be relevant. ER 402. Pursuant to ER 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus, in order "[t]o be relevant… evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case." *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (quoting *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)).

In addition, relevant evidence may be excluded if it is more prejudicial than probative, confuses the issues, or misleads the jury. ER

403. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011) (quoting *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)). Evidence should be excluded if "its effect would be to generate heat instead of diffusing light, or … where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." *Smith*, 106 Wn.2d at 776 (quoting State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)).

b. <u>The trial court erred when it permitted the State to introduce gang-related evidence that was unduly prejudicial.</u>

i. *Photographs of Saloy and Images of his Writings and Drawings*

Saloy refused to stipulate to the gang aggravator at trial and the jury did not find him guilty of this aggravator. CP 683, 685. However, at no point did Saloy dispute his *membership* in a gang. 7/31/14 RP 100. Thus, while the State was faced with the task of proving Saloy acted with the intent to benefit his gang, his membership in a gang was uncontested. 7/31/14 RP 100.

The court permitted Detective Benjamin Hughey to testify as a gang expert for the State over Saloy's objection, allowing the detective to speak at length to the jury about Seattle gangs, their culture and rivalries, and the respective gang memberships held by several of the individuals mentioned at trial, including Saloy, Coleman, and Clark. 5/27/14 RP 113. In addition to this testimony, the State sought to introduce an inordinate number of MySpace photographs showing Saloy with his friends, posing next to graffiti, and displaying gang signs, in addition to photographs of the tattoos on his body and images of writings and drawings he had made. Ex. 98. Saloy repeatedly objected to the admission of this evidence. 1 RP 173, 177; 7/31/14 RP 100. The State claimed it was admissible because it further demonstrated Saloy's connection to his gang, and therefore his motive to commit the shooting. 7/31/14 RP 104. The trial court allowed the photographs in, noting the State had already showed "some discretion" is narrowing it down to what ultimately totaled 59 photos. 7/31/14 RP 107; Ex. 98.

"In determining whether the probative value of evidence outweighs its unfair prejudice, a trial court should consider the availability of other means of proof and other factors." *State v. McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012) (citing *Powell*, 126 Wn.2d at 264). Here, the photographs and images in exhibit 98, particularly the

photographs taken from Saloy's MySpace account (which accounted for 37 of the 59 images), were extremely prejudicial to Saloy because they suggested Saloy had personality traits that would likely be extremely offensive to the jurors. 7/31/14 RP 101. Although the State argued the images provided proof of his motive and intent, Detective Hughey's testimony provided this same evidence without the emotionally-charged images contained in exhibit 98. *McCreven*, 170 Wn. App. at 457.

Saloy's connection to his gang was well-established through Detective Hughey's extensive testimony, and unrefuted by Saloy. The trial court erred when it admitted the images over Saloy's objection.

ii. *The "Casper Monologue"*

The State also sought to play a recording captured from Saloy's MySpace page and dubbed the "Casper Monologue," arguing that it was relevant and probative because Saloy referred to the Central District gangs and to Clark. 7/30/14 RP 5; Ex. 78. The defense moved to exclude this evidence, explaining it was clearly an attempt at a rap and highly prejudicial to Saloy. 7/30/14 RP 8; CP 649. Like the images presented in exhibit 98, it served to elicit an emotional reaction from jurors rather than tending to prove the existence of a fact. *Weaville*, 162 Wn. App. at 818; *Powell*, 126 Wn.2d at 264.

The State's reliance on Saloy specifically mentioning Clark in the recording was misguided, as the evidence indicated that if Saloy was the shooter, he did not know he was shooting at Clark that night. 7/30/14 RP 5; Ex 51 at 8. Thus, the recording was relevant and probative only insofar as it showed Saloy was a member of a South End gang, which had a rivalry with Central District gangs. Because this fact was well-established by Detective Hughey's testimony, any probative value from the recording was outweighed by the risk of unfair prejudice to Saloy. McCreven, 170 Wn. App. at 457. When the trial court determined that the probative value of the recording outweighed any prejudicial effect, it erred. 7/30/14 RP 12.

c. <u>The trial court erred in admitting evidence showing Saloy urinated on Coleman's memorial.</u>

In a motion in limine, Saloy moved to prohibit any reference to the fact he urinated near or on the memorial erected in honor of Coleman during his recorded conversation with Sanchez. CP 525; 1 RP 150. This evidence was irrelevant to the charges against Saloy and was sure to stimulate an emotional response from the jurors. As defense counsel explained to the trial court, this type of image evokes memories of the United States Marines charged with urinating on the bodies of dead Afghani citizens, which caused a huge outcry from the public only a few

years ago.[7] 1 RP 151. In fact, Detective Duffy's follow-up report demonstrates how, despite the tragic nature of the crime, it was *this* alleged act of Saloy's that struck a nerve with her. In a 43-page, single-spaced report, she uses a bolded font only once: when describing the claim that Saloy urinated on the same location he allegedly shot and killed Coleman. Pretrial Ex. 1 at 30. Evidence that stimulated an emotional response from a homicide detective was likely to do the same with the average juror.

The State claimed the evidence was relevant and probative because it showed Saloy was "extremely angry and highly emotional about what was going in 2008." 1 RP 152. However, the urination on the memorial did not occur until two years later, in 2010. CP 96. The fact that Saloy urinated on a memorial years after the shooting, where the evidence at trial established Coleman was a member of a rival gang, did not tend to prove or disprove an existence of a fact that was of consequence to the outcome of trial. *See Weaville*, 162 Wn. App. at 818; ER 401. It was also extraordinarily prejudicial given the negative and emotionally charged association the public has with this type of image. *Smith*, 106 Wn.2d at

[7] *See* http://usnews.nbcnews.com/_news/2013/01/16/16552152-marine-pleads-guilty-to-urinating-on-bodies-of-dead-taliban-posing-for-photographs?lite (last accessed December 22, 2015).

774. When the trial court admitted the evidence over Saloy's objection, it erred.

d. The erroneous admission of this evidence resulted in prejudice to Saloy.

The improper admission of evidence constitutes harmless error only "if the evidence is of minor significance in reference to the evidence as a whole." *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). If the error results in prejudice, reversal is required. *Id*. Under the cumulative error doctrine, even if no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (concluding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Although each erroneous admission of evidence supplies a stand-alone basis for reversal of Saloy's convictions, this Court should conclude, at a minimum, that their cumulative effect at trial created material prejudice that denied him a fair trial and reverse his convictions.

5. The trial court failed to consider the mitigating circumstances related to Saloy's youth when imposing a de facto life sentence, in violation of the Eighth Amendment and *Miller*.

a. *Miller* requires the trial court consider a youth's mitigating circumstances before imposing punishment.

As discussed *supra*, the United States Supreme Court has overturned laws permitting the imposition of the harshest sentences on juveniles, finding that even children who commit terrible crimes are not as morally culpable as adults.[8] *Miller*, __U.S. __, 132 S.Ct at 2460; *Graham*, 560 U.S. at 74; *Roper*, 543 U.S. at 578; U.S. Const. amends. VIII, XIV; Const. art. I, § 14. The Court's reasoning draws from the evolving science of brain development and sociological studies, but its resulting rule of law is grounded in the fundamental constitutional principle prohibiting excessive sanctions under the Eighth Amendment.

For purposes of sentencing, children are "constitutionally different from adults." *Miller*, 132 S.Ct. at 2464. They are categorically less

[8] Section 2(a) of the brief explains how the automatic decline statute violates the Eighth Amendment. This issue and the court's imposition of a de facto life sentence against Saloy demonstrate how, despite being only 16 years old at the time he allegedly committed the shooting, the justice system treated him no differently than an adult in direct contravention of controlling United States Supreme Court precedent.

blameworthy and more likely to be rehabilitated. *Id.*; *Roper*, 543 U.S. at 572. The principles underlying adult sentences – retribution, incapacitation, and deterrence – do not extend to juveniles in the same way. *Graham*, 560 U.S. at 71. Incapacitating a child for the rest of his life is rarely justifiable when a juvenile's developmental immaturity is temporary and her capacity for change is substantial. *Id*. at 2464-65; *see* M. Levick, et al, The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence, U. Pa. J.L. & Soc. Change, 297 (2012). Consequently, imposing a severe penalty on a person whose "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity" fails the Eighth Amendment's requirement of proportional punishment. *Roper*, 543 U.S. at 571; *accord Miller*, 132 S.Ct. at 2469.

It is necessary to evaluate a youth's individual circumstances *before* imposing a sentence. 132 S.Ct. at 2468; *see People v. Gutierrez*, 324 P.3d 225, 268-69 (Cal. 2014) (construing requirements of *Miller*). Relevant mitigating factors the judge must consider before imposing sentence are: (1) "chronological age and its hallmark features – among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) family and home environment; (3) the circumstances of the homicide, including extent of participation and the effects of peer or

familial pressure; (4) whether "incompetencies associated with youth" impaired his ability to navigate the criminal justice system; and (5) the possibility of rehabilitation. *Miller*, 132 S.Ct. at 2468.

b. Saloy's de facto life sentence is inconsistent with the teachings of *Miller*.

Relying on *Miller*, this Court recently held:

> Before imposing a term-of-years sentence that is the functional equivalent of a life sentence for crimes committed when the offender was a juvenile, the court must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."

State v. Ronquillo, __ Wn. App. __, 2015 WL 6447740 at *5 (No. 71723-5-I, October 26, 2015) (quoting *Miller*, __ U.S. __, 132 S.Ct. 2469). Like Saloy, the defendant in *Ronquillo* was alleged to have committed a gang-related drive-by shooting when he was 16 years old, which killed one person and injured another. *Id*. at *1. The trial judge sentenced the defendant to the bottom of the standard range for each of the counts against him, imposing a total sentence of 51.3 years. *Id*.

This Court reversed, finding *Miller* applies to a de facto life sentence, even when it is an aggregate sentence, and that a period of confinement that would not allow for a young person's release until age 68 qualifies as de facto life sentence. *Id*. at *5. It remanded the case for a new sentencing hearing and directed the trial court to consider whether the

defendant's youth diminished his culpability such that an exceptional sentence was warranted. *Id*. at *10.

Ronquillo controls here. Saloy received a sentence of 712 months, or 59.33 years. CP 689. Before imposing this de facto life sentence, the trial court did not consider how the fact Saloy was 16 years old at the time of the crime counseled against sentencing him to a lifetime in prison. *Ronquillo*, __ Wn. App. __, 2015 WL 6447740 at *5. Indeed, Saloy's age was only briefly mentioned at sentencing, and only then for the purpose of determining whether he should be sentenced to the very high end of the sentencing range. 1 RP 231-32, 237-38.

Accounting for the two firearm enhancements, the total standard range permitted Saloy to be sentenced to 776 months. CP 687. The State asked for 720 months, arguing:

> But I do want to explain the State's recommendation just briefly. I think as – as the Court is aware, the range here is essentially about 51-64 years. And as defense pointed out, the Defendant was only 16 years old when he committed this crime. And that's the reason the State's not asking for the very high end of 64 years, but is asking for 60 years.

1 RP 231-32. In response, defense counsel requested the trial court impose a lower sentence within the standard range, noting Saloy was only 16 at the time of the shooting and only 22 at sentencing. 1 RP 237. Defense counsel reminded the court studies had shown "age does change a

lot of things about the potential risk to society" and that Saloy's life expectancy in prison was likely shorter.[9] 1 RP 238. The trial court noted Saloy's age, in combination with the fact the State amended the charges against him when he elected to go to trial, when determining the high end of the sentencing range was inappropriate. 1 RP 242. It imposed a "mid-range" sentence of 712 months, closer to the top of the standard range than the bottom. 1 RP 242; CP 689.

At no point did the court fulfill its obligation under *Miller* and "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Ronquillo*, __ Wn. App. __, 2015 WL 6447740 at *5 (quoting *Miller*, __ U.S. __, 132 S.Ct. 2469). The trial court only considered a sentence within the standard range, and therefore considered only a de facto life sentence. CP 687 (showing the bottom of the standard range would still be 612 months, or 51 years). Indeed, it appears the trial court was not even aware of its duties under *Miller*, as before imposing Saloy's sentence, the judge stated:

[9] Indeed, studies have shown the life expectancy for incarcerated individuals is considerably shorter. The average life expectancy for men in the United States is 76 years. *See* http://en.wikipedia.org/wiki/List_of_countries_by_life_expectancy (last viewed December 21, 2015). But a study of incarcerated people in Michigan found that life expectancy is far lower for a person who starts serving a lengthy prison term as a child, dropping to an average of 50.6 years for people who started serving life sentences as children. *See* Michigan Life Expectancy Data for Youth Serving Natural Life Sentences http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (last viewed December 21, 2015).

> So I'm giving a mid-range sentence. Frankly I only have so much discretion in this case, truth be told, because the deadly weapon enhancements, of course, are required.

1 RP 242.

Thus, the trial court appeared not to recognize that, given Saloy's age when the shooting occurred, it not only had discretion when imposing Saloy's sentence but that it was *required* to consider the mitigating factors related to Saloy's young age, including the environment he was exposed to from birth. *Miller*, 132 S.Ct. at 2468. And to some degree, that evidence was before the court. Detective Hughey's testimony during a pretrial hearing and at trial provided the court with some understanding of what it was like for young boys, like Saloy, to grow up in a rough neighborhood with limited family support. As Detective Hughey explained, young boys in the South End joined "start-up" gangs at young ages for safety and to find a sense of belonging. 5/22/14 RP 39, 60. Losing a fellow gang member was akin to losing a family member. 5/22/14 RP 60. And by Detective Hughey's account, Saloy was pulled in at a particularly vulnerable age, when he was only seven years old. 5/22/14 RP 41.

Yet the trial court gave this information no consideration. Instead, it noted only how "disturbing" gangs were for the community and how "disturbing" it was that this was the life Saloy had chosen. 1 RP 242. It

relied on Saloy's age only to decline to impose a sentence at the high end of the range. 1 RP 242.

c. Reversal and remand for a new sentencing hearing is required.

Under Saloy's current sentence, he will not be eligible for release until somewhere around his 80th birthday. This is the "harshest possible penalty" available. *Miller*, 132 S.Ct. at 2469. It is a penalty reserved for those who are irreparably corrupt, beyond redemption, and unfit to reenter society notwithstanding the diminished capacity and greater prospects for reform that ordinarily distinguishes juveniles from adults. *Id*. This de facto life sentence does not include an opportunity for release based on his rehabilitation. Instead, it dictates Saloy spend the rest of his life in prison without the court having actually considered whether he is irreparably corrupt or beyond redemption.

The trial court's failure to consider whether a de facto life sentence was appropriate, and whether a downward departure from the guidelines was necessary under the considerations articulated in Miller, violated the Eighth Amendment. *Miller*, __ U.S. __, 132 S.Ct. at 2466; *Ronquillo*, __ Wn. App. __ 2015 WL 6447740 at *5. Saloy is entitled to a new sentencing hearing where the court meaningfully considers the effect of youth on his culpability and adjusts Saloy's sentence accordingly.

6. The Court should strike the legal financial obligations because Saloy lacks the ability to pay.

a. The relevant statutes and rules prohibit imposing LFOs on impoverished defendants; reading these provisions otherwise violates due process and the right to equal protection.

At Saloy's sentencing, the court imposed "the $500 victim penalty assessment; $100 DNA" fee. 1 RP 246. The trial court found it would "waive all other fines, fees and costs, based on the Defendant's indigency" but made no determination as to whether Saloy could afford the $600 in legal financial obligations (LFOs) it did impose. 1 RP 246. In the judgment and sentence, these obligations were excluded from the court's consideration of whether Saloy had the present or future ability to pay. CP 688 at 4.1-4.2.

Our legislature mandates that a sentencing 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). The Supreme Court recently emphasized this means "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." *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

Imposing LFOs on indigent defendants causes significant problems, including "increased difficulty in reentering society, the

doubtful recoupment of money by the government, and inequities in administration." *Id*. at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay $25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *Id*. at 836. This, in turn, causes background checks to reveal an "active record," producing "serious negative consequences on employment, on housing, and on finances." *Id*. at 837. All of these problems lead to increased recidivism. *Blazina*, 182 Wn.2d at 837. Thus, a failure to consider a defendant's ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010. Further, it proves a detriment to society by increasing hardship and recidivism. *Blazina*, 182 Wn.2d at 837.

The appearance of mandatory language in the statutes authorizing the costs imposed here does not override the requirement that the costs be imposed only if the defendant has the ability to pay. *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 43.43.756 ("must include" a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). These statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant's financial status and

refrain from imposing costs on those who cannot pay. RCW 10.01.160(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution "shall be ordered" for injury or damage absent extraordinary circumstances, but also states that "the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." RCW 9.94A.753. This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093, 1097 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).[10]

More than 20 years ago, the Supreme Court stated the Victim Penalty Assessment (VPA) was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). *Curry*, however, addressed a defense argument that the VPA was

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

unconstitutional. *Id*. at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and non-indigent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id*. at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("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."); *id*. at 839 ("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."). In addition, it does not appear that the Supreme Court has ever held that the DNA fee is exempt from the ability-to-pay inquiry. Although this Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 with *Blazina*, 182 Wn.2d at 830-39.

General Rule 34, which was adopted at the end of 2010, also supports Saloy's position. That rule provides in part, "Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a). The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay $50 within 90 days. *Id*. at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id*. This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs "shall" be imposed. *See* RCW 36.18.020.

Our Supreme Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Id.* at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id*. at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." *Id*. at 529.

Given Jafar's indigence, the Court said, "We fail to understand how, as a practical matter, Jafar could make the $50 payment now, within 90 days, or ever." *Id*. That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837; CP 49.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply in criminal cases. Indeed, the Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining a defendant's ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors).

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate

costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits imprisoning people for inability to pay fines, but assumed that LFOs could still be imposed on poor people because "incarceration would result only if failure to pay was willful" and not due to indigence. *Id*. at 241. This assumption was not borne out.

As significant studies post-dating *Blank* recognize, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. 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, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay); *see Blazina*, 182 Wn.2d at 836 (discussing report by Beckett et al. with approval).[11] The risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar's civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar's claim was ripe for review even though trial court had given her 90 days to pay $50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that

[11] Available at: http://www.courts.wa.gov/committee/pdf/ 2008LFO_report.pdf.

courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing LFOs on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Saloy concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like him is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

b. <u>This Court should reverse and remand with instructions to strike the legal financial obligations.</u>

This Court should apply a remedy in this case notwithstanding that the issue was not raised in the trial court. In *Blazina*, the Supreme Court exercised discretionary review under RAP 2.5(a) because "[n]ational and

local cries for reform of broken LFO systems demand" it. 182 Wn.2d at 835. This case raises the same concern. *See also Blazina*, 182 Wn.2d at 841 (Fairhurst, J. concurring) (arguing RAP 1.2(a), "rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits," counsels for consideration of the LFO issue for the first time on appeal).

Blazina clarified that sentencing courts must consider ability to pay before imposing LFOs. Because the trial court specifically noted Saloy's indigence, this Court should remand with instructions to strike the legal financial obligations.

7. The Court should not impose costs against Saloy on appeal.

In the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5. As set forth above, the imposition of costs on an indigent defendant is contrary to the statutes and constitution. Even if the Court disagrees, the Court should exercise its discretion not to impose appellate costs against Saloy. RAP 1.2(a), (c); RAP 2.5; *Blazina*, 182 Wn.2d at 835; *id*. at 841 (Fairhurst, J. concurring).

F. CONCLUSION

This Court should reverse Saloy's convictions for all of the reasons stated above. In the alternative, this Court must remand Saloy's case for a new sentencing hearing in order to consider whether, given the mitigating factors associated with Saloy's youth, a downward departure from the guidelines is appropriate.

DATED this 30th day of December, 2015.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. D'ANGELO SALOY, Appellant.	)))))))))	NO. 72467-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] D'ANGELO SALOY 355886 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362-1065	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF DECEMBER, 2015.

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