SUPREME COURT NO. 92079-6

NO. 46101-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

IRVIN LYLE,

Petitioner.

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

The Honorable John R. Hickman, Judge

PETITION FOR REVIEW

JENNIFER WINKLER
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Petitioner Irvin Lyle[1] asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' published split decision in State v. Lyle, filed July 10, 2015 ("Opinion" or "Op."), attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals properly exercise its discretion in declining to review the legal financial obligation-related claims of the petitioner—63 years old at the time of sentencing and subject to 44 months of incarceration—on the sole ground that his sentencing hearing occurred after that court issued its opinion in State v. Blazina,[2] but before this Court's opinion in that case?

2. Was the petitioner's trial attorney constitutionally ineffective for failing to object to the imposition of discretionary LFOs?

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[1] The superior court case caption lists Lyle's first name as "Irving." However, as he represented to that court, his true name is "Irvin." CP 48. This petition uses "Irvin" out of respect for Mr. Lyle.

[2] State v. Blazina 174 Wn. App. 906, 301 P.3d 492 (2013), remanded, 182 Wn.2d 827, 344 P.3d 680 (2015).

D. STATEMENT OF THE CASE

The State charged Lyle with failure to register as a sex offender between September 25 and October 16, 2013 and with having two or more prior convictions for failure to register, which enhanced the penalty for the charge. CP 1-3; see RCW 9A.44.132(1)(b) (elevating crime to class B felony based on prior convictions).

Lyle waived his right to a jury and was found guilty following a bench trial. CP 33-41.

At sentencing, a retired attorney, Gerald Burke, spoke on Lyle's behalf in favor of an exceptional sentence downward. 3RP 219. Burke informed the sentencing judge that Lyle had worked for a landscaping company that maintained Burke's yard. After Lyle's employment with the landscaping company ended, he continued to help Burke with his yard. 3RP 217. After Lyle had to sell his truck to pay rent, he relied on others for rides to Burke's house. 3RP 217-18. During allocution, Lyle informed the sentencing court of his recent difficulties with housing, employment, and community custody, including the fact that he had lost his job at a warehouse. 3RP 222. At the time of the sentencing hearing, Lyle was 63 years old. CP 18.

Rejecting Lyle's request for an exceptional sentence downward, the trial court sentenced Lyle to a standard range sentence of 44 months of incarceration. CP 22. The court also imposed $2,300 in legal financial obligations, including $1,500 in discretionary LFOs for court appointed attorney fees. CP 20-21.

Although there was no explicit discussion of Lyle's ability to pay LFOs during the sentencing hearing,[3] the judgment and sentence includes a written "finding," which was pre-printed on the sentencing form. The finding reads in part that: "The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations." CP 20 (financial obligation finding 2.5).

Lyle timely appealed to Division Two of the Court of Appeals. CP 46. On appeal, he challenged only the imposition of discretionary LFOs. He argued that the sentencing court failed to make an individualized determination on his ability to pay before imposing the LFOs. He also

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[3] Under RCW 10.01.160(3):

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

argued his counsel was ineffective for failing to object to the imposition of discretionary LFOs. Brief of Appellant, filed August 22, 2014.[4]

In a published decision signed by two judges, the Court of Appeals rejected Lyle's first argument on the grounds that Lyle had waived the issue by not objecting at the sentencing hearing. As the two judges explained:

> Our decision in [State v. Blazina], issued before Lyle's March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal. [174 Wn. App. 906, 911, 301 P.3d 492 (2013), remanded, 182 Wn.2d 827, 344 P.3d 680 (2015)]. As our Supreme Court noted, an appellate court may use its discretion to reach unpreserved claims of error. [State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015)]. We decline to exercise such discretion here.

Op. at 3-4 (footnote omitted).[5]

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[4] Per ACORDS, review had been granted in Blazina, and oral argument heard, by the time Lyle was sentenced in March of 2014. CP 18. The case was pending in this Court at the time Lyle filed his appellate brief.

[5] The Court also rejected Lyle's ineffective assistance claim, stating:

> Lyle presented some evidence relevant to his financial situation . . . These facts suggest that Lyle may be disabled but that he was able to do at least some work as evidenced by the fact he had been working for several months before the sentencing. . . . Because Lyle must establish prejudice on this record and the record is not sufficient for us to determine whether there is a reasonable probability that the trial court's decision would have been different, his ineffective assistance of counsel claim fails.

Op. at 5.

In a dissenting opinion, Judge Bjorgen pointed out the fallacy of the majority opinion's logic:

> [B]etween the two Blazina decisions the law took the pose of a Janus, telling parties both that they must raise the issue of ability to pay LFOs at sentencing and that it would be futile to do so. This contradiction is not relieved by holding that a defendant must raise the issue at sentencing, even though he may not know until some distant enforcement stage whether he actually has a meaningful challenge. With this equivocation in the law after our Blazina decision, that decision should not serve as the threshold beyond which this error cannot be raised for the first time on appeal. *Only with the Supreme Court's Blazina decision is that threshold crossed.*

Op. at 8 (Bjorgen, J., dissenting) (emphasis added).

Lyle now asks this Court to accept review, reverse the Court of Appeals, and order the case remanded to the superior court for consideration of Lyle ability to pay discretionary LFOs.[6]

E. REASONS REVIEW SHOULD BE ACCEPTED

1. WHERE THE COURT OF APPEALS' PURPORTED "EXERCISE OF DISCRETION" IN REFUSING TO CONSIDER LYLE'S CLAIM CONTRAVENES THIS COURT'S DECISION IN STATE V. BLAZINA, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1) AND (4).

The Court of Appeals' reliance on the timing of its own decision in Blazina should not form the sole basis of a refusal to consider an LFO

[6] After the Court of Appeals issued its decision in this case, the State filed a cost bill asking the Court of Appeals to order Lyle to pay $3,437.92 in costs on appeal. Appendix B. Lyle has objected to that cost bill based in part on this Court's ruling in Blazina.

argument on appeal. The law was still unsettled following that court's decision Blazina. It was even less settled at the time of Lyle's sentencing, considering that review had already been accepted by this Court, and oral argument heard, in Blazina at the time of Lyle's March 2014 sentencing hearing. Lyle asks this Court to accept review of his case, reverse the Court of Appeals published opinion, and issue a decision consistent with the well-reasoned Court of Appeals dissent.

In Blazina, this Court recognized the "problematic consequences" that LFOs inflict on indigent criminal defendants. 182 Wn.2d at 836. LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. at 836-37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id. at 837 (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH.

STATE MINORITY & JUSTICE COMM'N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these problems, in Blazina, this Court emphasized the importance of judicial discretion in the superior courts. Blazina, 182 Wn.2d at 834. In particular, RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. Blazina, 182 Wn.2d at 834, 839. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. at 834.

In Blazina, this Court determined that—although ripe for review—a challenge to the imposition of discretionary LFOs may not may be raised for the first time on appeal as a matter of right in the same manner as challenges to sentences under State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) and similar cases. Blazina, 182 Wn.2d at 832 n. 1, 832-33. This is because, unlike in those cases, uniformity is not the goal. Rather, the goal is a fair and individualized determination of ability to pay. Id. at 834.

As this Court observed, however, RAP 2.5(a) grants appellate courts discretion to accept review of certain errors not appealed as a matter of right. Blazina, 182 Wn.2d at 835. Although "[e]ach appellate court must make its own decision to accept discretionary review," the broken LFO system "demand[ed]" that this Court reach the merits of the underlying appeals. Id.

Although Lyle recognizes that this Court announced the Court of Appeals' has discretion to decide whether to reach the merits of such a challenge, the Court of Appeals' action here was not an exercise of reasoned discretion, but the creation of an arbitrary, and artificial, impediment. As the dissent aptly observes, Lyle raises the same issue and arrives at the court in the same posture as the Blazina petitioner, but receives no benefit from this Court's groundbreaking decision:

> The same effects of the LFO system that led the Supreme Court to reach the issue in Blazina face Lyle as much as they faced Blazina. If those consequences demanded that the Supreme Court reach the issue in Blazina, they surely demand the same of us here.

Op. at 6-7 (Bjorgen, J., dissenting).

As the dissent argues, the date of the issuance of the *Court of Appeals'* Blazina decision should not form an ill-advised temporal barrier between the privileged few and those who are, once again, out of luck. Op. at 8 (Bjorgen, J., dissenting). This is so because the law was

obviously in a state of flux following the issuance of the Court of Appeals' decision. See, e.g., State v. Duncan, 180 Wn. App. 245, 252, 327 P.3d 699 (2014) (Division Three opinion rejecting Duncan's LFO challenge but noting that Blazina was pending in this Court and this Court's decision would ultimately clarify the law). At the time of Lyle's sentencing there was also authority establishing a challenge to the imposition of LFOs was not ripe for review. Op. at 7 (Bjorgen, J., dissenting) (citing, inter alia, State v. Lundy, 176 Wn. App. 96, 107-08, 308 P.3d 755 (2013)).[7] It is also worth nothing that by the time of Lyle's sentencing hearing, this Court had already granted review and heard arguments in Blazina.

The Court of Appeals' published opinion refusing to consider a LFO argument on the sole grounds that its own Blazina decision provided unequivocal notice to accused persons is unsound. Because the consequences of such a misguided decision are potentially far-reaching, affecting all but the few appellants sentenced before May of 2013 this Court should grant review under RAP 13.4(b)(1) and (4).

[7] Lundy was decided by Division Two after Blazina and before the sentencing hearing in this case.

2. BECAUSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO OBJECT TO THE IMPOSITION OF LFOS, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(3).

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the accused Id. at 225-26 (adopting two-prong test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Lyle's counsel was ineffective for failing to object to the imposition of discretionary LFOs. Reversal is required because there is a reasonable likelihood failure to object to the LFOs prejudiced Lyle. See Duncan, 180 Wn. App. at 255 (ineffective assistance of counsel is "an available course

for redress" when defense counsel fails to address a defendant's inability to pay LFOs).

RCW 10.01.160(3) permits the sentencing court to order a defendant to pay LFOs, but only if the court has first considered his individual financial circumstances and concluded he has the ability, or likely future ability, to pay. Here, the discretionary LFO costs imposed were $1,500 in court appointed attorney fees.

Counsel's failure to object to this discretionary LFO fell below the standard expected for effective representation. There was no reasonable basis to fail to object. Counsel simply neglected alert the trial court to its failure to comply with the statutory requirements. See State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law); State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) (counsel is presumed to know court rules). Such neglect indicates deficient performance. See State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (finding failure to present available defense unreasonable).

Counsel's failure to object to the imposition of discretionary LFO's was also prejudicial. The record demonstrates a reasonable likelihood of a different outcome, had counsel directed the sentencing court to the proper statutes. At sentencing, statements by Lyle's occasional employer Burke indicated Lyle lacked significant assets, and was even required to sell his

vehicle to make rent. 3RP 217-18. Lyle informed the court he had lost a good job at a warehouse due to downsizing. 3RP 222. As the Court of Appeals opinion also acknowledges, "the facts suggest that Lyle may be disabled." Op. at 5.[8] Moreover, although Lyle had been employed to some degree in the past, he was born in 1951 and will be in his late 60s when he is released from prison on the current charge. CP 18, 22. Finally, Lyle qualified for counsel at public expense in the superior court. As this Court noted in Blazina, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839.[9]

There is a reasonable probability that defense counsel's failure to object to discretionary LFOs, imposed upon his aging client, affected the outcome of sentencing. This Court should also accept review because Lyle's constitutional right to effective assistance counsel was violated. RAP 13.4(b)(3).

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[8] Lyle informed the court he had post-traumatic stress disorder and was seeking a disability determination, although, in the context of an argument against an exceptional sentence, the State disputed various claims based on a lack of documentation. 3RP 224-25.

[9] The nature of the charge, failure to register, also prompted the State to present very detailed testimony regarding Lyle's place of residence. Lyle's various living situations (living with friends in the living room of a one-bedroom apartment, sleeping on the floor, moving to building's unfinished basement) are not indicative of wealth, to say the least. E.g. 1RP 30-33, 39-40, 57; 71-76; 2RP 119-20.

F. CONCLUSION

As this Court made clear in Blazina, the hardships that can result from the erroneous imposition of LFOs are numerous, as studies show the snowballing of such legal debts are the rule rather than the exception. This Court should accept review of Lyle's case under RAP 13.4(b)(1), (3) and (4).

DATED this 10TH day of August, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. IRVING B. LYLE, Appellant.	No. 46101-3-II PUBLISHED OPINION

JOHANSON, C.J. — Irving B. Lyle appeals the legal financial obligations (LFOs) the trial court imposed following his bench trial conviction for failure to register as a sex offender. He argues that the trial court failed to make an individualized determination on his present and future ability to pay before imposing the LFOs. He further argues that defense counsel provided ineffective assistance by failing to object to the LFOs. We hold that (1) because Lyle failed to challenge his LFOs and was sentenced after we issued *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), *remanded*, 182 Wn.2d 827, 344 P.3d 680 (2015), he has waived this issue, and (2) Lyle's ineffective assistance of counsel claim fails because the record does not establish that defense counsel's failure to object was prejudicial. Accordingly, we affirm.

FACTS

Following a bench trial, the trial court convicted Lyle of failure to register as a sex offender. At the March 14, 2014 sentencing hearing, the State requested various LFOs.

During the course of the sentencing hearing, in the context of discussing his request for an exceptional sentence downward, Lyle presented some evidence about his financial situation, his alleged disabilities, and his work history prior to his arrest. But the defense never mentioned any LFOs or discussed Lyle's present or future ability to pay LFOs.

The State argued against the exceptional sentence downward and asserted that Lyle's claims about any disability or having been a prisoner of war were unsubstantiated. But the State never discussed Lyle's present or future ability to pay LFOs.

The trial court denied Lyle's request for an exceptional sentence after acknowledging that Lyle's character witness had trusted Lyle to work on his property but noting that Lyle had not presented any documentation supporting his other claims. The trial court sentenced Lyle to 44 months of total confinement. Although the trial court mentioned it was imposing the LFOs, it did not say anything about Lyle's current or future ability to pay those LFOs.

The only mention of Lyle's ability to pay the LFOs was in a boilerplate section of Lyle's judgment and sentence, which stated,

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

Clerk's Papers at 20.

Lyle appeals the LFOs.

ANALYSIS

I. LFO ISSUE WAIVED

Lyle argues that the trial court failed to make an individualized determination on his ability to pay before imposing the LFOs. The State argues that this issue is not ripe for review until the State attempts to enforce the LFOs, that the issue was not preserved for appeal, and that the trial court properly considered Lyle's ability to pay.

Our Supreme Court recently rejected the State's ripeness argument in *Blazina*, 182 Wn.2d at 833 n.1. Accordingly, the fact that the State may not yet be attempting to collect Lyle's LFOs does not preclude our review of this issue.

But Lyle did not challenge the trial court's imposition of LFOs at his sentencing, so he may not do so on appeal. *Blazina*, 174 Wn. App. at 911. Our decision in *Blazina*, issued before Lyle's March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal.[1] 174 Wn. App. at 911. As our Supreme Court noted,

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[1] The dissent argues that our limiting review of unpreserved errors to those cases in which the sentencing was held before our 2013 *Blazina* decision is inappropriate because we had in other cases refused to address challenges to LFOs based on the ability to pay because the issue was not ripe for review. Dissent at 7 (citing *State v. Lundy*, 176 Wn. App. 96, 108, 308 P.3d 755 (2013)). The dissent asserts that the use of the ripeness doctrine could have suggested to counsel that it would be futile to object to the imposition of LFOs at trial. We disagree because a timely objection would not be futile.

The ripeness doctrine addresses only *when* a court can review an issue—it is not relevant to whether an issue was properly preserved for review. *See Lee v. Oregon*, 107 F.3d 1382, 1387-88 (9th Cir. 1997) ("[T]he ripeness doctrine can be specifically understood 'as involving the question of when may a party seek preenforcement review.'" (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.4 at 100 (1989))). Even if the issue were to become ripe at a later date, the defendant could not raise the issue unless it had been properly preserved at trial or review was allowed under RAP 2.5(a).

an appellate court may use its discretion to reach unpreserved claims of error. *Blazina*, 182 Wn.2d at 830. We decline to exercise such discretion here.

II. NO INEFFECTIVE ASSISTANCE OF COUNSEL

Lyle further argues that defense counsel provided ineffective assistance of counsel by failing to challenge the LFOs. Based on this record, we disagree.

We review an ineffective assistance claim de novo, beginning with a strong presumption that trial counsel's performance was adequate and reasonable. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To prevail on an ineffective assistance of counsel claim, the appellant must show both deficient performance and resulting prejudice; failure to show either prong defeats this claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Lyle is correct that defense counsel did not challenge the LFOs based on Lyle's current or future ability to pay. Because the sentencing hearing was after we issued our opinion in *Blazina*, counsel should have been aware that to preserve any issue related to the LFOs he was required to object. Thus, Lyle has arguably shown deficient performance, and we must next examine whether this deficient performance was prejudicial.

To show prejudice, Lyle must establish, "based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). Although the record contains some information about Lyle's financial status, he fails to show prejudice on this record.

Lyle presented some evidence relevant to his financial situation during the sentencing hearing. But this information was presented in the context of Lyle's request for an exceptional sentence downward, not to provide evidence related to Lyle's current or future ability to pay. These facts suggest that Lyle may be disabled but that he was able to do at least some work as evidenced by the fact he had been working for several months before the sentencing. The trial court stated that many of Lyle's assertions were unsupported and there are no additional facts in the record, such as whether Lyle has additional debt, which would allow us to determine whether the trial court would have imposed fewer or no LFOs if defense counsel had objected. Because Lyle must establish prejudice on this record and the record is not sufficient for us to determine whether there is a reasonable probability that the trial court's decision would have been different, his ineffective assistance of counsel claim fails.[2]

Accordingly, we affirm Lyle's sentence.

Johanson, C.J.
JOHANSON, C.J.

I concur:

Sutton, J.
SUTTON, J.

[2] We note that Lyle may be able to petition for remission of his LFOs under RCW 10.01.160(4).

BJORGEN, J. (dissenting) — In *State v. Blazina*, 182 Wn.2d 827, 830, 833-34, 344 P.3d 680 (2015), our Supreme Court exercised its discretion under RAP 2.5 to decide whether trial courts must make an individualized inquiry into a defendant's current and future ability to pay before imposing discretionary legal financial obligations (LFOs) under RCW 10.01.160(3). The court reached this issue, even though the defendant had not raised it at sentencing, because it found that the pernicious consequences of "broken LFO systems" on indigent defendants "demand" that it reach the issue, even though it was not raised in the trial court. *Blazina*, 182 Wn.2d at 833-34.

Before us, Lyle raises the same issue in the same posture: he, too, is an indigent who failed to raise the issue below. The same effects of the LFO system that led the Supreme Court to reach the issue in *Blazina* face Lyle as much as they faced Blazina. If those consequences demanded that the Supreme Court reach the issue in *Blazina*, they surely demand the same of us here.

As the majority points out, the Supreme Court in *Blazina* held that this court properly exercised its discretion to decline review when we issued our *Blazina* decision in 2013. *Blazina*, 182 Wn.2d at 833-34. The doctrinal tectonics, however, have shifted since our decision in *Blazina*. In that decision we followed the well trampled path of declining to reach issues for the first time on appeal if they did not fall within the exceptions of RAP 2.5. Now, the Supreme Court has concluded that the hazards of our LFO system demand consideration of this same issue, even if not raised below. As an indigent, Lyle confronts those same hazards. Although

our declining of review in 2013 was a sound exercise of discretion then, it is on much shakier grounds now, after the Supreme Court has spoken.

In addition, the Supreme Court's holding that we properly declined review in *Blazina* in 2013 came at the close of its demonstration that *Ford*[3] and its progeny do not create a right to review unpreserved LFO errors. *Blazina*, 182 Wn.2d at 833-34. Thus, this holding cannot serve as a license to continue to decline review of the same issue, when the Supreme Court has also made clear that these same circumstances demand the exercise of discretion *to* review.

Finally, the majority argues that any need to review unpreserved errors cannot extend to sentencing proceedings held after our *Blazina* decision in 2013, since that decision categorically required such errors to be raised at sentencing. However, during the interval between our *Blazina* decision and that of the Supreme Court, the law was also clear that a challenge to LFOs based on ability to pay was not generally "ripe for review until the State attempts to curtail a defendant's liberty by enforcing them." *State v. Lundy*, 176 Wn. App. 96, 107-08, 308 P.3d 755 (2013); *see also State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991), *amended*, 837 P.2d 646 (1992), and *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). The central rationale behind this rule was that only at enforcement could the ability to pay be meaningfully weighed. *See, e.g.*, *Blank*, 131 Wn.2d at 242. The case law deviated from this rule in the face of circumstances such as those presented in *State v. Bertrand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011), where a disabled defendant was ordered to commence payment of LFOs within 60 days of entry of judgment and sentence while still incarcerated.

[3] *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999).

During the interval between the two *Blazina* decisions, RCW 10.01.160(3) was also in effect, stating that

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

The case law, however, has interpreted this provision to be subject to Lundy's ripeness restriction. *See State v. Thomas*, 185 Wn. App. 1058, 2015 WL 728245, at *6 (2015).

Thus, between the two *Blazina* decisions the law took the pose of a Janus, telling parties both that they must raise the issue of ability to pay LFOs at sentencing and that it would be futile to do so. This contradiction is not relieved by holding that a defendant must raise the issue at sentencing, even though he may not know until some distant enforcement stage whether he actually has a meaningful challenge. With this equivocation in the law after our *Blazina* decision, that decision should not serve as the threshold beyond which this error cannot be raised for the first time on appeal. Only with the Supreme Court's *Blazina* decision is that threshold crossed.

For these reasons, I would hold that Lyle is not barred from raising his challenge to LFOs for the first time on appeal.

Bjorgen, J.
BJORGEN, J.

APPENDIX B

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

STATE OF WASHINGTON, Respondent, v. IRVING LYLE, Appellant.	NO. 46101-3 COST BILL

The STATE OF WASHINGTON, Respondent, asks that the following costs be awarded:

1. Charges for reproduction of

Respondent's Brief:	$ 0.00
Attorney Fees	2,692.00
VRPS	713.00
Pro Se Fees	0.00
Clerk's Papers	23.50
Appellant's Brief copies	9.42
	$ 3,437.92

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

The above items are expenses allowed as costs by RAP 14.3, and RCW 10.73.160 (Laws 1995, Chapter 275), reasonable expenses actually incurred, and reasonably necessary for review. The amount of $0.00 should be awarded to the Pierce County Prosecuting Attorney's Office; all remaining costs should be awarded to the Office of Public Defense, State of Washington. Appellant should pay the cost.

DATED: JULY 16, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Kathleen Proctor

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail, e-file, or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/16/15 [signature]
Date Signature

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

WASHINGTON STATE
OFFICE OF PUBLIC DEFENSE
Appellate Program

Indigent Defense Fund Cost Summary Request

Use this form to request a summary of the amount paid by the Washington State Office of Public Defense on a case as outlined in RAP 14.3.

TO BE COMPLETED BY REQUESTOR

Request Date:	07/13/15	Due Date:	07/20/5
Case Name:	STATE V. IRVING LYLE	COA No.:	46101-3
Superior Court No.:	13-1-04027-3	County:	Pierce
Requestor Name:	Heather Johnson		
Phone No.:	(253)798-7875	Email Address:	hjohns2@co.pierce.wa.us

Email the completed request form to: Michele.young@opd.wa.gov

TO BE COMPLETED BY OPD ACCOUNTING DIVISION

Amount Paid to Date

Counsel Fees:	$ 2692.00
VRP:	$ 713.00
VRP copy (RAP 10.10(e)):	$ -0-
Clerk's Papers:	$ 23.50
Brief Copies:	$ 9.42
TOTAL:	$ 3437.92

☒ If this box is checked either no invoice or only a partial invoice has been received and additional expenses may be incurred.

For cases consolidated with one or more co-defendants, the amount provided here reflects an even distribution of the total cost with the exception of counsel fees.

MMC — 7-14-15

Signature of OPD Staff — Date

QUESTIONS

Michele Young, Fiscal and Budget Manager
Washington State Office of Public Defense
P.O. Box 40957
Olympia, WA 98504-0957
(360) 586-3164 ext. 101
michele.young@opd.wa.gov

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. IRVING LYLE, Petitioner.	)))))))))	SUPREME COURT NO. _____ COA NO. 46101-3-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] IRVING LYLE
DOC NO. 229522
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF AUGUST 2015.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 10, 2015 - 3:28 PM

Transmittal Letter

Document Uploaded: 2-461013-Petition for Review.pdf

Case Name: Irvin Lyle
Court of Appeals Case Number: 46101-3

Is this a Personal Restraint Petition? Yes ● No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

● Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: mayovskyp@nwattorney.net

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us