

**NO. 47339-9-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**DEREK MARK LOUGHREY,**

Appellant.

---

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

The Honorable Suzan Clark, Judge

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**SUPPLEMENTAL BRIEF OF APPELLANT**  
**(re appellate costs)**

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LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1319  
Winthrop, WA 98862  
(509) 996-3959

**TABLE OF CONTENTS**

|  | Page     |
|--|----------|
| <b>A. SUPPLEMENTAL ASSIGNMENT OF ERROR.....</b>  | <b>1</b> |
| <b>If the state substantially prevails on appeal, any request for appellate costs should be denied.....</b>                              | <b>1</b> |
| <b>B. SUPPLEMENTAL ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....</b>  | <b>1</b> |
| <b>Should Mr. Loughrey have to pay appellate costs if he does not substantially prevail on appeal and the state requests costs?.....</b> | <b>1</b> |
| <b>C. SUPPLEMENTAL STATEMENT OF THE CASE.....</b>  | <b>1</b> |
| <b>D. SUPPLEMENTAL ARGUMENT.....</b>   | <b>1</b> |
| <b>If the state substantially prevails on appeal, any request for appellate costs should be denied.....</b>                              | <b>1</b> |
| <b>E. CONCLUSION.....</b>  | <b>2</b> |
| <b>CERTIFICATE OF SERVICE.....</b>   | <b>4</b> |

**TABLE OF AUTHORITIES**

Page

**Cases**

*State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 2

*State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, *review denied*, 185  
Wn.2d 1034 (2016)..... 1, 2

**Statutes**

RCW 10.73.160 ..... 1

**Other Authorities**

RAP 15.2..... 2

Title 14 of the Rules of Appellate Procedure..... 1

A. SUPPLEMENTAL ASSIGNMENT OF ERROR

If the state substantially prevails on appeal, any request for appellate costs should be denied.

B. SUPPLEMENTAL ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Should Mr. Loughrey have to pay appellate costs if he does not substantially prevail on appeal and the state requests costs?

C. SUPPLEMENTAL STATEMENT OF THE CASE

Supplemental facts are in the Argument section.

D. SUPPLEMENTAL ARGUMENT

**If the state substantially prevails on appeal, any request for appellate costs should be denied.**

If Mr. Loughrey does not substantially prevail on appeal, he requests that no costs of appeal be authorized under Title 14 of the Rules of Appellate Procedure. The Court of Appeals has discretion to deny a cost bill even where the state is the substantially prevailing party on appeal. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the “court of appeals . . . may require an adult . . . to pay appellate costs.”). Imposing costs against indigent defendants raises problems well documented in *Blazina*: “increased difficulty in reentering society, the doubtful recoupment of

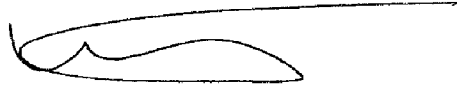
money by the government, and inequities in administration.” *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). Sinclair recognized the concerns expressed in *Blazina* applied to appellate costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. *Sinclair*, 192 Wn. App. at 391.

The trial court found Mr. Loughrey qualified for indigent defense at trial and on appeal. Appendix A (March 19, 2013 Clerk’s Minutes); Appendix B (Motion Indigent Status); Appendix C (Order of Indigent Status). Importantly, there is a presumption of continued indigency throughout the review process. *Sinclair*, 192 Wn. App. at 393; RAP 15.2(f). As in *Sinclair*, there is no trial court order finding Mr. Loughrey financial condition has improved or is likely to improve. *Sinclair*, 192 Wn. App. at 393. Mr. Loughrey is in DOC serving a 318 month to life sentence. CP 43. Given the serious concerns recognized in *Blazina* and *Sinclair*, this court should soundly exercise its discretion by denying the state’s request for appellate costs in this appeal involving an indigent appellant.

#### E. CONCLUSION

This court should impose no appellate costs on Mr. Loughrey if the state substantially prevails on appeal.

Respectfully submitted November 15, 2016.

A handwritten signature in black ink, consisting of a long horizontal stroke followed by a loop and a smaller loop below it.

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LISA E. TABBUT/WSBA 21344  
Attorney for Derek Mark Loughrey

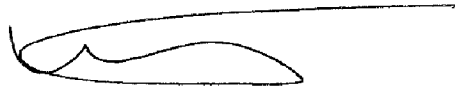
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Brief of Appellant to (1) Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Derek Mark Loughrey/DOC#380356, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 15, 2016, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Derek Mark Loughrey, Appellant

## APPENDIX A



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY

Judge: MELNICK

STATE OF WASHINGTON  
VS.

03/19/2013

9:03  
09:00

PA: HANSEN (P)

LOUGHREY, DEREK MARK ✓

DOB: 03/23/68

Atty: Dunberry (P)  
Reporter: CASSETTE  
Clerk: JOHNSON  
P.O.:

Cause# NEW CHARGE **13 1 00504 2**  
Charge(s): RAPE OF CHILD I POST-7/1/88 (3 cts)  
CHILD MOLESTATION I (2 cts)

Bkdt: 03/18/13 Cell: A1-1 Bail: 0.00 CFN: 110776

495

ASSIGNED DEPT # 1 2 3 4 5 6 7 **(8)** 9 10

Case Reassigned to: \_\_\_\_\_

1ST APPEAR  ARRAIGNMENT  CHANGE OF PLEA  SENT  VIOL  REV RELEASE  OMNIBUS  READINESS  OTHR \_\_\_\_\_

Defendant Appeared  Yes/No In Custody  Yes/No Warrant Authorized \_\_\_\_\_ Warrant Outstanding \_\_\_\_\_

Deft Answers to True Name as Charged  Advised of Civil & Constitutional Rights

Probable Cause Found  Probable Cause Not Found \_\_\_\_\_

Order for Psych Eval at WSH \_\_\_\_\_ sgnd Attorney Dunberry, Edward  Appointed/ Retained/ Waived

Personal Recognizance/ Supervised Release Granted / Denied . Release Revoked \_\_\_\_\_

Bail \$ 100,000 With Conditions Set/  Return to Court to Be Set/ Previously set. Bail Posted By: \_\_\_\_\_

Diversion Referral/ Confirmation \_\_\_\_\_ Stay Granted \_\_\_\_\_ PV:  Admit  Deny  Set Hrg \_\_\_\_\_

Next Court Appearance 3 - 29 - 1308 Time 130 For Arraign  Omnibus \_\_\_\_\_ Payment Rev \_\_\_\_\_

PV tracking with \_\_\_\_\_ Trial in Dept # \_\_\_\_\_ Other \_\_\_\_\_

NOT GUILTY PLEA/MOTION TO CONTINUE

GUILTY PLEA Original/ Amended

Information Served on Defendant \_\_\_\_\_ Statement on Plea of Guilty \_\_\_\_\_ Sgnd

Not Guilty Plea Entered \_\_\_\_\_ Psych Evaluation Ordered \_\_\_\_\_

Motion For Continuance of Trial Granted \_\_\_\_\_ Denied \_\_\_\_\_ Pre-sentence Report Ordered \_\_\_\_\_

Waiver of Speedy Trial Signed \_\_\_\_\_ Dismissal of Counts # \_\_\_\_\_

Readiness Hearing Date \_\_\_\_\_ RS 1:30PM

Trial Date \_\_\_\_\_ [ ] Sentencing Date \_\_\_\_\_

SENTENCING

OMNIBUS

Courts Finds the Defendant:  
\_\_\_\_\_ Guilty as Charged Based on Plea of Guilty  
\_\_\_\_\_ Convicted by the Jury \_\_\_\_\_ Court \_\_\_\_\_  
\_\_\_\_\_ in violation based on admissions

Def Omnibus \_\_\_\_\_ Sgnd State's Omnibus \_\_\_\_\_ Sgnd  
Cut Off date \_\_\_\_\_

Defendant is Sentenced to Jail /DOC for \_\_\_\_\_ Days/ Months/ Years to be Served as Follows:

CTS \_\_\_\_\_ JAIL \_\_\_\_\_ WORK RELEASE \_\_\_\_\_ WORK CREW \_\_\_\_\_ COMM SERV \_\_\_\_\_ SSOSA \_\_\_\_\_ DOSA \_\_\_\_\_

Misdemeanor Sent. \_\_\_\_\_ days with \_\_\_\_\_ days suspended/ deferred on conditions for \_\_\_\_\_ months/ years.

Community Custody \_\_\_\_\_ Mos. HIV/ DNA \_\_\_\_\_ DNA Fee \$ \_\_\_\_\_ Other Costs \$ \_\_\_\_\_ DV Penalty \$ \_\_\_\_\_

Court Costs \$ \_\_\_\_\_ Fine \$ \_\_\_\_\_ Drug Fund \$ \_\_\_\_\_ Atty Fees \$ \_\_\_\_\_ Extrdt \$ \_\_\_\_\_ Lab Fee \$ \_\_\_\_\_

Restitution \$ \_\_\_\_\_ Victim Assess \$ \_\_\_\_\_ Deft Served With Map to DOC/COLLECTIONS \_\_\_\_\_

Judgment & Sentence Signed \_\_\_\_\_ Defendant Fingerprinted Yes/No

Deft is Advised of His/ Her Rights to Appeal \_\_\_\_\_ Court Sets Appeal Bond at \$ \_\_\_\_\_  NCO Granted / Denied

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AS

## APPENDIX B

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**FILED**

MAR 13 2015

10:46am  
Scott G. Weber, Clerk, Clark Co

**THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CLARK COUNTY**

STATE OF WASHINGTON,  
  
Plaintiff,  
  
v.  
  
**DEREK MARK LOUGHREY**  
Defendant

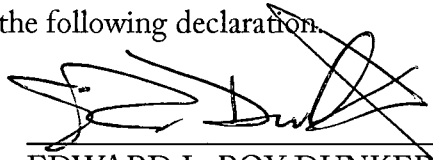
No. 13-1-00504-2

**MOTION INDIGENT STATUS**

A. MOTION

The defendant moves the Court for an order allowing the defendant to seek review at public expense and providing for appointment of attorney on appeal. This motion is based on RAP 2.2(a)(1) and is supported by the following declaration.

DATED this March 10, 2015.



EDWARD LeROY DUNKERLY, WSBA#8727  
Attorney for Defendant.

B. DECLARATION

I was found guilty before the Honorable Suzan Clark. A judgment and sentence was entered in this matter on 13 March 2015. I desire to appeal the conviction and the judgment imposed. I believe that the appeal has merit and is not frivolous and make the following assignments of error and any others that may be made by appellate counsel:

- 1. Limiting voir dire: 56-57 people in panel and only one hour allowed, denied additional time.

E.g., See State v. Williams, 123 Or. App. 546, 860 P.2d 860 (1993).

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EDWARD LeROY DUNKERLY  
ATTORNEY AT LAW  
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VANCOUVER WA 98660

- 1 2. Refusing to allow individual voir dire of all jurors who had either been sexually assaulted or  
2 someone close to them had been sexually assaulted.
- 3 3. Limiting the cross examination and presentation through defense witnesses about reasons  
4 Natasha Loughrey, the complaining witness, was punished / grounded and the increasing  
5 frequency of self destructive behavior, motive to falsify, secondary gain.
- 6 4. Admitting testimony of Amanda Smith.
- 7 5. Denying the right of confrontation: Witness Amanda Smith, transcript needed of morning  
8 motions as I wanted to set where the prosecutor sat, which provides an unobstructed view of  
9 the witnesses, and was not allowed to.
- 10 6. Prosecutorial misconduct in opening and closing - vouching and appealing to passion or  
11 prejudice.
- 12 7. There may have also been error in the reading of the jury instructions. Was the correct  
13 instruction 17 read to the jury.
- 14 8. Denying defendant's motion for new trial.

15 I have previously been found to be indigent. The following declaration provides  
16 information as to my current financial status:

- 17 1.) That I am the defendant in the above-captioned cause;
- 18 2.) That I do not own any real estate;
- 19 3.) That I do not own any stocks, bonds, or notes;
- 20 4.) That I am not the beneficiary of a trust account or accounts ;
- 21 5.) That I own the following motor vehicles or other substantial items of personal property:

| ITEM VALUE              | AMOUNT OWED ON ITEM |
|-------------------------|---------------------|
| 22 2001 Saturn, \$2,000 | \$0                 |

- 23 6.) That I do not have income from interest or dividends;

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1 7.) That I have approximately \$20 in checking account(s), \$0 in savings account(s), and \$0 in  
2 cash;

3 8.) That I am married (if so, my spouse's name and address is: Amy Loughrey, 2108  
4 Bridgecreek Ave. #113, Vancouver WA

5 9.) That the following persons are dependent on me for their support: Alex Loughrey age 16

6 10.) That I have the following substantial debts or expenses:

7 NAME AMOUNT OWED MONTHLY PAYMENT

8 11.) That I am personally receiving public assistance from the following sources (or was until I  
9 was incarcerated): State of Washington, Food Stamps and Insurance (family)

10 AGENCY OR PROGRAM AMOUNT OF ASSISTANCE

11 12.) That I am not employed, I'm in jail;

12 13.) That I have no substantial income other than what is set forth above;

13 14.) Other circumstances affecting my financial position include: I'm going to prison.

14 15.) I authorize the court to obtain verification information regarding my financial status from  
15 banks, employers, or other individuals or institutions, if appropriate.

16 16.) That I will immediately report to the Court any change in my financial status which  
17 materially affects the Court's finding of indigency.

18 17.) I certify that review is being sought in good faith. I designate the following parts of the  
19 record which are necessary for review:

20 (XX) The Entire Trial Date(s): 26 January - 30 January 2014

21 (X) Post-trial hearing Date(s): 2/17/15 (Motion New Trial)

22 (XX) Sentencing hearing(s) Date(s): \_\_\_\_\_  
23 Judge(s): Suzan Clark

24 (XX) Other: There may be some pre-trial hearings that appellate counsel may decide are  
25 necessary.


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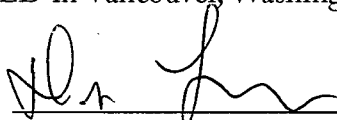
EDWARD LEROY DUNKERLY  
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VANCOUVER WA 98660

1 18.) That the foregoing is a true and correct statement of my financial position to the best of  
2 my knowledge and belief.

3 For the foregoing reasons, I request the Court to authorize me to seek review at public  
4 expense, including, but not limited to, all filing fees, attorney's fees, preparation of briefs, and  
5 preparation of verbatim report of proceedings as set forth in the accompanying order of  
6 indigency, and the preparation of necessary clerk's papers.

7 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is  
8 true and correct.

9 SIGNED in Vancouver, Washington this March 10, 2015. 

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11 \_\_\_\_\_  
12 Defendant's Signature

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## APPENDIX C

*W*

**FILED**

MAR 13 2015

Scott G. Weber, Clerk, Clark Co

*10:46am*

**THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CLARK COUNTY**

STATE OF WASHINGTON,

Plaintiff,

v.

DEREK MARK LOUGHREY

Defendant

No. 13-1-00504-2

ORDER INDIGENT STATUS

**THIS MATTER** having come on regularly before the undersigned judge upon the motion of the defendant for an order authorizing the defendant to seek review at public expense and the Court having considered the records and files herein, now therefore,

**IT IS HEREBY ORDERED** that the defendant shall be allowed  
( X ) To appeal from the certain **judgment and sentence** and every part thereof in the above-entitled cause, entered on 13 March 2015, at public expense -- to include the following:

- 1.) All filing fees;
- 2.) Attorney fees and the cost of preparation of briefs (including copying costs);
- 3.) Costs of preparation of the statement of facts which shall contain the verbatim report of the following proceedings, all of which are necessary for review:

( ) Pre-Trial Hearings

Date(s) \_\_\_\_\_

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*H*  
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Judge \_\_\_\_\_

(XX) Trial Date(s) 26 January - 30 January 2015  
Judge Suzanne Clark

(XX) Hearing on Post-Trial Date(s) 2/17/18  
Motions Judge Suzan Clark

(XX) Sentencing Hearing Date(s) 3/13/15  
Judge Suzan Clark

4.) Cost of a copy of the above record for the joint use of defendant's counsel and the prosecuting attorney; and

5.) Costs of the preparation of necessary clerk's papers.

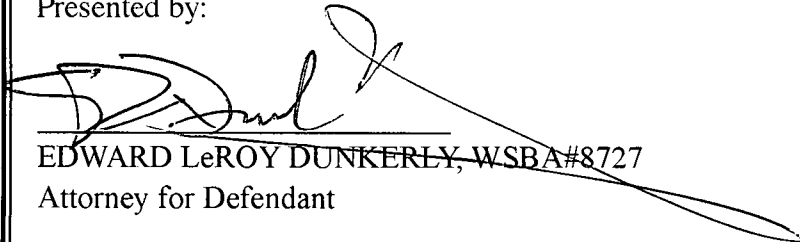
**IT IS FURTHER ORDERED** that counsel on appeal, or his/her representative, is authorized to remove the clerk's file from the Clerk's Office for the purpose of reproducing clerk's papers and designating the record for review.

**AND IT IS FURTHER ORDERED** that trial counsel is allowed to withdraw and that counsel on appeal be appointed by the Court of Appeals pursuant to RAP 15.2. Payment for expenses of this appointment is authorized under contract with the Office of Public Defense.

DONE IN OPEN COURT this 15<sup>th</sup> day of March, 2015.

  
\_\_\_\_\_  
JUDGE

Presented by:

  
\_\_\_\_\_  
EDWARD LeROY DUNKERLY, WSBA #8727  
Attorney for Defendant

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VANCOUVER WA 98660

**LISA E TABBUT LAW OFFICE**

**November 15, 2016 - 10:38 AM**

**Transmittal Letter**

Document Uploaded: 5-473399-Supplemental Appellant's Brief.pdf

Case Name: State v. Derek Loughrey

Court of Appeals Case Number: 47339-9

**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: Supplemental Appellant's

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: Lisa E Tabbut - Email: [ltabbutlaw@gmail.com](mailto:ltabbutlaw@gmail.com)

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

[prosecutor@clark.wa.gov](mailto:prosecutor@clark.wa.gov)