

74862-9

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FILED  
September 30, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 74862-9-I

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

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STATE OF WASHINGTON,

Respondent,

v.

CHAD SULLIVAN,

Appellant.

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

The Honorable Bruce E. Heller, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Chad Daniel Sullivan was deprived of the opportunity to present the testimony of the only available qualified expert in his defense.

Issue Pertaining to Assignment of Error

The King County Department of Public Defense denied Sullivan's repeated requests to present a highly qualified expert who would render an opinion that pepper spray is not a "noxious or destructive substance," one of the elements of the second degree assault provision under which Sullivan was charged. The denials demonstrated a misunderstanding of the issues of the case, were based on budgetary concerns, or were rooted in an incorrect belief that pepper spray qualifies as a "noxious or destructive substance" as a matter of law. The Department of Public Defense eventually relented somewhat and allowed Sullivan to present the substantively inferior testimony of a much less qualified expert. Did the Department of Public Defense's actions deprive Sullivan of a full and fair opportunity to present his defense?

B. STATEMENT OF THE CASE

The State charged Sullivan with one count of second degree assault under RCW 9A.36.021(d), a means that criminalizes the administration of a poison or other noxious or destructive substance. CP 1. The State amended

the Information before trial to include two additional assault counts for different victims based on the same means. CP 8-9.

According to the evidence presented at trial, a loss prevention officer at Sportsman's Warehouse in Federal Way observed Sullivan conceal one of two pepper spray canisters he took off a store shelf. RP 233. When approached by the loss prevention officer, Sullivan was initially cooperative. RP 236. However, Sullivan attempted to escape from the loss prevention room by spraying pepper spray at loss prevention officers and store employees. RP 238-40, 259-60, 288-92. Police arrived and took Sullivan into custody. RP 205, 207-08.

Before trial, Sullivan sought funding for the expert services of Kamran Loghman, an "extremely qualified expert in . . . all aspects of tear gas, pepper sprays and mace."<sup>1</sup> Supp. CP \_\_\_\_ (sub no. 36; Declaration of Counsel in Support of Motion for Payment of Expert Fees at Public Expense). Loghman held five patents for pepper spray formulas. Supp. CP \_\_\_\_ (sub no. 36). Defense counsel stated she "was unable to locate any other experts as uniquely qualified to prove services in this case." Supp. CP \_\_\_\_ (sub no. 36). Because he was uniquely qualified, Loghman's rate for

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<sup>1</sup> Defense counsel also moved to dismiss the charges, arguing that RCW 9A.36.021(1)(d) was unconstitutionally vague because it did not provide fair notice that pepper spray could qualify as a "poison or any other destructive or noxious substance." Supp. CP \_\_\_\_ (sub no. 85; Defense Trial Memorandum). The trial court denied this motion. CP 87-90; RP 330-32.

services was \$495 per hour. Supp. CP \_\_\_\_ (sub no. 36). According to counsel's declaration, Loghman would testify pepper was not noxious or harmful and that it was specifically formulated not to be noxious or harmful. Supp. CP \_\_\_\_ (sub no. 36). The King County Department of Public Defense denied Sullivan's request, reasoning, in part, that an expert was not necessary.

Sullivan resubmitted his request two additional times. The Department of Public Defense denied both requests, requiring Sullivan first to come up with less expensive experts and later determining again that an expert was not necessary essentially because pepper spray qualified as a noxious substance as a matter of law. Supp. CP \_\_\_\_ (sub no. 39; Declaration of Counsel in Support of Motion for Payment of Expert Fees at Public Expense (Re-submitted with additional detail regarding expected testimony)); Supp. CP \_\_\_\_ (sub no. 40; Order Denying Expert Services); Supp. CP \_\_\_\_ (sub no. 44; Declaration of Counsel in Support of Motion for Payment of Expert Fees at Public Expense (Re-submitted with additional detail regarding expected testimony)); Supp. CP \_\_\_\_ (sub no. 52; Supplemental Materials and Request for Clarification regarding Order Denying Services Other Than Counsel, Exhibit 5).

In Sullivan's latest request, counsel indicated she had found other experts familiar with pepper spray, but none were comparable given they

“would lack the qualifications necessary to testify regarding the chemical formula of this particular pepper spray and the nature of the chemical compounds in the pepper spray.” Supp. CP \_\_\_\_ (sub no. 52). Counsel also indicated Loghman agreed to reduce his hourly rate to \$375. Supp. CP \_\_\_\_ (sub no. 52).

The Department of Public Defense later authorized the expert services of Rick Walker. Supp. CP \_\_\_\_ (sub no. 53A). Walker was not as qualified as Loghman and had nowhere near the same level of experience or expertise. RP 350-52. Walker gave his opinion that pepper spray was not a toxic or harmful substance. RP 355. However, he made concessions that Loghman would not have, including that there could be long-term effects from pepper spray in cases where an individual had certain preexisting conditions and that pepper spray was “designed” to hurt. RP 360, 369.

The jury convicted Sullivan on all three counts of second degree assault. CP 36-38; RP 491-93. The trial court imposed concurrent low end standard range sentences of 63 months. CP 79; RP 519. The trial court waived all discretionary legal financial obligations. CP 78.

This timely appeal follows. CP 98.

C. ARGUMENT

1. THE REPEATED DENIALS OF SULLIVAN'S REPEATED REQUESTS FOR EXPERT SERVICES DEPRIVED SULLIVAN OF A FULL AND FAIR OPPORTUNITY TO PRESENT HIS DEFENSE THEORY TO THE JURY

Sullivan wished to present the expert testimony of Kamran Loghman, a patent-holding weapons manufacturer and researcher who would render an opinion that pepper spray does not qualify as a “destructive or noxious substance” under RCW 9A.36.021(d). Loghman would have further opined that pepper spray is especially designed *not* to be noxious, destructive, or harmful. The King County Department of Public Defense repeatedly denied Sullivan’s requests for Loghman’s services on several alternating grounds, citing budgetary reasons and otherwise reasoning that pepper spray is a noxious substance as a matter of law. These denials deprived Sullivan of a fair opportunity to present the only available qualified expert in his defense. This court should accordingly reverse and remand for a trial at which Sullivan is permitted to present Loghman’s expert opinion to the jury.

- a. The Department of Public Defense’s refusals to authorize Sullivan’s expert services requests denied him an expert necessary to an adequate defense

We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant

without making certain that he has access to the raw materials integral to the building of an effective defense.

Ake v. Oklahoma, 470 U.S. 68, 77, 405 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

“[I]t is difficult to identify any interest of the State, other than that in its economy, that weighs against recognition of this right.” Id. at 79.

“As part of an indigent defendant’s constitutional right to effective assistance of counsel, the State must pay for expert services, but only when such services are necessary to an adequate defense.” State v. Melos, 42 Wn. App. 638, 640, 713 P.2d 138 (1986). “[T]he State may not condition the exercise of a constitutional right upon financial ability or deny a basic legal right because of one’s poverty.” Id. at 641-42 (citing State v. Lewis, 55 Wn.2d 665, 670, 349 P.2d 438 (1960)). “This constitutional right is no broader than the defendant’s right to petition for State-paid services under CrR 3.1(f).” Id.

CrR 3.1(f)(2) provides, “Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court, or a person or agency to whom the administration of the program may have been delegated by local court rule, shall authorize the services.” King County has an applicable local rule, which states, in part,

all requests and approval for expert services expenditures are hereby delegated to the King County Office of the Public

Defender.<sup>[2]</sup> Upon finding that investigative, expert or other services are necessary to an adequate defense and that defendant is financial unable to obtain them, the King County Office of the Public Defender (OPD) shall authorize the services.

KCLCrR 3.1(f).

- i. The Department of Public Defense's first refusal rested on a misunderstanding of both the services requested and the applicable law

Sullivan first requested the services of Kamran Loghman on July 22, 2015. Supp. CP \_\_\_\_ (sub no. 36; Declaration of Counsel in Support of Motion for Payment of Expert Fees at Public Expense). Sullivan requested these services because Loghman is “an extremely qualified expert in . . . all aspects of tear gas, pepper sprays and mace” based on his years of experience and research, as well as his five “patents for pepper spray formulas.” Supp. CP \_\_\_\_ (sub no. 36). Counsel indicated she “was unable to locate any other experts as uniquely qualified to provide services in this case.” Supp. CP \_\_\_\_ (sub no. 36). Given his unique expertise, Loghman was expensive: he required approval for 20 hours of work at \$495 per hour for a total of \$9,900, though it was possible he could complete his services in less than 20 hours. Supp. CP \_\_\_\_ (sub no. 36).

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<sup>2</sup> King County has a Department of Public Defense, not an Office of the Public Defender. Notwithstanding the inconsistency in the local court rule, Sullivan will refer to the Department of Public Defense (or to just the Department) throughout his briefing.

The Department of Public Defense denied the request, stating, “Expert’s proposed testimony that there is no other case similarly charged as [defendant]’s case is not reasonable for a defense as it does not bear on whether pepper spray causes bodily harm.” Supp. CP \_\_\_\_ (sub no. 35; Order Denying Expert Services at Public Expense).

The Department’s denial confused the purpose and scope of Loghman’s testimony. Counsel identified the need for an expert in part based on the dearth of case law “in which an assault of this degree or severity was charged, based upon nothing more than the discharge of O.C. pepper spray.” Supp. CP \_\_\_\_ (sub no. 36). Thus, Loghman’s proposed testimony was not that there was no other similarly charged case, and the Department erred by denying the expert services based on its confusion of what the testimony would be. The Department’s denial also reflects its misunderstanding of RCW 9A.36.021(d), which states that a person is guilty of second degree assault if “[w]ith intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance . . . .” Under the statute, the defendant must merely intend to inflict bodily harm by administering a noxious substance; the question of whether bodily harm actually occurs is beside the point. The Department’s misunderstanding of the applicable law led it to mistakenly deny the services. Because Sullivan established Loghman’s services were necessary

to an adequate defense, the Department was required to authorize the services under the plain language of the applicable court rules.

- ii. The Department's second refusal was erroneously based entirely on budgetary concerns

Sullivan resubmitted his request for Loghman's services on the following day. Supp. CP \_\_\_\_ (sub no. 39; Declaration of Counsel in Support of Motion for Payment of Expert Fees at Public Expense (Re-submitted with additional detail regarding expected testimony)). According to the offer of proof in counsel's declaration, Loghman was able to testify pepper spray was not a noxious substance. Supp. CP \_\_\_\_ (sub no. 39). He was also

able to testify that pepper spray is not harmful, that it is deliberately formulated not to be harmful, and that he is aware of no incident in which any person has suffered lasting harm of any sort from a single exposure to pepper spray, and that even multiple exposures to pepper spray are unlikely to result in any harm to the person exposed.

Supp. CP \_\_\_\_ (sub no. 39). Counsel's declaration correctly stated that the prosecution was required to prove pepper spray "was noxious and harmful to the alleged victims. Mr. Loghman's expert testimony will directly contradict any evidence offered on that . . . element of proof, and will establish the best, and perhaps even the only viable defense available to this defendant." Supp. CP \_\_\_\_ (sub no. 39).

The Department of Public Defense again denied the services. Supp. CP \_\_\_\_ (sub no. 40). This time, the Department stated, "Before this amount

of money can be authorized, counsel needs to contact other experts or medical professionals who would be able to state an opinion as to whether O.C. pepper spray is a ‘noxious substance,’ similar to poison. The proposed fees from other experts should be included in discussion.” Supp. CP \_\_\_\_ (sub no. 40).

Contrary to CrR 3.1(f) and KCLCrR 3.1(f), the Department conditioned Sullivan’s right to present an expert on monetary concerns. The rules state that if the services are necessary and the defendant is financially unable to obtain them, the court or other administrator “shall authorize the services.” The rules do not contemplate a bidding war between experts, as the Department would apparently prefer. And, in any event, counsel had already repeatedly represented Loghman was by far the most qualified expert in the field and that his hourly rate was the “same or less than the normal rates charged for expert witnesses with his degree of education, qualifications and credentials, especially considering the extreme rarity of his expertise.” Supp. CP \_\_\_\_ (sub no. 39). By refusing expert services based on budgetary constraints, the Department of Public Defense was not faithful to CrR 3.1(f) or KCLCrR 3.1(f).

- iii. The Department's third refusal was based on the incorrect understanding that pepper spray qualifies as a noxious substance as a matter of law

Sullivan resubmitted his request for expert services a third time, highlighting particular portions supporting the request. Supp. CP \_\_\_\_ (sub no. 44; Declaration of Counsel in Support of Motion for Payment of Expert Fees at Public Expense (Re-submitted with additional detail regarding expected testimony)). Defense counsel also provided a revised version of this request on August 10, 2015, which is appended to counsel's later request for clarification. Supp. CP \_\_\_\_ (sub no. 52; Supplemental Materials and Request for Clarification regarding Order Denying Services Other Than Counsel, Exhibit 5). In the revised version, counsel indicated she had located retired police officers, military, and FBI experts familiar with pepper spray, but asserted these experts "would lack the qualifications necessary to testify regarding the chemical formula of this particular pepper spray and the nature of the chemical compounds in the pepper spray." Supp. CP \_\_\_\_ (sub no. 52). Defense counsel had also talked Loghman down from \$425 per hour to \$375 per hour, thus requesting authorization for \$7,500 for 20 hours of work instead of \$9,900. Supp. CP \_\_\_\_ (sub no. 52).

For a third time, the Department of Public Defense denied Sullivan's request. This time, the Department merely copied its previous denial that

cited budgetary constraints. Supp. CP \_\_\_\_ (sub no. 43). However, this denial also referenced an attached e-mail that was not attached. Supp. CP \_\_\_\_ (sub no. 43). This e-mail was included in defense counsel's later supplemental materials requesting clarification regarding the denials, however. Supp. CP \_\_\_\_ (sub no. 52; Supplemental Materials and Request for Clarification regarding Order Denying Services Other Than Counsel). The Department's e-mail provided,

I have reviewed your resubmitted request but am not willing to approve it. The Information alleged an intent to inflict bodily har[m] and did cause to be taken . . . "a poison and a destructive or noxious substance". The Information does not allege that "noxious" is similar to poison nor does it say it must be harmful to the alleged victims. It says "or noxious substance". Because "noxious" can be defined very broadly I do not believe the request is justified under CrR 3.1(f).

Supp. CP \_\_\_\_ (sub no. 52).

This denial was based on the Department's position that "noxious" carried such a broad meaning that pepper spray would like fall into it as a matter of law. The Department wholly ignored that the jury would be determining whether pepper spray qualified as a noxious substance, and thus Sullivan was entitled to an expert witness who could render an expert opinion on this factual question. The Department failed to apply CrR 3.1(f) and KCLCrR 3.1(f) because it did not actually consider whether Loghman was necessary to Sullivan's chosen defense. In essence, the Department

indicated Sullivan had no need of an expert because pepper spray automatically qualified as a noxious substance under the second degree assault statute. This violated the court rules specifying when a defendant is entitled to the services other than a lawyer.

- iv. The expert Sullivan was allowed to retain shows money was the Department of Public Defense's primary concern

Sullivan was eventually permitted the expert services of Rick Walker. Supp. CP \_\_\_\_ (sub no. 53A; Order Authorizing Expert Services at Public Expense). In contrast to Loghman, Walker charged \$25 per hour and was authorized for 20 hours of work for a total of \$500. Supp. CP \_\_\_\_ (sub no. 53A). Walker did not have Loghman's expertise or experience of consulting, developing, or researching pepper spray; instead, he owned a self defense company and was certified to demonstrate, train, and sell the products of a particular pepper spray brand. RP 351-52.

That the Department of Public Defense opted to authorize the services of Walker but denied the services of Loghman demonstrates that its primary concern was not whether a particular expert service was necessary to an adequate defense but whether the expert came with the right price tag. Sullivan was forced to proceed to trial with a much less qualified expert simply because the Department did not wish to authorize a more qualified—and therefore more expensive—expert witness. Moreover, in permitting

Walker's testimony, the Department flip-flopped on its prior view that pepper spray automatically qualified as a noxious substance and thus no expert was necessary at all. This sudden, unexplained change in positions shows that the Department's dispensation of expert services did not depend on its thoughtful analysis of the expert's necessity under the pertinent court rules, but only on the amount of money at issue.

Sullivan's right to qualified expert and a fair trial was conditioned on the amount of money he had, and his rights were therefore diminished because of his poverty. Reversal is the only just outcome here.

b. The denials of Sullivan's requested expert prejudiced the outcome of trial

Because Sullivan was not allowed to present Loghman's testimony, he was deprived of the opportunity to present the best, most qualified, and therefore the most persuasive expert in his defense. This prejudiced the outcome of the case.

The prejudice becomes very apparent when Loghman is compared to the expert Sullivan was permitted to present, Rick Walker. Supp. CP \_\_\_\_ (sub no. 53A). Walker's qualifications consisted of exposure to pepper spray, ownership of a personal safety training company, Black Dog Training, and being certified by a private pepper spray corporation to perform demonstrations, trainings, and sales. RP 351-52. Loghman, in contrast, held

five patents for pepper spray formulas. He had years of experience as the chief executive officer of a pepper spray manufacturer that provided pepper spray to local, state, and federal law enforcement agencies, and the military. He had authored numerous international law enforcement training manuals and published articles on pepper spray and other chemical agents. He had testified in numerous cases and was a trusted government consultant. See Supp. CP \_\_\_\_ (sub no. 39) (Loghman's curriculum vitae). Based on the clear and substantial differences in Walker's and Loghman's experiences and qualifications, Loghman's expert opinion that pepper spray is not noxious and is designed not to be so carries much more weight. It was prejudicial to deny Sullivan the opportunity to present Loghman's testimony to the jury when Department of Public Defense's alternative was such a poor substitute.

Furthermore, although Walker initially testified pepper spray causes no harm to the body, he nevertheless conceded there could be long-term effects from a single exposure to pepper spray in cases where an individual had a preexisting condition. RP 360. Then he also stated on cross examination that pepper spray was "designed" to hurt. RP 369. Loghman would not have conceded these points. According to the defense offer of proof, Loghman would have stated "he is aware of no incident in which any person has suffered lasting harm of any sort from a single exposure to pepper

spray, and that even multiple exposures to pepper spray are unlikely to result in any harm to the person exposed.” Supp. CP \_\_\_\_ (sub no. 39). Loghman, in contrast to Walker’s testimony, would also have explained how pepper spray was “deliberately formulated not to be harmful.” Supp. CP \_\_\_\_ (sub no. 39). The substance Loghman’s testimony would have been much more supportive of Sullivan’s theory—that pepper spray did not qualify as a “noxious substance.” Sullivan was prejudiced by the Department of Public Defense’s denial of Loghman’s expert services.

Finally, Sullivan acknowledges that a defendant is not denied equal protection when he receives a viable alternative expert, and that there is no right to have an expert of one’s choosing. Melos, 42 Wn. App. at 643-44.

As the High Court in Ake stated,

This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

Ake, 470 U.S. at 83. For these principles to mean anything, the competing experts in question must have similar qualifications. When the expertise called for is psychiatric, for instance, the State cannot satisfy its obligation by providing anything less than a licensed psychiatrist. Indeed, it would be

ridiculous to assign a social worker to render an opinion that only a trained psychiatrist was qualified to give.

The Department of Public Defense's substitution of Walker for Loghman was infirm under Ake and Melos. As discussed, because of the stark differences in their qualifications, Walker was not a permissible substitute. He therefore did not provide Sullivan with "an adequate opportunity to present [his] claims fairly within the adversary system." Ake, 470 U.S. at 77 (quoting Ross v. Moffitt, 417 U.S. 600, 612, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974)).

Because the Department of Public Defense failed to comply with CrR 3.1(f) and KCLCrR 3.1(f), and because this failure prejudiced Sullivan, Sullivan asks that this court reverse his conviction and remand for a fair trial.

2. THIS COURT SHOULD DENY APPELLATE COSTS

- a. Sullivan is presumed indigent throughout review and the record on review provides no basis to impose thousands of dollars in appellate costs

Appellate courts indisputably have discretion to deny appellate costs. RCW 10.73.160(1); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034, 377 P.3d 733 (2016). This court should exercise this discretion and deny any request by the State for thousands of dollars in appellate costs.

The trial court determined Sullivan was indigent and entitled to appellate representation and the creation of the appellate record at public expense. CP 96-97. Based on this determination, Sullivan is presumed indigent through this review. RAP 15.2(f). In Sinclair, this court stated, “We have before us no trial court order finding that Sinclair’s financial condition has improved or is likely to improve . . . . We therefore presumed Sinclair remains indigent.” 192 Wn. App. at 393. The same presumption should apply to Sullivan and this court should thus deny any request for appellate costs.

In addition, the trial court waived all discretionary legal financial obligations. CP 78; RP 519. The State below made no request for discretionary LFOs, such as counsel fees or court costs. RP 506. It would be inconsistent to impose significantly higher discretionary LFOs now.

Also, Sullivan suffers from a longstanding chemical dependency, and described during allocution how he and his entire family has “been plagued with drug addiction.” RP 511. The imposition of thousands of dollars in appellate costs will serve only to make Sullivan’s reentry into society as a sober, productive member all the more difficult. For these reasons, this court should exercise discretion and deny appellate costs.

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

Furthermore, any reasonable person reading the trial court's indigency order would believe (1) Sullivan was entitled to an attorney to represent him and to the preparation of an appellate record "at public expense" and (2) "at public expense" meant Sullivan would pay nothing due to his indigency, win or lose. The imposition of appellate costs would convert the trial court's indigency order into a complete and utter falsehood.

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not prevail, they will be assessed, at minimum, thousands of dollars in appellate costs. Unlike other lawyers whose clients pay them, the client's ability to pay does not factor into an appellate defender's representation of his or her client. Yet appellate defenders must still play the role of financial planner, hedging the strength of their arguments against the vast sums of money their clients will owe and attempting to advise their clients accordingly. This undermines the appellate defender's important role in advancing all issues of arguable merit on clients' behalf and thereby undermines the relationship between attorney and client.

This relationship is further undermined when clients see that the Office of Public Defense is the primary beneficiary—to the tune of thousands of dollars—of their unsuccessful arguments. This creates a perverse incentive: the Office of Public Defense, which pays the salaries of all appellate defenders and through which all appellate defenders represent their clients, collects money only when the appellate defender is unsuccessful. This is readily apparent as a conflict of interest and undermines any appearance that the appellate cost scheme is fair. See RPC 1.7(a)(2) (a conflict exists where “there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the lawyer”); Wood v. Georgia, 450 U.S. 261, 268-70, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (acknowledging conflict when interest of third party paying lawyer is at odds with client’s interest); Winkler v. Keane, 7 F.3d 304, 308 (2d Cir. 1993) (contingent fee in criminal case created actual conflict of interest); United States v. Horton, 845 F.2d 1414, 1419 (7th Cir. 1988) (conflict of interest arises when defense attorney must “make a choice advancing his own interest to the detriment of his client’s interests”).

The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the organization that funds their attorneys

when they lose. Franz Kafka himself would strain to imagine such a design. This court should deny appellate costs.

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

Both the state and federal constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV; CONST. art. I, § 3. “The due process clause of the Fourteenth Amendment confers both procedural and substantive protections.” Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” Id. at 218-19. Deprivations of life, liberty, or property must be substantively reasonable and are constitutionally infirm if not “supported by some legitimate justification.” Nielsen v. Dep’t of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

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

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

To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. Id. Although this is a deferential standard, it is not meaningless. Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976) (rational basis standard “is not a toothless one”).

The vast majority of the money awarded in an appellate cost bill is earmarked for indigent defense funding and goes to the Office of Public Defense. Although funding the Office of Public Defense is a legitimate state interest, the imposition of costs on appellants who cannot pay them does not rationally serve this interest.<sup>3</sup>

As the Washington Supreme Court recently recognized, “the state cannot collect money from defendants who cannot pay.” Blazina, 182 Wn.2d at 837. Imposing appellate costs under RCW 10.73.160 and RAP 14.2 on indigent persons who cannot pay them fails to further any state interest. There is no rational basis for appellate courts to impose this debt upon indigent persons who lack the ability to pay.

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<sup>3</sup> It is by no means clear that the appellate cost system produces a net positive balance in the state’s coffers. It is increasingly likely that imposition and enforcement efforts—if fairly quantified to include the time that trial and appellate lawyers, clerks, commissioners, and judges spend on these issues—would exceed the limited sums extracted from indigent persons.

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

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

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

any imposition of appellate costs without a preimposition determination of his ability to pay would violate Sullivan's substantive due process rights.

D. CONCLUSION

Because the repeated denials of only qualified expert available deprived Sullivan of a full and fair opportunity to present his theory of the case, Sullivan asks that this court reverse and remand for a new and fair trial.

DATED this 30th day of September, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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