

No. 45922-1-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

DARRELL PARNEL BERRIAN,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 13-1-02707-2  
The Honorable Jack Nevin, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The prosecutor committed flagrant and ill-intentioned misconduct during closing arguments when he repeatedly implied that Darrell Berrian had committed other acts of theft or robbery when no other theft or robbery or possession of stolen property crimes were charged or proved.
2. Trial counsel provided ineffective assistance when she failed to object or request a curative instruction after the prosecutor repeatedly made improper statements to the jury during closing arguments.
3. The trial court erred in finding that Darrell Berrian had the present or future ability to pay discretionary legal financial obligations.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the prosecutor commit flagrant and ill-intentioned misconduct during closing arguments when he repeatedly implied, even after a defense objection was sustained, that Darrell Berrian had committed other acts of theft or robbery when no other theft or robbery or possession of stolen property crimes were charged or proved? (Assignment of Error 1)
2. Did trial counsel provide ineffective assistance when she failed to object or request a curative instruction after the prosecutor repeatedly made improper statements to the jury during closing arguments? (Assignment of Error 2)
3. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary legal financial obligations as part of Darrell Berrian's sentence, where there was no evidence that he has the present or future ability to pay? (Assignment of Error 3)
4. Can Darrell Berrian's challenge to the validity of the legal financial obligation order be raised for the first time on appeal? (Assignment of Error 3)

5. Is Darrell Berrian's challenge to the validity of the legal financial obligation order ripe for review? (Assignment of Error 3)

### III. STATEMENT OF THE CASE

#### A. PROCEDURAL HISTORY

The State charged Darrell Parnel Berrian with one count of attempted first degree robbery (RCW 9A.56.190, .200; RCW 9A.28.020); one count of second degree assault (RCW 9A.36.021); and one count of unlawful possession of a firearm (RCW 9.41.010, .040). (CP 87-89) The State also alleged that Berrian was armed with a firearm during the attempted robbery and assault offenses (RCW 9.94A.530). (CP 87-88)

The trial court denied Berrian's pretrial motion to suppress the victim's show-up identification and jailhouse recordings, and ruled that Berrian's custodial statements to the arresting officer were admissible. (CP 25-29; 01/07/14 RP 61-63; 01/09/14 RP 37-38)<sup>1</sup> The jury convicted Berrian as charged, and found that he was armed with a firearm during commission of the offenses. (CP 79-83; 01/10/14 RP 4-5)

The trial court sentenced Berrian within his standard range to

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<sup>1</sup> Citations to the transcripts will be to the date of the proceeding.

75 months of confinement, and imposed both mandatory and discretionary legal financial obligations. (02/14/14 RP 12-13; CP 148, 150) This appeal timely follows. (CP 95)

B. SUBSTANTIVE FACTS

On July 7, 2013, Saroeun Dy drove his car to the AM/PM mini-market at 84<sup>th</sup> and Pacific in Tacoma, Washington, so he could check the numbers on his lottery ticket to see if he had won any money. (01/07/14 RP 73) He parked his car and went inside the market. (01/07/14 RP 72) He returned to his car a few minutes later and started to unlock the driver's side door. (01/07/14 RP 75, 76) As he did, a man approached him from behind, pointed a gun at Dy, and demanded that Dy give the man his car key. (01/07/14 RP 75, 76)

Dy grabbed the barrel of the gun, and the two men struggled. (01/07/14 RP 76) According to Dy, the man twisted his wrist and hit him over the head several times. (01/07/14 RP 76, 76-77) Dy fell to the ground, and the man ran away. (01/07/14 RP 76-77) Dy went back inside the AM/PM and asked the clerk to call the police. (01/07/14 RP 78)

Tacoma Police Officer Brandon Cockroft responded to the AM/PM at 8:19 a.m., and talked to Dy. (01/07/14 RP 99) Dy described the suspect as a black male, approximately five feet eight

inches tall, wearing a dark jacket, dark pants, and carrying a backpack. (01/07/14 RP 100)

Tacoma Police Officer Samuel Lopez-Sanchez was in the area and began looking for the suspect. (01/07/14 RP 114) About four blocks from the AM/PM, he saw a man he thought resembled the suspect's physical description (though not the clothing description), so he decided to contact and question the man. (01/07/14 RP 115, 116, 118, 139-40) The man, Darrell Berrian, initially told the officer that he was coming from his sister's house at 8606 Pacific Avenue. (01/07/14 RP 121)

Officer Lopez-Sanchez thought Berrian's answer was odd because, in the Officer's opinion, Berrian would be walking on the opposite side of the street if he was in fact coming from the stated location. (01/07/14 RP 121-22) He asked Berrian if he was certain, and Berrian responded that he was actually coming from 72<sup>nd</sup> Street and Pacific Avenue, and was looking for prostitutes. (01/07/14 RP 121-22) Officer Lopez-Sanchez continued to be suspicious because Berrian had no money to pay for a prostitute. (01/07/14 RP 122, 129)

While Officer Lopez-Sanchez detained Berrian, Officer Cockroft drove to Dy's house to pick him up and transport him to the scene for a show-up. (01/07/14 RP 82, 100) Dy positively identified

Berrian as the man who tried to rob him earlier that morning. (01/07/14 RP 83, 102) The Officers placed Berrian under arrest, and searched the immediate area for the backpack that Dy described but found nothing. (01/07/14 RP 102, 104, 124)

A few days later, a citizen called the police to report that they had found a gun in the bushes at South 84<sup>th</sup> Street and South Bell, about two blocks from the AM/PM. (01/07/14 RP 142-43, 144) Officers found a black handgun in the weeds between a retaining wall and the sidewalk. (01/07/14 RP 145) The Officers also found a backpack in some nearby bushes. (01/07/14 RP 152)

The backpack contained two cellular telephones, clothing, documents, and other miscellaneous items. (01/07/14 RP 153) The clothing included a black and gray lightweight jacket, several shirts, a pair of jeans, and a pair of sneakers. (01/07/14 RP 155-56) The papers inside the backpack included bills, paystubs and other financial documents bearing the names of Joe Franklin, Deanna Franklin and Deanna Cruthis, and a Lakewood Police Department traffic citation issued to a Darrell Berrian. (01/07/14 RP 157-59) There were also photographs stored on one of the cellular telephones, and one of the photographs appeared to show Berrian holding a gun that resembled the gun found in the weeds. (01/07/14

RP 154-55; 01/07/14 RP 18-19; Exh. 13)

At trial, the State introduced a video recording of the incident taken by a surveillance camera at the AM/PM.<sup>2</sup> (01/08/14 RP 48; Exh. P2) In it, the suspect can be seen carrying a backpack with a logo similar to the logo on the backpack found in the bushes, and wearing what appears to be a black and white jacket similar to the jacket found inside the backpack. (01/08/14 RP 60-61, 63; Exh. P2)

The State also introduced an audio recording of a phone call placed from the Pierce County Jail, initiated with the individual pin number assigned to Berrian, where a man can be heard asking a woman to go to the area of 84<sup>th</sup> and Pacific and to look for his backpack. (01/09/14 RP 21, 32, 35, 35-36, 37-38; Exh. P21A, P21B)

When questioned by Officer Lopez-Sanchez, however, Berrian denied being at the AM/PM on July 7, 2013. (01/09/14 RP 123)

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<sup>2</sup> The quality of the video recording was low, and did not accurately show the color and tint of clothing and other items worn by the suspect. (01/08/14 RP 50-51, 54; Exh. P2)

#### IV. ARGUMENT & AUTHORITIES

- A. THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENTS, COUPLED WITH TRIAL COUNSEL'S FAILURE TO ADEQUATELY OBJECT AND SEEK A CURATIVE INSTRUCTION, DENIED BERRIAN HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND TO EFFECTIVE ASSISTANCE OF COUNSEL.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutors have a duty to see that those accused of a crime receive a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978).

Prosecutorial misconduct may deprive a defendant of his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). "A "[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.'" State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); State v. Reed, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984)). Thus, in the interest of justice,

a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. Charlton, 90 Wn.2d at 664.

The prosecutor failed in his duties by engaging in flagrant, prejudicial and ill-intentioned misconduct. Further, counsel was ineffective in her failure to make a sufficient effort to mitigate the prejudice caused to her client by the misconduct.

In order to prevail on a claim of prosecutorial misconduct, a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)); State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

Absent a proper objection, a defendant is required to show the misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

It is improper and misconduct for a prosecutor to "make prejudicial statements that are not sustained by the record."

Dhaliwal, 150 Wn.2d at 577; see also State v. Belgarde, 110 Wn.2d 504, 516-17, 755 P.2d 174 (1988). For example, in State v. Boehning, this Court found that the prosecutor's repeated references to several dismissed rape counts and suggestions that the victim's out-of-court statements supported those charges were "uncalled for and impermissibly asked the jury to infer that Boehning was guilty of crimes that had been dismissed and were not supported by trial testimony." 127 Wn. App. 511, 522, 111 P.3d 899 (2005) (citing State v. Torres, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976)). The Court held that "such argument improperly appealed to the passion and prejudice of the jury and invited the jury to determine guilt based on improper grounds. This error alone compels reversal." Boehning, 127 Wn. App. at 522.

Similarly here, the prosecutor repeatedly implied that other uncharged and unproved crimes were committed by Berrian, when he stated:

[The mail from Mr. and Ms. Franklin and Ms. Cruthis] was the bulk of the documents in the backpack. There's only one citation or one piece of documentation for the defendant. Well, what would that tell you. If they came in here, what would that tell you. We can all surmise, by the way, what their mail is doing -- what their financial documents are doing in this backpack. But why is all their mail . . . (01/09/14 RP 90)

Berrian's objection to this argument was sustained (01/09/14 RP 91), but the prosecutor nevertheless continued:

Why is all their mail in a backpack with clothing used in a robbery? Why is all that mail in there with a phone that has the defendant's image on it? What are they really going to tell you? (01/09/14 RP 91)

Then, without objection, the prosecutor argued:

You're told that there was a missing piece because we don't know who the owner of the gun is. Well, here's what we do know. It ain't the defendant who's the owner of the gun. You also may know if you're a firearm owner that there's no place that you register your gun that we can just go and determine who owns a gun. We know that that gun don't belong to the defendant because he's a felon. (01/09/14 RP 91)

Berrian was not charged with theft or possession of other persons' financial information, and was not charged with theft of a firearm or possession of a stolen firearm. The prosecutor suggested to the jury that they assume that Berrian either committed or was planning to commit more acts of theft because he possessed those documents, and suggested that Berrian obtained the gun by illegal means. The prosecutor essentially told the jury that Berrian is a criminal type who obviously robs and steals on a regular basis. This argument was completely improper.

The Boehning opinion was published nine years ago, and

there are numerous other cases (including those cited above) forbidding arguments such as the one made by the prosecutor in this case. As a result, this Court can be confident that the misconduct here was flagrant and ill-intentioned. See State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996) (an appellate court may deem it “to be a flagrant and ill-intentioned violation of the rules governing a prosecutor’s conduct at trial” where an improper argument is made well after an opinion condemning it).

In addition, counsel’s failure to object and seek a curative instruction after the prosecutor continued to point out other potential but uncharged crimes to the jury compounded the problem. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995); U.S. Const. amd. VI; Wash. Const. art. I, § 22 (amend. x). Counsel is ineffective despite a strong presumption to the contrary if her conduct falls below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Here, counsel clearly recognized that the prosecutor was

making an improper argument, yet she failed to object when the prosecutor continued the argument even after her initial objection was sustained. And she failed to request a curative instruction that would have limited the jury's consideration of the prejudicial argument.

The identity of the perpetrator was the primary issue at trial. The jury was more likely to believe that Berrian tried to take Dy's car if they believed that Berrian is simply a criminal type who regularly takes property from other people. The prosecutor's flagrant and ill-intentioned argument implying as much to the jury, coupled with defense counsel's failure to take adequate steps to end or mitigate the impact of the misconduct, was prejudicial and denied Berrian a fair trial. Berrian's convictions must therefore be reversed.

B. THE TRIAL COURT'S FAILURE TO CONSIDER BERRIAN'S ABILITY TO PAY BEFORE IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS CONSTITUTES A SENTENCING ERROR THAT MAY BE CHALLENGED FOR THE FIRST TIME ON DIRECT APPEAL.

1. *The record fails to establish that the trial court actually took into account Berrian's financial circumstances before imposing discretionary LFOs.*

At sentencing, the State asked the trial court to impose standard mandatory legal financial obligations (LFOs) and also "[w]hatever the court sees fit" in non-mandatory DAC attorney fees.

(02/14/14 RP 6) Berrian's counsel told the court that Berrian was indigent and that he had problems staying employed in the past, and asked the court to consider reducing the amount of LFOs. (02/21/14 RP 288) The trial court ordered Berrian to pay legal costs in the amount of \$1,300.00, which included discretionary costs of \$500.00 for appointed counsel. (02/14/14 RP 288-89; CP 148)

The Judgment and Sentence includes the following boilerplate language:

2.5 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 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.

(CP 147)

RCW 10.01.160 gives a sentencing court authority to impose legal financial obligations on a convicted offender, and includes the following provision:

[t]he 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.

RCW 10.01.160 (3) (emphasis added). The word “shall” means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). Hence, the trial court was without authority to impose LFOs as a condition of Berrian’s sentence if it did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court’s decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant’s individual financial circumstances and made an individualized determination that he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court’s LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court’s authority.

The record does not establish the trial court actually took into account Berrian’s financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. The State did not provide evidence establishing Berrian’s

ability to pay or ask it to make a determination under RCW 10.01.160 when it asked that LFOs be imposed.<sup>3</sup> (02/14/14 RP 6-7) And the trial court made no further inquiry into Berrian's financial resources, debts, or employability. In fact, the trial court's concern was primarily with ensuring that defense counsel would be paid.<sup>4</sup> There was no specific evidence before the trial court regarding Berrian's past employment or his future educational opportunities or employment prospects.

The boilerplate finding in section 2.5 of the Judgment and Sentence does not establish compliance with RCW 10.01.160(3)'s requirements. Such a boilerplate finding is insufficient to show the trial court actually gave independent thought and consideration to the facts of Berrian's case. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011). The Judgment and Sentence form used in Berrian's case contained a pre-formatted conclusion that he had the ability to pay LFOs. It does not include a checkbox to register even minimal individualized judicial consideration. (CP 147) Rather,

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<sup>3</sup> It is the State's burden to prove the defendant's ability or likely ability to pay. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013).

<sup>4</sup> The court seemed to believe that defense counsel would only be paid the amount that the court ordered in DAC recoupment. The State told the court that the usual amount, at least in cases where a defendant pleads guilty, is \$500. (02/14/14 RP 13) So the court ordered Berrian to pay \$500.00. The court did not comment on whether he believed Berrian had the means to pay this \$500.00 LFO. (02/14/14 RP 13)

every time one of these forms is used, there is a pre-formatted conclusion that the trial court followed the requirements of RCW 10.01.160(3), regardless of what actually transpired. This type of finding therefore cannot reliably establish that the trial court complied with RCW 10.01.160(3). And the trial court made no contemporaneous statements at sentencing regarding Berrian's ability to pay. (02/14/14 RP 13)

In sum, the record fails to establish the trial court actually took into account Berrian's financial circumstances before imposing LFOs, and therefore did not comply with the authorizing statute. Consequently, this Court should vacate that portion of the Judgment and Sentence.

Where the sentencing court fails to comply with a sentencing statute when imposing a sentencing condition, remand is the remedy unless the record clearly indicates the court would have imposed the same condition anyway. State v. Chambers, 176 Wn.2d 573, 293 P.3d 1185 (2013) (citing State v. Parker, 132 Wn.2d 182, 937 P.2d 575 (1997)). The record in this case does not expressly demonstrate the trial court would have found sufficient evidence of Berrian's ability to pay the LFOs. At sentencing, the State failed to point to any evidence establishing Berrian's past or future educational and

employment prospects. It cannot be said this record expressly demonstrates the sentencing court would have imposed the same LFOs if it had actually taken into account Berrian's individual financial circumstances. As such, the remedy is remand for resentencing. Parker, 132 Wn.2d at 192-93.

2. *Berrian's challenge to the LFO order can be raised for the first time on appeal and is ripe for review.*

This Court recently held, in State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), that the defendant's failure to object at sentencing to a boilerplate finding of ability to pay LFOs precluded him from raising a challenge for the first time on appeal.<sup>5</sup> The holding was in error, however, because Washington courts have repeatedly held that a defendant may challenge sentencing rulings for the first time on appeal when the ruling in question is in violation of statutory requirements. See e.g. State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) ("when a sentencing court acts without statutory authority in imposing a sentence, the error can be addressed for the first time on appeal"); State v. Ford, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999). Like other parts of sentencing in this state, the authority to order a defendant in a criminal case to pay LFOs is

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<sup>5</sup> Our State Supreme Court has granted review of the Blazina decision. 178 Wn. 2d 1010, 311 P.3d 27 (2013).

wholly statutory. See Curry, 118 Wn.2d 918; RCW 9.94A.760.

There is also a line of cases that holds that a challenge to an LFO order is not “ripe for review” until the prosecution tries to enforce it.<sup>6</sup> But our State Supreme Court has rejected the idea that challenges to sentencing conditions are not “ripe” where, as here, the issues are primarily legal, do not require further factual development, and involve a final decision of the trial court. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Bahl, 164 Wn.2d at 751.

First, the issue raised here is primarily legal. Neither time nor future circumstances pertaining to enforcement will change whether the trial court complied with RCW 10.01.160 prior to issuing the order. Second, no further factual development is necessary. As

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<sup>6</sup> See, e.g., Lundy, 176 Wn. App. at 108-09 (holding “any challenge to the order requiring payment of legal financial obligations on hardship grounds is not yet ripe for review” until the State attempts to collect); State v. Ziegenfuss, 118 Wn. App. 110, 74 P.3d 1205 (2003) (determining defendant’s constitutional challenge to the LFO violation process is not ripe for review until the State attempts to enforce LFO order); State v. Phillips, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (holding defendant’s constitutional objection to the LFO order based on the fact of his indigence was not ripe until the State sought to enforce the order); State v. Baldwin, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (concluding the meaningful time to review a constitutional challenge to the LFO order on financial hardship grounds is when the State enforces the order).

explained above, Berrian is challenging the sentencing court's failure to comply with RCW 10.01.160(3). The facts necessary to decide this issue (the statute and the sentencing record) are fully developed.

Third, the challenged action is final. Once LFOs are ordered, that order is not subject to change. The fact that the defendant may later seek to modify the LFO order through the remission process does not change the finality of the trial court's original sentencing order. While a defendant's obligation to pay can be modified or forgiven in a subsequent hearing pursuant to RCW 10.01.160(4), the order authorizing that debt in the first place is not subject to change. In other words, while the defendant's obligation to complete payment of LFOs that have been ordered may be "conditional," the original sentencing order imposing LFOs is final.<sup>7</sup> Accordingly, all three prongs of the ripeness test are met.

Also, withholding consideration of an erroneously entered LFO places significant hardships on a defendant due to its immediate consequences and the burdens of the remission process. An LFO

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<sup>7</sup> Division 1 previously concluded a trial court's LFO order is "conditional," as opposed to final, because the defendant may seek remission or modification at any time. State v. Smits, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009). However, it did so in the context of reviewing a denial of the defendant's motion to terminate his debt on the basis of financial hardship pursuant to RCW 10.01.160(4). Thus, Division I's analysis was focused on the defendant's conditional obligation to pay rather than on the legal validity of the initial sentencing order. Smits, 152 Wn. App. at 523.

order imposes an immediate debt upon a defendant and non-payment may subject him to arrest. RCW 10.01.180. Additionally, upon entry of the judgment and sentence, he is immediately liable for that debt which begins accruing interest at an unconscionably high 12% interest rate. RCW 10.82.090.

The hardships that might result from the erroneous imposition of LFOs cannot be understated. A study conducted by the Washington State Minority and Justice Commission looking into the impact of LFOs, concludes that for many people LFOs result in:

...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnaring some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008).<sup>8</sup>

Withholding appellate court consideration of an erroneous LFO order means the only recourse available to a person who has

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<sup>8</sup> This report can be found at [http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf)

been erroneously burdened with LFOs is the remission process. Unfortunately, reliance on the remission process to correct the error imposes its own hardships.

First, during the remission process, the defendant is saddled with a burden he would not otherwise have to bear. During sentencing, it is the State's burden to establish the defendant's ability to pay prior to the trial court imposing any LFOs. State v. Lundy, 176 Wn. App. 96, 106, 308 P.3d 755 (2013). The defendant is not required to disprove this. See, e.g. Ford, 137 Wn. App. at 482 (stating the defendant is "not obligated to disprove the State's position" at sentencing where it has not met its burden of proof). If the LFO order is not reviewed on direct appeal and is left for correction through the remission process, however, the burden shifts to the defendant to show a manifest hardship. RCW 10.01.160(4). Permitting an offender to challenge the validity of the LFO order on direct appeal ensures that the burden remains with the State.

Second, an offender who is left to fight his erroneously ordered LFOs through the remission process will have to do so without appointed legal representation. State v. Mahone, 98 Wn. App. 342, 346, 989 P.2d 583 (1999) (recognizing an offender is not entitled to publicly funded counsel to file a motion for remission).

Given the petitioner's financial hardships, he will likely be unable to retain private counsel and, therefore, have to litigate the issue pro se.

For a person unskilled in the legal field, proceeding pro se in a remission process can be a confusing and daunting prospect, especially if this person is already struggling to make ends meet. See Legal Financial Obligations in Washington State at 59-60 (documenting the confusion that exists among legal debtors regarding the remission process). Indeed, some offenders are so overwhelmed, they simply stop paying, subjecting themselves to further possible penalties. Legal Financial Obligations in Washington State at 46-47. Permitting a challenge to an erroneous LFO order on direct appeal would enable an offender to challenge his or her debt with the help of counsel and before the financial burden grows to overwhelming proportions.

Finally, reviewing the validity of LFO orders on direct appeal, rather than waiting for the State to attempt collection and then remedying the problem during the remission process, serves an important public policy by helping conserve financial resources that may otherwise be wasted by efforts to collect from individuals who will likely never be able to pay. See State v. Hathaway, 161 Wn.

App. 634, 651-52, 251 P.3d 253 (2011) (reviewing the propriety of an order that the defendant pay a jury demand fee because it involved a purely legal question and would likely save future judicial resources). Allowing the matter to be addressed on direct appeal will emphasize the importance of undertaking the necessary factual consideration when imposing LFOs in the first place and not rely on the remission process to remedy errors.

For all these reasons, this Court should hold Berrian's challenge to the legal validity of the LFO order *can* be raised for the first time on appeal and *is* ripe for review.

## **V. CONCLUSION**

The prosecutor committed flagrant and ill-intentioned misconduct during closing arguments by telling the jury that Berrian was obviously guilty of other uncharged and unproved acts of theft and possession of stolen items. This misconduct, coupled with trial counsel's failure to adequately object and seek a curative instruction, denied Berrian his constitutional right to a fair trial and to effective assistance of counsel. Berrian's convictions should be reversed and his case remanded for a new trial.

Furthermore, the trial court's failure to comply with the sentencing statute when it imposed discretionary LFOs constitutes a

sentencing error that may be challenged for the first time on direct appeal, and is ripe for review. Because the record fails to establish that the trial court did in fact consider Berrian's ability to pay before imposing discretionary LFOs, Berrian's case should be remanded for resentencing.

DATED: August 11, 2014



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WSB #26436  
Attorney for Darrell Parnel Berrian

**CERTIFICATE OF MAILING**

I certify that on 08/11/2014, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Darrell P. Berrian, #2013188023, Pierce County Jail, 910 Tacoma Ave. S., Tacoma, WA 98402.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**August 11, 2014 - 9:27 AM**

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