

No. 45939-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

LEMAR WALLER,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Lemar Waller was deprived of his Sixth Amendment and Article I, § 22, rights to counsel and his Article I, § 3 and Fourteenth Amendment due process rights when the lower court refused to appoint new counsel and failed to conduct an adequate inquiry into the request.
2. Counsel committed serious misconduct and acted in his own interests rather than those of his client, thus effectively destroying the attorney-client relationship, by minimizing and misrepresenting crucial facts which would have supported his client's request for new counsel and which would have shown the severity of counsel's personal problems which had led him to seek a continuance a short time before.
3. Even if the trial judge did not initially err in refusing to reconsider the ruling of the presiding judge denying the motion for new counsel, he erred in failing to consider Waller's request once counsel's complete lack of communication and failure to review the crucial evidence with his client became clear.
4. The case should be remanded for resentencing because appellant Lemar Waller is indigent and the sentencing judge did not consider his individual financial circumstances or make a specific inquiry into his current and future ability to pay before imposing legal financial obligations (LFOs), as required under RCW 10.01.160(3), as recently interpreted in State v. Blazina, \_\_\_ Wn.2d \_\_\_, 344 P.3d 680 (2015 WL 1086552) (March 12, 2015).
5. This case presents the same policy issues as those which compelled the Supreme Court to act in Blazina and this Court should similarly exercise its discretion to grant relief.
6. Appellant assigns error to the boilerplate "finding" pre-printed on the judgment and sentence which provided:

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 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. RCW 9.94A.753.

CP 104-105.

B. ISSUES PERTAINING TO ASSIGNMENTS

1. Less than a month prior to trial, veteran appointed counsel was so overwhelmed with personal issues that he had communicated with the trial judge, presiding judge, his supervisor and clients about being unable to provide effective assistance. He also admitted he had not yet reviewed the crucial DVD of the alleged crime with his client, despite having been given multiple continuances in order to be able to do so.

Before trial, counsel moved in front of the presiding judge for new counsel to be appointed.

- a. Did counsel commit serious misconduct and violate his duties to his client by misrepresenting the severity of his personal issues and the situation in such a way that it left the presiding judge denying the motion on the incorrect belief that Mr. Waller was just trying to “attorney shop” and had no real or valid concerns?
- b. Did counsel further betray his client’s interests and show the depth of his own inability to perform adequately by deliberately telling the trial court not to file evidence relevant to counsel’s ability to perform his job and improperly incorporating by reference an argument from a completely different case without making an adequate record on his current client’s behalf?
- c. Did counsel’s putting his own self-interest in his reputation ahead of his client’s best interests, his failure to communicate with his client about the case prior to trial and his failure to review the crucial DVD with his client in order to investigate potential matters of defense deprive Mr. Waller of his constitutionally protected right to not only effective but also conflict-free counsel?
- d. Was counsel further ineffective and was Mr. Waller deprived of his rights to counsel when counsel failed to renew his motion in front of the proper judge even though he had evidence which would have supported it?

- e. Did the trial court fail in its duties to Mr. Waller and violate due process when it did not inquire further after it came to light that counsel was completely unaware of the names of potential defense witnesses because he had yet to discuss those matters with Mr. Waller and had yet to review the crucial DVD with his client?
2. Under RCW 10.01.160(3) as interpreted in Blazina, a sentencing judge “must consider the defendant’s individual financial circumstances and make an individualized inquiry into the defendant’s current and future ability to pay” before imposing discretionary LFOs on an indigent defendant. Did the sentencing court here err in failing to make such an inquiry before imposing such costs on appellant, who is indigent?
3. In Blazina, concerns about inequities, racial bias and other serious flaws in our current system of LFOs caused our highest court to unanimously agree that relief should be granted even though there was no objection below. Two justices would have reached the issue applying RAP 1.2(a) because addressing the issue and granting relief was necessary in order “to promote justice.”

Should this Court grant relief to appellant, because the same issue is presented here and this case presents the same concerns as those raised in Blazina?

4. The Blazina Court held that the requirements of RCW 10.01.160(3) meant that a sentencing court “must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.”

Is reversal and remand for resentencing required because the only finding made in this case about appellant’s “ability to pay” was just such an improper boilerplate finding and that finding was unsupported by the record?

C. STATEMENT OF THE CASE

1. Procedural history

Appellant Lemar Waller was charged by information filed on March 6, 2013, in Pierce County Superior Court, with unlawful delivery of a controlled substance (cocaine) and unlawful possession of a controlled

substance with intent to deliver (heroin). CP1-2; RCW 69.40.401(1)(2)(a). After continuances were granted by the Honorable Bryan Chuschcoff on March 8 and 26, April 23, May 21, June 18, September 17 and December 9, 2013, the Honorable Frank Cuthbertson denied a motion to dismiss counsel and for a further continuance on January 7, 2014. CP 4-9; 1RP 1, 2RP 1, 3RP 1, RP 1.<sup>1</sup>

Jury trial was held before the Honorable John R. Hickman on January 7, 8, 9, 13 and 14, 2014, after which the jury acquitted Mr. Waller of the heroin possession charge but found him guilty of unlawful delivery of cocaine. RP 458; CP 67-69.

At sentencing on January 24, 2014, Judge Hickman imposed a standard-range sentence. CP 96-109. Mr. Waller appealed and this pleading follows. See CP 113-24.

2. Testimony at trial

On March 5, 2013, officers from the Tacoma Police Department (TPD) conducted what they called a “hot pop” operation in an area in Tacoma where, one officer said, there had been neighborhood and local patrol officer reports of “loitering” and “high narcotics.” RP 205, 238-39. TPD Officer Brian Kim described a “hot pop” as taking a “confidential informant” to the area, using “surveillance” and sending that person into what the officer said was an “open air market” to try to buy drugs. RP

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<sup>1</sup>The verbatim report of proceedings in this case consists of 9 volumes which will be referred to as follows:

Motion hearing in the Simpson case on December 9, 2013, as “1RP;”

Motion hearing on December 9, 2013, as “2RP;”

Motion hearing on January 7, 2014, as “3RP;”

Chronologically paginated volumes containing the trial and sentencing proceedings of January 7, 8, 9, 13, 14 and 24, 2014, as “RP.”

203, 206. Such operations do not have a particular “target” but are just a fishing expedition to see who might sell. RP 206.

Kim explained that confidential informants are people who are either trying to “work off a past crime” by setting someone else up in exchange for leniency on their own charges, or someone who has contacted police and offered to set people up for money. RP 207-208. Kim thought most informants have their own history with drugs, although he thought some might not. RP 209.

The informant police were working with that early Spring day was a woman who was working as a “mercenary,” trying to earn some cash, but Kim did not know how much she was getting. RP 208-211, 232. The woman had her own problem with drugs, Kim admitted, and he had only worked with her once or twice in the past. RP 208-11.

The informant was given “buy” money which had the serial numbers recorded. RP 213-14. After driving the informant to the targeted area, the officers let her off about a block away. RP 215. Certain officers were supposed to keep her under surveillance. RP 216. Kim could not see her and admitted what he could hear from the recording she was making was “off and on.” RP 211, 217-18. Another officer with him, Officer Schultz, also could not see anything, either. RP 244-46. When asked how he was made aware that other officers were actually watching the informant, Schultz relied on the “assigned roles” from their earlier briefing and also said that he was “able to hear what other officers are indicating as far as what they’re observing while the operation is actually ongoing.” RP 247.

TPD officer Henry Betts was in the “takedown” or “arrest van,” with no windows on the side and “roll doors” and could not see any alleged transactions. RP 265.

The informant was out of the car for about 20 minutes when, Kim said, some unspecified officer said she had given a “good buy” signal and the “tech unit” broadcast information over the radio that there had been a transaction, describing the suspect. RP 219-20.

Kim then went to a pick-up location and met the informant. RP 220-21. He searched her again and said, if he had found anything, he would have arrested her. RP 220-26. The informant handed the officer some suspected crack cocaine. RP 220-21. A forensic later scientist testified that the suspected rock cocaine had the tested in a way “indicative” of cocaine. RP 317-25.

A video/DVD of the surveillance tape made of the alleged transaction showed an African-American man approach the informant on a bike, then go away, and then return. See Ex. 6; RP 13-16. When the man on the bike came back, another man joined the group. RP 14. A third man, later identified as Lemar Waller, joined after that, and the video showed him, the man on the bike and the other man with the woman informant. See Ex. 6; RP 13-16.

There were a lot of people in the park, including at least one bicyclist. RP 258. Officer Terry Krause was in the “tech unit” and said that there was a “little cluster of people other than the confidential informant.” RP 362. Krause said he actually tried to get the guy on the bike but he got away. RP 363-64. Krause also said he did not see either of

the other two people “make any kind of exchange with the informant” but instead saw Waller do so. RP 364-65. The officer thought the bike guy was the middleman. RP 365.

The arresting officers got a description from the surveillance unit and went to the area, looking for a man who fit and had a certain neck tattoo. RP 268, 308-309. According to Officer Betts, when he opened their van and tried to get the man, a chase ensued. RP 269. Betts said Waller was caught quickly after running on a sidewalk, through a planting strip, into a roadway, around a parked car and into the roadway again before being apprehended. RP 270. Betts walked back along the route he thought the man had run and found, near a parked car, a “little wadded-up plastic bag on the roadway” with suspected narcotics. RP 271.

TPD officer Christopher Shipp was also on the “arrest team.” RP He did not recall Waller running around near any parked vehicles in the area or see him carrying anything. RP 295. Shipp conducted the search of Waller incident to arrest and recovered the buy money, although he was not sure from which pocket. RP 296.

Shipp acknowledged that the arrest van was not marked as belonging to police. RP 300. He said, however, his vest was clearly marked. RP 301. He also conceded that, while he did not recall seeing it, other officers mentioned something about Mr. Waller having drainage tubes or a colostomy bag or something. RP 300.

Officer Martin admitted that he recalled “some type of medical tubing” on Waller when he searched him, and that Martin remembered “being informed about some type of bag or something like that.” RP 314.

He said he knew “there was a medical issue, yes,” with Waller. RP 314.

D. ARGUMENT

1. MR. WALLER’S ARTICLE I, SECTION 22, SIXTH AMENDMENT AND DUE PROCESS RIGHTS WERE REPEATEDLY VIOLATED AND HE WAS FORCED TO GO TO TRIAL WITH COUNSEL WHOSE PERSONAL PROBLEMS WERE SO SIGNIFICANT THAT HE HAD PUT HIS INTERESTS ABOVE HIS CLIENT’S AND FURTHER THE LOWER COURTS FAILED IN THEIR INHERENT DUTIES TO ENSURE A FAIR SYSTEM

In general, a trial court’s refusal to appoint new counsel is reviewed for abuse of discretion. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006). But a court “necessarily abuses its discretion” if it violates the constitutional rights of the accused. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). The right of the accused includes not only the right to counsel but to have counsel meet minimal professional standards and be deemed “effective.” Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. A defendant can be deprived of the due process guarantee of a fair trial when counsel fails to live up to minimum standards. See State v. Pryor, 67 Wash. 216, 121 P. 56 (1912); State v. Webbe, 122 Wn. App. 683, 694, 94 P.3d 994 (2004).

Thus, the constitutional right to have the assistance of counsel “carries with it a reasonable time for consultation and preparation, and a denial is more than a mere abuse of discretion; it is a denial of due process

of law.” State v. Sain, 34 Wn. App. 553, 556, 63 P.2d 493 (1983).

Further, a defendant is entitled to counsel who honors a duty of loyalty to him and does not have a conflict between his own interests and those of his client. See, e.g., State v. McDonald, 143 Wn.2d 506, 511, 22 P.3d 791 (2001).

While these rights stem in part from the right to effective assistance of appointed counsel, there is also a serious concern of judicial integrity and professional ethics involved when appointed counsel has a serious conflict of interest or is incapable of conforming to minimum professional standards due to a personal or professional impairment. See, United States v. Dolan, 570 F.2d 1177, 1184 (3<sup>rd</sup> Cir. 1978). In such cases, the U.S. Supreme Court has declared, a court “should not be required to tolerate an inadequate representation of a defendant.” Wheat v. United States, 486 U.S. 153, 162, 108 S. Ct. 1692, 100 L.Ed. 2d 140 (1988).

Indeed, the Court found, inadequate representation “not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge” to ensure that his rulings are respected and not later attacked. Id.

In this case, this Court should hold that Mr. Waller was deprived of his rights to due process, to effective assistance and indeed to counsel itself when counsel’s extremely serious personal problems led to counsel commit misconduct, covering up, misrepresenting his situation in order to protect his own personal interests to the detriment of his client, and otherwise putting his own interests before his client. Further, Mr. Waller

was repeatedly failed by the courts below. Nothing short of a new trial with an unburdened attorney can ensure that justice is served.

a. Relevant facts

Mr. Waller was charged on March 6 of 2013, and counsel filed a notice of appearance shortly thereafter. Supp. CP \_\_ (notice of appearance). On March 26, a continuance was granted due in part to a judicial conference and the trial calendar. CP 4. On April 23, 2013, a defense for a continuance was granted on the grounds that discovery was still needed. CP 5. A second defense request on that same basis was granted on May 21, 2013. CP 6.

On June 18, 2013, counsel brought a third defense request for a continuance, again saying he needed discovery from the state and further saying he needed time to review that discovery with Mr. Waller. CP 7.

Counsel was given until September 17, 2013, more than three months. CP 8. Then, on September 17, there was another defense motion for continuance, this time indicating that discovery appeared to be “finally complete” and counsel now needed time for trial preparation. CP 9.

All of these continuances were granted by the Honorable Judge Bryan Chuschcoff, presiding judge at that time. CP 4-9.

Another three months passed before, on December 9, 2013, the parties appeared before Judge Chuschcoff for yet another defense request for further time. 2RP 1.

This time, however, things were different. The prosecutor, Dione Hauger, told the court that she was ready to proceed to trial on Mr. Waller’s case. 2RP 1. She then declared, however, that she understood

defense counsel, Albert Germano, was going to be asking for a continuance, “similar to the case that the court heard earlier, the Simpson case.” See 2RP 1.

Counsel then told the court he was asking for more time to prepare for Mr. Waller’s trial. 2RP 1-2. Instead of making a detailed record of the reasons he needed more time, however, counsel referred to an email he said he had “discussed earlier” - presumably in the other case involving someone named “Simpson.” 2RP 3-4. Counsel Germano said he felt “compelled” to ask for more time, proposing January 7, 2014, for the trial date and saying Waller was aware of the need for additional time and had agreed to it. 2RP 4-5. Counsel also said the Mr. Waller had some medical issues himself and an appointment, as well as a relative in the hospital. 3RP 5.

Ultimately, counsel admitted, “I need a bit more time to give Mr. Waller effective representation to which he is entitled.” 3RP 5. The attorney went on:

I have a short - - little bit of a time off later this month. **I will be seeing my doctor before that time.** As I stated earlier, I did have an appointment to see my doctor. I had to cancel because I was engaged in trial on another matter. I just want to make sure that I’m providing Mr. Waller - - we joke about it. I try to give my clients 110 percent. I feel that they are entitled to that. That’s why I’m asking for a brief set over.

2RP 5. The court granted the request. 2RP 5.

Transcript from the same day from State v. Raydell Simpson, No, 13-1-01665-8, made part of the record on appeal upon a motion granted by this Court after investigation by appellate counsel, shows the same

prosecutor, judge and defense counsel talking in more depth about counsel's issues, again referring to email, earlier on December 9. 1RP 1. In that hearing, Germano told the court that he had, the previous week, notified the trial prosecutor, Ms. Hauger, that he "had some issues, personal issues, not related to the case or Mr. Simpson." 1RP 4. Counsel said he had "e-mailed" to "court administration detailing what some of those issues were." 1RP 4-5. Counsel then asked Judge Chuschcoff if he had been given a copy of the email, apparently assuming that all judges would somehow have seen it. 1RP 4-5.

The judge had not seen the email, so counsel handed up a copy. 1RP 4. At the time he did so, he declared, "[w]e don't need to be filing it." 1RP 4. Counsel had also provided a copy of that email to opposing counsel, Ms. Hauger, and said that he had "discussed the essence of it with Mr. Simpson," his client. 1RP 4-5.

Counsel then told the court:

Your Honor, I don't take this situation lightly. I don't take myself seriously, at least I try not to. I take my cases and my clients very seriously. They have a right to that.

I'm simply asking for some additional time to better provide effective assistance of counsel. I do have a little bit of time scheduled off at the end of this month to rest. I'm rescheduling an appointment with my doctor. I had an appointment, but I had to cancel it because I was in trial on another matter. I just don't want my effectiveness for Mr. Simpson to be in any way compromised. For that reason, I'm asking for a brief set over, January 21.

1RP 5. He said he realized "it is a somewhat unusual request, but that's the situation that I'm feeling at this time." 1RP 5.

Also in the Simpson hearing, counsel admitted that things were

serious enough that he had talked to his supervisor, Mary Kay High of the Department of Assigned Counsel, about the difficulties he was having in handling his cases as a result. IRP 5-6. Germano thought “[i]t may be that a couple of my cases, not this one or the next one this morning, perhaps could be reassigned to someone else because I’m going to need a little bit of time.” IRP 5-6.

For her part, the prosecutor, Ms. Hauger, raised no objection, stating that counsel had been “incredibly upfront and professional with me about the situation that he is dealing with.” IRP 6.

The emails referred to in the two proceedings were recovered from trial counsel’s email records at the Department of Assigned Counsel after investigation during the pendency of the appeal and filed below. See Supp. CP \_\_\_ (emails) (attached hereto as Appendix A). In the one to the prosecutor, Ms. Hauger, sent Thursday, December 5, 2013, counsel referred to their “conversations earlier this week,” not on the record, apparently about the reasons he needed additional time in his cases. App. A at 4. Counsel went on:

I have been dealing with personal issues these past few weeks which has made it quite difficult for me to do the things I really need to do. I probably need to take some time off, but that too is problematical with office staffing and coverage availability being what they are. I am taking the week between Christmas and New Years [sp] but that’s it.

App. A at 4. Counsel also discussed his difficulties with Mr. Waller’s case specifically, saying that Waller “might be willing to accept a deal (**but I have just not been able to free up the time needed to go over with him all of the evidence against him and the likely outcome of a trial.**)”

App. A at 4 (emphasis added).

In addition, counsel admitted that cases like Waller's were always falling to the bottom of his priorities at work because the client was out of custody, declaring, "[p]art of the problem at my end is that the in-custody people keep going to the top of the list with new ones coming all the time." App. A at 4. He expressed his hope that the court would allow setovers to early January in both the Waller and Simpson cases, "back to back if need be" and stated he would prefer that Simpson's case go to trial with Waller's set over if the court required them to go forward on anything on the 9th. App. A at 4. Counsel said he did not have other trials in the "next week; but December is a mess so far as my calendar is concerned." App. A at 4.

The next day, Friday, December 6, 2013, counsel sent the email to court administration which he asked Judge Chuschcoff about seeing at the later December 9 hearing. In response to a morning request by Pierce County Superior Court administration to submit "trial readiness information" for Monday, December 9, and an email from the prosecutor that she could be ready on either case but understood defense counsel would be asking for a continuance "due to some personal issues that he needs an opportunity to deal with," counsel sent a return email to the court and the prosecutor in which he declared:

I regret being in the situation to be requesting continuance of both matters into early/mid January. And as much as I dislike having to discuss my reasons, the basic truth is that I am dealing with some personal issues (a re-occurrence [sp] of a severe depression that I experienced some years ago) these last 2-3 weeks which have become worse (although certainly not overwhelming). As the Court probably already knows, I lost my mother in August;

my brother is losing his battle with cancer; and my dad, understandably, is not handling any of this well. I am not eating well; I am not sleeping well; and I am becoming increasingly tense and irritable with family and friends. I had an appointment to see my doctor on November 20, but had to cancel because I was in trial. The earliest I was able to reschedule for is Jan. 13.

App. A at 2.

Counsel said he would prefer to reset Mr. Waller's case to January 14 and Mr. Simpson's to January 6. App. A at 2. He also said he "suspect[ed]" he could settle Mr. Waller's case if he had more time. App. A at 2. Counsel promised to try to "get an earlier doctor's appointment" but did not explain how one appointment might make him suddenly recovered. App. A at 2.

When the parties next appeared it was January 7, 2014. See 3RP 1. They had learned the day before that the case was "top of the priority list as far as assignments for a courtroom." 3RP 2. Counsel had waited until the next morning, however, to tell the prosecution he was going to bring a motion on Mr. Waller's behalf. 3RP 2.

In front of the presiding judge, now Judge Cuthbertson, who had not presided over all of the previous motions including the December 9, hearings in Waller and Simpson, counsel explained that he had asked for a continuance a month earlier

because I felt I was stressed out and overwhelmed because of a lot of things that had happened in my personal life, my family life. And making a long story short, that request was granted. **I have not been able to provide the level of assistance to Mr. Waller I would prefer to be providing. Mr. Waller is dissatisfied.**

I've been a lawyer in DAC for over 20 years, in private practice for more than 10 before that. I have never asked to be released from a case. Mr. Waller prefers that I be dismissed from

his case and that new counsel be appointed. He feels he is not receiving effective assistance, and I respect that. The reality and the perception are the same: If a person feels that they're not getting the full effort, then they're not, because that perception is supreme, in my opinion.

I have never been asked to be released from a case, but I am going to with Mr. Waller's perception.

3RP 2-3 (emphasis added).

Counsel told the court that Mr. Waller had always come to court, kept in touch and had a stable address and telephone number. 3RP 3-4. Counsel said, "I would ask that he be allowed this request." 3RP 4. He also told the Court that Mr. Waller was facing "substantial jail time" and that another lawyer could be "on board very, very soon" and ready for trial within 30 days. 3RP 4.

Counsel declared it would be the "appropriate thing to do" to allow new counsel and would be in the "interest of justice." 3RP 4. Counsel said it was important to him that his client receive "full and effective assistance of counsel," then confessed, "**I feel that I have not done everything that I could have**" and that Mr. Waller clearly believed so, an opinion counsel said he "value[d]." 3RP 3-4 (emphasis added). Counsel also admitted that the attorney-client communication "has broken down." 3RP 4.

Mr. Waller told the court that, although the case had been ongoing for nine months, the only communication he had with his attorney outside of quick phone and hallway talk was within the previous 24 hours. 3RP 5. Waller said there had been a lot of continuances "not on the record," which had just involved him signing some paperwork, but other than that

not much contact. 3RP 5.

Mr. Waller told the court he did not believe that Mr. Germano was acting in Waller's best interests. 3RP 5. Mr. Waller mentioned "the last two continuances," stating it seemed to him that "whatever turmoil [counsel] might be going through with his family or other issues is affecting counsel on my behalf." 3RP 5.

At that point, counsel conceded that he still had not reviewed the crucial DVD evidence the prosecution was planning to use to prove Waller guilty of the crime. 3RP 5. Counsel admitted that he had "really meant to sit down with" his client to review the DVDs once counsel had received them, but had not yet done so, despite asking for previous "setovers" for such time. 3RP 5-6.

The prosecutor, Ms. Hauger, then objected to the "last minute" motion, stating her awareness that counsel had "personal issues" and that he had been granted a continuance the previous month to deal with those issues but arguing, essentially, that counsel should just move on:

While I sympathize and empathize with what's happened [in counsel's life], I have had personal issues in life I've had to deal with, with the health of individuals close to me, we all struggle with that.

3RP 6. The prosecutor also declared her belief that counsel had been "zealously advocating" for Mr. Waller by trying to settle the case and get Mr. Waller a plea deal. 3RP 7. Ms. Hauger told the court that counsel had made statements to the prosecutor which made the prosecutor believe that counsel had watched the DVD himself. 3RP 7.

Without engaging in further discussion, Judge Cuthbertson stated

he had “had several cases” over the years with counsel Germano and had “never seen him not to produce high quality work.” 3RP 7. The judge then told Mr. Waller, “[y]ou don’t get to lawyer shop,” and, “[a]t this point, you’re going to trial in Judge Hickman’s courtroom today.” 3RP 7.

Mr. Waller then protested, “it’s not about shopping for an attorney. It’s about in my best interests.” 3RP 7. When he tried to continue, the judge said, “[y]ou’re going to trial in Judge Hickman’s court. I believe it’s 211. Enjoy.” 3RP 7. Mr. Waller again objected that counsel had “stated on the record he was ineffective,” but the judge said, “[y]ou’ll have to see what happens.” 3RP 7.

A few minutes later, the prosecution’s case against Mr. Waller was called for trial in Judge Hickman’s courtroom. RP 3. Counsel told Judge Hickman he had asked to have the trial set over about a month to get substitute counsel but that request had been denied, then went on:

Simply stated again, I was going through some severe personal and family issues a month or two ago. That was addressed to the Court. The matter was set over for a month. To some extent, I’ve still been dealing with that, but to a much lesser extent. Mr. Waller feels that I have not fully prepared, **and I would agree that although I believe I am effective counsel, I am not as effective as I would prefer to be.**

RP 4. Counsel again mentioned his “over 20 years of practice at DAC” and “over ten years of practice in private practice” and said he “had never asked to be released from a case” but was doing so in the matter to “give Waller his full due.” RP 4.

Counsel admitted to Judge Hickman that counsel had failed to meet with Mr. Waller to review the DVDs in the case, although he had

meant to do that. 3RP 4. Counsel said, “I did mean to meet with Mr. Waller so that he could review them” and “I did not get around to doing that.” RP 4. Counsel acknowledged that this caused Mr. Waller “concern” and counsel then said, “I respect his perceptions.” RP 4-5.

Counsel told the court that Waller had asked that counsel “be dismissed from the case,” that another counsel could be “on board, certainly within 30 days,” that Waller was out of custody, had come to every court hearing and had a “consistent and constant address and phone number” and had never failed to “show up.” RP 4.

At that point, counsel said he wanted to “again make that request again,” which was “a significant request, not one that I take lightly, not one that Mr. Waller takes lightly.” RP 4. Counsel said Mr. Waller might “wish to address the court.” RP 4.

Judge Hickman said that preliminary motions are “made at presiding court” and that if that court had denied or granted a motion for a continuance or new counsel, the judge would “follow that directive.” RP 5. The judge also said he would not “second-guess my presiding judge” and that any further argument about the issue would have to be in front of Judge Cuthbertson “in terms of asking him to reconsider.” RP 5.

The judge then belatedly asked for the prosecutor’s opinion, and she reiterated her belief that counsel Germano had “zealously advocated for his client.” RP 6. The prosecutor also praised counsel generally as providing “stellar counsel for his clients,” caring about and zealously advocating for them in all of her “dealings with him.” RP 6. Judge Hickman said that had been his “experience as well.” RP 7.

At that point, the judge refused to hear from Mr. Waller about his concerns. RP 7. The court said he believed counsel was “capable,” that counsel had already “articulated the reasons” for new counsel in front of the presiding court and that the case would move forward unless the presiding judge reconsidered his decision. RP 7.

Counsel apparently did not renew his motion in presiding, nor did he ask for time to do so. RP 5-10.

The parties then began discussing trial. A few minutes later, when the judge said he had two witnesses lists from the state and none from the defense, counsel said he had no potential witnesses. RP 9-10. At that point, Mr. Waller said there *were* witnesses for the defense, that some of those people were also on the video and that there was a witness who was “a person implicated in the police report” who “plays a big part in this trial.” RP 10.

Counsel then asked his client, “[c]an I have that person’s name, address, phone number and we can get him here?” RP 10. Mr. Waller responded, “[w]ell, that’s the thing. If you were effective on my case, we would have discussed any issues.” RP 10.

The judge interjected that this conversation was “privileged” between Mr. Waller and his lawyer and the court did not want to be a part of it. RP 10. Judge Hickman said that what he was hearing was that, at that “point in time,” counsel had no potential witnesses, but “maybe your client has names that he can provide to you[.]” RP 10-11. Counsel said he could “amend that and supplement that tomorrow,” once he had time. RP 10-11. The trial court was concerned that allowing a new witness at this

late date might result in “trial by surprise.” RP 10-11.

Neither counsel nor the court discussed again Mr. Waller’s concerns that counsel was unprepared and had not communicated with Mr. Waller about the case sufficient to even know his client’s proposed witnesses for the defense. RP 8-10. A few minutes later, during trial, counsel asked for time to be able to watch the DVD with Mr. Waller, to see what matters of defense might arise if Waller might “see someone in the video, and that would have to do with a potential witness.” RP 29.

Counsel presented no witnesses or testimony in Waller’s defense at trial. Waller was convicted of the alleged transaction which was recorded on the DVD, although he was acquitted of a charge of unlawful possession of heroin for the items found on the street.

- b. Mr. Waller should be granted a new trial with new counsel because of the serious violations of his rights to due process, effective assistance and even counsel itself based on the misconduct of counsel and erroneous rulings below

This Court should grant Mr. Waller a new trial, because this case involves the extremely unusual and very serious situation where appointed counsel’s personal problems are so overwhelming and his professional vanity so strong that he not only fails to do the right thing for his client but in fact put his own interests ahead of his client multiple times, abandoning his duty of loyalty to Mr. Waller. Further, if not deliberate missteps, the errors counsel made in creating a proper record on his client’s behalf betray the serious depth of counsel’s problems - which were so severe they forced the veteran trial defender to admit to the court and opposing counsel that he was finding himself emotionally unable to handle his

caseload and utterly unprepared in Mr. Waller's case, less than a month prior to trial.

First, while counsel is to be lauded for asking for the continuance on December 9 in order to address his personal problems, his request betrayed either the depth of his inability to perform even basic trial tasks or worse, that he was clearly making his client's interests subservient to his own. By the time of the December 9 motion, counsel had been on the case since the previous March. See CP 4-8. More than six months had passed before counsel apparently got a copy of the crucial DVD which formed the bulk of the evidence against his client. See CP 4-8. And he had failed to review that evidence with his client prior to December 9, nor had he even discussed his client's case with his client, he admitted on December 5, sufficient to even consider the possibility he might accept a plea.

It is to counsel's credit that he recognized that his mother's death in August, his brother's cancer "fight" which was apparently being lost as of December, his father's "inability" to handle the emotional turmoil and counsel's apparent need to help his father with that burden while dealing with his own, as well as counsel's own depression, required him to ask for further time in several cases in order to be able to provide the minimum standard of "effective assistance."

But even in moving for a continuance, counsel betrayed either the depth of his impairment or how far his own interests were taking precedence to those of his clients. As an experienced trial attorney who usually was seen as doing a good job, Mr. Germano could hardly fail to

know how to make an adequate record in a particular client's case.

Further, it is trial practice "101" to file all documents relied on by a court in reaching a decision on a motion. Here, Germano not only failed to make an adequate record in Waller's case - he *deliberately* did so. First, he tried to quasi-incorporate by reference arguments made in a completely unrelated case. Second, he did not even *identify* that case on the record in Mr. Waller's case, so that at least there would be something hinting how to find the "incorporated" arguments and facts to ensure Mr. Waller's rights to a full record in his criminal case. 2RP 1-6.

Worse, counsel even **asked** the court to make an **inadequate** record by telling the court **not to file** the relevant email communications upon which counsel's motion relied in the first place. Id.

There is no doubt that counsel was embarrassed by his situation and the need to ask for time. But counsel could easily have requested that the court seal the emails, in order to make a full and proper record while honoring the sensitive nature of his disclosures.

At best, these failures show that a veteran trial attorney was so felled by the extreme impact of his personal tragedies that he forgot the basic, fundamental rules of trial practice. At worst, they show that counsel was more concerned with his personal and professional reputation than with ensuring his client's rights to an adequate record.

It was at the motion for new counsel, however, where the insurmountable conflict between counsel's embarrassment and professional pride led him to betray his duties to his client so completely

that Waller was deprived of his right to counsel and the attorney-client relationship completely broke down. Counsel waited to make the motion until the last minute, even though he was well aware that he had not yet reviewed the crucial DVD evidence or discussed potential defense witnesses with his client. And counsel's motion on behalf of his client in the presiding court was, at best, lukewarm. Indeed, he clearly minimized the situation so much that he led the presiding judge to believe Mr. Waller was simply trying to "attorney shop."

But as counsel well knew, Mr. Waller was **not** another public defense client trying to complain about a "public pretender" in order to get a delay of trial.

Further, the impression counsel gave the presiding judge - and later trial judge - about never having been asked "to be released from a case" by a client was a misrepresentation, to the extent it implied that counsel has never had a problem with his caseload or unhappy clients.

In fact, counsel was suspended from the practice of law by the state Supreme Court after about 8 years of practice for violating the rules of professional conduct by, *inter alia*, negligent failure to act with reasonable diligence on a client's behalf, failure to properly communicate with his client and other claims.. See Discipline Notice, *available at* <https://www.mywsba.org/DisciplineNotice/DisciplineDetail.aspx?dID=208>.

That suspension was long ago, of course, and Mr. Waller is not implying that the suspension then proves ongoing problems to this date.

Rather, it is troubling that counsel's declarations to the trial court minimizing the severity of the situation in Waller's case appear to have misrepresented counsel's past history of having such serious difficulties in case management that the bar had to become involved. And notably, counsel admitted below that he had suffered from depression and had problems many years before, suggesting the possibility that his previous suspension involved similar symptoms as what he was suffering at the time of trial.

And counsel again repeated this refrain implying never having had any problems in his many years of practice in front of the trial judge. RP 4-10. Only a few moments later, the trial judge refused to allow Mr. Waller to speak about his concerns about counsel, even after it came to light that counsel *still* had not reviewed the state's evidence with his client, *still* had not discussed potential defense witnesses with Mr. Waller and thus had conducted insufficient investigation into matters of defense.

Both the Sixth Amendment and Article I, § 22, of the Washington Constitution guarantee the defendant in a criminal case the right to not only have counsel appointed to represent them but also for counsel to be effective. Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963); see State v. Romero, 95 Wn. App. 323, 326, 975 P.2d 564, review denied, 138 Wn.2d 1020 (1999). The right to counsel plays a "crucial role" in our system, because "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." Strickland, supra, 466 U.S. at 645-46, quoting, Adams v.

United States ex rel. McCann, 317 U.S. 269, 275, 87 L Ed. 2d 268, 63 S. Ct. 236 (1942)).

But the right to counsel requires more than just that counsel is appointed. As the U.S. Supreme Court has made clear, “[t]hat a person who happens to be a lawyer is present” alongside an accused person “is not enough to satisfy the constitutional command.” Strickland, 466 U.S. at 685. While an indigent defendant is not entitled to choose the attorney appointed to represent him, he is entitled to an attorney who at least meets a certain level of effectiveness. Id.

Thus, “[t]o provide constitutionally adequate assistance, counsel must, at a minimum, **conduct a reasonable investigation**, enabling counsel to make informed decisions about how to best represent the client.” In re Brett, 142 Wn.2d 868, 873, 16 P.3d 602 (2001) (quotation marks and alterations omitted; emphasis in original). The purpose of such investigation is to determine possible defenses. See In re Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). Further, such investigation is essential because our system of adversarial testing “generally will not function properly unless defense counsel has done some investigation into the prosecution’s case and into various defense strategies.” Kimmelman v. Morrison, 477 U.S. 365, 385, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

As a result, counsel has a duty to make reasonable investigation into his client’s case “or to make a reasonable decision that makes particular investigations unnecessary.” Id. And adequate time is required to conduct such investigation regardless whether the prosecution or even

the trial court thinks that the case was straightforward and would not require much to defend, or that there was no defense. Sain, 34 Wn. App. at 556.

There is no question that the decision whether to call a witness is usually considered “trial tactics.” But tactical choices must still be reasonable, and made after sufficient investigation. See Roe v. Flores-Ortega, 528 U.S. 470, 180 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Further, “[c]ounsel can hardly be said to have made a strategic choice when s/he has not yet obtained the facts on which a decision could be made.” Rios v. Rocha, 299 F.3d 796, 806 (9<sup>th</sup> Cir. 2002).

Counsel’s utter failure to communicate with his client about potential matters of defense and review the state’s evidence with his client prior to trial cannot be deemed “strategic.” And even if the trial judge was originally justified in refusing to reconsider the motion for new counsel which had been decided by another judge, that judge failed to make the proper inquiry once counsel’s complete failure to review the crucial discovery with his client and the fact that he had not even talked to his client about potential witnesses, prior to trial, came to light.

In light of the concern that motions for new counsel can be used by a defendant for purposes of delay, courts have held that there was no right to a “meaningful attorney-client relationship.” See State v. Vargas, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). As the Supreme Court said, the focus was on “the adversarial process, not on the accused’s relationship with his lawyer as such.” United States v. Cronin, 466 U.S. 648, 657 n. 21, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Instead, the focus of determining whether new counsel should have been appointed as a result of a conflict between attorney and client has included 1) the extent of the conflict, 2) the adequacy of the trial court's inquiry into the conflict and 3) the timeliness of the motion to substitute counsel. State v. Stenson, 132 Wn.2d 688, 734, 940 P.2d 1239 (1997). In addition, in determining the effect of any conflict on the representation the defendant received, courts were tasked with looking at the record and evaluating the evidence as a whole. Id.

Even with this trial-centered focus, however, courts were still tasked with the ultimate duty of determining if counsel has an actual conflict of interest which impairs her ability to "conform with the ABA Code of Professional responsibility." Wheat, 486 U.S. at 162.

Here, Mr. Waller was forced to go to trial with counsel who had not reviewed the state's crucial evidence with his client and had not discussed with his client potential matters of defense - especially after counsel effectively misrepresented the reasonableness of Mr. Waller's concerns to such an extent that a judge thought he was "attorney shopping."

It is important to note that the Strickland presumption of effectiveness is based upon the belief that counsel was *actually involved in preparing a defense*, and thus "knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge." 466 U.S. at 689.

Counsel was well aware that this case was unique and Mr. Waller was not, in any way, "attorney shopping" but rather raising serious concerns about whether counsel was ready to go to trial. Those concerns

were not minimal but rather significant and real, given the extreme emotional impact of the death, terminal illness, loss of a father, lack of time to grieve and the return of counsel's own mental illness was so significant that counsel had to ask for further time.

Despite counsel's clear embarrassment at the situation, his personal problems were directly impacting his ability to represent his clients in such a significant way that he did not feel he could even be *adequate* in a criminal case despite his lengthy experience and practice. They were so serious he had talked to his supervisor about them and was asking for relief. They were so serious he told the prosecutor he needed a vacation which he was not going to get - more than the week he had planned. They were so serious he needed to see a doctor about the recurring depression he was having.

It is telling that this veteran public defender admitted to the prosecutor that, as late as December 5, 2013, counsel had "not been able to free up the time needed to go over" his client's case with him or discuss with Mr. Waller "all of the evidence against him and the likely outcome of trial" - or even the possibility of a plea. App. A at 4. And he admitted that Mr. Waller's case kept getting pushed to the bottom of the list as he was saddled with more "in-custody" people."

Even if the initial denial of the motion, in front of the presiding judge, was not an error because counsel had so mislead the court as to the severity of the situation, when trial began and counsel's failures came to light, the trial court should have, at a minimum, inquired into whether counsel could be deemed "prepared" when he had not even discussed

potential matters of defense or reviewed the evidence with his client.

Counsel's performance clearly fell below an objective standard of reasonableness. Counsel must "make a full and complete investigation" of both the facts and the law in order to "prepare adequately and efficiently to present any defense." State v. Burri, 87 Wn.2d 175, 180-81, 550 P.2d 507 (1976). Mr. Waller was deprived of his right to conflict-free counsel by counsel's efforts to avoid embarrassment. He was deprived of having counsel prepared for his trial. He was deprived of his due process rights to fundamental fairness. This Court should reverse.

2. THIS COURT SHOULD REVERSE AND REMAND FOR RESENTENCING BECAUSE THE LOWER COURT DID NOT MAKE THE REQUIRED INQUIRY BEFORE IMPOSING LEGAL FINANCIAL OBLIGATIONS ON THE INDIGENT APPELLANT AND THE CONCERNS RAISED BY OUR HIGHEST COURT IN BLAZINA ARE PRESENT HERE

Even if reversal and remand were not required based on the trial court's erroneous decision denying Mr. Waller's request for new counsel or counsel's ineffectiveness and the improper opinion testimony, reversal and remand for resentencing should be granted with instructions for the trial court to engage in the analysis set forth by the Supreme Court recently in State v. Blazina, supra, because the trial court did not follow the requirements of RCW 10.01.160(1), Mr. Waller is indigent and this Court should exercise its discretion to grant Mr. Waller the same relief as that given to the defendants in Blazina, because the very same policy concerns which compelled our highest court to act even absent an objection below are presented by this case.

Under RCW 10.01.160(1), a trial court can order a defendant

convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant's specific financial situation. RCW 10.01.160(3) provides:

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.

RCW 10.01.160(3).

At the sentencing hearing, the prosecutor argued for a particular sentence, then asked for community custody and "that he pay legal financial obligations, a \$100 DNA fee, \$200 filing fee, \$500 Crime Victim, \$1,500 DAC recoupment given the fact that this case did go to trial." RP 469. Counsel made no argument regarding his indigent client's ability to pay. RP 473-74. The court also said it would adopt the "legal financial obligations" and Germano had earned the \$1,500. RP 481.

Judge Hickman imposed a standard-range sentence and

In the written judgment and sentence, there was a preprinted portion which provided:

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS** The court has considered the total amount owing, the defend[ant]'s past, present and future ability to pay legal financial obligation, 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. RCW 9.94A.753.

CP 102-104. The document included an order of a \$500 crime victim assessment, \$100 DNA database fee, \$1500 for court-appointed attorney

fees/costs and a \$200 criminal filing fee, for a total of \$2300. Id. The order also required that payments will be “commencing immediately,” and that the court “shall report to the clerk’s officer within 24 hours of the entry of the judgment and sentence to set up a payment plan” unless the court set a different rate. Id. Waller was required to provide financial and other information to set up payments and to pay any costs of “services to collect unpaid legal financial obligations per contract or statute.” CP 102-104.

This Court should reverse and remand for resentencing, because the trial court did not follow the requirements of RCW 10.01.160(1) and relief should be granted under Blazina.

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RCW 10.01.160(3).

In Blazina, our highest Court recently interpreted RCW 10.01.160(3). Blazina involved two consolidated cases, each with an indigent defendant. 344 P.3d at 683-84. In one case, the sentencing court ordered a \$500 crime victim penalty assessment, a \$200 filing fee, a \$100 DNA fee, \$1,500 for assigned counsel and restitution to be determined “by later order.” 344 P.3d at 682-83. The other sentencing court ordered the

same fees except only \$400 for appointed counsel and an additional \$2,087.87 in extradition costs. Id.

Neither defense counsel raised an objection to the imposition of the costs or fees on their indigent client. Id.

On review, the prosecution first argued that the issue was not “ripe for review” until the state tried to enforce collection of the amounts imposed. 344 P.3d at 682-83 n. 1. The Supreme Court majority found instead that the issue was primarily legal, did not require further factual development and involved a final action of the sentencing court, a conclusion of “ripeness” with which the concurring justice seemed to agree. Id.<sup>2</sup>

The Court majority also found that RCW 10.01.160(3) was mandatory, noting that it requires that a trial court “**shall not**” order costs without making an “individualized inquiry” into the defendant’s individual financial situation and their current and future ability to pay, and that the trial court “**shall**” take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose” in determining the amount and method for paying the costs. 344 P.3d at 685 (emphasis in original). And the Court found that, in this context, the word “shall” is imperative. Id.

Further, the majority agreed with the defendants in both of the consolidated appeals that the individualized inquiry must be done on the record. 344 P.3d at 685. They then rejected the very same “boilerplate”

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<sup>2</sup>This portion of the decision was unanimous, but one justice would have used a different method of reaching the issues on appeal. See 344 P.2d at 686.

language used in this case:

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors. . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

344 P.3d at 686.

The Blazina majority also gave sentencing courts guidance on making the determination, referring them to the comments to GR 34 which set forth nonexclusive ways of determining indigency, including looking at household income, federal poverty guidelines, whether the person receives federal assistance, and other questions. Id.

The Blazina majority then rejected the defense claim that the sentencing court's failure to conduct the required inquiry could be raised for the first time on review as an "unpreserved sentencing error" under State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999). Blazina, 344 P.3d at 683-84. They found that the policy reasons behind Ford were to ensure uniformity of sentencing, a policy which is not served by allowing a challenge to imposition of legal financial obligations for the first time on appeal. Id.

Instead, the Court held, in crafting RCW 10.01.160(3) the Legislature "intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances." Id.; see also, 344 P.3d at 686 (Fairhurst, J., concurring). Further, the majority believed that the trial judge's failure to consider the

defendants' ability to pay in the consolidated cases on review was "unique to these defendants' circumstances." Blazina, 344 P3d at 683-84. The Court therefore believed that the failure of a sentencing court to properly consider the defendant's present and future ability to pay was an error not expected to "taint sentencing for similar crimes in the future," unlike the errors in Ford. 344 Wn.2d at 683.

The majority then held that, while the lower appellate courts had been within their authority to decide whether to exercise discretion to grant review of the issues presented under RAP 2.5(a), "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." 344 Wn.2d at 683.

The Court chronicled national recognition of "problems associated with LFO's imposed against indigent defendants," including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems "caused by inequitable LFO systems." Id. One of the proposed reforms the Court mentioned was a requirement "that courts must determine a person's ability to pay before the court imposes LFOs." Id.

The Court then noted the flaws in our own state's LFO system and the system's "problematic consequences." 344 P.3d at 684. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. 344 P.3d at 683-85. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford \$25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id.

The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 344 P.3d at 684-85. This increased involvement “inhibits reentry,” the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other “reentry difficulties increase the chances of recidivism.” Id.

Finally, the Blazina majority pointed to the racial and other disparities in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. 344 P.3d at 685-86. The court also noted that certain counties seem to have higher LFO penalties than others. Id.

The concurrence in Blazina agreed that the issue required action by the Court, but disagreed with how the majority applied RAP 2.5(a) and its exceptions. 344 P.3d at 686-87. The concurrence would have found the error non-constitutional and would not have addressed it under RAP 2.5(a)(3) but would instead have reached the issue under RAP 1.2(a), “to promote justice and facilitate the decision of cases on the merits.” Id. The concurring justice felt it was appropriate for the court to exercise its discretion to reach the unpreserved error “because of the widespread problems” with the LFO system as applied to indigents “as stated in the

majority.” Id. And she also would have reached the error, because “[t]he consequences of the State’s LFO system are concerning, and addressing where courts are falling short of the statute will promote justice.” Id.

In this case, this Court should follow Blazina and grant Mr. Waller relief. Just like the defendants in Blazina, Mr. Waller is indigent. Just like those defendants, he is already subject to 12% interest, compounding now, even while he is in custody. And just as in Blazina, here, there was no consideration of whether Mr. Waller has any present or future likelihood of having any hope of paying, despite the requirements of RCW 10.01.160 as noted in Blazina.

Further, just as in Blazina, the only findings on Waller’s “ability to pay” were the insufficient pre-printed “boilerplate” findings, entered without consideration of Mr. Waller’s individual circumstances.

Thus, Mr. Waller is in the same situation as the defendants in the consolidated cases in Blazina. He will suffer the impacts of the unfair and unjust system our Supreme Court has now condemned unless this Court follows Blazina and orders resentencing. The resentencing court should be ordered to consider Mr. Waller’s “individual financial circumstances and make an individualized inquiry into the defendant’s current and future ability to pay,” on the record as set forth in Blazina, before deciding whether it should even impose legal financial obligations.

Pursuant to RAP 1.2(a), this Court is tasked with interpreting the rules and exercising its discretion in order to serve the ends of justice. Blazina was a watershed in our state. Every single justice on our highest court agreed that our state’s system of imposing legal financial obligations

is so racially biased, unfair, improperly enforced and debilitating to the possibility of any rehabilitation for indigents that the justices unanimously agreed to take the extremely unusual step of addressing the issue for the first time on appeal, *even though they agreed it was non-constitutional error*. In so doing, they took a courageous step towards working to ensure that poor people convicted of crimes are not permanently marginalized as a sub-class of our society, never able to climb out from the ever-deepening hole of legal debt even if, as the Blazina Court noted, those people make full minimum payments for *years*.

For our highest state court to so rule sends a very clear message. While it was not error or an abuse of discretion for lower appellate courts to fail to take action prior to Blazina, the unprecedented message of Blazina is that our highest Court intends to ensure that the injustices in our LFO system are redressed. For this Court to decline to do so after the Blazina decision would not only perpetuate the same injustices our high Court has just condemned but amount to a significant unfairness, rising to the level of a due process violation.

The Blazina decision represents a fundamental recognition by our highest court that the system under which appellant was ordered to pay LFOs is flawed and unjust. The concerns shared by all of the justices on the Supreme Court in Blazina apply equally here as to the defendants in the two separate cases consolidated in Blazina. This Court should grant Mr. Waller the same relief as the defendants in Blazina and, in addition to the other remedies requested, should strike the LFO's and order reversal and remand for resentencing with orders for the trial court to give full and fair

consideration to Mr. Waller's individual financial circumstances and present and future ability to pay before imposition of any LFOs.

E. CONCLUSION

For the reasons stated herein, this Court should grant relief.

DATED this \_\_\_\_ day of May, 2015.

Respectfully submitted,

/s/ Kathryn Russell Selk  
KATHRYN RUSSELL SELK, No. 23879  
Counsel for Appellant  
RUSSELL SELK LAW OFFICE  
Post Office Box 31017  
Seattle, Washington 98103  
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Brief and Appendices to opposing counsel and appellant by depositing the same in the United States Mail, first class postage pre-paid, to Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402 and to Mr. Lemar Waller, DOC 946201, WCC, P.O. Box 900, Shelton, WA. 98584.

DATED this \_\_\_ day of May, 2015.

Respectfully submitted,

/s/ Kathryn A. Russell Selk  
KATHRYN RUSSELL SELK  
No. 23879  
Post Office Box 31017  
Seattle, Washington 98103  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

PIERCE COUNTY

THE STATE OF WASHINGTON,	)	Case No.: 13-1-00942-2
	)	
Respondent/Plaintiff,	)	COPIES OF EMAILS RE: DECEMBER 9,
	)	2013 HEARING
	)	
vs.	)	
	)	
LEMAR WALLER,	)	
	)	
Appellant/Defendant.	)	

**RE: Trial Readiness Information for: MONDAY 12/9**

**Albert Germano**

sent: Friday, December 06, 2013 2:11 PM

To: Dione Hauger; PCSupCrimCoord;

I regret being in the situation to be requesting continuances of both matters into early/mid January. And as much as I dislike having to discuss my reasons, the basic truth is that I am dealing with some personal issues [a re-occurrence of a severe depression that I experienced some years ago] these last 2-3 weeks which have become worse [although certainly not overwhelming]. As the Court probably already knows, I lost my mother in August; my brother is losing his battle with cancer; and my dad, understandably, is not handling any of this well. I am not eating well; I am not sleeping well; and I am becoming increasingly tense and irritable with family and friends. I had an appointment to see my doctor on Nov. 20, but had to cancel because I was in trial. The earliest I was able to reschedule for is Jan. 13. Neither of my clients is in custody. I would hope to reset the Simpson matter to January 6 and the Waller matter to Jan. 14. In the meantime, I'll see what I can do to get an earlier doctor's appointment. If the Court directs me to proceed to trial on Monday, it would make more sense [at least for me] to do the Raydell Simpson case with the Lemar Waller matter being set over. Mr. Simpson does want a trial. If I had more time, I suspect I could settle the Waller matter. Please forgive my "long winded" response. Thank you. Albert Germano.

**From:** Dione Hauger  
**Sent:** Friday, December 06, 2013 11:33 AM  
**To:** PCSupCrimCoord  
**Cc:** Albert Germano  
**Subject:** RE: Trial Readiness Information for: MONDAY 12/9

State v. Raydell Simpson and State v. Lemar Waller - State can be ready on either case barring witness scheduling issues. It is my understanding that defense counsel will be requesting a continuance of both cases due to some personal issues that he needs an opportunity to deal with.

Dione

**From:** PCSupCrimCoord  
**Sent:** Friday, December 06, 2013 9:04 AM  
**To:** Marcus Miller; 'Eric Trujillo'; Neil Horibe; 'jimoliverlaw@hotmail.com'; Robert Yu; Helene Chabot; John Macejunas; 'melvinrob5@msn.com'; 'garyclower@yahoo.com'; Brent Hyer; 'henryawarren@LIVE.COM'; Gregory Greer; 'Philip Thornton'; Patrick Hammond; 'brucef@hctc.com'; James Curtis; Vera Jean; 'ryandana11105@comcast.net'; Jesse Williams; 'James Schoenberger'; Dione Hauger; Albert Germano  
**Subject:** Trial Readiness Information for: MONDAY 12/9  
**Importance:** High

Counsel;

Please submit your **trial readiness information** for **THURSDAY DEC. 4** and include expected **number of trial days**, as well as any potential scheduling conflicts. This information is also needed if you have a **motion** scheduled. **Please include the reason for a continuance.** Thank you!!

**RE: Trials next week**

**Albert Germano**

sent: Thursday, December 05, 2013 2:01 PM

To: Dione Hauger;

Hello Dione.

This email to serve perhaps as a follow-up to our conversations earlier this week. I have been dealing with personal issues these past few weeks which has made it quite difficult for me to do the things I really need to do. I probably need to take some time off, but that too is problematical with office staffing and coverage availability being what they are. I am taking the week between Christmas and New Years, but that's it.

As regards our two cases, neither of my 2 clients is in custody. I have talked with Mr. Simpson at length. He is not accepting of a plea bargain and will be going to trial. Mr. Waller might be willing to accept a deal [but I have just not been able to free up the time needed to go over with him all of the evidence against him and the likely outcome of a trial]. Part of the problem at my end is that the in-custody people keep going to the top of the list with new ones coming all the time. I am hoping that the Court will allow both matters to be set over to early January [back to back if need be]. Should the Court require that one of the two go out, I would prefer that the Simpson matter go out with the Waller matter being set over. I do not have any other trials next week; but December is a mess so far as my calendar is concerned.

Thank you.

Al Germano.

**From:** Dione Hauger  
**Sent:** Tuesday, December 03, 2013 2:22 PM  
**To:** Albert Germano  
**Subject:** Trials next week

Al:

Raydell Simpson (13-1-01665-8) and Lemar Waller (13-1-00942-2) are both set for trial on Monday (12/9). Could you give me an idea of what you believe the status of those trials are? Do you anticipate being in trial on any other cases? Any chance of a resolution?

Thanks!  
Dione

