

No. 48042-5-II

#12-1-00762-2

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN BALE,

Appellant.

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

The Honorable Jeanette Dalton, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The resentencing court erred in believing it did not have discretion to order the sentences imposed for two serious violent offenses to run concurrently. In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007), and State v. Graham, 181 Wn.2d 878, 337 P.3d 319 (2014), control.
2. Appointed counsel was prejudicially ineffective at the resentencing hearing and Mr. Bale is entitled to new counsel on remand.
3. This Court should not depart from its prior procedure and adopt the new pleading requirements crafted by Division One in State v. Sinclair, __ Wn. App. __, __ P.3d __ (2016 WL 393719).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In Mulholland, *supra*, the Supreme Court found that it was a fundamental defect resulting in a complete miscarriage of justice and compelling relief for a petitioner when the court which had sentenced him for multiple serious violent offenses had believed that it did not have the authority to order the sentences to run concurrently instead of consecutively.

In Graham, *supra*, the Court reaffirmed Mulholland, restating the holding and rejecting new arguments. The Graham Court further extended Mulholland.

Is reversal and remand for resentencing required because the lower court in this case was unaware of its authority under Mulholland and Graham?

2. At the resentencing, appointed counsel was unaware of the relevant law applicable to the matter and Mulholland and Graham, even though both cases were decided before the resentencing and applied to his client's case. He was also apparently unaware of the facts of the prior sentencing, thus allowing the prosecution to mistakenly argue facts which encouraged a harsher sentence. Was appointed counsel prejudicially ineffective and do his unprofessional failures compel appointment of different counsel on remand?
3. In Sinclair, *supra*, Division One adopted a new pleading requirement for appellants in criminal appeals. Should this Court decline to change its procedures to follow Division One where the new procedures set forth in Sinclair run

afoul of decisions of our highest court, are unclear and potentially onerous, encourage waste of scarce judicial and criminal justice resources and will result in an improper presumption of imposition of costs against indigents, in violation of constitutional prohibitions set forth by the state and federal Supreme Courts in Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).

C. STATEMENT OF THE CASE

1. Procedural Facts

In 2012, appellant John M. Bale was convicted in Kitsap County Superior Court of two counts of first-degree assault and one count of possessing a stolen firearm, with the assault convictions including a firearm enhancement. CP 14-16; see 1RP 1.¹ On November 9, 2012, the Honorable Steve Dixon ordered a standard-range sentence for each offense. 1RP 1-13.

Bale appealed and, in 2014, this Court reversed the firearm possession conviction. CP 29-32. The case was remanded for resentencing. CP 53-69.

Resentencing was held before the Honorable Jeanette Dalton on August 21, 2015. 3RP 1. Judge Dalton imposed a new standard-range sentence for each of the two offenses which remained. See CP 72-82; 3RP

1. Mr. Bale appealed and this pleading follows. CP 91.

2. Facts relevant to issues on appeal

At the original sentencing hearing in 2012, counsel noted that Mr.

¹The verbatim report of proceedings in this appeal consists of the volume containing the sentencing proceeding of November 9, 2012, referred to herein as “1RP,” a motion hearing before Judge Dalton on February 20, 2015, as “2RP:” and the resentencing hearing of August 21, 2015, as “3RP.”

Bale's criminal history included all class C property crime and drug possession "type of offenses," and that Mr. Bale has a long history of drug abuse. 1RP 7. Counsel asked the court to impose the low end of the standard range on each case, which would still amount to about 36 years in custody. 1RP 7. He pointed out that ultimately no one was injured and that Mr. Bale's history did not include any violent or similar crimes. 1RP 8.

Mr. Bale asked for an "exceptionally low sentence," continuing to express disbelief that he was facing even 36 years in custody when no one had been hurt. 1RP 10. He told the judge that he had no record of violence or anything similar. 1RP 10. The judge responded that he thought it was "very fortunate" the victim, an officer, had not been killed in the first incident, but the facts were a little less egregious for the second count. 1RP 10.

On October 14, 2014, this Court reversed Mr. Bale's conviction for the firearm possession offense, finding that the prosecution had failed to prove beyond a reasonable doubt that Mr. Bale had known the firearm was stolen. CP 53-69. The case was remanded in light of that ruling and resentencing proceedings were held in front of Judge Dalton on August 21, 2015. CP 53-69; 3RP 1.

At the hearing, Judge Dalton, who had not presided at the prior trial, first noted that the firearm enhancements had to run consecutive to each other and were "flat time," for which no earned early release could be accrued. 3RP 3. The prosecutor then argued that the sentences for the counts themselves also had to run consecutive to each other and to the

enhancements because “these are serious violent offenses[.]” 3RP 4.

At that point, Mr. Bale personally objected, but the court interrupted, “Mr. Bale, have you spoken to your attorney about this?” 3RP 4. Mr. Bale then told the court it actually did have discretion to run the sentences concurrent, citing to a case he had read named “State v. Graham,” and providing a citation of “337 P.3d 319, 2014 case.” 3RP 4-5.

The prosecutor dismissed Mr. Bale’s argument, declaring, “[w]ell, I don’t think so, Your Honor.” 3RP 4. Next, the prosecutor suggested that Mr. Bale could “file some sort of motion post sentencing” if he wanted to but noted that nothing had been filed by counsel or in the court thus far. 3RP 4.

Judge Dalton pulled up a case which she thought was the case to which Mr. Bale referred, but concluded that it did not stand for the proposition that the judge could run things concurrent as an “[e]xceptional sentence downward.” 3RP 5. Instead, the judge said, the case dealt only with Ohio law, which had a provision that sentences were presumptively concurrent in that state but could be consecutive “upon certain findings.” 3RP 5. The judge read language from the case saying that “Graham’s aggregate sentence was greater than 11 years,” and that it did not address anything about downward sentences and further, that “[t]his case has no application in the State of Washington.” 3RP 7. The judge also said, “[i]t doesn’t interpret Washington State law.” 3RP 7.

Indeed, the judge said, there was a statute which required her to run sentences consecutive, citing RCW 9.94A.589(b). 3RP 7-8. The prosecutor then declared, “[t]hat’s right. And then those are run

consecutively.” 3RP 8.

When Mr. Bale asked about the “same criminal conduct” rule, noting that the offenses happened at the same time, the judge said, “[t]hat would have had to have been made as a finding by the trial judge.” 3RP 8. The judge also said that, with two victims in an assault case, the two convictions are considered “separate from each other” and “you can’t get the benefit of the same criminal conduct” rule for them to run concurrent. 3RP 9.

A little later, when the parties were discussing the sentence, again the judge stated her belief that the sentence for the charges were required to “run consecutive.” 3RP 14. At that point, counsel agreed with prosecutor as to the standard ranges, that each count had its own five-year dead time firearm enhancement, and that “all of those have to run consecutive.” 3RP 15.

Mr. Bale tried to address the court about how long the sentence was going to be despite the lack of any injury or even a shot being fired. 3RP 14-15. The judge told him she could truly understand his position but that she did not have the authority to just reduce the sentence without finding any “statutory mitigating factors exist.” 3RP 28. The judge then said she respected Judge Dixon, found him to be fair, and “for him to decide that you deserve the top end of the range must have come because he heard something during the trial that caused him to think that way.” 3RP 30. The judge then said she could not “just disregard” the decision made at the previous resentencing. 3RP 30.

In fact, she said, “it isn’t up to me to just unilaterally decide that,

because I wasn't there, didn't hear the verdict or didn't hear the evidence, that somehow I should disregard everything that has come before" and the prior judge's decision. 3RP 30.

The judge then announced that she was going to order 277 months on count I and 123 on count II, plus the firearm enhancements. 3RP 29-30. Mr. Bale objected that the prior judge had given him only 98 months on count II, and the prosecutor said, "I don't think so," but did not have "the full" prior judgment and sentence. 3RP 31.

Neither, apparently, did counsel. 3RP 31. Indeed, after Mr. Bale said "[n]inety-three," counsel said, "[n]inety-three would be the bottom." 3RP 31-32. The court then went through the file, unable to find the judgment and sentence, and counsel said he had "looked at it a few hours ago" so knew it was in there. 3RP 32. At that point, the prosecutor said she thought the prior judge had ordered 93 months, and the judge said she was willing to impose the same amount, which would mean a total sentence of 490 months. 3RP 33. The court then told Mr. Bale, "[y]ou knocked a few years off of your sentence, Mr. Bale, through your advocacy, so not a bad job all in all." 3RP 33.

D. ARGUMENT

1. THIS COURT SHOULD ORDER REMAND FOR RESENTENCING WITH NEW APPOINTED COUNSEL

Mr. Bale was not just correct about his prior sentence. He was also correct about the authority of the court to run the sentences for the serious violent offenses to run concurrent instead of consecutive. And he was correct that a case named Graham so held. This Court should reverse and

remand for resentencing and further should order new counsel appointed for that proceeding, because counsel was ineffective below.

First, Mr. Bale was correct that the lower court did have the authority to run sentences concurrent rather than consecutive even though the convictions were for “serious violent offenses.” In “explaining” to Mr. Bale to the contrary, the lower court here said the statutes did not allow such a sentence, citing RCW 9.94A.589(1)(b). 3RP 7-8.

But in fact, our highest Court has held as Mr. Bale declared. In Mulholland, supra, the defendant was convicted of, *inter alia*, six counts of first-degree assault. 161 Wn.2d at 325. The trial court ordered the sentences to run consecutive to each other, indicating it was without discretion to impose concurrent sentence for separate serious violent offenses. Id. Although the defendant argued that the assaults should be served concurrently because they were the “same criminal conduct,” the trial court rejected the argument because there were six different victims for the different assaults. 161 Wn.2d at 326.

On review, this Court affirmed, but later, after a timely personal restraint petition, reversed itself. The prosecution filed a petition for review, arguing that the Court of Appeals had applied the wrong standard for a personal restraint petition and relief should not have been granted. 161 Wn.2d at 326-27.

The Supreme Court reversed. First, it examined the language of RCW 9.94A.589(1)(b) requiring that serious violent offenses “shall be served consecutively to each other” - the same language upon which the lower court here relied. 161 Wn.2d at 326-27. But it also looked at the

language of RCW 9.94A.535, which provides that a departure from the standard range under RCW 9.94A.589 regarding consecutive or concurrent sentences is permissible as an exceptional sentence. 161 Wn.2d at 329-29. The Court rejected the prosecution's claim that the provisions of RCW 9.94A.589 should be the sole focus, instead concluding that the plain language of the statutes, read together, gave the trial court discretion to impose concurrent sentences even for serious violent offenses, as an exceptional sentence. 161 Wn.2d at 331.

The Mulholland Court also held that the trial court's authority did not require that the crimes in question were the "same criminal conduct." 161 Wn.2d at 327. The Court further found that the error was a fundamental defect resulting in a complete miscarriage of justice which compelled relief. 161 Wn.2d at 333. Because "[t]he trial court sentenced Mulholland while possessed of a mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which he may have been eligible," the Court reversed.

Mr. Bale was also correct that there was a recent case from our Supreme Court with the name "Graham" which also so held. That case was Graham, supra. In that case, the defendant was convicted of, *inter alia*, six "serious violent" offenses and they were run consecutively under RCW 9.94A.589(1)(b). 181 Wn.2d at 880-81. At a resentencing, he argued that the court should impose a sentence below the presumptive range for the serious violent offenses by not running them concurrent. 181 Wn.2d at 880-81. Like here and in Mulholland, the lower court in Graham had said it was required to run the sentences consecutive based on the

statutory scheme.

Both the Court of Appeals and Supreme Court disagreed. As in Mulholland, the focus was again on the plain language of the statutes involved. The prosecution argued that, under RCW 9.94A.589, the lower courts did not have the authority to run multiple offenses concurrently when the crimes in question were “serious violent offenses.” Graham, 181 Wn.2d at 882-83. The Supreme Court found, “Mulholland is controlling, and this case does not provide a factual or legal basis to reject or depart from our prior interpretation of .535.” Graham, 181 Wn.2d at 884.

The Graham Court also rejected the state’s attempts to challenge Mullholland. The state argued that Mullholland was “contrary to the legislature’s intent,” but the Court disagreed, pointing out that it had construed the plain language of the statute and that the legislature had subsequently indicated approval of that interpretation. 181 Wn.2d at 885. Indeed, the Court expanded the holding of Mulholland, making it clear that, under that case, a sentencing court has the authority to order either concurrent standard range sentences or reduce the standard range, or both, as an exceptional sentence. Graham, 181 Wn.2d at 885.

This is clearly not the Graham case the resentencing court found. But it clearly supports what Mr. Bale was arguing below. A sentencing court *does* have the authority to order sentences to run concurrent even when those sentences are being imposed for multiple serious violent offenses. The resentencing court was wrong in holding otherwise.

Notably, counsel was also apparently unaware of the law. Indeed, he *agreed* with the lower court and the prosecutor that the sentences had to

run consecutive. In this and several other ways, counsel was prejudicially ineffective below. Thus, on remand, this Court should order different counsel appointed.

Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 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). To show ineffective assistance, a defendant must show that, despite a presumption of effectiveness, counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

Counsel's performance is deficient if it falls below an "objective standard of reasonableness" and was not sound strategy. See In re PRP of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992). Those standards are amply met here. Below, counsel was not aware of the relevant law applicable to his client's case. Although he claimed to have reviewed the judgment and sentence, he appeared unaware that the prior sentences had *not* both been at the top of the standard range, as the prosecutor first claimed. And in fact, without Mr. Bale's arguments on his own behalf, Mr. Bale would have ended up serving several years *more*.

Counsel's performance prejudices the defense when there is a reasonable probability that, but for counsel's deficient performance, the result would have been different. A "reasonable probability" is one which

is “sufficient to undermine confidence in the outcome.” State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Luckily for Mr. Bale, he was aware enough of his own record to advocate for himself when counsel had failed to do so. Had he failed to do so, however, counsel’s failure to be even adequately aware of the prior sentence would have resulted in a longer sentence. On remand, this Court should ensure that Mr. Bale is assigned new counsel, to ensure that Mr. Bale’s rights are not just protected by happenstance but instead by an advocate who will take the time to adequately investigate the laws and the facts relevant to his client’s case.

2. THIS COURT SHOULD NOT ADOPT THE
INEFFICIENT, DUPLICATIVE NEW PLEADING
REQUIREMENTS DIVISION ONE ERRONEOUSLY
CRAFTED IN SINCLAIR

Although there is no federal constitutional right to appeal a criminal conviction, our state constitution guarantees that right. See Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963); State v. Blank, 131 Wn.2d 230, 244-45, 930 P.2d 1213 (1997). As a result, anyone convicted of a crime in our state courts has a constitutional right to a full, fair and meaningful appeal - and further, to appointed counsel at public expense if the person is indigent. See State v. Giles, 148 Wn.2d 448, 450-51, 60 P.3d 1208 (2003); Blank, 131 Wn.2d 244.

In general, it is unconstitutional to require someone to pay to exercise a constitutional right. See Fuller, supra. In Fuller, the U.S. Supreme Court upheld a statute which required a defendant who had been

given counsel due to indigency to repay that cost if he later became able. 417 U.S. at 45. The statute did not make repayment mandatory. 417 U.S. at 45. It also required the appellate court to “take into account the defendant’s financial resources and the burden that payment would impose.” See Blank, supra, 131 Wn.2d at 235-36 (citing Fuller).

In addition, the statute at issue in Fuller provided that no payment obligation could be imposed “if there was no likelihood the defendant’s indigency would end.” 417 U.S. at 46. It also provided that no convicted person could be held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46.

In upholding this repayment requirement, the Fuller Court was convinced the relevant statute did not penalize those who exercised their rights but simply “provided that a convicted person who later becomes able to pay. . . may be required to do so.” 417 U.S. at 53-54. Because the legislation was “tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to to meet it without hardship,” the statute was constitutional. 417 U.S. at 53-54.

In Blank, supra, our Supreme Court examined Fuller and our state’s own recoupment statute for appeals, RCW 10.73.160. That statute provides, in relevant part:

- (1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.
- (2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or

collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.

- (3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence.
- (4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The Blank Court examined the statute and concluded it did not violate either the mandates of Fuller or our state's constitutional right to appeal. The Blank Court was unconcerned about the prospect of indigent people being jailed or punished for being poor and unable to make payments, because of the provision allowing for "remission" of such costs if a person could not pay. 131 Wn.2d at 238-45. The Supreme Court was convinced that any trial court facing the question of whether a defendant should be punished for failing to pay would comply with the mandates of Fuller and that "sufficient safeguards" existed to prevent a person from being punished simply for their poverty and inability to pay. Blank, 131 Wn.2d at 241-42.

As a result, the Court found that RCW 10.73.160 "contemplates

the constitutionally required inquiry into ability to pay, the financial circumstances of the defendant, as well as the burden payment will place on defendant and his or her immediate family.” Id. The Court was also convinced that any future “additional penalty for failure to pay” could not be imposed by the state without the required inquiry, because “ability to pay must be considered at that point.” Id.

Blank thus upheld as constitutional an order against an indigent defendant for payment of costs of his unsuccessful appeal under RCW 10.73.160 and Rules of Procedure Title 14. 131 Wn.2d at 244-27. That statute and those rules, however grant this Court considerable discretion over not only when but even whether to order the appellant in a criminal case to pay those costs. State v. Nolan 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Nolan, our highest Court once again addressed the issue of imposition of costs on appeal in light of an indigent case. Mr. Nolan argued that, because of the constitutional rights involved, costs on appeal should not be ordered paid by an unsuccessful appellant in a criminal case who is indigent unless the appeal was wholly frivolous. 141 Wn.2d at 625-26. The Supreme Court rejected that theory but also dismissed the prosecution’s claim that costs should be awarded virtually as an automatic step in the process. 141 Wn.2d at 627-28. Imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Indeed, the Court held, the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise

of its discretion, whether to impose costs even when the party seeking costs establishes that they are technically entitled to costs under the rules. Nolan, 141 Wn.2d at 628.

RAP 14.2 also provides that, “[i]f there is no substantially prevailing party on review, the Commissioner or Clerk **will not** award costs to any party” (emphasis added). Where both parties prevail on major issues, there is actually no “substantially prevailing party” under RAP 14.2. Nolan, 141 Wn.2d 626, citing American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990).

These cases make it clear that the issue of whether and when to impose costs on an impoverished appellant after he exercises his constitutional right to appeal are complex, involving not just the specifics of the rules but serious and difficult questions of constitutional bent.

There is now a serious question as to whether imposition of costs on appeal continues to be constitutional and whether Blank remains good law. It has become abundantly clear that imposition of costs on indigents across our state is resulting not only in improper punishment for poverty but has resulted in such extreme issues of inequity, unfairness and even racism in application that our highest Court took the unprecedented step of addressing the issue in the interests of justice, even though it was not properly preserved. See Blazina, supra. Blazina laid bare the ugly realities of the system wrought in the wake of the assumptions of Blank; that no penalties would be imposed on indigent people until the moment of enforced collection, when a trial court would make the required inquiry. It

also laid to rest any notion that there was no impact on impoverished people ordered to pay legal financial obligations or costs on appeal which become part of those obligations. See, e.g., RCW 10.82.090(1) (imposition of 12 percent interest to start the date the judgement and sentence is entered; collection and payments start immediately); RCW 10.73.160(4) (no provision for counsel to help a defendant who is indigent to seek redress or remission of the costs imposed as a result of their having exercised the constitutional right to appeal).

In Sinclair, supra, Division One of the Court of Appeals recently looked at the issue of costs on appeal when a defendant whose conviction was affirmed objected to a cost bill filed post-decision by the state. 2016 WL 393719. In Sinclair, the prosecution urged the Court to automatically impose costs on appeal against indigent defendants in *every* case and wait to see if the defendant brings a remission hearing on his own in trial court to ask for relief from imposition of such costs. 2016 WL 393719 at 2-3.

Division One properly rejected that idea. But it then further rejected the procedure this Division has been using as a remedy. 2016 WL 393719 at 4-5. In this Division, for some time, this Court has followed the RAP Title 14 procedures about the timing of cost bill requests and pleadings, but when faced with a Blazina issue and an indigent defendant, has been ordering appellate costs contingent upon the finding of the trial court on remand that the defendant had the required “ability to pay.” See Sinclair, supra.

For Division One, however, this was problematic. 2016 WL 393719 at 4-5. That Division felt the procedure improperly delegates to

the trial court the appellate court's duty of deciding appellate costs. 2016 WL 393719 at 5. Division One then crafted a completely new pleading requirement for its Division; that an *appellant* must set forth "[f]actors that may be relevant to an exercise of discretion" to impose appellate costs in case there is a future request by the *respondent* for such costs to be imposed. *Id.* Ultimately, Division One thought it there might need to be a "rule change requiring the State to include a request for costs in the brief of respondent[.]" 2016 WL 393719 at 5-6. Absent such a change, however, Division One held, an appellant should "devote a section of its opening brief" to rebutting any potential request for imposition of appellate costs, with the prosecution then given "the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill." 2016 WL 393719 at 5-6.

This Court should not adopt the new pleading requirement created by Division One in Sinclair, because it is wrong as a matter of law and of policy on several levels. Further, the concerns expressed in Sinclair about this Court's procedure after Blazina are easily redressed without the extreme steps mandated by Division One.

First, Sinclair runs afoul of the clear holdings of our highest state court, in Blank, *supra*, and Nolan, *supra*. RAP Title 14 provides that the appellate court makes the decision on costs only "after the filing of a decision terminating review[.]" RAP 14.1(a). Further, the purpose of the RAPs allowing imposition of appellate costs are "designed to allocate appellate costs in a fair and equitable manner depending on the realities of the case." State v. Stump, __ Wn.2d __, __ P.3d __ (No. 91531-8, April

28, 2016). Until there is a decision on the merits, the balance of equities cannot be done; the “substantially prevailing party” not determined. That explains why RAP 14.4, which provides the procedure for seeking costs, requires that the party seeking costs must file and serve a cost bill very shortly after a decision, i.e., “within 10 days after the filing of an appellate court decision terminating review.” RAP 14.4(a).

In deciding what costs should be awarded and even whether, under the circumstances, the Court should exercise its considerable discretion and award costs at all, the Court must consider the decision on the merits by the Court. Under the procedure used by this Court and reflected in the rules, because costs are based upon information not even available until after the appeal has been decided on the merits, parties are only tasked with drafting and filing their requests for costs on appeal from a criminal case, if any, *after* they know what the Court decided. In this way scarce criminal justice resources are only expended when needed, rather than in every single case even if ultimately it will be irrelevant, as Sinclair requires.

Another very serious problem with the ruling in Sinclair is the potential scope of the requirement and its lack of clear standards, which in turn will result in further significant waste. In deciding to craft a new pleading requirement in Sinclair, Division One thought it could do the proper evaluation of ability to pay “at least as efficiently” through appellate briefing as it could be done in the trial court. 2016 WL 393719 at 4-5.

But even Division One did not seem to recognize the potential

scope of its order or what it was going to require. Comparing the situation to that in RAP 18.1(b), the court said, “[t]ypically, a short paragraph or even a sentence is deemed compliant with the rule,” and that, as a result, “we are not concerned that this approach will lead to overlength briefs.” 2016 WL 393719 at 4-5. This implies that all it is requiring is a mere sentence, so that a declaration in an opening brief of continued indigence would seem enough.

However, Division One then stated that the parties should ensure they have sufficient information to present to the appellate court which would be relevant to the issue of whether costs should be imposed in the future if there is a substantially prevailing party and a proper request is made:

Both parties should be well aware during the course of appellate review of circumstances relevant to an award of appellate costs. A great deal of information about any offender is typically revealed and documented during the trial and sentencing, including the defendant’s age, family, education, employment history, criminal history, and the length of the current sentence.

2016 WL 393719 at 4-5.

And it is not only that information the court thought was needed to support its decisions regarding appellate costs, but also “current ability to pay” and indeed other factors. Indeed, the scope is unlimited, because the list in Sinclair “is not intended as an exhaustive or mandatory itemization of information that may support a decision one way or another.” 2016 WL 393719 at 4. Division One concluded that parties should provide such briefing in order to assist the appellate court in the exercising its discretion “by developing fact-specific arguments from information that is available

in the existing record,” not only about ability to pay but also about the other factors it thought were relevant to the inquiry. 2016 WL 393719 at 5-6.

Thus, under Sinclair, counsel in criminal appeals will now be forced in Division One not only to file supplemental briefing in every case they have pending in that Division in order to comply. They will also have to exhaustively investigate the existing record as to the ability to pay at the time of the sentencing in order to ensure that they do not commit ineffective assistance in failing to object in advance to any future potential effect. This will have the further tax on scarce resources by requiring this Court to consider motions to supplement and supplemental pleadings in every criminal case pending before the Court on appeal, *even* if those cases, when decided on the merits, may not involve any need for such effort or consideration. And it will cause significant delay in new filings, as counsel would scramble to satisfy a new pleading requirement lest they be deemed ineffective later.

Ultimately, the Sinclair Court properly declined to impose appellate costs on Sinclair, who was 66 years old, likely to die in prison and who qualified not only for an order of indigency at the trial court level but also for the purposes of appeal, concluding that, “there is no reason to believe Sinclair is or ever will be able to pay \$6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent).” 2016 WL 393719 at 6. It did so despite the prosecution’s claim that Sinclair had a solid work history and there was no evidence he would be unable to work in the future. Id. Division One noted that there is a

presumption of continued indigency throughout appellate review under RAP 15.2(f), which requires the appellate court to “give a party the benefits of an order of indigency throughout the review unless the *trial court* finds the party’s financial condition has improved to the extent that the party is no longer indigent.” Because there was no trial court order that his financial situation had improved or is likely to improve, and no realistic possibility he would be gainfully employed at his release in his 80s, the court exercised its discretion to deny the state’s request for appellate costs.

Although it reached the right result by refusing to saddle the appellant in that case with LFOs, the other portions of Sinclair, creating a novel new briefing requirement which puts appellate defense counsel in the position of assuming the client may not prevail on substantive claims.” 2016 WL 393719 at 2-6. Not only that, Division One recognized that its new procedure has “practical inefficiencies,” because it may require counsel to “include a presumptive argument against costs in every case” even if the state does not intend to seek costs later.

It is consistent with the rules for Division One to honor and apply the presumption of indigence set forth in RAP 15.2(f). But the new requirements Division One created by engrafting RAP 18.1(b) onto this situation were improper. Notably, in Blank, our highest Court specifically rejected the same claim as that raised by Division One in Sinclair - that the briefing requirements of RAP 18.1 should apply to imposition of costs on appeal. The Blank Court declared that those “expenses which ay be

recouped under RCW 10.73.160 **do not fall within RAP 18.1.**” Blank, 131 Wn.2d at 250 (emphasis added).

Sinclair requires briefing not previously required, anticipatory to any issue even being raised, on an issue which may never need to be decided by the Court, in advance of the existence of the very facts which will be required for the decision to be made. Put simply, it is nonsensical and a waste of scarce resources to engraft a new pleading requirement in this fashion. This Court should decline to follow Division One’s improper decision in Sinclair.

In the alternative, the Court should follow Sinclair only to the extent that Division One honored the continuing presumption of indigency set forth in the Rules of Appellate Procedure, and should decline to impose costs on appeal on appellants who, like Mr. Bale, remain indigent and have no more ability to pay onerous costs for exercising their constitutional right to an appeal than they do to pay other legal financial obligations. Mr. Bale has no assets and a significant amount of previous LFO debt. This Court should deny any later state’s request for appellate costs, even if the prosecution somehow ends up having an argument it is the “substantially prevailing party” on reviews, due to Mr. Bale’s indigency.

E. CONCLUSION

The resentencing court erred in believing it did not have the authority to run the sentences for the two “serious violent” offenses concurrent rather than consecutive. Counsel was also prejudicially ineffective and this Court should order new appointed counsel for resentencing. Finally, this Court should decline to follow Sinclair and refuse to create a new, inefficient briefing requirement. As Mr. Bale is and remains indigent, imposition of costs on appeal would be inappropriate in any case under Blazina.

DATED this 26th day of May, 2016.

Respectfully submitted,

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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 Opening Brief to opposing counsel at the Kitsap County Prosecutor’s office, first class postage prepaid to Kitsap County Prosecutor’s Office, 614 Division St., Port Orchard, WA. 98366-4614 and to Mr. John M. Bale, WCC, P.O. Box 900, Shelton, WA. 98584.

DATED this 26th day of May, 2016.

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