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Court of Appeals  
Division II  
State of Washington  
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NO. 50442-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

RAMON TREVINO-HERNANDEZ,

Appellant.

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BRIEF OF APPELLANT

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John A. Hays, No. 16654  
Attorney for Appellant

1402 Broadway  
Suite 103  
Longview, WA 98632  
(360) 423-3084

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## **ASSIGNMENT OF ERROR**

### ***Assignment of Error***

The trial court erred when it resentenced the defendant on counts I and III and then entered findings that the defendant was “anticipated to be able to pay financial obligations in the future” and when it allowed for later entry of legal financial obligations including restitution

### ***Issues Pertaining to Assignment of Error***

1. In a case in which a 57-year-old indigent defendant is serving an indeterminate sentence of 318 months to life, does a trial court err if, without discussion or review of the facts, it enters a finding that the defendant “is presently indigent but is anticipated to be able to pay financial obligations in the future”?

2. In a case in which an appellate court has ordered a trial court to resentence a defendant from an indeterminate term to a determinate term, may the trial court also order future potential legal financial obligations to include restitution?

### STATEMENT OF THE CASE

On January 8, 2008, Appellant Ramon Trevino-Hernandez pled guilty under a second amended information to the following six offenses, admitted to have been committed within the listed time periods:

Count	Offense	Time Period
I.	1 <sup>st</sup> Degree Rape of a Child	9/1/96 to 8/31/01
II.	1 <sup>st</sup> Degree Rape of a Child	9/2/01 to 6/28/03
III.	1 <sup>st</sup> Degree Child Molestation	9/1/96 to 8/31/01
IV.	1 <sup>st</sup> Degree Child Molestation	9/2/01 to 6/28/03
V.	2 <sup>nd</sup> Degree Rape of a Child	6/26/03 to 6/1/05
VI.	2 <sup>nd</sup> Degree Child Molestation	6/26/03 to 6/1/05

CP 12-27.

The court later sentenced the defendant to life in prison on each count under RCW 9.94A.713, with the longest minimum mandatory term of 318 months before the defendant could first appear before the Indeterminate Sentencing Review Board for consideration of release. CP 12-27.

Within a year after entry of the sentence the defendant filed a Personal Restraint Petition arguing that his pleas were not knowingly entered because his trial attorney misinformed him of the correct standard ranges for each offense. CP 43-45. By order filed July 2, 2009, this court

denied the defendant's request and dismissed the Petition. *Id.* The certificate of finality issued on this decision was effective January 5, 2010. CP 42. This court also denied the defendant's request to file a late notice of appeal from entry of the sentence. CP 46-48. The defendant thereafter filed a second Personal Restraint Petition over a year after the judgement and sentence was filed arguing that his restraint was unlawful because his pleas were coerced, he was denied his right to effective assistance of counsel, and insufficient evidence supported the charges. CP 50. This court denied that Petition as untimely. CP 49-51.

The defendant thereafter filed a third Personal Restraint Petition arguing in part that the sentences in Counts I and III were facially invalid and should be reversed. CP 52-55. Specifically, the defendant argued that the trial court had sentenced him in Counts I and III to an indeterminate sentence with lifetime community custody under a statute that did not go into effect until after the last date upon which he might have committed the two offenses. *Id.* The state conceded the argument and by order entered March 8, 2017, the Washington State Supreme Court remanded this case to the trial court for resentencing on Counts I and III. *Id.* However, the court rejected the defendant's other arguments from his most recent PRP, holding as follows:

But a facial sentencing error does not exempt from the time limit a claim that a guilty plea was involuntary due to misinformation as to sentencing consequences. *In re Pers. Restraint of Snively*, 180 Wn.2d 28, 32, 320 P.3d 1107 (2014). Nor does a facial sentencing error permit the assertion of an otherwise untimely claim of ineffective assistance of counsel. *In re Pers. Restraint of Adams*, 178 Wn.2d 417, 426-27, 309 P.3d 451 (2013). Thus, Trevino-Hernandez's sole remedy is correction of the sentence. *Snively*, 180 Wn.2d at 32.

CP 54.

Based upon this holding the Washington Supreme Court ordered the defendant's sentences on Counts I and III vacated and remanded the case for imposition of standard range sentences on those two counts. CP 54.

On May 19, 2017, the defendant appeared before the Clark County Superior Court in this case, at which time the trial court entered an "Order Vacating Sentence for Counts 1 and 3 in Judgment and Sentence filed on March 14, 2008." CP 57. The court then sentenced the defendant to 318 months on Count I and 198 months on Count III as well as 36 months community custody on each count. CP 72-86. Without any discussion about the facts that the defendant was indigent, had spent the previous 10 years in prison, and had another 16 years to serve before he would first become eligible for release, the trial court entered the following finding as a part of Judgment and Sentence on Counts I and III:

That the defendant is presently indigent but is anticipated to be able to pay financial obligations in the future. RCW 9.94A.752.

CP 75.

Although the court did not enter further legal-financial obligations, it did enter the following order:

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing . . . shall be set by the prosecutor.

CP 78.

Following imposition of the new judgment and sentence as to Counts I and III, the defendant filed timely notice of appeal. CP 60-61.

## ARGUMENT

**THE TRIAL COURT ERRED WHEN IT RESENTENCED THE DEFENDANT ON COUNTS I AND III AND THEN ENTERED FINDINGS THAT THE DEFENDANT WAS “ANTICIPATED TO BE ABLE TO PAY FINANCIAL OBLIGATIONS IN THE FUTURE” AND WHEN IT ALLOWED FOR LATER ENTRY OF LEGAL FINANCIAL OBLIGATIONS INCLUDING RESTITUTION.**

A trial court’s authority to impose legal financial obligations as part of a judgment and sentence in the State of Washington is limited by RCW 10.01.160. Section three of this statute states as follows:

(3) The court shall not sentence 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).

Although the court need not enter written findings and conclusions in regards to a defendant’s current or future ability to pay costs, the court must consider this issue and find either a current or future ability before it has authority to impose costs. *State v. Eisenman*, 62 Wn.App. 640, 810 P.2d 55, 817 P.2d 867 (1991). In addition, in order to pass constitutional muster, the imposition of legal financial obligations and any punishment for willful failure to pay must meet the following requirements:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;

3. Repayments may only be ordered if the defendant is or will be able to pay;

4. The financial resources of the defendant must be taken into account;

5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;

6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and

7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

*State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment.

*Fuller v. Oregon*, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).

In the case at bar the trial court originally imposed discretionary legal financial obligations in the form of court costs. Although the court did not increase those costs during the new sentencing hearing on Counts I and III, it did enter a new finding of fact that the defendant, while indigent, was

“anticipated to be able to pay financial obligations in the future.” The court entered this finding even though (1) the defendant is currently 56-years-old, (2) the defendant is indigent, (3) the defendant had already been in prison over 10 years, and (4) the defendant has approximately 16 more years to serve before he first becomes eligible for release. Since the trial court did not engage in any meaningful discussion concerning the defendant’s future ability to pay legal-financial obligations, the court erred by entering the finding that he had the future ability to pay. Thus, the trial court violated RCW 10.01.160(3), as well as the defendant’s right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the trial court’s new finding concerning the defendant’s future ability to pay legal-financial obligations.

In this case the state may argue that this court should not address this issue because the defendant did not sufficiently preserve this statutory error at the trial level and the argument does not constitute a manifest error of constitutional magnitude as is defined under RAP 2.5(a). However, in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court took the opportunity to review the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction

with the unfair penalties that indigent defendant's experience based upon this failure. The court then decided to deviate from this general rule precluding review. The court held:

At sentencing, judges ordered *Blazina* and *Paige-Colter* to pay LFOs under RCW 10.01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings.

*State v. Blazina*, at 11-12.

In the case at bar the record reveals that the trial court did not make "an individualized inquiry in to the defendant's current and future ability to pay" before entering its finding on the defendant's future ability to pay legal-financial obligations. As a result, this court should reverse this finding and remand for an adequate consideration of this issue.

In this case the state may also claim that this issue is moot because

the trial court did not enter any new legal financial obligations. However, any such argument should fail because the trial court specifically reserved the right to enter further legal financial obligations. In the new Judgment and Sentence the court held:

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing: shall be set by the prosecutor.

CP 78.

The finding that the defendant has the future ability to pay continues to be relevant in two ways. First, it will affect the trial court's disposition of "other legal financial obligations" which the court has reserved the right to enter. Second, it will potentially affect the enforcement of the current legal financial obligations from the original judgment and sentence.

Finally, the trial court's finding on the ability to pay and the trial court's decision to provide for a new restitution hearing at the state's discretion suffers from a more fundamental error. That error is that the Washington Supreme Court did not grant the trial court the authority to again rule on these issues. Rather, the Court's decision only addressed the length and type of the sentence. That order required that the trial court (1)

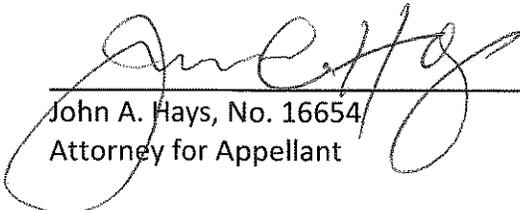
vacate the indeterminate sentence and the requirement of lifetime community custody, and (2) then impose sentences within the standard ranges on Counts I and II although with 36 months community custody on each count. The Supreme Court did not give the trial court either a mandate or the discretion to take any further actions.

## CONCLUSION

This court should order the trial court to strike those portions of the new judgment and sentence that set out the ability to pay, allow for anew restitution hearing, and grant the trial court the authority to impose new legal financial obligations.

DATED this 12<sup>th</sup> day of December, 2017.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 12**

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,  
Respondent,

NO. 504421-1-II

vs.

AFFIRMATION  
OF SERVICE

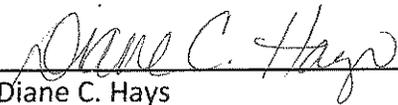
RAMON TREVINO-HERNANDEZ,  
Appellant.

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The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Tony Golik  
Clark County Prosecuting Attorney  
1013 Franklin Street  
Vancouver, WA 98666-5000  
prosecutor@clark.wa.gov
2. Ramon Trevino-Hernandez, No.314712  
Airway Heights Corrections Center  
P.O. Box 1899  
Airway Heights, WA 99001-1899

Dated this 12<sup>th</sup> day of December, 2017, at Longview, WA.

  
Diane C. Hays

**JOHN A. HAYS, ATTORNEY AT LAW**

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**Filing on Behalf of:** John A. Hays - Email: jahayslaw@comcast.net (Alternate Email: jahayslaw@comcast.net)

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1402 Broadway  
Longview, WA, 98632  
Phone: (360) 423-3084

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