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No. 50802-8-II

Pierce County No. 16-1-02472-8

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

STATE OF WASHINGTON,

Respondent,

v.

LEE A. COMENOUT, JR.,

Appellant.

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

The Honorable Frank Cuthbertson, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The convictions on counts 4 and 5 were entered in violation of appellant's rights to be free from double jeopardy. Appellant Lee Comenout, Jr., was deprived of his Sixth Amendment and Article 1, §22, rights to effective assistance of appointed counsel based on counsel's unprofessional, prejudicial failures on this issue.
2. The superior court erred, abused its discretion and violated CrR 3.2, state and federal due process and the presumption of innocence pretrial. Counsel was again prejudicially ineffective.
3. The state and federal prohibitions against excessive bail, the presumption of innocence and equal protection were violated when the superior court set a \$1.5 million financial condition for pretrial release on an indigent accused. Counsel was again prejudicially ineffective.
4. Appellant's state and federal due process rights were further violated when the state failed to have him evaluated for mental competency in a timely fashion despite the mandates of the 2015 statutory changes and the federal court order in Trueblood v. Wash. State Dep't of Social & Health Svcs, 822 F.3d 1037,1038-39 (9th Cir. 2016) (Trueblood II), amended, 2016 WL 4268933 (August 15, 2016). Appointed counsel was again prejudicially ineffective.
5. Due process was further violated by the state's failure to timely provide competency restoration to Mr. Comenout, Jr., in violation of the statutes and the order in Trueblood, supra. Counsel was again prejudicially ineffective.
6. The \$200 criminal filing fee, \$100 DNA database fee, and onerous conditions of financial repayment should be stricken, because Mr. Comenout, Jr., was indigent at the time of sentencing, and State v. Ramirez, __ Wn.2d __, __ P.3d __ (2018 WL 449761) (September 20, 2018) controls.¹
7. Appellant assigns error to the preprinted "finding" in the judgment and sentence which provides as follows:
 - 2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS:** The court has considered the total amount owing, the defendant's past, present

¹A copy of the decision is attached hereto as Appendix G.

and future ability to pay legal financial obligations, 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 280.

B. QUESTIONS PRESENTED

1. Where the state charges two separate counts for the robbery of a grocery store and argues that the jury can either find guilt based on individual items taken from each victim or the interest the victims shared as co-owners of the store, must one of the counts be dismissed as violating double jeopardy?

Was appointed counsel prejudicially ineffective in allowing his client's double jeopardy rights to be violated and incorrectly agreeing with the trial court that special interrogatories were not needed?

2. Did the superior court violate CrR 3.2 and implicate state and federal due process and the presumption of innocence by failing to apply the mandatory presumption of release on personal recognizance and imposing conditions of pretrial release?

Did the superior court further err under the mandates of CrR 3.2 in failing to consider all less restrictive conditions of pretrial release prior to imposing a \$1.5 million bail on the indigent defendant?

Does it violate state and federal due process and equal protection when a person cloaked with the presumption of innocence and subject to a presumption of pretrial release without conditions is nevertheless kept in physical custody because he is too impoverished to be able to pay financial conditions or "bail?"

Was appointed counsel prejudicially ineffective in his handling of this issue?

3. Where the accused is suspected of being incompetent to stand trial and the state is under a federal court order and statutory mandate to provide timely competency evaluations, is it a violation of the defendant's substantive due process rights for the state to fail to comply?

4. Where the accused has been found incompetent to stand trial and is on a "no-bail" hold, does it violate his substantive due process rights for the state to fail to comply despite the federal court order requiring it?
5. Is counsel ineffective in failing to raise the violation of his client's rights and failing to seek statutory remedies on his client's behalf?
6. Is Mr. Comenout, Jr., entitled to relief from legal financial obligations imposed below where the Supreme Court held in Ramirez that 2018 legislative changes eliminating the state's ability to impose such obligations applied to all cases still pending on direct review?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Lee A. Comenout, Jr., was charged by second amended information in Pierce County superior court with three counts of first-degree robbery, two counts of second-degree assault, a count of third-degree theft and one of second-degree unlawful possession of a firearm. CP 64-69; RCW 9.41.010, RCW 9.41.040(2)(a), RCW 9A.36.021, RCW 9A.56.020(1), RCW 9A.56.050(1), RCW 9A.56.190, RCW 9A.56.200(1). The robbery and assault convictions were aggravated with deadly weapon enhancements for a "switch-bladed knife," a folding knife and a firearm, as well as the "aggravating circumstance" of "multiple current offenses" and an allegation that the defendant's high offender score would result in some of the current offenses going unpunished[.]" CP 64-69.

After pretrial and competency proceedings on June 17, July 22 and December 21, 2016, April 16 and 21 and June 30, 2017, trial was held before the Honorable Frank Cuthbertson on July 19, 24-27, August 1 and

2, 2017.² Counts 3 and 7, a second-degree assault and the unlawful firearm possession count were dismissed with prejudice prior to the case being submitted to the jury. CP 273-74. Also dismissed and not submitted to the jurors were all of the enhancements regarding being armed with a knife. CP 273-74. Mr. Comenout, Jr., was convicted of the remaining charges and enhancements. CP 211-19.

On September 1, 2017, Judge Cuthbertson sentenced Mr. Comenout, Jr., to serve a standard-range sentence of 345 months for the felonies and enhancements and 364 days (concurrent) for the misdemeanor.³ CP 275-91. He appealed and this pleading follows. See CP 296.

2. Testimony at trial

a. Counts 1 and 2

It was about 5:30 p.m. on June 15th when Oscar Corro-Garcia was unloading the tools and items used in his construction work from his truck into his garage. TRP 225-32. He heard a voice behind him asking him to give up his keys and turned around to see two men he did not know. TRP 231-32. One was wearing a white shirt and one had a shirt which was "brown spotted," and both had hoods covering the sides and

²The verbatim report of proceedings consists of multiple volumes which are unfortunately not all chronologically paginated. They will be referred to as follows:
the volume containing June 17 and December 21, 2016, as "1RP;"
July 22, 2016, as "2RP;"
April 16, 2017, as "3RP;"
April 21, 2017, as "4RP;"
June 30, 2017, as "5RP;"
the 10 volumes containing the trial proceedings and sentencing of July 19, 24-17, August 1-2, and September 1, 2017, as "TRP;"
the volume containing the transcription of Exhibits 15, 21, 22 and 23, as "ERP."

³Further discussion of facts relevant to the sentencing are discussed in the argument section, *infra*.

top of their heads and handkerchiefs covering from their noses down - one red and the other possibly dark blue. TRP 248, 264, 273.

The man with the spotted shirt was standing away from Corro-Garcia, on the passenger side of the truck. TRP 235-36, 264-65. He was not facing towards Corro-Garcia and the other man but instead looking towards the house. TRP 247. The other, the man who had demanded the keys, was near Corro-Garcia on the driver's side but at the very back of the pickup. TRP 266. TRP 235-36. That man then repeated his demand but this time was more "loud" and angry. TRP 239-40.

Corro-Garcia noticed the man had something white in his hands. TRP 240-42. A moment later, the man moved the white object and pulled out what looked like a gun. TRP 240-42, 269-70. Corro-Garcia, who did not know a lot about guns, could not really describe the object he saw, but was positive it was black. TRP 271-73. He said it seemed like a pistol and was not very long. TRP 273.

After the man at the driver's side door made this threat, Mr. Corro-Garcia got scared for his family inside the home, so he pulled out the truck keys and threw them. TRP 242-44. When the man followed the keys with his eyes and looked away, Corro-Garcia ran, sprinting into his house where he told his family what had happened and one of them called police. TRP 243-50. One of his sons wanted to drive after the two men to try to stop them but Corro-Garcia discouraged him, saying they "had guns." TRP 249-50. Although he had only seen the man by the driver's side with a gun, Corro-Garcia thought on the passenger side sort of hand his hands under his sweater "as if he were going to shoot at

someone." TRP 249-50.

Ultimately, however, Corro-Garcia conceded that he had not seen anything sticking out, like a weapon. TRP 250. He also admitted the passenger side person never threatened him or pulled out a gun or anything similar. TRP 270-81. In fact, the two men never spoke to each other and the passenger side person said nothing at all. TRP 268.

Corro-Garcia's 21-year-old son, Leonardo Corro, had seen from the back window that two men were getting into the truck and decided he would follow. TRP 369-72. He grabbed his keys and drove off after the truck, which seemed to him to be speeding. TRP 378-79. He was about two or three car lengths away when the truck ahead stopped at some apartments, in the middle of the road. TRP 279. Two men got out - one holding a gun down by his waist. TRP 279-80. Corro's focus was then on that man alone. TRP 403-404.

The men were so far away he could not really see their faces, Corro admitted. TRP 384-86, 401. He could not remember whether the person in the gun had gotten out of the driver's side or passenger's side of the truck with the object in their hand, did not recall what that person was wearing and did not know what color bandana was covering the face of the man with the gun as opposed to the other man, whose face was also covered. TRP 384-85, 402. But he also did not recall the clothing of the passenger while being able to describe a white shirt on the driver. TRP 382-90.

Both Corro and Corro-Garcia were shown photographic montages and each picked out people they thought "kind of looked like"

one of the men involved. TRP 261-63, 386-87. Mr. Corro said he had not seen the faces of the two men involved well enough to know what they looked like, but he picked a photo of someone who looked most like the driver. TRP 386-87. At trial, when asked if he could identify the person whose photo he had picked out of the montage as being in the courtroom, Corro the guy had only kind of looking like him and he could not say whether they were in court or not. TRP 387.

Mr. Corro-Garcia also said he had only seen the men with hoods and bandanas but was nevertheless able to identify a photo from a montage shown the day after the event. TRP 261-63. The photo he identified was the driver who had on the white top, not the passenger. TRP 277. When asked if he could identify the person whose photo he had picked out of the montage in the courtroom, Corro-Garcia asked to see the exhibit copy of the photos in the montage. TRP 261-63. Even after that perusal, he was still unable to say if that person was present. TRP 261-63.

Mr. Corro-Garcia got the truck back a month or two later, heavily damaged and with boxes of cigarettes and lottery tickets inside. TRP 25-27.

The state alleged first-degree robbery of Corro-Garcia's truck (count 1) and second-degree assault of Corro at the apartment building in the street (count 2). CP 64-65.

b. Counts 4, 5 and 6

Chong Sun Namkung and her husband, Myoung Namkung owned a convenience store and were working there with their adult son,

June Namkung, about 6:40 that evening when two men walked in with handkerchiefs on their faces.⁴ TRP 302-13, 675-76. One of them was wearing a white sweatshirt and he came close to the counter and demanded money, flashing what appeared to be a gun. TRP 676-79. Myoung opened up the cash register and said that, after that, "they" then grabbed a box and started to put money in their pockets and the box. TRP 678.

Myoung said it was the man who had a pattern on his shirt and who did not have a gun who was holding the box. TRP 678-79. That man also started grabbing "scratch" lottery tickets and had a black bandana on his face. TRP 679. The man with the gun was wearing a red bandana and Myoung could not recall if that man grabbed scratch tickets too. TRP 679. Chong recalled the man with the red bandana grabbed cigarettes as well. TRP 330-36.

The man with the red bandana kept demanding more money and Myoung said there was no more. TRP 679. The man then started searching behind the counter and Myoung thought the man with the black bandana also started opening drawers. TRP 679-80. Meanwhile, the man with the gun demanded that the Namkungs stay together with their hands up. TRP 681. At one point, after the man with the gun had found some more money in a cabinet, Myoung said, the man with the black bandana reached into Myoung's pocket, taking money he had inside. TRP 682.

⁴Because they share the same last name, these witnesses will be referred to by their first names for clarify, with no disrespect intended.

Chong testified that the man with the gun and white hood also took her cellular telephone. TRP 336-38. She was not really familiar with guns and said the gun looked real but she did not know. TRP 353-54. She did not recall the two men talking to each other or even gesturing during the incident. TRP 351-58. She was sure the gun was black and said it was not displayed until the man with the red bandana was behind the counter. TRP 352-58.

June was in the "cold room" when the men came in and said they were "fully masked" and also wearing sunglasses. TRP 596-99. He did not see that the man in the white "hoodie" had a gun until he was out of the cooler. TRP 608-12. June also assumed the other man had a gun, too, but admitted he saw none. TRP 611-12.

June saw the gun at most a few seconds and thought it might have been a semiautomatic. TRP 626-38. After making eye contact with his dad from where the men could not see, June snuck out the back door and went to a nearby restaurant, from which he called police. TRP 605-11. He later learned that his cell phone, which had been out in the store, was gone. TRP 617-19.

For this conduct, the state charged two first-degree robberies - one for Myoung Namkung and one for Chong Namkung - as well as a third-degree theft for June's phone. CP 65-68.

c. The apprehension

Multiple officers testified about hearing about the robbery of the grocery store and the truck and following - even chasing it - through the streets. TRP 645-55, 714-22. The truck eventually crashed into a vehicle

in an intersection and both people inside got out. TRP 711-33, 790-92, 868. The suspected driver was seen with a gun at a nearby gas station by multiple officers, so they detailed how one of them ran him over on purpose and he was pinned under a patrol SUV with his legs severely broken because of officers' concerns he was a danger. TRP 711-42, 790-95.

The driver was later identified as Errol Comenout. TRP 868. Near him was found some money including bills and rolled coins. TRP 724-43, 794-809. The officer who had rammed into him to stop him testified that even after he was hit the other man did not drop his gun but it just sort of "rolled out" of his hands after he was further confronted. TRP 724-43, 794-809. That gun was tested for "operability" and an officer said it had "fired and functioned normally." TRP 838.

Inside the truck were found lottery "scratch" tickets in several "batches," a black backpack with what an officer said was some drug paraphernalia, a cellphone, and a cardboard box with "multiple cigarette cartons and tobacco products and lighters in it." TRP 831, 880-89. A "tote bag" or bank bag like the one the Namkungs used for their grocery was found embedded in the bumper of the SUV which had struck Errol Comenout. TRP 827.

Lakewood Police Department "K-9" companion officer Keith Czuleger was right behind the truck in his police vehicle when the crash occurred. TRP 652-68. He saw the passenger get out of the truck, so Czuleger released his dog with the command to "apprehend." TRP 665-66. Czuleger caught up after the dog had taken the man "to the

ground,” biting him on the leg. TRP 665-66. That man was wearing a “camouflage” pattern sweatshirt and had a “red mask-type garment” and a black hood around his neck. TRP 669-75. In a search incident to arrest, officers found about \$1,500 and, in his pants pocket, a knife. TRP 879-83.

D. ARGUMENT

1. APPELLANT WAS DEPRIVED OF HIS RIGHTS TO BE FREE FROM DOUBLE JEOPARDY AND APPOINTED COUNSEL WAS PREJUDICIALLY INEFFECTIVE

Both the state and federal constitutions prohibit the state from subjecting a person to “jeopardy” for the same offense twice. See In re the Personal Restraint of Davis, 142 Wn.2d 165, 171, 12 P.3d 603 (2000); Albernaz v. United States, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981); Fifth Amend.; Fourteenth Amend.; Art. 1, § 9. Even when the state charges multiple violations of the same statute, double jeopardy prohibits multiple convictions or punishments for the same offense, or “unit of prosecution.” See State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998); see also, Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). In this case, because the robbery counts charged in count 4 and 5 were for the same unit of prosecution, entry of the two convictions was in violation of double jeopardy. The conviction and resulting sentence should be reversed and dismissed. Further, the Court should find appointed counsel was prejudicially ineffective in his performance regarding these issues below.

a. Relevant facts

The state charged two separate counts, counts 4 and 5, for the grocery store robbery. CP 65-69. The jury was instructed on those two

counts, as follows:

A person commits the crime of Robbery in the First Degree when in the commission of a robbery, or in immediate flight therefrom, he and/or a person to whom he is an accomplice, is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon.

CP 185. The "to convict" for count 4 provided, in relevant part, that the state had to prove six elements beyond a reasonable doubt:

- (1) That on or about the 15th day of June, 2016, the defendant and/or a person to whom he was an accomplice unlawfully took personal property from the person or in the presence of Myoung Namkung;
- (2) That Myoung Namkung owned, was acting as a representative of the owner of, or was in possession of the property taken;
- (3) That the defendant and/or a person to whom he was an accomplice intended to commit theft of the property;
- (4) That the taking was against Myoung Namkung's will by the defendant's use or threatened use of immediate force, violence, or fear of injury to Myoung Namkung, or that of a person to whom he was an accomplice;
- (5) That force or fear was used by the defendant and/or a person to whom he was an accomplice, to obtain or retain possession of the property or to prevent or overcome resistance to the taking:
- (6)
 - (a) That in the commission of these acts, or in immediate flight therefrom, the defendant and/or a person to whom he was an accomplice was armed with a deadly weapon, or
 - (b) That in the commission of these acts, or in the immediate flight therefrom, the defendant and/or a person to whom he was an accomplice displayed what appeared to be a firearm or other deadly weapon;
- (7) That any of these acts occurred in the State of Washington.

CP 192. The “to convict” for Count 5 was essentially identical to the instruction for Count 4, except that the name of the victim was Chong Namkung, and it was Chong Namkung who the jury had to find “owned, was acting as a representative of the owner of, or was in possession of the property taken[.]” CP 194. The state proposed special interrogatory forms for those counts in order to ask the jury to “specify what the basis of the property stolen was for each of the robberies.” TRP 954. The prosecutor told the court it was just for a “sentencing issue” but also that he wanted to make sure there was a record for the appellate court “in case there is a question about what property we’re talking about[.]” TRP 954. Indeed, the prosecutor admitted that jurors could theoretically find guilt for the charge involving Chong Namkung based on the theft of her phone or the “other property belonging to the store at large[.]” TRP 955. The prosecutor also noted that the jury could find guilt for the taking of the money from Myoung’s Namkung’s pocket or the money from the cash register, so that “the same property is the basis for the Robbery of both of the Namkungs.” TRP 955. The prosecutor was concerned the court of appeals might find there was not sufficient evidence to support one “taking” but there was for another. TRP 956-57.

Judge Cuthbertson thought that the “tougher question” was “whether this is going to be one or multiple units of prosecution, was this the same criminal conduct or not[.]” TRP 957. But the judge thought that, because the two victims were married, they The prosecutor pointed out that the “same criminal conduct” could not be found with “two different victims.” TRP 959.

The judge thought that the separate counts were supported based solely on the Namkungs each being a “co-owner” of the business. TRP 963. The prosecutor again expressed concern that the appellate court “would look at it as a - - as a unit of prosecution concern because there are two counts of Robbery for what could have been just one taking of property from the couple.” TRP 963. Judge Cuthbertson admitted he had not researched the issue recently but counsel then spoke up, saying he did not think the interrogatories were “necessary,” and that it was “a solution looking for a problem, if you will.” TRP 963-64.

Counsel cited “Tvedt⁵” a Supreme Court case he thought “addresses this exact issue.” TRP 963-64. He told the court that he would “have a hard time” arguing “this is all one unit of prosecution” because each alleged victim had a “possessory interest” in the items taken from the store. TRP 964. He concluded that there was no “concern.” TRP 964. Judge Cuthbertson ruled that the counts were “separate units of prosecution” and declined to give any interrogatories. TRP 965-66.

In closing argument, in arguing count 4, regarding Myoung, the prosecutor argued jurors could rely on the “money taken from his person” or the money or items taken from the “store at large.” TRP 997. The prosecutor similarly told jurors for count 5, the first-degree robbery of Chong, that the property involved could be the cell phone stolen from her or “the property at large.” TRP 998. The prosecutor said:

Remember, they are joint owners of the store and what the

⁵Counsel appears to have been referring to State v. Tvedt, 153 Wn.2d 705, 712, 107 P.3d 728 (2005). His ineffectiveness in misapprehending the holding of the case is discussed in more detail, *infra*.

store sells so that the cash that's in the cash register and the other items around the store, the cigarettes, the lotto tickets, the lighters, all of that property is her property, as well.

TRP 998-99.

After Mr. Comenout, Jr., was convicted of both counts 4 and 5, the prosecution calculated the standard range by including both as "other current" violent offenses, at 2 points each against each other. See CP 240-49. The prosecutor also argued that the victims were each "victimized in their own right," relying on the following facts, "cash was stolen from Myoung Namkung's pocket at gunpoint (Robbery 1)," and "Chong Namkung's cellphone was stolen from her at gunpoint (Robbery 1)." CP 244-49. The judgment and sentence reflected convictions for both counts and sentences reflecting each conviction, with the separate counts increasing each other's offender score. See CP 240-69, 290-91.

- b. The convictions on both counts 4 and 5 violated the prohibitions against double jeopardy and counsel was prejudicially ineffective

This Court should reverse and dismiss one of the convictions on counts 4 and 5, because they were for the same "unit of prosecution" and thus there was a violation of the state and federal prohibitions against double jeopardy.

At the outset, this issue is properly before the Court, despite counsel's erroneous agreement that there was "no issue" below. A waiver is an intentional relinquishment or abandonment of a known right or privilege. See Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). While a defendant may waive a constitutional right, waiving double jeopardy requires an affirmative act by the defendant.

See Jeffers v. United States, 432 U.S. 137, 154, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977). And courts “indulge every reasonable presumption against waiver.” Brewer v. Williams, 430 U.S. 387, 403, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977).

Indeed, even when a defendant enters a plea to two separate counts, that agreement does not foreclose later relief on the grounds of double jeopardy. See Blackledge v. Perry, 417 U.S. 21, 30, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); In re the Personal Restraint of Butler, 24 Wn. App. 175, 178, 599 P.2d 1311 (1979). He may even raise a double jeopardy violation years later, because double jeopardy is a claim which is so significant it is not subject to the one-year limit for collateral review. See In re the Personal Restraint of Schorr, ___ Wn.2d ___, 422 P.3d 451 (2018).

While there are many rights which may be waived, a defendant may not validly waive the right to challenge a sentence which is in excess of the court’s statutory authority. Id.; see In re the Personal Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). This is true even when the defendant explicitly agreed to such a sentence. Goodwin, 146 Wn.2d at 873-74; see In re the Personal Restraint of Moore, 116 Wn.2d 30, 38, 803 P.2d 300 (1991) (the agreement of the parties “cannot exceed the statutory authority given to the courts”). A double jeopardy challenge is a challenge to “the very power of the State” to gain the conviction or enter a sentence. See In re the Personal Restraint Petition of Dominique, 170 Wn.2d 517, 242 P.3d 866 (2010); State v. Hughes, 166 Wn.2d 675, 681 n. 5, 212 P.3d 558 (2009). This is distinct from a case where the defendant

agrees to enter a plea to two counts where the factual similarities giving rise to the double jeopardy claim are not clear from the record, so the plea is deemed to have waived the right to present evidence in challenge. See Schorr, 422 P.3d at 457-58.

The proper interpretation and application of the double jeopardy clause is a question of law, reviewed by this Court de novo. State v. Knight, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008). Where, as here, the state claims that the defendant has committed multiple violations of the same statute, the issue is what “unit of prosecution” was intended by the legislature when it crafted the crime. See State v. Root, 141 Wn.2d 701, 710, 9 P.3d 214 (2000). Thus, for example, where the defendant simultaneously possesses various items of property stolen from multiple owners, the statute defining the crime of possession of stolen property criminalized that conduct as one “unit of prosecution,” so only one conviction can be had. See State v. McReynolds, 117 Wn. App. 309, 335-40, 71 P.3d 663 (2003).

Here, the relevant crime is first-degree robbery, and this Court is not writing on a clean slate. Robbery is defined in RCW 9A.56.190, which provides:

[a] person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone.

In State v. Molina, Jr., 83 Wn. App. 144, 920 P.2d 1228 (1996), the Court examined this statute when the defendant was convicted of three counts of first-degree robbery with a weapon, the same charge as involved here.

83 Wn. App. at 146. The defendant went to a fast-food restaurant with another man, Ruiz. When they robbed a fast-food restaurant together, Ruiz pointed a gun at the manager, forcing him to go to the restaurant office, open the safe and hand him the money inside. 83 Wn. App. at 146. Meanwhile, Molina pointed a gun at the cook and ordered her to open the cash registers and empty money into a bag. Id. Because the cook had no access to the cash registers, however, a supervisor who had “register keys” was ultimately involved. Id.

On review, the Court of Appeals recognized the importance of ensuring against multiple convictions “where the offenses are identical both in fact and in law.” 83 Wn. App. at 146-47. The Court then examined the situation of “[w]hen robbery occurs in a commercial establishment.” Id. Where such a robbery occurs, the Court found, “multiple counts are identical in fact when the victims exercise joint control over the property taken but there is no separate taking from each individual.” 83 Wn. App. at 147. To hold otherwise, the Court found, would improperly base convictions on the number of employees present during a robbery instead of each actual taking. Id.

More recently, in Tvedt, the Supreme Court clarified the “unit of prosecution” for robbery, finding that the Legislature intended the crime to be “dual” in nature, which meant that “robbery is a property crime *and* a crime against the person.” Tvedt, 153 Wn.2d at 712 (emphasis added). Thus, the Tvedt Court concluded, the “unit of prosecution” for robbery is “each forcible taking” of property “from a separate person.” Id.

In Tvedt, the defendant was charged with four counts of robbery

for having forcibly taken 1) cash from the clerk at store 1 against her will, 2) truck keys from another person at store 1, against his will, 3) cash from the assistant manager of store 2, against her will and 4) a cell phone from a fourth person near or at store 2, against his will. Id. The Court concluded that he was properly charged with and convicted of four separate counts of robbery. Id.

But the Court also rejected the idea that the “unit of prosecution” for robbery is the “number of items or property taken” from each person or the number of people present. 153 Wn.2d at 714. For example, the Court noted, it would be improper to have three counts of robbery from the same victim if a watch, wallet and ring were taken at the same time. 153 Wn.2d at 714. It is also not permissible to simply ask “the number of persons placed in fear.” Id.

The Court concluded that, where here is one taking of cash from a business, there is only one count because there has been only one taking, but where there is more than one taking of items from more than one person, multiple convictions may be upheld. Tvedt, 153 Wn.2d at 715. The lower appellate court had found that it was proper for convictions to be brought for each employee present and having joint control over the property when a robbery of a business occurs, but the Supreme Court disagreed. 153 Wn.2d at 715. Instead, the Court held, if there is one taking of cash from a business, there is only one count because there has been only one taking, but where there is more than one taking of items from more than one person, multiple convictions may be upheld. Tvedt, 153 Wn.2d at 715.

Applying those standards here, it would not violate double jeopardy if the convictions for counts 4 and 5 were based the robbery of *different* property, but double jeopardy is violated if both counts were based on taking the *same* property. Given the evidence and instructions in this case, there is an ambiguity in the jury's verdict. The instructions given allowed and the prosecutor argued both that jurors could find guilt for the two counts based on taking the separate property *and* that guilt could be based for both counts on taking the *same* property because of the "mutual" interest each had in the store. CP 185, 192-95; Indeed, the prosecutor admitted below that there was a potential "unit of prosecution" problem, because jurors could find guilt for both counts 4 and 5 based on either the individual items taken from Chong and Myoung separately *or* the "other property belonging to the store at large[.]" TRP 955-59, 963, 965-66. That expansive view of the possible grounds for finding guilt for counts 4 and 5 was reflected in the instructions and further emphasized by the prosecutor in closing argument. TRP 997-98 (each count could be based on individual items or "the property at large" based on mutual ownership interests in the store).

This Court should reverse and dismiss one of the counts for first-degree robbery of the store. Where, as here, there is no way to determine in fact that the jury did not decide the case in a way which violated double jeopardy, the rule of lenity applies. See State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008); State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), affirmed on other grounds, 149 Wn.2d 906 (2003). As a result, the Court construes the verdicts in the defendant's favor.

Where there is an ambiguity in a jury's verdict, the rule of lenity requires it to be resolved in the defendant's favor. Kier, 164 Wn.2d at 811. Put another way, if the instructions, evidence and argument create a possibility that the jury's verdicts violate double jeopardy, the Court will so hold. Id.

With the instructions, argument and evidence, the jury could well have found Mr. Comenout, Jr., guilty of both counts 4 and 5 for the same unit of prosecution. The Court should reverse and dismiss one of the counts.

The trial court erred in concluding that there was no issue of "unit of prosecution" - and also in believing that the only issue with "unit of prosecution" analysis was sentencing. See, e.g., State v. Womac, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). Even if a conviction is entered but *no* sentence imposed, a conviction may violate double jeopardy. Id. The Double jeopardy prohibits not just multiple punishments but also multiple convictions for the same offense. Id.

Appointed counsel did not create the error and it was the court which ruled that there was no need to know the jury's basis for the two convictions. But counsel's failure to apprehend the relevant law on double jeopardy meant he was unaware that his client's constitutional rights to be free from double jeopardy were at issue and take some step, such as requesting an instruction telling jurors they would need to rely on "separate and distinct" acts for each count. See, e.g., State v. Watkins, 136 Wn. App. 240, 243-44, 148 P.3d 1112 (2006), review denied, 161 Wn.2d 1028 (2007), cert. denied, 552 U.S. 1282, 128 S. Ct. 1707 (2007).

Further, the state could well have made an election of which evidence it was relying on for each count.

Even if counsel's comments somehow contributed to the error, the "invited error" doctrine does not apply when counsel is ineffective in setting up the error. See State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000). Both the state and federal constitutions guarantee the right to effective assistance of appointed counsel. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Counsel is ineffective when his performance falls below an objective standard of reasonableness and that deficiency prejudices the defendant. See Thomas, 109 Wn.2d at 229. Only legitimate trial strategy or tactics are "reasonable" performance. See, State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Prejudice exists when there is a reasonable probability that, but for counsel's unprofessional errors, the result would likely have been different. Thomas, 109 Wn.2d at 226. To the extent that counsel's agreement with the court that there was no issue might be seen as contributing towards the error, there could be no reasonable tactical basis for allowing your client's double jeopardy rights to be violated. And allowing that to occur prejudiced Mr. Comenout, Jr., who was sentenced based on *both* counts. The convictions for counts 4 and 5 violate double jeopardy and one of them should be reversed and dismissed with prejudice.

2. MR. COMENOUT, JR., WAS REPEATEDLY DEPRIVED OF HIS STATE AND FEDERAL DUE PROCESS RIGHTS AND RIGHTS UNDER CRIMINAL RULE 3.2 PRETRIAL AND COUNSEL WAS AGAIN PREJUDICIALLY INEFFECTIVE

Pretrial, the presumption of innocence is a fundamental of our system. State ex rel Wallen v. Judges Noe, Towne, Johnson, 78 Wn.2d 484, 487, 475 P.2d 787 (1970); Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed 481 (1895). The presumption enshrines the due process rights of the accused and further ensures that the state does not punish anyone based on a mere accusation. See Hudson v. Parker, 156 U.S. 277, 285, 15 S. Ct. 450, 39 L. Ed. 424 (1895).

Indeed, pretrial release and liberty is supposed to be “the norm.” United States v. Salerno, 481 U.S. 739, 742, 107 S. Ct. 2095, 96 L. Ed. 2d 697 (1987); see State v. Barton, 181 Wn.2d 148, 331 P.3d 50 (2014). Pretrial detention is intended to be a “carefully limited exception.” Salerno, 481 U.S. at 742.

This case involves pretrial detention and the state’s repeated failure to comply with its own mandatory laws regarding those it holds in custody prior to trial. Below, the trial court violated not only the principles of the presumption of innocence and due process but also the requirements of CrR 3.2. The judge’s decision to impose extreme financial conditions upon a homeless defendant violated equal protection and due process further, also violating the state and federal prohibitions on excessive bail. As if that was not sufficient error, the state again violated due process and the relevant statutes by failing to timely comply with the superior court’s order to evaluate Mr. Comenout, Jr.’s, competency. Once he was found incompetent, again the state violated

due process and its duties by failing to timely provide him with “restoration” services. Throughout these pretrial proceedings, counsel was prejudicially ineffective by failing to take necessary steps to preserve and protect the constitutional and rule-based rights of his client.

a. Violations relating to pretrial release

In Washington, Article 1, § 10 and § 20, the federal Eighth Amendment and CrR 3.2 apply to the issue of whether the state has properly retained an accused in custody pretrial. Barton, 181 Wn.2d at 152-54. Both the Eighth Amendment and Article 1, § 10, prohibit “excessive” bail, although the federal provision does not guarantee a right to bail but only that any bail amount set will be reasonable. See Salerno, 481 U.S. at 742.

For our state, Article 1, § 20, goes further, ensuring a right to bail “by sufficient sureties” in all cases except those in which the defendant is accused of a “capital” or “death penalty” crime or one which will likely subject him to life without parole. Our state court rule, CrR 3.2, goes farther, providing for a presumption of pretrial release on personal recognizance - with no conditions. Barton, 181 Wn.2d at 152; CrR 3.2. Unfortunately for Mr. Comenout, Jr., the superior court complied with neither constitution nor rule in its decisions regarding pretrial release and Mr. Comenout, Jr.’s, rights to pretrial liberty..

i. Relevant facts

Mr. Comenout, Jr., was originally charged on June 17, 2016. CP 1-2. That same date, he appeared before Judge Arend for arraignment. TRP 5-6. The prosecutor asked for “bail,” as follows:

[T]he State would request \$1.5 million bail at this time, noting he has quite a number of felony convictions as well as gross misdemeanor convictions, and Escape in the Second Degree conviction in July of 2015. [Unl]awful possession of controlled substance, one conviction in 2014 and one in 2013. Twelve gross misdemeanors, including a dangerous weapon violation in 2014. Driving with license suspended or revoked in the First Degree in 2013, ignition interlock violation in 2013, possession of another's identification, hit and run attended, property damage, both in 2013, reckless driving in 2013. Two driving with license suspended or revoked in the First Degree in 2012 and 2009.

Your Honor, there was also a minor in possession of liquor in 2006, reckless driving conviction in 2005. Based on his substantial criminal history, as well as the nature of these charges and the potential danger to the community, the State would ask for \$1.5 million.

TRP 5-6. The prosecutor said there were "quite a number of bench warrants" in the history and said there were three open warrants, and nine other warrants in his history. TRP 6.

Mr. Comenout, Jr., was given counsel who was just standing in and had no familiarity with the case. See TRP 6-7. Counsel told the court that the defense was "going to be reserving an argument as to bail today." TRP 6. He also said Comenout had a "DOC hold." TRP 6. He thought that time was needed to allow the actually assigned attorney to meet with Mr. Comenout, Jr., after which he might possibly make some argument for "bail reduction" in the future. TRP 6. At that point, the judge asked Mr. Comenout, Jr., if he lived at a particular address. TRP 7. Mr. Comenout, Jr., responded, "[n]o, I'm homeless right now." TRP 7.

Without further discussion, the judge said the order would reflect "the issue with regard of bail is being reserved pending future order of the Court," but also that "[b]ail will be set in the sum of \$1.5 million." TRP 7.

The written order entered provided both "[b]ail issue reserved"

and “[d]efendant shall be released upon execution of a surety bond in the amount of \$1,500,000.00 or posting cash in the amount of %1,500,000.00 * * *NEW BAIL * * *.” CP 6-7 (see Appendix A). The order contained no findings of fact regarding any danger or anything similar but simply declared the court had “found probable cause.” CP 6-7.

- ii. The trial court erred in failing to follow CrR 3.2 and the presumption of release on personal recognizance

The trial court failed to follow CrR 3.2, in multiple ways. First, the it failed to apply the presumption of release on personal recognizance.

CrR 3.2 provides:

- (a) **Presumption of Release in Noncapital Cases.** Any person, other than a person charged with a capital offense, shall at the preliminary appearance or reappearance . . . be ordered released on the accused’s personal recognizance pending trial unless
 - (1) the court determines that such recognizance will not reasonably assure the accused’s appearance, when required, or
 - (2) there is shown a likely danger that the accused:
 - (a) will commit a violent crime, or
 - (b) will seek to intimidate witnesses, or otherwise unlawfully interfere with the administration of justice.

CrR 3.2(a) (emphasis in original).

This rule creates a presumption of release on personal recognizance. Butler v. Kato, 137 Wn. App. 515, 154 P.3d 259 (2007). “Personal recognizance” release generally means “[t]he release of a defendant in a criminal case in which the court takes the defendant’s word he or she will appear for a scheduled matter” or “pretrial release of

an arrested person who promises, usually in writing but without supplying a surety or posting bond, to appear.” BLACKS LAW DICTIONARY (10th ed. 2014).

Thus, under the plain language of CrR 3.2, the accused are entitled to presumptive release pretrial without *any* conditions, financial or other. See CrR 3.2; State v. Rose, 146 Wn. App. 439, 450-51, 191 P.3d 83 (2008). Indeed, under the rule, the trial court has no statutory authority to order *any* conditions of release unless and until it makes the required findings that the presumption was rebutted. Rose, 146 Wn. App. at 450-51.

No such findings were made in this case, prior to the court’s decision to impose conditions of pretrial release. There are two grounds upon which the superior court may find the presumption has been rebutted. See Butler, 137 Wn. App. at 521. One is if the state has shown the defendant has a danger of not returning to court for a future appearance. Id. The second is if the state proves that the defendant presents a real and serious risk of committing a violent crime against a witness or another. Barton, 181 Wn.2d at 162-63.

Even if one of the exceptions is shown, however, the superior court must impose only those conditions of pretrial release which are least restrictive to serve the required purpose, i.e., the least restrictive conditions sufficient to “reasonably assure the accused will appear in court” or reasonably satisfy the court’s concerns about safety. Barton, 181 Wn.2d at 164; Butler, 137 Wn. App. at 523.

Here, the court made no finding that either of the exceptions was shown and the presumption of release without any conditions pretrial

thus rebutted. There was no oral finding. There was no written finding. Without that, the court had no authority to impose any pretrial conditions for release. Rose, 146 Wn. App. at 450-51.

The rule provides specific factors a court is to consider when determining whether one of the exceptions to the presumption has been proved, starting with whether the imposition of conditions is required because there is a substantial risk of future “failure to appear:”

- (1) The accused’s history of response to legal process, particularly court orders to personally appear;
- (2) The accused’s employment status and history, enrollment in an educational institution or training program, participation in a counseling or treatment program, performance of volunteer work in the community, participation in school or cultural activities or receipt of financial assistance from the government;
- (3) The accused’s family ties and relationships;
- (4) The accused’s reputation, character and mental condition;
- (5) The length of the accused’s residence in the community;
- (6) The accused’s criminal record;
- (7) The willingness of responsible members of the community to vouch for the accused’s reliability and assist the accused in complying with conditions of release;
- (8) The nature of the charge, if relevant to the risk of nonappearance;
- (9) Any other factors indicating the accused’s ties to the community.

CrR 3.2(c). CrR 3.2(e) provides the relevant factors for determining the second grounds upon which the presumption of release may be found rebutted - a “showing of substantial danger that the accused will commit a violent crime[,] . . . seek to intimidate witnesses or otherwise unlawfully

interfere with the administration of justice” - as follows:

- (1) The accused’s criminal record;
- (2) The willingness of responsible members of the community to vouch for the accused’s reliability and assist the accused in complying with conditions of release;
- (3) The nature of the charge;
- (4) The accused’s reputation, character and mental condition;
- (5) The accused’s past record of threats to victims or witnesses or interference with witnesses or the administration of justice;
- (6) Whether or not there is evidence of present threats or intimidation directed to witnesses;
- (7) The accused’s past record of committing offenses while on pretrial release, probation or parole; and
- (8) The accused’s part record of use of or threatened use of deadly weapons or firearms, especially to victim’s [sic] or witnesses.

It is not enough that there be allegations or that there is a normal risk - there must be “information before the court sufficient to rebut the presumption of release.” See, e.g., Butler, 137 Wn. App. at 522. For example, CrR 3.2 does not require proof of just any degree of “danger;” it requires a “**substantial danger**.” See Rose, 146 Wn. App. at 452 (“[t]he trial court may impose conditions for pretrial release on a showing “that a substantial danger exists”).⁶

⁶While CrR 3.2(a)(2) refers to the required danger as “likely danger,” the rule then uses the term “substantial danger” throughout - including in the section listing the factors required to be considered in making the determination. CR 3.2(d) refers to the conditions of release to be used upon a “[s]howing of substantial danger,” if there is proof “there exists a substantial danger that the accused will commit a violent crime” or seek to intimidate a witness or unlawfully interfere with the administration of justice. See CrR 3.2(e) refers to the “Relevant Factors” for “Showing of Substantial Danger,” and again, under CrR 3.2(a) is to be used in determining if the presumption of release without conditions was rebutted. CrR 3.2(a); see Rose, 146 Wn. App. at 446.

Thus, to rebut the presumption of release without conditions, there had to be “available” information before the superior court to prove a “substantial” danger that Comenout, Jr., would engage in a violent crime, intimidate a witness or fail to appear. See Butler, 137 Wn. App. at 524 (trial court made finding of “substantial danger”).

The Order here, however, did not find a “substantial” danger of such potential harm or any such potential risk. App. A. And notably, a court has declined to find evidence sufficient to prove a “substantial danger” even where the defendant is charged with four counts of first-degree unlawful possession of a firearm, has a previous kidnaping conviction and had previously skipped bail on an offense. Rose, 146 Wn. App. at 443-44.

The trial court’s failure to comply with the requirements of the rule are not trivial. The mandates of the rule are intended to prevent imposition of pretrial conditions in the majority of cases. Further, adoption of the rule occurred as a direct result of a national trend to try to limit the role of commercial bail bondsmen in the criminal justice system. Barton, 181 Wn.2d at 166. The task force which crafted the rule used the 1966 federal Bail Reform Act as a guide. Id., quoting, Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 22 (1971). In fact, the stated purpose of the rule was “to make money bail the trial court’s last resort in setting conditions for ensuring the accused’s appearance at trial.” Barton, 181 Wn.2d at 166, quoting, Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 22 (1971); see Schilb v. Kuebel, 404 U.S. 357, 359-60, 92 S. Ct. 479, 30 L. Ed. 2d 502

(1971) (noting the impact of the rise of the bail industry and the increase in financial conditions imposed pretrial).

Holding to the actual standard of the rule is vital to ensuring the rights of those only accused and not yet convicted of a crime. Pretrial detention has a significant negative impact on people who are kept in custody - “warehoused” despite not having been convicted of the crime:

The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time.

Barker v. Wingo, 407 U.S. 514, 532-33, 33 L. Ed. 2d 101, 92 S. Ct. 2182

(1972). There is also strong evidence that pretrial detention correlates to increased likelihood of conviction and higher sentence. See Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1165 (2005); Christopher T. Lowenkamp et. al, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Arnold Foundation (Nov. 2013).⁷

In addition, there can be no question that a person still cloaked with the presumption of innocence suffers significant negative impact on their lives - and their case - when deprived of the presumption of release on personal recognizance set forth in CrR 3.2. But as the Supreme Court has held, “[t]o infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act” itself - one which would inject into “our own system of government the very principles of

⁷Available at <https://csgjusticecenter.org/courts/publications/investigating-the-impact-of-pretrial-detention-on-sentencing-outcomes/>

totalitarianism[.]” Stack v. Boyle, 342 U.S. 1, 5-6, 72 S. Ct. 1, 96 L. Ed. 3 (1951).

The lower court’s decision violated the requirements of CrR 3.2 in yet another way. Under CrR 3.2(d), even if there is sufficient proof of a showing of “substantial danger” rebutting the presumption of release without conditions and the court is thus authorized to impose *some* conditions, there are limits. CrR 3.2(d)(6) provides that the court may require a financial condition, but only if certain requirements are met:

[The court may] [r]equire the accused to pose a secured or unsecured bond or deposit cash in lieu thereof, conditioned on compliance with all conditions of release. **This condition may be imposed only if no less restrictive condition or combination of conditions would reasonably assure the safety of the community.** If the court determines under this section that the accused must post a secured or unsecured bond, the court shall consider, on the available information, the accused’s financial resources for the purposes of setting a bond that will reasonably assure the safety of the community and prevent the defendant from intimidating witnesses or otherwise unlawfully interfering with the administration of justice.

CrR 3.2(d)(6) (emphasis added).

Here, the court made no findings that a financial condition of \$1.5 million was required because “no less restrictive condition or combination of conditions would reasonably assure the safety of the community” or ensure that Mr. Comenout, Jr., would return for trial.

The superior court’s decision below violated CrR 3.2 again and again. It ignored the presumption of release on personal recognizance, even though it applied. It failed to make the required findings to rebut the presumption, but imposed conditions anyway. It then imposed a \$1.5 million bail amount on an accused who was homeless, in violation of the mandates of CrR 3.2 prohibiting imposition of financial conditions except

as, effectively, a last resort.

These errors did not just violate the Rule. They also violated Mr. Comenout, Jr.'s, fundamental constitutional rights, including due process, equal protection and the state and federal rights to be free of excessive bail. The federal and state constitutions protect against the state depriving any person of "life, liberty or property, without due process of law." Hardee v. Dep't. of Soc. & Health Svcs., 172 Wn.2d 1, 256 P.3d 339 (2011); Salerno, 481 U.S. at 744. These protections apply pretrial. Salerno, 481 U.S. at 744. And it is an essential part of pretrial due process - even "implicit in the concept of ordered liberty" - that every person is presumed innocent unless and until proven guilty by the state, beyond a reasonable doubt. See Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 368 (1970).

As a result, being a pretrial detainee is far different and due process provides far greater protection for such detainees as compared with those being detained *after* conviction, either in custody or on parole. See Bell v. Wolfish, 441 U.S. 520, 535 n. 16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1997); State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981).

The state's highest Court has already recognized that bail systems can be unconstitutional and in violation of due process when they discriminate on the basis of wealth. Reanier v. Smith, 83 Wn.2d 342, 517 P.2d 949 (1974). In Reanier, as here, the system was such that wealthy defendants were treated differently and secured release (except where no bail was allowed), while indigent defendants did not. 83 Wn.2d at 349. Put bluntly, the Court declared, based on the existing "present (especially

state) bail procedures," the wealthy "are able to remain out of prison until conviction and sentencing; the poor stay behind bars." 83 Wn.2d at 349.

The lower court's decisions also violated the prohibitions against "excessive bail" contained in the state and federal constitutions. That prohibition is violated when bail is set "at a figure higher than an amount reasonably calculated" to ensure the presence of the accused in court. Stack, 342 U.S. at 5. In our state, Article 1, § 20,⁸ of the Washington Constitution provides a right to bail in all but the most extreme case, while Article 1, §10 prohibits "excessive bail." State v. Heslin, 63 Wn.2d 957, 959-60, 389 P.3d 892 (1964); Barton, 181 Wn.2d at 152-53.

The function of bail is "limited" so that fixing of it for "any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." Id. Further, bail "is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial[.]" Stack, 342 U.S. at 7-8 (Jackson, J, and Frankfurter, J, concurring). In this respect, the right to be free from "excessive" bail reflects a principle of proportionality, requiring that the court setting bail must consider the specific situation of the individual involved and set bail only at the amount required for the relevant purpose, in light of the situation of the accused. Stack, supra; see also,

⁸Before 2010, that meant a trial court had no authority to deny bail in any case unless the defendant was accused of a capital (i.e. death penalty) crime. See Barton, 181 Wn.2d at 152-53. After 2010 amendments, Article 1, § 20, now provides, in relevant part, "[a]ll persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evidence or the presumption great," and that bail may be denied for offenses punishable with possible life without parole, "upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any person." See Barton, 181 Wn.2d at 153; see ESHJ Res. 4220, 61st Leg., Reg. Sess. (Wash. 2010) (amending Article 1, § 20).

Salerno, supra, 481 U.S. at 744-47.

Here, the amount was not set based on a determination of the amount required for the relevant purpose in light of Mr. Comenout, Jr.'s, particular situation, home life, ties to the community or anything similar. There was no discussion of why the extreme amount was necessary in order to ensure against some perceived danger consistent with the requirements of CrR 3.2.

Finally, incarcerating people because they are unable to pay to be freed, whether based on "fines" or a particular type of bond, violates equal protection. See, e.g., Tate v. Short, 401 U.S. 395, 398, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971); Bearden v. Georgia, 461 U.S. 660, 672-73, 103 S. Ct. 2016, 76 L. Ed. 2d 221 (1983). Equal protection requires that similarly situated individuals receive similar treatment under the law. State v. Simmons, 152 Wn.2d 450, 458, 98 P.3d 789 (2004). Even applying the most deferential standard of review, "rational basis," to the superior court's practices below, the violation here is still clear. There is no legitimate or rational difference between a person in Mr. Comenout, Jr.'s situation who has money and one who does not - they present exactly the same risk. Yet Mr. Comenout, Jr., was deprived of his liberty pretrial, despite the presumption of innocence, despite the principles of CrR 3.2, simply because he was too poor to pay for his release.

This failure to adjust bail to fit the individual case created not only a violation of excessive bail but a problem of equal protection, as impoverished suspects like Mr. Comenout, Jr. are kept in jail pending trial while those with money are not. The existence of a separate "second

class” system of accused in jail despite the presumption of innocence, based on inability to post monetary bail has been discussed with concern for years. See, e.g., John S. Goldkamp, *Two Classes of the Accused: A Study of Bail and Detention in American Justice* (Ballinger Publishing Co., 1979) (Cambridge, Ma); see also, Ram Subramanian et al, *Incarceration’s Front Door: The Misuse of Jails in America*, Vera Institute of Justice) (Feb. 2015).⁹ Exacerbating this issue, the private “bail bonds” industry, outlawed in all but one other country in the world, has enjoyed staggering growth. See Subramanian et al, supra. The average length of pretrial stay also increased during this time, from 14 to 23 days, but in Washington state it is usually far, far longer. See, e.g., Caseloads of the Courts, Superior Courts, Criminal Case Management (2016).

Over this same time, there has been a stark increase in the use of “financial” conditions upon people presumed innocent, awaiting trial. From 1990 to 1998, “non-financial” release in state courts dropped from 40% of all those released to 28%. See Thomas H. Cohen and Brian A. Reaves, Bureau of Justice Statistics, Special Report, *Pretrial Release of Felony Defendants in State Courts* (Nov. 2007).¹⁰ In 2009, the percentage of pretrial release involving financial conditions had grown to an estimated average in large urban counts of 61 percent of all cases involving felonies. See Brian A. Reaves, Bureau of Justice Statistics, State Court Processing Statistics, *Felony Defendants in Large Urban Counties*,

⁹Available at <https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>.

¹⁰Available at <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf>.

2009 - *Statistical Tables* (Dec. 2013).¹¹

There has been a concurrent rise in costs not only to the accused and his or her family but to society itself. Just a few years ago, then-U.S. Attorney General Eric Holder acknowledged that the cost of increased pretrial detention of the accused was an estimated 9 billion taxpayer dollars. Eric Holder, Attorney General of the United States, Speech at the National Symposium on Pretrial Justice (June 1, 2011).¹² Closer to home, the Honorable Theresa Doyle of King County Superior Court in our state has noted, “[s]ociety bears the non-economic costs of lost employment, housing, family support, public benefits, and financial and emotional security for the children of the incarcerated person.” Hon. Theresa Doyle, *Fixing the Money Bail System*, KING COUNTY BAR BULL. (KCBA, Seattle, WA) (April 2016).

Today, it is estimated that, like Mr. Comenout, Jr., three out of five people sitting in jail in our country are legally presumed innocent, awaiting trial or plea resolution and there simply because they are too poor to afford to post bail. See Timothy R. Schnacke, *Fundamentals of Bail: a Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, U.S. Dept. Of Justice, Nat’l Inst. of Corrections (2014).¹³

It is worth noting that, in fact, the portions of CrR 3.2 limiting use

¹¹ Available at <https://www.bjs.gov/content/pub/pdf/fdluco9.pdf>.

¹² Available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice>.

¹³ Available at <http://www.pretrial.org/download/research/Fundamentals%20of%20Bail%20-%20NIC%202014.pdf>.

of financial conditions of pretrial release to only those limited situations and amounts truly needed were added in 2002, for the very purpose of reducing the unconstitutional, unfair disparities between the treatment of those with resources and those without. See *In the Matter of the Adoption of the Amendments to CrR 3.2, CrR 3.2.1, CrRLJ 3.2 and CrRLJ 3.2.1*, Order No. 25700-A-721 (WSR 02-01-025) (Dec. 6, 2001).¹⁴ The Commission proposed amendments to CrR 3.2 after receiving a study which “concluded the criteria established by court rule for pretrial release may discriminate against persons who are economically disadvantaged.” Id; see, George Bridges, *A Study on Racial and Ethnic Disparities in Superior Court Bail and Pre-Trial Detention Practices in Washington*, Washington State Minority and Justice Commission (Oct. 1997).¹⁵

The failure to follow the mandates of CrR 3.2 and the constitutional violations the indigent accused are suffering is not limited to the Pierce County Superior Court, the court involved in this case. Indeed, this Court has recently issued a published decision addressing a similar failure from Clallam County. See *State v. Huckins*, __ Wn.2d __, __ P.3d __ (2018 WL 4571852). The Court considered the issue despite claims it was “moot,” finding that it was “of continuing and substantial public interest.” Id. Although the Court disagreed with Mr. Huckins that there was insufficient evidence to support a finding that the presumption had been rebutted, it agreed that the trial court had erred in failing to

¹⁴Available at <http://apps.leg.wa.gov/documents/laws/wsr/2002/02/02-01-025.htm>.

¹⁵Available at http://www.courts.wa.gov/committee/pdf/1997_ResearchStudy.pdf.

follow the requirements of CrR 3.2 before imposing financial bail. Id. The Court declared, “[t]he condition of monetary bail may only be imposed if no less restrictive condition or combination or conditions would reasonably assure” either the safety of the community or the defendant’s reappearance. Id.

In Huckins, the defendant was going to be homeless - here, the defendant already was. Id. There, however, the court imposed only a \$1,000 bail - here, it was \$1.5 million. The improper failure to comply with the rule and the constitutional violations are issues of continuing and substantial interest, likely to arise again but evade review. See, e.g., Federated Publ’ns, Inc. v. Swedberg, 96 Wn.2d 13, 16, 633 P.2d 74 (1981), cert. denied, 456 U.S. 984 (1982). This Court should address the issue, should roundly decry the lower court’s violations of CrR 3.2 and should hold that the procedures here used violated due process, the right to the presumption of innocence, the state and federal prohibitions against excessive bail, and equal protection.

Notably, in Huckins, Mr. Huckins did not ask for reversal of his convictions as a result of the violations of his rights pretrial. In this case, however, the state committed further violations of Mr. Comenout, Jr.’s due process rights, again by simply failing to comply with mandatory provisions of rule or law. Taken all together, the multiple, pervasive violations of Mr. Comenout, Jr.’s rights and failures to follow the law is such that this Court should reverse and dismiss the convictions as a result.

b. Violations involving competency

It is the constitutional obligation of this Court to ensure that the

rights of the accused are protected, whether the state has provided adequate funding to ensure those rights or not. See State v. A.N.J., 168 Wn.2d 91, 121, 225 P.3d 956 (2010). Under both state and federal due process, the government is prohibited from forcing a defendant who is not legally competent to stand trial in a criminal case. See Drope v. Missouri, 420 U.S. 162, 172, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); State v. Kidder, 197 Wn. App. 292, 310, 389 P.3d 664 (2016). Extended pretrial detention of a person who is not competent - but is not released - implicates his due process rights. Trueblood v. Wash. State Dep't of Soc. & Health Servs, 73 F. Supp. 3d 1311, 1314 (W.D. Wash. 2014) ("Trueblood 1").

The due process concepts of "reasonableness" apply where someone is being committed "solely on account of his incapacity to proceed to trial." Jackson v. Indiana, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). Due process mandates that such a person may not be held more than the amount of time necessary to "determine whether there is a substantial probability that he will attain" the capacity to proceed to trial "in the foreseeable future" - and that the amount of time must be "reasonable." Jackson, 406 U.S. at 738.

At a minimum, "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Id.

Washington state's system regarding the evaluation and restoration of competency pretrial has been the subject of litigation. See Kidder, 197 Wn. App. at 310. Initially enacted in 1973, our statutory

scheme for addressing the competency of criminal defendants has been held, in general, to provide greater protection than that provided under the state or federal constitutions. See In re the Personal Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). Under RCW 10.77.050, no “incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.”

But our state - and in particular, the Department of Social and Health Services - has faced “considerable challenges” in ensuring that defendants accused of a crime and suspected of being incompetent and those deemed incompetent who need restoration receive the actual services required in a reasonable time. Trueblood II, 822 F.3d at 1038-39. The prohibition against trying an incompetent person, coupled with the due process rights of the accused, have resulted in a history of years of the state failing to satisfy its duties to the accused. Id.

In order to “honor its constitutional obligations,” our state provides that, when there is reason to doubt the competency of an accused, the court may order an evaluation to ensure the defendant is sufficiently competent to withstand prosecution. RCW 10.77.060. The state’s chronic failure to timely provide such evaluations and restoration treatment to pretrial detainees has been claimed to be the result of legislative failures to provide the state with adequate resources to have sufficient ability to meet its duties, however. Kidder, 197 Wn. App. at 310. Indeed, in 2014, the Western State Hospital Medical Director estimated that, for those ordered restored to competency, it was taking about 65 days on average for a person to be transferred for those services

despite statutes mandating a far shorter time. 197 Wn. App. at 303.

In Trueblood I, the court certified a class which includes Mr. Comenout, Jr., - people charged with a crime in the state and ordered by a trial court to receive a competency evaluation or restoration services through the Department of Social and Health Services (DSHS) who are waiting in jail for those services after DSHS has received the court's relevant orders. 101 F.Supp. 3d at 1014. The class members argued that their due process rights were being violated by the wait time spent in jail for court-ordered competency evaluations or restoration services. 73 F.Supp. 3d at 1315. The state argued that it did not have sufficient funding, qualified staff or facilities. Id.

The trial court held that the defendants had "liberty interests in freedom from incarceration and in restorative treatment," as well as the right to receive ordered treatment within a reasonable period of time. 73 F.Supp. 3d at 1314. The court also rejected the state's complaints about resources, finding that this excuse did not justify violating the liberty interests of class members. 73 F.Supp. 3d at 1315-16. The court also found that the state had failed to provide timely services, causing "prolonged incarceration of criminal defendants waiting for court-ordered competency evaluation and restoration," and that it had thus violated "the substantive due process rights of those detained." Id.

After a later trial, the federal court ordered 1) in-jail competency evaluations within 7 days of the court order, 2) in-hospital competency evaluations within 7 days of the court order, and 3) admission of all persons ordered to competency restoration within 7 days of the signing of

the court order. 101 F.Supp. 3d at 1023-24. On review, however, the Ninth Circuit court of appeals reversed the order regarding in-jail competency evaluations, noting changes in our state's statutes allowing a 14 day period of wait. See Kidder, 197 Wn.2d at 307 n. 7.

Those changes to our statutory scheme came about in 2015 in large part because of the Trueblood class action. See Kidder, 197 Wn. App. at 307 n. 7; see Laws of 2015, ch. 5, § 1. In 2015, the Legislature enacted RCW 10.77.068, setting performance targets and maximum limits for the state, as discussed in Trueblood II.

None of the "target" or mandatory time limits were met in this case. Relatively early, on July 22nd, 2016, the possible need for a "10.77" hearing was noted. CP 46 (Appendix B). On July 29, 2018, the trial court entered an order finding that there was a reason to doubt his competency to stand trial. CP 9 (Appendix C). The court's order provided for a preliminary examination to take place in Pierce County Jail "under the authority of RCW 10.77.060." CP 9-10. The order stayed the trial during the exam period and "until this court enters an order finding the Defendant to be competent to proceed." CP 14. The competency hearing was set for August 10th. CP 14-15 .

The same date, an order was entered "ESTABLISHING CONDITIONS PENDING TRIAL PURSUANT TO CrR 3.2." CP 15-16. That order provided in relevant part, "[d]efendant is to be held in custody without bail (no bail hold)." CP 15-16. In the later filed forensic mental health evaluation of Mr. Comenout, Jr., filed in the trial court file on August 26th, 2016, the evaluating forensic psychologist, Dr. Judith L.

Kirkeby, acknowledged that the Pierce County Superior Court had ordered an in-custody evaluation of competence to stand trial and said the order was entered on July 19, 2016. CP 20-28. The interview occurred on August 15, 2016, at Pierce County Detention and Corrections Center, for a little less than two hours. CP 24-25.

Thus, the competency evaluation was not conducted within 7 days or even 14, as required.

On August 17, 2016, Mr. Comenout, Jr., was found incompetent, and the court entered an order for competency restoration, up to 90 days. CP 17-19 (Appendix D). The follow-up forensic mental health evaluation was filed in the court file and dated December 15, 2016. CP 29-41. In the report, Dr. Ray Hendrickson, a supervising psychologist and Dr. Katharine McIntyre, a psychology postdoctoral "fellow," stated that the Pierce County superior court had ordered Comenout, Jr., committed to WSH for "up to 90 days for competency restoration" on August 17, 2016. CP 30. They admitted that Comenout, Jr., was not admitted for competency restoration until September 23, 2016. CP 30-31.

Thus, the state did not comply with the 7 day target or the 14 day maximum and instead subjected Mr. Comenout, Jr., to more than 30 extra days in custody pretrial simply because the state chose not to provide sufficient resources to comply with the state's own laws.

Such delays in the evaluation for competency and in admission for treatment pretrial violate the substantive due process rights guaranteed by the state and federal constitutions. See, Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). In 2014, in

Trueblood I, the federal court examined our state's laws and practices and found "the state has consistently and over a long period of time violated the constitutional rights of the mentally ill" regarding timely competency evaluation and timely restoration. 73 F. Supp. 3d at 1717-18.

In fact, the federal court held, the state's failure to provide such services in a timely fashion has caused class members (such as Mr. Comenout, Jr.) to "languish in city and county jail for prolonged periods of time," a failure which "violates their right to substantive due process[.]" Id. And after further proceedings, the court declared that the state has, over the years, "demonstrated a consistent pattern of intentionally disregarding court orders." Trueblood v. Washington State Dept. of Social & Health Services, 101 F. Supp.3d 1010, 1024 (2015), remanded, 822 F.3d 1037 (2016). The Washington Legislature responded by setting limits with RCW 10.77.068, requiring 7 days or less as a "performance target" but the maximum delay between court order and admission to 14 days. See Laws of 2015, ch. 5.

Substantive due process prohibits the government from detaining a person pretrial while they are believed to be incompetent but waiting to be evaluated, or upon evaluation, as an incompetent person, for competency to be restored. See Trueblood II, 822 F.3d at 1037.

Thus, the state failed not once or twice but multiple times to follow the mandates of the relevant laws. It failed to follow CrR 3.2 and the presumption of pretrial release without conditions, failed to make the required findings to establish the presumption was rebutted, failed to follow the rules limiting imposition of financial conditions of release to

only specific cases and then imposed the extreme \$1.5 million bail amount on the indigent (and homeless) accused. The state then failed to timely provide a competency evaluation, keeping Mr. Comenout, Jr., in custody during the extended time. Once Mr. Comenout, Jr., was found incompetent, the state failed to follow the rules yet again, forcing him to wait more than an extra month in custody before restoration services are provided. And then, after competency was found, the court again simply entered a \$1.5 million bail order again.

This Court has a duty to say what the law is and serve as a check on the executive branch in the form of DSHS, when it fails to comply. See e.g., Marbury v. Madison, 5 U.S. 91, 2 L.Ed. 60 (1803). The failure to provide timely services to those accused of crimes but suspected to be incompetent is chronic. See Trueblood II, 73 F. Supp. 3d at 1315-17. Other courts have also grappled with these issues. See Oregon Advocacy Center v. Mink, 322 F.3d 1101 (9th Cir. 2003); see also Advocacy Center for Elderly and Disabled v. Louisiana Dept. of Health and Hosp., 731 F. Supp. 2d 603 (E.D. La. 2010). Indeed, the failures are nationwide, with many defendants languishing in jail cells because of critical lack of commitment to provide sufficient funding. See Atayde v. Napa State Hosp, 255 F. Supp. 3d 978, 992 (E.D. Cal. 2017).

Once again, counsel failed in his duties to his client. Mr. Comenout, Jr., was entitled to have the mandates of CrR 3.2 apply and to have timely competency evaluation and restoration. Counsel should have moved to dismiss the case with prejudice or at least without below. See Kidder, 197 Wn. App. at 294. The court had the authority to dismiss

without prejudice, which would have required the state to release Mr. Comenout, Jr., instead of keeping him in custody on a no-bail hold with the time for trial suspended until the state got around to providing the needed services.

This Court should reverse and dismiss the convictions. The state should not be allowed to repeatedly ignore the mandatory rules and statutes. In this case, the failure to follow the mandates of law happened over and over, depriving Mr. Comenout, Jr., of his substantive due process and other rights. This Court should not countenance these continued failures and should reverse and dismiss.

3. THE LEGAL FINANCIAL OBLIGATIONS SHOULD BE STRICKEN UNDER THE CONTROLLING NEW PRECEDENT OF RAMIREZ

On the judgment and sentence was preprinted the following language:

- 2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS:**
The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including 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 280 (Appendix F). In addition, Mr. Comenout, Jr., was ordered to pay a \$100 "DNA Database Fee," and a \$200 "Criminal Filing Fee." CP 281. Also ordered were the requirement for Mr. Comenout, Jr., to "report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan," a requirement for him to pay "collection costs" if any and an order that interest is to be charged from the date of sentencing. CP 281-82.

In Ramirez, supra (Appendix G), the Supreme Court recently held that the changes to our state's legal financial obligation system made by the 2018 Legislature applied to all cases still pending on direct review. App. G at 2. The amendments were made by the Legislature in Engrossed Second Substitute House Bill ("Bill") 1783, and include a total prohibition against "the imposition of certain LFOs on indigent defendants." App. G at 2, 6-7; see Laws of 2018, ch. 269. Further, the Bill eliminates the authority to impose a criminal filing fee of \$200 on an indigent defendant, eliminates "interest accrual" on all nonrestitution LFOs, establishes that the DNA database fee is no longer mandatory in some situations and provided new limits to remedies for failure to pay. App. G at 17-18.

The Ramirez Court examined the Bill and applied the amendments to the petitioner even though the Bill was not enacted until *after* his sentencing and lower appellate court proceedings had occurred. App. G at 17-22. Because the Bill's amendments concerned "the court's ability to impose costs on a criminal defendant following conviction," and because Ramirez' case was still pending on first direct appeal as a matter of right, his case was deemed "not yet final under RAP 12.7" when the Bill was enacted. As a result, the Ramirez Court held, the petitioner was entitled to the benefit of the statutory changes, no matter when his sentencing occurred. Id.

Similarly, here, Mr. Comenout, Jr. is entitled to relief from the statutory changes of the Bill. Like Ramirez, he was sentenced well before the Bill was enacted in 2018 and his case is still on direct appeal as this is

his opening brief in that proceeding. He was subjected to the \$200 filing fee and ordered to pay interest, which is no longer authorized under the Bill (Laws of 2018, ch. 269, § 1). He was also ordered to pay a DNA fee but under the new provisions, such a fee is no longer mandatory if the defendant's DNA has been taken before. See Ramirez, App. G. Even if he were not entitled to other relief, Mr. Comenout, Jr., would be entitled to have these conditions and costs stricken under Ramirez. This Court should so hold.

E. CONCLUSION

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

DATED this 9th day of October, 2018.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, Box 176
Seattle, Washington 98115
(206) 782-3353

DECLARATION OF SERVICE BY EFILING/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 Opening Brief to opposing counsel VIA this Court's upload service, to Pierce County Prosecutor's Office, and to Mr. Comenout, Jr., by depositing a true and correct copy into first-class postage prepaid, at the following address: Lee Comenout, Jr., DOC 369473, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362.

DATED this 9th day of October, 2018,

/S/Kathryn A. Russell Selk
KATHRYN RUSSELL SELK, No. 23879
1037 Northeast 65th St., Box 176
Seattle, WA. 98115
(206) 782-3353

APPENDIX A

**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE**

STATE OF WASHINGTON,

vs.
LEE ALLEN COMENOUT, Jr

Plaintiff
|
Defendant

No. 16-1-02472-8

**ORDER ESTABLISHING CONDITIONS OF
RELEASE PENDING PURSUANT TO CrR 3.2
(orecrp)**

Arresting Agency : LAKEWOOD POLICE DEPARTMENT

Incident Number : 1616701522

Charges

- ROBBERY IN THE FIRST DEGREE
- ROBBERY IN THE FIRST DEGREE
- ATTEMPTED ROBBERY IN THE FIRST DEGREE

THE COURT HAVING found probable cause, establishes the following conditions that shall apply pending in this cause number or until entry of a later order; IT IS HEREBY ORDERED

Release Conditions:

- Defendant shall be released upon execution of a surety bond in the amount of \$1,500,000.00 or posting cash in the amount of \$1,500,000.00.
*****NEW BAIL*****
- Bail issue reserved.

Conditions that take effect upon release from custody:

- Defendant is to reside/stay only at this address **Disclose address at PTC or upon release**
- Travel is restricted to the following counties **Pierce, King, Thurston, and Kitsap Counties.**
- The defendant is not to drive a motor vehicle without a valid license and insurance.

Conditions that take effect immediately:

- Defendant is to have no violations of the criminal laws of this state, any other state, any political subdivision of this state or any other state, or the United States, during the period of his/her release.

- That the Defendant have no contact with the alleged victim(s), witness(es), co-defendant(s). and/or **EDWARD AMOS COMENOUT, M. Namkung, C. Namkung and J. Namkung and the Olympic Grocery, O. Corro-Garcia and his son and J. and A. Albrecht.** This includes any attempt to contact, directly or indirectly, by telephone and/or letter at their residence or place of work.
- Defendant shall not possess weapons or firearms.
- Defendant shall not consume or possess alcohol, marijuana, nonprescription drugs or knowingly associate with any known drug users or sellers, except in treatment
- Remain in contact with the defense attorney.
- Attachment of additional conditions of release: **Immediately clear warrants in Puyallup, Fife and Toppenish.**
- Other: **DOC Hold.**
- The said defendant is hereby committed to the custody of the arresting law enforcement agency to be detained by the same until the above-stated conditions of release have been met.

Dated : June 17, 2016.

Electronically Signed By
/s/MEAGAN M. FOLEY
JUDGE/COMMISSIONER

I agree and promise to appear before this court or any other place as this court may order upon notice delivered to me at my address stated below. I agree to appear for any court date set by my attorney and I give my attorney full authority to set such dates. I understand that my failure to appear for any type of court appearance will be a breach of these conditions of release and a bench warrant may be issued for my arrest. I further agree and promise to keep my attorney and the office of Prosecuting Attorney informed of any change of either my address or my telephone number.

I have read the above conditions of release and any other conditions of release that may be attached. I agree to follow said conditions and understand that a violation will lead to my arrest. FAILURE TO APPEAR AFTER HAVING BEEN RELEASED ON PERSONAL RECOGNIZANCE OR BAIL IS AN INDEPENDENT CRIME, PUNISHABLE BY 5 YEARS IMPRISONMENT OR \$10,000 OR BOTH (RCW 10.19).

Address: **908 RIVER RD STE B PUYALLUP, WA 98371-4169 (mailing) SA**

Phone: **(253) 348-8037**

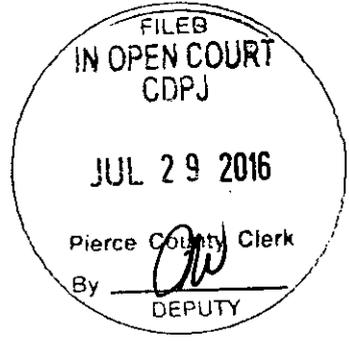
Defendant unable to sign:
shackled

APPENDIX B

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16-1-02472-8 47337737 ORECRP 08-02-16



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 16-1-02472-8

vs.

Lee Allen Comenaut, Jr.
Defendant.

ORDER ESTABLISHING CONDITIONS
PENDING TRIAL PURSUANT TO CrR 3.2

Rebb 1° (x2)
Att. Rebb. 1°

THE COURT HAVING found probable cause, establishes the following conditions that shall apply pending trial in this cause number or until entry of a later order; IT IS HEREBY ORDERED

Release conditions:

- Defendant is to be held in custody without bail (no bail hold). 10.77
- Defendant is to be released on personal recognizance.
- Defendant is to be released upon execution of a surety bond in the amount of \$ _____ or posting of cash in the amount of \$ _____.

Conditions that take effect upon release from custody:

- Defendant is released to the supervision of _____.
- Defendant is to reside/stay only at this address _____.
- Travel is restricted to Pierce, King, Thurston, and Kitsap Counties.
- Defendant is not to drive a motor vehicle without a valid license and insurance.
- Defendant is to keep in contact with defense attorney.

Conditions that take effect immediately:

- Defendant is to have no violations of the criminal laws of this state, any other state, any political subdivision of this state or any other state, or the United States, during the period of his/her release.

0101
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Defendant is to have no contact with the victim(s) or witness(es), to wit:

This includes any attempt to contact, directly or indirectly, by telephone and/or letter.
 Pierce County jail shall monitor phone calls made by the defendant to insure compliance with this directive.

Defendant is to have no contact with minor children (under age 18) and is not to be on school grounds or playgrounds, except for:

Defendant is to report to the Pierce County jail by _____ for administrative booking procedure.

Defendant shall not possess weapons or firearms.

Defendant shall not consume or possess alcohol or non-prescription drugs, or associate with any known drug users or sellers.

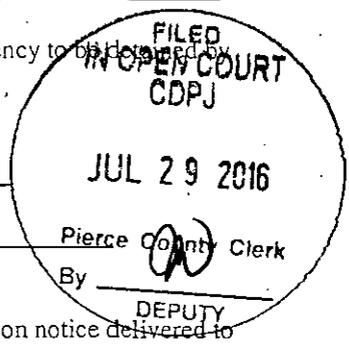
Additional conditions of release are included in an attachment:
 BTC Protective Order Other _____

Other all other conditions remain in effect (see previous order)

Defendant is hereby committed to the custody of the arresting law enforcement agency to be held by the same until the above stated conditions of release have been met.

DATED this 29 day of July, 2016

JUDGE M E S
MICHAEL E. SCHWARTZ



I agree and promise to appear before this court or any other place as this court may order upon notice delivered to me at my address stated below or upon notice to my attorney. I agree to appear for any court date set by my attorney and I give my attorney full authority to set such dates. I understand that my failure to appear for any type of court appearance will be a breach of these conditions of release and a bench warrant may be issued for my arrest. I further agree and promise to keep my attorney or, if I am representing myself, the Office of the Prosecuting Attorney-informed of any change of either my address or my telephone number.

I have read the above conditions of release and any other conditions of release that may be attached. I agree to follow said conditions and understand that a violation will lead to my arrest. FAILURE TO APPEAR AFTER HAVING BEEN RELEASED ON PERSONAL RECOGNIZANCE OR BAIL IS AN INDEPENDENT CRIME, PUNISHABLE BY 5 YEARS IMPRISONMENT OR \$10,000, OR BOTH (RCW 10.19).

Address: _____ Phone: _____

10.77 - F/C
DEFENDANT

DATE

APPENDIX C



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 16-1-02472-8

vs.

LEE ALLEN COMENOUT, JR.,

ORDER FOR EXAMINATION BY WESTERN STATE HOSPITAL OR QUALIFIED EXPERT (Preliminary Evaluation)

Defendant.

THIS MATTER coming on in open court upon the motion of the COURT/STATE/DEFENDANT, and there being reason to doubt the defendant's competency to proceed and/or there may be entered a mental defense to one or more charges, and the court being duly advised, now, therefore, IT IS HEREBY

ORDERED, under the authority of RCW 10.77.060, that defendant, LEE ALLEN COMENOUT, JR, who is charged with the crime(s) of ROBBERY IN THE FIRST DEGREE; ROBBERY IN THE FIRST DEGREE; ATTEMPTED ROBBERY IN THE FIRST DEGREE shall be examined by:

Qualified experts or professional persons on staff at Western State Hospital and are designated by the Secretary of the Department of Social and Health Services, and approved by the prosecuting attorney; or

Qualified experts or professional persons who are not on staff at Western State Hospital but are selected from a panel of experts pre-approved by the court, the prosecuting

1 attorney, and members of the county defense bar.¹ These experts or professional persons shall be
2 compensated by the Department of Social and Health Services.

3 FURTHER,

4 [] Because the court has been advised that the defendant may be developmentally
5 disabled, the expert or professional person must qualify as a developmental disabilities
6 professional.

7 PLACE OF EXAMINATION AND SUBMISSION OF REPORT DEADLINE

8 I. PRELIMINARY EXAMINATION AT PIERCE COUNTY JAIL

9 A preliminary examination shall take place in the Pierce County Jail. If the evaluator
10 conducting the examination at the Pierce County Jail determines that inpatient commitment will
11 be necessary to complete an accurate evaluation, the Pierce County Sheriff's Department or its
12 designee shall transport the defendant to Western State Hospital, within seven days of the date of
13 the evaluation, for a period of confinement not to exceed fifteen days from the time of admission
14 to Western State Hospital.

15 Once the Western State Hospital examination and testing are complete, the Pierce County
16 Sheriff's Department or its designee shall return the defendant to the custody of the Pierce
17 County Jail, unless the defendant has waived his/her presence at the competency hearing (see
18 waiver of presence, *infra*).

19 The evaluator shall then file his/her report to this court in writing and provide copies to
20 the Prosecuting Attorney and Defense Counsel within two working days following the final
21 evaluation of the defendant, unless the court grants further time.

22 If the defendant is released from the Pierce County Jail prior to being transported to
23 Western State Hospital for the examination, the defendant shall contact the staff at Western State
24 Hospital at 253-761-7565 within the next working day following his/her release from jail to
25 schedule an appointment for examination at a facility.

26 II. EXAMINATION AT THE PIERCE COUNTY JAIL

27 [] If an accurate evaluation is accomplished in the Pierce County Jail, the evaluator
28 shall file his/her report to this court and provide copies to the Prosecuting Attorney and Defense

¹ Pursuant to SB 5551 (2013-2014).

1
2 Counsel within 7 working days following the evaluator's receipt of discovery related to the
3 defendant and his/her case, unless the court grants further time.²

4 III. EVALUATION AT WESTERN STATE HOSPITAL WITHOUT
5 PRELIMINARY EVALUATION AT PIERCE COUNTY JAIL

6 [] The defendant shall be committed, inpatient, to Western State Hospital without a
7 preliminary assessment of his/her mental condition at the Pierce County Jail, in the following
8 circumstances:

9 [] The defendant is charged with murder in the first or second
10 degree;

11 [] The court has found it is more likely than not that an evaluation
12 in the jail will be inadequate to complete an accurate evaluation; or

13 [] The court has found an evaluation outside the jail setting is
14 necessary for the health, safety, or welfare of the defendant.

15 In this event, the defendant shall be committed to Western State Hospital for a period of
16 up to fifteen days from the date of admission to Western State Hospital.

17 The defendant is to be transported and admitted to Western State Hospital no later than
18 seven days from the date of this order.

19 The Pierce County Sheriff's Department or its designee shall transport the defendant to
20 Western State Hospital for the purposes set forth above and at the end of the period of
21 examination, the Pierce County Sheriff's Department or its designee shall return the defendant to
22 the Pierce County Jail to be held pending further proceedings, unless the defendant has waived
23 his/her presence at the competency hearing (see waiver of presence, *infra*).

24 The evaluator shall file his/her report with this court and provide copies to the
25 Prosecuting Attorney and Defense Counsel within two days of the final evaluation of the
26 defendant.

27 IV. OUT OF CUSTODY EXAMINATION

28 [] Because the defendant is currently out of custody, the defendant and/or the
defendant's attorney shall contact the staff at Western State Hospital at 253-761-7565 within the
next working day following the date of this order to schedule an appointment for examination.

² Pursuant to SB5551 (2013-2014).

1
2 The examination shall occur, and the report submitted to this court and copies provided to
3 the Prosecuting Attorney and defense counsel, within twenty-one days of the receipt of this
4 order, the charging documents and the discovery regarding the defendant and his/her charges,
5 unless the court grants further time.

6 WAIVER OF DEFENDANT'S PRESENCE WHEN DEFENDANT IS COMMITTED TO
7 WESTERN STATE HOSPITAL

8 [] In the event the evaluator recommends a continuation of the stay of criminal
9 proceedings in order to complete an accurate evaluation, and/or the defendant remains
10 incompetent and there is no remaining restoration period as currently ordered by the court, all
11 parties agree to waive the presence of the defendant, or to his/her remote participation, at a
12 subsequent competency hearing, provided the hearing is held prior to the expiration of the
13 currently authorized commitment period.

14 NOTICE TO DEFENSE COUNSEL AND OPPORTUNITY TO BE PRESENT AT
15 EXAMINATION

16 Defense Counsel shall be notified by the evaluator of the time, place and procedure of
17 any examination of the defendant and shall be given the opportunity to be present at such
18 examination. Defense Counsel may be contacted at 253-798-7863.

19 EVALUATOR'S REPORT

20 The staff of Western State Hospital shall file the evaluator's report with the undersigned
21 Court, and provide copies to the Prosecuting Attorney and Defense Counsel and others as
22 designated in RCW 10.77.060 and 10.77.065. The report of the examination shall include the
23 following pursuant to RCW 10.77.060:

24 A description of the nature of the evaluation: Competency

25 A diagnosis or description of the current mental status of the defendant: _____

26 **COMPETENCY:** An opinion as to the defendant's capacity to understand the
27 proceedings and to assist in defendant's own defense.

28 [] **MENTAL STATE:** The capacity of the defendant to have the particular mental state of
mind which is an element of the offense(s) charged, as listed below.

OFFENSE _____	MENTAL STATE _____

An opinion as to whether the defendant should be evaluated by a County Designated Mental Health Professional under RCW 71.05.

The following opinions are to be given only if the evaluator or court determines the defendant is competent to stand trial:

[] SANITY: an opinion as to the extent, at the time of the offense, as a result of mental disease or defect, the defendant was unable to either perceive the nature and quality of the acts with which the defendant is charged, or to know right from wrong with reference to those acts (only required when the defendant has indicated his or her intention to rely on the defense of insanity and has provided an evaluation and report by an expert or professional person concluding that the defendant was criminally insane at the time of the alleged offense):

[] SAFETY: An opinion as to whether the defendant is a substantial danger to other persons or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons;

The Staff is further required to give an opinion as to whether further examination and testing is required.

IT IS FURTHER

ORDERED for the purpose of conducting the examination, the appointed expert and his/her staff is granted access to all of the defendant's records held by any mental health, medical, educational or correctional facility that relate to the present or past mental emotional, or physical condition of the defendant, whether they are located at the Pierce County Jail, at Western State Hospital or any other clinic or hospital.

IT IS FURTHER

ORDERED that this action be stayed during this examination period and until this court enters an order finding the Defendant to be competent to proceed. The next hearing date is

8-10-16

FILED 0178 13250 8/3/2016

DONE IN OPEN COURT this 29 day of July, 2016

Presented by:

TERRY LANE

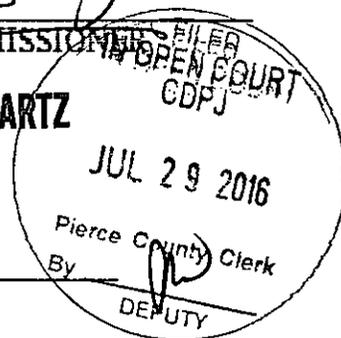
Deputy Prosecuting Attorney

Phone Number: (253) 798-4862

WSB# 16708

JUDGE/COMMISSIONER

MICHAEL E. SCHWARTZ



Approved as to Form, Copy Received:

MARK T. QUIGLEY

Attorney for Defendant

Phone Number: 253-798-7863 FAX Number 253-798-6715

WSB# 14496

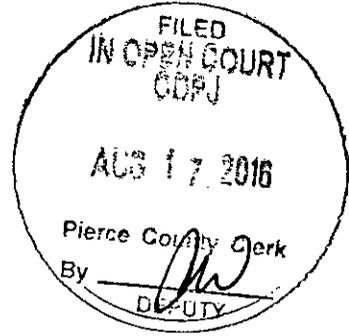
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APPENDIX D

OD
1/C



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 16-1-02472-8

vs.

LEE ALLEN COMENOUT, JR,

ORDER OF COMMITMENT TO
WESTERN STATE HOSPITAL
(COMPETENCY RESTORATION)

Defendant.

THIS MATTER coming on in open court upon the motion of the State, and there being reason to doubt the defendant's competency to understand the proceedings against defendant and assist in defendant's own defense, and the court having examined the report of Judith L. Kirkeby, Ph.D. ABPP, Western State Hospital, dated August 16, 2016, and the court being in all things duly advised, Now, Therefore, **IT IS HEREBY**

ORDERED that the defendant, LEE ALLEN COMENOUT, JR, be committed to Western State Hospital for a period not to exceed:

Ninety (90) days where the criminal charge is classified as a class A or class B violent felony;

Forty-five (45) days for all other felonies

1
2 **The commitment will occur without further order of the court and the defendant will**
3 **undergo evaluation and treatment to restore competency to proceed to trial, to include the**
4 **administration of psychotropic medications, including antipsychotics, to the defendant as deemed**
5 **medically appropriate by the staff of Western State Hospital, against the defendant's will if**
6 **necessary, as the court finds that there is no less intrusive form of treatment which is likely to**
7 **restore the defendant's competency to stand trial; IT IS FURTHER**

8
9 **ORDERED that the staff of Western State Hospital shall report to the undersigned court**
10 **in the manner specified in RCW 10.77 as to a description of the nature of the examination and**
11 **treatment, a diagnosis of mental condition, an opinion as to the defendant's capacity to**
12 **understand the proceedings against defendant and to assist in defendant's own defense, and an**
13 **opinion as to whether defendant's mind was so diseased or affected that defendant was unable to**
14 **perceive the moral qualities of the act with which defendant is charged and was unable to tell**
15 **right from wrong with reference to the particular acts charged. The staff is further required to**
16 **give an opinion as to whether further examination, testing and treatment is required. The report**
17 **is to be submitted in writing to this court within ten days of the expiration of the period of**
18 **commitment unless further time is requested, and copies are to be sent to the Prosecuting**
19 **Attorney, the Defense Counsel, and the Jail Physician; and, IT IS FURTHER**
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ORDERED that upon completion of said period of evaluation and treatment, or when defendant has regained competency, whichever occurs first, the defendant shall be returned to the custody of the Sheriff of Pierce County, to be held pending further proceedings herein.

DONE IN OPEN COURT this 17 day of August, 2016.

M. A-5
JUDGE/COMMISSIONER
MICHAEL E. SCHWARTZ

Presented by:

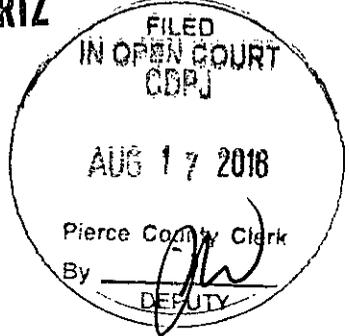
[Signature]

TERRY LANE
Deputy Prosecuting Attorney
WSB# 16708

Approved as to Form:

[Signature]

MARK T. OUGLEY
Attorney for Defendant
WSB# 14496



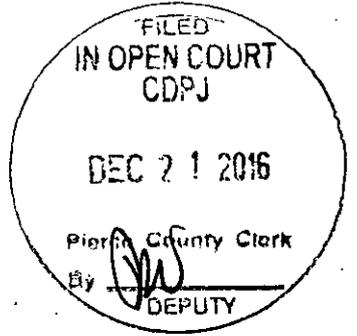
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APPENDIX E

0103



16-1-02472-8 48132078 ORECRP 12-23-16



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 16-1-02472-8

vs.

Lee Allen Comerout Jr.

Defendant.

ORDER ESTABLISHING CONDITIONS
PENDING TRIAL PURSUANT TO CrR 3.2

Rob 1° (acts), AH. Rob 1°

THE COURT HAVING found probable cause, establishes the following conditions that shall apply pending trial in this cause number or until entry of a later order; IT IS HEREBY ORDERED

Release conditions:

- Defendant is to be held in custody without bail (no bail hold).
- Defendant is to be released on personal recognizance.
- Defendant is to be released upon execution of a surety bond in the amount of \$ 1,500,000 or posting of cash in the amount of \$ 1,500,000.

Conditions that take effect upon release from custody:

- Defendant is released to the supervision of _____.
- Defendant is to reside/stay only at this address Disclose upon release.
- Travel is restricted to Pierce, King, Thurston, and Kitsap Counties.
- Defendant is not to drive a motor vehicle without a valid license and insurance.
- Defendant is to keep in contact with defense attorney.

Conditions that take effect immediately:

- Defendant is to have no violations of the criminal laws of this state, any other state, any political subdivision of this state or any other state, or the United States, during the period of his/her release.

12/27/2016 15243

0104
15243
12/27/2016

Defendant is to have no contact with the victim(s) or witness(es), to wit:
Edward Amos Comerout, M. Namkung, C. Namkung, J. Namkung & the olympic
Grocery,

This includes any attempt to contact, directly or indirectly, by telephone and/or letter.
 Pierce County jail shall monitor phone calls made by the defendant to insure compliance with this directive.

Defendant is to have no contact with minor children (under age 18) and is not to be on school grounds or playgrounds, except for:
O. Comro-Garcia, son, and J. A. Albrechts

Defendant is to report to the Pierce County jail by _____ for administrative booking procedure.

Defendant shall not possess weapons or firearms.

Defendant shall not consume or possess alcohol or non-prescription drugs, or associate with any known drug users or sellers.

Additional conditions of release are included in an attachment:

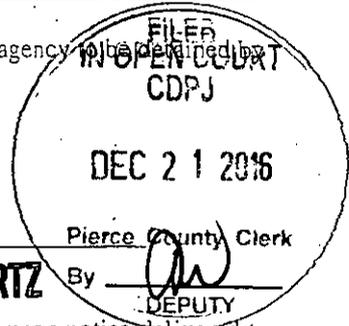
BTC Protective Order Other _____

Other 1.) clear warrants in Puyallup, Fife, and Toppenish.

Defendant is hereby committed to the custody of the arresting law enforcement agency to be detained by the same until the above stated conditions of release have been met.

DATED this 21 day of December, 2016.

M. Schwartz
JUDGE
MICHAEL E. SCHWARTZ



I agree and promise to appear before this court or any other place as this court may order upon notice delivered to me at my address stated below or upon notice to my attorney. I agree to appear for any court date set by my attorney and I give my attorney full authority to set such dates. I understand that my failure to appear for any type of court appearance will be a breach of these conditions of release and a bench warrant may be issued for my arrest. I further agree and promise to keep my attorney or, if I am representing myself, the Office of the Prosecuting Attorney-informed of any change of either my address or my telephone number.

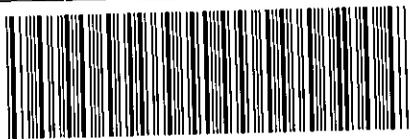
I have read the above conditions of release and any other conditions of release that may be attached. I agree to follow said conditions and understand that a violation will lead to my arrest. FAILURE TO APPEAR AFTER HAVING BEEN RELEASED ON PERSONAL RECOGNIZANCE OR BAIL IS AN INDEPENDENT CRIME, PUNISHABLE BY 5 YEARS IMPRISONMENT OR \$10,000, OR BOTH (RCW 10.19).

Address: _____ Phone: _____

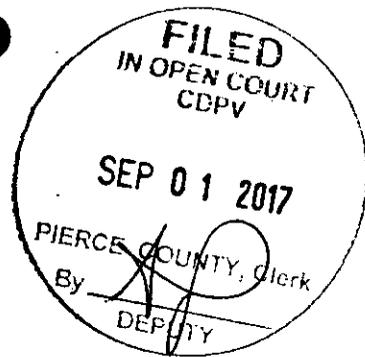
[Signature]
DEFENDANT

12-21-16
DATE

APPENDIX F



16-1-02472-8 49856693 JDSWCD 09-05-17



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 16-1-02472-8

vs.

LEE ALLEN COMENOUT, JR,

Defendant.

WARRANT OF COMMITMENT

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

X 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

WARRANT OF COMMITMENT - I

Handwritten: fwd to Sheriff 9/5

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9/5/2017

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 9/1/17

By direction of the Honorable [Signature]
JUDGE

Frank E. Cuthbertson

KEVIN STOCK
CLERK

By: [Signature]
DEPUTY CLERK



CERTIFIED COPY DELIVERED TO SHE [Signature]
Date _____ By _____ Deputy

STATE OF WASHINGTON

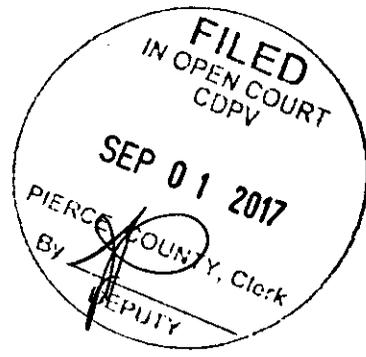
ss:

County of Pierce

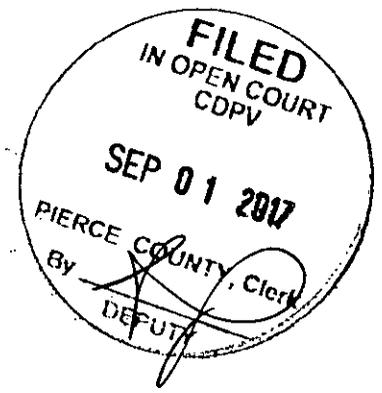
I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office. IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____.

KEVIN STOCK, Clerk
By: _____ Deputy

ajm



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 16-1-02472-8

vs.

JUDGMENT AND SENTENCE (JS)

LEE ALLEN COMENOUT, JR

Defendant.

- Prison
- RCW 9.94A.712&9.94A.507 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Alternative to Confinement (ATC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8
- Juvenile Decline Mandatory Discretionary

SID: WA24494963

DOB: 12/16/88

I HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 08/02/17

by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	ROBBERY IN THE FIRST DEGREE/FASE (AAA30)	9A.56.190 9A.56.200(1)(b)(i) (ii)(b) 9.94A.535(2)(c)	FASE	06/15/16	LWPD 1616701522
II	ASSAULT IN THE SECOND DEGREE/FASE (E53)	9A.36.021	FASE	06/15/16	LWPD 1616701522
IV	ROBBERY IN THE FIRST DEGREE/FASE (AAA30)	9A.56.190 9A.56.200(1)(b)(i) (ii)(b)	FASE	06/15/16	LWPD 1616701522

17-9-07407-6

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
V	ROBBERY IN THE FIRST DEGREE/FASE (AAA30)	9.94A.535(2)(c) 9A.56.190 9A.56.200(i)(a)(i)(ii)(b) 9.94A.535(2)(c)	FASE	06/15/16	LWPD 1616701522

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the SECOND AMENDED Information

- [X] A special verdict/finding for use of firearm was returned on Count(s) I, II, IV, V RCW 9.94A.602, 9.94A.533.
- [] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- [] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	RECKLESS DRIVING	05/29/05	YAKIMA DIST CT, WA	07/18/05	A	N/A
2	MINOR OP VEH AFTER VEH	06/25/06	YAKIMA DIST CT, WA	05/14/06	A	N/A
3	DWLS 2	06/25/06	YAKIMA DIST CT, WA	05/14/06	A	N/A
4	MP	03/10/09	YAKIMA DIST CT, WA	04/27/08	A	N/A
5	DWLS 2	03/10/09	YAKIMA MUNICT, WA	07/30/08	A	N/A
6	DUI	03/10/09	YAKIMA DIST CT, WA	02/11/09	A	N/A
7	DWLS 2	03/10/09	YAKIMA DIST CT, WA	02/11/09	A	N/A
8	DWLS 1	10/13/09	YAKIMA DIST CT, WA	06/04/09	A	N/A
9	DWLS 2	02/25/09	PUY MUNICT, WA	07/03/09	A	N/A
10	UPFGLM	02/25/10	PUY MUNICT, WA	02/19/10	A	N/A
11	DWLS 1	02/09/12	PUY MUNICT, WA	04/22/11	A	N/A
12	OPER VEH W/OIGN INTERLOCK	02/09/12	PUY MUNICT, WA	04/22/11	A	N/A
13	DWLS 1	01/03/12	LAKWOOD MUNICT, WA	09/04/11	A	N/A
14	DWLS 1	10/10/13	TAC MUNICT, WA	10/08/12	A	N/A
15	OPER VEH W/OIGN INTERLOCK	10/10/13	TAC MUNICT, WA	10/08/12	A	N/A
16	HIT & RUN ATT VEH NON INJURY	05/22/13	PIERCE, WA	02/27/13	A	N/A
17	DWLS 1	05/22/13	PIERCE, WA	02/27/13	A	N/A
18	RECKLESS DRIVING	05/22/13	PIERCE, WA	02/27/13	A	N/A
19	THEFT 3	05/28/13	PUYALLUP MUNICT, WA	05/24/13	A	N/A
20	POSS ANOTHER ID	10/08/13	PIERCE, WA	09/18/13	A	N/A
21	UPCS - HEROIN	10/08/13	PIERCE, WA	09/18/13	A	NV
22	POSS DANG WFN	09/11/14	FIFE MUNICT, WA	09/10/14	A	N/A
23	UPCS - HEROIN	11/03/14	PIERCE, WA	10/16/14	A	NV
24	ESCAPE 2	07/23/15	PIERCE, WA	11/12/14	A	NV

[] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

JUDGMENT AND SENTENCE (JS)

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9	IX	129 TO 171 MONTHS	60 MONTHS - FASE	189 TO 230 MONTHS	LIFE/ \$50,000
II	9	IV	63 TO 84 MONTHS	36 MONTHS - FASE	99 TO 120 MONTHS	10 YRS/ \$20,000
IV	9	IX	129 TO 171 MONTHS	60 MONTHS - FASE	189 TO 230 MONTHS	LIFE/ \$50,000
V	9	IX	129 TO 171 MONTHS	60 MONTHS - FASE	189 TO 230 MONTHS	LIFE/ \$50,000

2.4 **EXCEPTIONAL SENTENCE.** Substantial and compelling reasons exist which justify an exceptional sentence:

within below the standard range for Count(s) _____.

above the standard range for Count(s) _____.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including 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.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 **FELONY FIREARM OFFENDER REGISTRATION.** The defendant committed a felony firearm offense as defined in RCW 9.41.010.

The court considered the following factors:

the defendant's criminal history.

whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.

evidence of the defendant's propensity for violence that would likely endanger persons.

other: _____

[] The court decided the defendant [] should [] should not register as a felony firearm offender.

III JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 [] The court DISMISSES Counts _____ [] The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN

Restitution to: LIBERIA MUTUAL INSURANCE CO.
\$ 500.00 Restitution to: CHONG and MYOUNG NAMKUNG
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV \$ 500.00 Crime Victim assessment

DNA \$ 100.00 DNA Database Fee

PUB \$ _____ Court-Appointed Attorney Fees and Defense Costs

FRC \$ 200.00 Criminal Filing Fee

FCM \$ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ 800.00 TOTAL

The above total does not include all restitution 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.

[] is scheduled for _____

RESTITUTION. Order Attached

[] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(S).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ _____ per month commencing _____ RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.640

4.3 NO CONTACT
The defendant shall not have contact with ① - OSCAR CORPO-GARCIA ④ - CHONG NAMKUNG
② - LEONARDO CORPO ⑤ - JUNE NAMKUNG
③ - MYOUNG NAMKUNG (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence).
10 years for victims ①, ②, ③, ④

[] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER: Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4a Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days unless forfeited by agreement in which case no claim may be made. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

0075
11958
9/5/2017

129 months on Count I 129 months on Count V
63 months on Count II _____ months on Count _____
129 months on Count IV _____ months on Count _____

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 months on Count No I 60 months on Count No V
36 months on Count No II _____ months on Count No _____
60 months on Count No IV _____ months on Count No _____

Sentence enhancements in Counts ^{I, II, IV, V} shall run
 concurrent consecutive to each other.
 Sentence enhancements in Counts ^{I, II, IV, V} shall be served
 flat time subject to earned good time credit

Actual number of months of total confinement ordered is: 345

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) **Credit for Time Served.** The defendant shall receive credit for eligible time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. ~~The jail shall compute time served.~~

CREDIT COMPUTED AS: 442 days, MINUS TIME SERVED FOR DOC VIOLATIONS

4.6 [] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months;

Count _____ for _____ months;

Count _____ for _____ months;

[X] COMMUNITY CUSTODY (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

The defendant shall be on community custody for:

Count(s) _____ 36 months for Serious Violent Offenses

Count(s) I, II, IV, V 18 months for Violent Offenses

Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

(B) While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit to electronic monitoring if imposed by DOC. The defendant's residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The court orders that during the period of supervision the defendant shall:

[] consume no alcohol.

[X] have no contact with: Oscar Corro Garcia, Leonardo Corro, Myoung Namkung, and Soone Namkung, Cabne Namkung,

[] remain [] within [] outside of a specified geographical boundary, to wit: _____

[] not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

[] participate in the following crime-related treatment or counseling services: _____

[] undergo an evaluation for treatment for [] domestic violence [] substance abuse

[] mental health [] anger management and fully comply with all recommended treatment.

[] comply with the following crime-related prohibitions: _____

[] Other conditions: _____

[] For sentences imposed under RCW 9.94A.702, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 [] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER (known drug trafficker)** RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW

9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 RESTITUTION HEARING:

[] Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.

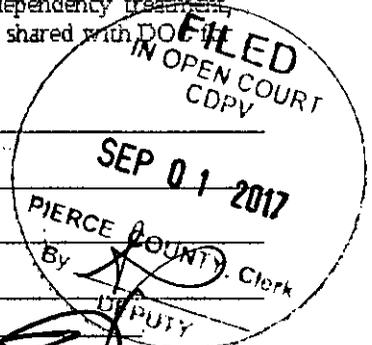
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5.8 [X] The court finds that Count I, II is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: _____

DONE IN OPEN COURT and in the presence of the defendant this date: _____



[Signature]

JUDGE
Print name: _____

[Signature]

Cuthbertson

Frank E. Cuthbertson

Deputy Prosecuting Attorney
Print name: TOMMY LANE
WSB # 16708

Attorney for Defendant
Print name: Mark Quigley
WSB # 14496

Refused to sign
Defendant
Print name: Lee Comerout

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-

16-1-02472-8
9/5/2017 11:58

CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 16-1-02472-8

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

IDENTIFICATION OF COURT REPORTER

TIM REGIS

Court Reporter

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APPENDIX G

2018 WL 4499761
Only the Westlaw citation is currently available.
Supreme Court of Washington.

STATE of Washington, Respondent,
v.
David Angel RAMIREZ, Petitioner.

NO. 95249-3
|
Argued June 26, 2018
|
Filed September 20, 2018

Appeal from Lewis County Superior Court, (No. 15-1-00520-5), Hon. Richard Lynn Brosey,
Judge

Attorneys and Law Firms

Kathleen A. Shea, Washington Appellate Project, 1511 3rd Avenue, Suite 610, Seattle, WA
98101-3647, for Petitioner.

Jessica L. Blye, Lewis County Prosecutor 's Office, 345 W. Main Street, Chehalis, WA 98532-
4802, for Respondent.

Opinion

STEPHENS, J.

*1 ¶ 1 In State v. Blazina, 182 Wash. 2d 827, 839, 344 P.3d 680 (2015) , we held that under former RCW 10.01.160(3) (2015), trial courts have an obligation to conduct an individualized inquiry into a defendant 's current and future ability to pay before imposing discretionary legal financial obligations (LFOs) at sentencing. This case provides an opportunity to more fully describe the nature of such an inquiry. An adequate inquiry must include consideration of the mandatory factors set forth in Blazina, including the defendant 's incarceration and other debts, and the court rule GR 34 criteria for indigency. Id. at 838, 344 P.3d 680 . The trial court should also address what we described in Blazina as other “important factors ” relating to the defendant 's financial circumstances, including employment history, income, assets and other financial resources, monthly living expenses, and other debts. Id.

¶ 2 The trial court in David A. Ramirez's case failed to conduct an adequate individualized inquiry before imposing LFOs on Ramirez. While this *Blazina* error would normally entitle Ramirez to a resentencing hearing on his ability to pay discretionary LFOs, such a limited resentencing is unnecessary in this case. Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), which amended two statutes at issue and now prohibits the imposition of certain LFOs on indigent defendants, applies prospectively to Ramirez's case on appeal. We reverse the Court of Appeals and remand for the trial court to strike the improperly imposed LFOs from Ramirez's judgment and sentence.

FACTS AND PROCEDURAL HISTORY

¶ 3 A jury convicted Ramirez of third degree assault and possession of a controlled substance, and found by special verdict that he committed the assault with sexual motivation and displayed an egregious lack of remorse. Clerk's Papers (CP) at 63-66.

¶ 4 At sentencing, the State sought an exceptional sentence of 10 years based on Ramirez's prior record and offender score. 2 Verbatim Report of Proceedings (Mar. 7, 2016) (VRP) at 346. Following the State's argument for imposing an exceptional sentence, Ramirez took the opportunity to directly address the trial court. Ramirez explained to the court that despite the State's representations, he "was doing everything right" before his arrest. *Id.* at 360. Ramirez shared that prior to his arrest, he was working a minimum wage job at Weyerhaeuser as part of a "temporary service team" and paying all his household bills, including a DirecTV subscription that included Seattle Seahawks games. *Id.* at 359-60, 362-63. Ramirez had opened a bank account for the first time in his life, was planning on getting his driver's license, and had moved into his own apartment with the help of his wife. *Id.* at 360, 362. Ramirez discussed these favorable aspects of his life in an effort to show that despite his criminal history, he did not deserve an exceptional sentence. Suppl. Br. of Pet'r at 3. He lamented that because of his drug relapse and arrest, "I missed out on all of that." VRP at 363.¹

¹ Ramirez's full statement was, "I missed out on all of that because I screwed up before even the first Seahawk game. That was the weekend that I screwed up. It was the Saturday before the first Seahawk game." VRP at 363.

*2 ¶ 5 The trial court sentenced Ramirez to five years for the third degree assault conviction and two years for possession of a controlled substance, to be served consecutively. *Id.* at 372-73. The trial court also imposed \$ 2,900 in LFOs, including a \$500 victim assessment fee, a \$100 DNA (deoxyribonucleic acid) collection fee, a \$200 criminal filing fee, and discretionary LFOs of \$2,100 in attorney fees, and set a monthly payment amount of \$25. *Id.* at 375-76. After the court announced the sentence, Ramirez presented a notice of appeal and a motion for an order of

indigency, which the court granted. *Id.* at 373; Suppl. CP at 1-4. According to the financial statement in his declaration of indigency, Ramirez had no source of income or assets and no savings, and owed more than \$10,000 at the time of sentencing (apparently previously imposed court costs and fees). Suppl. CP at 2-4.

¶ 6 Prior to imposing LFOs, the trial court asked only two questions relating to Ramirez's current and future ability to pay, both of which were directed to the State. First, the court asked, "And when he is not in jail, he has the ability to make money to make periodic payments on his LFOs, right?" VRP at 348. The State responded that Ramirez had the ability to pay his LFOs "[w]hen he's not in jail and when he is in jail," noting that Ramirez could work while incarcerated. *Id.* The trial court then asked the State to once more confirm that LFOs were appropriate in Ramirez's case: "But as far as you are concerned, the LFOs should be imposed." *Id.* The State answered, "Yes." *Id.*

¶ 7 The trial court did not directly ask Ramirez or his counsel about his ability to pay at any point during sentencing. The only statement made by Ramirez concerning his ability to pay came after the trial court announced its decision to impose discretionary costs. After finding that Ramirez had "the ability to earn money and make small payments on his financial obligations," the court listed the specific costs imposed and ordered Ramirez to pay "25 bucks a month starting [in] 60 days." *Id.* at 375-76. Ramirez then asked, "How am I going to do that from inside?" *Id.* at 376. Ramirez's counsel responded, "I will explain." *Id.* The discussion then moved on to a different subject.²

² Ramirez's counsel made only one mention of LFOs, in correcting the trial court's original estimate of the amount of attorney fees. The court initially stated that these discretionary costs totaled \$900, but Ramirez's counsel clarified that \$2,100 was the correct amount. VRP at 375.

¶ 8 On appeal, Ramirez argued that the trial court failed to make an adequate individualized inquiry into his ability to pay before imposing discretionary LFOs, contrary to *Blazina*, 182 Wash.2d at 837-38, 344 P.3d 680.³ In a 2-1 unpublished opinion, Division Two of the Court of Appeals affirmed the trial court, holding that the court "conducted an adequate individualized inquiry and did not err in imposing the discretionary LFOs." *State v. Ramirez, No. 48705-5-II*, slip op. at 13, 2017 WL 4791011 (Wash. Ct. App. Oct. 24, 2017) (unpublished), <https://www.courts.wa.gov/opinions/pdf/D2%2048705-5-II%20Unpublished%20Opinion.pdf>. In reviewing the trial court's decision to impose discretionary LFOs on Ramirez, the Court of Appeals majority applied an overall abuse of discretion standard; it cited the information offered by Ramirez in his statement to the trial court as sufficient grounds for finding Ramirez able to pay LFOs. *Id.* at 12-13.

³ Ramirez's appeal additionally raised several guilt-phase claims of error, which the Court of Appeals rejected. *State v. Ramirez, No. 48705-5-II*, slip op. at 7-11, 13-15, 2017 WL 4791011 (Wash. Ct. App. Oct. 24, 2017) (unpublished), <https://www.courts.wa.gov/opinions/pdf/D2%2048705-5-II%20Unpublished%20Opinion.pdf>. These issues are not before us.

¶ 9 In dissent, Chief Judge Bjorgen argued that the question of whether a trial court made an adequate inquiry into a defendant's ability to pay discretionary LFOs should be reviewed de novo, not for an abuse of discretion. *Id.* at 16 (Bjorgen, C.J., dissenting). Applying the de novo standard, Chief Judge Bjorgen concluded that the trial court's inquiry into Ramirez's financial status fell short of the *Blazina* standards. *Id.* at 19.

*3 ¶ 10 On March 7, 2018, we granted Ramirez's petition for review "only on the issue of discretionary [LFOs]." Order Granting Review, No. 95249-3 (Wash. Mar. 7, 2018). On March 27, 2018, just weeks after we granted Ramirez's petition, House Bill 1783 became law. LAWS OF 2018, ch. 269. House Bill 1783's amendments relate to Washington's system for imposing and collecting LFOs and are effective as of June 7, 2018. House Bill 1783 is particularly relevant to Ramirez's case because it amends the discretionary LFO statute to prohibit trial courts from imposing discretionary LFOs on defendants who are indigent at the time of sentencing. *Id.* at § 6(3).

ANALYSIS

¶ 11 This case concerns Washington's system of LFOs, specifically the imposition of discretionary LFOs on individuals who lack the current and future ability to pay them. State law requires that trial courts consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay discretionary costs. See RCW 10.01.160(3).

¶ 12 We addressed former RCW 10.01.160(3) in *Blazina* and held that the statute requires trial courts to conduct an individualized inquiry into the financial circumstances of each offender before levying any discretionary LFOs. 182 Wash.2d at 839, 344 P.3d 680. As Ramirez's case demonstrates, however, costs are often imposed with very little discussion. We granted review in this case to articulate specific inquiries trial courts should make in determining whether an individual has the current and future ability to pay discretionary costs.

¶ 13 After we granted review, the legislature enacted House Bill 1783, which amends former RCW 10.01.160(3) to categorically prohibit the imposition of any discretionary costs on indigent defendants. LAWS OF 2018, ch. 269, § 6(3). House Bill 1783 also amends the criminal filing fee statute, former RCW 36.18.020(2)(h) (2015), to prohibit courts from imposing the \$200 filing fee on indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h). According to Ramirez's motion for an order of indigency, which the trial court granted, Ramirez unquestionably qualified as indigent at the time of sentencing: Ramirez had no source of income or assets and no savings, and owed more than \$10,000 at the time of sentencing. Suppl. CP at 3-4.

¶ 14 This case presents two issues. The primary issue is whether the trial court conducted an adequate individualized inquiry into Ramirez's ability to pay, as required under *Blazina* and former RCW 10.01.160(3). A separate but related issue is whether House Bill 1783's statutory amendments apply to Ramirez's case on appeal.

I. The Trial Court Did Not Conduct an Adequate Individualized Inquiry into Ramirez's Current and Future Ability To Pay LFOs

¶ 15 The threshold issue in this case is whether the trial court performed an adequate inquiry into Ramirez's present and future ability to pay before imposing discretionary LFOs. In addressing this issue, we must decide what standard of review applies to a trial court's decision to impose discretionary LFOs. The Court of Appeals was seemingly split on this question, with the majority applying an overall abuse of discretion standard and the dissenting judge applying de novo review. We address the proper standard of review before turning to the merits of Ramirez's argument.

A. The Adequacy of the Trial Court's Individualized Inquiry into a Defendant's Ability To Pay Discretionary LFOs Should Be Reviewed De Novo

¶ 16 As Ramirez correctly points out, the question of whether the trial court adequately inquired into his ability to pay discretionary LFOs involves both a factual and a legal component. Suppl. Br. of Pet'r at 16. On the factual side, the reviewing court determines what evidence the trial court actually considered in making the *Blazina* inquiry. Chief Judge Bjorgen aptly observed that the factual determination can be decided by simply examining the record for supporting evidence.⁴ *Ramirez*, slip op. at 17 (Bjorgen, C.J., dissenting). On the legal side, the reviewing court decides whether the trial court's inquiry complied with the requirements of *Blazina*. Both the majority and dissenting opinions below recognized that this legal inquiry merits de novo review. See *id.* at 13 n.4 (“[w]hether or not a trial court makes an individualized inquiry is reviewed de novo”), 17 (Bjorgen, C.J., dissenting) (describing this as “an unalloyed legal question”).

⁴ Ramirez criticizes Chief Judge Bjorgen for embracing a “clearly erroneous” standard of review for factual determinations, based on prior appellate decisions. See Suppl. Br. of Pet'r at 17 & n.6. Ramirez insists that “substantial evidence” is the correct Washington standard, while “clear error” applies in federal courts. *Id.* We believe the distinction is semantic in this context. The very case Ramirez cites as identifying different state and federal standards says, “[W]e review [factual findings] for substantial evidence, which is analogous to the ‘clear error’ test applied by the federal courts.” *Steele v. Lundgren*, 85 Wash. App. 845, 850, 935 P.2d 671 (1997).

*4 ¶ 17 Given their shared recognition that de novo review applies to the question of whether the trial court complied with *Blazina*, the split in the Court of Appeals may be more a difference in emphasis than in substance. *Blazina* establishes what constitutes an adequate inquiry into a defendant's ability to pay under state law, and the standard of review for an issue involving questions of law is de novo. *State v. Hanson*, 151 Wash.2d 783, 784-85, 91 P.3d 888 (2004). Ramirez is correct that the *Blazina* inquiry is similar to other inquiries trial judges make that are subject to de novo review. See Suppl. Br. of Pet 'r at 16-17 (citing *State v. Vicuna*, 119 Wash. App. 26, 30-31, 79 P.3d 1 (2003)) (applying de novo review to determination of whether a conflict exists between attorney and client); *State v. Ramirez-Dominguez*, 140 Wash. App. 233, 239, 165 P.3d 391 (2007) (applying de novo review to determination of whether the defendant knowingly, intelligently, and voluntarily waived his right to a jury trial).

¶ 18 That said, the trial court's ultimate decision whether to impose discretionary LFOs is undoubtedly discretionary. The trial court must balance the defendant's ability to pay against the burden of his obligation, which is an exercise of discretion. *State v. Baldwin*, 63 Wash. App. 303, 312, 818 P.2d 1116 (1991). But, discretion is necessarily abused when it is manifestly unreasonable or based on untenable grounds or reasons. *State v. Stenson*, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997). If the trial court fails to conduct an individualized inquiry into the defendant's financial circumstances, as RCW 10.01.160(3) requires, and nonetheless imposes discretionary LFOs on the defendant, the trial court has per se abused its discretionary power. Stated differently, the court's exercise of discretion is unreasonable when it is premised on a legal error. The focus of Ramirez's argument for de novo review is squarely on the trial court's legal error in failing to conduct an individualized inquiry. Thus, while the State is correct that the abuse of discretion standard of review is relevant to the broad question of whether discretionary LFOs were validly imposed, de novo review applies to the alleged error in this case: the failure to make an adequate inquiry under *Blazina*.

B. The Trial Court's Inquiry into Ramirez's Ability To Pay Discretionary LFOs Was Inadequate under *Blazina*

¶ 19 The legal question before us is whether the trial court's inquiry into Ramirez's current and future ability to pay discretionary LFOs was adequate under *Blazina*. In *Blazina*, we held that former RCW 10.01.160(3) requires the trial court to conduct an individualized inquiry on the record concerning a defendant's current and future ability to pay before imposing discretionary LFOs. 182 Wash.2d at 839, 344 P.3d 680. We explained that “the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry.” *Id.* at 838, 344 P.3d 680. As part of this inquiry, the trial court is required to consider “important factors,” such as incarceration and the defendant's other debts, when determining a defendant's ability to pay. *Id.* Additionally, we specifically instructed courts to look for additional guidance in the comment to court rule GR 34, which lists the ways a person may prove indigent status for the purpose of seeking a waiver of filing fees and surcharges. *Id.*; *City*

of *Richland v. Wakefield*, 186 Wash.2d 596, 606-07, 380 P.3d 459 (2016). As we further clarified, “if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.” *Blazina*, 182 Wash.2d at 839, 344 P.3d 680.

¶ 20 Here, the record shows that the trial court asked only two questions concerning Ramirez’s ability to pay LFOs, both of which were directed to the State. First, the court asked, “And when he is not in jail, he has the ability to make money to make periodic payments on his LFOs, right?” VRP at 348. The State responded, “When he's not in jail and when he is in jail,” noting that Ramirez could work while incarcerated. *Id.* The court then asked the State for clarification on the LFO issue: “But as far as you are concerned, the LFOs should be imposed.” *Id.* In response, the State simply answered, “Yes.” *Id.* The record reflects that these two questions, directed to the State, are the only questions asked by the trial court relating to Ramirez's ability to pay discretionary LFOs before ordering him to pay \$25 per month starting in 60 days. When Ramirez asked, “How am I going to do that from inside?” *id.* at 376, the trial court said nothing. Ramirez's counsel said, “I will explain,” and the court moved on. *Id.*

*5 ¶ 21 The court made no inquiry into Ramirez’s debts, which his declaration of indigency listed as exceeding \$10,000 at the time of sentencing (apparently previously imposed court costs and fees). Suppl. CP at 4. Nor does the record reflect that the trial court inquired into whether Ramirez met the GR 34 standard for indigency. Had the court looked to GR 34 for guidance, as required under *Blazina*, it would have confirmed that Ramirez was indigent at the time of sentencing--his income fell below 125 percent of the federal poverty guideline. As we explained in *Blazina*, “if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.” 182 Wash.2d at 839, 344 P.3d 680; *Wakefield*, 186 Wash.2d at 607, 380 P.3d 459. The record does not reflect that the trial court meaningfully inquired into any of the mandatory *Blazina* factors.

¶ 22 The trial court also failed to consider other “important factors” relating to Ramirez's current and future ability to pay discretionary LFOs, such as Ramirez’s income, his assets and other financial resources, his monthly living expenses, and his employment history. *Blazina*, 182 Wash.2d at 838, 344 P.3d 680. In *Blazina*, we held that “[t]he record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay,” which requires the court to consider “important factors,” in addition to the mandatory factors discussed above. *Id.* The only information in the record about Ramirez's financial situation came during Ramirez's allocution and was offered to show how he had been putting his life in order prior to his arrest. The court made no inquiry.

¶ 23 Consistent with *Blazina*'s instruction that courts use GR 34 as a guide for determining whether someone has an ability to pay discretionary costs, we believe the financial statement section of Ramirez's motion for indigency would have provided a reliable framework for the individualized inquiry that *Blazina* and RCW 10.01.160(3) require. In determining a defendant's indigency status, the financial statement section of the motion for indigency asks the defendant to answer questions relating to five broad categories: (1) employment history, (2) income, (3)

assets and other financial resources, (4) monthly living expenses, and (5) other debts. *See* Suppl. CP at 2-4. These categories are equally relevant to determining a defendant's ability to pay discretionary LFOs.

¶ 24 Regarding employment history, a trial court should inquire into the defendant's present employment and past work experience. The court should also inquire into the defendant's income, as well as the defendant's assets and other financial resources. Finally, the court should ask questions about the defendant's monthly expenses, and as identified in *Blazina*, the court must ask about the defendant's other debts, including other LFOs, health care costs, or education loans. To satisfy *Blazina* and RCW 10.01.160(3)'s mandate that the State cannot collect costs from defendants who are unable to pay, the record must reflect that the trial court inquired into all five of these categories before deciding to impose discretionary costs. That did not happen here.

¶ 25 The State argues, and the Court of Appeals majority agreed, that despite any lack of inquiry by the trial court into Ramirez's ability to pay, statements by Ramirez during his allocution were adequate to support the imposition of discretionary LFOs. Resp't's Br. at 4. In opposing the State's request for an exceptional sentence, Ramirez told the court he was "doing everything right" prior to his arrest--he was working a minimum wage job at Weyerhaeuser on a "temporary service team," his wife had helped him get his own apartment, he was paying his household bills, including a DirecTV subscription, and he had opened a bank account for the first time in his life and was hoping to get a driver's license. VRP at 359-363. Ramirez did not offer this information in the context of assessing his current and future ability to pay LFOs, but rather in an effort to "counter the State's negative portrayal of him and direct the court's attention to his accomplishments in order to persuade the court he was deserving of a lesser sentence." Suppl. Br. of Pet'r at 19.

*6 ¶ 26 Notably, while the Court of Appeals majority viewed Ramirez's statements as supporting imposition of discretionary costs, there is no indication in the record that the trial court actually relied on any of Ramirez's statements. *See Ramirez, slip op. at 13*.⁵ Nor would reliance on Ramirez's statements be reasonable, given that Ramirez was describing his circumstances and the positive strides he had made in the months *prior* to his arrest. As his statements at sentencing and his declaration of indigency make clear, all of that changed. Indeed, Ramirez lamented that after being on the right track, he "screwed up" and lost everything. VRP at 363.

⁵ The Court of Appeals inferred that the trial court's decision was based on Ramirez's statements:

– Here, the court considered that Ramirez had recently been released from custody, was working in a minimum wage job, and had been paying his household bills. Ramirez also told the court that he had opened a bank account for the first time in his life and "was just getting on track[.]" He added that although he was working a minimum wage job "it was fine because it took care of everything." Thus, we hold that the court conducted an adequate individualized inquiry and did not err in imposing the discretionary LFOs.

Ramirez, slip op. at 13 (citations omitted).

¶ 27 RCW 10.01.160(3) requires the trial court to inquire into a person's present and future

ability to pay LFOs. This inquiry must be made on the record, and courts should be cautious of any after-the-fact attempt to justify the imposition of LFOs based on information offered by a defendant for an entirely different purpose. Judges understand that defendants want to appear in their best light at sentencing. It is precisely for this reason that the judge's obligation is to engage in an on-the-record individualized inquiry into the defendant's ability to pay discretionary LFOs.

¶ 28 We hold that the trial court failed to make an adequate individualized inquiry into Ramirez's current and future ability to pay prior to imposing discretionary LFOs. Normally, this *Blazina* error would entitle Ramirez to a full resentencing hearing on his ability to pay LFOs. The timing of Ramirez's appeal, however, makes this case somewhat unusual. After we granted review, the legislature passed House Bill 1783, which amends two LFO statutes at issue. LAWS OF 2018, ch. 269. House Bill 1783 amends the discretionary LFO statute, former ROW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c). LAWS OF 2018, ch. 269, § 6(3). House Bill 1783 also amends the criminal filing fee statute, former RCW 36.18.020(h), to prohibit courts from imposing the \$200 filing fee on indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h).

¶ 29 Ramirez argues that House Bill 1783's amendments apply to his case on appeal because he qualified as indigent at the time of sentencing and his case was not yet final when House Bill 1783 was enacted. Suppl. Br. of Pet'r at 8-10. As for the remedy, Ramirez asks us to strike the discretionary LFOs and the \$200 criminal filing fee from his judgment and sentence rather than remand his case for resentencing. For the reasons discussed below, we agree that House Bill 1783 applies on appeal to invalidate Ramirez's discretionary LFOs (and the \$200 criminal filing fee) and that resentencing is unnecessary in this case.

II. House Bill 1783 Applies Prospectively to Ramirez's Case Because the Statutory Amendments Pertain to Costs and His Case on Direct Review Is Not Yet Final

¶ 30 House Bill 1783's amendments modify Washington's system of LFOs, addressing some of the worst facets of the system that prevent offenders from rebuilding their lives after conviction. For example, House Bill 1783 eliminates interest accrual on the nonrestitution portions of LFOs, it establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction, and it provides that a court may not sanction an offender for failure to pay LFOs unless the failure to pay is willful. LAWS OF 2018, ch. 269, §§ 1, 18, 7. Relevant here, House Bill 1783 amends the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 6(3). It also prohibits imposing the \$200 filing fee on indigent defendants. *Id.* § 17. Because House Bill 1783 was enacted *after* we granted Ramirez's petition for review, we must decide whether House Bill 1783's amendments apply to Ramirez's

case on appeal. We hold that House Bill 1783 applies prospectively to Ramirez because the statutory amendments pertain to costs imposed on criminal defendants following conviction, and Ramirez's case was pending on direct review and thus not final when the amendments were enacted.

*7 ¶ 31 At the time of Ramirez's sentencing in 2016, the discretionary cost statute provided that “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” Former RCW 10.01.160(3). In making this determination, the statute instructed the trial court to “take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Id.* The statutory language directs that the trial court must consider a defendant's current and future ability to pay before deciding to impose discretionary costs on the defendant.

¶ 32 House Bill 1783 amends former RCW 10.01.160(3) to expressly prohibit courts from imposing discretionary costs on defendants who are indigent at the time of sentencing: “The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” LAWS OF 2018, ch. 269, § 6(3). Under RCW 10.101.010(3)(a) through (c), a person is “indigent” if the person receives certain types of public assistance, is involuntarily committed to a public mental health facility, or receives an annual income after taxes of 125 percent or less of the current federal poverty level. If the defendant is not indigent, the amendment instructs the court to engage in the same individualized inquiry into the defendant's ability to pay as previously required under former RCW 10.01.160(3), i.e., to assess “the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Id.* In this case, there is no question that Ramirez satisfied the indigency requirements of RCW 10.101.010(3)(c) at the time of sentencing. Accordingly, if House Bill 1783 applies to Ramirez's case, the trial court impermissibly imposed discretionary LFOs on Ramirez.

¶ 33 As noted, House Bill 1783 also amends the criminal filing fee statute, former RCW 36.18.020(2)(h), to prohibit charging the \$200 criminal filing fee to defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 17. Thus, if House Bill 1783's amendments apply to Ramirez's case on appeal, the trial court improperly imposed both the discretionary costs of \$2,100 and the criminal filing fee.

¶ 34 This is not our first occasion to consider the prospective application of cost statutes to criminal cases on appeal. In State v. Blank, 131 Wash.2d 230, 249, 930 P.2d 1213 (1997), we held that a statute imposing appellate costs applied prospectively to the defendants' cases on appeal. In Blank, the defendants' appeals were pending when the legislature enacted a statute providing for recoupment of appellate defense costs from a convicted defendant. *Id.* at 234, 930 P.2d 1213. In determining whether the statute applied to the defendants' cases, we clarified that “[a] statute operates prospectively when the precipitating event for [its] application ... occurs after the effective date of the statute.” *Id.* at 248, 930 P.2d 1213 (alterations in original) (quoting Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass'n, 83 Wash.2d 523, 535,

520 P.2d 162 (1974)). We concluded that the “precipitating event” for a statute “concerning attorney fees and costs of litigation” was the termination of the defendant's case and held that the statute therefore applied prospectively to cases that were pending on appeal when the costs statute was enacted. *Id.* at 249, 930 P.2d 1213 (citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wash.2d 222, 232, 883 P.2d 1370, 915 P.2d 519 (1994) (holding that the right to attorney fees is governed by the statute in force at the termination of the action)).

*8 ¶ 35 Similar to the statute at issue in *Blank*, House Bill 1783 's amendments concern the court's ability to impose costs on a criminal defendant following conviction. House Bill 1783 amends former RCW 10.01.160(3) by expressly prohibiting the imposition of discretionary LFOs on defendants like Ramirez who are indigent at the time of sentencing; the amendment conclusively establishes that courts do not have discretion to impose such LFOs. And, like the defendants in *Blank*, Ramirez's case was on appeal as a matter of right and thus was not yet final under RAP 12.7 when House Bill 1783 became effective. Because House Bill 1783 's amendments pertain to costs imposed upon conviction and Ramirez 's case was not yet final when the amendments were enacted, Ramirez is entitled to benefit from this statutory change.

¶ 36 Applying House Bill 1783 to the facts of this case, we hold that the trial court impermissibly imposed discretionary LFOs of \$2,100, as well as the \$200 criminal filing fee, on Ramirez. We reverse the Court of Appeals and remand for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs.

CONCLUSION

¶ 37 In *Blazina*, we held that under former RCW 10.73.160(3), trial courts have an obligation to conduct an individualized inquiry into a defendant 's current and future ability to pay discretionary LFOs before imposing them at sentencing. Today, we articulate specific inquiries trial courts should make in determining whether an individual has the current and future ability to pay discretionary costs. Trial courts must meaningfully inquire into the mandatory factors established by *Blazina*, such as a defendant 's incarceration and other debts, or whether a defendant meets the GR 34 standard for indigency. Trial courts must also consider other “important factors ” relating to a defendant 's financial circumstances, including employment history, income, assets and other financial resources, monthly living expenses, and other debts. Under this framework, trial courts must conduct an on-the-record inquiry into the mandatory *Blazina* factors and other “important factors” before imposing discretionary LFOs.

¶ 38 We reverse the Court of Appeals and hold that the trial court failed to conduct an adequate *Blazina* inquiry into Ramirez 's current and future ability to pay. Although this *Blazina* error

would normally entitle Ramirez to a resentencing hearing on his ability to pay, resentencing is unnecessary in this case. House Bill 1783, which prohibits the imposition of discretionary LFOs on an indigent defendant, applies on appeal to invalidate Ramirez 's discretionary LFOs (and the \$200 criminal filing fee). We remand for the trial court to strike the \$2,100 discretionary LFOs and the \$200 filing fee from Ramirez's judgment and sentence.

WE CONCUR:

Fairhurst, C.J.

Johnson, J.

Madsen, J.

Owens, J.

Wiggins, J.

González, J.

Gordon McCloud, J.

Yu, J.

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