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Division II  
State of Washington  
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NO. 53147-0-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

LEONA RUTH MARTIN,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE STEPHEN E. BROWN, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENT OF ERROR**

The Judgment and Sentence does not assess a cost for community supervision, but instead gives the Department of Corrections discretion to assess a fee for community custody, or not. This fee is not a “cost” as defined by RCW 10.01.160, and may legally be assessed on indigent defendants.

## **RESPONDENT’S COUNTER STATEMENT OF THE CASE**

A jury convicted Defendant Leona Ruth Starr of Felony Violation of a No Contact Order – Domestic Violence. CP 19. The Honorable Stephen Brown sentenced the Defendant to 16 months of total confinement, followed by 12 months’ Community Custody. 2RP 22.

Judge Brown found the Defendant to be indigent, so the only cost assessed at sentencing was a \$500 crime victim assessment. 2RP 22–23. This cost is mandatory, per RCW 7.68.035.

As one of the conditions to her 12 months’ of community custody, the Court ordered the Defendant to pay any supervision fees the DOC might assess. CP 12.

## ARGUMENT

**1. The Judgement & Sentence lawfully gives the Department of Corrections authority to impose a non-cost legal financial obligation.**

RCW 10.01.160 defines certain legal financial obligations as “costs,” and forbids a trial court from imposing them on indigent criminal defendants. However, the community supervision fee that the Department of Corrections imposes on some defendants is not a “cost” as defined by that statute.

**a. The community custody supervision assessment is not a cost that must be waived.**

Judges may not impose discretionary costs on indigent defendants. RCW 10.01.160(3). But a community custody supervision assessment is not a “cost.”

RCW 10.01.160(2) defines “costs” as “expenses especially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” In *State v. Clark*, Division III of this Court found that a \$500 *fine* was not a “cost,” and so upheld its imposition upon an indigent defendant. *State v. Clark*, 191 Wn. App. 369, 375, 362 P.3d 309, 312 (2015). Because the fine was not an expense incurred by the State in

prosecuting the defendant, no inquiry into the defendant's ability to pay was necessary. *Id* at 376.

The legislature amended RCW 10.01.160(3) in 2018, establishing a bright-line rule that discretionary costs shall not be imposed on indigent defendants as defined by the statute. *Compare* RCW 10.01.160(3) (2015) *with* RCW 10.01.160(3) (2019). This was after the *Clark* decision, but the definition of "cost" did not change with the amendment. *See* Laws of 2018, ch. 269, § 6. So the reasoning of *Clark* remains; the fact that a legal financial obligation is discretionary does not make that obligation a discretionary cost under the definition in RCW 10.01.160(2). *Clark*, 191 Wn. App. at 376. Just as inquiry on a defendant's ability to pay was not be required for non-cost LFOs before the amendment, a finding of indigency does not prohibit non-cost LFOs now.

Recently, this Court used the *Clark* framework to address the exact same issue raised here, and found that "a community custody supervision assessment clearly does not meet the definition of a cost under RCW 10.01.160(2)." *State v. Abarca*, No. 51673-0-II, 2019 WL 5709517, \*11 (November 5, 2019) (unpublished).

The Defendant correctly states that the supervision assessment is a discretionary legal financial obligation under RCW 9.94A.703. *State v.*

*Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116, 1121 n.3 (2018).

This uninteresting fact was also acknowledged in *Clark* regarding the \$500 fine: “the fact that imposing a fine under this general statute is a discretionary act does not make the fine a discretionary ‘cost’ within the meaning of RCW 10.01.160(3).” *Clark*, 191 Wn. App at 376. Indeed, in *Abarca* the court cited *Lundstrom* for the same proposition: “[t]he community custody supervision assessment is a discretionary LFO,” *Abarca*, WL 5709517 at \*11. Neither decision stands for the proposition that discretionary legal financial obligations must be treated as costs under the statute, and waived for all indigent defendants. That this Court in *Lundstrom* was merely bringing the LFOs discretionary nature to the attention of the lower court—not forbidding it—comports with the policy of considering a defendant’s ability to pay, even for LFOs that are not costs, encouraged in both *Clark* and *Abarca*. *See Abarca*, WL 5709517 at \*11.<sup>1</sup>

The Defendant argues that, because the trial court waived the discretionary costs, it must have meant to waive the community supervision fee, and that the Judgment & Sentence is in error. The Defendant’s error in reasoning demonstrates the same fallacy that

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<sup>1</sup> “Although the court is not required to reevaluate imposing the community custody supervision assessment . . . the trial court is encouraged to do so”

underpins the Defendant's whole argument: that the community supervision fee is a cost that must be treated as a cost, simply because it is discretionary. The Defendant is mistaken, and his factual assertion is speculative. This is speculative. The trial court never mentioned the community supervision fee in its oral ruling.

To justify her reasoning, the Defendant cites to an earlier unpublished opinion, *State v. Taylor*, 9 Wn. App. 2d 1042, at \*4 (June 25, 2019) (unpublished). *Taylor* does not take into account the difference between costs and non-cost legal financial obligations pointed out in *Clark*. Rather, *Taylor* equates discretionary legal financial obligations as fees that may not be imposed on indigent defendants. However, RCW 10.01.160 draws a distinction between cost and non-cost legal financial obligations, as *Clark* points out.

Indeed, in *Abarca* this Court affirmed the supervision assessment despite the parties' agreement it should be struck, "declin[ing] to accept the State's concession as to the community custody supervision assessment." *Id.*

This Court should follow *Clark's* reasoning here, as it did in *Abarca*, and rule that the analysis should focus on whether a legal

financial obligation is a cost or not, rather than whether it is discretionary, and uphold the judgment.

**b. No fee is actually assessed by the judgment.**

To any extent that the community supervision fee is a cost under RCW 10.01.160(3) that must be waived, there is no indication in the record that the Department of Corrections has imposed this fee on the Defendant. In the absence of any such proof, this Court should decline to reach the issue.

The only cost or fee actually assessed in the judgment is the mandatory crime victim fee. Regarding the community custody supervision fee, the judgment merely leaves the Department of Corrections with discretion to assess a fee at some point in the future. It does not assess anything itself.

Because there is no indication in the record that the Department of Corrections has decided to assess a fee upon the Defendant, there is no controversy, and this Court should decline to consider this issue.

**CONCLUSION**

To any extent that the issue of a community supervision fee may be reached, it is not a cost that is governed by RCW 10.01.160. It is a fee.

Fees may be imposed upon indigent defendants. This Court should affirm the Judgment & Sentence.

DATED this 17<sup>th</sup> day of January, 2020.

Respectfully Submitted,

BY: 

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JFW /

# GRAYS HARBOR PROSECUTING ATTORNEY

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## Transmittal Information

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**Appellate Court Case Number:** 53147-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Leona Ruth Starr, Appellant  
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