

NO. 33213-6-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DEBRA MONROE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

When Debra Monroe was sentenced to the high end of the range for three counts of possession of stolen property in the second degree, the court found that she had a criminal offender history of 18 points. The findings of fact in the judgment and sentence do not support this conclusion and instead indicate Ms. Monroe had only 8 points at the time of her conviction for these offenses. Because the court found an inaccurate score, this Court should remand this matter for a new sentence hearing.

This Court should also remand for a new sentence hearing because the court failed to inquire into whether Ms. Monroe, who suffers from mental health disorders, should have had her DNA fee waived under RCW 9.94A.777, which requires the court to inquire into whether a person who suffers from mental illness is entitled to have all legal financial obligations other than the victim penalty assessment waived.

Finally, the court failed to inquire into Ms. Monroe's ability to pay legal financial obligations, instead imposing the DNA fee and the victim penalty assessment. With considerable evidence that Ms. Monroe has no current or future ability to pay legal financial

obligations, this error requires this Court to remand Ms. Monroe's case for a new sentencing hearing in order to determine whether the legal financial obligations should be waived.

B. ASSIGNMENTS OF ERROR

1. The court miscalculated the offender score to find Ms. Monroe had 18 points, when the judgment and sentence indicates a score of 8.

2. The court failed to comply with RCW 9.94A.777 when it imposed the DNA fee without first determining whether Ms. Monroe's mental health conditions prevented her from paying the additional sums.

3. The court imposed legal financial obligations without properly inquiring into ability to pay where evidence was established that Ms. Monroe lacked the present and future ability to pay her financial obligations.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Before sentencing a person under the Sentencing Reform Act, the court must first determine the offender score. The State must establish prior convictions are felony offenses which do not "wash out" because the defendant has lived in the community crime free. Is

resentencing required where the court found Ms. Monroe had 18 points of scorable history when the judgment and sentence only establishes 8 points?

2. RCW 9.94A.777 requires the court to determine whether all legal financial obligations other than restitution and the victim penalty assessment where should be waived where defendants suffer from a mental health condition which impacts their ability to participate in gainful employment. Where the record establishes that Ms. Monroe suffers from mental health conditions which impact her ability to pay legal financial obligations, is remand required so that the court can determine whether Ms. Monroe's mental health conditions prevent her from paying the legal financial obligations?

3. The legislature has mandated that legal financial obligations shall not be imposed unless the defendant has a present or future ability to pay them. Where the record established that Ms. Monroe lacks the present or future ability to pay legal financial obligations was it error to impose the DNA fee and the victim penalty assessment?

D. STATEMENT OF THE CASE

After a jury verdict, Debra Monroe was convicted of three counts of possession of stolen property in the second degree. CP 59-60.

At sentencing, the state alleged Ms. Monroe had an offender score of 18. 2 RP 240.¹ Defense counsel contested this score, but did agree Ms. Monroe's score was above 9. *Id.* at 244. Based upon her criminal history, the State asked that Ms. Monroe be sentenced to 29 months, which is the high end of the range for a nine point offender. *Id.* at 241.

Defense counsel informed the court of the troubles Ms. Monroe has had since 1994, when she started abusing controlled substances. 2 RP 243. She began with cocaine and ultimately became addicted to methamphetamines. *Id.* From 2001 to 2009 she was able to remain drug and crime free. *Id.* She was able to find employment and get her children back from her sister. *Id.* Ms. Monroe's attorney characterized this period of her life as "good." *Id.*

In 2009, Ms. Monroe relapsed and was convicted of several drug related crimes. 2 RP 243. When this incident occurred, Ms. Monroe was homeless. *Id.* at 244. She was found sleeping in a shed. *Id.* at 246. She had been revoked from a residential DOSA sentence because of her inability to find housing. *Id.* at 245. She also suffers

¹ The transcript was prepared in two volumes, with the page numbers continuing from one volume to the next. This brief will refer to the volume in which the referenced testimony can be found and then the page number. E.g., 2 RP 240. References to the clerk's papers will be referenced by page number. E.g., CP 59.

from mental health disorders, including diagnoses for “bipolar, OCD, PTSD and ADHD.” *Id.* At the time of her sentencing, she was taking several medications to treat her mental health conditions.² *Id.*

In sentencing Ms. Monroe, the court first determined that she had “horrible criminal history.” 2 RP 253. The court found she had a drug addiction problem and denied her request for a DOSA sentence. *Id.* Based upon her criminal history, the court determined Ms. Monroe should be sentenced to the “high end” of the standard range and imposed 29 months. *Id.* at 253-54. After telling Ms. Monroe “I honestly don't want you to steal” or commit other illegal acts to pay her legal financial obligations, the court waived the filing fee and imposed the victim penalty assessment and DNA fees for a total of \$600. *Id.* at 254. The court did not consider whether her mental health issues entitled her to a waiver of her legal financial obligations.

² The court reporter recorded these medications as “high DROKS SDEEN”, “toe RAZ zone” and “Paxil.” Counsel assumes these are phonetic spellings of medications used to treat mental health disorders and are likely to drugs Hydroxyzine, Thorazine and Paxil, the commercial name for Paroxetine. 1 RP 245.

E. ARGUMENT

1. The court miscalculated Debra Monroe's offender score.

- a. *A sentencing court must base its offender score calculation on the criminal history it determines exists at the time of sentencing.*

Sentencing authority derives strictly from statute. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). A sentencing court's failure to follow the dictates of the SRA may be raised on appeal even if no objection was raised below. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999); *In re the Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

In broad terms, when a court undertakes to calculate an offender score under RCW 9.94A.525 it takes "three steps: (1) identify all prior convictions; (2) eliminate those that wash out; (3) 'count' the prior convictions that remain in order to arrive at an offender score." *State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). With respect to the first step, RCW 9.94A.500 (1) requires in relevant part

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

"Criminal history"

means the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere . . . The history shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration

RCW 9.94A.030 (11).

“Bare assertions, unsupported by evidence do not satisfy the State's burden to prove the existence of a prior conviction.” *State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). Instead, due process requires the State bear the “ultimate burden of ensuring the record” supports the individual’s criminal history and offender score. *Ford*, 137 Wn.2d at 480-81.

b. Prior offenses are not scored where an offender lives in the community crime free for the statutory time period.

The Supreme Court has said “[i]n the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.” *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) (*citing Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); and *State v. Cass*, 62 Wn. App. 793, 795, 816 P.2d 57 (1991), *review denied*, 118 Wn.2d 1012

(1992). Under the Sentencing Reform Act, some felony convictions should not be included in an offender score because they wash out.

RCW 9.94A.525 (2)(b) provides in relevant part:

. . . class B prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525 (2)(c) provides in relevant part:

. . . class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525 (2) does not require inclusion of a prior offenses in the offender score “unless” they are shown to have washed out. Instead, the statute provides they “shall not be included” unless they have been shown to have not washed out. The term “shall” indicates a mandatory duty on the trial court. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

Thus, before a court can include a Class B felony in an offender score, the court must determine the person has not spent ten crime-free years from the date of release from confinement to the date of the next offense. RCW 9.94A.525(2)(b). Before the court can include a Class C felony in an offender score, the court must determine the person has not spent five crime-free years from the date of release from confinement to the date of the next offense. RCW 9.94A.525(2)(c). To permit such a determination, the trial court must find the dates of the offense, sentencing, and release, for any intervening misdemeanor convictions which may have prevented the listed offenses from washing out.

c. The court’s finding of an offender score of 18 is not supported by the record.

The judgment and sentence in this case contains a section entitled II. “FINDINGS.” Within this section, is paragraph 2.2 entitled “Criminal History (RCW 9.94A.525).” CP 61. This section includes the findings of fact made by the court with regard to Ms. Monroe’s criminal history. *Id.*

2.2 Criminal History: (RCW 9.94A.525):

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
PCS	120811	DRUG	A	SPOKANE CO, WA	061312
MONEY LAUNDER (F)	120811	NV	A	SPOKANE CO, WA	061312
PCS	040212	DRUG	A	SPOKANE CO, WA	061212
MONEY LAUNDER (F)	040212	NV	A	SPOKANE CO, WA	061212

CP 61.

PCS CONSP	020411	DRUG	A	SPOKANE CO, WA	051711
PCS CONSP	090210	DRUG	A	SPOKANE CO, WA	051711
THEFT 2	050401	NV	A	SPOKANE CO, WA	AFFIRMED 101404
PSP 2	041001	NV	A	SPOKANE CO, WA	AFFIRMED 101404
FORGERY	100399	NV	A	SPOKANE CO, WA	101700
PCS	081898	DRUG	A	SPOKANE CO, WA	020200
PCS	051795	DRUG	A	SPOKANE CO, WA	052196
THEFT 2	091795	NV	A	SPOKANE CO, WA	122295
PSP 2	032195	NV	A	SPOKANE CO, WA	072495
PCS	102794	DRUG	A	SPOKANE CO, WA	010495
STLN PPTY TRAF 1	082394	NV	A	SPOKANE CO, WA	010495
THEFT	020411	MISD.	A	SPOKANE CO, WA	031611
DWLS 3	042010	MISD.	A	SPOKANE CO, WA	070610
FAIL TRNSFR TITLE	030709	MISD.	A	SPOKANE CO, WA	081909
DWLS 3	040607	MISD.	A	LINCOLN CO, WA	NA
DWI	080992	MISD.	A	SPOKANE CO, WA	011995
DWI	032192	MISD.	A	SPOKANE CO, WA	090292

CP 62. The court also found Ms. Monroe committed this offense while on community placement or community custody. *Id.* While RCW 9.94A.030(11) provides that when the information is available, criminal history should include the length and terms of an probation and/or incarceration, no such findings were included.

Based upon this history, the court found Ms. Monroe had an offender score of 18. CP 62.

2.3 SENTENCING DATA:

CT NO	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus enhance-ments*	Total Standard Range (including enhancements)	Maximum Term
1	18	1	22-29mo	-	22-29mo	5YR 10R
2	18	1	22-29mo		22-29mo	5YR 10R
3	18	1	22-29mo		22-29mo	5YR 10R

CP 62. The findings of fact do not support this conclusion. Instead, the findings indicate that Ms. Monroe has an offender score of 8.

d. An analysis of Ms. Monroe's current and prior offenses indicate an offender score of 8.

Ms. Monroe was sentenced on June 13, 2012 for two counts of possession of controlled substance and two counts of money laundering. Possession of a controlled substance is a C felony. RCW 69.50.4013. Money Laundering is a B felony. RCW 9A.83.020. Because less than the statutory period of time has run to consider whether these crimes should not be scored, they are properly scored towards Ms. Monroe's criminal history.

Ms. Monroe was convicted of two counts of conspiracy to possess a controlled substance on May 17, 2011. Conspiracy to commit a class C felony is a gross misdemeanor. RCW 9A.28.040(3)(d), *see also* RCW 69.50.407. While prior felony anticipatory offenses should be scored the same as if they were convictions of the completed offense, this rule does not apply to gross misdemeanors. RCW 9.94A.525(4); *See State v. Austin*, 105 Wn.2d 511, 517, 716 P.2d 875 (1986) (defendant's plea to plea to felony possession when originally charged with misdemeanor possession under RCW 69.50.403 upheld). Instead, RCW 9A.28.040 clearly states that a criminal conspiracy is a

“gross misdemeanor when an object of the conspiratorial agreement is a class C felony.” RCW 9A.28.040. Because RCW 9.94A.525(4) only applies to felony anticipatory offenses, these two offenses should not score.

The State may argue that *Austin* stands for the principle that RCW 69.50.403 requires conspiracy to commit drug offense to be charged in the same way as the original offense and that these offenses should therefore be scored as felonies. In *Austin*, however, the issue was whether it was permissible for a person to plead to a higher drug offense when they were originally charged with a misdemeanor. 105 Wn.2d at 517. Austin was charged with attempted violation of RCW 69.50.403(a)(3), which was a gross misdemeanor and she pleaded guilty to a violation of RCW 69.50.403(a)(3), as a class C felony. *Id.* The court affirmed this procedure, recognizing that Austin entered into the plea voluntarily and knowingly and was fully aware of the consequences. *Id. citing State v. Majors*, 94 Wn.2d 354, 616 P.2d 1237 (1980). Because there is no proof these offenses were pled to as felonies, they should not be scored.

Ms. Monroe was convicted of theft in the second degree and possession of stolen property in the second degree in a case which was

“affirmed” on October 14, 2004.³ Both of these offenses are class C felonies. RCW 9A.56.040; RCW 9A.56.160. More than five years passed between any finding of finality in these matters and Ms. Monroe’s next offense date, which is September 2, 2010. The absence of a finding of an intervening conviction requires this Court to presume that no intervening event occurred to reset the “wash-out” period. *Armenta*, 134 Wn.2d at 14. In the absence of such a finding and Ms. Monroe spent more than five years in the community crime free, these should not score. RCW 9.94A.525(2)(c).

Ms. Monroe was convicted of forgery with a sentence date of October 17, 2000. Forgery is a class C felony. RCW 9A.60.020. Because there is an intervening five year period from October 14, 2004 until September 2, 2010 where Ms. Monroe was in the community crime free, this offense should not score. RCW 9.94A.525(2)(c).

Ms. Monroe was convicted of possession of a controlled substance with a sentence date of February 2, 2000. Possession of a Controlled Substance is a class C felony. RCW 69.50.4013. Because there is an intervening five year period from October 14, 2004 until

³ The judgement and sentence does not indicate the date of the sentence or when Ms. Monroe was released from confinement for these offenses and instead lists the date the matter was affirmed by the Court of Appeals. 2 RP 250.

September 2, 2010 where Ms. Monroe was in the community crime free, this offense should not score. RCW 9.94A.525(2)(c).

Ms. Monroe was convicted of possession of a controlled substance with a sentence date of May 21, 1996. Possession of a Controlled Substance is a class C felony. RCW 69.50.4013. Because there is an intervening five year period from October 14, 2004 until September 2, 2010 where Ms. Monroe was in the community crime free, this offense should not score. RCW 9.94A.525(2)(c).

Ms. Monroe was convicted of theft in the second degree with a sentence date of December 22, 1995. Theft in the second degree is a class C felony. RCW 9A.56.040. Because there is an intervening five year period from October 14, 2004 until September 2, 2010 where Ms. Monroe was in the community crime free, this offense should not score. RCW 9.94A.525(2)(c).

Ms. Monroe was convicted of possession of stolen property in the second degree with a sentence date of July 24, 1995. Possession of stolen property in the second degree is a class C felony. RCW 9A.56.160. Because there is an intervening five year period from October 14, 2004 until September 2, 2010 where Ms. Monroe was in

the community crime free, this offense should not score. RCW 9.94A.525(2)(c).

Ms. Monroe was convicted of possession of a controlled substance and trafficking in stolen property in the first degree on January 4, 1995. Possession of a Controlled Substance is a class C felony. RCW 69.50.4013. Trafficking in stolen property in the first degree is a class B felony. While there is an intervening five year period from October 14, 2004 until September 2, 2010 where Ms. Monroe was in the community crime free which would mean the possession of a controlled substance charge should not score, there is no ten year period which would allow the court to not score the trafficking offense. RCW 9.94A.525(2) (b) and (c).

In total, Ms. Monroe has 8 points which should have been scored against her and not 18. She has a total of five prior offenses which may be scored, none of which may be scored for more than one point. 9.94A.030(11). She has two other current offenses, both of which also score at one point each. RCW 9.94A.589. Finally, the court found she was on community custody, which would require another point. RCW 9.94A.525(19)

Offenses which may be scored	Sentence Date	Score
Adult History		5
• Possession of Controlled Substance	6/13/12	
• Money Laundering	6/13/12	
• Possession of Controlled Substance	6/12/12	
• Money Laundering	6/12/12	
• Trafficking in Stolen Property in the first degree	1/4/95	
Other Current Offenses		2
• Possession of Stolen Property		
• Possession of Stolen Property		
Community Custody		1
Total Score		8

Possession of Stolen Property in the second degree is a level one offense. RCW 9.94A.515. The sentence range for an offender with 8 points on a level one offense is 17-22 months. *Id.*

e. Ms. Monroe is entitled to a new sentencing hearing.

Ms. Monroe is entitled to a new sentence hearing. According to the findings of fact, her offender score is 8, which makes her standard range 17-22 months, rather than 22-29 months. RCW 9.94A.515. It is also likely that the miscalculation of her offender score as 18 points resulted in the court sentencing her to the high end of the standard range. Because Ms. Monroe was sentenced with an offender score of 18, which the findings of fact do not support, she is entitled to a new sentencing hearing. This Court should reverse Ms. Monroe's sentence

and order she be sentenced consistent with the proven criminal history of 8 offender points.

2. The legal financial obligations should be modified because Ms. Monroe suffers from a mental health condition.

a. A person with a mental health condition should not be ordered to pay legal financial obligations.

Before imposing legal financial obligations upon a person who suffers from a mental health condition, other than restitution or the victim penalty assessment, the court must first determine that the defendant has the means to pay the additional sums. RCW 9.94A.777(1). This inquiry requires the court to determine whether the defendant suffers from a mental health which prevents her from participating in gainful employment. *Id.*

A court must “do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry” before imposing legal financial obligations. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Instead, the record must show the court “made an individualized inquiry into the defendant's current and future ability to pay.” *Id.* This inquiry requires the court to consider factors such as incarceration, debt and mental health conditions. *State v. Hart*, --- Wash.App. ---, 353 P.3d 253, 259 (Wash. Ct. App. 2015). The

Hart court recognized that part of the trial court’s obligations in assessing legal financial obligations is to determine whether RCW 9.94A.777(1) requires the court to determine whether the mental health of a defendant also impacts her ability to pay legal financial obligations. *Id.*

b. Ms. Monroe has mental health condition which impact her ability to find gainful employment.

At sentencing, the court was made aware of Ms. Monroe’s mental health conditions. She told the court she was on a number of medications to treat several mental health disorders, including “bipolar, OCD, PTSD and ADHD.” 2 RP 245. The National Institute for Mental Health (NIH) describes bipolar disorder as “a brain disorder that causes unusual shifts in mood, energy, activity levels, and the ability to carry out day-to-day tasks.”⁴ According to the NIH, people who suffer from obsessive compulsive disorder (OCD) “feel the need to check things repeatedly, or have certain thoughts or perform routines and rituals over and over. The thoughts and rituals associated with OCD cause distress

⁴ A full description of bipolar disorder can be found on the NIH website, which can be found at <http://www.nimh.nih.gov/health/topics/bipolar-disorder/index.shtml>. Last visited on September 11, 2015.

and get in the way of daily life.”⁵ Persons who suffer from post-traumatic stress disorder (PTSD) “feel stressed or frightened even when they’re no longer in danger.”⁶ Attention Deficit Hyperactivity Disorder (ADHD) causes a person to have “difficulty staying focused and paying attention, difficulty controlling behavior, and hyperactivity (over-activity).”⁷ All of these disorders are classified as a mental health disorder in the Diagnostic and Statistical Manual of Mental Health Disorders (DSM 5).

In addition, Ms. Monroe suffers from lifelong drug addiction. She began using illegal substances in 1994, with only her only period of sobriety being from 2001 to 2009. 2 RP 243. She had engaged in two court mandated drug treatment programs, one a prison based DOSA and the other a residential based DOSA. 2 RP 245. She was also in drug court. *Id.* at 240. The court found she had a chemical dependency

⁵ A full description of OCD can be found on the NIH website, which is located at <http://www.nimh.nih.gov/health/topics/obsessive-compulsive-disorder-ocd/index.shtml>. Last visited on September 11, 2015.

⁶ A full description of PTSD can be found on the NIH website, which is located at <http://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml>. Last visited on September 11, 2015.

⁷ A full description of ADHD can be found on the NIH website, which is located at <http://www.nimh.nih.gov/health/publications/attention-deficit-hyperactivity-disorder/index.shtml>. Last visited on September 11, 2015.

problem which contributed to her having committed these offenses. *Id.* at 253; *see also* CP 61.

According to the NIH's National Institute on Drug Abuse drug addiction is a mental illness

because addiction changes the brain in fundamental ways, disturbing a person's normal hierarchy of needs and desires and substituting new priorities connected with procuring and using the drug. The resulting compulsive behaviors that override the ability to control impulses despite the consequences are similar to hallmarks of other mental illnesses.⁸

The DSM-5 distinguishes between two types of drug use disorders: drug abuse and drug dependence. In this analysis, drug dependence includes compulsive use, tolerance and withdrawal. For Ms. Monroe, whose life has been dismantled by her drug dependency, the mental disorder is clear. Like her other recognized mental health disorders, the court could easily have found she also suffers from mental health disorders because of her drug dependency had it conducted the required statutory analysis.

⁸ National Institute of Health, *Comorbidity: Addiction and Other Mental Illnesses*. Found at <http://www.drugabuse.gov/publications/research-reports/comorbidity-addiction-other-mental-illnesses/drug-addiction-mental-illness>. Last visited September 11, 2015.

- c. *This Court should remand for a new sentencing hearing to determine whether legal financial obligations should be waived because of Ms. Monroe's mental health condition.*

Although the court recognized Ms. Monroe had drug dependency issues and the evidence of her other mental health disorders were not contested, the court did not inquire into whether her mental health would impact her ability to pay legal financial obligations. The failure to waive the DNA fee under RCW 9.94A.777 requires this Court to remand Ms. Monroe's case for a new sentencing hearing to determine whether her mental health conditions affect her ability to pay legal financial obligations.

3. All of Ms. Monroe's legal financial obligations should be stricken because she lacks the ability to pay.

- a. *The court shall not order costs unless a person is or will be able to pay them.*

The legislature has mandated that a sentencing court "shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). The Supreme Court recently emphasized that "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." *Blazina*, 182 Wn.2d at 830.

Imposing legal financial obligations on indigent defendants causes significant problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wn.2d at 835. Legal financial obligations accrue interest at a rate of 12%, so even a person who manages to pay \$25 per month toward legal financial obligations will owe more money 10 years after conviction than when the legal financial obligations were originally imposed, even when the minimum amount is imposed by the trial court. *Id.* at 836. This, in turn, causes background checks to reveal an “active record,” producing “serious negative consequences on employment, on housing, and on finances.” *Id.* at 837. All of these problems lead to increased recidivism. *Id.* at 837. Thus, a failure to consider a defendant’s ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

The State may argue that the court properly imposed these costs without regard to Ms. Monroe’s ability to pay because the statutes in question use the word “shall” or “must.” *See* RCW 7.68.035 (penalty

assessment “shall be imposed”); RCW 43.43.7541 (every felony sentence “must include” a DNA fee); *State v. Lundy*, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). But these statutes must be read in tandem with RCW 10.01.160, which requires courts to inquire about a defendant’s financial status and refrain from imposing costs on those who cannot pay. RCW 10.01.060(3); *Blazina*, 182 Wn.2d at 830, 838. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants.

When the legislature means to depart from this presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution “shall be ordered” for injury or damage absent extraordinary circumstances, but also states that “the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.” RCW 9.94A.753. This clause is absent from other legal financial obligations statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, ___ Wn.2d ___, ___ P.3d ___, No. 90782-0, 2015 WL 4760487, at *4 (filed Aug. 13, 2015) (the

legislature's choice of different language in different provisions indicates a different legislative intent).

To be sure, the Supreme Court more than 20 years ago stated that the Victim Penalty Assessment was mandatory notwithstanding a defendant's inability to pay. *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). But that case addressed a defense argument that the victim penalty assessment was unconstitutional. *Id.* at 917-18. The Court simply assumed that the statute mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." *Id.* at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear petitioners argued that RCW 10.01.160(3) applies to the victim penalty assessment, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to "LFOs," not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 ("we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs."); *Id.* at 839

(“We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.”). Indeed, when listing the legal financial obligations imposed on the two defendants at issue, the court cited the same legal financial obligations Ms. Monroe challenges here: the victim penalty assessment and the DNA fee. *Id.* at 831 (discussing defendant Blazina); *Id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other legal financial obligation applied to him (attorney’s fees), and defendant Blazina had only two (attorney’s fees and extradition costs). *See Id.* If the Court were limiting its holding to a minority of the legal financial obligations imposed on these defendants, it presumably would have made such limitation clear.

Indeed, it does not appear that the Supreme Court has ever held that the DNA fee is exempt from the ability-to-pay inquiry. And although the Court so held in *Lundy*, it did not have the benefit of *Blazina*, which now controls. *Compare Lundy*, 176 Wn. App. at 102-03 with *Blazina*, 182 Wn.2d at 830-39.

GR 34, which was adopted at the end of 2010, also supports Ms. Monroe’s position. That rule provides in part, “Any individual, on the

basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable court." GR 34(a).

The Supreme Court applied GR 34(a) in *Jafar v. Webb*, 177 Wn.2d 520, 303 P.3d 1042 (2013). There, a mother filed an action to obtain a parenting plan, and sought to waive all fees based on indigence. *Id.* at 522. The trial court granted a partial waiver of fees, but ordered Jafar to pay \$50 within 90 days. *Id.* at 523. The Supreme Court reversed, holding the court was required to waive all fees and costs for indigent litigants. *Id.* This was so even though the statutes at issue, like those at issue here, mandate that the fees and costs "shall" be imposed. *See* RCW 36.18.020.

The Court noted that both the plain meaning and history of GR 34, as well as principles of due process and equal protection, required trial courts to waive all fees for indigent litigants. *Jafar*, 177 Wn.2d at 527-30. If courts merely had the discretion to waive fees, similarly situated litigants would be treated differently. *Id.* at 528. A contrary reading "would also allow trial courts to impose fees on persons who, in every practical sense, lack the financial ability to pay those fees." *Id.*

at 529. Given Jafar’s indigence, the Court said, “We fail to understand how, as a practical matter, Jafar could make the \$50 payment now, within 90 days, or ever.” *Id.* That conclusion is even more inescapable for criminal defendants, who face barriers to employment beyond those others endure. *See Blazina*, 182 Wn.2d at 837.

Although GR 34 and *Jafar* deal specifically with access to courts for indigent civil litigants, the same principles apply here. Indeed, the Supreme Court discussed GR 34 in *Blazina*, and urged trial courts in criminal cases to reference that rule when determining ability to pay. *Blazina*, 182 Wn.2d at 838.

Furthermore, to construe the relevant statutes as precluding consideration of ability to pay would raise constitutional concerns. U.S. Const. amend. XIV; Const. art. I, § 3. Specifically, to hold that mandatory costs and fees must be waived for indigent civil litigants but may not be waived for indigent criminal litigants would run afoul of the Equal Protection Clause. *See James v. Strange*, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972) (holding Kansas statute violated Equal Protection Clause because it stripped indigent criminal defendants of the protective exemptions applicable to civil judgment debtors). Equal Protection problems also arise from the arbitrarily disparate handling of

the “criminal filing fee” across counties. The fact that some counties view statewide statutes as requiring waiver of the fee for indigent defendants and others view the statutes as requiring imposition regardless of indigency is not a fair basis for discriminating against defendants in the latter type of county. *See Jafar*, 177 Wn.2d at 528-29 (noting that “principles of due process or equal protection” guided the court’s analysis and recognizing that failure to require waiver of fees for indigent litigants “could lead to inconsistent results and disparate treatment of similarly situated individuals”). Indeed, such disparate application across counties not only offends equal protection, but also implicates the fundamental constitutional right to travel. *Cf. Saenz v. Roe*, 526 U.S. 489, 505, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (striking down California statute mandating different welfare benefits for long-term residents and those who had been in the state for less than a year, as well as different benefits for those in the latter category depending on their state of origin).

Treating the costs at issue here as non-waivable would also be constitutionally suspect under *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). There, the Supreme Court upheld an Oregon costs statute that is similar to RCW 10.01.160, noting that it

required consideration of ability to pay before imposing costs, and that costs could not be imposed upon those who would never be able to repay them. *See Id.* Thus, under *Fuller*, the Fourteenth Amendment is satisfied if courts read RCW 10.01.160(3) in tandem with the more specific cost and fee statutes, and consider ability to pay before imposing legal financial obligations.

Although the Court in *Blank* rejected an argument that the Constitution requires consideration of ability to pay at the time appellate costs are imposed, subsequent developments have undercut its analysis. *See State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997). The *Blank* Court noted that due process prohibits imprisoning people for inability to pay fines, but assumed that legal financial obligations could still be imposed on poor people because “incarceration would result only if failure to pay was willful” and not due to indigence. *Id.* at 241. Unfortunately, this assumption was not borne out. As indicated in the record in Ms. Monroe’s case, as well as significant studies post-dating *Blank*, indigent defendants in Washington are regularly imprisoned because they are too poor to pay legal financial obligations. Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm’n, *The Assessment and Consequences of*

Legal Financial Obligations in Washington State, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay). In other words, the risk of unconstitutional imprisonment for poverty is very real – certainly as real as the risk that Ms. Jafar’s civil petition would be dismissed due to failure to pay. *See Jafar*, 177 Wn.2d at 525 (holding Jafar’s claim was ripe for review even though trial court had given her 90 days to pay \$50 and had neither dismissed her petition for failure to pay nor threatened to do so). Thus, it has become clear that courts must consider ability to pay at sentencing in order to avoid due process problems.

Finally, imposing legal financial obligations on indigent defendants violates substantive due process because such a practice is not rationally related to a legitimate government interest. *See Nielsen v. Washington State Dep’t of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing test). Ms. Monroe concedes that the government has a legitimate interest in collecting the costs and fees at issue. But imposing costs and fees on impoverished people like Ms. Monroe is not rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” *Blazina*, 182 Wn.2d at 837. Moreover, imposing legal financial obligations on impoverished

defendants runs counter to the legislature's stated goals of encouraging rehabilitation and preventing recidivism. See RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose legal financial obligations on indigent defendants.

b. Ms. Monroe is unable to pay the court costs imposed.

When Ms. Monroe was arrested, she was sitting on an uncovered mattress in a shed which had been broken into. 1 RP 134. She had been sitting in a park until 2:30 a.m. the night before with a friend known as "Dirty Mike." *Id.* at 134-135. She had other bags and purses with her that she acknowledged were hers. *Id.* at 136.

At sentencing, Ms. Monroe informed the court she was homeless. 2 RP at 244. She was sleeping in a shed which did not belong to her. *Id.* at 246. She was chemically dependent and unable to complete drug treatment. *Id.* at 245. She also suffered from mental health disorders, including diagnoses for "bipolar, OCD, PTSD and ADHD." *Id.* With chemical dependency issues which spanned decades, she demonstrated no current or future ability to pay.

c. A hearing should be ordered to waive Ms. Monroe's court costs.

While the court waived the filing fee for Ms. Monroe, it never made the inquiry into whether she had a current or future ability to pay the other costs the court ordered she pay, despite clear evidence of her continuing indigency and the likelihood she has not future ability to pay legal financial obligations. This court should order that this matter be remanded for a new sentencing hearing, where the court can determine whether Ms. Monroe has an ability to pay the DNA fee and the victim penalty assessment.

F. CONCLUSION

Because the court's conclusion that Ms. Monroe was an 18 point offender is not supported by the findings of fact in the judgment and sentence, this Court should remand this matter for a new sentencing hearing. This Court should also order the trial court to determine whether Ms. Monroe's mental health conditions require the court to waive her DNA fee and whether her lack of current or future ability to pay require the court to waive all legal financial obligations other than restitution.

DATED this 15th day of September 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 33213-6-III
)	
DEBRA MONROE,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF SEPTEMBER, 2015.

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