

FILED

**May 09, 2016**

Court of Appeals

Division III

State of Washington

No. 33311-6-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

MANUEL RODRIGUEZ-FLORES,  
Defendant/Appellant.

APPEAL FROM THE DOUGLAS COUNTY SUPERIOR COURT  
Honorable John Hotchkiss, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to prove appellant delivered a controlled substance within 1,000 feet of a school bus route stop.

2. The court acted outside its authority in running three school bus route stop enhancements consecutive to each other on top of the base concurrent sentences.

3. In considering appellant's rejection of a more favorable plea offer, the trial court penalized appellant for exercising his constitutionally protected decision to stand trial.

4. The trial court erred by entering Finding of Fact No. 2.5 where the record does not support the boilerplate finding that the court considered Mr. Rodriguez-Flores' present and future ability to pay, including his financial resources. (Judgment and Sentence, CP 90)

5. The imposition of legal financial obligations is improper because Mr. Rodriguez-Flores lacks the ability to pay.

*Issues Pertaining to Assignments of Error*

1. Was the evidence insufficient for any rational trier of fact to find an essential element of the special verdicts regarding the school bus

route stop enhancement, where there was no proof of the seating capacity of the school buses?<sup>1</sup>

2. Was the evidence insufficient for any rational trier of fact to find an essential element of the special verdicts regarding the school bus route stop enhancement, where there was no proof the sales occurred within 1,000 feet of a school bus stop designated by the school district?<sup>2</sup>

3. Under *State v. Conover*, 183 Wn.2d 706, 355 P. 3d 1093 (2015), whether multiple school bus route stop enhancements on different counts run consecutively to each other is determined by resort to RCW 9.94A.589. Under RCW 9.94A.589, consecutive sentences may only be imposed as part of an exceptional sentence above the standard range or if the offenses are serious violent offenses or are certain firearm or driving offenses. None of these exceptions apply here. Did the trial court therefore act outside its authority in running the three school bus route stop enhancements on different counts consecutively to each other?<sup>3</sup>

4. A court may not impose an enhanced sentence based upon the defendant's exercise of his constitutionally protected right to trial. The court here imposed a sentence at the high end of the standard range based

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<sup>1</sup> Assignment of Error No. 1.

<sup>2</sup> Assignment of Error No. 1.

<sup>3</sup> Assignment of Error No. 2.

upon Mr. Rodriguez-Flores' exercise of his right to trial. Is Mr. Rodriguez-Flores entitled to resentencing?<sup>4</sup>

5. RCW 10.01.160 mandates waiver of costs and fees for indigent defendants, and 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.” *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). Here, the record established Mr. Rodriguez-Flores was impoverished but the court nevertheless imposed LFOs without mention of Mr. Rodriguez-Flores’ inability to pay. Should this Court remand with instructions to strike LFOs?<sup>5</sup>

## **B. STATEMENT OF THE CASE**

Following a jury trial in Douglas County Superior Court, appellant Manuel Rodriguez-Flores was convicted of three counts of delivering methamphetamine within 1,000 feet of a school bus route stop and one count of possessing a controlled substance with intent to deliver. CP 76–82. The deliveries reportedly occurred on October 14, October 16 and October 20, 2014, at locations in in Bridgeport, Washington. CP 15–20; RP 18–34, 79–83, 142–51.

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<sup>4</sup> Assignment of Error No. 3.

The delivery<sup>6</sup> charges arose after police from the drug task force for Okanogan, Douglas and Ferry Counties arrested Christina Ferguson on drug charges (five deliveries) and she agreed to become a confidential informant to work off those charges. As part of the deal, Ferguson agreed to make purchases from Mr. Rodriguez-Flores. RP 13–16, 52–54, 134–37, 154–55. Each of the buys was for a small amount of methamphetamine, contained in two packages worth \$20.00 each. RP 20–22, 26, 28, 30, 34, 143–49.

To prove the deliveries occurred within 1,000 feet of a school bus route stop the state offered the parties’ stipulation, which the court read to the jury: “The parties stipulate that as to Counts I, II and IV, that the location of the alleged acts occurred within 1,000 feet of a school bus stop.” RP 176–77.

The special verdicts relied upon for the school bus stop enhancements asked in relevant part whether Mr. Rodriguez-Flores

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<sup>5</sup> Assignment of Error Nos. 4 and 5.

<sup>6</sup> The possession with intent to deliver charge originated from drugs found on Mr. Rodriguez-Flores’ person when he was booked into jail after his arrest on the delivery charges. RP 34–39, 163–67.

delivered a controlled substance “within 1000 feet of a school bus route stop designated by a school district.” CP 80<sup>7</sup>, 81, 82.

The jury was given the following instructions to guide them in answering the special verdict forms:

#### INSTRUCTION NO. 19

You will also be given special verdict forms for the crimes charged in Count I, Count II, and Count 4. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

CP 75.

#### INSTRUCTION NO. 16

“School bus” means a vehicle that meets the following requirements: (1) has a seating capacity of more than ten persons including the driver; (2) is regularly used to transport students to and from school or in connection with school activities; and (3) is owned and operated by any school district or privately owned and operated under contract or otherwise with any school district for the transportation of students. The term does not include buses operated by common carriers in the urban transportation of students such as transportation of students through a municipal transportation system.

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<sup>7</sup> The special verdict form for count I leaves out the last word, “district,” and reads: “within 1000 feet of a school bus route stop designated by a school.”

CP 71.

The jury returned a verdict of guilty on all counts and found by special verdicts the three delivery convictions occurred within 1,000 feet of a school bus stop. CP 80–82.

The standard range for each of the three methamphetamine deliveries was 20 to 60 months and each carried a 24-month sentencing enhancement. CP 89. The state asserted the court was required to run the enhancements consecutively to the concurrent base sentences for the deliveries and consecutively to each other. In other words, the state asserted the standard range was 20 to 60 months + 24 months (enhancement count I) + 24 months (enhancement count II) + 24 months (enhancement count IV), for a total range of 92 to 132 months. RP 239–40. The state asked for a total sentence of 100 months. RP 234–35. Citing his client’s lack of prior criminal history and the small amounts involved in the deliveries, defense counsel requested the low end of the standard range. RP 236.

Before imposing sentence, Mr. Rodriguez-Flores was asked if he had anything to say. Through an interpreter, he stated:

DEFENDANT: Well, yes, they, they judged me for something that I – that was not true.

THE COURT: Okay. Anything else?

DEFENDANT: I've been here legally for 30 days [*sic*] and I never had any problems. Thirty years. Never had any problems.

RP 237–38.

The court responded, saying,

Well, Mr. Rodriguez-Flores, let me tell you this: You had no defense. They had you on video. They had you under surveillance. You had absolutely no defense and you went to trial anyway. And I know because of what was going on in this Court at that time that I had another jury in that you were offered a plea bargain of significantly less time. I have absolutely no question in my mind that you will be released and continue to do the same kind of stuff. I don't think you have any remorse; I don't think you have any concern. 132 months.

RP 238.

The court's total sentence of 132 months did not follow the state's recommended sentence of 100 months and included 72 months for the three special verdict enhancements. CP 89–90, 98; RP 234–35.

The court added a jury fee amount to the state's proposed standard financial obligations and imposed a total legal financial obligation of \$2,050<sup>8</sup>. CP 92–93; RP 235. Defense counsel responded “yeah” when asked by the court if Mr. Rodriguez-Flores “can [] afford to pay [\$25.00

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<sup>8</sup> This amount consists of a \$500 victim assessment, \$200 criminal filing fee, \$250 jury demand fee, \$400 court-appointed attorney fee, \$500 fine (RCW 9A.20.021), \$100 crime lab fee, and \$100 DNA collection fee. CP 92–93.

per month] once he gets out” and the court ordered that the monthly payments begin within a month after the date of sentencing. CP 93; RP 241. The Judgment and Sentence contained a boilerplate finding that “[t]he court has considered the total amount owing, the defendant's 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.” CP 90 at ¶ 2.5. Mr. Rodriguez-Flores did not object to the imposition of the LFOs. No restitution was ordered.

Mr. Rodriguez-Flores timely appealed. CP 100.

## **C. ARGUMENT**

### **1: The state failed to prove the school bus route stop enhancements beyond a reasonable doubt.**

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U. S. Const. amend. XIV; *In re Matter of Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction must be reversed for insufficient evidence where no reasonable fact finder would have found all the elements of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979); *State v. C.G.*, 150 Wn.2d 604, 610, 80

P. 3d 594 (2003). The same is true of enhancements. *Blakely v. Washington*, 542 U.S. 296, 124 S Ct. 2531, 2538, 159 L Ed.2d 403 (2004).

The state must prove each element of the enhancement beyond a reasonable doubt. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995). On review, the evidence is viewed in the light most favorable to the state, *id.*, drawing all reasonable inferences in favor of the state. *State v. Salinas*, 119 Wn.2d 192, 201–02, 829 P.2d 1068 (1992).

Under RCW 9. 94A.533(6):

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69. 50 RCW if the offense was also a violation of RCW 69. 50.435 or 9. 94A.B27. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 69.50.435(1)(c) orders an enhanced penalty for persons selling drugs “within 1,000 feet of a school bus route stop designated by the school district.”

a. Failure of proof of seating capacity.

RCW 69.50.435(6)(c) defines "school bus route stop" as any stop designated by a school district. In addition, the jury was instructed in pertinent part that “school bus” means:

a vehicle that meets the following requirements: (1) has a seating capacity of more than ten persons including the driver ...

Instruction No. 16, at CP 71. Instruction 16 was based on Washington pattern jury instruction 50.63. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 50.63, at 1000 (3d ed.2008). The instruction combines the statutory definition of “school bus” with a definition contained in administrative regulations published by the superintendent of public instruction. *Id.*

The law of the case doctrine is not limited in its application to elements instructions. It provides more generally (and has, since 1896) that “whether the instruction in question was rightfully or wrongfully given, it was binding and conclusive upon the jury, and constitutes upon this hearing the law of the case.” *Pepperall v. City Park Transit Co.*, 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896), *overruled in part on other grounds by Thornton v. Dow*, 60 Wn.2d 622, 111 P. 899 (1910). The doctrine extends to definition instructions. *See Scoccolo Constr., Inc. v. City of Renton*, 158 Wn.2d 506, 522–23, 145 P.3d 371 (2006) (Madsen, J., concurring) (narrow and debatable definition of “acting for” accepted in instructions was law of the case); *Englehart v. Gen. Elec. Co.*, 11 Wn. App. 922, 923, 527 P.2d 685 (1974) (definition of accidental death was law of the case, no error having been assigned). If insufficient evidence is

introduced at trial to prove the added element, reversal is required. *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995).

The jury was instructed that a “school bus” as used in the instructions must have a seating capacity of more than 10 persons including the driver. Instruction 16 was the only substantive instruction given to the jury to guide its determination whether the state met its burden of proof, beyond a reasonable doubt, that Mr. Rodriguez-Flores possessed a controlled substance within the required proximity of a designated “school bus” stop. The state raised no objection to the instruction, which thereby became the law of the case. Indeed, the state proposed the instruction. CP 40. No evidence was presented regarding the seating capacity of buses stopping within 1,000 feet of the delivery transactions. Reversal of the school bus stop enhancements is required. Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

b. Failure of proof that the school bus stops were designated by the school district.

RCW 69.50.435(1)(a) prescribes an enhanced penalty for persons selling drugs within 1000 feet of a school bus stop. RCW 69.50.435(6)(b)

defines “school bus stop” as any stop designated by a school district. The actual designation of a school bus route stop is essential to ensure that the bus stop enhancement is not void for vagueness. *State v. Coria*, 120 Wn.2d 156, 167, 839 P.2d 890 (1992).

The state had to prove that Mr. Rodriguez-Flores committed his drug delivery crimes within 1,000 feet of a school bus stop as designated by a school district. But the state failed to meet its burden of proof. The parties stipulated that “the location of the alleged acts occurred within 1,000 feet of a school bus stop.” RP 176–77. The jury was not provided the statutory definition of “school bus stop.” The state presented no evidence that a school district had designated the “stops” referred to in the stipulation. Yet the special verdict forms and accompanying instructions required the jury to determine beyond a reasonable doubt that Mr. Rodriguez-Flores delivered the drugs within 1,000 feet of “a school bus route stop designated by a school district<sup>9</sup>.” CP 75, 80, 81, 82. Viewed in the light most favorable to the state, no rational trier of fact could have found existence of the requisite “school bus stop [as] designated by a school district.”

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<sup>9</sup> Special Verdict Form A (count I) left out the final word, “district.” It reads in pertinent part, “[D]id the defendant, Manuel Rodriguez-Flores, deliver a controlled substance to a person within 1000 feet of a school bus route stop designated by a school?” CP 80.

For this additional reason it was error to enhance Mr. Rodriguez-Flores' sentence. The matter must be remanded for re-sentencing without the school bus stop enhancements. *Hardesty*, 129 Wn.2d at 309.

**2. The court exceeded its authority in imposing consecutive school bus route stop enhancements.**

A trial court may only impose a sentence authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P. 3d 782 (2007). A defendant may therefore challenge an illegal or erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P. 3d 678 (2008). RCW 9.94A.533(6) provides:

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. *All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.*

(Emphasis added).

Our state Supreme Court recently interpreted this italicized language as not requiring that multiple school bus route stop enhancements on different counts be run consecutively to each other. *State v. Conover*, 183 Wn.2d 706, 708, 355 P. 3d 1093 (2015). In so

holding, the Court primarily relied on its decision in *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 955 P. 2d 798 (1998), in which it interpreted virtually identical statutory language as ambiguous. Following *Charles*, the *Conover* Court held that whether multiple school bus route stop enhancements on different counts run concurrently or consecutively is determined by resort to RCW 9.94A.589(1)( a). *Conover*, 183 Wn.2d at 708.

Under RCW 9. 94A.589:

(1)(a) Except as provided in ( b), ( c), or ( d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9. 94A.535. ...

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9. 94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to ( a) of this subsection. All sentences imposed under this subsection (1)(b)

shall be served consecutively to each other and concurrently with sentences imposed under ( a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(d) All sentences imposed under RCW 46.61.502(6), 46.61.504(6), or 46.61.5055(4) shall be served consecutively to any sentences imposed under RCW 46.20.740 and 46.20.750.

None of the exceptions for consecutive sentencing apply here. The court did not impose consecutive sentences as part of an aggravated sentence. Delivery is neither a serious violent offense nor an offense involving a firearm or one of the enumerated driving offenses. There was therefore no authority for the court to impose consecutive school bus route stop enhancements. This Court should therefore reverse and remand for resentencing. *Conover*, 183 Wn.2d at 708, 718.

**3. The court penalized Mr. Rodriguez-Flores for exercising his right to trial in considering his rejection of a plea offer.**

Generally, a standard range sentence may not be appealed. RCW 9.94A.585(1). That statute does not place an absolute prohibition on the

right of appeal; rather, it only precludes review of challenges to the amount of time imposed when the time is within the standard range. *State v. McGill*, 12 Wn. App. 95, 99, 47 P.3d 172 (2002). A defendant, however, may challenge the procedure by which a sentence within the standard range is imposed. *State v. Mail*, 121 Wn.2d 707, 712–13, 854 P.2d 1042 (1993). Thus, a defendant “may appeal a standard range sentence if the sentencing court failed to comply with ... constitutional requirements.” *State v. Osman*, 157 Wn.2d 474, 481–82, 139 P.3d 334 (2006).

It is unconstitutional to use enhanced sentencing to punish or penalize a defendant who exercises his constitutional rights. *See United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (holding that practice which discourages exercise of Fifth or Sixth Amendment rights by penalizing through enhanced sentencing the exercise of those rights is unconstitutional). *See also State v. Kellis*, 148 Idaho 812, 814, 229 P.3d 1174, 1176 (Ct. App. 2010) (it is improper for a court to penalize a defendant merely because he or she exercises the right to put the government to its proof at trial).

Each case requires individualized sentencing procedures; however, whether a defendant exercises his constitutional right to trial by

jury to determine guilt or innocence must have no bearing on the sentence.

*United States v. Marzette*, 485 F.2d 207 (8<sup>th</sup> Cir. 1973); *accord* *Bordenkircher v. Hayes*, 443 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604, 610 (1978) (“[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort”).

Here, the record discloses Mr. Rodriguez-Flores had absolutely no prior criminal history, the amounts of drugs he delivered were small, and the State recommended a mid-range sentence of 100 months. Yet the court retorted as follows to Mr. Rodriguez-Flores’ brief allocution:

Well, Mr. Rodriguez-Flores, let me tell you this: You had no defense. They had you on video. They had you under surveillance. You had absolutely no defense and you went to trial anyway. And I know because of what was going on in this Court at that time that I had another jury in that you were offered a plea bargain of significantly less time. I have absolutely no question in my mind that you will be released and continue to do the same kind of stuff.

RP 238. There can be little dispute the trial court expressly based its decision on sentence length on Mr. Rodriguez-Flores’ rejection of a plea offer in favor of exercising his constitutionally protected right to a jury trial.

*Commonwealth v. Bethea*, 474 Pa. 571, 379 A.2d 102 (1977), involved a similar situation where the record indicated the trial judge

might have been influenced by the fact the defendant chose to stand trial rather than plead guilty. The judge made statements to the effect that: “had you pled guilty, it might have shown me the right side of your attitude about this, but you pled not guilty, fought it all the way, and the jury found you guilty, and I’m going to sentence you at this time.” *Bethea*, 379 A.2d at 106. The Pennsylvania Supreme Court invalidated the sentence because the remarks created the inference that the trial court impermissibly considered *Bethea*’s decision to stand trial. 379 A.2d at 105–07.

The trial court’s remarks here are also very similar to those found impermissible in *In re Lewallen*, 23 Cal.3d 274, 152 Cal. Rptr. 528, 590 P.2d 383 (1979). There, *Lewallen* refused the prosecutor’s plea offers and proceeded to trial where he was acquitted of all but one charge. *Lewallen*, 590 P.2d at 384. At sentencing, defense counsel asked for a sentence identical to one of the plea offers. The court’s comments in response included the statement: “[A]s far as I’m concerned, if a defendant wants a jury trial and he’s convicted, he’s not going to be penalized with that, but on the other hand he’s not going to have the consideration he would have had if there was a plea.” *Lewallen*, 590 P.2d at 385. Rejecting the state’s argument that the remark was ambiguous, the *Lewallen* Court found the

only rational interpretation was that the trial judge based the sentence in part on the fact that Lewallen declined the plea bargain and demanded a trial by jury. *Lewallen*, 590 P.2d at 387. The California Supreme Court vacated the sentence. *Id.* at 388.

Similarly, in *State v. Knaak*, 396 N.W.2d 684 (Minn. 1986), the Minnesota Supreme Court remanded for resentencing based on the following remark by the sentencing judge: “[The sentence] may be a little bit more harsh than if you had entered a plea of guilty to start with but I don’t know as that’s true in as much as I am sentencing in accordance with the standard first-time penalty.” *Knaak*, 396 N.W.2d at 689 (brackets in original). *See also Johnson v. State*, 274 Md. 536, 336 A.2d 113, 117–18 (1975) (vacated sentence based on trial judge’s remark: “If you had come in here with a plea of guilty ... you would probably have gotten a modest sentence”).

On appeal, the reviewing court does not have to find that the trial court actually punished the defendant for standing trial. *United States v. Hess*, 496 F.2d 936, 937–38 (9<sup>th</sup> Cir. 1974). The inference created by the trial court’s comments is sufficient to invalidate the sentence on appeal. *Id.* *See, e.g., United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9<sup>th</sup>

Cir. 1982); *United States v. Stockwell*, 472 F.2d 1186, 1187 (9<sup>th</sup> Cir.), *cert. denied*, 411 U.S. 948, 36 L.Ed.2d 409, 93 S.Ct. 1924 (1973); *State v. Baldwin*, 192 Mont. 521, 629 P.2d 222, 225–26 (1981); *State v. Hass*, 268 N.W.2d 456, 463–65 (N.D. 1978); *Commonwealth v. Bethea*, *supra*; *State v. Fitzgibbon*, 114 Or. App. 581, 836 P.2d 154, 157 (1992). Any doubt as to the sentencing judge’s consideration should be resolved in favor of the defendant. *Johnson v. State*, 274 Md. 536, 336 A.2d 113, 117 (1975). Resentencing is warranted in the absence of an unequivocal statement on the part of the sentencing judge that the defendant’s decision to go to trial was not considered. *United States v. Hutchings*, 757 F.2d 11, 13–14 (2<sup>nd</sup> Cir.), *cert. denied*, 472 U.S.1031, 87 L.Ed.2d 640, 105 S.Ct. 3511 (1985); *Knaak*, 396 N.W.2d at 689; *Fitzgibbon*, 836 P.2d at 157.

In this case, the trial court’s remarks indicate that Mr. Rodriguez-Flores’ election of a jury trial influenced the court’s decision to sentence him to the top end of the standard range. At a minimum, the comments create the appearance of a penalty for Mr. Rodriguez-Flores’ choice to require the state to prove the charges in a jury trial. Such comments inevitably result in a substantial chilling effect on the exercise of the right to stand trial, which only a remand for resentencing can remedy. *Medina-Cervantes*, 690 F.2d at 717; *Commonwealth v. Bethea*, 379 A.2d at 104.

Mr. Rodriguez-Flores had the absolute right to refuse the prosecutor's plea offer(s) and rely on the presumption of innocence by going to a jury trial. These decisions should have had no bearing on the trial court's sentencing determination. The court impermissibly penalized Mr. Rodriguez-Flores for exercising his constitutional rights. Thus, the sentence should be vacated and the case remanded for resentencing before a different judge.

**4. The legal financial obligations should be stricken because Mr. Rodriguez-Flores lacks the ability to pay.**

The record established Mr. Rodriguez-Flores was 54-years old, worked at seasonal jobs, was indigent for purposes of defending against the state's prosecution, and had no money or assets. RP 178–79; CP 11, 92. The court nevertheless imposed \$2,050 in legal financial obligations, including a \$500 victim assessment, \$200 criminal filing fee, and \$100 DNA collection fee. The Judgment and Sentence contained boilerplate language that the court had “considered” Mr. Rodriguez-Flores' present and future ability to pay LFOs and his financial resources. The parties and the court did not discuss this finding at all.

a. The imposition of LFO's on an impoverished defendant is improper under the relevant statutes and court rules, and violates principles of due process and equal protection.

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.” *State v. Blazina*, 182 Wn.2d 127, 830, 344 P.3d 680 (2015).

There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Id.* at 835. LFOs accrue interest at a rate of 12%, so even a person who manages to pay \$25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. *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. *Blazina*, 182 Wn.2d 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 some of these costs without regard to Mr. Rodriguez-Flores's poverty, because the statutes in question use the word "shall" or "must." *See* RCW 7.68.035 (penalty assessment "shall be imposed"); RCW 36.18.020(2)(h) (convicted criminal defendants "shall be liable" for a \$200 fee); 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, as explained above, 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 (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. *See State v. Conover*, 183 Wn.2d at 712–13 (the legislature's choice of different language in different provisions indicates a different legislative intent).<sup>10</sup>

It is true 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 VPA 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

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<sup>10</sup> The legislature did amend the DNA statute to remove consideration of “hardship” at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

VPA, but simply assumed it did not. *See also State v. Duncan*, No. 90188-1, 2016 WL 1696698, fn. 3 at \*5, \_\_\_ P.3d \_\_\_ (Wash. Apr. 28, 2016) (stating “we have found that the victim penalty assessment statute was not unconstitutional on its face or as applied to the defendants in the case because there were sufficient safeguards to prevent the defendants from being sanctioned for non-willful failure to pay. *See Curry*, 118 Wn.2d at 917”). In light of *Blazina*, the continued constitutional adequacy of the “safeguards” relied upon in *Curry* is questionable.

*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.”). It is noteworthy that when listing the LFOs imposed on the two defendants at issue, the court cited the same LFOs Mr. Rodriguez-Flores includes in his challenge here: the Victim Penalty Assessment, DNA fee, and criminal filing fee. *Id.* at 831

(discussing defendant Blazina); *id.* at 832 (discussing defendant Paige-Colter). Defendant Paige-Colter had only one other LFO 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 LFOs imposed on these defendants, it presumably would have made such limitation clear.

It does not appear that the Supreme Court has ever held that the DNA fee and “criminal filing fee” are 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.

It would be particularly problematic to require Mr. Rodriguez-Flores to pay the “criminal filing fee,” because many counties – including Washington’s largest – do not impose it on indigent defendants. *See State v. Duncan*, No. 90188-1, 2016 WL 1696698, fn. 3 at \*5, \_\_\_ P.3d \_\_\_ (Wash. Apr. 28, 2016) (citing to *Lundy* in recognizing “[o]ther [legislative designation of fees such as the filing fee imposed by RCW 36.18.020(2)(h)] have been treated as mandatory by the Court of Appeals,” but suggesting the untested constitutionality of such statutes may depend on whether “there were sufficient safeguards to prevent the defendants

from being sanctioned for non-willful failure to pay”). Disparate treatment means that at worst, the relevant statutes are ambiguous regarding whether courts must consider ability to pay before imposing the cost. Accordingly, the rule of lenity applies, and the statutes must be construed in favor of waiving the fees for indigent defendants. *See Conover*, 183 Wn.2d 706, 711–12 (“we apply the rule of lenity to ambiguous statutes and interpret the statute in the defendant’s favor”). To do otherwise would not only violate canons of statutory construction, but would be fundamentally unfair. *See Blazina*, 182 Wn.2d at 834 (reaching LFO issue not raised below in part because “the error, if permitted to stand, would create inconsistent sentences for the same crime”); *see also id.* at 837 (discussing the “[s]ignificant disparities” in the administration of LFOs among different counties); *and see* RCW 9.94A.010(3) (stating that a sentence should “[b]e commensurate with the punishment imposed on others committing similar offenses”).

GR 34, which was adopted at the end of 2010, also supports Mr. Rodriguez-Flores’ 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. *Id.* 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. Our 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”). 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 some of 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 LFOs.

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 LFOs 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 significant studies post-dating *Blank*, indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs. *See e.g.*, 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).<sup>11</sup> In other words, the risk of unconstitutional imprisonment for poverty is very real—certainly as real as the risk that Ms.

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<sup>11</sup> Available at [http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

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 LFOs 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). Mr. Rodriguez-Flores concedes that the government has a legitimate interest in collecting all of the costs and fees at issue. But imposing costs and fees on impoverished people like Mr. Rodriguez-Flores 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 LFOs 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

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cost and fee statutes must be read in tandem with RCW 10.01.160, and courts must not impose LFOs on indigent defendants.

b. This Court should reverse and remand with instructions to strike legal financial obligations.

This Court should apply a remedy in this case notwithstanding that the issue was not raised in the trial court. Prior to *Blazina*, the trial court may have been bound by the decision in *Lundy* for certain “mandatory” fees, so any objection would have been futile and contrary to the goal of judicial efficiency. See *State v. Robinson*, 171 Wn. 2d 292, 305, 253 P.3d 84 (2011) (granting relief even though issue not raised below, where trial court would have been bound by precedent that was abrogated post-trial). However, *Blazina* mandated consideration of ability to pay before imposing LFOs and held the ability to pay legal financial LFOs may be raised for the first time on appeal by discretionary review. In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand ... reach[ing] the merits ... .” *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the state’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” *Blazina*, 344 P.3d at 684. Requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use of administrative and judicial process. A more efficient use of state resources would result from this court’s remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court’s decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant’s

current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—"to stand by the thing decided"—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Rodriguez-Flores' case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) ("Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.") (Citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685. Mr. Rodriguez-Flores' May 4, 2015, sentencing occurred two months after the *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect trial courts to make the appropriate ability to pay inquiry on the record. The court below did not inquire. Mr.

Rodriguez-Flores respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 182 Wn.2d 827, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

In sum, because *Blazina* clarified that sentencing courts must consider ability to pay before imposing LFOs, and because the record demonstrates Mr. Rodriguez-Flores' extreme indigence, this Court should remand with instructions to strike legal financial obligations, or in the alternative make a fair inquiry into Mr. Rodriguez-Flores' ability to pay.

#### **5. Appeal costs should not be imposed.**

Mr. Rodriguez-Flores was sentenced to 132 months (eleven years) of confinement inclusive of three consecutive<sup>12</sup> protected zone enhancements totaling 72 months. CP 90. The evidence showed he was 54 years old, and a seasonal worker with a wife and five children. RP 178–79. For purposes of defending against this prosecution, Mr. Rodriguez-Flores had zero money and no assets and a court-appointed attorney. CP 11, 92. The trial court found Mr. Rodriguez-Flores to be indigent and unable to pay for the expenses of appellate review and

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<sup>12</sup> If, as argued herein, the enhancements run concurrent to each other, the total sentence would be reduced by 48 months, yielding a period of confinement of 84 months (seven years).

entitled to appointment of appellate counsel at public expense. CP 101–02; RP 243. If Mr. Rodriguez-Flores does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. *See State v. Sinclair*, \_\_\_ P.3d \_\_\_, 2016 WL 393719 (filed January 27, 2016) (instructing defendants on appeal to make this argument in their opening briefs).

RCW 10.73.160(1) states the “court of appeals ... may require an adult ... to pay appellate costs.” (Emphasis added) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the state’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose LFOs. *Blazina*, 182 Wn.2d 8 at 834. Only by conducting such a “case-by-case” analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.* Accordingly, Mr. Rodriguez-Flores’ ability to pay must be determined before discretionary costs of appeal are imposed. The trial court made no such finding. Without a basis to determine Mr. Rodriguez-Flores has a present or future ability to pay, this Court should

not assess appellate costs against him in the event he does not substantially prevail on appeal.

**D. CONCLUSION**

For the reasons stated, Mr. Rodriguez-Flores asks this court to reverse his sentence and costs imposed and remand for a new sentencing hearing. If he is not deemed the substantially prevailing party on appeal, this Court should decline to assess appeal costs should the state ask for them.

Respectfully submitted on May 8, 2016.

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