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Court of Appeals
Division III
State of Washington

No. 33423-6-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MAURICIO LEON DELGADO,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable Evan E. Sperline, Judge

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# BRIEF OF APPELLANT

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## A. ASSIGNMENTS OF ERROR

1. Washington's pattern jury instruction on reasonable doubt is unconstitutional.

2. In the unlikely event appellate costs become an issue in this appeal, this court should exercise its discretion and decline to impose them given that Delgado is indigent and has no ability to pay them.

*Issues Pertaining to Assignments of Error*

1. Did the reasonable doubt instruction stating a "reasonable doubt is one for which a reason exists," misdescribe the burden of proof, undermine the presumption of innocence, and shift the burden to Delgado to provide a reason for why reasonable doubt exists?

2. Under this court's current approach to appellate costs, any objection to such costs must be made prior to a decision on the merits and before the prevailing party is even known. Therefore, in the event this court erroneously affirms Delgado's conviction, should this court exercise discretion in the decision terminating review by declining to impose appellate costs on Delgado based on his indigence?

## B. STATEMENT OF THE CASE

The Grant County Prosecutor charged Mauricio Delgado with second degree rape and third degree rape, arising out of the same incident.

CP 65, Instruction No. 2 at paragraph one. The prosecution alleged that on June 2, 2014, Delgado engaged in sexual intercourse with another person by forcible compulsion and/or without consent. CO 60–61.

The trial court gave the standard reasonable doubt instruction to the jury, which read in part, "A reasonable doubt is one for which a reason exists." CP 65, Instruction No. 2 at paragraph four.

The jury found Delgado guilty as charged. CP 74–75. The court imposed a minimum term of confinement of 90 months under RCW 9.94A.507. CP 109. The trial court also ordered that "[a]n award of costs on appeal against the defendant may be added to the total financial obligations. RCW 10.73.160." CP 113.

Delgado timely appeals. CP 128. Because of Delgado's indigency, Delgado was entitled to counsel on appeal and the costs of preparing the appellate record at public expense. CP 156–58.

## C. ARGUMENT

1. The mandatory jury instruction, "a reasonable doubt is one for which a reason exists," is unconstitutional.

Delgado's jury was instructed, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence."

CP 65, Instruction No. 2 at paragraph four; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01, at 85 (3d Ed 2008) ("WPIC"). The Washington Supreme Court requires trial courts to provide this instruction in every criminal case, at least "until a better instruction is approved." State v. Bennett, 161 Wn.2d 303,318, 165 P.3d 1241 (2007). A better instruction is needed because in its current form it is constitutionally defective because it requires the jury to articulate a reason to establish a reasonable doubt. In light of this serious instructional error, this Court must reverse.

WPIC 4.01 is invalid for two reasons. First, it tells jurors they must be able to articulate a reason for having a reasonable doubt. This engrafts an additional requirement on reasonable doubt. Jurors must have more than just a reasonable doubt; they must also have an articulable doubt. This makes it more difficult for jurors to acquit and easier for the prosecution to obtain convictions. Second, telling jurors a reason must exist for reasonable doubt undermines the presumption of innocence and is effectively identical to the fill-in-the-blank arguments that Washington courts have invalidated in prosecutorial misconduct cases. If fill-in-the-blank arguments impermissibly shift the burden of proof, so does an instruction requiring exactly the same thing. Instructing jurors with WPIC 4.01 is constitutional error.

a. WPIC 4.01's language improperly adds an articulation requirement.

Having a "reasonable doubt" is not, as a matter of plain English, the same as a reason to doubt. But WPIC 4.01 requires both for a jury to return a not guilty verdict. A simple examination of the meaning of the words "reasonable" and "a reason" reveals this critical flaw in WPIC 4.01.

"Reasonable" means "being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous … being or remaining within the bounds of reason … having the faculty of reason: Rational … possession of good sound judgment … .." *Webster's Third New Int'l Dictionary* 1892 (Merriam-Webster, 1993). For a doubt to be reasonable under these definitions it must be rational, logically derived, and have no conflict with reason. Accord *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) ("A 'reasonable doubt,' at a minimum is one based upon 'reason'"); *Johnson v. Louisiana*, 406 U.S. 360, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (collecting cases defining reasonable doubt as one "'based on reason which arises from the evidence or lack of evidence'" (quoting *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2nd Cir 1965)).

The placement of the article "a" before the noun "reason" in WPIC 4.01 inappropriately alters and augments the definition of reasonable doubt.

"[A] reason" in the context of WPIC 4.01 means "an expression or statement offered as an explanation of a belief or assertion or as a justification." *Webster's Third New Int'l Dictionary*, supra, at 1891. In contrast to definitions employing the term "reason" in a manner that refers to a doubt based on reason or logic, WPIC 4.01's use of the words "a reason" indicates that reasonable doubt must be capable of explanation or justification. In other words, WPIC 4.01 requires more than just a reasonable doubt; it requires an explainable, articulable doubt—one for which a reason exists, rather than one that is merely reasonable.

Washington's reasonable doubt instruction is unconstitutional because its language requires more than just a reasonable doubt to acquit. *Cf. In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt."). Under the current instruction, jurors could have a reasonable doubt but also have difficulty articulating or explaining why their doubt is reasonable. A case might present such voluminous and contradictory evidence that jurors having legitimate reasonable doubt would struggle putting it into words or pointing to a specific, discrete reason for it. Yet, despite reasonable doubt, acquittal would not be an option.

Scholarship on the reasonable doubt standard expresses similar concerns with requiring jurors to articulate their doubt:

> An inherent difficulty with an articulability requirement of doubt is that it lends itself to reduction without end. If the juror is expected to explain the basis for a doubt, that explanation gives rise to its own need for justification. If a juror's doubt is merely, 'I didn't think the state's witness was credible,' the juror might be expected to then say why the witness was not credible. The requirement for reasons can all too easily become a requirement for reasons for reasons, ad infinitum.
>
> One can also see a potential for creating a barrier to acquit for less-educated or skillful jurors. A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt. This bar is more than a basis for other jurors to reject the first juror's doubt. It is a basis for them to attempt to convince that juror that the doubt is not a legal basis to vote for acquittal.
>
> A troubling conclusion that arises from the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient. Such a doubt lacks the specificity implied in an obligation to 'give a reason,' an obligation that appears focused on the details of the arguments. Yet this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state burden of proof, require acquittal.

Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1213–14 (2003) (footnotes omitted). In these various scenarios, despite having reasonable doubt, jurors could not vote to acquit in light of WPIC 4.01's direction to articulate a reasonable

doubt. By requiring more than a reasonable doubt to acquit a criminal defendant, WPIC 4.01 violates the federal and state due process clauses. *Winship*, 297 U.S. at 364; U.S. CONST. amends. V, XIV; CONST. art. I,§ 3.

b. WPIC 4.01's articulation requirement impermissibly undermines the presumption of innocence.

"The presumption of innocence is the bedrock upon which the criminal justice system stands." *Bennett*, 161 Wn.2d at 315. It "can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve." *Id*. at 316. To avoid this, Washington courts have strenuously protected the presumption of innocence by rejecting an articulation requirement in different contexts. This court should similarly safeguard the presumption of innocence in this case.

In the context of prosecutorial misconduct, courts have proscribed arguments that jurors must articulate a reason for having reasonable doubt. Fill-in-the-blank arguments are flatly barred "because they misstate the reasonable doubt standard and impermissibly undermine the presumption of innocence." *State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). The Court of Appeals has repeatedly rejected such arguments as prosecutorial misconduct. See, e.g., *State v. Walker*, 164 Wn. App. 724, 731, 265 P.3d 191 (2011) (holding improper prosecutor's PowerPoint slide

that read, "'If you were to find the defendant not guilty, you *have* to say: 'I had a reasonable doubt[.]' What was the reason for your doubt? ' My reason was __ .'"); *State v. Johnson*, 158 Wn. App. 677, 682,684,243 P.3d 936 (2010) (holding improper argument when prosecutor told jurors that they have to say, "'I doubt the defendant is guilty and my reason is I believed his testimony that ... he didn't know that the cocaine was in there, and he didn't know what cocaine was'" and that "'[t]o be able to find reason to doubt, you have to fill in the blank, that's your job'" (quoting reports of proceedings)); *State v. Johnson*, 158 Wn. App. 677, 682, 684,243 P.3d 936 (2010) (holding flagrant and ill-intentioned the prosecutor's statement "'In order to find the defendant not guilty, you have to say to yourselves: "I doubt the defendant is guilty, and my reason is"-blank'" (quoting report of proceedings)); *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (finding improper prosecutor's statement that "'in order to find the defendant not guilty, you have to say 'I don't' believe the defendant is guilty because,' and then you have to fill in the blank'" (quoting report of proceedings)).

Although it does not explicitly require jurors to fill in a blank, WPIC 4.01 implies that jurors need to do just that. Trial courts instruct jurors that a reason must exist for their reasonable doubt—this is in

substance the same mental exercise as telling jurors they need to fill in a blank with an explanation or justification in order to acquit. If telling jurors they must articulate a reason for reasonable doubt is prosecutorial misconduct because it undermines the presumption of innocence, it makes no sense to allow the exact same undermining to occur through a jury instruction.

WPIC 4.01 fails to make it manifestly clear that jurors need not be able to give a reason for why reasonable doubt exists. Far from making the proper reasonable doubt standard manifestly apparent to the average juror, WPIC 4.0 1's infirm language affirmatively misdirects the average juror into believing a reasonable doubt cannot exist unless and until a reason for it can be articulated. Instructions must not be "misleading to the ordinary mind." *State v. Dana*, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). WPIC 4.01 is readily capable of misleading the average juror into thinking that acquittal depends on whether a reason for reasonable doubt can be stated. The plain language of the instruction, and the fact that legal professionals have been misled by the instruction in this manner, compels this conclusion.

Recently, in *State v. Kalebaugh*, the Washington Supreme Court held a trial court's preliminary instruction that a reasonable doubt is “a doubt for which a reason can be given" was erroneous because "the law

does not require that a reason be given for a juror's doubt." 183 Wn.2d 578, 585, 355 P.3d 253 (2015). This conclusion is sound:

> Who shall dete1mine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.

*State v. Cohen*, 78 N.W. 857, 858 (Iowa 1899); see also *Siberry v. State*, 33 N.E. 681, 684–85 (Ind. 1893) (criticizing instruction "a reasonable doubt is such a doubt as the jury are able to give reason for" because it ·"puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case").

Just like a preliminary instruction to jurors that they must give a reason to have a reasonable doubt and just like a fill-in-the-blank argument, WPIC 4.01 "improperly implies that the jury must be able to articulate its reasonable doubt .... . " *Emery*, 174 Wn.2d at 760. By requiring more than just a reasonable doubt to acquit, WPIC 4.01 impermissibly undercuts the presumption of innocence. WPIC 4.01 is unconstitutional.

c. WPIC 4.01's articulation requirement requires reversal.

An instruction that eases the State's burden of proof and undermines the presumption of innocence violates the Sixth Amendment's jury-trial guarantee. *Sullivan v. Louisiana*, 508 U.S. 275, 279–80, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). Where, as here, the "instructional error consists of a misdescription of the burden of proof, [it] vitiates *all* the jury's findings." *Id.* at 281. Failing to properly instruct jurors regarding reasonable doubt "unquestionably qualifies as 'structural error.'" *Id.* at 281–82.

As discussed, WPIC 4.01's language requires more than just a reasonable doubt to acquit criminal defendants; it requires a reasonable, articulable doubt. Its articulation requirement undermines the presumption of innocence. WPIC 4.01 misinstructs jurors on the meaning of reasonable doubt. Instructing jurors with WPIC 4.01 is structural error and requires reversal. Because Delgado's jury was so misinstructed, reversal is warranted.

2. This court should exercise discretion not to impose appellate costs and so state in its decision terminating review.

In the event the State erroneously substantially prevails in this appeal, this court should exercise discretion and decline to impose appellate costs. This court should state as much in its decision terminating review.[1]

a. The trial court informed Delgado prior to appeal that appellate costs, including the cost of an appellate defender, would be provided at public expense, but this was untrue.

Because Delgado was indigent, the trial court appointed appellate counsel and provided preparation of the appellate record "at public expense." CP 156–58. Any reasonable person reading this order would believe (1) Delgado was entitled to an attorney to represent him and the preparation of an appellate record at public expense and (2) "at public expense" means Delgado would pay nothing due to his indigency, win or lose. Any imposition of appellate costs would convert this indigency order

[1] This court's commissioners have refused to exercise any discretion with regard to appellate costs when the issue is raised in a post-decision objection to cost bill. In so refusing, they have referenced RAP 14.2, which reads in part, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." In *State v. Nolan*. 141 Wn.2d 620, 626, 8 P.3d 300 (2000), the court stated, albeit in dictum, RAP 14.2 "appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision." If this is so, the only mechanism available to avoid the imposition of appellate costs is assigning contingent error to the imposition of appellate costs to enable this court to direct that costs not be imposed in its decision terminating review.

into a falsehood. This alone is a sound reason for this court to exercise discretion and deny appellate costs.

> b. Attempting to fund the Office of Public Defense on the backs of indigent persons when their public defenders lose their cases undermines the attorney-client relationship and creates a perverse conflict of interest.

Because the courts do not do so, appellate defenders must explain to their indigent clients that if their arguments do not win the day in the Court of Appeals, their clients will have to pay, at minimum, thousands of dollars in appellate costs. In this manner, appellate defenders become more than just their clients' lawyers, but also their financial planners. Appellate defenders must hedge the strength of their arguments against the vast sums of money their clients will owe and advise their clients accordingly. This undermines attorneys' fundamental role in advancing all issues of arguable merit on their clients' behalf and thereby undermines the relationship between attorney and client.

Not only do appellate defenders have to explain to clients they will face substantial appellate costs if their arguments are unsuccessful, they also have to explain that the Office of Public Defense gets most of the money. Many clients immediately see the perverse incentive this creates: the Office of Public Defense, through which all appellate defenders represent their indigent clients, collects money only when the appellate

defender is unsuccessful. This is readily viewed as a conflict of interest and undermines the appearance of fairness of the appellate cost scheme. The current appellate cost system works as a contingent fee arrangement in reverse: rather than pay their attorneys upon winning their cases, indigent clients must pay the organization that funds their attorneys when they lose. This court should exercise its discretion and deny costs in this case.

c. County prosecutors seek costs to punish the exercise of constitutional rights.

Prosecutors in Eastern Washington are inconsistent internally and between counties in the filing (or not) of cost bills. County prosecutors have no real interest in imposing costs. They recover only a small amount of ordered appellate costs. Given the small sum, it is not unreasonable to question whether a given county prosecutor's real purpose in filing cost bills may be to punish those who exercise their rights to counsel and to appeal under article I, section 22 of the state constitution. This court should deny costs in this case.

d. The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this court should accordingly exercise its discretion to deny appellate costs in the cases of indigent appellants.

The *Blazina* court recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. *State v. Blazina*, 182 Wn.2d 827, 836–37, 344 P.3d 680 (2015). LFOs accrue

interest at a rate of 12 percent so that even persons "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." *Id*. at 836. This in turn "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." *Id*. 836–37. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." *Id*. (citing AM. CIVIL LIBERTIES UNION, *In for a Penny: The Rise of America's New Debtors' Prisons,* at 68-69 (2010) (available at https://www.aclus.org/files/assets/InForAPenny_web.pdf); KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS. WASH STATE MINORITY & JUSTICE COMM'N, *The Assessment and Consequences of Legal Financial Obligations in Wash. State*, at 9–11, 21–22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_ report.pdf.

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case."

*Blazina*, 182 Wn.2d 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*.

While the *Blazina* court addressed trial court LFOs, the "problematic consequences" of trial court LFOs are every bit as problematic in the context of appellate costs. The appellate cost bill, which generally totals thousands of dollars, imposes a debt for not prevailing on appeal which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). This debt results in the same compounding of interest and prolonged retention of court jurisdiction. Appellate costs negatively impact indigent persons' ability to move on with their lives in precisely the same ways the *Blazina* court identified.

Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel): RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342. 346–47, 989 P.2d 583 (1999) (holding that because motion tor remission of LFOs is not appealable as matter of right "Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to

petition for remission without the assistance of counsel is neither fair nor realistic.

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The *Blazina* court also stated, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839.

This court receives orders of indigency "as part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this court to "seriously question" an indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. 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). If this court errs by affirming, this court should nonetheless embrace and soundly exercise its discretion by denying the award of any appellate costs in its decision terminating review in light of the serious concerns recognized in *Blazina*.

> e. Imposing costs on indigent persons without assessing whether they have the ability to pay does not rationally serve a legitimate state interest and accordingly violates substantive due process.

Both the state and federal constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. CONST. amends. V, XIV; CONST. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208.216, 143 P.3d 571 (2006).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." *Id*. at 218–19. Deprivations of life, liberty, or property must be substantively reasonable and are constitutionally infirm if not “supported by some legitimate justification."

*Nielsen v. Dep't of Licensing*, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013).

The level of scrutiny applied to a substantive due process challenge depends on the nature of the right at issue. *Johnson v. Dep't of Fish & Wildlife*, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, courts apply rational basis scrutiny. *Nielsen*, 177 Wn. App. at 53–54.

To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. *Id*. Although this is a deferential standard, it is not meaningless. *Mathews v. DeCastro*, 429 U.S. 18L 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976) (cautioning rational basis standard "is not a toothless one").

The vast majority of the money awarded in an appellate cost bill is earmarked for indigent defense funding and goes to the Office of Public Defense. Although funding the Office of Public Defense is a legitimate state interest, the imposition of costs on appellants who cannot pay them does not rationally serve this interest.

As the Washington Supreme Court recently recognized, "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d at 83 7. Imposing appellate costs under RCW 10.73.160 and RAP

14.2 on indigent persons who cannot pay them fails to further any state interest. There is no rational basis for appellate courts to impose this debt upon indigent persons who lack the ability to pay.

Likely intending to avoid such a result, the legislature expressly granted discretion to deny a request to impose costs on indigent litigants: "The court of appeals, supreme court, and superior courts may require an adult or a juvenile convicted of an offense or the parents of another person legally obligated to support a juvenile offender to pay appellate costs." RCW 10.73.160(1) (emphasis added). "The authority is permissive as the statute specifically indicates." *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). No rational legislation would expressly grant discretion to courts that refuse to exercise it. Washington courts must, at minimum, require an ability-to-pay determination *before* imposing costs to comport with the due process clauses.

The state also has a substantial interest in reducing recidivism and promoting postconviction rehabilitation and reentry into society. *Blazina*, 182 Wn.2d at 836–37. As discussed, appellate costs immediately begin accruing interest at 12 percent, making this reentry unduly onerous if not impossible to achieve. See *id*.; RCW 10.82.090(1). This important state interest cuts directly against the discretionless imposition of appellate costs.

When applied to indigent persons who do not have the ability or likely future ability to pay, as here, the imposition of appellate costs under title 14 RAP and RCW 10.73.160 does not rationally relate to the state's interest in funding indigent defense programs. In the unlikely event the issue arises, Delgado asks this court to conclude, in its decision terminating review, that any imposition of appellate costs without a preimposition determination of his ability to pay would violate his substantive due process rights.

> f. Based on Delgado's continued indigence, this court should exercise its discretion and decline to award appellate costs.

In a recent published decision terminating review, *State v. Sinclair*, 72102-0-1 (Wash. App. January 27, 2016), Division I recognized its discretion to direct that appellate costs would not be awarded to the State as the "substantially prevailing party on review" based on a determination from the record that Mr. Sinclair remained indigent with no realistic possibility of future ability to pay. *Sinclair, Slip Opinion* at 4–14.

> To summarize, we are not persuaded that we should refrain from exercising our discretion on appellate costs. Nor are we attracted to the idea of delegating our discretion to a trial court. We conclude that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief.

*Sinclair, Slip Opinion* at 9–10.

Here, there are several reasons this court should exercise its discretion not to impose costs. Delgado is currently46 years old. CP 104. He was educated through the 6th grade in Mexico with no other formal education; he speaks and writes in Spanish and his English is very limited. CP 84. Based on his citizenship status, Delgado's defense counsel believes it likely he will be removed from the country after serving any period of confinement. RP 17. Delgado was sentenced to a minimum term of incarceration of 90 months in May 2015. CP 104, 109. His sentence is indeterminate and has a statutory maximum of life. CP 109. The trial court made no determination that Delgado was able to pay any amount in trial court legal financial obligations [LFOs] and in fact waived all nonmandatory LFOs in the judgment and sentence. CP 108, 111. The trial court authorized Delgado to seek review at public expense and to have appointment of appellate counsel and preparation of the record at State expense. CP 156–57.

The *Sinclair* court noted that, "Important to our determination, the Rules of Appellate Procedure establish a presumption of continued indigency throughout review." *Sinclair*, *Slip Opinion* at 12–13 (citing RAP 15.2(f)). As in *Sinclair*, because there is no trial court order finding that Delgado's financial condition has improved or is likely to improve, this

court should presume Delgado remains indigent. Under the circumstances, there is no reason to believe Delgado is or ever will be able to pay the accrued appellate costs, let alone any interest that compounds at an annual rate of 12 percent. This court should accordingly exercise discretion and deny the award of appellate costs in the decision terminating review in this matter.

g. Alternatively, this court should require superior court fact-finding to determine Delgado's ability to pay.

In *Sinclair*, Division I declined to delegate its discretion to determine the appropriateness of awarding appellate costs to the trial court. In the event this court wishes to delegate the determination or to impose appellate costs but believes there is insufficient information, it should first require a fair preimposition fact-finding hearing to determine whether Delgado can pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of compounded interest. If it erroneously affirms and is inclined to impose appellate costs, this court should first direct the superior court to allow Delgado to litigate his ability to pay before appellate costs are imposed.

If the State is able to overcome the presumption of continued indigence and support a factual finding that Delgado has the ability to pay, then either this court or the superior court could fairly exercise discretion

to impose appellate costs depending on Delgado's actual and documented ability to pay.[2]

*Blazina* signals that the time has come for Washington courts and prosecutors to stop punishing the poor for their poverty. Delgado asks that this court deny all appellate costs or at least require the trial court on remand to conduct a fair fact-finding hearing to determine his actual ability to pay appellate costs.

## D. CONCLUSION

For the reasons stated, this court should reverse and remand for a new trial based on the trial court's constitutionally deficient instruction on reasonable doubt.

Respectfully submitted on February 2, 2016.

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[2] The trial court here declined to impose any discretionary costs associated with trial. CP 111–12.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on February 2, 2016, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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