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Court of Appeals
Division III
State of Washington

No. 33526-7-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

FRANK MURILLO, IV,
Defendant/Appellant.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Alexander C. Ekstrom, Judge

BRIEF OF APPELLANT

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The court erred in calculation of the offender score.
2. The sentencing condition prohibiting appellant' s contact with his biological children infringes on his fundamental right to parent.
3. The trial court erred in imposing improper conditions of community custody.
4. The trial court erred in imposing legal financial obligations without conducting an adequate inquiry into appellant's likely ability to pay as required by *State v. Blazina*.
5. Appellant's trial counsel was ineffective for failing to object to the imposition of legal financial obligations when appellant lacks the present and likely future ability to pay.
6. Insufficient evidence supports the trial court's determination that appellant has the likely present or future ability to pay legal financial obligations.
7. The court erred by imposing a \$500 fine under RCW 9A.20.021 and costs for recoupment of sheriff service fees.
8. The imposition of legal financial obligations is improper because appellant lacks the likely ability to pay.

Issues Pertaining to Assignments of Error

1. Do the possession of depictions counts comprise the same criminal conduct when the possession is a continuing offense that is committed at the same time and place and encompasses the same criminal intent and same victim?¹

2. Appellant was convicted of possession of depictions of engaging in consensual sexually explicit conduct with his 16-year-old girlfriend. As conditions of sentence, the court prohibited contact with minors including appellant's biological children. Where the sentencing conditions are not crime-related and are broader than reasonably necessary to prevent harm to the children, must the conditions be stricken?²

3. Does a court violate due process and exceed its statutory authority by imposing conditions of community custody that are improper, not crime-related or unconstitutionally vague?³

4. 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 trial court

¹ Assignment of Error 1.

² Assignments of Error 2, 3.

recognized appellant was impoverished but nevertheless imposed LFOs without inquiry into his inability to pay. Should this Court remand with instructions to strike LFOs?⁴

B. STATEMENT OF THE CASE

On February 18, 2014, police saw the defendant, Frank Murillo IV, drive away several times and return to the parking lot near the Tahitian Motel in Pasco, Washington. 5/14/15⁵ RP 80, 82–83. After confirming Mr. Murillo had a suspended license and was on community custody as a result of an earlier conviction and had apparently been living at the motel for a week without notifying his Community Corrections Officer (“CCO”), police arrested Mr. Murillo. 12/2/14 RP 5–9, 23, 32–33, 35–37, 39; 5/14/15 RP 27–29, 31–32, 83, 90. Two short videos and a number of pictures made by Mr. Murillo while he and his 16-year-old girlfriend “J.G.” engaged in consensual sexual intercourse were on a black Verizon LG cell phone seized during the search incident to arrest. 12/2/14 RP 10, 24; 5/14/15 RP 68–69, 72, 84, 95–97, 104–05, 114, 120–21, 123–24, 127. Police also found a large amount of marijuana, a scale and Ziploc baggies

³ Assignment of Error 3.

⁴ Assignments of Error 4, 5, 6, 7, and 8.

⁵ Because the proceedings below were reported by various court reporters and are contained in separate volumes, they will be cited to by date, e.g., “5/14/15 RP ___.”

during searches of the car and motel room. 5/14/15 RP 28–30, 42–43, 85–90, 104.

The state charged Mr. Murillo with one count, relating to the two videos, of sexual exploitation of a minor occurring on or about February 14, 2014, and one count of possession with intent to deliver marijuana and ten counts, relating to the photographs, of first degree possession of depictions of a minor engaged in sexually explicit conduct, all occurring on or about February 18, 2014. CP 191–94; 5/13/16 RP 15.

A jury acquitted Mr. Murillo of the sexual exploitation and drug counts and found him guilty of the possession of depictions counts. CP 53–64.

At sentencing, defense counsel requested the ten convictions for possession of depictions be counted under a same criminal conduct analysis as one point for purposes of calculating the offender score, and the following discussion took place.

[THE COURT]: We are here for the matter of sentencing [] today. Should indicate to counsel I've reviewed the pre-sentence investigation and looked at RCW 9.68A.070 ... The unit of prosecution is for each depiction or image on the conviction [*sic*].
...

6/2/2015 RP 10.

[PROSECUTOR]: I'll make a brief additional record that each count would be counted against each other, also there was no evidence in this case that the photographs were made at the same place and time. They all involve the same victim ... Mr. Murillo said he made the video on different days regarding [sic] the photographs. There is one file image that is distinctly different from the others. The State charged possession, he possessed them on the same date. As to where [sic] they were made, they weren't at the same point in time so they are not the same criminal [conduct].

6/2/2015 RP 10–11.

[DEFENSE COUNSEL]: I was going to cite to [*State v.*] *Polk*[,187 Wn. App. 380, 348 P.3d 1255 (2015)]. *Polk* is a second degree [possession of depictions] case. It is interpreting the statute as amended. Further goes on, it's on page nine of Westlaw, 'Still, even when the legislature has expressed its view on the unit of prosecution, we must perform a factual analysis to determine whether more than one 'unit of prosecution' is present in a particular case.' In other words a double jeopardy issue. And they did that analysis in *Polk* and found that it did violate that defendant's right against double jeopardy. So that applies -- compares in this particular case. What I'm hearing from the State is really a burden shifting saying we haven't proved otherwise. Well, I would say the reverse is true. They have not made a case that these were taken on different occasions and they were counted as separate criminal conduct and units of prosecution.

... My client is going to do a lot of time, even on the low end of the range he is looking at 21 months, which is a long time for some pictures of his girlfriend. ...

6/2/2015 RP 11–12.

[THE COURT]: Thank you, counsel. Your references [sic] as I understand it is that the Court treat these always [sic] as the same criminal conduct resulting in an offender score of three and a half. You indicated 21 months. My understanding is he was on community custody and he has two and a half points otherwise; is that correct?

[DEFENSE COUNSEL]: He has one juvenile, one other felony. I have two and a half.

[THE COURT]: We have one point for community custody and half point for the juvenile felony and there is the other point for manufacture/deliver 2013 – yes. So you are asking that I treat this as a two point five; am I correct?

[DEFENSE COUNSEL]: Yes.

[PROSECUTOR]: It's clear from the law [RCW] 9.68A.070([1])(c) that these are to be treated as separate offenses. That being the case, the defendant's offender score is nine plus, which makes his range 77 to 102 months. ...

6/2/2015 RP 13–14.

[THE COURT]: All right. Counsel, convictions are count two through 11 in this case. Counts one and 12 were found not guilty by the jury in this case. The Court believes that after reviewing *Polk* and reviewing the statute [RCW] 9.68A.070, specifically subsection (1)(c), that the Court is bound to treat each of the depictions as separate incidences of conduct. That results in a score of 12 and a half points. For our purposes, 9 plus. This yields a range of 77 to 102 months. ...

6/2/2015 RP 16–17.

Using an offender score of nine plus, the court imposed concurrent 84 months of confinement on each of the counts. CP 28. The court was aware it could not be told “for sure” whether Mr. Murillo would be capable of employment upon release from confinement, that he was physically able, and that he owes child support and “approximately \$30,000 in fines and restitution.” 6/2/15 RP 15. The trial court imposed

\$1, 287.48⁶ in legal financial obligations (“LFOs”), stating “While he does have prior obligations based on prior convictions and a current child support obligation to one child with the reasonable belief that he may eventually have to pay support for the other two children, I still believe that an imposition of fines are [sic] appropriate.” CP 25; 6/2/15 RP 17. In boilerplate language, Mr. Murillo was ordered to make monthly payments of at least \$100, “commencing immediately.” CP 26. The Judgment and Sentence contained a boilerplate finding that Mr. Murillo “is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 24, ¶ 2.5.

Among the conditions of sentence, the court ordered certain “crime-related prohibitions” as follows.

(1) That Mr. Murillo have no contact with children under eighteen, including his biological children, unless the contacts are pre-approved and supervised. CP 16.⁷ A related condition completely prohibits entering or frequenting areas/businesses which are routinely used by minors, such as school grounds, parks and shopping centers. CP 16.⁸

⁶ This amount consists of a \$500 victim assessment, \$200 criminal filing fee, \$87.50 sheriff service fee, \$500 fine (RCW 9A.20.021). CP 25. The court declined to impose a \$100 felony DNA collection fee. CP 25; 6/2/15 RP 17.

⁷ Appendix F to Judgment and Sentence, paragraph 13.

⁸ Appendix F to Judgment and Sentence, paragraph 15,

(2) That Mr. Murillo not wear clothing or other items as determined by his Community Corrections Officer (“CCO”) that are in gang-associated colors; that he not use his own or any other person’s gang “tags, nicknames or monikers”; and that he have no contact with persons identified by legal authorities as gang members or their associates. CP 15, 17.⁹

(3) That Mr. Murillo “shall submit to urine, breath, or other screening” whenever requested to do so by the program staff or his CCO. CP 15.¹⁰

(4) That Mr. Murillo “not enter bars, taverns, lounges, or any place/business where alcohol is the primary sale item. CP 16.¹¹

(5) That Mr. Murillo consent to unannounced examinations of any computer or cell phone equipment owned or controlled by him, including retrieval/copying of all data from the computer and any internal/external peripherals and may involve removal of such equipment for further investigation.¹²

Mr. Murillo timely appealed. CP 8–9.

⁹ Appendix F to Judgment and Sentence, paragraphs 25, 26 and 27.

¹⁰ Appendix F to Judgment and Sentence, paragraph 5.

¹¹ Appendix F to Judgment and Sentence, paragraph 21.

¹² Appendix F to Judgment and Sentence, paragraph 28.

C. ARGUMENT

1. The possession of depictions counts comprise the same criminal conduct when the possession is a continuing offense that is committed at the same time and place and encompasses the same criminal intent and same victim.

A sentencing court's decision on same criminal conduct is reviewed for an abuse of discretion or misapplication of the law. *State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). “Under this standard, when the record supports only one conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* at 537–38. “But where the record adequately supports either conclusion, the matter lies in the court's discretion.” *Id.* at 538.

Generally, “[w]hen imposing a sentence for two or more current offenses, the court determines the sentence range for each current offense by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score.” *State v. Polk*, 187 Wn. App. 380, 396, 348 P.3d 1255 (2015), *citing State v. Ehli*, 115 Wn. App. 556, 560, 62 P.3d 929 (2003) (footnote omitted). However, offenses

comprising the same criminal conduct are scored as a single offense under RCW 9.94A.589(1)(a). “Same criminal conduct” means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a).

To commit possession of depictions of a minor engaged in sexually explicit conduct in the first degree, a person must knowingly possess a visual or printed matter depicting a minor engaged in sexually explicit conduct as defined by RCW 9.68A.011(4)(a) through (e). RCW 9.68A.070(1)(a). For the purposes of determining the unit of prosecution for each first degree offense in the aforementioned section, each depiction or image constitutes a separate offense. *Id.*

However, whether multiple possessions of depictions comprise same criminal conduct for purposes of calculating the offender score is a separate inquiry. “[I]t is well established that a double jeopardy violation claim ‘is distinct from a “same criminal conduct” claim and requires a separate analysis.’ ... ‘The double jeopardy violation focuses on the allowable unit of prosecution and involves the charging and trial stages. The “same criminal conduct” claim involves the sentencing phase and focuses instead on the defendant's criminal intent.’ ” *State v. Thompson*,

192 Wn. App. 733, 736 fn.1, 370 P.3d 586, 587 (2016), *citing State v. French*, 157 Wn.2d 593, 611, 141 P.3d 54 (2006).

The crimes here occurred at the same time and place because the possession charge is a continuing offense. *Polk*, 187 Wn. App. at 396. When a continuing offense is charged, it is a single offense over the entire time period during which the offense occurred. *See In re Snow*, 120 U.S. 274, 281–82, 7 S. Ct. 556, 30 L. Ed. 658 (1887) (unlawful cohabitation is a continuing offense that cannot be divided into multiple charges for arbitrarily selected time periods); *State v. McReynolds*, 117 Wn. App. 309, 339, 71 P.3d 663 (2003) (separate discrete possessions of stolen property may be charged as separate units of prosecution, but the State may not divide a continuous course of possession into separate units of prosecution).

Moreover, the state charged and asked the court to instruct the jury that “on or about February 18, 2014,” was the requisite date of possession of depictions for each of the ten counts, and the state argued in closing and to the sentencing court that Mr. Murillo’s possession occurred on the date of his arrest on February 18, 2014. CP 87 (Instruction No. 17), 113 (proposed Instruction No. 17), 191–94; 5/15/15 RP 172; 6/2/15 RP 10.

The offending possessions of depictions necessarily occurred at the same time and place.

Further, it is undisputed the depictions involved the same victim and Mr. Murillo knew he possessed the depictions. *Polk*, 187 Wn. App. at 397 (“The requisite criminal intent for possession of depictions is *knowing possession* of the prohibited images” (emphasis in original)).

Because the intent of each first degree possession of depictions counts is the same and the possessions of depictions were committed at the same time and place and involved the same victim, Mr. Murillo’s convictions constitute the same criminal conduct. *Accord, State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994) (“[W]e hold concurrent counts involving simultaneous simple possession of more than one controlled substance encompass the same criminal conduct for sentencing purposes.”).

The trial court’s determination that the possession of depictions offenses were not same criminal conduct was a misapplication of the law and an abuse of discretion. As discussed above and contrary to the court’s stated belief, *Polk* and RCW 9.68A.070(1)(c) do not “[bind] [the court] to treat each of the depictions as separates incidences of conduct.” 6/2/15 RP 16–17. The record and law support only one conclusion, that these crimes

constituted the same criminal conduct, and the sentencing court abused its discretion in arriving at a contrary result.” *Graciano*, 176 Wn.2d at 537–38. The matter must be remanded for resentencing using the correct offender score. *See* 6/2/2015 RP 13–14.

2. The court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are improper, not crime-related, or are unconstitutionally vague.

A defendant may 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); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). “As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions.” RCW 9.94A.703(3)(f). A “[c]rime-related prohibition” is defined, in relevant part, as “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10); *see also State v. O’Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). If the condition is statutorily authorized, crime-related prohibitions are reviewed for abuse of

discretion. *Armendariz*, 160 Wn.2d at 110, citing *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). But conditions that do not reasonably relate to the circumstances of the crime, the risk of re-offense, or public safety are unlawful, unless explicitly permitted by statute. See *Jones*, 118 Wn .App. at 207–08.

a. Prohibition of contact with biological minor children. Parents have a fundamental liberty interest in the care, custody, and control of their children.” *Ancira*, 107 Wn. App. at 653, citing *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L.Ed.2d 599 (1982). While the trial court is authorized to impose crime-related prohibitions as part of any sentence, when the court imposes conditions which infringe on the defendant’ s fundamental rights, those conditions must be reasonably necessary to accomplish the essential needs of the State and prevent further criminal conduct. *State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998) (concluding that prohibition on sex offender’s contact with minors not justified where victim was not a minor). Appellate courts review crime-related prohibitions for abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993).

Careful review is required when sentencing conditions interfere with a fundamental constitutional right. *State v. Warren*, 165 Wn.2d 17,

32, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009). The fundamental right to parent can be restricted by a condition of a criminal sentence only if that condition is reasonably necessary to prevent harm to the child. *Ancira*, 107 Wn. App. at 654. Both the scope and duration of a no contact order affecting a defendant's parental rights must be reasonably necessary. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 381, 229 P.3d 686 (2010).

In this case, barring contact with his biological children is not a valid crime-related prohibition because the state failed to show Mr. Murillo is a danger to his young children and the constraint unduly burdens his fundamental parenting rights. Mr. Murillo was convicted of possessing pictures he took of consensual sexual relations between him and his sixteen-year-old girlfriend. There was no evidence of force or assaultive conduct. At the time of sentencing, his oldest child was four, the next oldest was 18 months, and his youngest child was born while Mr. Murillo has been in custody regarding the present offenses. CP 44–45. The children do not reside with him nor were they present at any of the picture-taking sessions. While they and the victim are minors, there is no evidence that Mr. Murillo poses a risk of harm to his very young children. *Cf. State v. Corbett*, 158 Wn. App. 576, 599, 242 P.3d 52 (2010)

(upholding the sentencing condition prohibiting contact with the defendant's minor children because of the defendant's history of establishing trust in a parental role to victimize other minors); *see also State v. Berg*, 147 Wn. App. 923, 927, 943, 198 P.3d 529 (2008) (upholding a sentencing condition prohibiting the defendant from unsupervised contact with his minor daughter because the defendant was convicted of committing crimes against other children entrusted in his care).

In *State v. Ancira*, the defendant pleaded guilty to felony violation of a domestic violence no-contact order prohibiting contact with the defendant's wife. 107 Wn. App. at 652. As a condition of sentence, the trial court prohibited the defendant from having contact with his wife and children. *Id.* The court explained it prohibited contact with the defendant's children in addition to his wife because it was harmful to children to witness violence between their parents. *Id.* at 653–54. On appeal, the court invalidated the sentencing condition reasoning that witnessing domestic violence between parents is not a sufficient basis to prohibit parental contact with children. *Id.* at 654. In *Ancira*, there was no indication the violence the children witnessed their mother suffer would be turned upon them or the father otherwise posed a risk of harm to them.

See id. at 653. Here, the sexual acts were consensual, there was no evidence of violence being suffered, and the minor children were not present at the taking of the pictures. And as in *Ancira*, there was nothing remotely suggesting Mr. Murillo otherwise posed a risk of harm to his children.

In *State v. Letourneau*, Division One struck down a no-contact order related to biological children because insufficient evidence existed to show it was reasonably necessary to protect her own children. 100 Wn. App. 424, 441–42, 997 P.2d 436 (2000). Letourneau did not have sex with a family member or with a child living in her home and evaluators did not find her to be a pedophile. *Berg*, 147 Wn. App. at 943 (citing *Letourneau*, 100 Wn. App. at 441–42. As in *Letourneau*, Mr. Murillo’s offense of possession of depictions was not perpetrated against a minor he parented. *Letourneau* is indistinguishable and provides the necessary support to strike a prohibition on contact with his own children.

Ultimately, the *Ancira* court held that while “some limitations on Ancira’s contact with his children, such as supervised visitation, might be appropriate, even as a part of a sentence,” the no contact order was far too broad and the facts of the case “do not form a sufficient basis for this

extreme degree of interference with fundamental parental rights.” *Id.* at 655–56.

Here, as in *Ancira*, the order prohibiting contact with Mr. Murillo’s children and the complete prohibition against entry in areas where his parenting of very young children would reasonably require an active presence such as school grounds, parks and shopping centers, is far broader than reasonably necessary to protect his minor children. This interference with Mr. Murillo’s fundamental rights is not justified, and the prohibitions must be stricken.

b. Gang-related conditions. The prohibitions against Mr. Murillo’s association or contact with “gang members or their associates” or wearing apparel in certain colors or “using” gang nicknames are not related to the crimes of conviction. There is no evidence in the record that his possession of depictions involved gang-related circumstances. In fact the court prohibited any testimony of gang affiliation or significance with respect to tattoos of Mr. Murillo visible in the videos and some of the photographs. CP 150; 5/13/15 RP 14–19. The court exceeded its statutory authority in imposing the sentencing conditions and they must be stricken.

See O'Cain, 144 Wn. App. at 775 (stating the remedy for an erroneous community custody condition is to strike it on remand).

Alternatively, the challenged conditions are unconstitutionally vague and impinge on protected Mr. Murillo's First Amendment rights. The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. 14, Const. art. I, § 3; *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 753.

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. *Bahl*, 164 Wn.2d at 751–52. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. *Id.* at 752. *See also State v. Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (pre-enforcement challenges to community custody conditions are ripe for review when the issue raised is

primarily legal, further factual development is not required, and the challenged action is final). In *Valencia*, the petitioner’s vagueness challenge to their community custody condition prohibiting possession or use of “any paraphernalia that can be used for the ingestion or processing of controlled substances” was held to be ripe for review. *Valencia*, 169 Wn.2d at 786–91. Here, Mr. Murillo similarly challenges the gang-related conditions as unconstitutionally vague. The issue is ripe for review and should be considered on its merits.

“[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct.” *Bahl*, 164 Wn.2d at 752. This assures that ordinary people can understand what is and is not allowed, and are protected against arbitrary enforcement of the laws. *Id.* at 752–53 (quoting *Douglass*, 115 Wn.2d at 178 (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983))). Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. *Bahl*, 164 Wn.2d at 753, 193 P.3d 678. If the condition is unconstitutionally vague, it is manifestly unreasonable. *Valencia*, 169 Wn.2d at 793 (citing *Bahl*, 164 Wn.2d at 753).

Here, the offending prohibitions are:

- not to “dress wholly in one color or display any other gang-associated dress items, based on color, to include, but not limited to, dew rags, kerchiefs, belts, shoelaces, or any other item deemed so by CCO” (CP 17, paragraph 25)
- not to “use your own or any other’s gang ‘tags’, nicknames or monikers, unless asked for such by law enforcement, DOC or other appropriate legal authority” (CP 17, paragraph 27)
- not to “have contact with any person identified by DOC or law enforcement as being a member or associate of any gang (CP 17, paragraph 26)

The terms “gang members or their associates” and apparel color or “gang-associated dress items [that] include ... any other item deemed so by CCO” and nicknames that may be indicative of gangs are not defined. The conditions are no more acceptable from a vagueness standpoint than the conditions found vague in *Bahl*, which prohibited the possession of or access to pornography. As in *Bahl*, the vague scope of proscribed conduct fails to provide Mr. Murillo with fair notice of what he can and cannot do.

Moreover, the breadth of potential violations under these conditions offends the second prong of the vagueness test, rendering the conditions unconstitutionally vague. Because the conditions might potentially encompass a wide range of everyday conduct, they “ ‘do[] not provide ascertainable standards of guilt to protect against arbitrary enforcement.’ ” *Bahl*, 164 Wn.2d at 753 (quoting *Kolender*, 461 U.S. at

357, 103 S.Ct. 1855). Conditions that leave so much to the discretion of individual community corrections officers are unconstitutionally vague.

Other jurisdictions considering vagueness challenges to similar restrictions involving gang clothing have required specificity. *See e.g.*, *United States v. Soltero*, 510 F.3d 858, 865–86 (9th Cir.2007) (condition forbidding the defendant from wearing, using, displaying or possessing apparel connoting affiliation upheld because it specifically referenced the Delhi gang and district court was entitled to presume the defendant—who had admitted to being a member of the gang—was familiar with the gang's paraphernalia); *United States v. Johnson*, 626 F.3d 1085, 1091 (9th Cir. 2010) (upholding release condition proscribing wearing clothing that “ ‘evidences affiliation’ with the Rollin' 30's gang”).

Specificity has also been required regarding association with gang members. *See e.g.*, *United States v. Vega*, 545 F.3d 743, 749–50 (9th Cir.2008) (upholding a release condition prohibiting the defendant from associating “with any member of any criminal street gang as directed by the Probation Officer, specifically, any member of the Harpys street gang”); *Soltero*, 510 F.3d at 866–67 (upholding a condition forbidding the defendant from associating “with any known member of any criminal street gang ..., specifically, any known member of the Delhi street gang”).

Unlike in the above cases, the restrictions in Mr. Murillo’s case lack specificity and are therefore impermissibly vague.

In *United States v. Johnson*, the court concluded the restriction against association with “persons who associate with” gang members was impermissibly vague.

There is a considerable difference, however, between forbidding a defendant from associating with gang members and precluding him from associating with *persons who associate with* gang members. The latter proscription is impermissibly vague and entails a deprivation of liberty that is greater than necessary to achieve the goal of preventing Johnson from reverting to his previous criminal lifestyle. As Johnson points out, this condition sweeps too broadly because it encompasses not only those who are involved in the gang’s criminal activities, but also those who may have only a social connection to an individual gang member. The provision could forbid Johnson from associating with, for example, the mother or father, sister or brother, aunt or uncle, employer, minister or friend of a Rollin’ 30’s gang member. It could even preclude Johnson from meeting with his probation officer.

Johnson, 626 F.3d at 1091. As in *Johnson*, the condition prohibiting Mr. Murillo’s contact with the “associates” of gang members is impermissibly vague.

Where First Amendment rights are involved, a greater degree of specificity may be demanded. *Bahl*, 164 Wn.2d at 757 (freedom of speech); *see also State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (gang affiliation is protected by the First Amendment right of association). Conditions that place limitations upon fundamental rights

are permissible only if imposed sensitively. *State v. Riley*, 121 Wn.2d at 37; *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir.1975). A defendant's freedom of association may be restricted only if reasonably necessary to accomplish the essential needs of the state and public order. *Malone v. United States*, 502 F.2d 554, 556 (9th Cir.1974), *cert. denied*, 419 U.S. 1124, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975).

Choice of wearing apparel, names and friends or acquaintances involve fundamental freedoms that should not lightly be abrogated. The boilerplate constraints imposed upon Mr. Murillo are unconstitutionally vague. The conditions are not crime-related and should be stricken for that reason. And because they are also manifestly unreasonable, the offending conditions should be reversed. *Bahl*, 164 Wn.2d at 753.

c. Possession of alcohol/entering places primarily selling alcohol.

The court had discretionary authority to order Mr. Murillo to refrain from consuming¹³ alcohol under former RCW 9.94A.703(3)(e)(2009).¹⁴

However it could not impose the non-statutory constraints unrelated to his crime of possession of depictions that prohibited him from possessing

¹³ Appendix F to Judgment and Sentence, paragraph 20.

¹⁴ See RCW 9.94A.345 ("Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.").

alcohol or entering any place or business where alcohol is the primary sale item.¹⁵ The conditions must be vacated.

d. Breath screening condition. Although the jury did not convict him of the crime, Mr. Murillo told law enforcement he possessed marijuana with intent to sell some of it. 2/14/15 RP 104; CP 53. The condition requiring Mr. Murillo to submit to urinalysis¹⁶ is arguably reasonably related to that admission. However, there is no evidence of any connection between Mr. Murillo's possible consumption of alcohol and such admission or his convictions for possession of depictions. As David Boerner states in his treatise, *Sentencing in Washington* § 4.5 (1985),

There must be some basis for the 'crime-related' determination if the limitation is to have any meaning. For a sentencing judge to base the determination that conduct is crime-related upon belief alone, without some factual basis, would be to read the crime-related requirement out of the statute.

Accordingly, it was error to impose the condition requiring Mr. Murillo to submit to breathalyzer testing. The condition must be vacated. *State v. Parramore*, 53 Wn. App. 527, 531, 768 P.2d 530 (1989).

e. Search of computer equipment. The court imposed requirements related to computer and cell phone equipment.¹⁷ Mr. Murillo possessed depictions on his cell phone. In *O'Cain*, a condition prohibiting

¹⁵ Appendix F to Judgment and Sentence, paragraphs 20 and 21.

¹⁶ CP 15, Appendix F to Judgment and Sentence, paragraph 5.

the defendant from accessing the Internet without prior approval from his CCO or treatment provided was not crime-related and therefore was stricken. 144 Wn. App. at 773. *O’Cain* controls. As in that case, there is no evidence in the record that the challenged condition as to computers is crime-related. *Id.* For example, there is no evidence Mr. Murillo accessed a computer before committing the crime or that use of a computer contributed in any way to the crime, and the trial court made no such findings. Moreover, insofar as the above-mentioned condition as to computers can be considered a “monitoring” condition, it is invalid; so-called “monitoring” conditions must be limited to monitoring compliance with valid community custody conditions. *State v. Combs*, 102 Wn. App. 949, 952–53, 10 P.3d 1101 (2000). This condition as it relates to computers should be stricken.

3. The legal financial obligations should be stricken because Mr. Murillo lacks the ability to pay.

- a. The trial court’s nominal inquiry fails to satisfy the requirements of *Blazina* that it consider “the financial resources of the defendant and the nature of the burden that payment of costs will impose.”

¹⁷ Appendix F to Judgment and Sentence, paragraph 28.

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court “may order the payment of a legal financial obligation.” RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he 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).

In response to national attention given to the unanticipated and unintended effects of the burdens associated with imposing unpayable legal financial obligations on indigent defendants, the *Blazina* Court reaffirmed the trial court’s statutory duty to conduct an individualized inquiry in the defendant’s current and future ability to pay, considering factors “such as incarceration and a defendant’s other debts, including restitution.” *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Referencing GR 34, the Court also noted, “if someone does meet the GR standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

Here, upon inquiry, the court was aware it could not be told “for sure” whether Mr. Murillo would be capable of employment upon release

from confinement, that he was physically able, and that he owes child support and “approximately \$30,000 in fines and restitution.” 6/2/15 RP 15. The court stated it had reviewed the pre-sentence investigation (“PSI”) report. 6/2/15 RP 10. The PSI revealed Mr. Murillo dropped out of school in eighth grade, had worked as a field laborer or during tax season had dressed up in a Statue of Liberty costume and danced on the sidewalk to attract customers for Liberty Tax Service, received \$180 a month in food assistance, and had no other form of income, and that he had substantial outstanding debt, including \$30,000 in fines and restitution and \$6,000 in unpaid child support for one child with the potential of such obligations for two more children. CP 44. Despite this record of significant pre-existing debt and minimal work qualifications, the court did not inquire into the effects of the LFOs it was intending to assess or the 84-month (seven year) sentence it was intending to impose on Mr. Murillo’s ability or likely future ability to pay. The trial court simply assessed \$1, 287.48 in legal financial obligations.

The nominal inquiry conducted by the trial court fails to satisfy the requirements of *Blazina* because it inquired only into whether Mr. Murillo was able to work for wages in the future. The court did not consider his living expenses or education or work experience, whether he supports

dependents, the effect of the pretrial incarceration on his debt burden, the outstanding legal financial obligations already existing at the time of sentencing, the impact of accruing interest on the rate of repayment, or any other factor related to Mr. Murillo's ability or likely future ability to pay LFOs. Further, the inquiry failed to address the factors specifically identified by the *Blazina* Court as mandatory, namely, the effects of incarceration and the defendant's other debts. *Blazina*, 182 Wn.2d at 838. The inquiry is wholly inadequate to satisfy the minimum requirements set forth in *Blazina*.

The *Blazina* Court recognized that under RCW 10.01.160(3), the obligation to conduct an individualized inquiry rests with the trial court. 181 Wn.2d at 839. This structure suggests that to the extent the state wishes the court to impose discretionary legal financial obligations, the state carries the burden of production to demonstrate to the court that the defendant will be able to pay them. In an analogous setting, the imposition of sentence, the trial court is required to impose a sentence within the standard range established for the offense. RCW 9.94A.505. There, the Washington Supreme Court has held that the burden of proving prior criminal history necessary to calculate the offender score rests with the

state and cannot be shifted to the defendant without violating his right to due process. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

Where the state fails to meet its evidentiary burden, no strategic reason exists to justify the failure to object. *See, e.g., State v. Lopez*, 107 Wn. App. 270, 27 P.3d 237 (2001). Under such circumstances, counsel's failure to object cannot be attributed to legitimate trial strategy because no possible advantage inures to the defendant. *Id.* at 277. Here, where the inquiry was nominal and failed to address significant LFOs already owed by the defendant and ultimately disregarded two of the obligatory factors recognized in *Blazina*, the effect of incarceration and the existence of other debt, trial counsel's failure to hold the state and the trial court to their obligations provides no conceivable benefit to Mr. Murillo. This Court should hold that failing to object to an inadequate *Blazina* inquiry constitutes deficient performance and, under the facts of this case, was prejudicial in light of Mr. Murillo's ongoing indigency and substantial debt.

A finding of ability to pay is reviewable under a "clearly erroneous" standard. *State v. Bertrand*, 165 Wn. App. 393, 403–04, 267 P.3d 511 (2011). In light of *Blazina*'s requirements, the court's

unsupported remark that “I still believe that an imposition of fines are [sic] appropriate” is inadequate to support the finding of future ability to pay and is therefore clearly erroneous. CP 25; 6/2/15 RP 17.

This court should consider, as directed by *Blazina*, the extent of Mr. Murillo’s debts and the effects of the 84-month term of incarceration, considering the amount of interest that will accrue on the obligations as well as Mr. Murillo’s likely earning capacity upon release. Mr. Murillo respectfully submits that review of these facts will demonstrate the imposition of LFOs implicates all of the negative consequences associated with subjecting offenders to perpetual debt, and that the court’s finding he has the likely future ability to pay is clearly erroneous in light of the amount of outstanding debt and term of confinement imposed. In the alternative, the matter should be remanded to the superior court to reconsider these legal financial obligations consistent with the requirements of *Blazina*. *Id.*

b. 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.” *Blazina*, 182 Wn.2d at 830.

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 mandatory as well as discretionary costs 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 mandatory costs without regard to Mr. Murillo’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 706, 712–13, 355 P.3d 1093 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).¹⁸

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 VPA, 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,”

¹⁸ 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).

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. Murillo includes in his challenge here: the Victim Penalty Assessment 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; see also *State v. Duncan*, No. 90188-1, 2016 WL 1696698, at *5 n.3 (Wash. Apr. 28, 2016).

It would be particularly problematic to require Mr. Murillo to pay the “criminal filing fee,” because many counties – including Washington’s largest – do not impose it on indigent defendants.¹⁹ This 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

¹⁹ This Court can take judicial notice of the fact that King County courts never impose this cost on indigent defendants. In the alternative, Mr. Murillo would be happy to provide the Court with representative judgments from King County.

commensurate with the punishment imposed on others committing similar offenses”).

GR 34, which was adopted at the end of 2010, also supports Mr. Murillo’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. *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 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, Alexis 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).²⁰ 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 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. Murillo 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 Mr. Murillo is not rationally related to the goal, because "the state cannot collect money from defendants who cannot pay." *Blazina*,

²⁰ Available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

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

c. 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*, 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.

RAP 2.5(a)(2) permits errors to be raised for the first time upon review when the error alleges "failure to establish facts upon which relief can be granted." The exception "is fitting inasmuch as '[a]ppel is the first time sufficiency of evidence may realistically be raised.'" *Roberson v. Perez*, 156 Wn.2d 33, 40, 123 P.3d 844 (2005) (quoting *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998)). RAP 2.5(a)(2) has been applied to review of remedies imposed following a substantive trial, including a party's entitlement to attorney fees. *Stedman v. Cooper*, 172 Wn. App. 9, 24–25, 292 P.3d 764 (2012). *Stedman* is directly analogous to the imposition of LFOs following a trial when there is no stipulation as to the defendant's ability to pay. Where, as here, insufficient facts support the trial court's determination that the defendant has the likely ability to pay LFOs, the statutory requirements to impose LFOs under RCW 10.01.160 are not met. Likewise, in *Stedman*, insufficient facts supported the imposition of attorney fees because they failed to show the requirements of RCW 7.06.060 were met. As in *Stedmen*, review should

be granted.

Review of the LFO imposition is also appropriate under RAP 2.5(a)(3) when the failure to object constitutes ineffective assistance of counsel. Division Two of the Court of Appeals has noted that failing to object to legal financial obligations may constitute deficient performance by trial counsel. *State v. Lyle*, 188 Wn. App. 848, 355 P.3d 327 (2015), *rev. granted, cause remanded*, 365 P.3d 1263 (Wash. February 2, 2016). However, the *Lyle* court declined to reverse the sentence on the grounds the record did not reflect additional debt that would allow an evaluation of his ability to pay by the appellate court. *Id.* at 329–30.

Here, as discussed above, the record disclosed significant existing debt and the reasonable prospect of its being increased. The existence of this debt supports Mr. Murillo’s request for review pursuant to RAP 2.5(a)(3) because it tends to show that he was prejudiced by the failure to object to the LFO assessment. Had Mr. Murillo’s counsel held the trial court to its duty under *Blazina* to inquire into the existence of his other debts and the effects of education, income, and incarceration, the court’s conclusion that Mr. Murillo had a realistic ability to pay additional LFOs upon his release would be significantly undermined.

Public policy also 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. Murillo’ 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. Murillo’s’ June 2, 2015, sentencing occurred three months after the *Blazina* opinion was issued on March 12, 2015. Pre- and post-*Blazina*, trial courts are required to make the appropriate inquiry to pay inquiry on the record. *Kitsap Alliance of Prop. Owners, supra*. The court below did not adequately inquire and trial counsel failed to object.

Mr. Murillo 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. Murillo's extreme indigence, this Court should remand with instructions to strike legal financial obligations, and strike the boilerplate finding that Mr. Murillo has the ability to pay.

4. Appeal costs should not be imposed.

20-year -old Mr. Murillo was sentenced to 84 months of confinement. CP 28²¹. The trial court found him indigent and unable to pay for the expenses of appellate review and entitled to appointment of appellate counsel at public expense. CP 5–7. If Mr. Murillo does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. *See* General Court Order of Court of Appeals, Division III (filed June 10, 2016); *see also State v. Sinclair*, __ P.3d __, 2016 WL 393719 (filed January 27, 2016) (instructing defendants on appeal to make this argument in their opening briefs). Appellate counsel anticipates filing

a report as to Mr. Murillo’s continued indigency and likely inability to pay an award of costs no later than 60 days following the filing of this brief, as required by the General Court Order.

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. Murillo’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the court waived most non-mandatory fees. Without a basis to determine Mr. Murillo 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.

²¹ Mr. Murillo’s date of birth is August 31, 1993, and he was 20 years old at the time of the incident at issue here. CP 20.

D. CONCLUSION

For the reasons stated, the matter should be remanded for resentencing. If Mr. Murillo 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 July 5, 2016.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office, P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 5, 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:

Frank Murillo, IV (#368186)
Airway Heights Corrections Center
PO Box 2049
Airway Heights WA 99001

E-mail: appeals@co.franklin.wa.us
Shawn P. Sant
Franklin County Prosecutor's Office
1016 N 4th Ave
Pasco WA 99301-3706

s/Susan Marie Gasch, WSBA #16485