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Court of Appeals
Division III
State of Washington

No. 34037-6-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

HERBERT AARON MARTIN II,
Defendant/Appellant.

APPEAL FROM THE KITTITAS COUNTY SUPERIOR COURT
Honorable Scott R. Sparks, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the school bus route stop enhancement.

2. The trial court erred in imposing the school bus route stop enhancement.

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 imposition of legal financial obligations is improper because appellant lacks the likely ability to pay.

8. The Judgment and Sentence contains a scrivener's error that should be corrected.

Issues Pertaining to Assignments of Error

1. Whether the evidence was insufficient to establish a bus stop designated by a school district existed within 1000 feet of the site of the crime of possession of methamphetamine with intent to deliver at the time of the possession?

2. Whether the trial court acted without authority in imposing an enhanced penalty for the crime of possession of methamphetamine with intent to deliver where the special verdict asked if the defendant delivered a controlled substance within the protected zone?

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?

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

5. Does the Judgment and Sentence contain a scrivener's error that should be corrected where the jury found the defendant guilty of the crime of possession of a controlled substance with the intent to deliver but the Judgment and Sentence states the crime of conviction is delivery of a controlled substance? CP 150, 156.

B. STATEMENT OF THE CASE

A confidential informant, Maria Ryan, agreed to work with law enforcement and buy drugs from target Elizabeth McKelheer in order to reduce penalties she faced for having sold drugs herself. RP 89, 92–93, 98. During a controlled buy on February 11, 2015, Ryan arrived at the house which happened to belong to Herbert Martin. RP 96, 106–11, 118–19, 143–51, 159, 199. McKelheer gave the \$40 buy money to a male named “Herb.” RP 96, 98, 121. The male left for a while and returned with a small package which he placed on the table. RP 98, 111, 121–23. Ryan left with the package which was later determined to contain methamphetamine. RP 75–77, 81, 98, 111, 149–50.

Mr. Martin and another witness said they had driven over to Montana on February 10 or 11 intending to purchase a car. The deal fell through and they returned to Ellensburg around February 14. Mr. Martin testified he had never met Ryan and was not at his house on February 11.

RP 182–86, 189–90, 193, 198, 202–11. When shown a photo montage several months after the incident, Ryan identified another person as the male who was present. RP 99–101, 153. At trial Ryan was “100 per cent” sure Mr. Martin was the person at the house the day of the incident. RP 99–101, 103.

Ben Mount, transportation director for the Ellensburg School District, testified to the location of six school bus stops within 1000 feet of the delivery address of 310 West 10th Avenue in Ellensburg, using a map generated from a school district computer program. RP 67–69. Mr. Mount testified the bus stop locations were “continually review[ed],” approximately once a month, because for various reasons stops were added or became inactive and were removed. RP 70–71. He did not testify the same spots were designated as school bus stops nearly a year earlier. Nor did Mr. Mount specifically testify the same bus stops existed on the February 11, 2015, date of delivery. RP 67–72 *passim*.

The special verdict relied upon for the school bus stop enhancement was proposed by the state and read as follows:

(THIS SPECIAL VERDICT IS TO BE ANSWERED ONLY IF THE JURY FINDS THE DEFENDANT GUILTY OF POSSESSION OF METHAMPHETAMINE WITH INTENT TO DELIVER AS CHARGED IN COUNT ONE)

We, the jury, return a special verdict by answering as follows:

QUESTION: Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus route stop designated by a school district?

CP 113, 151 (Verdict Form A-1).

The jury was given the following instruction, also proposed by the state, to guide them in answering the special verdict form:

INSTRUCTION NO. 13

You will also be given special verdict forms for the crimes [sic] charged in count one.¹ If you find the defendant not guilty of this crime, do not use the special verdict form. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," you must fill in the blank with the answer "no." If after full and fair consideration of the evidence you are not in agreement as to the answer, then do not fill in the blank for that question.

CP 111 (citing WPIC 160.00), 142 (Instruction No. 13).

¹ The first sentence of the state's proposed instruction reads "You will also be given special verdict forms for the crimes charged in counts one through six." CP 111. After discussion, the state and/or defense counsel prepared a corrected version intended to eliminate references to more than one crime or one count. RP 233-34, 238-39.

Following a jury trial in Kittitas County Superior Court, Mr. Martin was convicted of possession of methamphetamine with intent to deliver. CP 150. The jury found by special verdict Mr. Martin “delivered a controlled substance” to a person in a protected zone. CP 151.

Based upon an offender score of one, the court imposed a mid-standard range sentence of 16 months and a 24-month mandatory sentence enhancement, for a total of 40 months of confinement. CP 158-59.

The court imposed mandatory fees of \$600² and discretionary fees of \$200³, after Mr. Martin responded he would not be able to work upon his release because he is on disability due to his diseases and crippled hands and shoulders. RP 299. The court ordered Mr. Martin to make monthly payments of \$50 towards the legal financial obligations commencing upon release. RP 300. The Judgment and Sentence contains a boilerplate finding that “[t]he court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the

² \$500 victim assessment and \$100 DNA collection fee. CP 161.

³ \$200 court costs. CP 161. A \$200 criminal filing fee imposed under RCW 36.18.020(2)(h) is mandatory, not discretionary. *See, e.g., State v. Blazina*, 174 Wn. App. 906, 911 n.3, 301 P.3d 492 (2013), *review granted* (Wash. Oct. 2, 2013). However, the \$200 in court costs imposed here was not labeled as the criminal filing fee by the trial court, and therefore, it cannot be considered as such. *State v. Kuster*, 175 Wn. App. 420, 425, 306 P.3d 1022 (2013).

likelihood that the defendant's status will change.” CP 158 at ¶2.5. Mr. Martin did not object to the imposition of the LFOs. No restitution was ordered.

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

(7) Defendant shall not associate with persons involved in the use, sales and/or possession of dangerous drugs, narcotics or controlled substances.

(8) Defendant shall not enter into or remain in areas where dangerous drugs, narcotics, or controlled substances are being sold/purchased, possessed, and/or consumed.

(9) Defendant shall not purchase, possess, and/or consume any intoxicating liquors.

(10) Defendant shall not enter into or remain in establishments where alcohol is the main source of revenue. This does not include a restaurant which is attached to but separate from a bar/lounge area.

CP 166–67.

Mr. Martin timely appealed. CP 175.

C. ARGUMENT

1: The evidence was insufficient to establish a bus stop designated by a school district existed within 1000 feet of the site of the crime of possession with intent to deliver methamphetamine at the time of the possession.

Due process requires the state to prove every element of an offense beyond a reasonable doubt. U. S. Const. amend. XIV; *In re Matter of Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A conviction must be reversed for insufficient evidence where no reasonable fact finder would have found all the elements of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed 2d 560 (1979); *State v. C.G.*, 150 Wn.2d 604, 610, 80 P. 3d 594 (2003). The same is true of enhancements. *Blakely v. Washington*, 542 U.S. 296, 124 S Ct. 2531, 2538, 159 L Ed.2d 403 (2004).

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

A defendant convicted of possession with intent to deliver methamphetamine within 1000 feet of a school bus route stop designated by the school district is subject to a sentencing enhancement under RCW 69.50.435(1)(c). The existence of a school bus stop within 1,000 feet is sufficient to warrant imposition of the bus stop enhancement. *State v. Davis*, 93 Wn. App. 648, 652, 970 P.2d 336 (1999). However, the state

failed to prove that a school bus stop as designated by a school district existed within 1000 feet of the site of the crime of possession of methamphetamine with intent to deliver at the time of the possession.

Ben Mount, transportation director for the Ellensburg School District, testified merely to the location of six school bus stops within 1000 feet of the possession with intent to deliver address of 310 West 10th Avenue in Ellensburg as of the date of his testimony on January 15, 2016. RP 67–72. This was eleven months after the crime of possession of methamphetamine with intent to deliver occurred in February 2015 and was some five months following the commencement of a new school year in September 2015. Mr. Mount further testified each of the district’s bus stop locations and route sheets were “continually review[ed],” approximately once a month, because for various reasons stops were added or became inactive and were removed. RP 70–71. The map of bus stops created for use at trial did not prove that at least one of the same spots was designated as a school bus stop nearly a year earlier. Nor did Mr. Mount specifically testify at least one of the same bus stops existed on the February 11, 2015, date of the crime of possession with intent to deliver.

The mere fact that conditions existed even a few months ago is not evidence they are the same conditions that exist now. See, e.g., *State v.*

Simms, 95 Wn .App. 910, 977 P.2d 647 (1999), in which Division II noted that proof a man is incompetent at time of trial is not proof he was incompetent a few months before. Despite the fact the prosecutor could easily have asked the question whether one or more of the school bus stops at the relevant location had been there last year, this information was never established. In the event the stops to which the transportation director testified at the January 2016 trial were new stops, the state could still have prevailed if it had shown that a bus stop that existed at the time of the crime was within a thousand feet of the relevant location, even if that bus stop was not currently extant. The state did not do this either.

Moreover, the jury was not asked to identify or agree upon the exact location where Mr. Martin was alleged to have committed his crime of possession with intent to deliver. In its closing argument, the state said Mr. Martin “delivered” and “gave” Ryan the drugs at the house. RP 267. However, the record discloses he left his house with money, was gone for an undetermined amount of time, and then returned. Thus, although the jury had a date to go by, there was no evidence to rely upon or even to infer that Mr. Martin’s possession with intent to deliver did in fact occur within 1000 feet of even one of the eight bus stops.

As a result, the jury had only its own guesswork on which to rely in coming to its conclusion that at the time of the crime there was a bus stop within 1000 feet of the location where the crime was committed. “Guesstimates” cannot establish sufficient evidence. See *State v. Hennessey*, 80 Wn. App. at 194.

The state failed to prove Mr. Martin’s crime was committed within 1000 feet of a then-existing school bus stop and reversal of the school bus stop enhancement is required. Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). The matter must be remanded for re-sentencing without the school bus stop enhancement. *Id.*; *Hennessey*, 80 Wn. App. at 195.

2. The trial court erred in imposing an enhanced penalty for the crime of possession of methamphetamine with intent to deliver where the jury found only that the defendant delivered a controlled substance within the protected zone.

RCW 9.94A.533(6) provides that “[a]n additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435” The jury found Mr. Martin guilty of

the crime of possession of methamphetamine with intent to deliver offense. CP 150. Possession with intent to deliver methamphetamine is a ranked offense under RCW 69.50. RCW 69.50.401(a)(1)(ii); RCW 9.94A.518. And under RCW 69.50.435(1)(c), it is illegal to possess methamphetamine with intent to deliver within 1000 feet of a school bus stop.

Possessing with intent to deliver a controlled substance and delivering a controlled substance are made crimes by the same statute; however, they are different crimes and the elements required to prove each crime are different. Possession of a controlled substance with intent to deliver requires the state to prove the defendant's (1) unlawful possession and (2) intent to deliver (3) a controlled substance. RCW 69.50.401(a); *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 85 (1994); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.14 (3d Ed). Unlawful delivery of a controlled substance requires the state to prove that the defendant (1) delivered a controlled substance and (2) knew that the substance delivered was a controlled substance. RCW 69.50.401(a); *State v. Evans*, 80 Wn. App. 806, 814 n. 17, 911 P.2d 1344 (1996); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.06 (3d Ed). Thus, possession with intent to deliver lacks the element of actual delivery. And the crimes have different intent

elements. Possession with intent to deliver requires intent to deliver in the future, while delivery requires the intent to do so in the present. See *State v. Burns*, 114 Wn.2d 314, 319, 788 P.2d 531 (1990); *State v. Garcia*, 65 Wn. App. 681, 690, 829 P.2d 241 (1992).

Here, the jury was asked to answer the special verdict if it found Mr. Martin “guilty of possession of methamphetamine with intent to deliver as charged in count one.” CP 151. However, the special verdict question posed to the jury did not ask whether Mr. Martin committed this crime within the protected zone. Instead, it asked

Did the defendant deliver a controlled substance to a person within one thousand feet of a school bus stop designated by a school district?

CP 151 (emphasis added).

The state proposed the special verdict form. CP 113. However, it did not follow Mr. Tegland’s Note on Use for the “question” to be presented to the jury.

[QUESTION: Did the defendant manufacture a controlled substance ...] ...

[QUESTION: Did the defendant deliver a controlled substance to a person...] ...

[QUESTION: Did the defendant possess a controlled substance (insert one of the bracketed locational phrases listed above) with intent to [manufacture][or][deliver] the controlled substance at any location?] ...

“Use this special verdict if it is alleged that the defendant should be subject to enhanced sentencing because the controlled substance offense was committed in an area specified in RCW 69.50.435 and the statutory defense is not at issue. ... Select from among the three bracketed questions depending on whether the state has alleged manufacturing, delivering, or possession with intent to manufacture or deliver a controlled substance. ...” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.61, NOTE ON USE (3d Ed). The state alleged possession with intent to deliver a controlled substance yet asked whether Mr. Martin delivered a controlled substance.

The jury answered the question, “yes”. The jury did not return a special verdict that Mr. Martin’s crime of possession of methamphetamine with intent to deliver was committed in a protected zone. The trial court acted without authority in imposing a sentence enhancement to Mr. Martin’s standard range and the penalty must be vacated.

3. 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 against association with persons involved in or entering into areas where dangerous drugs, narcotics or controlled substances are used, sold or possessed is impermissibly vague and overly broad.

The offending prohibitions are:

- not to associate with persons involved in the use, sales and/or possession of dangerous drugs, narcotics or controlled substances (CP 166, paragraph 7)
- not to enter into or remain in areas where dangerous drugs, narcotics, or controlled substances are being sold/purchased, possessed, and/or consumed (CP 166, paragraph 8)

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. Martin similarly challenges the above-referenced 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).

The terms “associate with persons involved in,” “enter into or remain in areas,” and “dangerous drugs” are not defined.⁴ 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. Martin with fair notice of what he can and cannot do.

More importantly, the breadth of potential violations under these conditions offends the second prong of the vagueness test, rendering the conditions unconstitutionally vague. Pharmacies, hospital pharmacies and doctors’ offices routinely stock narcotics, controlled substances and drugs that might be viewed as dangerous, but the possession and distribution of

⁴ Mr. Martin does not challenge Condition (6) in its use of the undefined term “dangerous drugs,” because the requisite “purchase, possession or consumption” is not prohibited if there is a valid prescription from a licensed physician. CP 166 at paragraph 6. Thus a physician, not Mr. Martin or a community corrections officer, would be the person responsible for making the determination a given drug was “dangerous” and thereby avoid any arbitrariness in interpreting “dangerous drugs” in this context.

drugs by those entities and their staff are commonplace and lawful. One must reasonably agree a probation condition that forbade a defendant from going to the doctor or to a pharmacy or to a hospital would be overbroad. See e.g. *In re Sheena K.*, 40 Cal.4th 875, 890 (2007). So, too, is a probation condition that forbids Mr. Martin from befriending or even making casual conversation with medical providers and their staff, be it at their office or place of business or the grocery store or over the fence to his next door neighbor.

Because the conditions as written 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.

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 22,

37, 846 P.2d 1365 (1993); *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).

Obtaining proper medical advice and care, and the choice of friends and acquaintances involve fundamental freedoms that should not lightly be abrogated. The boilerplate constraints imposed upon Mr. Martin are unconstitutionally vague and overbroad. Because they are manifestly unreasonable as written, the offending conditions should be reversed. *Bahl*, 164 Wn.2d at 753.

b. Purchase of alcohol/entering places primarily selling alcohol.

The court had discretionary authority to order Mr. Martin to refrain from possession or consuming alcohol under RCW 9.94A.703(3)(e).⁵ However it exceeded its statutory authority by imposing the non-statutory constraints unrelated to his crime of possession of methamphetamine with intent to deliver that prohibited him from purchasing alcohol or entering any place or business where alcohol is the primary source of revenue.⁶ *See*

⁵ CP 167 (Appendix F to Judgment and Sentence, paragraph 9).

⁶ CP 167 (Appendix F to Judgment and Sentence, paragraph 10).

RCW 9.94A.030(10); .703(3)(f); *Jones*, 118 Wn. App. at 207–08.

Therefore, the conditions are illegal or erroneous. The conditions must be stricken.

4. The legal financial obligations should be stricken because

Mr. Martin 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.”

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, the court inquired and was thus made aware Mr. Martin had health disabilities that would affect his likely ability to pay in the future. The court did not inquire into the effects of the LFOs it was intending to assess or the 40 month sentence it was intending to impose on Mr. Martin's ability or likely future ability to pay. The trial court simply assessed \$800 in legal financial obligations.

The nominal inquiry conducted by the trial court fails to satisfy the requirements of *Blazina*. It disregarded information Mr. Martin had disabilities that could affect future work capabilities. 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, any outstanding debts existing at the time of sentencing, the impact of accruing interest on the rate of repayment, or any other factor

related to Mr. Martin'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 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. Martin. This Court should hold that failing to object to an inadequate *Blazina* inquiry constitutes deficient performance and, under the facts of this case, was

This court should consider, as directed by *Blazina*, the effects of the 40-month term of incarceration as well as Mr. Martin's likely earning capacity upon release. Mr. Martin 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 term of confinement imposed and known disabilities. 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. Martin'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).⁷

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

⁷ The legislature did amend the DNA statute to remove consideration of “hardship” at the time the fee is imposed. *Compare* RCW 43.43.7541 (2002) *with* RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

VPA, but simply assumed it did not.

Blazina supersedes *Curry* to the extent they are inconsistent. The Court in *Blazina* repeatedly described its holding as applying to “LFOs,” not just to a particular cost. *See Blazina*, 182 Wn.2d at 830 (“we reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant’s current and future ability to pay before the court imposes LFOs.”); *id.* at 839 (“We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay before the court imposes LFOs.”). It is noteworthy that when listing the LFOs imposed on the two defendants at issue, the court cited the same LFOs Mr. Martin 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. Martin to pay the “criminal filing fee,” because many counties – including Washington’s largest – do not impose it on indigent defendants.⁸ 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

⁸ This Court can take judicial notice of the fact that King County courts never impose this cost on indigent defendants. In the alternative, Mr. Martin would be happy to provide the Court with representative judgments from King County.

the same crime”); *see also id.* at 837 (discussing the “[s]ignificant disparities” in the administration of LFOs among different counties); *and see* RCW 9.94A.010(3) (stating that a sentence should “[b]e commensurate with the punishment imposed on others committing similar offenses”).

GR 34, which was adopted at the end of 2010, also supports Mr. Martin’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, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, 49-55 (2008) (citing numerous accounts of indigent defendants jailed for inability to pay).⁹ 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. Martin concedes the government has a legitimate interest in collecting the costs

⁹ Available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf.

and fees at issue. But imposing costs and fees on impoverished people like Mr. Martin is not rationally related to the goal, because “the state cannot collect money from defendants who cannot pay.” *Blazina*, 182 Wn.2d at 837. Moreover, imposing LFOs on impoverished defendants runs counter to the legislature’s stated goals of encouraging rehabilitation and preventing recidivism. *See* RCW 9.94A.010; *Blazina*, 182 Wn.2d at 837. For this reason, too, the various 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.

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. Martin’ 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. Martin's January 19, 2016, sentencing occurred after the *Blazina* opinion was issued on March 12, 2015. Pre and post-*Blazina*, trial courts are required to make the appropriate ability 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. Martin 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. Martin's extreme indigence, this Court should remand with instructions to strike legal financial obligations, and strike the boilerplate finding that Mr. Martin has the ability to pay.

5. The Judgment and Sentence contains a scrivener's error that should be corrected.

The jury found Mr. Martin guilty of the crime of possession of a controlled substance with the intent to deliver. CP 150. The Judgment and Sentence states the crime of conviction is delivery of a controlled

substance. CP 156. Mr. Martin is entitled to the benefit of having a corrected judgment and sentence so that the judgment accurately reflects the verdict of the jury. *See, e.g., State v. Nallieux*, 158 Wn. App. 630, 647, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

6. Appeal costs should not be imposed.

Mr. Martin asks this court to exercise its discretion not to award costs in the event the state substantially prevails on appeal.

Under RAP Title 14.2, clerks or commissioners may not exercise discretion in imposing appellate costs; costs must be awarded. However, the appellate courts have discretion to refrain from ordering an unsuccessful appellant to pay appellate costs even if the state substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612, rev. denied, 185 Wn.2d 1034 (2016); RAP 14.2. In *Sinclair*, the court affirmed that RCW 10.73.160 authorizes the appellate court to deny appellate costs in appropriate circumstances. 192 Wn. App. at 388.

An appellate court should deny an award of costs to the state in a criminal case if the defendant is indigent and lacks the ability to pay. In the same way that imposition of legal financial obligations following a trial creates problematic ongoing consequences for the criminal defendant, so, too, costs on appeal grow at a compounded interest rate of 12%, lengthen court jurisdiction, interfere with employment opportunities, and create barriers to re-integration in the community. *State v. Blazina*, 182 Wn.2d at 835. Under *Sinclair*, it is "entirely appropriate for an appellate court to be mindful of these concerns." 192 Wn. App. at 391.

Under RAP 15.2(f), where a trial court has made an unchallenged finding of indigency, there is a presumption of continued indigency throughout review. *Sinclair*, 192 Wn.2d at 393. The appellate courts should also consider important nonexclusive factors such as an individual's other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual's age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant "cannot contribute anything toward the costs of appellate review." *Sinclair* 192 Wn. App. at 391.

In *Sinclair*, the court ordered appellate costs not to be awarded. *Id.* at 363. The court found the trial court had authorized the defendant to pursue his appeal in *forma pauperis*, and to have appointed counsel and preparation of the record at state expense. *Id.* at 392. The court held Sinclair's indigency, advanced age and lengthy prison sentence precluded the possibility he could pay appellate costs.

Mr. Martin is currently 54 years old. CP 1, 3¹⁰. The trial court found him indigent for purposes of defending against the state's prosecution. CP 171. The court found Mr. Martin remained indigent for purposes of appeal and was unable to pay for the expenses of appellate review and was entitled to appointment of appellate counsel at public expense. CP 176–77. Appellate counsel anticipates filing a report as to Mr. Martin'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 Order¹¹.

RAP 15.2(f) provides there is a presumption of continued indigency throughout the appeal. In the event he does not substantially prevail on the state's appeal, Mr. Martin asks the court to consider his

¹⁰ Mr. Martin's date of birth is July 8, 1962. CP 1, 3.

¹¹ General Court Order, Court of Appeals, Division III (filed June 10, 2016).

present and/or likely future inability to pay and not assess appellate costs against him

D. CONCLUSION

For the reasons stated, the matter should be remanded for resentencing. If Mr. Martin is not deemed the substantially prevailing party on appeal, he asks this Court to decline to assess appeal costs should the state ask for them.

Respectfully submitted on September 7, 2016.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 7, 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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