

No. 34703-6-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOSE LUIS MATA,

Appellant.

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

The Honorable Judge Vic Vanderschoor

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Jose Mata was convicted of possession of a controlled substance (methamphetamine) with intent to deliver after officers found narcotics in Mr. Mata's family's garage where Mr. Mata resided. Mr. Mata's conviction should now be reversed and the matter remanded for a new trial due to ineffective assistance of defense counsel. Defense counsel's failure to request a lesser included instruction on possession of a controlled substance was objectively unreasonable under the circumstances of this case. Had defense counsel requested the lesser included instruction, there is at least a reasonable probability the outcome of this case would have been different. Thus, this matter should be reversed and remanded for a new trial.

Alternatively, this Court should reverse and remand to strike discretionary costs from Mr. Mata's legal financial obligations. The trial court's inquiry into Mr. Mata's ability to pay was inadequate, and its boilerplate finding that Mr. Mata had the ability to pay nearly \$6,000 in discretionary legal financial obligations was not supported.

Finally, Mr. Mata requests this Court deny costs on appeal in the event the State is the substantially prevailing party on review.

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B. ASSIGNMENTS OF ERROR

1. Defense counsel was ineffective for failing to request a lesser included instruction on possession of a controlled substance. Mr. Mata's conviction of possession of a controlled substance with intent to deliver should not stand where Mr. Mata did not receive effective assistance of counsel.
2. The court erred by failing to conduct a sufficient inquiry into the defendant's likely present or future ability to pay and imposing approximately \$6,000 in legal financial obligations.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Mata was denied his Sixth Amendment right to effective assistance of counsel when his attorney failed to request a jury instruction for possession of a controlled substance, a lesser-included offense of possession of a controlled substance with intent to deliver.

- a. The legal requirement of the *Workman* test was satisfied in this case in support of a lesser included instruction.
- b. The factual requirement of *Workman* is satisfied; Mr. Mata was entitled to a lesser included instruction on possession of a controlled substance.
- c. Mr. Mata was denied his Sixth Amendment right to effective assistance of counsel when his attorney failed to request an instruction on the lesser included possession offense.
 - i. Defense counsel's decision to forgo a lesser included offense instruction fell below an objective standard of reasonableness.
 - ii. Mr. Mata was prejudiced by his attorney's failure to request a lesser included instruction on simple possession.

Issue 2: Whether the trial court erred by imposing nearly \$6,000 in discretionary legal financial obligations against this indigent defendant without conducting a sufficient inquiry into Mr. Mata's present or likely future ability to pay.

Issue 3: Whether this Court should deny costs against Mr. Mata on appeal in the event the State is the substantially prevailing party.

D. STATEMENT OF THE CASE

On April 14, 2016, a Pasco, Washington, law enforcement officer signaled to stop a man named Christian Gonzalez for a possible traffic infraction while riding a bicycle. RP 8, 30.¹ Mr. Gonzalez left the bicycle and ran, but officers caught up with him and located methamphetamine. RP 8-9, 39, 41, 49. Officers interviewed Mr. Gonzalez about the narcotics, and Mr. Gonzalez said large amounts of methamphetamine could be found at his friend Jose Mata's home in Pasco. RP 10-11. Mr. Gonzalez said the drugs were behind the sheetrock in the wall of the garage; Mr. Gonzalez said Mr. Mata was storing the drugs for him. RP 11, 46, 103-04.

That evening, officers executed a search warrant at Mr. Mata's garage. RP 11-12, 30, 49. When officers arrived, Mr. Mata exited the garage through his usual means of egress, a window; Mr. Mata did not appear to be fleeing. RP 11-12, 41, 43. When asked if he knew why officers were there, Mr. Mata saw the federal Drug Enforcement Administration agents with "DEA" on their clothing and responded, "Oh sh-t." RP 17.

¹ "RP" refers to the trial transcript. "2RP" refers to the sentencing transcript.

Officers subsequently seized approximately six pounds of methamphetamine, with a street value over \$20,000, from three places inside the garage: behind the sheetrock, near or inside a couch and near a mannequin. RP 12, 22-23, 31-32, 36-37, 44, 59, 64, 79, 89, 92-93, 97-99, 109-18. Some of the methamphetamine was located in larger bags that contained smaller baggies of methamphetamine; the baggies looked like the same type of packaging found on Mr. Gonzalez earlier that day. RP 25-26, 54, 103, 109. There was also a digital scale in the garage with residue on it, along with glass smoking pipes and a prescription pill bottle in Mr. Mata's name. RP 12-14, 42, 51-52, 60. Mr. Gonzalez said he bought the used scale from Mr. Mata for \$20. RP 75. Mr. Mata stipulated to the fact that he lived in the garage. RP 15-16.

Mr. Mata declined to speak with officers. RP 37. But Mr. Gonzalez submitted to several interviews with officers over the next two days. RP 81, 83. Mr. Gonzalez described a drug trafficking operation to officers whereby methamphetamine was manufactured in Mexico and then transported to the Tri-Cities by someone who gave it to Mr. Gonzalez for distribution. RP 57-58, 64, 79. In his first three interviews, Mr. Gonzalez maintained Mr. Mata was only storing the drugs on Mr. Gonzalez's behalf and that Mr. Mata and his family had nothing to do with the distribution of

any drugs. RP 67-68. Mr. Gonzalez said he never knew Mr. Mata to deal drugs at all, and that they just smoke together. RP 68.

After the first three interviews where Mr. Gonzalez refused to implicate Mr. Mata in the distribution of any drugs (RP 67-68, 72-73), officers told Mr. Gonzalez the bags from the garage would be tested for fingerprints. RP 83, 85. Officers emphasized the importance of full disclosure in order for Mr. Gonzalez to “get consideration” in the federal narcotics case he faced, and Mr. Gonzalez asked officers several times to help him out. RP 69, 84. Mr. Gonzalez then told officers he had given Mr. Mata \$600 worth of methamphetamine to help hide and distribute the drugs. RP 57-58, 72-73. He said Mr. Mata helped him put the bags of narcotics in the wall of the garage, serving as the “stash house” to store the drugs. RP 74-76. Mr. Gonzalez told officers Mr. Mata had already helped him sell some of the methamphetamine at a motel in Pasco for \$2,200. RP 58.

After the methamphetamine was seized from the garage, the bags were tested for fingerprints. RP 101. While Mr. Gonzalez’s fingerprints were present on the bags of narcotics, Mr. Mata’s fingerprints were not. RP 70, 78, 101. Also, whereas hundreds of dollars were found on Mr. Gonzalez during his arrest, no money was found on Mr. Mata or in the garage during execution of the search warrant. RP 74, 79-80. And, while

methamphetamine was located on Mr. Gonzalez after his arrest (RP 8-9), no drugs were found on Mr. Mata when he was arrested (RP 47).

The defense theory of the case was that Mr. Mata had merely stored the drugs on Mr. Gonzalez's behalf, whereas Mr. Gonzalez was the deliverer of the drugs. RP 134-35. Defense counsel pointed out Mr. Gonzalez's fingerprints, rather than Mr. Mata's fingerprints, were found on the baggies of drugs. RP 138. Likewise, no drugs or money were found on Mr. Mata, but they were found on Mr. Gonzalez. *Id.* Defense counsel argued the defendant may have known the drugs were in his garage and smoked some of the methamphetamine with his friend, but Mr. Gonzalez was the person who handled the baggies of drugs and intended to traffic the methamphetamine rather than Mr. Mata. RP 137-42. Defense counsel emphasized how Mr. Gonzalez only accused Mr. Mata of planning to deliver the drugs after the pressure to do so through four interviews with officers and realizing he needed to offer more to the officers to get help with his federal narcotics case. *Id.*

The jury was instructed on Mr. Mata's charged crime of possession of methamphetamine with intent to deliver (CP 6, 58-63), but defense counsel did not request a jury instruction for simple possession of methamphetamine (CP 33-47). The jury found Mr. Mata guilty as charged of possession of methamphetamine with intent to deliver. RP 146; CP 67.

Mr. Mata, who faced a standard range sentence of 60 to 120 months,² received a sentence of 90 months incarceration. CP 82.

The court then turned to the issue of legal financial obligations (LFOs) and asked whether Mr. Mata was an adult who was not disabled. 2RP 3-4. Defense counsel responded Mr. Mata owed significant LFOs already and had applied for SSI. 2RP 4. The trial court found Mr. Mata indigent for purposes of this appeal (CP 71-72), it entered a boilerplate finding that Mr. Mata had the likely present or future ability to pay LFOs, and it imposed a total of \$6,500 in LFOs. CP 78-79. The court commented that Mr. Mata's ability to pay could be addressed at the time of collection. 2RP 5.

This appeal timely followed. CP 90.

E. ARGUMENT

Issue 1: Whether Mr. Mata was denied his Sixth Amendment right to effective assistance of counsel when his attorney failed to request a jury instruction for possession of a controlled substance, a lesser-included offense of possession of a controlled substance with intent to deliver.

The defense theory of the case was that Mr. Mata was only guilty of possession of methamphetamine, rather than possession of methamphetamine with intent to deliver. Yet, defense counsel never

² Based on an offender score of six to nine, the standard range for possession of methamphetamine is 12 to 24 months. RCW 69.50.4013; RCW 9.94A.525(7). With the same offender score, the standard range for possession of methamphetamine with intent to deliver is 60 to 120 months. RCW 69.50.401(2)(b); RCW 9.94A.525(13).

requested the lesser jury instruction to correspond with this theory of the case. The jury was very likely to find Mr. Mata guilty of some offense. The evidence would have supported a simple possession conviction rather than possession with intent to deliver if the jury relied on Mr. Gonzalez's statements during his first three interviews that Mr. Mata was not involved in the distribution; Mr. Gonzalez telling officers the scale seized during the warrant execution belonged to him; the lack of Mr. Mata's fingerprints on the baggies of drugs; Mr. Gonzalez being found with methamphetamine in similar packaging to that seized from Mr. Mata's garage; the lack of drugs on Mr. Mata during his arrest, whereas it was found on Mr. Gonzalez; the lack of any money being found at the garage or on Mr. Mata's person, whereas it was found on Mr. Gonzalez; and Mr. Gonzalez only accusing Mr. Mata of being involved with any drug distribution in a fourth interview after officers said he could "get consideration" on his pending federal narcotics case.

The jury had reason to doubt whether Mr. Mata possessed the methamphetamine with intent to deliver, or whether Mr. Gonzalez was instead retrieving the drugs from Mr. Mata's garage of his own accord and then distributing them without Mr. Mata's involvement in the deliveries. Under the circumstances of this case, Mr. Mata was prejudiced by his attorney's failure to request a jury instruction on simple possession. It was

objectively unreasonable for defense counsel to pursue an “all or nothing approach,” particularly where counsel acknowledged Mr. Mata was guilty of some offense, the evidence cast doubt on the extent of Mr. Mata’s involvement with distribution, and Mr. Mata faced a mid-standard range sentence that was 72 months longer for the intent to deliver conviction rather than a simple possession conviction. The matter should be remanded for a new trial with a properly instructed jury.

When a defendant is charged with an offense consisting of varying degrees, the jury may find that person not guilty of the higher degree that has been charged and guilty of an inferior degree thereto. RCW 10.61.003. To benefit from this statute, the defendant needs to request an instruction on the inferior offense. *See e.g., State v. Crittenden*, 146 Wn. App. 361, 366, 189 P.3d 849 (2008) (“To find an accused guilty of a lesser included offense, the jury must be instructed on its elements.”)

A defendant is entitled to a lesser-included offense jury instruction if two conditions are met. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382, 385 (1978). First, “[t]o satisfy the legal requirement, the proponent must show that the proposed instruction describes an offense that is an inferior degree of the charged offense, or, alternatively, that the proposed instruction describes an offense each element of which is included within the charged offense.” *State v. McDonald*, 123 Wn. App.

85, 88-89, 96 P.3d 468 (2004) (internal citations omitted). Second, “[t]o satisfy the factual requirement, the proponent must show that when the evidence is viewed in the light most favorable to him, the jury could find that even though the defendant is not guilty of the charged offense, he is guilty of the inferior or lesser offense embodied in the proposed instruction.” *Id.* at 89 (citing *State v. Tamalini*, 134 Wn.2d 725, 732, 953 P.2d 450 (1998) (evidence must support inference that defendant committed the lesser offense “instead of” the charged offense)).

- a. The legal requirement of the *Workman* test was satisfied in this case in support of a lesser included instruction.

As to the legal requirement, “[p]ossession of a controlled substance with intent to deliver requires proof of both drug possession and some additional factor supporting an inference of intent to deliver it.” *State v. Slighte*, 157 Wn. App. 618, 627, 238 P.3d 83 (2010), *remanded on other grounds by*, 172 Wn.2d 1003 (2011); RCW 69.50.401(2)(b); RCW 69.50.4013. On the other hand, simple possession of a controlled substance may be established where the defendant was aware of drugs in his home; such constructive possession may be proven where the evidence suggests the defendant knew about the drugs, which has been inferred where there was drug paraphernalia in the home and items established the defendant’s dominion and control over the premises. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), *abrogated on other grounds*

by *In re Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014). “[B]are possession of a controlled substance, absent other facts and circumstances, allows for no permissible inference of intent to deliver. Mere possession alone is just as consistent with an intent to make personal use of the substance.” *State v. Harris*, 14 Wn. App. 414, 418, 542 P.2d 122 (1975).

It is well settled that “[s]imple possession of a controlled substance, either actual or constructive, is a lesser-included offense within the crime of possession with intent to deliver.” *Harris*, 14 Wn. App. at 418; *State v. Hassan*, 151 Wn. App. 209, 216n.3, 211 P.3d 441 (2009); *State v. O’Connor*, 87 Wn. App. 119, 123, 940 P.2d 675 (1997). Each element of possession of a controlled substance is included within the offense of possession of a controlled substance with intent to deliver; the offenses are the same for purposes of the *Workman* legal requirement.

- b. The factual requirement of *Workman* is satisfied; Mr. Mata was entitled to a lesser included instruction on possession of a controlled substance.

The factual requirement of the *Workman* test is also satisfied in this case: when the evidence is viewed in the light most favorable to Mr. Mata, the evidence supports an inference that possession of a controlled substance was committed. See *McDonald*, 123 Wn. App. at 89 (setting forth this factual requirement); see also *Workman*, 90 Wn.2d at 448

(stating “the evidence in the case must support an inference that the lesser crime was committed.”)

Mr. Gonzalez informed officers that Mr. Mata had agreed to store drugs for him at the garage where Mr. Mata resided. RP 11, 46, 103-04. Mr. Mata expressed concern when the DEA arrived to search his garage, apparently acknowledging some narcotics connection. RP 17. Mr. Mata stipulated he had dominion and control over the garage where the methamphetamine was located. RP 15-16. Also, like in *Walton, supra*, drug paraphernalia was located in Mr. Mata’s home/garage; these facts all suggest Mr. Mata was well aware of the drugs located on the premises so as to satisfy the elements for possession of a controlled substance.

Walton, 64 Wn. App. at 415-16; RP 12-14, 42, 51-52, 60.

Furthermore, the jury could readily have doubted whether Mr. Mata committed the greater offense of possession of methamphetamine with intent to deliver. Mr. Gonzalez, rather than Mr. Mata, was the individual who was found with baggies matching the ones found in the garage when the warrant was executed. RP 25-26, 54, 103, 109. Mr. Gonzalez, not Mr. Mata, was the one found with both methamphetamine and significant cash on his person. RP 8-9, 47, 74, 79-80. Mr. Gonzalez, not Mr. Mata, was the individual whose fingerprints were found on the

baggies of methamphetamine confiscated from Mr. Mata's garage. RP 70, 78, 101.

Additionally, Mr. Gonzalez said he bought the digital scale from Mr. Mata, demonstrating Mr. Gonzalez was the deliverer, and Mr. Gonzalez insisted Mr. Mata only personally consumed the narcotics. RP 68, 75. In three interviews, Mr. Gonzalez insisted Mr. Mata was only storing the drugs and was never involved with the distribution of any drugs. RP 67-68, 72-73. It was only after Mr. Gonzalez was offered "consideration" on his federal case that he accused Mr. Mata of participating or intending to participate in the delivery of drugs (RP 57-58, 69, 72-73, 84); Mr. Gonzalez's pressure from and promises by law enforcement could have cast doubt in the jury's minds about the credibility of the accusations against Mr. Mata.

In this case, the jury could certainly have found Mr. Mata was not guilty of possession of methamphetamine, but was guilty of the lesser offense of possession of a controlled substance. As a result, the factual requirement of *Workman* is easily satisfied. *McDonald*, 123 Wn. App. 85, 88-89. An accused person has an "absolute right" to have the jury consider a lesser included offense if there is "even the slightest evidence" he may have committed only that offense. *State v. Parker*, 102 Wn.2d 161, 164, 166, 683 P.2d 189 (1984) (quoting *State v. Young*, 22

Wash. 273, 276-77, 60 P. 650 (1900)). Had Mr. Mata requested a lesser included instruction on possession of a controlled substance, he would have been entitled to the instruction.

- c. Mr. Mata was denied his Sixth Amendment right to effective assistance of counsel when his attorney failed to request an instruction on the lesser included possession offense.

The pertinent question here is not whether Mr. Mata was entitled to a lesser included instruction on possession of a controlled substance (as established above, he clearly was entitled to the instruction had it been requested). Instead, the key to deciding this issue is whether defense counsel was ineffective for failing to request the lesser included instruction. Mr. Mata is raising this instructional error for the first time on appeal because he was denied his constitutional right to effective assistance of counsel when his defense attorney failed to request the lesser included instruction at trial. RAP 2.5(a)(3).

To establish ineffective assistance of counsel, Mr. Mata must prove the following two-prong test:

- (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984))).

- i. Defense counsel’s decision to forgo a lesser included offense instruction fell below an objective standard of reasonableness.

The decision to seek a lesser included offense instruction “is a decision that requires input from both the defendant and...counsel but ultimately rests with defense counsel.” *State v. Grier*, 171 Wn. 2d 17, 32, 246 P.3d 1260 (2011) (a defendant’s agreement to forgo a lesser included instruction does not control the ineffective assistance of counsel inquiry). When the failure to instruct the jury on a lesser-included offense is raised as an ineffective assistance of counsel claim, “[t]he salient question . . . is not whether [the defendant] is entitled to such instructions but, rather, whether defense counsel was ineffective in forgoing such instructions.” *Grier*, 171 Wn. 2d at 42. The decision to forgo an otherwise permissible instruction on a lesser included offense is not ineffective assistance if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. *Id.* at 33, 42-43 (emphasis added); *see also Hassan*, 151 Wn. App. at 218.

Importantly, even if the decision to forgo a lesser included instruction is part of defense counsel’s deliberate trial strategy, it would

still constitute ineffective assistance if the strategy was not “objectively reasonable” under the circumstances of the case. *McFarland*, 127 Wn.2d at 334-35; *Strickland*, 466 U.S. at 687; *Crace v. Herzog*, 798 F.3d 840, 848-49, 852-53 (9th Cir. 2015) (holding, defense counsel’s decision to forgo a request for a lesser included instruction was not “sound” trial strategy and was “manifestly unreasonable” where the defendant was plainly guilty of some offense and, in part, the “all or nothing” strategy unreasonably exposed the defendant to a third strike and decades of additional prison time.)

In *Grier*, our Supreme Court found the withdrawal of lesser-included jury instructions was not ineffective assistance of counsel. 171 Wn.2d at 42-45. The Court reasoned, “[the defendant] and her defense counsel reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal.” *Id.* at 43. On the other hand, where there is overwhelming evidence that the defendant is “plainly guilty of some offense,” such strategy may be unreasonably risky and fall below an “objective standard of reasonableness.” *Crace v. Herzog*, 798 F.3d at 848 (citing *Keeble v. United States*, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973); *Strickland*, 466 U.S. at 687-88).

The record in this case is not clear as to why a lesser included instruction was not requested by defense counsel. The record is clear,

however, that forgoing a lesser included instruction under the circumstances of this case was not a *legitimate* trial strategy and fell below *Strickland's* “objective standard of reasonableness.” Outright acquittal was not a realistic goal in this case; therefore, this case demands a different result than *Grier, supra*. *C.f. Grier*, 171 Wn.2d at 44 (recognizing forgoing lesser included instruction is a legitimate strategic decision where “acquittal was a realistic goal”).

Defense counsel’s failure to request a lesser included instruction constituted deficient performance because it was not an “objectively reasonable” trial strategy under the circumstances of this case. As explained above under the factual prong analysis of the *Workman* test, the evidence established Mr. Mata was plainly guilty of some offense. Defense counsel stipulated on Mr. Mata’s behalf that Mr. Mata had dominion and control over the premises where over \$20,000 of methamphetamine was located. RP 15-16. At the very least, the evidence established Mr. Mata was serving as a “stash house” for Mr. Gonzalez’s drug trafficking operation. RP 75-76. Unlike in *Grier, supra*, an outright acquittal was not “a realistic goal.” 171 Wn.2d at 44. Instead, the jury was likely to hold Mr. Mata accountable for some criminal offense, even if the only offense before the jury was one for which it may have doubted the intent to deliver element.

The defense theory of the case would have been most consistent with an instruction on a lesser included offense. Defense counsel argued Mr. Mata was storing drugs on Mr. Gonzalez's behalf while Mr. Gonzalez was the admitted drug trafficker. RP 134-35. Defense counsel pointed out Mr. Gonzalez's fingerprints were on the baggies of methamphetamine, suggesting Mr. Mata only held the drugs or smoked them with his friend, as opposed to participating in the delivery operation. RP 138. As argued by counsel, no drugs or money were found on Mr. Mata, like they were on Mr. Gonzalez (*id.*), which would be consistent with mere constructive possession rather than intended participation in the delivery operation. The defense theory of Mr. Mata knowing about the drugs in his garage, but not participating in trafficking of drugs, led the jury to conclude Mr. Mata was plainly guilty of some offense. It was not reasonable trial strategy, under this circumstance, to only present the jury one option – convict Mr. Mata of possession with intent to deliver or acquit.

Defense counsel's "all or nothing" approach was also not reasonable when considering the disparity in sentences faced by the defendant. With an offender score of six to nine, as Mr. Mata faced, the standard sentence range for possession of a controlled substance was 12 to 24 months. RCW 69.50.4013; RCW 9.94A.525(7). The same offender score for possession of a controlled substance with intent to deliver

subjected Mr. Mata to a standard sentencing range of 60 to 120 months. RCW 69.50.401(2)(b); RCW 9.94A.525(13). Assuming a mid-range sentence imposed for either offense (as the trial court imposed in Mr. Mata's case, CP 82), the disparity in sentences between the greater and lesser offenses was 72 months. If the jury convicted Mr. Mata of simple possession and the trial court again imposed the mid-range, it is likely Mr. Mata would have been released from incarceration long before this appeal could be decided. But Mr. Mata's current conviction on the greater offense, the only offense put before the jury, subjects Mr. Mata to approximately six additional years of incarceration. The disparity in sentences was too great for defense counsel to reasonably decide to forgo an instruction on the lesser included offense.

Even if defense counsel's decision was deliberate or strategic, it was nonetheless manifestly unreasonable under the circumstances of this case. Only sound, "legitimate" strategic decisions can serve as a barrier to ineffective assistance of counsel determinations. Considering the evidence and argument presented in this case that clearly made Mr. Mata guilty of some offense, and the disparity in punishment between the greater and lesser drug possession offenses, any decision to forgo a request for a lesser included instruction fell below an objective standard of

reasonableness. As such, Mr. Mata has satisfied the first *Strickland* prong for proving ineffective assistance of defense counsel.

- ii. Mr. Mata was prejudiced by his attorney's failure to request a lesser included instruction on simple possession.

As to the second *Strickland* prong, Mr. Mata was prejudiced by his attorney's deficient representation. There is a reasonable probability the result would have been different had a lesser included instruction been offered to the jury. *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* The accused "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693.

As a threshold matter, the *Grier* court appeared to incorrectly liken the required prejudice test to a sufficiency of the evidence analysis. In finding no prejudice from counsel's failure to request a lesser included instruction, the *Grier* court reasoned as follows:

Assuming, as this court must, that the jury would not have convicted Grier of second degree murder unless the State had met its burden of proof, the availability of a compromise verdict would not have changed the outcome of Grier's trial. *See Strickland*, 466 U.S. at 694, 104 S. Ct. 2052 ("a court should presume . . . that the judge or jury acted according to law"); [*Autrey v. State*, 700 N.E.2d 1140, 1142 (Ind. 1998)] (availability of manslaughter would not have affected outcome where jury found defendant guilty of murder beyond reasonable doubt).

Grier, 171 Wn.2d at 43-44.

This reasoning is unsound and is inconsistent with other Supreme Court authority in this state and in the federal Ninth Circuit. Sufficient evidence supporting the jury’s guilty verdict does not mean the jury is required to reach the same verdict. *See State v. Condon*, 182 Wn.2d 307, 321, 343 P.3d 357 (2015) (sufficient evidence supported a finding of premeditation, but the trial court erroneously denied a lesser included instruction “[b]ecause a rational jury could have had a reasonable doubt as to premeditation”). The jury might decide a lesser included offense is better suited to the facts of the case. It is conjecture to hold a jury that was never given the option to consider a lesser included offense would necessarily reach the same verdict as a jury that was. *Grier’s* analysis of *Strickland* prejudice, to the extent it substitutes the prejudice analysis with a sufficiency of the evidence inquiry, essentially eliminates all ineffective assistance claims for failure to request lesser included instructions.

The Ninth Circuit recently described *Grier’s* reasoning as invalid:

The Washington Supreme Court’s methodology is a patently unreasonable application of *Strickland* *Strickland* did instruct reviewing courts to presume that trial juries act “according to law,” but the Washington Supreme Court . . . has read far more into that instruction than it fairly supports and, as a result, has sanctioned an approach to *Strickland* that sidesteps the reasonable-probability analysis that *Strickland’s* prejudice prong explicitly requires.

Crace, 798 F.3d at 847. The *Crace* court further explained:

[*Strickland*] does not require a court to presume—as the Washington Supreme Court did—that, because a jury convicted

the defendant of a particular offense at trial, the jury could not have convicted the defendant on a lesser included offense based upon evidence that was consistent with the elements of both.

...The Washington Supreme Court thus was wrong to assume that, because there was sufficient evidence to support the original verdict, the jury *necessarily* would have reached the same verdict even if instructed on an additional lesser included offense.

...[U]nder the Washington Supreme Court's approach, a defendant can only show *Strickland* prejudice when the evidence is insufficient to support the jury's verdict And conversely, if the evidence is sufficient to support the verdict, there is categorically no *Strickland* error, according to the Washington Supreme Court's logic. By reducing the question to sufficiency of the evidence, the Washington Supreme Court has focused on the wrong question here—one that has nothing to do with *Strickland*.

Id. at 847-49.

As the *Crace* court noted above, the infirmity in *Grier* is that it conflates sufficiency of the evidence with *Strickland's* prejudice inquiry. The Ninth Circuit's reasoning, which is consistent with our Supreme Court's prejudice inquiry in *Condon*, 182 Wn.2d at 321, is sound, whereas *Grier's* prejudice inquiry is not. *Grier* is incorrect and harmful because it forecloses any ineffective assistance claim whenever sufficient evidence supports a guilty verdict. Such a result effectively insulates defense counsel's unreasonable and unsupportable decisions—and therefore clients' constitutional right to effective assistance of counsel—from judicial scrutiny. *Grier's* prejudice analysis – to the extent it substitutes the proper prejudice inquiry with a sufficiency of the evidence analysis –

should be abandoned. See *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (stare decisis “doctrine requires a clear showing that an established rule is incorrect and harmful before it is abandoned”).³

The correct prejudice inquiry of *Strickland* (which the *Grier* court said it was adhering to prior to its sufficiency analysis, 171 Wn.2d at 32) requires the defendant to “establish that ‘there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.’” *Grier*, 171 Wn.2d at 34 (quoting *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

When conducting the prejudice inquiry in this case, this Court should remain mindful of the generally recognized principle that a jury presented with only two options- to convict on a single charge or acquit a defendant altogether – “is likely to resolve its doubts in favor of conviction...” *Keeble*, 412 U.S. at 212-13.⁴ Even if a jury has reservations about one of the elements of the charged offense, it is still

³ Where relief is not provided by our state courts, the defendant may well be entitled to habeas relief for the violation of his Sixth Amendment right to effective assistance of counsel, as recognized in *Crace*, 798 F.3d 840.

⁴ See also Kyron Huigens, *The Doctrine of Lesser Included Offenses*, 16 U. PUGET SOUND L. REV. 185, 193 (1992) (“When faced with a choice between acquittal and conviction of a crime not quite proved by the evidence, a jury can be expected, if some sort of wrongdoing is evident, to opt for conviction.”)

likely to convict the defendant if it believes “the defendant is plainly guilty of some offense.” *Id.* In such circumstances, there is a reasonable probability that the “availability of a third option”, which defense counsel neglected to present to the jury, could have led to a conviction on a lesser included offense. *Id. Accord Crace*, 798 F.3d at 846-53. Providing the jury with a third option of convicting on a lesser included offense “ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard.” *Beck v. Alabama*, 447 U.S. 625, 634, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

Here, Mr. Mata was prejudiced by his attorney’s failure to request a lesser included instruction on simple possession of methamphetamine. There is a reasonable probability the jury would have found Mr. Mata guilty of possession of a controlled substance, rather than possession with intent to deliver, had it been given this option. The defense essentially conceded guilt on simple possession. At the same time, there were many reasons to doubt whether Mr. Mata intended to deliver any methamphetamine. The jury could have doubted Mr. Mata’s guilt of the greater offense due to Mr. Gonzalez changing his story and only accusing Mr. Mata after promises to “get consideration” in his federal case if he made additional accusations. There was also reason to doubt Mr. Mata’s guilt of the greater offense considering the baggies of methamphetamine

in similar packaging to that found on Mr. Gonzalez during his arrest, money found on Mr. Gonzalez during his arrest, and Mr. Gonzalez's fingerprints on the baggies of narcotics at Mr. Mata's home. The evidence gave the jury reasons to doubt whether Mr. Mata did anything more than allow his friend to store narcotics in his home/garage and then smoke some of the narcotics with Mr. Gonzalez.

In other words, there was no doubt Mr. Mata was guilty of some narcotics offense, but there was reason to doubt whether Mr. Mata intended to deliver any narcotics. Had the jury been instructed on simple possession, there is at least a reasonable probability the outcome of these proceedings would have been different.

In sum, counsel was ineffective for failing to ask for a lesser included instruction that would have given the jury the opportunity to convict Mr. Mata of possession of a controlled substance rather than possession of a controlled substance with intent to deliver. Mr. Mata requests this Court reverse his conviction and remand for a new trial. *State v. Henderson*, 180 Wn. App. 138, 143, 321 P.3d 298 (2014), *aff'd*, 182 Wn.2d 734, 344 P.3d 1207 (2015) (citing *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005)) (“The remedy for failure to give a lesser included instruction when one is warranted is reversal.”).

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Issue 2: Whether the trial court erred by imposing nearly \$6,000 in discretionary legal financial obligations against this indigent defendant without conducting a sufficient inquiry into Mr. Mata's present or likely future ability to pay.

Mr. Mata requests this Court remand this case for resentencing and direct the trial court to strike the \$5,700 in discretionary legal financial obligations (LFOs) from his judgment and sentence. CP 79. The trial court's boilerplate finding that Mr. Mata had the present or likely future ability to pay (CP 78) was not supported by the record, and was contrary to the record developed at sentencing. The imposition of discretionary costs, and the trial court's suggestion Mr. Mata simply challenge costs at the time of enforcement (2RP 5), is inconsistent with the principles enumerated in *Blazina, infra*, *Blank, infra*, and *Mahone, infra*.

A court may order a defendant to pay LFOs, including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). Mr. Mata was ordered to pay mandatory court costs and a discretionary fee of \$600 for his court appointed attorney. CP 79.

Also, a person "who has been convicted of a crime involving methamphetamine may be punished by imprisonment, a fine, or both." *State v. Wood*, 117 Wn. App. 207, 212, 70 P.3d 151 (2003); RCW 69.50.401(2)(b). "If a fine is imposed, the first \$3,000 collected must go to the drug site cleanup fund. *Id.* (emphasis in original). "As written, the

statute authorizing a contribution to the drug cleanup fund is discretionary with the trial court.” *Id.* The LFOs imposed against Mr. Mata in this case included this discretionary \$3,000 cleanup fine. CP 79. The trial court also imposed a discretionary crime lab fee of \$100 pursuant to RCW 43.43.690 (permitting the trial court to waive this fee if it finds the person does not have the ability to pay).

Another significant part of the LFOs imposed against Mr. Mata included a \$2,000 fine pursuant to RCW 9A.20.021(1)(b). This statute limits punishment for class “b” felonies to a maximum of 10 years incarceration, a \$20,000 fine, or both. RCW 9A.20.021(1)(b). In *State v. Clark*, this Court held such fine was not a “cost” subject to the statutory requirement that a court inquire into a defendant’s ability to pay before imposing discretionary LFOs. *State v. Clark*, 191 Wn. App. 369, 372-76, P.3d 309 (2015). But the Supreme Court granted review in *Clark* and remanded to the trial court for an inquiry into the defendant’s ability to pay, explaining as follows:

The Department unanimously agreed that the superior court in imposing discretionary legal financial obligations on the Petitioner in connection with his criminal conviction did not adequately address his present and future ability to pay based on consideration of his financial resources and the nature of the burden that the payment of discretionary costs would impose, as required by RCW 10.01.160(3) and this court's decision in *State of Washington v. Nicholas Peter Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). Pursuant to that decision, the superior court must conduct on the record an individualized inquiry into the Petitioner's current and

future ability to pay in light of such nonexclusive factors as the circumstances of his incarceration and his other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status under GR 34.

State v. Clark, 187 Wn.2d 1009, 388 P.3d 487 (2017).

“Unlike mandatory obligations, if a court intends on imposing *discretionary* legal financial obligations as a sentencing condition, such as court costs and fees, it must consider the defendant’s present or likely future ability to pay.” *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013) (emphasis in original). The applicable statute states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Before imposing discretionary LFOs, the sentencing court must consider the defendant’s current or future ability to pay based on the particular facts of the defendant’s case. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The record must reflect that the sentencing judge made an individualized inquiry into the defendant’s current and future ability to pay, and the burden that payment of costs imposes, before it assesses discretionary LFOs. *Id.* at 837–39. This inquiry requires the court to consider important factors, such as incarceration and a defendant’s other debts, including any restitution. *Id.* at 838-39.

“[T]he court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Blazina*, 182 Wn.2d at 838 (quoting RCW 10.01.160(3)). “[T]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them.” *Id.* (quoting RCW 10.01.160(3)). If a defendant is found indigent, such as if his income falls below 125 percent of the federal poverty guideline and thereby meets “the GR 34 standard of indigency, courts should seriously question that person’s ability to pay LFOs.” *Id.* at 839.

The *Blazina* court specifically acknowledged the many problems associated with imposing LFOs against indigent defendants, including increased difficulty reentering society, increased recidivism, the doubtful recoupment of money by the government, inequities in administration, the accumulation of collection fees when LFOs are not paid on time, defendants’ inability to afford higher sums especially when considering the accumulation at the current rate of twelve percent interest, and long-term court involvement in defendants’ lives that may have negative consequences on employment, housing and finances. *Blazina*, 182 Wn.2d at 834–837. “Moreover, the state cannot collect money from defendants who cannot pay, which obviates one of the reasons for courts to impose LFOs.” *Id.* at 837.

A trial court must consider the defendant's ability to pay before imposing discretionary LFOs, but it is not required to enter specific findings regarding a defendant's ability to pay discretionary court costs. *Lundy*, 176 Wn. App. at 105 (citing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)). Where a finding of fact is entered, it "is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" *Id.* (internal quotations omitted). Ultimately, a finding of fact must be supported by substantial evidence in the record. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Here, the court found "the defendant 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 78. But this finding was clearly erroneous. Though Mr. Mata's counsel started to explain the burden LFOs would have on Mr. Mata, considering his significant amount of LFOs already owed (2RP 4), the trial court stopped the inquiry short and did not inquire into Mr. Mata's ability to pay (2RP 4-5).

Defense counsel also mentioned Mr. Mata was in the process of applying for SSI, which suggested Mr. Mata may not be able to work and

pay LFOs in the future due to a disability. *Id.* But, again, the trial court neglected to inquire into Mr. Mata’s SSI status, physical abilities, work history, work prospects, or possible physical or mental impairments that would impede his ability to pay costs. If Mr. Mata indeed qualifies for SSI benefits, the imposition of LFOs would not be permitted. *See City of Richland v. Wakefield*, 186 Wn.2d 596, 599-613, 380 P.3d 459 (2016) (“federal law prohibits courts from ordering defendants to pay LFOs if the person’s only source of income is social security disability.”) Moreover, a person’s ability to pay LFOs should be seriously questioned when he has a SSI-qualifying impairment and faces a long period of incarceration. *Id.* at 607 (noting, “a person who pays \$25 per month toward their LFOs will owe the State more 10 years after conviction than they did when LFOs were initially assessed) (quoting *Blazina*, 182 Wn.2d at 836).

Our Supreme Court in *Blazina* detailed the inquiry the trial court should undertake before finding that a defendant has the ability to pay, but the trial court did not consider the personal circumstances of Mr. Mata, including the 90 months of incarceration he faced, possible physical or mental impairments, the LFOs already owed, or work prospects. The court’s finding that Mr. Mata had the present or likely future ability to pay LFOs was not made after a sufficient individualized inquiry, and was contrary to the record created at sentencing where defense counsel raised

concerns with Mr. Mata's ability to pay due to existing LFOs and SSI. The court's finding is not supported by substantial evidence in the record and must be set aside. *Brockob*, 159 Wn.2d at 343.

The trial court also neglected to consider the nature of the burden that LFOs would impose on Mr. Mata when he attempts to successfully reenter society. *Blazina*, 182 Wn.2d at 838-39; RCW 10.01.160(3). Given the defendant's indigent status, the trial court should have "seriously question[ed]" Mr. Mata's ability to pay LFOs. *Id.*; CP 71-72. The cursory questioning done at sentencing in this case did not satisfy the inquiry that is supposed to precede a finding on Mr. Mata's ability to pay LFOs. The finding on Mr. Mata's ability to pay LFOs should be set aside, and the \$5,700 in discretionary court costs should be stricken from Mr. Mata's judgment and sentence.

Finally, the trial court erred to the extent it deferred its required inquiry into the defendant's ability to pay to the time of collection. 2RP 5. Prior to *Blazina*, *supra*, courts would not always inquire into an indigent appellant's ability to pay at the time costs were imposed (at sentencing), because ability to pay would be considered at the time the State attempted to collect the costs. *State v. Blank*, 131 Wn.2d 230, 244, 246, 252-53, 930 P.2d 1213 (1997). But this time-of-enforcement inquiry is inadequate, especially in light of *Blazina*'s recognition that the accumulation of

interest begins at the time costs are imposed, causing significant and enduring hardship that must be addressed when costs are imposed. *Blazina*, 344 P.3d at 684; *see also* RCW 10.82.090(1) (“[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments.”).

Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *State v. Mahone*, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). Expecting indigent defendants to shield themselves from the State’s collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic. The *Blazina* Court expressly rejected the argument that “the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” *Blazina*, 182 Wn.2d at 832, n.1. The trial court was required to consider Mr. Mata’s ability to pay before imposing LFOs. *See Lundy*, 176 Wn. App. 96; 103 RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827. This error is not remedied by Mr. Mata’s potential pro se future ability to challenge costs (which will have incurred significant interest) at the time of enforcement.

Issue 3: Whether this Court should deny costs against Mr. Mata on appeal in the event the State is the substantially prevailing party.

Mr. Mata preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

The trial court briefly inquired into Mr. Mata's ability to pay legal financial obligations and was informed that Mr. Mata already owes a significant amount of LFOs and is currently applying for SSI. 2RP 4. An order finding Mr. Mata indigent was entered by the trial court (CP 71-72), and there has been no known change to this indigent status. Appellate counsel anticipates filing a report as to Mr. Mata's continued indigency and likely inability to pay costs presently or in the future, no later than 60 days following the filing of this brief, as required by this Court's General Court Order issued on June 10, 2016.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *Blazina*, 182 Wn.2d at 835. In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants.

Blazina, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” *Blazina*, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without

determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Mata has demonstrated his indigency and current and future inability to pay costs. In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs, as suggested by the trial court in this case. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Mata would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); *Mahone*, 98 Wn. App. at 346-47 (because motion for remission of LFOs is not appealable as matter of right, “Mahone cannot receive counsel at public expense”). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State’s collection efforts. *See Lundy*, 176 Wn. App. 96; 103 RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.”

GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839. Mr. Mata met this standard for indigency. CP 71-72.

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 71-72. “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839. It does not appear to be the burden of Mr. Mata to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, it is anticipated Mr. Mata will complete and file a Report as to Continued Indigency to solidify his ongoing inability to pay LFOs now or in the future.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the “supreme court . . . 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). *Blank*, too, recognized appellate courts have discretion to deny the State’s requests for costs. *Blank*, 131 Wn.2d at 252-53. Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Mata’s current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. There is also the possibility Mr. Mata qualifies for SSI (2RP 4), which would foreclose a court’s ability to impose any LFOs. *See Wakefield*, 186 Wn.2d at 599-613, 380 P.3d 459 (2016) (“federal law prohibits courts from ordering defendants to pay LFOs if the person’s only source of income is social security disability.”)

Appellate costs should not be imposed in this case.

F. CONCLUSION

Defense counsel was ineffective for failing to request a lesser included jury instruction on simple possession of a controlled substance. Mr. Mata requests this Court reverse and remand for a new trial. Alternatively, Mr. Mata requests this Court remand for the trial court to strike discretionary LFOs from Mr. Mata's judgment and sentence. Finally, Mr. Mata asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 28th day of March, 2017.

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34703-6-III
vs.) Franklin County No. 15-1-50187-6
)
JOSE LUIS MATA) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 28, 2017, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Jose Luis Mata, DOC #776267
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Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001-2049

Having obtained prior permission, I also served a copy of the attached brief on the Respondent by email at appeals@co.franklin.wa.us.

Dated this 28th day of March, 2017.

/s/ Kristina M. Nichols
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