

34703-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE LUIS MATA,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Did defense counsel perform deficiently in failing to request a jury instruction for a lesser included offense where counsel's reasonable strategy was to deny any offense at all and where there was no factual basis for the lesser offense?
2. Did the court abuse its discretion in imposing \$700 in discretionary costs after proper inquiry?
3. If the State substantially prevails on appeal, should this Court impose costs?

IV. STATEMENT OF THE CASE

The Defendant Jose Mata has been convicted by jury of possession of methamphetamine with intent to deliver. CP 6, 67, 75.

On April 14, 2016, Christian Gonzalez dropped a large amount of methamphetamine on the ground while trying to escape police. RP¹ 6-9, 20, 41. He was carrying the meth in several bags: one in his back pants pocket (16.78 grams), another in a sock in his waistband (29.69 grams), and a bag (350.53 grams) with many smaller bags dropped beside his bicycle. RP 20, 34.

In interviewing Gonzalez, police learned that there was another six pounds of methamphetamine in a wall at the converted garage where the Defendant Jose Mata resided. RP 10-11, 15-16, 35, 46-47, 56-57. Initially, Gonzalez claimed the Defendant had no knowledge of the drugs that were hidden in his bedroom. RP 67-69. However, Gonzalez wanted a deal, and he knew he would not receive any consideration if he were caught in a lie. RP 65, 84. When Gonzalez became worried that the Defendant's fingerprints would be found on the drugs, he finally admitted Mata's involvement. RP 74-75, 82-84.

Gonzalez told police that the Defendant had agreed to help him hide and distribute seven pounds of methamphetamine received from a Tijuana drug trafficker. RP 57-58, 63-64, 71. The Tijuana connection supplied the drugs up front, expecting to be paid

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

approximately \$24,000 after distribution. RP 64. Gonzalez paid the Defendant with an ounce of crystal methamphetamine. RP 58. The two of them loaded the drugs into a hidden compartment in the Defendant's garage. RP 58, 74-75. They reinforced the wall together. RP 74. Gonzalez gave the Defendant \$20 to purchase² a digital scale for use in the Defendant's bedroom to divide the methamphetamine into saleable amounts. RP 12-13, 75. And the Defendant helped Gonzalez sell a half pound of meth to people at the Pasco Sage and Sun Motel. RP 58, 78.

The DEA acquired a search warrant, and executed the warrant at 11:20 at night. RP 11, 59. When Sergeant Miller knocked on front the door, the Defendant tried to escape³ through a back window, only to be detained. RP 11-12, 18-19, 41. Confronted by armed agents, the Defendant succumbed. RP 43. He asked whether he was wanted on a warrant. RP 17. Detective Jones responded, "What does it say on the back of their vests?" RP 17. The Defendant read, "DEA," and said, "Oh shit." RP 17.

² The Defendant's claim that Gonzalez purchased a used scale from Mata misstates the record. Appellant's Opening Brief (AOB) at 4, 13 (citing RP 75).

³ The record cited does not support an interpretation (AOB at 3) that the window was "his usual means of egress." The Defendant did not exit via the front garage door, but came "crawling" out a back window. RP 18-19.

In the garage, police located five and a half pounds of methamphetamine as well as scales and pipes. RP 12-13, 42, 59-60; PE 1 (photo of digital scale). There was white crystal residue on the small digital scale, used to weigh out prepackaged amounts of narcotics in small amounts such as grams or ounces. RP 11-14, 42, 50-52. It no longer appeared new. RP 75. The meth was located in two discrete areas in the garage: by a couch and behind the sheetrock. RP 21, 59, 89. No meth was found on the Defendant's person. RP 37.

One large clear plastic bag of meth fell out when Sergeant Pettijohn moved a child-sized dummy seated on the floor beside two stacked couches. RP 23-24, 26, 31, 35-36.

Detective Jones testified that drug dealers typically hide large quantities of drugs. RP 27-28. With K-9 assistance, police located an even larger bag, suspended and hidden behind the sheetrock and accessible by a string through a cutout. RP 22, 36, 53, 88-89. Inside this bag were two bags taped together with black electrical tape. RP 25. The bags were too heavy for the sergeant's scale, so they had to be taken apart and weighed separately. RP 37.

The packaging of the drugs located at the Defendant's

residence was identical to that recovered from Gonzalez. RP 54. In total, 6.16 pounds of methamphetamine from the original seven pounds was recovered. RP 44, 53, 71-72.

DEA Agent Corrall testified that the Defendant's residence was a stash house such as is used by a mid to upper level drug dealer. RP 75-76. A low level dealer would only sell small amounts (1/8 or 1/16 of an ounce for sale at \$100-200), sufficient to support one's own habit. RP 76. A mid level dealer would have access to an ounce of methamphetamine valued at \$450-500. RP 76. But for pound or kilogram quantities valued at \$3700-7000, this would be high level dealing and would involve money laundering and currency transporting. RP 77. Gonzalez named Fabio and Huero as components of the transport network. RP 64, 71. The Defendant had access to seven pounds and already had assisted in distributing half a pound (~\$2200-2300) before he was arrested. RP 78-79.

The defense was unwitting possession, i.e. that someone else entered his bedroom without his knowledge and used his home for storage storage. RP 141. The strategy painted Gonzalez as an opportunist who repeatedly stated that the Defendant had no knowledge of the drugs, only falsely implicating the Defendant after

many interviews in order to save his own skin. RP 134-42.

The court imposed a mid-range sentence of 90 months confinement. CP 82. The judge asked the defense counsel about the client's ability to pay legal financial obligations (LFO's). 2RP 3-4.

MR. STOVERN: I know currently he has a lot of LFO's from previous matters.

THE COURT: That doesn't have anything to do with whether he can work or not.

MR. STOVERN: He is applying for SSI, but that's gonna be delayed.

THE COURT: I will assess the appropriate fines and he can address those later with the LFO clerks. Mr. Mata, anything you would like to say to the court?

DEFENDANT MATA: Just I'm sorry for whatever I did, but I -- I don't know. I need treatment, if I can get it.

2RP 4. The court then recited the Defendant's criminal history. 2RP 4-5. The court found the adult, able-bodied Defendant had the ability to pay legal financial obligations. CP 78. It imposed the \$6500 in legal financial obligations (LFO's):

- \$500 crime victim assessment,
- \$200 court filing fee,

- \$600 attorney fees,
- \$2000 VUCSA fine,
- \$100 crime lab fee,
- \$3000 meth cleanup fine, and
- \$100 DNA fee.

RP 79.

V. ARGUMENT

A. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The Defendant claims his attorney should have requested the lesser included instruction of simple possession. Appellant's Opening Brief (AOB) at 7-25.

In order to show ineffective assistance of counsel, the Defendant has the burden of showing both (1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Deficient performance is that which falls "below an objective

standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d at 334-35.

To demonstrate prejudice, the Defendant must show a reasonable probability that but for the deficient performance, the outcome of the trial would have been different. *In re Crace*, 174 Wn.2d 835, 843, 280 P.3d 1102 (2012). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

1. The Defense Strategy Was Reasonable.

The analysis of any claim of ineffective performance begins with a “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The Defendant bears the burden of proving that “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland v. Washington*, 406 U.S. at 689 (1984).

The Defendant contradictorily argues that the defense theory of the case was simple possession and that it was an “all or nothing approach.” AOB at 7, 9. This is not the record.

The defense strategy was to claim that there had been no possession of any kind; the Defendant was an unwitting patsy. RP 138 (asking where was this ounce that was supposedly given in payment). The defense admitted Gonzalez’s hearsay in order to develop its theory that there wasn’t possession of any kind, neither simple possession nor possession with intent. Rather, Gonzalez was pressured into incriminating the Defendant in order to secure a better deal for himself.

The defense argued only one person was to blame. “Christian Gonzalez is guilty of trafficking meth.” RP 134. Mr. Mata’s prints were not on the drugs. RP 139. It was Gonzalez’s fingerprints on the drugs. RP 139. Gonzalez was the one with the Tijuana connection. RP 134. The feds were interested in Gonzalez alone. RP 135 (“If he possessed all this, why is it that Mr. Gonzalez faced federal prosecution? Mr. Mata is in state court.”). The defense wanted the jury to see that the packaging was the same, because it was Mr. Gonzalez’s packaging. RP 135-36. The defense wanted the jury to

believe that Mr. Gonzalez was motivated to incriminate the Defendant in order to placate agents and reduce the charges for himself. RP 136 (“He was advised detectives would definitely speak with the prosecutors regarding his prosecution.”); RP 138 (“So at that point it becomes clear to Mr. Gonzalez he’s got to tell them a different answer or they’re just going to keep asking.”) He argued that if Gonzalez had been afraid that the Defendant’s fingerprints would be on the packaging, then that should have been in the written reports. RP 139. Because they were not in the reports, the agents’ interpretation of events in hindsight was unreliable.

The defense emphasized, no drugs were found on the Defendant. RP 138. No significant cash was found in the raid on his residence. RP 138.

[T]he science doesn’t say that he’s guilty. It says that Mr. Gonzalez is guilty. The facts don’t say that he’s guilty. They say that Mr. Gonzalez is guilty.

RP 139.

The defense argument at trial was plausible. A jury could have agreed and acquitted the Defendant. Ultimately, the jury did not agree. It is immaterial that this strategy ultimately proved unsuccessful; hindsight has no place in the analysis. *See Strickland*,

466 U.S. at 689; *cf. State v. Hoffman*, 116 Wn.2d 51, 112, 804 P.2d 577 (1991) (“The defendants cannot have it both ways; having decided to follow one course at trial, they cannot on appeal now change their course and complain that their gamble did not pay off.”). Because this was a legitimate strategy, it is not deficient performance.

The Defendant claims the trial strategy was objectively unreasonable if the jury believed Gonzalez’s earliest statements. AOB at 8-9. This is not true. Earlier Gonzalez said he had used drugs with the Defendant. But using drugs is not a crime. The defense argued there was no private supply in evidence. The only drugs were in packages too large for private consumption.

2. An Instruction On The Lesser Included Offense Would Not Have Been Permitted.

For the jury to be instructed on a lesser offense, two conditions must be satisfied. *State v. Pacheco*, 107 Wn.2d 59, 69, 726 P.2d 981, 987 (1986); *State v. Workman*, 90 Wn.2d 443, 447–48, 584 P.2d 382, 385–86 (1978). First, the legal prong, each of elements of the lesser offense must be a necessary element of the offense charged. And second, the factual prong, the evidence must support an inference that the lesser crime was committed to the exclusion of the

crime charged. *Id.*

It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given.

State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991) (where defendant was charged with assault with a deadly weapon for pulling a gun out of his holster and pointing it at the victim, and where his only testimony in defense was a denial and a suggestion that his gun may have been visible when he lifted his shirt, he was not entitled to instruction on unlawful display of a weapon). *See also State v. Speece*, 115 Wn.2d 360, 798 P.2d 294 (1990) (per curiam) (where defense was solely that he did not commit the burglary, no affirmative evidence in the record supported an inference that he was not armed once the jury found he was the burglar such that he was not entitled to the lesser included instruction of second degree burglary).

Here the factual prong is not met. For the jury to convict on the lesser included offense, it would have to have found that the Defendant possessed methamphetamine, but had no intent to transfer the drugs to anyone else. As defense counsel noted in his

closing argument, there was no evidence of a small amount set aside for personal consumption.

He says he gave [Mr. Mata] an ounce. Did we ever find that? Is there an ounce sitting in Mr. Mata's house?
No.

RP 138. The only evidence of drugs possessed were those found in bulk for processing and distribution.

On appeal, the defense argues that the evidence was that "Mr. Mata was well aware of [all] the drugs located on the premises." AOB at 12 (the Defendant having agreed to store the drugs for Mr. Gonzalez, having stipulated to dominion and control, and having expressed dismay at the DEA's arrival). But the jury could not find that Mr. Mata was in possession of five and a half pounds of methamphetamine and did not intend to transfer some or all of it.

The jury could only reach two conclusions on this evidence. Either Mr. Mata did not know that Mr. Gonzalez had left drugs in his home. Or Mr. Mata knew about this large quantity of drugs and intended to transfer them to someone else, whether it be Mr. Gonzalez or any number of buyers.

"Deliver" does not mean "sell." It simply means "transfer." CP 27. If the Defendant held the drugs to return them to Mr. Gonzalez,

then he intended to transfer or deliver them to Mr. Gonzalez. The only way a person is convicted of simple possession is when the possession is for personal use or destruction.

The large bags of drugs were entered into evidence as exhibits 5 and 6. RP 32-33, 61-62, 97-100, 108-11, 114-16. While it may be useful for the court to see what six pounds of methamphetamine looks like, it is inappropriate to transmit controlled substances to the court of appeals. RAP 9.8(b). Nevertheless, the transcript amply demonstrates that the large amount of drugs found in the Defendant's home could never have been for personal use.

Methamphetamine is sold in amounts that can be weighed on a digital scale the size of a cell phone. PE 1. The evidence was that a low level dealer will sell 1/16 to 1/8 of an ounce (1.75 – 3.5 grams). RP 76. The Defendant was in possession of 5.5 pounds (88 ounces) or 2.5 kilograms (2500 grams). In other words, he possessed 700-1400 times what a person would generally purchase for personal use.

A single tablet of ibuprofen (Advil), acetaminophen (Tylenol), salicylic acid (aspirin), or naproxen sodium (Aleve) weighs between 200-500 mg. Therefore, a purchase of methamphetamine for personal use would be the size of 3-17 crushed tablets. A bulk bottle

of Aleve with 200 pills weighs 44 grams (or one and a half ounces). The Defendant was found in possession of approximately 2500 grams of methamphetamine. By weight, that would be the equivalent of approximately 56 bulk bottles or 11,200 tablets of Aleve.

This is not how a methamphetamine user who lives in his parents' cluttered garage purchases drugs for personal use. Users cannot afford to buy, be stolen from, or be found "holding" in bulk. And dealers will not carry or sell large amounts of product, because they do not want to be caught holding by law enforcement and they do not want to risk being robbed by other dealers. RP 75. Therefore, the only place you will see drugs in such large quantities is at a stash house. RP 75. A stash house will have hidden compartments or a false wall, like was found at the Defendant's residence. RP 75.

The evidence was that this was a stash house, a place to store drugs before transferring it to individual buyers. The evidence at trial was not of a person's simple possession for his own use. He was holding it in order transfer it to others. The court could not have instructed on the lesser offense under these facts. The evidence does not support an inference that the lesser crime was committed to the exclusion of the crime charged.

3. The Defendant was not prejudiced.

The Defendant claiming ineffective assistance of counsel bears the burden of proving that, but for the deficient performance of his attorney, the outcome of the trial would have been different. He cannot make that showing here. If counsel has requested the instruction, his motion would have been denied. On this evidence, the jury could not have found that the Defendant possessed five and half pounds of methamphetamine for his own use with no intention of sharing or distributing it.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING LEGAL FINANCIAL OBLIGATIONS.

The Defendant challenges for the first time on appeal the imposition of LFO's. This Court is not required to grant review of the challenge, but may exercise discretion to do so. *State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015).

The claim is made under *Blazina*, which discussed the mandate in RCW 10.01.160(3) that the court "shall not" order a defendant to pay "costs" unless the defendant is or will be able to pay them, taking into account the offender's financial resources and the nature of the burden "costs" will impose. The Defendant notes that

\$5700 of the \$6500 LFO's were discretionary. AOB at 26-27. Of this amount, \$5000 comes from fines. The mandate in RCW 10.01.160(3) does not apply to restitution or fines, but only to costs. *State v. Clark*, 191 Wn. App. 369, 375-76, 362 P.3d 309 (2015) ("the fact that imposing a fine under this general statute is discretionary does not make the fine a discretionary "cost" within the meaning of RCW 10.01.160(3)).⁴ The Defendant's challenge then is only whether the court made an adequate inquiry into ability to pay before imposing the discretionary costs of \$700 (attorney fees and crime lab fee).

In deciding whether to accept discretionary review of an unpreserved claim of error, this Court should consider that:

- the lower court made inquiry,
- the Defendant was less than forthcoming to the inquiry,
- only \$700 is at issue, and
- there are better, evolving procedures which will address new information brought to the court's attention.

⁴ The order in *State v. Clark*, 187 Wn.2d 1009, 388 P.3d 487 (2017) does not address the difference between costs and fines, but only instructs the superior court to make a more adequate consideration of the defendant's financial resources and the nature of the burden. Moreover, the 2017 order is not a review of this 2015 opinion, but of *State v. Clark*, 195 Wn. App. 868, 381 P.3d 198 (2016). Therefore, the Defendant's attempt to characterize the brief order from the supreme court as a reversal (AOB at 27-28) is doubly misleading.

A sentencing court has discretion in assessing LFO's. RCW 9.94A.760(1). A court abuses its discretion when its decision is manifestly unreasonable when the decision is based on untenable grounds because it applies the wrong legal standard or relies on unsupported facts. *Salas v. Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

At the sentencing hearing, **the judge specifically inquired into the Defendant's ability to pay**. RP 3-4 ("Have you had the discussion with your client about ability to pay fines, restitution, and fees."). It is reasonable for the court to address its inquiry to the Defendant who has access to relevant information that the State does not. For example, the State does not possess the Defendant's medical records, tax returns, or employment history. However, the Defendant provided none of this information to the court.

If the judge is forced to rely on a convicted person's recitation alone, and there is no procedure for investigating last minute claims of debt or disability, then the only information a court will receive is a self-serving claim of inability to pay. There is little incentive to claim otherwise.

As this Court has previously said, an offender has good

strategic reasons not to detail his poor work history at sentencing. *State v. Duncan*, 180 Wn. App. 246, 251, 327 P.3d 699 (2014). Here the sentencing court was considering the term of incarceration at the same time as it was determining LFO's. The range of punishment was significant. CP 78 (60-120 months). And the attorneys were asking for opposite ends of the range. 2RP 2-3. In this context, it would have not have been helpful to represent himself as likely to remain unproductive or as irretrievably indigent.

The Defendant was not forthcoming. He complained of LFO debt, but did not provide the court with a number. The court would be aware that the Defendant also has mechanisms for remitting those LFO's for demonstrated hardship. His attorney said "I think Mr. Mata is an addict" (2RP 3), but provided no evaluation, affidavit, or even letters from friends and family to support this thinking. When defense counsel offers only his inexpert impression, the court can hold no one accountable as to the veracity of such claim. Defense counsel did not claim his client was disabled. He said Mr. Mata would be applying for SSI. Anybody can file an application. The application of itself is not proof of anything. Counsel did not explain in what way his client might qualify. (Drug addiction is not a qualifying condition for SSI.) Here

Mr. Mata has not even filed an application, and if he does, it will not be for years – after he is released from incarceration. 2RP 4.

The Defendant unfairly claims the trial court “deferred its required inquiry” into ability to pay. AOB at 32. The court only indicated that the LFO’s could be revisited⁵ if and when an SSI grant came into existence. 2RP 4.

The Defendant claims the finding at CP 78 is clearly erroneous. AOB at 30. In fact, it is amply supported in the record. The court had information from which to consider the Defendant’s future ability to pay and the nature of the burden of LFO’s. The court was aware that the Defendant was a young man. CP 92 (37 years old). He will still be young at the completion of his term. RCW 9.94A.729(3) (earned early release may be as much as 50%). The court was aware that the Defendant was a fit man, with no trouble climbing through windows. The court knew that the Defendant was living in his parents’ home, suggesting both that had family that was willing to provide him a place to live and had no expenses. The only debt claimed was the kind of debt that our courts are actively remitting.

⁵ The Defendant’s reference to *City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459 (2016) misrepresents a remission matter for SSI as being an imposition question. AOB at 31.

And the court was aware of his criminal history as well as the facts of this crime, which indicated a choice for criminal employment.

There was no basis for the court to “seriously question” his ability to pay. AOB at 32 (misrepresenting the language of the *Blazina* opinion). Indigency **as determined by the Comment under GR 34** would give the court reason to question ability to pay. *State v. Blazina*, 182 Wn.2d at 838-39. There has been no such GR 34 Comment indigency assessment. The record provides no demonstration that the Defendant is receiving needs-based, means-tested public assistance.

On this record, the superior court did not abuse its discretion in finding an ability to pay an additional \$700 in discretionary costs for his attorney and for lab testing.

It is not an efficient use of public resources for courts of appeal to remand every sentence for a second look where the defendant has been less than forthcoming in the face of the sentencing judge’s solicitation. It is particular inefficient where the offender’s circumstances are likely to change after a long period of incarceration.

Our statutes suggest that an order to pay at sentencing is not final. Rather the court’s decision is a preliminary determination that

can be reduced administratively at a better time. RCW 9.94A.760.

Once under supervision, the offender:

is required, under oath, to respond truthfully and honestly to all questions concerning present, past, and future earning capabilities and the location and nature of all property or financial assets. The offender is further required to bring all documents requested by the department.

RCW 9.94A.760(6). When the county clerks access employment security data as part of collection, they receive further detailed information about historical earnings. RCW 9.94A.760(13). This thorough examination does not happen at sentencing.

At the time of sentencing, the State did not even have access to the Defendant's financial declaration and, accordingly, no ability to investigate it. Indeed, it would be highly problematic for prosecutors to review these declarations *when submitted for the purpose of appointment of counsel*. However, under supervision, an updated declaration would be required and could be investigated for the purpose of setting a fair payment schedule.

The department or county clerk may modify the payment schedule *without involving the court* and to "reflect a change in financial circumstances." RCW 9.94A.760(7)(a) and (b). That

change in circumstances may be an offender's demonstration of disability by having been approved for SSI or of an offender's entry into a treatment program. This could result in the clerk suspending or terminating collection. The county's evolving practice is for the clerks, after having gathered information that is private and hard to ascertain in a courtroom setting, to assist offenders in ex parte motions to remit.

In this case the court made a proper inquiry. The court does not abuse its discretion because the Defendant is less than forthcoming. The imposition of \$700 of LFO's was reasonable.

C. THE STATE OPPOSES CATEGORICAL DENIALS OF APPELLATE COSTS PREMISED ON INDIGENCY SUFFICIENT FOR APPOINTMENT OF COUNSEL.

While costs are discretionary, this Court should reject arguments to deny any and all costs for the simple reason that the Defendant has obtained an order of indigency. Such order is not premised on the GR 34 Comment. The order does not speak to future ability to pay. The argument rejects out of hand the lower court's discretionary finding of fact that the Defendant has an ability to pay. And the practice provides an unacceptable inducement to appeal. ABA Criminal Justice Standard 21-2.3, *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. (1993).

Standard 21-2.3. Unacceptable inducements and deterrents to taking appeals

(a) Administration of a system of elective appeals presupposes that the parties with the right to appeal will choose to do so only when they, with advice of counsel, have identified grounds on which substantial argument can be made for favorable action by the appellate court. The system should not contain factors that induce or deter appeals for other reasons.

(b) Examples of unacceptable inducements for defendants to appeal are:

(i) absence of any risk that a financial obligation may be imposed on an appellant who pursues a frivolous appeal;

...

Last month, the Defendant filed a financial declaration. He claims he has a \$20,000 LFO debt, a \$35,000 child support debt, and owes another \$60,000 “other” debt. On the face of it, this is significant debt. Beyond the face of it, it may be mere paper debt.

The Defendant has not provided any documentary proof of his debt, beyond the declaration. If he believes he has a \$20,000 LFO debt based on the Judicial Information System, the Court should be aware that this system automatically calculates interest. But a significant majority of counties do not collect interest. After the principal is paid, the Franklin County Clerk ends collection.

Therefore, this number may be an inflation of the true debt.

As to the child support debt, if it is owed to the State, it is even more readily forgiven than LFO's – through a conference board hearing which can be accomplished over the telephone even while the Defendant is incarcerated. RCW 74.20.330; WAC 388-14A-4010(2)(b); WAC 388-14A-6400; WAC 388-14A-8600.

If the Court is inclined to exercise its discretion, the State's recommendation would be for some nominal imposition of costs to avoid inducing frivolous appeals.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

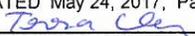
DATED: May 24, 2017.

Respectfully submitted:

SHAWN P. SANT
Prosecuting Attorney



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

<p>Kristina M. Nichols <Kristina@ewalaw.com> <admin@ewalaw.com></p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 24, 2017, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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May 24, 2017 - 5:00 PM

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