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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35240-4-III

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STATE OF WASHINGTON, Respondent,

v.

MANUEL RODRIGUEZ-FLORES, Appellant.

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**APPELLANT'S BRIEF**

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## **I. INTRODUCTION**

This appeal arises from a resentencing hearing after the original sentence was reversed and remanded. In the first appeal, the Court of Appeals cautioned the sentencing court to avoid any implication that its decision to impose the high end of the standard range was the result of the defendant's exercise of his right to a jury trial but declined to require resentencing before a different judge. On remand, Douglas County Judge John Hotchkiss publicly disparaged by name the Court of Appeal judges who decided the first appeal, questioned their experience in Superior Court, and proceeded to state again that Manuel Rodriguez-Flores's decision to proceed to a jury trial without a defense manifested a lack of remorse warranting the high end of the standard range. Additionally, the court erroneously imposed a discretionary jury demand fee under the mistaken belief that the fee was mandatory. Rodriguez-Flores now appeals and requests remand for resentencing before an impartial judge.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR NO. 1:** Rodriguez-Flores was deprived of his right to an unbiased judge at sentencing.

ASSIGNMENT OF ERROR NO. 2: The trial court erred in imposing a high-end sentence based upon Rodriguez-Flores's exercise of his constitutional right to a jury trial.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in imposing a \$250 jury demand fee as a mandatory legal financial obligation ("LFO").

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

ISSUE NO. 1: When, in open court, the sentencing court disparages Court of Appeals judges by name and criticizes their experience in response to the Court of Appeals' ruling on the first appeal, has the sentencing court demonstrated an inability to act fairly and impartially at resentencing?

ISSUE NO. 2: When the sentencing court states that its reason for imposing the high end is because the defendant's decision to proceed to a jury trial with "absolutely no defense at all" reflects a lack of remorse, has the sentencing court penalized the defendant for exercising a constitutional right?

ISSUE NO. 3: Should the \$250 jury demand fee be stricken when the sentencing court indicated it did not intend to impose discretionary LFOs, but mistakenly identified the jury demand fee as a mandatory LFO?

#### IV. STATEMENT OF THE CASE

The facts of the underlying case are set forth in this court's unpublished opinion no. 33311-6-III (Feb. 23, 2017), 197 Wn. App. 1080, \_\_ P.3d \_\_ (2017). There, this court held that sufficient evidence supported the convictions for delivering a controlled substance with school zone enhancements, but considered Rodriguez-Flores's argument that in imposing a sentence, the trial court improperly penalized him for exercising his right to a jury trial. *Id.* at \*4; CP 24-25. In particular, this court focused upon the following statements made by the sentencing court:

THE COURT: Well, Mr. Rodriguez-Flores, let me tell you this: You had no defense. They had you on video. They had you under surveillance. You had absolutely no defense and you went to trial anyway. And I know because of what was going on in this Court at that time that I had another jury in that you were offered a plea bargain of significantly less time. I have absolutely no question in my mind that you will be released and continue to do the same kind of stuff. I don't think you have any remorse; I don't think you have any concern. 132 months.

*Id.* at \*2; CP 20.

Because this court was already remanding the case for resentencing due to the erroneous imposition of consecutive terms for each of the three school zone enhancements, the court declined to find that the court's comments at sentencing amounted to a chilling of the right to a jury trial, but cautioned the trial court "to avoid even an implication that a

harsh sentence is based on Mr. Rodriguez-Flores's choice to stand trial.”  
*Id.* at \*4; CP 25. The court did not require resentencing to occur before a different judge. *Id.*

Thereafter, Rodriguez-Flores appeared in front of the same judge for a resentencing hearing. He appeared before the court as a 56 year old man with no prior convictions. CP 45, 46. Rather than avoiding the implication that the high-end sentence was due to Rodriguez-Flores's decision to proceed to a jury trial, the sentencing court doubled down on its prior comments, stating:

THE COURT: All right. Well, the Court has read the Court of Appeals decisions and, quite candidly, the Court gets a little bit tired of particularly Judge Siddoway and Judge Fearing chastising Superior Court Judges. I have the ability to sentence within the standard range to what sentence I believe is appropriate in this particular matter. I don't need Judge Siddoway, Judge Fearing, or anybody else to tell me, to merely caution me to avoid any implication of hard sentences, harsh sentences based upon Mr. Flores's choice to stand trial.

I have been a Superior Court Judge in Douglas County for eighteen-plus years. I have never, ever seen the prosecution for Douglas County impose an enhancement when the defendant pleads guilty to the major charges of distributing a controlled substance.

When he goes to trial and has absolutely no defense at all and then once he comes back asks me to ignore essentially the enhancements or any other harsher sentence, I find that the defendant has absolutely no remorse for what he's done. He has absolutely no recognition of the wrongdoing.

This Court has no reason to believe it won't happen again as soon as he is released, and again, there was no defense at all. He was caught on videotape. He knew that. So with no defense at all, he takes the matter to trial, then comes and asks the Court at sentencing to do what he could have done for himself.

I think the only way to stop this kind of activity for Mr. Rodriguez is to sentence him to the maximum time so when he gets out, at least some people will be safe.

84 months.

RP 13-14. A few moments later, the court made additional disparaging comments about the Court of Appeals, stating, "Court of Appeals Judges can run for Superior Court Judge if they want. I think they don't have any experience though." RP 14.

Additionally, Rodriguez-Flores requested that the court waive discretionary legal-financial obligations ("LFOs") to the extent it could, based upon Rodriguez-Flores's impending incarceration, additional debts, and imminent deportation from the United States. RP 10-11. The trial court found Rodriguez-Flores was unable to pay discretionary LFOs and stated that it intended to impose only mandatory LFOs. RP 12. However, the court included a \$250 jury demand fee in its assessment, apparently based upon the prosecuting attorney's representation that the fee was mandatory. RP 9, 12, 14; CP 49.

Rodriguez-Flores now appeals, and has been found indigent for that purpose. CP 56, 73.

#### **V. ARGUMENT**

On resentencing following remand from this court, the sentencing court not only ignored this court's cautionary instruction to avoid the suggestion that Rodriguez-Flores's choice to hold the State to its burden of proof in a jury trial factored into its calculation, but reiterated and emphasized that in its view, his choice to proceed to a jury trial reflected a lack of remorse justifying the highest possible sentence. The sentencing court's rather shocking disparagement of this court was contrary to the canons of judicial conduct and reflected a bias that should have disqualified him from imposing a sentence. Further, for all the reasons set forth in the first appeal in this case, the sentence constituted an improper sanction against Rodriguez-Flores's exercise of his constitutional rights. Lastly, because the imposition of a discretionary jury demand fee cannot be squared with the trial court's determination that only mandatory LFOs should be imposed, the \$250 jury demand fee should be stricken. For these errors, Rodriguez-Flores respectfully requests that the court vacate his sentence and remand the case for resentencing before a different judge.

1. The trial court's comments disparaging the Court of Appeals reflected a personal interest that deprived Rodriguez-Flores of his right to an impartial tribunal.

Although a defendant generally may not challenge a sentence within the standard range, he may do so when the sentence does not comport with minimal constitutional requirements. RCW 9.94A.585(1); *State v. Osman*, 157 Wn.2d 474, 481-82, 139 P.3d 334 (2006); *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). “A fair trial in a fair tribunal is a basic requirement of due process.” *State v. Madry*, 8 Wn. App. 61, 68, 504 P.2d 1156 (1972). In addition to the guarantees of an impartial court set forth in the U.S. Constitution's due process clauses, Washington's constitution requires an impartial tribunal. Wash. Const. art. I, § 22.

This requirement of impartiality requires the absence not only of actual bias, but even the appearance of it. *Madry*, 8 Wn. App. at 69 (*citing Offutt v. U.S.*, 348 U.S. 11, 13, 75 S. Ct. 11, 99 L. Ed. 11 (1954)); *see also* CJC 2.2. Because of the enormous discretion and authority vested in trial judges,

The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. The law goes

farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge.

*Madry*, 8 Wn. App. at 70.

To determine whether a judge's appearance of impartiality might reasonably be questioned, courts apply an objective test that assume an objective observer who knows and understands all of the relevant facts. *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). The reviewing court must determine whether a reasonably prudent and disinterested observer would conclude that the defendant received a fair, impartial, and neutral hearing. *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010).

In the present case, no reasonable observer would regard the sentencing court's comments as objective and detached. The record is evident that the sentencing court resented the ruling on appeal and, for that reason, would not put aside his personal interest in defending his position toward the defendant's choice of a jury trial and approach the proceeding neutrally. The judge's comments disputing the appellate process as not needing to be told how to rule and criticizing the decisions and experience of appellate court judges by name also fell short of the requirements of

CJC 1.2, requiring judges to promote public confidence in the integrity of the judiciary. Rather than merely accept the extremely light-handed rebuke handed down by the Court of Appeals and comply with it, the sentencing court plainly took personal offense and decided to use the resentencing hearing as an opportunity to call out the Court of Appeals. Rodriguez-Flores was caught in the crossfire, sacrificed to the sentencing court's intent to pursue a personal vendetta. Any reasonable person would regard this treatment as unfair and partial. Consequently, the proceeding failed to satisfy constitutional requirements for impartial decision-making, and reversal is required.

Although reassignment as a remedy on appeal is limited "if an appellate opinion offers sufficient guidance to effectively limit trial court discretion on remand," when review of the facts demonstrates that the judge's impartiality might reasonably be questioned, reassignment is appropriate. *Solis-Diaz*, 187 Wn.2d at 540. Here, the sentencing court has already demonstrated its unwillingness to accept correction from the Court of Appeals following remand. Rodriguez-Flores respectfully requests that the court remand his case for resentencing before a different judge.

2. The trial court's sentence cannot be justified when the court's comments reflect a deliberate intent to penalize Rodriguez-Flores's choice to exercise his constitutional right to a jury trial.

For all of the same reasons argued in Rodriguez-Flores's first appeal, the sentencing court's comments evidence its decision to impose a harsh sentence based upon Rodriguez-Flores's choice not to plead guilty but to demand a jury trial when, in the court's view, he had no chance of prevailing at trial. Imposing a sentence as a penalty for exercising the right to a jury trial is a violation of due process. *State v. Richardson*, 105 Wn. App. 19, 22, 19 P.3d 431 (2001); *State v. Sandefer*, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995); *see also U.S. v. Jackson*, 390 U.S. 570, 582-83, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) (invalidating statute limiting death penalty to cases in which a jury trial is pursued as penalizing the assertion of a constitutional right), *U.S. v. Mazzaferro*, 865 F.2d 450, 459-60 (1st Cir. 1989), and cases cited therein.

Doubling down on the comments it made in the first sentencing hearing, at resentencing, the court expressly stated that in its view, Rodriguez-Flores's decision to proceed to a jury trial evidenced a lack of remorse that justified the highest sentence permissible. Because, in the sentencing court's view, Rodriguez-Flores had no defense to the charge,

the only way to avail himself of leniency in sentencing was to enter a guilty plea. Based upon his awareness of the prosecutor's standard plea offers, the sentencing court expressly refused to consider a less harsh penalty, stating, "So with no defense at all, he takes the matter to trial, then comes and asks the Court at sentencing to do what he could have done for himself." RP 13-14. Based upon these comments, it is clear that the sentencing court punished Rodriguez-Flores for doing what the law plainly allows him to do – require the State to prove his guilt to a jury beyond a reasonable doubt. This amounts to "a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978).

It is also troubling that the sentencing court characterized Rodriguez-Flores's appearance before the court following a successful appeal as "once he comes back asks me to ignore essentially the enhancements or any other harsher sentence." RP 13. First, Rodriguez-Flores did not ask the court to ignore the enhancements at any time, directing the majority of its comments to ability to pay LFOs and merely asking the court to impose the low end of the standard range, acknowledging that the majority of the time imposed would be the result of the sentence enhancements. RP 10-11. Second, to the extent the court was required to "ignore" enhancements, it is because the law requires him

to run the enhancements concurrently, consistent with Rodriguez-Flores's successful appeal. CP 23-24; *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015). Asking the court to follow the law is not evidence of a lack of remorse, and should not be penalized as such.

For the reasons argued in Rodriguez-Flores's first appeal, cases from other jurisdictions considering similar comments have resulted in reversal and remand. *See, e.g., Commonwealth v. Bethea*, 474 Pa. 571, 379 A.2d 102 (1977) (“[H]ad you pled guilty, it might have shown me the right side of your attitude about this, but you plead not guilty, fought it all the way, and the jury found you guilty.”); *In re Lewallen*, 23 Cal.3d 274, 152 Cal. Rptr. 528, 590 P.2d 383 (1979) (“[A]s far as I’m concerned, if a defendant wants a jury trial and he’s convicted, he’s not going to be penalized with that, but on the other hand he’s not going to have the consideration he would have had if there was a plea.”); *State v. Knaak*, 396 N.W.2d 684 (Minn. 1986) (“[The sentence] may be a little more harsh than if you had entered a plea of guilty to start with but I don’t know as that’s true in as much as I am sentencing in accordance with the standard first-time penalty.”); *Johnson v. State*, 274 Md. 536, 336 A.2d 113, 117–18 (1975) (“If you had come in here with a plea of guilty . . . you would probably have gotten a modest sentence.”).

Likewise, comments that create an inference of greater punishment for refusal to plead guilty can invalidate a sentence, even if the appellate court declines to find that the trial court actually punished the defendant. *See U.S. v. Hess*, 496 F.2d 936, 937–38 (9th Cir. 1974); *U.S. v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982); *U.S. v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), *cert. denied*, 411 U.S. 948, 36 L.Ed.2d 409, 93 S.Ct. 1924 (1973); *State v. Baldwin*, 192 Mont. 521, 629 P.2d 222, 225–26 (1981); *State v. Hass*, 268 N.W.2d 456, 463–65 (N.D. 1978); *Commonwealth v. Bethea*, *supra*; *State v. Fitzgibbon*, 114 Or. App. 581, 836 P.2d 154, 157 (1992). In a case where a sentencing court’s comments, similar to those in the present case, reflected its opinion that the jury trial had been a waste of public funds due to the lack of defense and that there should not have been a trial, the court’s failure to state expressly on the record whether the decision to go to trial factored into its decision warranted remand. *U.S. v. Hutchings*, 757 F.2d 11, 14 (2nd Cir. 1985). Because such comments result in a substantial chilling effect on the right to require the state to prove the charges in a jury trial, remand for resentencing is necessary. *Medina-Cervantes*, 690 F.2d at 717; *Commonwealth v. Bethea*, 379 A.2d at 104.

Here, the sentencing court expressly acknowledged that it considered Rodriguez-Flores’s exercise of his jury trial right as a lack of

remorse warranting punishment. Taken as a whole, the comments unquestionably serve to warn Rodriguez-Flores, defense counsel, and those present in the courtroom, that the court regarded proceeding to trial as a significant factor in its decision to impose the lengthiest possible sentence. Further, any observer in the courtroom would receive the message that proceeding to trial in a case where acquittal is not virtually assured will come at a cost. This result plainly undermines constitutional protections and thereby violates due process. Accordingly, Rodriguez-Flores's sentence should be reversed and remanded.

3. Because a jury demand fee is a discretionary, rather than a mandatory, LFO, the trial court erred in imposing it when it determined that only mandatory LFOs were appropriate.

The sentencing court implicitly found that Rodriguez-Flores lacked the ability to pay discretionary LFOs, stating that it would only impose mandatory ones. RP 12. In its comments, the prosecuting attorney stated that the jury demand fee of \$250 was a mandatory LFO, and the trial court imposed it. RP 9, 14; CP 48-49. This was erroneous.

The only mandatory LFOs are victim restitution, the victim assessment, the DNA fee, and the criminal filing fee, as the legislature has divested sentencing courts of the discretion to waive these amounts. *State*

*v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). The jury demand fee is discretionary. *Id.* at 107. As an item of costs, the governing statute allows, but does not require, the sentencing court to impose the jury demand fee. *See State v. Hathaway*, 161 Wn. App. 634, 652-53, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011). Because the jury demand fee is discretionary, it may only be imposed when the sentencing court finds that the defendant has the ability to pay it. RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Here, the sentencing court appears to have erroneously imposed the jury demand fee under the mistaken belief that the fee was mandatory rather than discretionary. It is not. Accordingly, the \$250 jury demand fee should be stricken from the judgment and sentence.

## **VI. CONCLUSION**

For the foregoing reasons, Rodriguez-Flores respectfully requests that the court REVERSE and VACATE his sentence, REMAND the case for resentencing before a different judge, and STRIKE the \$250 jury demand fee imposed.

RESPECTFULLY SUBMITTED this 28 day of December,

2017.

A handwritten signature in blue ink, appearing to read "Andrea Burkhart". The signature is written in a cursive style with a large initial 'A'.

---

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 28 day of December, 2017 in Walla Walla,  
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\_\_\_\_\_  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

**December 28, 2017 - 11:26 AM**

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