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Court of Appeals
Division III
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NO. 35766-0-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT CUFF,
Appellant.

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

Douglas County Cause No. 17-1-00047-1

The Honorable John Hotchkiss, Judge

BRIEF OF APPELLANT

Skylar T. Brett
Attorney for Appellant

LAW OFFICE OF SKYLAR T. BRETT
P.O. Box 18084
Seattle, WA 98118
(206) 494-0098
skylarbrettlawoffice@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ISSUES AND ASSIGNMENTS OF ERROR 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 4

ARGUMENT 9

I. The sentencing court violated Spencer’s rights under the Eighth Amendment by failing to properly consider all of the relevant factors under *Miller* when considering whether his youth (and its “mitigating qualities”) at the time of the offenses warranted an exceptional sentence below the standard range. 9

II. The sentencing court violated Spencer’s right to due process by imposing numerous sentencing conditions that are unconstitutionally vague. 13

III. If the state substantially prevails on appeal, this Court should decline any request to impose appellate costs upon Spencer because he is indigent. 16

CONCLUSION 18

TABLE OF AUTHORITIES

FEDERAL CASES

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010)
..... 10

Miller v. Alabama, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012)
..... 1, 9, 10, 11, 12, 18

Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) 10

WASHINGTON STATE CASES

State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008)..... 13, 14, 15, 16

State v. Bassett, 198 Wn. App. 714, 394 P.3d 430 (2017), *review granted*,
189 Wn.2d 1008, 402 P.3d 827 (2017)..... 11

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 17, 18

State v. Clark, 187 Wn.2d 641, 389 P.3d 462 (2017)..... 13

State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005) 11

State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017) 9, 11, 12

State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) 9, 10, 11, 12

State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010).... 13, 16

State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005)..... 15

State v. Sinclair, 192 Wn. App. 380, 367 P.3 612 (2016)..... 16, 17

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VIII 1, 9, 10, 12, 18

U.S. Const. Amend. XIV 1, 2, 9, 13

Wash. Const. art. I, § 3..... 1, 2, 3, 13

OTHER AUTHORITIES

2017 WASHINGTON COURT ORDER 0001 17

GR 34 17

RAP 14.2..... 16, 17, 18

RAP 15.2..... 17

RAP 2.5..... 13

ISSUES AND ASSIGNMENTS OF ERROR

1. The sentencing court violated Spencer Cuff's rights under the Eighth and Fourteenth Amendments.
2. The sentencing court abused its discretion by failing to consider all of the factors enumerated in *Miller v. Alabama*.

ISSUE 1: When considering whether to sentence an offender below the standard range of offenses committed as a juvenile or very young adult, the Eighth Amendment requires a court to consider his/her: age, immaturity, impetuosity, inability to appreciate risk and consequences, home environment, the circumstances of the offense, and the possibility of rehabilitation. Did the sentencing court violate Spencer Cuff's rights under the Eighth Amendment by failing to consider any factor except for whether his actions demonstrated "impulsiveness"?

3. The sentencing court erred by adopting "recommendation" 1 as a condition of community custody. CP 149.
4. "Recommendation" 1 is unconstitutionally vague in violation of the Fourteenth Amendment.
5. "Recommendation" 1 is unconstitutionally vague in violation of Wash. Const. art. I, § 3.
6. The sentencing court erred by adopting "recommendation" 3 as a condition of community custody. CP 149.
7. "Recommendation" 3 is unconstitutionally vague in violation of the Fourteenth Amendment.
8. "Recommendation" 3 is unconstitutionally vague in violation of art. I, § 3.
9. The sentencing court erred by adopting "recommendation" 4 as a condition of community custody. CP 149.
10. "Recommendation" 4 is unconstitutionally vague in violation of the Fourteenth Amendment.
11. "Recommendation" 4 is unconstitutionally vague in violation of art. I, § 3.

12. The sentencing court erred by adopting “recommendation” 5 as a condition of community custody. CP 149.
13. “Recommendation” 5 is unconstitutionally vague in violation of the Fourteenth Amendment.
14. “Recommendation” 5 is unconstitutionally vague in violation of art. I, § 3.
15. The sentencing court erred by adopting “recommendation” 7 as a condition of community custody. CP 150.
16. “Recommendation” 7 is unconstitutionally vague in violation of the Fourteenth Amendment.
17. “Recommendation” 7 is unconstitutionally vague in violation of art. I, § 3.
18. The sentencing court erred by adopting “recommendation” 8 as a condition of community custody. CP 150.
19. “Recommendation” 8 is unconstitutionally vague in violation of the Fourteenth Amendment.
20. “Recommendation” 8 is unconstitutionally vague in violation of art. I, § 3.
21. The sentencing court erred by adopting “recommendation” 9 as a condition of community custody. CP 150.
22. “Recommendation” 9 is unconstitutionally vague in violation of the Fourteenth Amendment.
23. “Recommendation” 9 is unconstitutionally vague in violation of art. I, § 3.
24. The sentencing court erred by adopting “recommendation” 10 as a condition of community custody. CP 150.
25. “Recommendation” 10 is unconstitutionally vague in violation of the Fourteenth Amendment.
26. “Recommendation” 10 is unconstitutionally vague in violation of art. I, § 3.
27. The sentencing court erred by adopting “recommendation” 12 as a condition of community custody. CP 150.
28. “Recommendation” 12 is unconstitutionally vague in violation of the Fourteenth Amendment.

29. “Recommendation” 12 is unconstitutionally vague in violation of art. I, § 3.

ISSUE 2: A sentencing condition is unconstitutionally vague if it fails to define proscribed conduct with sufficient definiteness or to provide ascertainable standards to protect against arbitrary enforcement. Are the treatment provider’s treatment recommendations – which the sentencing court adopted as conditions of Spencer Cuff’s sentence – unconstitutionally vague when they focus on internal processes such as: “eliminating cognitive distortions,” “demonstrating sensitivity,” “demonstrating an accurate understanding,” “gain[ing] a clear understanding,” “demonstrating a solid awareness,” and “demonstrating concern;” and rely on undefined, subject terms such as “cognitive distortions,” “thinking errors,” “high risk situations,” “responsible decision-making,” “honesty,” “appropriate use of leisure time,” “responsibility,” “concern,” “pornography,” and a “constructive and responsible lifestyle”?

30. The Court of Appeals should decline to impose appellate costs, if Respondent substantially prevails on appeal and requests such costs.

ISSUE 3: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Cuff is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Spencer Cuff was twenty-one-years-old at the time of his sentencing for offenses that occurred when he was sixteen- and twenty-years-old. *See* CP 135.

Spencer incurred several brain injuries during his youth. RP¹ 53-54. As a result, he had significant damage to his frontal lobe, which is the part of the brain that regulates decisions and behavior. RP 52-54, 56. The frontal lobe acts as the “governor” or “breaks” of the brain, stopping a person from making bad decisions by making him/her aware of the probable negative consequences. RP 52, 56. Cognitive testing showed that Spencer’s frontal lobe functioned in the range of the bottom 8-9% of the population. RP 70.

The type of frontal lobe damage Spencer suffers is treatable with both behavioral and neurological methods. RP 57-58, 62. Treatment for his condition is very effective, showing results within three to six weeks. RP 80-81.

Even into his early twenties, Spencer’s knowledge of sexual topics was very deficient. RP 83. He did not understand basic anatomy or “how sex worked.” RP 83. He did not understand how healthy relationships

¹ All citations to the Verbatim Report of Proceedings refer to the volume from 12/06/2017.

worked, what consent was, or what sexual conduct was legal and what was not. RP 83.

When Spencer was twenty-years-old his cousin, E.C., reported that Spencer had been sexually abusing her on and off for years. *See* CP 51-80. E.C. is about seven years younger than Spencer. *See* CP 106. The state charged Spencer with three counts of first degree child molestation (based on events occurring when he was sixteen), as well as one count second degree of child molestation, cyberstalking, and communicating with a minor for immoral purposes (based on events occurring when he was twenty). CP 106.

Spencer pleaded guilty to all of the charges, except for cyberstalking, which was dismissed. CP 7-25, 135-35.

Spencer began sex offender treatment. RP 84. He was very committed to treatment and was never late to a session in over six months, which his provider called “exceptional.” RP 84. Spencer was also compliant with all of his treatment provider’s conditions. RP 87.²

Once he began treatment, Spencer finally understood the harm that he had caused to E.C. and took responsibility for his actions. RP 63, 85, 91-92. He broke down in tears upon realizing the gravity of what he had

² Spencer’s treatment provider noted that Spencer had violated the rules by speeding (while driving) on one occasion. RP 87.

done to his cousin. RP 63. He even cried several times in front of his treatment group of ten other men when thinking about the damage that he had caused to E.C. RP 85, 91. He also regularly reminded other treatment participants of the level of hurt that sexual abuse causes to its victims. RP 92.

An expert risk assessment found Spencer to pose a very low risk of re-offense by both juvenile and adult metrics. RP 84; CP 129. Spencer did not demonstrate any risk factors for reengaging in sexual misconduct. RP 86; CP 125-29. Testing showed that he did not experience any “deviant arousal,” such as pedophilia. RP 63-64. The evaluation concluded that Spencer was a “very good candidate for remaining in the community,” with the condition that he continue with his treatment. CP 128-29.

Spencer’s psychological evaluator (Dr. Packard) and treatment provider (Dr. Kahn) both testified at his sentencing hearing.

Dr. Packard explained how Spencer’s frontal lobe injuries inured him to the harm that his offenses were causing to E.C. RP 56. He also testified that, even without injury, the frontal lobe does not finish developing until about the age of twenty-five. RP 52. This leads even normal adolescents to engage in significant risk-taking and stimulation-seeking. RP 52.

Finally, the Dr. Packard noted that Spencer was not high risk enough to be eligible for any treatment for his sexual misconduct if sentenced to the Department of Corrections (DOC). RP 65-66. This is because DOC reserves its limited treatment resources for those who pose a higher risk. RP 65-55.

Spencer's defense attorney asked the court for an exceptional sentence below the standard range with an increased period of community supervision and monitoring. RP 100-01. Defense counsel argued that Spencer's youth, naivete, and limited cognitive abilities mitigated his culpability. RP 96-98. Defense counsel also pointed out that Spencer has demonstrated ability to internalize the lessons of treatment but that his chances of success in treatment would decrease over time. RP 99. Finally, defense counsel noted that Spencer would only have been facing a sentence measured in weeks if his most serious offenses (those committed at the age of sixteen) had been prosecuted when he was a juvenile. RP 100.

The court denied the request for an exceptional sentence and sentenced Spencer to 149 months in DOC custody. RP 105.

The sentencing judge said that he was aware of the research into brain development but that the legislature has chosen not to incorporate it into the sentencing statutes. RP 102. The judge also said that he did not

find the research significant in Spencer's case because he did not find that Spencer had acted impulsively. RP 104. The court's written ruling also focuses exclusively on the issue of impulsivity. CP 153-58.

The court incorporated Dr. Kahn's recommended conditions of community custody into Spencer's Judgment and Sentence. CP 150-51. But the court also incorporated Dr. Kahn's "treatment recommendations" as conditions of Spencer's sentence. CP 149-51. As a result, Spencer was ordered to comply with the following conditions:

1. Spencer will eliminate cognitive distortions (thinking errors) in his day-to-day interactions with others. This includes being able to identify and describe thinking errors used by himself and others.
3. Spencer will demonstrate sensitivity to the feelings and experiences of others, as evidenced by his participation in group therapy, his day-to-day interactions, as well as his discussions with other persons on his treatment team.
4. Spencer will demonstrate an accurate understanding of coercion and consent, and he will demonstrate the ability to seek verbal consent from others in all his behavior.
5. Spencer will gain a clear understanding of the impact of sexual abuse on victims.
7. Spencer will demonstrate a solid awareness of his treatment rules, and he will demonstrate the ability to avoid high risk situations, including use of pornography...
8. Spencer will demonstrate responsible decision-making and honesty in his day-to-day life including appropriate use of leisure time...

9. Spencer will demonstrate honesty, responsibility and concern in all relationships...
 10. Spencer will develop increased comfort in acknowledging his sexual feelings...
 12. Spencer will demonstrate internalization of treatment concepts, and a constructive and responsible lifestyle prior to the termination of treatment
 13. Spencer will completely abstain from *any* viewing of pornography.
- CP 149-150.

This timely appeal follows. CP 161.

ARGUMENT

I. THE SENTENCING COURT VIOLATED SPENCER’S RIGHTS UNDER THE EIGHTH AMENDMENT BY FAILING TO PROPERLY CONSIDER ALL OF THE RELEVANT FACTORS UNDER *MILLER* WHEN CONSIDERING WHETHER HIS YOUTH (AND ITS “MITIGATING QUALITIES”) AT THE TIME OF THE OFFENSES WARRANTED AN EXCEPTIONAL SENTENCE BELOW THE STANDARD RANGE.

Because “children are different” to an extent that “has constitutional ramifications,” the Eighth Amendment requires a sentencing court to take an accused person’s youth into account during sentencing.

U.S. Const. Amends. VIII, XIV; *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2470, 183 L.Ed.2d 407 (2012); *State v. Houston-Sconiers*, 188 Wn.2d 1, 8, 391 P.3d 409 (2017).³

³ A sentencing court’s decision regarding whether to depart from the standard sentencing range is reviewed for an abuse of discretion. *State v. O’Dell*, 183 Wn.2d 680, 697, 358 P.3d 359 (2015). A court abuses its discretion by failing to properly exercise that discretion. *Id.*

The U.S. Supreme Court has held as much, based on research demonstrating that youth have an “underdeveloped sense of responsibility,” which “result[s] in impetuous and ill-considered actions and decisions.” *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The *Roper* court noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior” and that the personalities and character traits of young people are not as fixed as those of adults. *Id.* at 569.

Likewise, in *Graham* and *Miller*, the Courts cite to research demonstrating that the “parts of the brain involved in behavior control” are fundamentally different in juveniles than in adults. *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller*, 567 U.S. at 471–72. Those differences imbue young people with “transient rashness, proclivity for risk, and inability to assess consequences,” all of which mitigate their “moral culpability” and make it more likely that criminal behavior can be reformed. *Miller*, 567 U.S. at 471-72.

These neurological differences persist even past the age of eighteen. *O'Dell*, 183 Wn.2d at 695–96.

Accordingly, the Eighth Amendment mandates a court consider the “mitigating qualities of youth” when weighing whether to sentence an offender who was a juvenile and/or a very young adult at the time of an

offense below the standard range for a typical adult. *Miller*, 567 U.S. at 467; *O'Dell*, 183 Wn.2d at 695-96; *Houston-Sconiers*, 188 Wn.2d at 21.

Specifically, the sentencing court must consider the following

“*Miller* factors:”

... chronological age, ‘immaturity,’ ‘impetuosity,’ ‘failure to appreciate risks and consequences,’ the surrounding family and home environment, ‘the circumstances of the ... offense...’ and the possibility of rehabilitation.

State v. Bassett, 198 Wn. App. 714, 725, 394 P.3d 430 (2017), *review granted*, 189 Wn.2d 1008, 402 P.3d 827 (2017) (*citing Miller*, 567 U.S. at 477-78).

A sentencing court’s failure to exercise its discretion by failing to properly consider each of these factors is, itself, an abuse of discretion subject to reversal. *O'Dell*, 183 Wn.2d at 697 (*citing State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005)).

In Spencer’s case, the sentencing court abused its discretion by meaningfully considering only one of the *Miller* factors: impetuosity. RP 104; CP 153-58. The court failed to meaningfully address the factors that were most critical in Spencer’s case: his immaturity, his failure to appreciate risks and consequences, and the possibility of his rehabilitation. CP 153-58; *Bassett*, 198 Wn. App. at 725.

Spencer was sixteen-years-old when he committed the offenses that controlled his standard-range sentence. *See* CP 135. The evidence at the sentencing hearing focused on Spencer’s frontal lobe impairment, which impacted his ability to understand the probable consequences of his actions. RP 52-54, 56, 70. This evidence demonstrated that he was unable to appreciate risks and consequences in the same manner as a normal adult. The evidence also showed that Spencer was particularly immature even as a twenty-year-old, with very deficient knowledge of sexual topics. RP 83. And, most critically, the evidence showed that Spencer had a very high possibility of complete rehabilitation, as demonstrated by his amenability and compliance with treatment and ability to internalize the damage he had done to E.C. as well as the availability of treatment to reverse the damage to his frontal lobe. RP 57-58, 62-63, 80-81, 85, 91-92.

By looking only to his impetuosity or “impulsiveness,” the sentencing court failed to properly consider all of the relevant “mitigating qualities” of Spencer’s youth, as required by the Eighth Amendment. *Miller*, 567 U.S. at 467; *O’Dell*, 183 Wn.2d at 695-96; *Houston-Sconiers*, 188 Wn.2d at 21. Spencer’s case must be remanded for resentencing with proper consideration of all of the *Miller* factors. *Id.*

II. THE SENTENCING COURT VIOLATED SPENCER’S RIGHT TO DUE PROCESS BY IMPOSING NUMEROUS SENTENCING CONDITIONS THAT ARE UNCONSTITUTIONALLY VAGUE.

Due process requires that the state provide citizens with fair warning of proscribed conduct. *State v. Sanchez Valencia*, 169 Wn.2d 782, 791, 239 P.3d 1059 (2010); U.S. Const. Amend. XIV; art. I, § 3.⁴

A community custody condition is unconstitutionally vague if it (1) fails to define the proscribed conduct with “sufficient definiteness” that an ordinary person can understand what is prohibited or (2) fails to provide “ascertainable standards” to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53. Failure to satisfy either requirement renders the condition void for vagueness. *Id.*

The vagueness doctrine applies to sentencing and community custody conditions. *See e.g. Valencia*, 169 Wn.2d 782. Like a statute, sentencing condition is unconstitutionally vague if either it does not ensure that “citizens have fair warning of proscribed conduct” or if it permits for arbitrary enforcement. *Id.* at 791.

There is no presumption in favor of the constitutionality of a community custody condition. *Id.* at 792-93. Community custody conditions are subject to reversal when they are manifestly unreasonable.

⁴ A constitutional vagueness challenge can be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); RAP 2.5(a)(3). Constitutional issues are reviewed *de novo*. *State v. Clark*, 187 Wn.2d 641, 389 P.3d 462 (2017).

Id. The imposition of an unconstitutionally vague condition is *ipso facto* manifestly unreasonable. *Id.* at 792.

Here, the sentencing court imposed Dr. Kahn’s “treatment recommendations” – in addition to his proposed sentencing conditions -- as conditions of Spencer’s community custody.⁵ CP 149-51.

Almost all of those treatment recommendations focus on Spencer’s internal processes such as “eliminating cognitive distortions,” “demonstrating sensitivity,” “demonstrating an accurate understanding,” “gain[ing] a clear understanding,” “demonstrating a solid awareness,” “demonstrating concern,” and “demonstrat[ing] internalization” of concepts. CP 149-50. But the language of the conditions does not provide for any metric by which intangible and subjective things like sensitivity, understanding, awareness, or internalization will be measured. CP 149-50. Accordingly, the sentencing conditions fail to describe the prohibited conduct with sufficient definiteness or to provide any ascertainable standards for enforcement as required by Due Process. *Bahl*, 164 Wn.2d at 752-53.

Furthermore, a sentencing condition is unconstitutionally vague if it relies on the use of undefined terms that lack sufficient definiteness to

⁵ Defense counsel agreed to the adoption of Dr. Kahn’s “conditions.” RP 106. But he did not agree to the adoption of his treatment recommendations as conditions of community custody. *See* RP *generally*. Accordingly, the defense did not invite this error.

permit “ordinary people” to understand what is encompassed. *See State v. Sansone*, 127 Wn. App. 630, 639, 111 P.3d 1251 (2005).

The treatment recommendations adopted as conditions of Spencer’s sentence are replete with undefined terms that are subject to vastly different interpretations. For example, the language of the conditions refers to subjective concepts like “cognitive distortions,” “thinking errors,” “feelings and experiences of others,” “coercion and consent,” “high risk situations,” “responsible decision-making,” “honesty,” “appropriate use of leisure time,” “responsibility,” “concern,” “pornography,” and a “constructive and responsible lifestyle.” CP 149-50. Because these terms are open to widely varying interpretations by Spencer, future courts, treatment providers, and DOC officers, they fail to describe the prohibited conduct with sufficient definiteness or to provide any ascertainable standards for enforcement. *Id.*; *Bahl*, 164 Wn.2d at 752-53.

In fact, the *Sansone* court specifically found that the term “pornography” was unconstitutionally vague unless further defined because it was not sufficiently definite to permit ordinary people to understand what was or was not prohibited. *Sansone*, 127 Wn. App. at 639.

Conditions 1, 3, 4, 5, 7, 8, 9, 10, and 12 of exhibit 1 to the Judgment and Sentence are unconstitutionally vague because they neither permit understanding of what is proscribed nor protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 752-53.

The remedy for an unconstitutionally vague sentencing condition is to strike it from the judgment and sentence. *Valencia*, 169 Wn.2d at 795.

Conditions 1, 3, 4, 5, 7, 8, 9, 10, and 12 of exhibit 1 to Spencer's Judgment and Sentence are unconstitutionally vague. *Bahl*, 164 Wn.2d at 752-53; *Valencia*, 169 Wn.2d at 794-95. Those conditions must be stricken from the Judgment and Sentence. *Id.*

III. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE ANY REQUEST TO IMPOSE APPELLATE COSTS UPON SPENCER BECAUSE HE IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3 612 (2016).⁶

⁶ Though the recent amendments to RAP 14.2 arguably negate the requirement for an indigent appellant to raise this issue in his/her Opening Brief, appellant raises it,

(Continued)

Appellate costs are “indisputably” discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court waived non-mandatory LFOs in Spencer’s case. CP 141-42. The trial court also found him indigent at the end of the proceedings in superior court. CP 159-60.

That status is unlikely to change. The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

Additionally, the newly amended RAP 14.2 specifies that the trial court’s finding of indigency stands unless the state presents evidence that the accused’s financial circumstances have changed:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

RAP 14.2 (*as amended by 2017 WASHINGTON COURT ORDER 0001*).

nonetheless, out of an abundance of caution. See RAP 14.2 (*as amended by 2017 WASHINGTON COURT ORDER 0001*).

The state is unable to provide any evidence that Mr. Cuff's financial situation has improved since he was found indigent by the trial court.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested. RAP 14.2; *Blazina*, 182 Wn.2d 827.

CONCLUSION

The sentencing court abused its discretion and violated Spencer Cuff's rights under the Eighth Amendment by failing to properly consider all of the "mitigating qualities" of Spencer's youth, as outlined by the U.S. Supreme Court in *Miller*. Spencer's case must be remanded for resentencing.

Additionally, conditions 1, 3, 4, 5, 7, 8, 9, 10, and 12 of exhibit 1 to Spencer's Judgment and Sentence – adopted from Dr. Kahn's treatment recommendations -- are unconstitutionally vague. Those conditions must be stricken from the Judgment and Sentence.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Cuff who is indigent.

Respectfully submitted on July 11, 2018,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Robert Cuff/DOC#402477
Monroe Correctional Complex-WSR
PO Box 777
Monroe, WA 98272

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Douglas County Prosecuting Attorney
sclem@co.douglas.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on July 11, 2018.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT

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