

FILED
Court of Appeals
Division III
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NO. 36007-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

FRANCISCO AGUINAGA,

Appellant.

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

The Honorable Bruce A. Spanner, Judge

BRIEF OF APPELLANT

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
1. The sentencing court failed to engage Mr. Aguinaga in a meaningful colloquy, per RCW 10.10.160(3) and <i>State v. Blazina</i> , prior to imposing \$1306.68 in discretionary legal financial obligations (LFOs).	
2. This court should exercise its discretion to not award appellate costs if the State substantially prevails on appeal and submits a cost bill.....	1
B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	1
1. Whether the trial court’s failure to engage Mr. Aguinaga in a meaningful colloquy on his ability to pay \$1306.68 in discretionary legal financial obligations requires remand for a hearing to determine his ability to pay as required by both RCW 10.10.160(3) and <i>State v. Blazina</i> ?.....	1
2. Whether this court should exercise its discretion to not award appellate costs if the State substantially prevails on appeal and submits a cost bill?.....	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT.....	6
Issue 1: The trial court erred in imposing \$1306.68 of discretionary legal financial obligations because the court failed to engage in an adequate <i>Blazina</i> colloquy.....	6
Issue 2: Appellate costs should not be imposed if requested by the State.....	14

E. CONCLUSION.....16
CERTIFICATE OF SERVICE.....17
APPENDIX: GR 34

TABLE OF AUTHORITIES

Page

Washington Supreme Court Cases

City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016) 10
State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)1, 6, 8, 9, 10, 11, 13,
.....15
State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018) ..7, 8, 10, 11, 12, 13

Washington Court of Appeals Cases

State v. Gonzalez-Gonzalez, 193 Wn. App. 683, 370 P.3d 989 (2016).....12
State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013) 12
State v. Mathers, 193 Wn. App. 913, 918, 376 P.3d 1163 (2016).....12
State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016) 14, 15

Statutes

RCW 10.01.160.....6, 8, 10, 11, 13
RCW 10.10.160..... 1
RCW 10.46.190..... 12
RCW 10.73..... 14
RCW 36.18.016.....12
RCW 36.18.020..... 12
RCW 9A.52.020 4

Other Authorities

GR 34 6, 10
House Bill 1783 12, 13
LAWS OF 2018..... 13
RAP 14.2 14
RAP 15.2 15
RAP Title 14 14

A. ASSIGNMENTS OF ERROR

1. The sentencing court failed to engage Mr. Aguinaga in a meaningful colloquy, per RCW 10.10.160(3) and *State v. Blazina*, prior to imposing \$1306.68 in discretionary legal financial obligations (LFOs).

2. This court should exercise its discretion to not award appellate costs if the State substantially prevails on appeal and submits a cost bill.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the trial court's failure to engage Mr. Aguinaga in a meaningful colloquy on his ability to pay \$1306.68 in discretionary legal financial obligations requires remand for a hearing to determine his ability to pay as required by both RCW 10.10.160(3) and *State v. Blazina*?

2. Whether this court should exercise its discretion to not award appellate costs if the State substantially prevails on appeal and submits a cost bill?

C. STATEMENT OF THE CASE

Sarah Pingle is Francisco Aguinaga's long-time girlfriend. RP 2/1/18 at 81. During a break in their relationship, Mr. Aguinaga briefly dated Mike Vasquez's sister. RP 2/1/18 at 83, 112. Because of the long-term nature of Mr. Aguinaga's relationship with Pingle, Vasquez assumed Mr. Aguinaga had been unfaithful to his sister. RP 2/1/18 at 40-42.

Vasquez reacted by spreading unkind rumors about Mr. Aguinaga. RP 2/1/18 at 71-72, 83, 91. The rumors eventually made their way to Mr. Aguinaga's ears. RP 2/1/18 113, 121.

Mr. Aguinaga's business is entertaining people. West Coast Records employed him as a turntablist and DJ. RP 2/1/18 112. To have people turn out to music events, the bread and butter of Mr. Aguinaga's business, he needed to maintain his reputation and be looked upon by others favorably. RP 2/1/18 118. Vasquez's rumor spreading hurt Mr. Aguinaga's reputation. RP 2/1/18 91, 119.

Vasquez's rumors also upset Pingle. RP 2/1/18 83-84. She knew the rumors were untrue. RP 2/1/18 71-72.

Allyse Nicholson was Pingle's best friend and had been for the ten years they had been out of high school. RP 2/1/18 39, 58, 82. Their relationship was strained though by Nicholson being Vasquez's girlfriend. RP 2/1/18 60, 84. At the height of Pingle's frustration over the rumors, she texted Nicholson that Vasquez needed to stop spreading rumors or risk being "beat on-site." RP 2/1/18 72. Mr. Aguinaga had never even met Vasquez. RP 2/1/18 47, 124.

In July 2017, Mr. Aguinaga, Pingle, and their friend Stacey Hall went to some bars. RP 2/1/18 85, 100. Pingle drove her red Kia. RP

2/1/18 32, 78, 87. They all drank, and Mr. Aguinaga drank more than Pingle. RP 2/1/18 92. Over the evening, Mr. Aguinaga decided it was time for him to meet Vasquez and talk to him in person about the hurtful rumors. RP 2/1/18 101, 114.

Pingle knew where Vasquez lived because of his relationship with Nicholson. RP 2/1/18 86. Around midnight, Pingle drove to Vasquez's apartment complex and parked in front. RP 2/1/18 86-87, 114. Mr. Aguinaga and Hall got out of the car. RP 2/1/18 103, 116.

Mr. Aguinaga knocked on Vasquez's door, and Hall lagged back. RP 2/1/18 103-04, 116. Vasquez and Nicholson were alone in the apartment and scrambled to get dressed. RP 2/1/18 43, 73. Vasquez opened the apartment door. RP 2/1/18 100. The exterior of the apartment was so dark that Mr. Aguinaga could not see who opened the door. RP 2/1/18 116. He asked the person at the door if he was Mike. RP 2/1/18 46, 116. Suddenly, the person kicked out, and Mr. Aguinaga jumped back to avoid the kick. RP 2/1/18 116. Vasquez attacked Mr. Aguinaga, and the two rolled around on the apartment's linoleum floor. RP 2/1/18 46, 116.

Per Vasquez, Mr. Aguinaga forced his way into the apartment, attacked him, and said, "This is what I do." 2/1/18 45-46. Nicholson

joined in. RP 2/1/18 47, 77, 117. Mr. Aguinaga had no permission to enter the apartment. RP 2/1/18 51.

After a struggle, Mr. Aguinaga broke free with some assistance from Hall. RP 2/1/18 117-18. Mr. Aguinaga and Hall returned to Pingle's car, and they drove away. RP 2/1/18 48, 87-88, 119.

Vasquez called the police. RP 2/1/18 48. Kennewick Police Sergeant Jason Kiel met with Vasquez and Nicholson at the apartment. RP 2/1/18 25-26. Sergeant Kiel took pictures of Vasquez's disheveled appearance and his injuries. RP 2/1/18 100.

As part of his investigation, Sergeant Kiel contacted Hall and Pingle. RP 2/1/18 31, 33. Both agreed to having gone to Vasquez's apartment. RP 2/1/18 89, 102. Hall later took a plea deal to criminal trespass for his part in having gone to the apartment. RP 2/1/18 107-08.

The police did not contact Mr. Aguinaga as part of their investigation although they made an effort to do so. RP 2/1/18 32, 35. As such, the police did not document the injuries Mr. Aguinaga received when attacked by Vasquez. RP 2/1/18 36.

The State charged Mr. Aguinaga with first-degree burglary in violation of RCW 9A.52.020(1)(b). CP 1-2. The jury found Mr. Aguinaga guilty as charged. CP 3; RP 2/1/18 162. Mr. Aguinaga had no criminal

history. CP 6. The court sentenced him to 15 months in prison followed by 18 months of community custody. CP 9-10; RP 2/22/18 at 14.

The court imposed the following discretionary legal financial obligations (LFOs):

- \$200 filing fee
- \$60 sheriff service fee
- \$250 jury demand fee
- \$96.68 witness fee
- \$700 attorney fee

CP 7, 14.

Appointed counsel represented Mr. Aguinaga . RP 2/22/18 11.

In Mr. Aguinaga's Report of Continued Indigency filed with this court, he indicated no ownership of real property, no personal property other than personal effects, that he lost his job due to incarceration, that he had no income from any source, he'd done 12 years in school but had no high school diploma, he suffers from the mental disability of high anxiety, and that he is in arrears on child support for his two children.

(See Report of Continued Indigency filed with this court August 24, 2018.)

Mr. Aguinaga appeals at public expense. CP 17-19.

D. ARGUMENT

Issue 1: The trial court erred in imposing \$1306.68 of discretionary legal financial obligations because the court failed to engage in an adequate *Blazina* colloquy.

The trial court ordered Mr. Aguinaga to pay \$1306.68 in discretionary LFOs without first engaging him in an adequate *Blazina* colloquy to determine his ability to pay the discretionary costs. Aguinaga's case must be remanded to the trial court for an adequate *Blazina* hearing or to otherwise strike all discretionary LFOs.

The Washington legislature mandated, "A court 'shall not order a defendant to pay costs unless the defendant is or will be able to pay them.'" *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3)). This imperative language prohibits a trial court from ordering discretionary LFOs absent an individualized inquiry into the person's current and future ability to pay them. *Id.* The *Blazina* court suggested that an indigent person likely could never pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs"). See GR 34 attached as Appendix.

At sentencing, the court prefaced the brief LFO discussion by telling Mr. Aguinaga, “We need to talk about your ability to pay legal financial obligations.” RP Sentencing 2/22/18 11.

Mr. Aguinaga told the court he worked as a deejay in a music-related business and he performed weekly in Spokane. RP 2/22/18 at 11.

When asked how much he made in a year, Mr. Aguinaga told the court,

I’m not too sure. With my – it depends, because on the record label that I’m on, we do certain yearly tours and stuff like that. So we have yearly/monthly cash outs. And then I get paid weekly in Spokane.

He then volunteered, “I am able to pay fines.” RP 2/22/18 11. Mr. Aguinaga also told the court that before the altercation, he had been saving money for a new lease and to buy a van but that he had spent his savings on gas money, hotels, and getting bailed out on his case. RP 2/22/18 12.

That was the extent of the LFO colloquy on Mr. Aguinaga’s income. The court made no further inquiry of Mr. Aguinaga.

In *State v. Ramirez*, our Supreme Court reiterated the trial court’s obligation to perform an adequate inquiry into a defendant’s ability to pay discretionary LFOs. *State v. Ramirez*, 191 Wn.2d 732, 740, 426 P.3d 714 (2018). Courts are required to consider both a defendant’s financial

resources and the nature of the burden brought on by imposing mandatory and discretionary LFOs. *Id.* at 739.

On review, whether a trial court adequately inquired into a defendant's ability to pay discretionary LFOs involves both a factual and a legal component. *Ramirez*, 191 Wn. 2d at 740. On the factual side, the reviewing court determines what evidence the trial court actually considered in making the *Blazina* inquiry. The factual determination is as simple as reviewing the record for supporting evidence. *Id.* On the legal side, the reviewing court decides whether the trial court's inquiry complied with *Blazina* under a de novo review standard. *Id.*

The trial court's authority to impose discretionary LFOs is discretionary. *Id.* at 740. But the discretion is necessarily abused when it is manifestly unreasonable or based on untenable grounds or reasons. *Id.* at 741. If the trial court fails to conduct an individualized inquiry into the defendant's financial circumstances, as RCW 10.01.160(3) requires, and nonetheless imposes discretionary LFOs on the defendant, the trial court has per se abused its discretionary power. Stated differently, the court's exercise of discretion is unreasonable when premised on a legal error. Here, the trial court abused its discretion in failing to conduct an individualized inquiry into Mr. Aguinaga's financial circumstances. All the

court learned from its abbreviated inquiry is Mr. Aguinaga worked as a deejay for an unspecified amount of time, he made an unspecified amount of money in doing so, and that prior to his arrest he saved an unspecified sum of money toward providing himself with housing and a vehicle but spent all his savings dealing with the fallout of his criminal charge.

The trial court failed to consider other “important factors” relating to Mr. Aguinaga’s current and future ability to pay discretionary LFOs, such as his actual income, his assets, and other financial resources, his monthly living expenses, and his employment history. *Blazina*, 182 Wn.2d at 838. In *Blazina*, the court held that “[t]he record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay,” which requires the court to consider “important factors,” in addition to the mandatory factors discussed above. *Id.* The only information in the record about Mr. Aguinaga’s financial situation was when he told the court he had spent all his savings getting back and forth to court to answer to his criminal charge. The court made no individualized inquiry.

Mr. Aguinaga agreed he could pay a fine but the court never inquired how paying the fine would fit into his budget or what basic human

needs he would have to sacrifice to pay fees that were otherwise discretionary for the court to impose. *Ramirez*, 191 Wn. 2d at 741.

The record does not reflect that the trial court inquired into whether Mr. Aguinaga met the GR 34 standard for indigency. Had the court looked to GR 34 for guidance, as required under *Blazina*, it likely would have confirmed that Mr. Aguinaga was indigent at the time of sentencing meaning his income fell below 125 percent of the federal poverty guideline. As the court explained in *Blazina*, “if someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.” 182 Wn.2d at 839; *City of Richland v. Wakefield*, 186 Wn.2d 596, 607, 380 P.3d 459 (2016). The court could not make that assessment because the court made no inquiry into what it had to know before imposing discretionary LFOs.

Consistent with *Blazina’s* instruction that courts use GR 34 as a guide for determining whether someone has an ability to pay discretionary costs, the trial court should have used a standard motion for indigency form as a reliable framework for inquiring on Mr. Aguinaga’s financial status per *Blazina* and RCW 10.01.160(3) requirements. In determining a defendant’s indigency status, the financial statement section of a standard motion for indigency asks the defendant to answer questions relating to

five broad categories: (1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts. These categories are equally relevant to determining a defendant's ability to pay discretionary LFOs. *Ramirez*, 191 Wn. 2d. at 743-44.

Regarding employment history, a trial court should inquire into the defendant's present employment and past work experience. The court should also inquire into the defendant's income, and the defendant's assets and other financial resources. Finally, the court should ask questions about the defendant's monthly expenses, and as identified in *Blazina*, the court must ask about the defendant's other debts, including other LFOs, health care costs, or education loans. To satisfy *Blazina* and RCW 10.01.160(3)'s mandate that the State cannot collect costs from defendants unable to pay, the record must reflect that the trial court inquired into all five categories before imposing discretionary costs. *Ramirez*, 191 Wn. 2d at 743-44.

That did not happen here. In filling out this Court's Report on Continued Indigency, Aguinaga reported he owns no real property, has no property other than personal effects, has no income from any source, went to school for 12 years but has no diploma, suffers from the mental disability

of high anxiety, is financially responsible for 2 children, and was then \$2,000 in arrears on his child support obligations.

Under the pressure of the court's questions, Mr. Aguinaga believed he could pay "a fine" of \$50-\$100 per month. RP 2/22/18 13. It is well documented that a person before a court will try to appear in their "best light at sentencing" and misrepresent how much money they can give to the court monthly to pay off court debt. *Ramirez*, 191 Wn.2d at 746.

All the costs imposed, except the \$100 felony DNA collection fee and the \$500 victim assessment are discretionary. *State v. Mathers*, 193 Wn. App. 913, 918, 376 P.3d 1163 (2016).

By statute, the \$250 jury demand fee "may be imposed as costs under RCW 10.46.190." RCW 36.18.016(3)(b). But it is a discretionary cost. Other discretionary costs imposed include the \$60 sheriff service fee, the \$96.68 witness fee and the \$700 court-appointed attorney fee. *State v. Lundy*, 176 Wn. App. 96, 107, 308 P.3d 755 (2013); *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 693, 370 P.3d 989 (2016).

At the time of sentencing, the \$200 filing fee was statutorily mandated. Under former RCW 36.18.020(2)(h), upon conviction, an adult criminal defendant was liable for a filing fee of \$200. House Bill 1783 modified Washington's system of legal financial obligations. *Ramirez*, 426

P.3d at 716. It amended former RCW 10.01.160(3) to expressly prohibit a court from imposing discretionary costs on indigent defendants. LAWS OF 2018 ch. 269 §6(3). The formerly mandatory criminal filing fee became a discretionary cost. LAWS of 2018 269 § 17(2)(h).

Our Supreme Court held that individuals whose case was not final at the statute's effective date were entitled to the benefit of the amended criminal filing fee statute. *Ramirez*, 426 P.3d 714. As Mr. Aguinaga's case is on direct appeal, it is not final. He is entitled to the benefit of the amended statute, and the \$200 criminal filing fee should be stricken as a discretionary cost.

On remand, after an adequate colloquy, should the trial court confirm Mr. Aguinaga's indigency, his financial obligation to the Superior Court should be reduced by the \$1306.68 in discretionary fees. *Blazina*, 182 Wn.2d at 838. And any interest assessed on the original, greater amount should be rescinded. Under the current rules, interest only accrues on unpaid restitution. *Ramirez*, 191 Wn. 2d at 747 (House Bill 1783 eliminates interest actual on the nonrestitution portions of the LFOs).

Issue 2: Appellate costs should not be imposed if requested by the State.

Under RCW 10.73 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. A commissioner or clerk of the appellate court must award costs to the party that substantially prevails on review unless the appellate court directs otherwise in its decision terminating review. RAP 14.2.

In *State v. Sinclair*, the Court of Appeals concluded that where appellate costs in a criminal case are raised in the appellant's brief or on a motion for reconsideration, it is appropriate for the reviewing court to exercise its discretion and consider it. *State v. Sinclair*, 192 Wn. App. 380, 382, 367 P.3d 612 (2016). The *Sinclair* Court reasoned that exercising discretion meant *inquiring into a defendant's ability or inability to pay appellate costs*. *Sinclair*, 192 Wn. App. at 392. If a defendant is indigent and lacks the ability to pay, an appellate court should deny an award of costs to the State. *Sinclair*, 192 Wn. App. at 382.

The costs of appeal are added to the fees imposed by the trial court. As noted in Issue 1, the Washington Supreme Court recognizes the widespread "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants, which include court oversight until

LFOs are paid, and long-term court involvement, which inhibits re-entry into the community and increases the chance of recidivism. *Blazina*, 182 Wn.2d at 836.

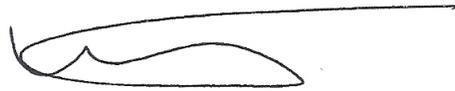
In *Sinclair*, the defendant was indigent, aged, and facing a lengthy prison sentence. The Court determined there was no realistic possibility he could pay appellate costs and denied an award of those costs. *Sinclair*, 192 Wn. App. at 392.

The court sentenced Mr. Aguinaga to 15 months in prison followed by an additional 18 months of community custody. CP 9-19. Even if Mr. Aguinaga's case is remanded for entry of only mandatory LFOs, he is still facing \$500 for a mandatory victim assessment and a \$100 DNA collection fee. The trial court found Mr. Aguinaga indigent at the trial court and on appeal. Under *Sinclair* and RAP 15.2(f), this Court should presume Mr. Aguinaga remains indigent.

E. CONCLUSION

This court should remand Mr. Aguinaga's case to the trial court for an adequate LFO colloquy.

Respectfully submitted February 4, 2019.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', written over a horizontal line.

LISA E. TABBUT/WSBA 21344
Attorney for Francisco Aguinaga

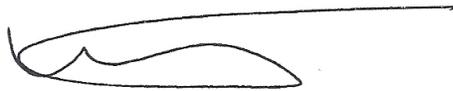
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I filed the Brief of Appellant to (1) Benton County Prosecutor's Office, at andy.miller@co.benton.wa.us; (2) the Court of Appeals, Division III; and (3) I maintain a copy in my file Mr. Aguinaga.

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

Signed February 4, 2019 in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Francisco Aguinaga, Appellant

APPENDIX

GR 34

Waiver of Court and Clerk's Fees and Charges in Civil Matters on the Basis of Indigency

(a) Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court.

(1) The application for such a waiver may be made ex parte in writing or orally, accompanied by a mandatory pattern form created by the Administrative Office of the Courts (AOC) whereby the applicant attests to his or her financial status or, in the case of an individual represented by a qualified legal services provider ("QLSP") or an attorney working in conjunction with a QLSP, a declaration of counsel stating that the individual was screened and found eligible by the QLSP.

(2) The court shall accept an application submitted in person, by mail and where authorized by local court rule not inconsistent with GR 30, electronic filing. The process for presentation of the application shall conform to local court rules and clerk processes not inconsistent with the rules of this court for presenting ex parte orders to the court directly or via the clerk. All applications shall be presented to a judicial officer for consideration in a timely manner and in conformity with the local court's established procedures. There shall be no locally imposed fee for making an application. The applicant or applicant's attorney filing by mail, shall provide the court with a self-addressed stamped envelope for timely return of a conformed copy of the order.

COMMENT

This rule establishes the process by which judicial officers may waive civil filing fees and surcharges for which judicial officers have authority to grant a waiver. This rule applies to mandatory fees and surcharges that have been lawfully established, the payment

of which is a condition precedent to a litigant's ability to secure access to judicial relief. These include but are not limited to legislatively established filing fees and surcharges (e.g., RCW 36.18.020(5)); other initial filing charges required by statute (e.g., family court facilitator surcharges established pursuant to RCW 26.12.240; family court service charges established pursuant to RCW 26.12.260; domestic violence prevention surcharges established pursuant to RCW 36.18.016(2)(b)); and other lawfully established fees and surcharges which must be paid as a condition of securing access to judicial relief.

(3) An individual who is not represented by a qualified legal services provider (as that term is defined below) or an attorney working in conjunction with a qualified legal services provider shall be determined to be indigent within the meaning of this rule if such person, on the basis of the information presented, establishes that:

(A) he or she is currently receiving assistance under a needs-based, means-tested assistance program such as the following:

(i) Federal Temporary Assistance for Needy Families (TANF);

(ii) State-provided general assistance for unemployable individuals (GA-U or GA-X);

(iii) Federal Supplemental Security Income (SSI);

(iv) Federal poverty-related veteran's benefits; or

(v) Food Stamp Program (FSP); or

(B) his or her household income is at or below 125 percent of the federal poverty guideline; or

(C) his or her household income is above 125 percent of the federal poverty guideline and the applicant has recurring basic living expenses (as defined in RCW 10.101.010(4)(d)) that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made; or

(D) other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges.

(4) An individual represented by a QLSP, or an attorney working in conjunction with a QLSP that has screened and found the individual eligible for services, is presumptively deemed indigent when a declaration from counsel verifies representation and states that the individual was screened and found eligible for services.

(5) As used in this rule, "qualified legal services provider" means those legal services providers that meet the definition of APR 8(e).

Waiver of Court and Clerk's Fees and Charges in Civil Matters on the Basis of Indigency

(a) Any individual, on the basis of indigent status as defined herein, may seek a waiver of filing fees or surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief from a judicial officer in the applicable trial court.

(1) The application for such a waiver may be made ex parte in writing or orally, accompanied by a mandatory pattern form created by the Administrative Office of the Courts (AOC) whereby the applicant attests to his or her financial status or, in the case of an individual represented by a qualified legal services provider ("QLSP") or an attorney working in conjunction with a QLSP, a declaration of counsel stating that the individual was screened and found eligible by the QLSP.

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- (iii) Federal Supplemental Security Income (SSI);
- (iv) Federal poverty-related veteran's benefits; or
- (v) Food Stamp Program (FSP); or

(B) his or her household income is at or below 125 percent of the federal poverty guideline; or

(C) his or her household income is above 125 percent of the federal poverty guideline and the applicant has recurring basic living expenses (as defined in RCW 10.101.010(4)(d)) that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made; or

(D) other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges.

(4) An individual represented by a QLSP, or an attorney working in conjunction with a QLSP that has screened and found the individual eligible for services, is presumptively deemed indigent when a declaration from counsel verifies representation and states that the individual was screened and found eligible for services.

(5) As used in this rule, "qualified legal services provider" means those legal services providers that meet the definition of APR 8(e).

LAW OFFICE OF LISA E TABBUT

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- prosecuting@co.benton.wa.us

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Sender Name: Lisa Tabbut - Email: ltabbutlaw@gmail.com

Address:

PO BOX 1319

WINTHROP, WA, 98862-3004

Phone: 877-856-9903

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