

FILED
Court of Appeals
Division III
State of Washington
5/3/2019 12:38 PM

36387-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

ELI GALLEGOS,

Appellant.

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

BRIEF OF APPELLANT

KATE R. HUBER
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711
katehuber@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR 3

D. STATEMENT OF THE CASE 6

E. ARGUMENT 9

1. Interpreting possession of a controlled substance as a strict liability offense and requiring Mr. Gallegos to prove he unwittingly possessed the substance impermissibly shifted the burden of proof and violated the presumption of innocence and due process of law. 9

 a. The presumption of innocence and due process require the State to prove every element of an offense beyond a reasonable doubt. 9

 b. Interpreting the possession statute to have no mental element unconstitutionally shifts the burden of proof to the defendant. 11

 c. Requiring Mr. Gallegos to prove he lacked knowledge of the drugs in his pocket violated due process. 13

2. The court issued contradictory jury instructions that relieved the State of its burden to prove Mr. Gallegos knew entering or remaining was unlawful when it instructed the jury a person need not know their action is unlawful. 14

 a. Due process requires that jury instructions be clear and correctly state the relevant law. 14

 b. The jury instructions on trespass and knowledge contradicted each other and cannot be harmonized. 17

 c. The jury instructions relieved the State of its burden to prove knowledge of the unlawfulness, requiring reversal of the trespass conviction. 21

3. The court failed to conduct an adequate individualized indigency inquiry, but the record reflects Mr. Gallegos is indigent; therefore, this Court should strike the imposition of certain costs from the judgment and sentence. 22

 a. Courts must conduct an individualized indigency inquiry and may not impose certain costs where a person is indigent. 23

b. Recent amendments to the legal financial obligation statutes prohibit the imposition of discretionary costs on indigent defendants and prohibit the imposition of non-restitution interest.	24
c. The VUCSA fine is a discretionary legal financial obligation.	26
d. The court conducted an inadequate indigency inquiry and erred in finding Mr. Gallegos was not indigent.	28
e. The evidence before the court established Mr. Gallegos was indigent.	30
f. This Court should strike the VUCSA fine and prohibited interest accrual from the judgment and sentence.	31
4. Because Mr. Gallegos’s sole source of income is from funds protected by the antiattachment clause, the judgment and sentence must be revised to prohibit the collection of legal financial obligations from these protected funds.....	32
5. Alternatively, Mr. Gallegos received ineffective of counsel regarding the imposition of costs.....	33
a. The constitution guarantees defendants the effective assistance of counsel.	33
b. Mr. Gallegos’s counsel performed deficiently by failing to object to the inadequate indigency inquiry, erroneous finding regarding indigency, and imposition of prohibited legal financial obligations.	34
c. Mr. Gallegos was prejudiced by his attorney’s deficient performance at sentencing.	36
F. CONCLUSION	36

TABLE OF AUTHORITIES

Cases

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	9
<i>Chapman v. California</i> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	21
<i>City of Richland v. Wakefield</i> , 186 Wn.2d 609, 380 P.3d 459 (2016)..	5, 32
<i>City of Seattle v. Grundy</i> , 86 Wn.2d 49, 541 P.2d 994 (1975)	14
<i>Coffin v. United States</i> , 156 U.S. 432, 15 S. Ct. 394, 39 L. Ed. 481 (1895)	9
<i>Dawkins v. State</i> , 313 Md. 638, 547 A.2d 1041 (1988).....	12
<i>Elonis v. United States</i> , ___ U.S. ___, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015).....	10
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)	9
<i>Lafler v. Cooper</i> , 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)	34
<i>Morissette v. United States</i> , 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952).....	9
<i>Nelson v. Colorado</i> , ___ U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017)	11
<i>Patterson v. New York</i> , 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).....	11
<i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979).....	15
<i>Schad v. Arizona</i> , 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality)	12, 13
<i>State v. A.M.</i> , 4 Wn. App. 2d 1061 (2018), <i>review granted</i> , 192 Wn.2d 1021 (2019).....	10

<i>State v. Adkins</i> , 96 So. 3d 412 (Fla. 2012).....	12
<i>State v. Anderson</i> , 141 Wn.2d 357, 5 P.3d 1247 (2000).....	10
<i>State v. Bell</i> , 649 N.W.2d 243 (N.D. 2002)	12
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	passim
<i>State v. Bradshaw</i> , 152 Wn.2d 528, 98 P.3d 1190 (2004).....	10, 11, 12
<i>State v. Castorena Gonzalez</i> , 7 Wn. App. 2d 1006, 2019 WL 118401 (Jan. 7, 2019) (unpublished), review denied, 438 P.3d 113 (2019).....	26
<i>State v. Catling</i> , ___ Wn.2d ___, ___ P.3d ___, 2019 WL 1745697 (Apr. 18, 2019)	5, 31, 32, 33
<i>State v. Catling</i> , 2 Wn. App. 2d 819, 413 P.3d 27 (2018), <i>aff'd in relevant part</i> , ___ Wn.2d ___, ___ P.3d ___, 2019 WL 1745697 (April 18, 2019)	32
<i>State v. Clark</i> , 191 Wn. App. 369, 362 P.3d 309 (2015)	27
<i>State v. Cleppe</i> , 96 Wn.2d 373, 635 P.2d 435 (1981).....	10
<i>State v. Cowin</i> , 116 Wn. App. 752, 67 P.3d 1108 (2003).....	27
<i>State v. Eaton</i> , 168 Wn.2d 476, 229 P.3d 704 (2010).....	13
<i>State v. Glover</i> , 4 Wn. App. 2d 690, 423 P.3d 290 (2018)	24, 30, 32
<i>State v. Goble</i> , 131 Wn. App. 194, 126 P.3d 821 (2005)	19, 20
<i>State v. Hayward</i> , 152 Wn. App. 632, 217 P.3d 354 (2009)	19, 21
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	14, 15, 16, 35
<i>State v. Lundstrom</i> , 6 Wn. App. 2d 388, 429 P.3d 1116 (2018).....	31
<i>State v. Malone</i> , 193 Wn. App. 762, 376 P.3d 443 (2016).....	27, 31
<i>State v. Mayer</i> , 120 Wn. App. 720, 86 P.3d 217 (2004).....	27, 32
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	34

<i>State v. McLoyd</i> , 87 Wn. App. 66, 939 P.2d 1255 (1997), <i>aff'd sub nom.</i> <i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	15
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009)	15
<i>State v. Ramirez</i> , 191 Wn.2d 732, 738-39, 426 P.3d 714 (2018) . . .passim	
<i>State v. Smith</i> , 174 Wn. App. 359, 298 P.3d 785 (2013).....	14, 16
<i>State v. Stein</i> , 144 Wn.2d 236, 27 P.3d 184 (2001)	16
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004)	21
<i>State v. Walden</i> , 131 Wn.2d 469, 932 P.2d 1237 (1997).....	15
<i>State v. Welch</i> , 3 Wn. App. 2d 1049, 2018 WL 2074133 (May 3, 2018) (unpublished)	26
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	33, 34

Statutes

Unif. Controlled Substances Act 1970 § 401.....	12
42 U.S.C. § 407.....	5, 32, 33
Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (2018).....	24, 31, 34
Laws of 2018, ch. 269, § 1	25
Laws of 2018, ch. 269, § 2.....	25
Laws of 2018, ch. 269, §6.....	24
RCW 3.50.100	25
RCW 9A.20.021.....	27
RCW 9A.52.080.....	18, 22

RCW 10.01.160	passim
RCW 10.82.090	25
RCW 10.101.010	25
RCW 69.50.430	2, 4, 26, 27

Other Authorities

11 Washington Practice: Pattern Jury Instructions: Criminal 0.10 (4th ed. 2016)	19
11 Washington Practice: Pattery Jury Instructions: Criminal 10.02 (4th ed. 2016)	19, 20
11A Washington Practice: Pattern Jury Instructions: Criminal 60.18 (4th ed. 2016)	19

Rules

GR 14.1	27
RAP 2.5	16, 29, 33

Constitutional Provisions

Const. art. 1, § 3	2, 9, 16
Const. art. I, § 22	5, 33
Const. art. I, § 3	9
U.S. Const. amend VI	5, 33
U.S. Const. amend. XIV	2, 9, 16

A. INTRODUCTION

Eli Gallegos was attempting to give an old acquaintance money to help her following her recent release from jail. However, the acquaintance's mother called the police, and Mr. Gallegos was arrested for trespassing on the mother's property based on a verbal warning he received from police over a year earlier. When police arrested Mr. Gallegos, they found methamphetamine in his pocket.

Mr. Gallegos denied knowingly possessing the methamphetamine and explained it was in the pocket of a jacket that he had just received from a neighbor. Nonetheless, a jury convicted him of possession because he was unable to prove his lack of knowledge by a preponderance of the evidence. Requiring a defendant to prove unwitting possession impermissibly shifts the burden of proof and violates the presumption of innocence and due process of law.

In addition, the court erred in giving contradictory jury instructions that informed the jury it could convict Mr. Gallegos of trespass even if the State failed to prove Mr. Gallegos knew he was not permitted on the premises.

This Court should reverse Mr. Gallegos's convictions.

B. ASSIGNMENTS OF ERROR

1. In violation of due process as guaranteed by the Fourteenth Amendment and article I, section 3, the offense of possession of a controlled substance lacks a mens rea element, violates the presumption of innocence, and improperly shifts the burden to defendants to prove their possession was “unwitting.”

2. The court misinstructed the jury and relieved the State of its burden of proof as to the criminal trespass charge when it instructed the jury that Mr. Gallegos need not know his actions were unlawful. CP 29 (Jury Instructions 11).

3. The court erred in finding Mr. Gallegos was not indigent.

4. The court erred in conducting an inadequate indigency inquiry.

5. The court erred in imposing the \$2,000 VUCSA fine¹ where the record indicates Mr. Gallegos was indigent.

6. The court erred in ordering the accrual of interest on non-restitution legal financial obligations (LFOs).

7. The court erred in failing to denote on the judgment and sentence that no costs may be collected from funds protected by the antiattachment clause.

¹ RCW 69.50.430 mandates a fine for certain drug offenses where the defendant is not indigent. The record below refers to this a “VUCSA fine.” CP 38. Therefore, that term is used throughout the brief.

8. Mr. Gallegos was denied his constitutional right to the ineffective assistance of counsel when his attorney failed to object properly to the absence of an adequate indigency inquiry, leading the court to impose LFOs.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Criminal laws that lack a mens rea element and shift the burden to defendants to prove their innocence are contrary to the fundamental principles of the presumption of innocence and due process. In Washington, courts have interpreted possession of a controlled substance as a strict liability crime, and a person in possession of a controlled substance is presumed guilty unless he can prove “unwitting possession.” Should this Court reverse Mr. Gallegos’s conviction where this presumption of guilt impermissibly shifts the burden of proof and violates the presumption of innocence and due process?

2. Jury instructions that relieve the State of its burden of proving every element of an offense are presumed prejudicial and require reversal. To prove the crime of criminal trespass in the second degree, the State was required to prove beyond a reasonable doubt that Mr. Gallegos knowingly entered or remained on the premises and that he knew his entry or remaining was unlawful. However, immediately after reading the trespass to convict instruction, the court instructed the jury that it was not

necessary for the State to prove a person knew his actions were unlawful. CP 28-29 (Jury Instructions 10, 11). Did the court's contradictory instructions relieve the State of its burden of proving beyond a reasonable doubt that Mr. Gallegos knew his entry or remaining on the premises was unlawful?

3. RCW 10.01.160 and supreme court precedent prohibit courts from imposing discretionary LFOs unless the court conducts an individualized inquiry that affirmatively establishes an individual is not indigent and possesses the ability to pay LFOs. In addition, RCW 69.50.430 prohibits the imposition of the VUCSA fine where an individual is indigent. Here, the court conducted no indigency inquiry and asked Mr. Gallegos a single question: whether he could pay \$50 a month towards his LFOs. Should this Court strike the imposition of the VUCSA fine where the court failed to conduct an adequate inquiry and the record established Mr. Gallegos was indigent?

4. Effective June 7, 2018, amendments to the LFO statutes prohibit interest accrual on non-restitution portions of LFOs, including fines. The court sentenced Mr. Gallegos after the effective date of the amendments but ordered all LFOs shall bear interest from the date of the judgment until the payments are made in full. Should this Court strike the immediate accrual of interest because it is no longer authorized by statute?

5. 42 U.S.C. § 407(a) and *City of Richland v. Wakefield*² prohibit collection of LFO payments from individuals whose sole source of income is from social security. Where a defendant receives such funds, *State v. Catling*³ requires courts to denote on a judgment and sentence that no LFOs may be satisfied out of any such protected funds. Where the record before the trial court established social security funds are Mr. Gallegos's only source of income, should this Court remand for the court to revise the judgment and sentence to direct that no LFOs may be paid out of these protected funds?

6. The Sixth Amendment and article 1, section 22, guarantee defendants the effective assistance of counsel, which includes advocacy at sentencing. Here, defense counsel failed to object to the court's erroneous conclusion that Mr. Gallegos was not indigent, to the inadequate indigency inquiry, to the imposition of the VUCSA cost, to interest accrual, and to the failure to include a directive prohibiting the collection of LFOs from protected funds. Where the record shows Mr. Gallegos was indigent and his sole source of income was from social security, and where recent changes in the law prohibit imposition of discretionary LFOs and interest,

² 186 Wn.2d 596, 609, 380 P.3d 459 (2016).

³ ___ Wn.2d ___, ___ P.3d ___, 2019 WL 1745697 (Apr. 18, 2019).

did Mr. Gallegos receive ineffective assistance of counsel at sentencing where his attorney failed to object to the imposition of prohibited costs?

D. STATEMENT OF THE CASE

Eli Gallegos went to Elizabeth Sauer's home, looking for her adult daughter. RP 68, 82, 108. Mr. Gallegos previously had a relationship with the daughter. RP 71-72. Mr. Gallegos had learned the daughter was recently released from jail, and he went to the house to offer her help by giving her money. RP 81-82. Ms. Sauer was unhappy with her daughter's relationship with Mr. Gallegos, refused to let him in, and called the police. RP 69, 71-72.

Over a year before, Ms. Sauer told Mr. Gallegos he was not welcome on her property and reported his unwanted presence to the police. RP 69, 71-73, 74-75. The police told Mr. Gallegos he could not go back to Ms. Sauer's property. RP 75. They did not issue Mr. Gallegos a trespass notice, nor did they arrest him. RP 76. They did not tell Mr. Gallegos for how long he could not return to Ms. Sauer's property. RP 76-77.

After receiving Ms. Sauer's call, police went to arrest Mr. Gallegos for trespassing. RP 81. When they arrived at his home, rather than immediately arrest him, the officers questioned Mr. Gallegos. RP 81-82. Mr. Gallegos told the police he was at the Sauer residence because he

wanted to give the daughter money to help her because she had just been released from jail. RP 81-82. He explained did not know he was trespassing. RP 105, 107.

After the police secured Mr. Gallegos's statement that he was at the Sauer residence, they Mirandized him and told him they were arresting him. RP 82. Mr. Gallegos, who was wearing no shirt at the time the police initially entered his home, went to the kitchen to grab a jacket. RP 82,105, 108. The police wrestled with him, and they found a bag of methamphetamine. RP 84, 105; Ex. 1.

The location and origin of the methamphetamine was an issue of dispute at trial. Mr. Gallegos testified it was in the pocket of the jacket he was trying to put on. RP 105-08. Mr. Gallegos explained the jacket was not his. RP 106. He received it from a neighbor in exchange for fixing their washing machine. RP 106. He did not know the jacket had a bag of methamphetamine in the pocket. RP 105-08. The police testified it was in the pocket of his pants. RP 82, 110.

As to the possession charge, the court instructed the jury the State need only prove possession of a controlled substance and that Mr. Gallegos had to prove his possession was unwitting. CP 25-27, 32; RP 118, 122. As to the trespass charge, the court instructed the jury that to convict Mr. Gallegos of trespass, the State had to prove beyond a

reasonable doubt that Mr. Gallegos “knowingly entered or remained in or upon the premises of another” and that “the defendant knew that the entry or remaining was unlawful.” CP 28; RP 119. Immediately following the trespass to-convict instruction, the court instructed the jury, “It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.” CP 29; RP 119. The court also instructed the jury that the instructions “are all important” and must be considered “as a whole.” CP 19; RP 115. The jury convicted Mr. Gallegos of both counts. CP 34; RP 137-38.

At sentencing, the court asked Mr. Gallegos if he was employed, to which Mr. Gallegos responded that he was disabled.⁴ RP 146. The only other question the court asked Mr. Gallegos regarding his financial situation was if he could pay fifty dollars per month towards his LFOs. RP 146. The court found Mr. Gallegos was not indigent for LFO purposes. RP 146-48. The court found Mr. Gallegos was indigent for purposes of appeal. CP 42-43; RP 144. The court imposed a sentence of 90 days’ confinement, \$500 victim assessment fee, \$2,000 VUCSA fine, the immediate accrual of interest, and ordered payments commence on

⁴ Mr. Gallegos’s financial declaration in support of his request for appointment of trial counsel at public expense also notes his only income is social security. Supp. CP ____, sub. no. 7.

March 1, 2019, at the rate of fifty dollars per month. CP 37-38; RP 149-52.

E. ARGUMENT

1. Interpreting possession of a controlled substance as a strict liability offense and requiring Mr. Gallegos to prove he unwittingly possessed the substance impermissibly shifted the burden of proof and violated the presumption of innocence and due process of law.

- a. The presumption of innocence and due process require the State to prove every element of an offense beyond a reasonable doubt.

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895). Due process permits this presumption to be overcome only where the State proves every essential element of the charged offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

It is fundamental that “wrongdoing must be conscious to be criminal.” *Morrisette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). The apparent absence of a mental element from a

statute does not mean none is required. *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). Unless it can be absolutely shown that a legislature intended to exclude a traditional mental element, the courts will imply one. *See, e.g., State v. Anderson*, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000) (declining to interpret unlawful possession of firearm statute as strict liability offense and instead interpreting knowledge element, despite absence of apparent mental intent element in statute). Failure to imply a mens rea element creates the potential to criminalize innocent conduct.

Notwithstanding the foregoing principles, Washington courts have construed the possession of a controlled substance statute as creating a strict liability crime with no mental element. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). *But see State v. A.M.*, 4 Wn. App. 2d 1061 (2018), *review granted*, 192 Wn.2d 1021 (2019).⁵ The State need only prove the nature of the substance and the fact of possession, not that the possession was knowing. *Bradshaw*, 152 Wn.2d at 537-38. For the

⁵ In *A.M.*, the Court will consider “Whether requiring a defendant charged with possession of a controlled substance to prove the affirmative defense of unwitting possession improperly shifts the State’s burden to prove the elements of the charge beyond a reasonable doubt in violation of due process principles.” https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf. Oral arguments are set for May 28, 2019.

innocent to avoid conviction, they bear the burden of proving, by a preponderance of the evidence, that their possession was unwitting. *Id.* at 538. Such an interpretation rejects the presumption of innocence and creates a presumption of guilt.

- b. Interpreting the possession statute to have no mental element unconstitutionally shifts the burden of proof to the defendant.

This impermissible burden shifting scheme deprives individuals of their liberty without due process of law. A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if “it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). “The presumption of innocence unquestionably fits that bill.” *Nelson v. Colorado*, ___ U.S. ___, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017).

History and tradition provide guidance on when the constitutional line is crossed:

Where a State’s particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no

analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden.

Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); *see Schad*, 501 U.S. at 650 (Scalia, J. concurring) (“It is precisely the historical practices that *define* what is ‘due.’”).

Washington appears to be the only state that interprets drug possession as a true strict liability crime. *State v. Adkins*, 96 So. 3d 412, 423 n.1 (Fla. 2012) (Pariente, J., concurring); *see Bradshaw*, 152 Wn.2d at 534; *Dawkins v. State*, 313 Md. 638, 647 n.7, 547 A.2d 1041 (1988); *State v. Bell*, 649 N.W.2d 243, 252 (N.D. 2002) (legislature changed North Dakota law to require mental element); *Adkins*, 96 So. 3d at 415-16 (Florida applying knowledge requirement to possession, although not exact nature of substance).

That nearly every drug possession offense in this country has a mens rea requirement is unsurprising. As acknowledged in *Bradshaw*, the Uniform Controlled Substances Act of 1970 has a “knowingly or intentionally” requirement for the crime of possession. Unif. Controlled Substances Act 1970 § 401(c); *Bradshaw*, 152 Wn.2d at 534. This element demonstrates the offense of possession of a controlled substance has traditionally required proof of knowledge.

Washington's drug possession law is contrary to the practice of every other state. It is contrary to the tradition of requiring the State prove a mens rea element in drug possession crimes. This suggests the possession statute violates due process. *Schad*, 501 U.S. at 640.

Stripped of the traditional mental element of knowledge, there is no "wrongful quality" about a person's conduct in possessing drugs. To conclude otherwise criminalizes the innocent behavior of possessing property. Washington's possession statute is unconstitutional.

- c. Requiring Mr. Gallegos to prove he lacked knowledge of the drugs in his pocket violated due process.

Courts must construe criminal statutes to avoid constitutional deficiencies. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). The jury convicted Mr. Gallegos without proof beyond a reasonable doubt that he knowingly possessed a controlled substance. In addition, the jury was able to presume Mr. Gallegos guilty and to require him to disprove this presumption only by showing his possession was unwitting.

Interpreting possession of a controlled substance to lack a mens rea element transforms it into a strict liability offense. Our courts disfavor strict liability offenses because such offenses potentially criminalize innocent behavior. Similarly, requiring a defendant to prove lack of knowledge through unwitting possession impermissibly shifts the burden

of proof and violates the presumption of innocence and due process of law.

Construing the law to require Mr. Gallegos to prove he did not know he possessed the methamphetamine found in his pocket required him to rebut a presumption of guilt. This unconstitutional burden shifting violated the presumption of innocence and due process. The statute is unconstitutional. For the statute to be constitutional, the State must bear the burden of proving knowledge of the controlled substance. Here, the State did not prove such knowledge. Therefore, this Court should reverse and dismiss Mr. Gallegos's conviction. *See City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

2. The court issued contradictory jury instructions that relieved the State of its burden to prove Mr. Gallegos knew entering or remaining was unlawful when it instructed the jury a person need not know their action is unlawful.

- a. Due process requires that jury instructions be clear and correctly state the relevant law.

Due process demands that jury instructions, read as a whole, correctly state the relevant law. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Smith*, 174 Wn. App. 359, 366, 298 P.3d 785 (2013). Where the instructions read as a whole fail to inform correctly the jury of the applicable law, mislead they jury, or do not permit the defendant to present his theory of the case, the instructions fail to satisfy

the constitutional demands of a fair trial. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009).

When considering the propriety of the jury instructions, each instruction must be “read in light of all other instructions,” and the jury is “to presume that each instruction has meaning.” *State v. McLoyd*, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997), *aff'd sub nom. State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999). “If the jury instructions read as a whole are [] ambiguous, the reviewing court cannot conclude that the jury followed the constitutional rather than the unconstitutional interpretation.” *Id.* (citing *Sandstrom v. Montana*, 442 U.S. 510, 526, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)). Therefore, to satisfy constitutional concerns, the jury instructions, read as a whole, must reflect a correct statement of the law and ““must make the relevant legal standard manifestly apparent to the average juror.”” *Kyllo*, 166 Wn.2d at 864 (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)).

Where the court instructs the jury on both a correct and an incorrect statement of the law, the instructions are erroneous if, read as a whole, they allow the jury to apply an incorrect standard or allow the jury to misunderstand the State’s burden. *Kyllo*, 166 Wn.2d at 864-65. In *Kyllo*, the court instructed the jury on the law of self-defense. 166 Wn.2d at 859-60. The instructions included both a proper statement of self-

defense (that the defendant must reasonably believe he is about to be injured and that he use no more force than necessary) and an improper statement of self-defense (that he must reasonably believe he is in actual danger of great bodily harm). *Id.* The court found instructional error because, read as a whole, the jury could have applied an incorrect legal standard and convicted the defendant based on the misstated level of harm that must be perceived. *Id.* at 870.

Jury instructions that relieve the State of its burden to prove each element beyond a reasonable doubt violate due process. U.S. Const. amend. XIV; Const. art. 1, § 3. A challenge to such instructions present an issue of manifest error of constitutional magnitude that a defendant may raise for the first time on appeal. RAP 2.5(a)(3); *State v. Stein*, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001) (finding manifest constitutional error where jury instructions may have been construed to relieve state of burden of proving every element); *Smith*, 174 Wn. App. at 365 (reviewing challenge to instructions on elements despite absence of objection below because it presents “issue of manifest error affecting a constitutional right”).

b. The jury instructions on trespass and knowledge contradicted each other and cannot be harmonized.

Read as a whole, the jury instructions in this case were contradictory, confusing, and relieved the State of its burden to prove beyond a reasonable doubt that Mr. Gallegos knew his entry or remaining on Ms. Sauer's property was unlawful. The court instructed the jury that in order to convict Mr. Gallegos of the crime of criminal trespass in the second degree the State had to prove beyond a reasonable doubt that "the defendant knew that the entry or remaining was unlawful."⁶ CP 28 (Instruction No. 10). However, immediately after instructing the jury that the State had to prove Mr. Gallegos knew the entry or remaining was unlawful, the court conversely instructed the jury, "It is not necessary that

⁶ Instruction No. 10 reads in its entirety:

To convict the defendant of the crime of criminal trespass in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 4th day of March, 2018, the defendant knowingly entered or remained in or upon the premises of another;
- (2) That the defendant knew that the entry or remaining was unlawful;
- and
- (3) That this act occurred in the Whitman County.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 28.

the person know that the fact is defined by law as being unlawful or an element of a crime.”⁷ CP 29 (Instruction No. 11).

The instruction that the State was required to prove Mr. Gallegos knew his entry or remaining was unlawful immediately followed by the instruction that the State need not prove Mr. Gallegos knew that fact was unlawful is completely contradictory. There is no way to reconcile these two instructions. Knowledge of the unlawfulness is an essential element of the crime of criminal trespass in the second degree. RCW 9A.52.080(1). The State was required to prove beyond a reasonable doubt that Mr. Gallegos knew his entry or remaining was unlawful. But Instruction No. 11 clearly told the jury proof of this knowledge was unnecessary.

Both instructions were adopted verbatim from the pattern jury instructions. 11A Washington Practice: Pattern Jury Instructions: Criminal 60.18 (4th ed. 2016) (WPIC) (Criminal Trespass – Second

⁷ Instruction No. 11 reads in its entirety:

A person knows or acts knowingly or with knowledge with respect to a fact when he is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 29.

Degree – Elements); 11 WPIC 10.02 (Knowledge – Knowingly – Definition). However, this adoption does not render them immune from challenge. The pattern jury instructions “are not the law; they are merely persuasive authority.” *State v. Hayward*, 152 Wn. App. 632, 645, 217 P.3d 354 (2009). The pattern instructions may serve as a guide, but where the pattern instructions conflict with a relevant statute, the court must abandon the pattern instructions and follow the statutory language. *Id.* at 646; *see also* 11 WPIC 0.10 (pattern instructions intended to assist and guide courts).

Instructions that mirror the pattern may still relieve the State of its burden of proof. *See State v. Goble*, 131 Wn. App. 194, 203-04, 126 P.3d 821 (2005). In such cases, the instructions are erroneous, and reversal is required. *Hayward*, 152 Wn. App. at 646 (holding where jury instruction mirrored WPIC but conflicted with the statute, instruction violated defendant’s right to due process, reversing conviction, and remanding for retrial); *Goble*, 131 Wn. App. at 202-04. Instructing the jury in conformity with a pattern instruction is no inoculation to a challenge.

In *State v. Goble*, this Court reviewed a court’s instructions giving an earlier version of the WPIC 10.02 knowledge instruction in an assault case where the State was required to prove the defendant knew the complainant was a law enforcement officer. 131 Wn. App. at 201. This

Court found the knowledge instruction was erroneous because it was confusing, misleading, and misstated the law. Read as a whole, the instructions permitted the jury to convict without the State proving the necessary element that the defendant knew the complainant was a law enforcement officer. *Id.* at 202-03. This Court reversed, even though the knowledge instruction the court gave was from WPIC 10.02.

In addition, the language at issue here is not contained within the main definition of knowledge but instead within the bracketed language of the model instruction. WPIC 10.02. The “note on use” states that bracketed language should be used “as applicable.” The comment to the WPIC further explains the purpose of the bracketed language to state the rule that ignorance of the law is no excuse:

The committee believes that this sentence will assist the jury in understanding that the defendant must have knowledge of the facts, circumstances, or results that constitute a crime, rather than knowledge that the facts, circumstances, and results are a crime.

(citation omitted). Criminal trespass, however, is a unique offense inasmuch as it *does* require an individual to know that the fact of their presence is unlawful. Therefore, the bracketed portion of the instruction is not only inapplicable to the statutory definition of criminal trespass but also explicitly relieves the State of its burden to prove the essential element of knowledge.

- c. The jury instructions relieved the State of its burden to prove knowledge of the unlawfulness, requiring reversal of the trespass conviction.

This constitutional error was prejudicial in Mr. Gallegos's case. Constitutional errors are presumed prejudicial, and the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *Hayward*, 152 Wn. App. at 646-47; *see also Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Where an error involves "omissions or misstatements of elements in jury instructions, 'the error is harmless if that element is supported by uncontroverted evidence.'" *Hayward*, 152 Wn. App. at 646-47 (quoting *State v. Thomas*, 150 Wn.2d 821, 845, 83 P.3d 970 (2004)).

Whether Mr. Gallegos knew his presence on the Sauer property was unlawful on the date he committed the alleged trespass was a significant issue at trial. Ms. Sauer and Sergeant Brown both told Mr. Gallegos he could not return to the Sauer property. Ms. Sauer told Mr. Gallegos this three years before. RP 73. Sergeant Brown told Mr. Gallegos this over a year before. RP 74-76. Neither Ms. Sauer nor Sergeant Brown told Mr. Gallegos the duration for which he was prohibited from returning to the Sauer property. RP 76-77. Sergeant Brown acknowledged he gave Mr. Gallegos no written documents

explaining the trespass. RP 76-77. Mr. Gallegos testified he did not know he was not supposed to be on the Sauer property. RP 105, 107.

Mr. Gallegos acknowledged going to the Sauer property. RP 81-82, 108. However, the jury needed to decide whether the State proved he knew his presence was unlawful. RCW 9A.52.080. Given that the only evidence the State offered were verbal warnings over a year old, this was a contested issue of fact. The State cannot show that the instructional error was harmless. This Court should reverse and remand for a new trial.

3. The court failed to conduct an adequate individualized indigency inquiry, but the record reflects Mr. Gallegos is indigent; therefore, this Court should strike the imposition of certain costs from the judgment and sentence.

The court did not conduct an adequate individualized indigency inquiry. However, the court imposed a total of \$2,500 in LFOs, including a \$2,000 VUCSA fine. CP 38. The court also ordered interest accrue from the date of the judgment through payment in full. CP 38. Because imposition of the VUCSA fine is prohibited where a defendant is indigent, and interest is prohibited on non-restitution LFOs, the court erred in imposing these costs, and they must be stricken from the judgment and sentence.

- a. Courts must conduct an individualized indigency inquiry and may not impose certain costs where a person is indigent.

RCW 10.01.160(3) categorically prohibits a sentencing court from imposing costs on indigent defendants and “requires that trial courts consider the financial resources of a defendant and the nature of the burden imposed by LFOs before ordering the defendant to pay discretionary costs.” *State v. Ramirez*, 191 Wn.2d 732, 738-39, 426 P.3d 714 (2018). Courts must conduct an individualized inquiry into a person’s current and future ability to pay before it may impose discretionary LFOs or set a payment schedule. *State v. Blazina*, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015). Such an inquiry must include consideration of certain itemized factors, including a person’s incarceration, other debts, restitution, past and future employment, income, assets, financial resources, and living expenses, but may include consideration of any relevant factor. *Ramirez*, 191 Wn.2d at 743-44; *Blazina*, 182 Wn.2d at 839 (describing list of relevant factors as “nonexhaustive”). Absent an individualized inquiry establishing the ability to pay, the statute prohibits a court from imposing discretionary costs.

This Court has found an inquiry inadequate where the court “asked only about [the defendant’s] work history and whether there was any reason she could not work,” but “failed to inquire at all about other debts,”

“failed to examine her financial situation, such as the extent of her assets,” and generally failed to consider other important factors. *State v. Glover*, 4 Wn. App. 2d 690, 696, 423 P.3d 290 (2018) (reversing imposition of the LFOs and remanding for a new sentencing hearing). In addition, this Court specifically noted that a later finding of indigency, presumably for purposes of the appeal, “call[s] into question [the defendant’s] ability to pay” LFOs. *Id.*

Appellate courts review de novo the adequacy of the trial court’s inquiry. *Ramirez*, 191 Wn.2d at 740-42.

- b. Recent amendments to the legal financial obligation statutes prohibit the imposition of discretionary costs on indigent defendants and prohibit the imposition of non-restitution interest.

In Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (2018) our legislature amended the LFO statutes to prohibit more clearly courts from imposing costs when a defendant is indigent. Laws of 2018, ch. 269, § 6. In doing so, the legislature unequivocally mandated that if a person is indigent under the statute, the court may not impose certain costs. RCW 10.01.160(3). These costs include any discretionary LFOs.

Amended RCW 10.01.160(3) “categorically prohibit[s] the imposition of any discretionary cost on indigent defendants.” *Ramirez*, 191 Wn.2d at 739. RCW 10.01.160(3) provides:

The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

In addition, amendments to the LFO statutes eliminate interest accrual on LFOs except for restitution. Laws of 2018, ch. 269, §§ 1-2; RCW 3.50.100(4)(b); RCW 10.82.090(1) (“no interest shall accrue on nonrestitution [LFOs]”). This amendment took effect June 7, 2018, prior to Mr. Gallegos’s October 19, 2018, sentencing.

c. The VUCSA fine is a discretionary legal financial obligation.

RCW 69.50.430⁸ requires a fine for felony possession of a controlled substance convictions. The fine is \$2,000 where defendants have a prior possession conviction. RCW 69.50.430(2). However, the plain language of the statute prohibits its imposition where the court finds the defendant “to be indigent.” RCW 69.50.430(1), (2). In such cases, the court must suspend or defer the fine. *Id.*

A VUCSA fine is a discretionary LFO that a court may not impose where a defendant is indigent. *State v. Castorena Gonzalez*, 7 Wn. App. 2d 1006, 2019 WL 118401 at *8 (Jan. 7, 2019) (unpublished) (finding VUCSA fine to be discretionary LFO, holding court erred in imposing it in absence of adequate *Blazina* indigency inquiry, and remanding for fine to be stricken), *review denied*, 438 P.3d 113 (2019); *State v. Welch*, 3 Wn. App. 2d 1049, 2018 WL 2074133 at *3-4 (May 3, 2018) (unpublished)

⁸ RCW 69.50.430 provides in relevant part:

(1) Every adult offender convicted of a felony violation of RCW 69.50.401 through 69.50.4013, 69.50.4015, 69.50.402, 69.50.403, 69.50.406, 69.50.407, 69.50.410, or 69.50.415 must be fined one thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the adult offender to be indigent, this additional fine may not be suspended or deferred by the court.

(2) On a second or subsequent conviction for violation of any of the laws listed in subsection (1) of this section, the adult offender must be fined two thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the adult offender to be indigent, this additional fine may not be suspended or deferred by the court.

(finding court erred in failing to conduct indigency inquiry before imposing VUCSA fine and remanding for hearing).⁹

Alternatively, the VUCSA fine is an applicable fine that courts must waive where a defendant is indigent. *State v. Malone*, 193 Wn. App. 762, 764 n.2, 765-66, 376 P.3d 443 (2016) (recognizing VUCSA fine is mandatory but must be suspended or deferred where defendant is indigent under *Blazina*); *State v. Mayer*, 120 Wn. App. 720, 86 P.3d 217 (2004) (recognizing VUCSA fine is mandatory except where court finds defendant indigent and remanding for court to conduct indigency determination); *State v. Cowin*, 116 Wn. App. 752, 760, 67 P.3d 1108 (2003) (recognizing RCW 69.50.430 fine is mandatory “unless the court makes a finding of indigency”). *Cf. State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015) (holding fines under RCW 9A.20.021, which has no indigency clause, are not discretionary costs under RCW 10.01.160 and, therefore, are not subject to a *Blazina* inquiry).

Whether the VUCSA fine is labeled a discretionary cost that is subject to an indigency inquiry under RCW 10.01.160 and *Blazina* or a mandatory fine that must be waived under RCW 69.50.430 where the

⁹ These cases are cited as nonbinding persuasive authority under GR 14.1 for consideration as this Court deems appropriate.

defendant is indigent, the relevant determination requiring or prohibiting imposition is a defendant's indigency status.

- d. The court conducted an inadequate indigency inquiry and erred in finding Mr. Gallegos was not indigent.

At sentencing, the court found Mr. Gallegos indigent for purposes of appeal and granted his motion for an order of indigency. RP 144-45; CP 42-43. Following issuance of that order, the court asked Mr. Gallegos if he was employed. RP 146. Mr. Gallegos responded that he was unemployed because he was disabled. RP 146. The court then asked Mr. Gallegos if he was "able to pay \$50 a month towards your legal/financial [sic] obligations," to which Mr. Gallegos responded he was. RP 146-47. The court did not ask Mr. Gallegos any questions regarding his income, assets, financial resources, living expenses, debts, incarceration, or restitution. The court made no other inquiries into Mr. Gallegos's financial circumstances and made no individualized inquiry at all into Mr. Gallegos's ability to pay.

The court's inquiry was inadequate to find Mr. Gallegos was not indigent. The court failed to conduct any individualized inquiry under the statute. The court did not consider Mr. Gallegos's income, expenses, debts, or other financial resources.

In addition, the court's conclusion that Mr. Gallegos was not indigent because he agreed with the court that he could pay \$50 a month in LFOs was manifestly unreasonable. First, as explained above, the court entirely failed to conduct the required indigency inquiry. Second, courts may not find a defendant is not indigent solely based on a defendant's statement that he can pay a certain amount per month when made in the context of trying to present himself in the best possible light prior to sentencing. *Ramirez*, 191 Wn.2d at 745-46 (recognizing defendants try to "appear in their best light at sentencing" and dismissing comments about intending to pay costs as sufficient indigency inquiry).

Defense counsel asked the court if it was finding Mr. Gallegos indigent for purposes of LFOs since it found Mr. Gallegos indigent for purposes of appeal. RP 147-48. The court responded, "Well, I'm not, 'cause--he said he could pay \$50 a month towards his LFOs. So, . . . I'm going to impose the LFOs as recommended." RP 148-49. The court then imposed the \$2,000 VUCSA fine. CP 38.

Defense counsel's inquiry was sufficient to raise the court's attention to the indigency issue. In addition, this Court may consider the improper imposition of LFOs for the first time on appeal. *Blazina*, 182 Wn.2d at 830 (exercising RAP 2.5 discretion to consider unpreserved

challenge to imposition of LFOs without proper inquiry into ability to pay and remanding for new sentence hearing).

- e. The evidence before the court established Mr. Gallegos was indigent.

The court imposed the VUCSA fine instead of waiving it based on its erroneous conclusion that Mr. Gallegos was not indigent. However, the court conducted an insufficient indigency inquiry on which to base that conclusion. In addition, the evidence before the court demonstrated Mr. Gallegos was indigent. At the commencement of the case, the court found Mr. Gallegos to be indigent and appointed counsel to represent him. Supp. CP ____, sub. no. 9. Appointed counsel represented Mr. Gallegos for the duration of his case through trial and sentencing. The court found Mr. Gallegos indigent for purposes of appeal. CP 42-43; RP 144-45; *see Glover*, 4 Wn. App. 2d at 696 (relying on post-sentence finding of indigency to question defendant's ability to pay LFOs).

The financial declaration in support of his request for the appointment of counsel at public expense, Mr. Gallegos declared his only source of income was \$1,000 from social security. Supp. CP ____, sub. no. 7. The declaration evidenced no other source of income, and Mr. Gallegos declared he had no assets. Supp. CP ____, sub. no. 7. In addition, at

sentencing, Mr. Gallegos informed the court he is unemployed because he is disabled. RP 146.

f. This Court should strike the VUCSA fine and prohibited interest accrual from the judgment and sentence.

The record before the trial court and this Court demonstrates Mr. Gallegos is indigent. In addition, no part of Mr. Gallegos's LFOs include restitution. Therefore, interest is prohibited. A resentencing hearing is unnecessary, and this Court may remand with a directive that the VUCSA fine and interest accrual be stricken from the judgment and sentence. *Ramirez*, 191 Wn.2d at 749-50 (reversing and remanding for trial court to amend judgment and sentence to strike discretionary LFOs); *State v. Catling*, ___ Wn.2d ___, ___ P.3d ___, 2019 WL 1745697 at *6 n.5 (Apr. 18, 2019) (noting House Bill 1783 "eliminated interest accrual on all LFOs except restitution" and remanding with directive "to revise the judgment and sentence to eliminate such interest on any qualifying remaining LFOs."); *State v. Lundstrom*, 6 Wn. App. 2d 388, 396, 429 P.3d 1116 (2018) (following *Ramirez* and reversing imposition of discretionary LFOs and remanding).

Alternatively, this Court should find the sentencing court conducted an inadequate individualized inquiry as required by the statutes and remand for a resentencing hearing. *Malone*, 193 Wn. App. at 765-66

(remanding for indigency inquiry under *Blazina*); *Mayer*, 120 Wn. App. at 729 (remanding for court to conduct indigency determination where evidence was insufficient to support finding relating to indigency for VUCSA fine purposes); *see also Glover*, 4 Wn. App. 2d at 694-96 (finding inquiry inadequate where court asked only about work history but not debts, assets, or overall financial situation, and reversing and remanding for hearing on indigency and LFOs).

4. Because Mr. Gallegos’s sole source of income is from funds protected by the antiattachment clause, the judgment and sentence must be revised to prohibit the collection of legal financial obligations from these protected funds.

The federal antiattachment clause protects certain funds from collection. 42 U.S.C. § 407(a). Funds from social security may not be used to satisfy even mandatory fees, including the victim assessment fee. 42 U.S.C. § 407(a); *State v. Catling*, 2 Wn. App. 2d 819, 826, 413 P.3d 27 (2018), *aff’d in relevant part*, ___ Wn.2d ___, ___ P.3d ___, 2019 WL 1745697 (April 18, 2019); *City of Richland v. Wakefield*, 186 Wn.2d 596, 609, 380 P.3d 459 (2016). *Catling* requires that, where a defendant’s sole source of income is from protected funds, courts must denote on the judgment and sentence that courts may not collect money from protected funds to satisfy LFOs. 2019 WL 1745697 at * 6 (remanding with order to “revise the judgment and sentence and repayment order . . . to indicate that

[LFOs] may not be satisfied out of any funds subject to the Social Security Act's antiattachment statute, 42 U.S.C. § 407(a)").

The record before the court established Mr. Gallegos was disabled and his sole income was from social security. RP 145-46; Supp. CP ____, sub. no. 7. However, the court did not denote on the judgment and sentence that no payments can be taken from these protected funds. CP 38. This Court should remand with a directive to the trial court to so amend the judgment and sentence. *Catling*, 2019 WL 1745697 at * 6 (remanding for revision of judgment and sentence).

5. Alternatively, Mr. Gallegos received ineffective of counsel regarding the imposition of costs.

Mr. Gallegos's attorney raised the indigency issue and LFOs at sentencing, preserving the issue. RP 147-48. In addition, this Court may exercise its discretion and consider these issues under RAP 2.5(a). Alternatively, this Court should find Mr. Gallegos's attorney performed deficiently when he failed to adequately raise these issues or object to the court's finding.

- a. The constitution guarantees defendants the effective assistance of counsel.

The federal and state constitutions guarantee defendants the right to effective assistance of counsel. U.S. Const. amend VI; Const. art. I, § 22; *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d

674 (1984); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

An appellate court must grant relief based on an ineffective assistance of counsel claim where the appellant demonstrates the attorney's performance was deficient and that prejudice resulted from the deficiency. *Strickland*, 466 U.S. at 688-89; *McFarland*, 127 Wn.2d at 334-35.

Ineffective assistance of counsel occurs when "counsel's representation fell below an objective standard of reasonableness," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler v. Cooper*, 566 U.S. 156, 163, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) (quoting *Strickland*, 466 U.S. at 694).

- b. Mr. Gallegos's counsel performed deficiently by failing to object to the inadequate indigency inquiry, erroneous finding regarding indigency, and imposition of prohibited legal financial obligations.

The amendments to the LFO statutes went into effect on June 7, 2018, before Mr. Gallegos's sentencing. As explained above, these amendments prohibit the imposition of discretionary LFOs on indigent defendants and prohibit interest on non-restitution LFOs. Laws of 2018, ch. 269 (HB 1783). In *Ramirez*, the Supreme Court held these statutory amendments applied to cases pending in the courts, including on appeal. 191 Wn.2d at 748 (holding amendments "expressly prohibit courts from

imposing discretionary costs on defendants who are indigent at the time of sentencing”).

Ramirez also reiterated the requirements of *Blazina* and elaborated upon the necessity of holding an individualized inquiry into a person’s financial circumstances before imposing LFOs. *Id.* at 740. “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.” *Id.* at 741.

Here, defense counsel did not advise the court of the changes in the statute, nor did he remind the court of the requirement for an individualized indigency inquiry required by the statute, *Blazina*, and *Ramirez*. Counsel has an obligation to remain familiar with changes in the law. *Kyllo*, 166 Wn.2d at 862, 868-69 (noting attorneys have duty to research relevant law and finding attorney’s failure to apply relevant law was not legitimate trial tactic but was deficient performance). No reasonable strategic basis exists for failing to object to the court’s imposition of discretionary and prohibited costs or to fail to move the court to fulfill its obligation to conduct an individualized indigency inquiry.

- c. Mr. Gallegos was prejudiced by his attorney's deficient performance at sentencing.

The court failed to conduct any individualized inquiry. In addition, the court's finding that Mr. Gallegos was not indigent is unsupported by sufficient evidence and contradicted by the record. Had defense counsel objected and requested the court engage in the required individualized inquiry, the court would have had to find Mr. Gallegos indigent and could not have imposed the VUCSA fine.

In addition, the interest is prohibited by statute. Had defense counsel objected and identified the amended statute, the court could not have imposed interest. For these reasons, Mr. Gallegos was prejudiced by his attorney's deficient performance.

F. CONCLUSION

Mr. Gallegos's conviction for possession of a controlled substance should be reversed because requiring Mr. Gallegos to prove unwitting possession unconstitutionally shifted the burden of proof and violated the presumption of innocence and due process of law. In addition the court erred in instructing the jury that Mr. Gallegos need not know his entry or remaining was unlawful, contradicting the essential elements of trespass and relieving the State from its burden of proving Mr. Gallegos knew the entry or remaining was unlawful.

Finally, the Court should find the imposition of the VUCSA fine impermissible and strike it from the judgment and sentence or, in the alternative, remand for an adequate indigency inquiry. In addition, the Court should remand for the court to strike the prohibited interest accrual from the judgment and sentence and to denote that no LFOs may be paid from fund protected by the antiattachment clause.

DATED this 3rd day of May, 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Huber', with a long horizontal flourish extending to the right.

KATE R. HUBER (WSBA 47540)
Washington Appellate Project (91052)
Attorneys for Appellant
katehuber@washapp.org
wapofficemail@washapp.org

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

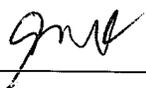
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36387-2-III
)	
ELI GALLEGOS,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF MAY, 2019, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> DENIS TRACY, PROSECUTOR [denist@co.whitman.wa.us] WHITMAN COUNTY PROSECUTOR'S OFFICE PO BOX 30 COLFAX WA 99111-0030	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> ELI GALLEGOS (NO CURRENT ADDRESS ON FILE) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	() () (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF MAY, 2019.

X _____ 

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

May 03, 2019 - 12:37 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36387-2
Appellate Court Case Title: State of Washington v. Eli Gallegos
Superior Court Case Number: 18-1-00060-7

The following documents have been uploaded:

- 363872_Briefs_20190503123652D3667891_0775.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.050319-03.pdf

A copy of the uploaded files will be sent to:

- amandap@co.whitman.wa.us
- denist@co.whitman.wa.us
- greg@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Kate Huber - Email: katehuber@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190503123652D3667891