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Court of Appeals  
Division III  
State of Washington  
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NO. 36647-2-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

v.

TERRY LEE RUSSELL,

Appellant.

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

The Honorable Stanley J. Rumbaugh, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-9301

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**A. SUPPLEMENTAL ASSIGNMENT OF ERROR**

1. The sentencing court erred by imposing legal financial obligations (LFOs) including court-appointed attorney fees, criminal filing fee, an interest accrual provision in the judgment and sentence, following the Supreme Court's decision in *State v. Ramirez*<sup>1</sup> and after enactment of House Bill 1783. Clerk's Papers (CP) 88, 89.

**B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR**

1. Following the Supreme Court's decision in *Ramirez* recent statutory amendments affecting legal financial obligations (LFOs), should the case be remanded to strike the imposition of court-appointed attorney fees, criminal filing fee and interest accrual on non-restitution LFOs from the judgment and sentence? Assignment of Error 1.

2. Is the imposition of discretionary legal financial obligations clearly erroneous when the court conducts an inadequate *Blazina*<sup>2</sup> inquiry and evidence shows that the appellant is indigent? Assignment of Error 1.

**C. SUPPLEMENTAL STATEMENT OF THE CASE**

**1. Procedural facts:**

Appellant Terry Russell was sentenced on January 29, 2018. 6RP at 3-24. He was simultaneously sentenced in cause no. 17-1-03266-4. The

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<sup>1</sup> 191 Wn.2d 732, 426 P.3d 714 (2018).

<sup>2</sup> *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

court imposed a \$500.00 crime victim assessment, \$300.00 court-appointed attorney fees, a \$200.00 criminal filing fee, and \$100.00 DNA collection fee. CP 90-91.

The judgment and sentence states:

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.  
CP 92.

The court interlineated “no interest as long as no more than 3 payments missed in 18 mo. period.” CP 92.

Appellant’s brief was filed August 23, 2018. The case was transferred to Division Three and counsel was granted leave to file a supplemental brief addressing LFOs on May 20, 2019.

#### **D. ARGUMENT**

##### **1. THE COURT ERRED IN IMPOSING A \$200 CRIMINAL FILING FEE, ATTORNEY FEES, AND INTEREST ACCRUAL**

###### ***a. Recent statutory amendments prohibit discretionary costs for indigent defendants.***

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in *Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess.* (Wash. 2018) (HB 1783) and as of

June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee, former RCW 36.18.020(2)(h), on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The amendment applies prospectively and is applicable to cases pending on direct review and not final when the amendment was enacted. *Ramirez*, 191 Wn.2d at 739, 746-50.

House Bill 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” *Ramirez*, 191 Wn.2d at 746 (citing *Laws of 2018*, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”). At sentencing on January 29, 2018, the trial court imposed a \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h). HB 1783 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. RCW 36.18.020(2)(h) states that “this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

The Supreme Court in *Ramirez* concluded the trial court

impermissibly imposed discretionary LFOs and a \$200 criminal filing fee and remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. *Ramirez*, 191 Wn.2d at 750.

As amended in 2018, subsection (3) of RCW 10.01.160 now states, “[t]he 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).” RCW 10.01.160(3). Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

The court also imposed a \$500 crime victim fund assessment, which HB 1783 retains as a mandatory LFO. RCW 7.68.035(1)(a). *State v. Catling*, No. 95794-1, filed April 18, 2019, 438 P.3d 1174, 2019 WL 1745697 at \*3. Therefore the LFO is not challenged here.

In addition to the \$200.00 criminal filing fee, the court also imposed \$300.00 for court-appointed attorney fees, and \$100.00 DNA collection fee. 6RP at 3-24; CP 90. Mr. Russell is entitled to relief from the statutory changes of the Bill regarding those LFOs. As was the case in

*Ramirez*, his case is still on direct appeal.

***b. The court did not adequately inquire into Mr. Russell's ability to pay LFOs***

The record indicates that Mr. Russell is indigent and that he qualified for court-appointed trial and appellate counsel. CP 90, 103-04.

Mr. Russell was ordered to pay “all the mandatories” and discretionary costs including attorney fees, criminal filing fee, and interest accrual. 6RP at 18, 19, 20. Regarding Department of Assigned Counsel attorney fees, the court stated:

We don't run a debtor's prison here. I think part of that is necessary because it's an issue of responsibility. But if, as you present to me, there is employment out there and you are physically able to work, then some payment for your DAC recoupment is appropriate, but I don't necessarily need to see it all back.

6RP at 19.

The court imposed only one DNA collection between the two cause numbers. 6RP at 20.

The sentencing court must conduct on the record an individualized inquiry into the defendant's present and future ability to pay before imposing discretionary costs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry requires the court to consider factors such as incarceration and a defendant's other debts, including restitution, when

determining his ability to pay. *Id.*

The court engaged in a *Blazina* inquiry. 6TP at 14-21. Mr. Russell told the court that he did not finish high school because he was working in the family construction business, that he was completing his GED, and that he has spent a lot of time doing mechanical work on cars. 6RP at 14-15. He has a number of misdemeanors but had no felony history until the instant case, and a VUCSA case for which he was being simultaneous sentenced. 6RP at 15. Mr. Russell told the court about his progress in recovery since his incarceration in the Pierce County jail. 6RP at 15-17. Although the court engaged in a colloquy with Mr. Russell, the court did not question him about his income, his assets and other financial resources, and did not inquire about his monthly expenses after his release, debts including other LFOs from his previous misdemeanor matters,<sup>3</sup> health care costs, or education loans, debts, and present and future ability to pay LFOs. 6RP at 9-20.

Division Two recently found a similar LFO inquiry inadequate, reversing imposition of the LFOs, including attorney fees, and remanded for a new sentencing hearing. *State v. Glover*, 4 Wash.App.2d 690, 423

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<sup>3</sup>Mr. Russell has ten misdemeanors listed in his Judgment and Sentence, the most recent being two convictions for criminal assault in Tacoma

P.3d 290 (2018). In *Glover*, the Court found the inquiry inadequate where the court “asked only about Glover's work history and whether there was any reason she could not work.” *Id.* The Court noted the sentencing court “failed to inquire at all about other debts,” “failed to examine her financial situation, such as the extent of her assets,” and the general failure to consider other important factors *Id.* Finally, the Court specifically noted that the later finding of indigency, presumably for purposes of the appeal, “call[ed] into question [the defendant's] ability to pay.” *Id.*

RCW 10.01.160 is mandatory: “it creates a duty rather than confers discretion.” *Blazina*, 182 Wn.2d at 838 (citing *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). “Practically speaking ... the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay.” *Id.* “Within this inquiry, the court must also consider important factors ... such as incarceration and a defendant's other debts ... when determining a defendant's ability to pay.” *Id.*

***c. Mr. Russell was indigent***

Mr. Russell was represented by court-appointed counsel. Shortly

after sentencing the court found Mr. Russell was unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 103-04. Although he had worked in the past, he did not report to the court that he had a job waiting for him upon release, and had just served approximately 155 days in jail at the time of sentencing. 6RP at 10, 13-19. Thus, the record indicates that Mr. Russell was indigent under RCW 10.101.010(3) at the time of sentencing.

***d. The trial court erred by imposing discretionary costs including attorney fees and interest accrual LFOs***

Mr. Russell challenges the interest accrual on non-restitution LFOs assessed in the judgment and sentence. CP 91. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence states that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. CP 91. The 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.” As amended, RCW 10.82.090 now provides:

(1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of the effective date of this section [June 7, 2018], no interest shall accrue on non-restitution legal

financial obligations.

See Laws of 2018, ch. 269.

The interest accrual provision in the judgment and sentence pertaining to non-restitution LFOs should be stricken.

**E. CONCLUSION**

For the reasons stated above, Mr. Russell respectfully requests this Court remand for resentencing with instructions to strike the criminal filing fee, attorney fees, and the interest accrual provision to the extent it applies to non-restitution LFOs.

DATED: May 24, 2019.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

PETER B. TILLER-WSBA 20835  
[ptiller@tillerlaw.com](mailto:ptiller@tillerlaw.com)  
Of Attorneys for Terry Russell

CERTIFICATE OF SERVICE

The undersigned certifies that on May 24, 2019, that this Supplemental Appellant's Opening Brief was sent by the JIS link to division III clerk of the Court, Court of Appeals, Division III, and to Nathaniel Block, Prosecuting Attorney's Office and copies were mailed by U.S. mail, postage prepaid, to the following:

Nathaniel Block	Clerk of the Court
Pierce County Prosecutor's Office	Court of Appeals Div III
<a href="mailto:Nathaniel.block@piercecountywa.gov">Nathaniel.block@piercecountywa.gov</a>	500 N Cedar St.
	Spokane, WA 99201

Mr. Terry L. Russell  
5228 S State St  
Tacoma, WA 98409

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 24, 2019.



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PETER B. TILLER

**THE TILLER LAW FIRM**

**May 24, 2019 - 2:00 PM**

**Transmittal Information**

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