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No. 373851
District Court No. 17-1-01371-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

*Plaintiff-Respondent*,

vs.

THOMAS MADISON CAREY,

*Defendant-Appellant*.

On Appeal From the Court of Appeals of the State of Washington, Division III

# DEFENDANT-APPELLANT'S OPENING BRIEF

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## STATEMENT OF THE CASE

On April 8, 2017, the Appellant, Thomas Carey, was arrested for Second Degree Assault. On April 10, 2017, that charge was amended to First Degree Manslaughter. Through an amended information filed on September 11, 2017, Mr. Carey was charged with Second Degree Murder. Through a second amended information filed on March 29, 2019, Mr. Carey was charged with aggravated Second Degree Assault and the State proceeded with trial against Mr. Carey. On May 21, 2019, the Court filed a judgment acquitting Mr. Carey of the aforementioned charges, based on the jury finding that Mr. Carey was not guilty of the aforementioned charges. After acquitting Mr. Carey, the jury then found, after further deliberation pursuant to RCW 9A.16.110, that Mr. Carey acted in defense of others. Mr. Carey hired attorney David Partovi to defend Mr. Carey in this matter, signing two contracts that obligates Mr. Carey to pay a total of $260,000 for the legal services rendered in regard to this matter. Additional fees and costs brought the total obligation of Mr. Carey to $278,879.84. On January 27, 2020, the Trial Court Ordered that the State shall reimburse Mr. Carey the amount of $122,431.31. In fashioning this award, the Court held that Mr. Partovi's pre-trial flat fee of $10,000 was reasonable, and awarded $351.31 based upon miscellaneous costs. The remainder of the award was done using the *Lodestar* Method, which essentially takes a "reasonable hourly rate" then multiplies that hourly rate by the amount of work done. The Court awarded $119,280 for attorney time, arbitrarily choosing a $300 hourly rate, and $2,800 for paralegal time, choosing an equally arbitrary $125 hourly rate. The Court never explained as to why Mr. Partovi's proposed hourly rate of $500 was not used in the *Lodestar* Calculation, nor did it make any finding that Mr. Partovi's trial fee of $260,000 was unreasonable. Quite the opposite. As is argued below, the court lavished praise on the preparation and performance of both trial counsel.

## RELIEF SOUGHT

1. Vacate the January 27, 2020 Order on Attorney's Fees and Costs pursuant to RCW 9A.16.110(2).
2. Award the Appellant's request for reimbursement in the amount of $278,879.84.
3. Consider the Appellant reasonable attorney's fees and costs for this appeal.

## ARGUMENT

This Court should vacate the Trial Court's Order and award the Appellant the full amount of his request for reimbursement of $278,879.84. It was erroneous to use the *Lodestar* method in determining the fee award, as RCW 9A.16.110(2) and corresponding case law state that the State of Washington shall reimburse and indemnify a defendant for reasonable attorney's fees and costs when that defendant is found not-guilty by reason of self-defense. That law also provides for the reimbursement and indemnification of appeal fees.

### A. The Trial Court erred in using the *Lodestar* Method in awarding Mr. Partovi attorney's fees pursuant to RCW 9A.16.110(2).

The standard of review for an issue of law is *de novo*. *See State v. Villanueva*, 177 Wash. App 251, 254, 311 P.3d 79 (Div. III, 2013).

> When a person charged with a [violent crime] is found not guilty by reason of self-defense, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, fees incurred, and other expenses involved in his or her defense . . . . To award these reasonable costs the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence.

RCW § 9A.16.110(2)

The Court's Order states "[t]he Court is unaware of any authority cited by counsel . . . which supports the theory that the Court may consider a flat fee retainer independently agreed to between counsel and his client." Order on Attorney's Fees at p. 6. The Court's Order is plainly wrong as

Counsel did present authority to the Court to show that the Court may consider a flat fee retainer in a circumstance such as this. A close reading of the statute itself should show that the State is to indemnify a Defendant in this circumstance, as the statute lists "fees incurred," when the Legislature could have easily drafted the statute to read "fees paid." *See* RCW 9A.16.110(2). *State v. Anderson* illustrates that the State is required to indemnify the defendant under a self-defense reimbursement claim. "In our view, an award of reasonable legal fees under RCW § 9A.16.110 must include but shall not exceed the sum of (a) legal fees the defendant has paid in the past, plus (b) legal fees the defendant has become legally obligated to pay in the future. *State v. Anderson*, 72 Wash. App. 253, 264, 863 P.2d 1370 (Div. II, 1993) (*rev. denied* 123 Wash.2d 1010, 879 P.2d 292 (1994)).

It is worth noting that counsel could not find a reported case in Washington Courts where a court uses the *Lodestar* Method in determining a reasonable reimbursement award under RCW 9A.16.110(2). [1] The main inquiry in RCW 9A.16.110(2) reimbursement cases is whether there was a finding of self-defense by a preponderance of the evidence, and if so, whether the amount requested for reimbursement was "reasonably incurred in order to establish self-defense." *Id.*

Mr. Carey clearly fits the statutory parameters of RCW § 9A.16.110(2), he was charged with multiple violent crimes, and then found not guilty of those crimes by reason of defense of another, which was sustained by a preponderance of the evidence. Further, Mr. Carey is legally obligated to pay a sum totaling $278,879.84 for fees reasonably incurred and costs in this matter as set forth in the Declaration of David Partovi. As RCW § 9A.16.110(2) and the corresponding case law is clear that the State shall reimburse and indemnify a defendant's attorney's fees and costs related to a proceeding where the defendant was found not-guilty by reason of defense of others, the Trial Court's

[1] *See generally State v. Villanueva*, 177 Wash. App 251, 311 P.3d 79 (Div. III, 2013); *see also Anderson*, 72 Wash. App 253; *see also State v. Bessey*, 191 Wash. App 1, 361 P.3d 763 (Div. II, 2015); *see also State v. Lee*, 96 Wash. App. 336, 979 P.2d 458 (Div II, 1999); *see also State v. Jones*, 92 Wash. App 555, 563-64, 964 P.2d 398 (Div II, 1998).

Order should be vacated, and this Court should order the indemnification of the full sum of $278,879.84. That order would then be sent to the legislature for a vote to appropriate the difference between the trial court's arbitrary number and the full amount Mr. Carey is obligated to pay.

Further, the trial court never made a finding that the fee was unreasonable. Instead, the trial court wrote:

> "Mr. Partovi has been practicing law in the State of Washington for approximately 20 years, and has, in many instances, obtained excellent results for his clients in a number of complex and high-profile criminal proceedings. In the matter before this Court, Mr. Partovi was thoroughly prepared and provided zealous representation to his client. Counsel's arguments before the Court were well reasoned and when necessary, properly briefed. The Court would also note that the State was well represented by Mr. Whaley who at all times zealously advocated on the State's behalf and presented what appeared to be a very strong case. It is not unreasonable to assume under these circumstances that defense counsel with less experience than Mr. Partovi, may very well have obtained an unfavorable verdict given the unique complexities of this case, and a highly skilled prosecuting attorney representing the State."

Order on Attorney's Fees at p. 3

**B. This Court *could* award the Appellant the attorney's fees and costs pursuant to this appeal.**

Mr. Carey was put in significant jeopardy in this criminal prosecution process and incurred significant fees and costs to avoid that jeopardy. Based on the trail court's erroneous ruling using a *Lodestar* calculation for a RCW 9A.16.110 reimbursement, he is now having to litigate on appeal to avoid an ongoing legal obligation of more than $156,000. This appeal also stems from the criminal case and is specific to the application of RCW 9A.16.110 so the line of cases created under that statute should apply.

The case most specifically on point is *State v. Jones* which stated, "At least as a general rule, the "defense" of a case continues until all claims have been finally resolved. Accordingly, we hold that the State must compensate for post-acquittal fees and costs reasonably incurred in the trial or appellate courts." *State v. Jones*, 92 Wn.App. 555, 563-64, 964 P.2d 398 (Div II, 1998).

Mr. Carey's argument here suggests that the Court *could* rather than *should* award fees on appeal. That is because, unlike the pre-trial and trial retainers, no appeal retainer was signed due to the oversight of the undersigned counsel. Thus Mr. Carey is not legally obligated to pay an amount for appeal. In such a circumstance, the law of indemnification would not apply. It could be argued that Mr. Carey is receiving a benefit for the appeal and thus should be obligated to pay or that fees are "being incurred" and the State must indemnify Mr. Carey. At the same time, Mr. Carey's indemnification is for a fee owed to the undersigned counsel. Under these circumstances such an argument is just greedy and is not being made. This section is simply to flush out the law on the topic. Had Mr. Carey been obligated to pay an appeal retainer, that would absolutely have been reasonably incurred in pursuit of his indemnification pursuant to RCW 9A.16.110 and should be ordered repaid. Because Mr. Carey is not legally obligated to pay for an appeal, the law which forms the backbone of this argument does not apply.

## CONCLUSION

As laid out above, this Court should vacate the Trial Court's January 27, 2020 Order on Attorney's Fees and Costs pursuant to RCW 9A.16.110(2) and enter an order providing that the State must indemnify Mr. Carey for the full the sum of $278,879.84.

DATED: MAY 4, 2020

PARTOVI LAW

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Attorney for Appellant
THOMAS MADISON CAREY

## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on this 4th day of May, 2020, a true and correct copy of the foregoing was served via e-filing – Court of Appeals website and email to the following:

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## May 04, 2020 - 11:25 AM

## Transmittal Information

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