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STATE OF WASHINGTON
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NO. 89109-5
(consolidated with 89028-5)

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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MAURICIO PAIGE-COLTER, APPELLANT

Review of Court of Appeals #42904-7-II,
an Appeal from the Superior Court of Pierce County
No. 11-1-03207-0

Supplemental Brief of Respondent

MARK LINDQUIST
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A. ISSUES PERTAINING TO THE REVIEW AS ACCEPTED BY THE COURT.

1. Whether the Court of Appeals abused its discretion, under RAP 2.5, in declining to review the issue of imposition of legal financial obligations, where the defendant did not preserve the issue for appeal?

2. Whether the issue of imposition of legal financial obligations is ripe for review where the State has yet to set a payment schedule or sought to collect the debt?

3. Whether the trial court complied with RCW 10.01.160(3) when, before imposing the financial obligations, it considered the defendant's ability to pay?

4. Whether, based upon all the information in the record, the trial court committed clear error in finding that the defendant has the ability or likely future ability to pay the legal financial obligations ordered?

B. STATEMENT OF THE CASE.

1. Procedure

On August 9, 2011, the State charged the defendant, Mauricio Terrence Paige Colter, with assault in the first degree (Count I), and unlawful possession of a firearm in the first degree (Count II). CP 1-2.

On November 15, 2011, jury trial proceeded before the Honorable Stephanie A. Arend. 1 RP 1. The jury found defendant guilty as charged. CP 66-67. The jury also found that defendant was armed with a firearm on Count I. CP 68.

On December 9, 2011, the court sentenced defendant to a total of 360 months of confinement: 300 months for Count I, 116 months on Count II to run concurrently, and 60 months on the enhancement on Count I. CP 76. The court also ordered the defendant to pay legal financial obligations (LFOs). CP 74.

The defendant appealed the imposition of LFOs in the judgment. The Court of Appeals affirmed the judgment and sentence, including the LFOs. *See, State v. Paige-Colter*, #42904-7-II, noted at 175 Wn. App. 1010 (2013 WL 2444604). The defendant petitioned for review. This Court accepted review and consolidated the case with *State v. Blazina*, #89028-5.

2. Facts

The relevant facts, as in *Blazina*, are fairly simple and limited to the issue of the imposition of LFOs. After hearing the case, the trial court found that defendant was able to pay his LFOs. Finding 2.5 of defendant's judgment and sentence states that:

The court has considered the total amount owing, the defend's [sic] past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's

status will change. The court finds that the defendant has the likely future ability to pay the legal financial obligations imposed herein.

CP 74.

The court imposed three mandatory fees: a \$500 victim assessment, \$100 DNA database fee, and \$200 criminal filing fees. CP 74. The court also imposed a \$1,500 recoupment fee for court-appointed counsel. CP 74. Restitution was imposed in the amount of \$29,832. CP 69. The defendant did not object to the court's finding of his ability to pay his legal financial obligations (LFOs). 12/9/2011 RP 15.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR IN ORDERING THE DEFENDANT TO PAY LEGAL FINANCIAL OBLIGATIONS WHEN THE ISSUE IS NEITHER PRESERVED FOR APPEAL NOR RIPE FOR REVIEW.

- a. Division I in *Calvin* no longer conflicts with Division II.

On October 22, 2013, Division I of the Court of Appeals filed an Order granting reconsideration and amending its opinion in *State v. Calvin*. See, Order Granting (attached as Appendix). The Court reversed itself and deleted the section which had previously found no evidence to support the trial court's findings. Order Granting, at 1. The Court deleted and replaced section V of *Calvin*, at 20-22. The new section V declines to review the LFO issue for the first time on appeal. Order Granting, at 3.

The Court goes on to say that, substantively, the trial court's "finding" *was* supported by the record and therefore was not clearly erroneous. *Id.*, at 3-4. Regarding the LFO issues, the Court affirmed the trial court in all aspects.

Although, as the State pointed out in its Supplemental Brief in *Blazina, Calvin* never did conflict in the application of the law, now that Division I has amended its opinion, *Calvin* does not conflict in the result, either. *Calvin* and *State v. Parmelee*, 172 Wn. App. 899, 917, 292 P.3d 799 (2013) are both from Division I. Both apply the cases and law as Division II does. There is no conflict.

b. The issue was not preserved for appeal.

RAP 2.5(a) grants the Appellate Court discretion in refusing to review claims of error not raised at the trial court level. RAP 2.5(a) also provides three circumstances in which an appellant may raise an issue for the first time on appeal: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *Id.*

In *State v. Blazina*, 174 Wn. App. 906, 911, 301 P. 3d 492 (2013), Division II of the Court of Appeals declined to review the LFO issue for the first time on appeal. *See also, State v. Lundy*, -Wn. App.-, 308 P.3d 755, 763 (2013); *State v. Ralph*, 175 Wn. App. 814, 827, 308 P.3d 729 (2013) (Johanson, A.C.J., concurring in both cases). In *Calvin, supra*,

Division I likewise now declines to review the issue for the first time on appeal.

In this case, the defendant did not claim any of the three circumstances listed under RAP 2.5(a) in which an issue could be raised for the first time on appeal. The defendant made no objection to the imposition of LFO's. 12/9/2011 RP 15. Therefore, the defendant did not properly preserve this issue for appeal. The Court of Appeals did not abuse its discretion in declining to review the issue substantively.

c. The issue is not ripe for review.

Trial courts may require defendants to pay court costs and other assessments associated with bringing the case to trial. RCW 10.01.160. RCW 10.01.160(3) requires the trial court to consider a defendant's ability to pay:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Within the statute are constitutional safeguards that prevent the court from improperly imposing LFOs and allow the defendant to modify payment of costs. RCW 10.01.160(4):

A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the

payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant remains under the court's jurisdiction after release for collection of restitution until the amounts are fully paid, and the time period extends even beyond the statutory maximum term for the sentence. RCW 9.94A.753(4).

The time to challenge the imposition of LFOs is when the State seeks to collect the costs. *See, State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997); *State v. Smits*, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing *State v. Baldwin*, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. *Baldwin*, at 311; *see also State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. *Id.* Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." *Blank*, 131 Wn.2d 230, 241–242.

Here, the judgment and sentence recites that the court considered or, in the language of the statute, "took account" of, the defendant's present and likely future financial resources:

The court has considered the total amount owing, the defendant's past, present and future ability to pay future legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 74 . That recitation satisfied the prerequisites for imposing discretionary financial obligations.

The "boilerplate" finding of ability to pay on the Judgment and Sentence is likely an effort to standardize compliance with RCW 10.01.160(3) and *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992). As the Court of Appeals observed in its original opinion in *Calvin*, 302 P. 3d at 521, and *Lundy*, 308 P. 3d at 760, it is unnecessary under the statute. Because it is unnecessary, its inclusion creates confusion and should probably be removed from the form judgment and sentence. *See Lundy*, at 760, n. 7.

Confusion and caution by the trial courts stems from the language in RCW 10.01.160(3). The first sentence says that the court "shall not" order costs "*unless* the defendant is or will be able to pay them" (emphasis added). While *Curry*, at 916, and numerous cases following have stated that the court need not enter specific findings, trial courts are left to ask

themselves how to order costs without "finding" that the defendant can or will be able to pay. RCW 10.01.160(4) permits a defendant to seek relief from payment, based upon financial hardship. However RCW 10.01.160(3) would seem to bar the order in the first place, absent a finding.

In *Lundy*, the Court notes that this confusion also stems from a misreading of the fifth factor in *Curry*, 118 Wn.2d at 915: "A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end." Division II points out that *Curry* does not say that "a repayment obligation may not be imposed unless it appears from the record that there is a likelihood that the defendant will have the future ability to pay legal financial obligations." 308 Wn. App. at 760, n.9. Although the trial court also "found" that the defendant had the present or likely future ability to pay the financial obligations, that conclusion or finding is immaterial and does not warrant relief even if it is not supported by the record. See *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992).

The defendant has the burden to show indigence. See RCW 10.01.020; *Lundy*, 308 Wn. App. at 759, n.5. Defendants who claim indigency must do more than plead poverty in general terms in seeking remission or modification of LFOs because compliance with the conditions imposed under a Judgment and Sentence are essential. *State v. Woodward*, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). While a

court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. *Bearden v. Georgia*, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); *Woodward*, 116 Wn. App. at 704.

In this case, the defendant challenges the court's imposition of LFOs claiming it erred in when it found the defendant had the present or future ability to pay costs. Here, the State has not attempted to collect legal financial obligations from the defendant nor established when he is expected to begin repayment of these obligations. *See* CP 75. The State has not sought enforcement of the costs; therefore, the determination as to whether the trial court erred is not ripe for adjudication. *See Lundy*, 308 P. 3d at 761.

The time to challenge the costs is at the time the State seeks to collect them because while the defendant may or may not have assets at this time, the defendant's future ability to pay is speculative. In addition, the defendant can take advantage of the protections of the statute at the time the State seeks to collect the costs. Therefore, the defendant's challenge to the court costs is premature. The challenge to the order requiring payment of legal financial obligations is not ripe for review.

- d. The trial court did not err in ordering the defendant to pay legal financial obligations.

After Reconsideration and Amendment of the *Calvin* opinion, Divisions I and II do not conflict on the application of the law. Division II in *Blazina*, and Division I in *Calvin*, now reach the same results.

Different components of defendant's financial obligations require separate analysis because some LFO's are mandatory and some are discretionary. *State v. Baldwin*, 63 Wn. App. 303, 309, 818 P.2d 1116 (1991); *State v. Curry*, 118 Wn.2d 911, 915–916, 829 P.2d 166 (1992). The sentencing court's determination of a defendant's resources and ability to pay legal financial obligations is reviewed under the clearly erroneous standard. *Baldwin*, 63 Wn. App. at 312. However, the decision to impose recoupment of attorney fees is reviewed for an abuse of discretion. *Baldwin*, 63 Wn. App. at 312. The court must balance the defendant's ability to pay costs against burden of his obligation before imposing attorney fees. *Id.*; see also *State v. Wimbs*, 68 Wn. App. 673, 847 P.2d 8 (1993), *rev'd on other grounds by*, *State v. McGee*, 122 Wn.2d 783, 864 P.2d 912 (1993).

As pointed out above, pursuant to RCW 10.01.160, the court may require defendants to pay court costs and other assessments associated with bringing the case to trial:

(1) The court may require a defendant to pay costs. Costs may be imposed only upon a convicted defendant, except for costs imposed upon a defendant's entry into a deferred prosecution program, costs imposed upon a defendant for pretrial supervision, or costs imposed upon a defendant for preparing and serving a warrant for failure to appear.

RCW 10.01.160(1).

The court does not always have discretion regarding LFOs. Under statute, it is mandatory for the court to impose the following LFOs whenever a defendant is convicted of a felony: criminal filing fee, crime victim assessment fee, and DNA database fee. RCW 7.68.035; RCW 43.43.754; RCW 9.94A.030; RCW 36.18.020(h). The court is also mandated to impose restitution whenever the defendant is convicted of an offense that results in injury to any person. RCW 9.94A.753(5).

Since *Blazina* was decided, Division II of the Court of Appeals published another case discussing the same LFO issue: *Lundy*, -Wn. App.-308 P.3d 755 (2013).

As in *Lundy*, the defendant in the present case did not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because for mandatory legal financial obligations, the legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing these obligations. See RCW 9.94A.505, RCW 9.94A.753(4) and (5); *Lundy*, at 759. For victim

restitution, victim assessments, DNA fees, and criminal filing fees, the legislature has directed expressly that a defendant's ability to pay should not be taken into account. *See, e.g., State v. Kuster*, 175 Wn. App. 420, 306 P.3d 1022 (2013). Therefore, in the present case, the review ultimately concerns the discretionary amount of \$1,500 in defense counsel recoupment.

Here, the defendant argued that the trial court erred when it concluded that he had the present or future ability to pay mandatory and discretionary LFOs. The defendant relied on *Bertrand* for the proposition that the record does not contain evidence that demonstrates the defendant's present or future ability to pay LFOs. COA Brief of Appellant at 3-4, citing *State v. Bertrand*, 165 Wn. App. 393, 405, 267 P.3d 511 (2011). The Court in *Bertrand* found error in the trial court's finding that Bertrand had the present or future ability to *ever* pay LFOs because she was disabled and the record contained no evidence to support its finding.

Division I of the Court of Appeals does not conflict with Division II in applying the law in these cases. Recently, in *Parmelee*, 172 Wn. App. at 917, the defendant argued that the trial court erred by imposing discretionary legal financial obligations without finding that he had any ability to pay. Division I rejected this argument, holding that the court's discretionary LFO order did not require findings (citing *Curry*, 118 Wn.2d at 916), and that the issue of ability to pay would be considered when the State tried to collect (citing *Blank*, 131 Wn.2d at 242). *Id.*, at 918.

Calvin no longer holds that the trial court's ruling was "clearly erroneous" when the trial court found that an unemployed carpenter could likely pay the LFO's in the future. *See*, Order, at 3-4.

In factual contrast to *Bertrand*, in the present case, the record shows that the defendant has the present and future ability to pay his LFOs. Unlike *Bertrand*, the record shows that the defendant is able-bodied. Among other things, the record shows that the defendant is a young man with many friends and family. As the Court noted in *Calvin*, Order Granting, at 4, the defendant in the present case had the resources or financial support to pay private counsel. Before trial, his privately retained attorney had met with the victim and drafted a sworn statement for her. 2 RP 79, 80, 3 RP 151-152. That attorney was prevented from representing the defendant at trial because the attorney became a potential witness. 3 RP 151. During trial, the defendant expressed displeasure with trial counsel and told the court that the defendant had resources to hire a lawyer. 3 RP 147, 148. It was clear from the record that the defendant's mother supported the defendant financially, including providing him and the victim with automobiles at her expense. 2 RP 101, 3 RP 190.

This Court should affirm the trial court's imposition of LFOs because in conjunction with statutory authority, which compels the court to impose LFOs, the court properly found that the defendant has the

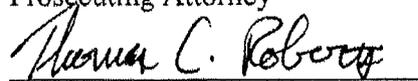
present or future ability to pay LFOs. There was sufficient evidence in the record for the court to determine that the defendant has the ability to pay his LFOs. The defendant fails to demonstrate that the trial court's order to contribute to publicly provided legal fees was "clearly erroneous" or an abuse of discretion.

D. CONCLUSION

State v. Blazina and *State v. Calvin* do not conflict in terms of the law. *Blazina* and *Paige-Colter* are correctly decided and should be affirmed. Although the Division I and II cases do not conflict, they, and subsequent cases like *Lundy*, illustrate the confusion in the trial courts regarding full compliance with RCW 10.01.160(3) and *State v. Curry*. The State respectfully requests that the Court affirm the judgment in *Paige-Colter*, and provide guidance regarding the meaning and application of RCW 10.01.160(3) for the lower courts.

DATED: December 5, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Thomas C. Roberts
Deputy Prosecuting Attorney
WSB # 17442

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12.5.13 Therenthal
Date Signature

APPENDIX "A"

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

STATE OF WASHINGTON,)	
)	No. 67627-0-1
Respondent,)	
)	ORDER GRANTING
v.)	RESPONDENT'S MOTION
)	FOR RECONSIDERATION
DONALD L. CALVIN)	AND AMENDING OPINION
)	
Appellant.)	
<hr/>		

The respondent, State of Washington, filed a motion for reconsideration. The appellant, Donald Calvin, has filed an answer. A panel of the court has determined that the motion should be granted, and the published opinion filed May 28, 2013 shall be amended. Now, therefore, it is hereby

ORDERED that the motion is granted; it is further

ORDERED that the published opinion filed May 28, 2013 be amended as follows:

DELETE the last two sentences of the first paragraph on page 1 that read:

We affirm his convictions. Because there is no evidence to support the trial court's finding that Calvin has the ability to pay court costs and the record does not otherwise show that the trial court considered Calvin's financial resources, we remand for the trial court to strike the finding and the imposition of court costs.

REPLACE those sentences with the following sentence:

We affirm.

No. 67627-0-1/2

DELETE section V. Legal Financial Obligations, which begins on page 20 and ends on page 22, in its entirety.

REPLACE that section with the following:

V. Legal Financial Obligations

The trial court ordered Calvin to pay a total of \$1,300 in legal financial obligations (LFOs), including \$450 in court costs. It also entered a boilerplate finding stating that had the ability to pay LFOs:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

Calvin challenges the imposition of \$450 in court costs, arguing that the boilerplate finding is not supported by evidence, and that the trial court was required to determine whether he had the ability to pay before ordering the payment of costs. The State argues that Calvin did not preserve this issue for review and cannot raise it for the first time on appeal. We agree with the State.

Under RCW 10.01.160(3), "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." Our Supreme Court has made several things clear about this

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statute. First, the sentencing court's consideration of the defendant's ability to pay is not constitutionally required. State v. Blank, 131 Wn.2d 230, 241-42, 930 P.2d 1213 (1997) ("the Constitution does not require an inquiry into ability to pay at the time of sentencing"). Accordingly, the issue raised by Calvin is not one of constitutional magnitude that can be raised for the first time on appeal under RAP 2.5(a).

Second, the imposition of costs under this statute is a factual matter "within the trial court's discretion." State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Failure to identify a factual dispute or to object to a discretionary determination at sentencing waives associated errors on appeal. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874-75, 50 P.3d 618 (2002); In re Pers. Restraint of Shale, 160 Wn.2d 489, 494-95, 158 P.3d 588 (2007). Calvin's failure to object below thus precludes review.

Third, "[n]either the statute nor the constitution requires a sentencing court to enter formal, specific findings" regarding a defendant's ability to pay. Curry, 118 Wn.2d at 916. The boilerplate finding is therefore unnecessary surplusage. If a challenge to the court's discretion were properly before us, striking the boilerplate finding would not require reversal of the court's discretionary decision unless the record affirmatively showed that the defendant had an *inability* to pay both at present and in the future.

Finally, even if the finding were properly before us for review, we would conclude that it is not clearly erroneous.¹ Calvin testified to his high school

No. 67627-0-1/4

education, some technical training, and his past employment as a carpenter, including a brief time in the union. Calvin also had retained, not appointed, counsel at trial. These facts are sufficient to support the challenged finding under the clearly erroneous standard.

Calvin also challenges the imposition of a \$250 fine pursuant to RCW 9A.20.021. That provision, however, merely enumerates the maximum sentence for Calvin's convictions. It does not contain a requirement that the court even take a defendant's financial resources into account before imposing a fine, let alone enter findings. Calvin has not articulated any basis for striking the fine.

¹ We review the trial court's decision to impose discretionary financial obligations under the clearly erroneous standard. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646, 837 P.2d 646 (1991). "A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a 'definite and firm conviction that a mistake has been committed.'" Schryvers v. Coulee Cmty. Hosp., 138 Wn. App. 648, 654, 158 P.3d 113 (2007) (quoting Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

DELETE the first paragraph on page 24 with reads:

We affirm Calvin's convictions and remand for the trial court to strike the finding that Calvin has the present or future ability to pay LFOs and the imposition of \$450 in court costs.

No. 67627-0-I/5

REPLACE that paragraph with the following paragraph:

We affirm.

DATED this 12th day of October, 2013.

WE CONCUR:

Spencer, A.C.T.

Grosse, J

Appelwick, J

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Please see attached the State's Supplemental Brief of Respondent in the below referenced matter.

St. v. Paige-Colter
No. 89109-5
Submitted by: T. Roberts
WSB #17442

Please call me at 253/798-7426 if you have any questions.

Therese Kahn
Legal Assistant to T. Roberts