72467-3

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Division I
State of Washington

NO. 72467-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

D'ANGELO SALOY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE REGINA S. CAHAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Where the application for an intercept order contained sufficient facts to support the inadequacy of other investigative techniques, did the trial court properly deny Saloy's motion to suppress the wire recording under the Privacy Act? Where Saloy failed to point to sufficiently material misstatements or omissions in the wire application, did the trial court properly deny Saloy's motion for an evidentiary hearing on the issue of probable cause?

2. Where Saloy committed first-degree murder at the age of sixteen and would thus be subject to the automatic exclusive original jurisdiction of the adult court, has he failed to establish that any charging delay prejudiced him? Where binding precedent holds the automatic decline statute constitutional, has Saloy failed to establish why that precedent should not be applied?

Due to the reluctance of eyewitnesses to cooperate with law enforcement and the paucity of physical evidence, there was insufficient evidence to charge Saloy until the police received the cooperation of an informant who wore a wire and recorded inculpatory remarks by Saloy. Has Saloy failed to establish that preaccusatorial delay violated his right to due process?

3. When two witnesses denied any recollection about the case, the prosecutor probed the veracity of their claims by reference to prior interviews by the defense attorney. Did the trial court properly deny Saloy's motion for a mistrial based on the prosecutor's questioning?

4. Did the trial court properly deny Saloy's motion for a mistrial based on his claim that the prosecutor's closing argument improperly commented on his right not to testify?

5. Did the trial court properly exercise its discretion to admit some of Saloy's gang photographs, writings, and a video, because they were highly probative of Saloy's motivation to commit the crime and highly probative of the gang aggravating factor?

6. Did the trial court properly exercise its discretion to admit that portion of the wire recording where Saloy urinated near the stairs where the victim was killed because it also contained other highly probative admissions of guilt by Saloy?

7. Saloy did not ask for an exceptional sentence below the standard range, and he does not allege ineffective assistance of counsel at sentencing. When imposing sentence, the sentencing court considered Saloy's age at the time of the offense, his background, and how those factors affected his participation in the crime. Has Saloy failed to establish that his standard-range sentence violates the Eighth Amendment?

8. Did the sentencing court properly impose $600 in mandatory legal financial obligations?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Following a jury trial in 2014, appellant D'Angelo Saloy was found guilty of first-degree murder with a firearm enhancement for the shooting death of Quincy Coleman. CP 584-85, 678-79. The jury also convicted Saloy of first-degree attempted murder with a firearm enhancement for shooting Demario Clark, who survived his wounds. CP 584-85, 680-81. Although both counts also included the allegation that Saloy committed the crimes for the benefit of a criminal street gang, the jury was unable to reach a unanimous verdict as to the gang aggravators. CP 584-85, 883, 685. On September 10, 2014, the Honorable Judge Regina Cahan imposed a standard-range sentence of 719 months imprisonment. CP 687-89.

2. SUBSTANTIVE FACTS.

In 2008, gang members from the south end of Seattle ("South End") were embroiled in a feud with gang members from the Central District of Seattle ("CD"). 7/17/14 RP 86; 7/22/14 RP 43; 7/24/14 RP 22. Several juvenile gang members were shot and killed, beginning with CD gang member Allen Joplin in January of 2008. 7/17/14 RP 88; 7/22/14 RP

17; 7/28/14 RP 26-30. A few days after Joplin was murdered, South End gang member De'Che Morrison ("Streetz") was shot and killed. 7/17/14 RP 88-89. Pierre LaPointe ("Pete Da Sneak") was killed in August of 2008. 7/17/14 RP 89; 7/28/14 RP 26. LaPointe was a close friend of Saloy's and a fellow South End gang member. 7/17/14 RP 89; 7/28/14 RP 26; 7/31/14 RP 118. Although the homicides of Joplin, Morrison, and LaPointe remained unsolved, it was assumed that the killings were the result of gang rivalry between the CD and the South End. 7/17/14 RP 89; 7/28/14 RP 27.

Saloy was deeply saddened by LaPointe's murder, as well as the murders of his friends De'Che Morrison and D'Quan Jones ("Soup"). Ex. 98; 7/28/14 RP 66, 98; 7/31/14 RP 137, 148-50. Saloy posted pictures on the internet memorializing his slain friends, wore customized shirts and hats with their images, and had tattoos in their honor permanently inked onto his body. Ex. 98; 7/31/14 RP 148-55, 165-67. Saloy posted disrespectful images and words about his rivals – the CD gang members he believed were responsible for the deaths of his friends. Id.

On the evening of October 31, 2008, Quincy Coleman, a member of the CD gang Valley Hood Piru, was with his friends Gary Thomas ("Gucci"), Demario Clark ("D-Valley"), Frank Graves Jr. ("Fat Frank"), and Cleden Jimerson – all CD gang members. 7/17/14 RP 117-18, 122,

129-30; 7/22/14 RP 16-25. The young men were standing on the stairs leading down to the Garfield High School ballfields, directly behind the Garfield Teen Life Center. Ex. 25; 7/22/14 RP 23-25. The top of the stairwell sits directly along the west side of 25th Avenue, which runs in a north/south direction. Ex. 25; 7/15/17 RP 47; 7/17/14 RP 46-47. Garfield High School and the surrounding area were common places for CD gang members to hang out. 7/17/14 RP 111-12. That night, Coleman was wearing red and black gym shorts, jeans, and two red bandanas, one as a belt. 7/17/14 RP 163; 7/21/14 RP 21, 25. Red was the color typically associated with Coleman's CD gang. 7/17/15 RP 93, 121-22.

As Coleman and his friends stood on the stairs talking, a car pulled up alongside them, and the parties engaged in a very brief interaction. 7/22/14 RP 32. Moments later, the same car pulled up again; the driver slammed on the brakes, and gunshots rang out. 7/22/14 RP 27-28. All of the young men on the stairs jumped and ran for cover. Id.

Quincy Coleman and Demario Clark, who had been standing at the top of the stairs, were both struck by bullets. 7/22/14 RP 25-27. Coleman fell onto one of the landings on the stairwell. 7/22/14 RP 26. Two bullets entered his body through his lower back. 7/21/14 RP 62, 84. One of the bullets traveled upward, tore through his aorta, and lodged in his spinal column at the base of his skull. 7/21/14 RP 100-05. The other came to

rest in the left side of his clavicle. 7/21/14 RP 91. Paramedics were unable to resuscitate Coleman, and he died at the scene. 7/21/14 RP 69. Coleman was just fifteen years old. 7/17/14 RP 7.

Demario Clark managed to run into the Teen Life Center; he had a gunshot wound to his hand and a gunshot wound to his buttocks. 7/15/14 RP 33-35, 124-26; 7/22/14 RP 26. Clark remained conscious, asking those who attended to him to call his mother. 7/15/14 RP 128; 7/17/14 RP 56-58. He was later transported to Harborview Medical Center for treatment. 7/15/14 RP 129.

C. ARGUMENT

1. THE JUDICIALLY-AUTHORIZED WIRE RECORDING OF A CONVERSATION BETWEEN SALOY AND A FELLOW GANG MEMBER WAS PROPERLY ADMITTED.

a. Relevant Facts.

i. The initial police investigation.

Despite having very little physical evidence and encountering extremely limited cooperation from those involved, Seattle Police Detective Dana Duffy and her partner conducted a lengthy and thorough investigation of Coleman's homicide. See CP 296-373; Pretrial Ex. 1.

A single .40 caliber shell casing was found on the west side of 25th Avenue. 7/15/14 RP 78; 7/17/14 RP 160-62. However, the two bullets recovered from Coleman's body were both .38 caliber, and Demario

Clark's wounds were "through and through," so it was unknown what type of gun was used to shoot Clark. CP 297-98; Pretrial Ex. 1, at 11. Although there were multiple people milling about the area at the time of the shooting, the police were unable to locate any third-party eyewitnesses. 7/15/14 RP 54, 62, 67.

Clark was uncooperative and hostile with the police when they came to speak with him at the hospital. CP 299; Pretrial Ex. 1, at 7. In fact, despite having been shot, Clark never provided a statement to the police, nor did he participate in the trial. 7/30/14 RP 93. Cleden Jimerson told the police only that the car was a light-colored Ford Taurus. Ex. 45; 7/17/14 RP 27-29. He claimed to remember nothing at trial. 7/21/14 RP 124-48. When Frank Graves Jr. finally agreed to be interviewed by police a week after the shooting, the only information he provided was that he believed the car involved was a silver-colored Ford Taurus and that he had seen a dark-skinned arm with a gun.[1] Pretrial Ex. 1, at 12; 7/30/14 RP 93-96. At trial, Graves Jr. refused to be sworn, claimed to remember nothing – including his father's name – and denied being at Garfield High School the evening Coleman was killed. 7/21/14 RP 155-68.

[1] Graves Jr. ultimately admitted to having his own gun when he was shot at, and admitted that he had discarded it in the bathroom of the Teen Life Center immediately thereafter. CP 299-300; Pretrial Ex. 1, at 13. The gun was discovered in the bathroom the night of the shooting. CP 299; Pretrial Ex. 1, at 4.

Based on information that Graves Jr. provided to another CD gang member, and based on rumors about what Clark was telling others, Detective Duffy initially focused on a South End gang member named Monroe Ezell and a Samoan male named "Ramsey." CP 298-300; Pretrial Ex. 1, at 4. In late November of 2008, Detective Duffy interviewed Ezell, who claimed that he had been at the Union Gospel Mission to pick up community service paperwork around the time of the crime. CP 303; Pretrial Ex. 1, at 20. Ezell gave conflicting accounts of where he had gone after that. CP 303.

In mid-December 2008, Robert Martin, who worked at the Union Gospel Mission, confirmed that Ezell had been there the evening of the shooting, and estimated it was around the time of the shooting. CP 304; Pretrial Ex. 1, at 21; 7/17/14 RP 22. According to Martin, Ezell later called him and said that "a guy named D'Angelo Saloy" and "Ramsey" had done the shooting, but Ezell did not say how he knew that. Pretrial Ex. 1, at 21. Based on cellular tower site tracking information, Ezell's telephone appeared to be near the Union Gospel Mission at the time of the shooting, although other information police had was inconsistent with his alibi. CP 304-05; Pretrial Ex. 1, at 22.

Detective Duffy was able to identify "Ramsey" as Ramsey Fola. CP 299; Pretrial Ex. 1, at 19. Detectives learned that one of Fola's family

members owned a gray Ford Taurus that Fola sometimes drove. CP 302-03, 306; Pretrial Ex. 1, at 19, 25. Fola told the police that he had been at his friend Kenneth Woods' house on the night of the murder. Id.

In December of 2008, Woods and his mother told detectives that Fola and Saloy had been at their home the night of the shooting; however, Woods did not know when, and his mother estimated they had arrived between 6:00 and 7:00 p.m. CP 303; Pretrial Ex 1, at 21. The shooting occurred at 8:19 p.m. 7/17/14 RP 22. The police learned that Fola's cellular phone had been turned off during the shooting, so police could not determine his location at that time. Pretrial Ex. 1, at pg. 22.

On March 4, 2009, a confidential source ("CW#1") told detectives that he had recently been hanging out with a group of individuals, including Saloy, and that Saloy told the group that Fola had been driving and that Saloy had shot Coleman. Pretrial Ex. 1, at 23. CW#1 had no details and was not present when the crime occurred. Id.

On March 10, 2009, the police went to a possible address for Saloy and left a message for him to contact them. Pretrial Ex. 1, at 23. Saloy called Detective Duffy the next day and said that he would arrange a meeting the following week, but he never called back nor answered his phone. Pretrial Ex. 1, at 23-24. On June 30, 2009, Detective Duffy was alerted that Gang Unit detectives had Saloy at police headquarters for an

unrelated incident, and she was able to speak to him about Coleman's murder for the first time. CP 305; Pretrial Ex. 1, at 25. Saloy told her that he had been at Woods' house with Fola and estimated that he left around 7:00 p.m. Id. He was not sure how he got home, but claimed that he either walked or that his sister picked him up. Id.

On September 29, 2009, police arrested a young man ("CW#2") on a warrant who claimed that he had heard Fola talking about how he had been driving his brother's Ford Taurus while Saloy shot at Coleman and his friends. CP 306; Pretrial Ex. 1, at 26. CW#2 told police that he had also heard Saloy bragging about shooting Coleman, but that he did not believe him at first. CP 306-07. CW#2 told police that Saloy had said he had a .38 revolver and Ramsey had a .40 caliber semiautomatic handgun. Id. CW#2 stated that neither Fola nor Saloy had gone into great detail about the shooting. Pretrial ex. 1, at 26.

In mid-December of 2009, CW#2 told Detective Duffy that Saloy had recently shown him where he had disposed of the murder weapons in Lake Washington. CP 308; Pretrial Ex. 1, at 27. Detective Duffy called the Harbor Patrol to look for the weapons but they were unsuccessful in locating them. Id.

On January 4, 2010, Detective Duffy applied for and received approval for a wire recording using CW#2. CP 308; Pretrial Ex. 1, at 27.

However, CW#2 did not follow through and participate with the intercept and later told the police he was "not on good terms" with either Fola or Saloy. CP 308--9; Pretrial Ex. 1, at 27-28.

On August 11, 2010, an individual who wished to remain anonymous ("AW") told police that he had seen Saloy with Ezell and a Samoan male one night and heard Saloy claiming to have just shot someone with a .38 revolver. CP 309; Pretrial Ex. 1, at 28-29. The individual did not believe Saloy until he later saw the news about a shooting at Garfield. Id.

Also in August of 2010, a scuba diver located a .357 revolver and a .45 caliber semi-automatic handgun in Lake Washington in close proximity to where CW#2 had said Saloy discarded the weapons from the Coleman murder. CP 309; Pretrial Ex. 1, at 28. The weapons were retrieved, and Detective Duffy submitted requests for latent fingerprint, ballistics, and DNA analysis. Id.

On October 10, 2010, an individual named Juan Sanchez and his family came to the attention of federal immigration authorities. Special Agents from the Department of Homeland Security spoke to Sanchez's mother, who told them that her son had information about a murder. CP 310; Pretrial Ex. 1, at 29. Due to significant pressure from the federal authorities regarding immigration, Sanchez, who was a close friend of

Saloy's, agreed to be interviewed by Seattle Police Homicide detectives.[2] Id. Sanchez told Detective Duffy that Saloy had previously admitted to him that he and Fola had committed the murder from Fola's sister's car. CP 311; Pretrial Ex. 1, at 29. Saloy told Sanchez that he wanted to kill a CD gang member for revenge after his friend Pierre LaPointe's death. Id. Sanchez told police that he thought Saloy used a .38 caliber gun. Pretrial Ex. 1, at 29. Sanchez told Detective Duffy that Ezell could not have been with Saloy and Fola during the shooting because Ezell had been with Sanchez. Id.

Based on her investigation to date, and based on Sanchez's agreement to cooperate, Detective Duffy prepared an application for an intercept order to record conversations between Sanchez and Saloy and Fola during the time frame between November 27, 2010 and December 4, 2010. CP 296-317; Pretrial Ex. 1, at 29. The Honorable Judge Richard Eadie signed the order on November 22, 2010. CP 375-77.

ii. The judicially-authorized wire recording.

On November 27, 2010, detectives met with Sanchez and wired him for the operation. Although Sanchez met with Saloy that evening, other individuals were present, so Sanchez did not bring up Coleman's murder, and Saloy did not talk about it. Pretrial Ex. 1, at 30; 7/28/14RP

[2] The federal authorities told Sanchez that if he did not cooperate, they would deport him and his parents. 7/28/14 RP 50-52.

55-57. A few days later, on December 1, 2010, detectives wired Sanchez's body and his car for both audio and video. Pretrial Ex. 1, at 30. Sanchez picked up Saloy and the two drove around. They drove to Garfield High School, where they got out of the car at the scene of the shooting. While driving in the car and while at Garfield, Saloy confessed to murdering Coleman, and provided significant detail about the shooting and how it had occurred. Ex. 48, 49, 50, 51; Pretrial Ex. 1, at 30; 7/28/14 RP 59-68, 71-83, 87-102.

iii. Saloy's pretrial motion to suppress the wire recording.

Saloy moved pretrial to suppress the wire recording, or in the alternative, to grant him an evidentiary hearing pursuant to Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). Saloy argued that law enforcement was required, but failed, to exhaust all regular avenues of investigation before seeking the intercept order. He also argued that Detective Duffy recklessly or intentionally provided incorrect information in her application for the intercept order, entitling him to a hearing on the issue. CP 63-74, 236-40; 5/20/14 RP 67-80. Following extensive briefing and argument, the trial court denied Saloy's motion to suppress, denied Saloy an evidentiary hearing, and entered

written findings of fact and conclusions of law. CP 695-700; 5/27/14 RP 116-26.

b. The Trial Court Properly Admitted The Wire Recording.

Washington's Privacy Act, RCW chapter 9.73, generally prohibits recording private conversations without the consent of all the parties to the conversation. RCW 9.73.030; State v. Roden, 179 Wn.2d 893, 898, 321 P.3d 1183 (2014). However, electronic recording of conversations with one party's consent is permitted where law enforcement obtains a judicial order finding probable cause to believe that the nonconsenting party has committed a felony. RCW 9.73.090(2). The application for the judicial order must contain a particular statement of facts relied upon by the applicant to justify the belief that an authorization should be issued, and must include, among other things:

> A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear unlikely to succeed if tried or to be too dangerous to employ.

RCW 9.73.130(3)(f).

Saloy argues that the trial court should have suppressed the wire recording because Detective Duffy's application for judicial authorization did not contain sufficient particularized facts to support Judge Eadie's conclusion that "[n]ormal investigative techniques have been tried and

failed and reasonably appear to be unlikely to succeed if tried." CP 376. However, the trial court properly determined that the facts set forth by Detective Duffy in her application adequately supported Judge Eadie's determination.

Initially, Saloy misstates the standard of review for all suppression rulings under the Privacy Act as *de novo*. A judge considering an application for an intercept order has considerable discretion to determine whether statutory procedures have been met. State v. Johnson, 125 Wn. App. 443, 455, 105 P.3d 85 (2005) (citing State v. Cisneros, 63 Wn. App. 724, 728-29, 821 P.2d 1262 (1992)). A reviewing court will affirm an intercept order when the facts set forth in the application were minimally adequate to support the court's determination. Johnson, 125 Wn. App. at 455; State v. Manning, 81 Wn. App. 714, 718, 915 P.2d 1162 (1996); State v. Porter, 98 Wn. App. 631, 634, 990 P.2d 460 (1999).

In support of his claim that the appropriate standard of review is *de novo*, Saloy cites to State v. Kipp, 179 Wn.2d 718, 728, 317 P.3d 1029 (2014). This Court should reject Saloy's broad interpretation of Kipp, which held only that the question of whether a conversation is "private" within the meaning of the Privacy Act could be determined as a matter of law where the facts surrounding the conversation are undisputed. 179 Wn.2d at 722-23. Kipp does not contradict the above cases concluding

that an intercept order will be affirmed whenever the application sets forth minimally adequate facts to support the authorizing court's determination.

Contrary to Saloy's argument, law enforcement is not required to demonstrate absolute necessity to obtain an intercept order. State v. Constance, 154 Wn. App. 861, 880, 226 P.3d 231 (2010) (citing State v. Platz, 33 Wn. App. 345, 349, 655 P.2d 710 (1982)). Rather, investigating officers must demonstrate that they have tried, or have given serious consideration to other methods, and explain to the authorizing judge why those other methods are inadequate in the particular case. Manning, 81 Wn. App. at 720. This requirement is to be interpreted in a common sense fashion, and the intercept order must be affirmed if it sets forth minimally adequate facts to support a determination that other investigatory techniques were inadequate. Platz, 33 Wn. App. at 350; Manning, 81 Wn. App. at 718.

Non-exclusive relevant factors for the court's consideration include the nature of the crime and inherent difficulties in proving it,[3] the fact that the case has remained unsolved for a significant period of time,[4] the fact that there is no additional evidence to be collected,[5] the fact that

[3] State v. Kichinko, 26 Wn. App. 304, 311, 613 P.2d 792 (1980).

[4] Platz, 33 Wn. App. at 350.

[5] Johnson, 125 Wn. App. at 456.

the suspect has already denied involvement in the crime and is unlikely to confess to police,[6] the likelihood that the suspect would not divulge to an outside party,[7] the difficulty of surveillance without the aid of an electronic device given the uncertainty or inaccessibility of the location where the conversations are anticipated to take place,[8] that the exact wording of the conversation could be of critical evidentiary importance,[9]the necessity of avoiding a one-on-one dispute about what was said during the conversation,[10] and to avoid an attack on the credibility of a witness, particularly one with criminal history.[11]

Detective Duffy's application contains numerous particularized facts explaining the investigative methods police had already attempted, as well as the serious consideration she gave as to why additional investigative methods other than the wire recording were unlikely to suffice. At the time Duffy sought the intercept order, over two years had elapsed since the shooting, and police still had insufficient evidence to charge either Fola or Saloy. See CP 317 (application signed on November 22, 2010).

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[6] Constance, 154 Wn. App. at 880-84.

[7] State v. Irwin, 43 Wn. App. 553, 557, 718 P.2d 826 (1986).

[8] Id.

[9] State v. Lopez, 70 Wn. App. 259, 267, 856 P.2d 390 (1993).

[10] State v. D.J.W., 76 Wn. App. 135, 149, 882 P.2d 1199 (1994).

[11] Lopez, 70 Wn. App. at 267.

It was apparent from the intercept application that the case would not be proven with eyewitness testimony. Detective Duffy outlined how the suspected motivation for the crime was gang-related and how the known eyewitnesses were reluctant to cooperate and had refused to provide any significant information to law enforcement. See CP 299-300 (detailing how the surviving victim, Demario Clark, was hostile and uncooperative with police despite the fact that he was rumored to be providing information to third parties); CP 298-300 (eyewitness Frank Graves Jr. provided the police only with a description of the vehicle, despite rumors that he was able to identify its occupants).

Detective Duffy informed the authorizing court that the police had conducted multiple interviews in the case which had proven only that "due to the [g]ang mentality" and its "code of ethics," the witnesses, victims, and suspects would not "snitch" on opposing gang members. CP 315. Duffy outlined how in her experience, gang members have a "code of silence" that they use to justify their non-cooperation with law enforcement, and then she specifically connected that experience to the behavior of the witnesses in this particular case:

> This behavior was depicted by Demario Clark in the hospital, refusing to talk to the detectives who were investigating the murder of his friend and also the violent assault on him. Clark's family was also uncooperative and would not encourage their son to divulge information.

> Your affiant attempted to gain assistance from the murdered boy's family and again was met with the same hostility and lack of cooperation. Detectives have made direct contact with numerous witnesses but no witness has been able or willing to tell detectives what they saw on the night of the shootings.

CP 315.

It was also apparent that the case would not be solved through the use of physical evidence. The application informed the authorizing judge that the only physical evidence was one shell casing from the scene (.40 caliber), and the two fired bullets recovered from Coleman's body (.38 caliber). CP 297-98. As Detective Duffy pointed out, "[D]ue to the length of time since the crime and the already thorough investigation that has been conducted and not led to charging to date, it is unlikely there will be physical or documentary evidence which, standing alone, will significantly link Saloy and/or Fola to the crimes." CP 315.

Detective Duffy also included the fact that she had interviewed all three suspects in the crime – Ezell, Fola, and Saloy – and all three denied any involvement. CP 302-03, 305, 315. And she explained how she had previously attempted to lawfully intercept inculpatory conversations between Saloy, Fola, and a different informant, but had been unsuccessful. CP 308-09.

Saloy attempts to undermine these highly relevant facts by asserting that both CW#2 and Sanchez were "ready and willing to *testify* against Saloy at trial," and then contending that the State merely "preferred" to have Saloy's statements recorded rather than rely on the informants' testimony. Brf. of App. at 15 (emphasis added). However, Saloy does not support his claim that CW#2 and Sanchez were willing to testify with any citation to the record. Indeed, there is nothing at all in the application to suggest that either CW#2 or Sanchez had any intention of testifying against Saloy. Agreeing to provide information to law enforcement while being named only as a "confidential source" in police reports is qualitatively different than agreeing to appear in court and testify in front of the defendant.[12]

Moreover, even if the application did support the conclusion that CW#2 and Sanchez were willing to testify, Saloy asks this Court to substitute its judgment for that of the authorizing judge and determine that further investigation was unnecessary to prove the charges. However, the application made clear that Sanchez "self-initiated" assistance with the investigation only after being approached by Homeland Security and

[12] The record ultimately bears out this conclusion: CW#2 did not testify at trial, and Sanchez testified only after being arrested on a material witness warrant. 7/23/14 RP 2-3. Moreover, Sanchez made clear that he never had testifying in mind when he agreed to wear the wire to avoid deportation, and that he originally believed that his agreement to cooperate was limited to the wire recording. 7/28/14 RP 132.

threatened with his family's deportation from the country. CP 310-11. Enhancing the credibility of a witness, particularly one with motive to fabricate, is a relevant consideration for the authorizing court. State v. D.J.W., 76 Wn. App. 135, 149, 882 P.2d 1199 (1994).

Moreover, the application described specific reasons why a recorded confession from Saloy was necessary; it was all too easy for Saloy to later claim that he was only "fantasizing" or "kidding" when he made the remarks to his fellow gang members. CP 316. As Detective Duffy noted in the application, CW#2 did not initially even believe Saloy when he first heard him make inculpatory remarks about the shooting. CP 307. And Saloy *did* argue to the jury that his words were merely untrustworthy bravado, made in an attempt to gain "street credibility" and were not supported – even contradicted – by other evidence. 8/6/14 RP 105-16. As such, Detective Duffy rightfully suggested that a recording of the actual conversation between Saloy and Sanchez would allow the jury to determine for themselves what was said and what weight should be given to Saloy's admissions. See Manning, 81 Wn. App. at 720-21 (citing Platz, 33 Wn. App. at 350) (while boilerplate assertions regarding the desirability of avoiding a swearing contest are insufficient to justify an intercept order when standing alone, it is an appropriate consideration when based upon particularized facts).

Finally, the application reflected specific reasons why law enforcement officers could not have positioned themselves in a place to listen and overhear the conversation between Sanchez and Saloy (instead of recording it). Given the unpredictability of when and where the conversations might take place, officers could not access or position themselves in advance in a location where surveillance would be possible. CP 315-16.

In sum, the application described the status of the investigation nearly two years after the murder had been committed and explained exactly why detectives reasonably believed there was no other investigative avenue likely to produce reliable evidence of Saloy's guilt other than to intercept and record his own words admitting participation in the crime. The fact that Saloy had made incriminating remarks to other gang members was insufficient to prove that he committed the murder in the absence of any physical evidence tying him to the scene and in the absence of any eyewitness testimony establishing his guilt. Because the application contained minimally adequate facts to support a determination that other investigatory techniques were inadequate, the trial court properly admitted evidence of the wire recording.

c. The Court Properly Denied Saloy's Request For An Evidentiary Hearing.

Alternatively, Saloy argues that the trial court should have granted his motion for an evidentiary hearing. He contends that Detective Duffy included several false statements in her application and omitted other relevant facts. Saloy contends that these misstated and omitted facts were material to a finding of probable cause, and thus he was entitled to an evidentiary hearing.

Saloy's argument fails. First, the authorizing court's determination that there was probable cause to believe Saloy had committed a felony was guided by the Privacy Act statute itself, not the Fourth Amendment or article I, section 7 of the Washington Constitution. Thus, Saloy's reliance on case law outlining a procedure meant to safeguard a defendant's Fourth Amendment rights is misplaced. However, even if a probable cause finding under RCW 9.73 is guided by the constitutional standards applicable to search warrants, the trial court properly determined that the alleged misstatements or omissions here were not material to the authorizing court's determination of probable cause, and properly denied Saloy's motion for an evidentiary hearing.

Neither the Fourth Amendment nor article I, section 7 of the state constitution restricts one-party consent recordings. State v. Clark, 129

Wn.2d 211, 221-22, 916 P.2d 384 (1996). Although in the consolidated case of Clark, the Washington Supreme Court noted that it had not yet decided whether the Privacy Act's probable cause requirement differed from that of the Fourth Amendment and found it unnecessary to do so in in that case,[13] this Court had concluded below that a lesser standard applied under RCW 9.73.090. D.J.W., 76 Wn. App. at 145. And even though the appellate courts applied a Franks analysis to applications for intercept orders in both State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992), and Cisneros, supra, it does not appear that either court considered whether a different analytical framework should apply, nor did the State argue against the constitutional standard. Therefore, this Court is free to apply D.J.W. and conclude that the Franks standard is inapplicable to applications for wire recordings.

Regardless, even assuming that Franks applies to applications for intercept orders under RCW 9.73.090(2), the trial court properly denied Saloy an evidentiary hearing because the alleged misstatements and omissions he pointed to were not material to a finding of probable cause. In Franks, the Court concluded that:

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the

[13] Clark, 129 Wn.2d at 223-24, n.12.

> affiant in the warrant affidavit, *and if the allegedly false statement is necessary to the finding of probable cause*, the Fourth Amendment [to the United States Constitution] requires that a hearing be held at the defendant's request.

438 U.S. at 155-56 (emphasis added). Intentionally or recklessly omitted material may also form the basis for a challenge under Franks. Id.

Here, Saloy argued that Detective Duffy misstated the following evidence in her application for an intercept order: 1) that Saloy told Sanchez he used a .38 caliber firearm in the shooting; 2) that Saloy told Sanchez that Fola was armed with a .40 caliber semi-automatic firearm during the shooting; and 3) that Saloy told Sanchez that he and Fola were in his sister's Ford Taurus at the time of the shooting. CP 696. Saloy also alleged that Detective Duffy improperly omitted Sanchez's criminal history, as well as the fact that someone else had identified Ezell as being present and shooting at Coleman. Id. However, the trial court properly concluded that these misstatements (if considered such) and omissions were insufficiently material to the finding of probable cause to warrant an evidentiary hearing under Franks. CP 697-98; 5/27/14 RP 119-24.

First, the court correctly noted that all references to Saloy's statements to Sanchez could have been entirely removed from the application (thus negating the need to include Sanchez's criminal history), and probable cause would still have existed. 5/27/14 RP 124. As outlined

elsewhere in the application, Saloy had told CW#2 that he had a .38 caliber revolver and Fola had a .40 caliber semi-automatic firearm at the time of the shooting. CP 306. Frank Graves Jr. had told the police that the car involved appeared to be a silver Ford Taurus. CP 300. Fola himself told the police his brother owned a gray Ford Taurus that he sometimes drove. CP 303. Detective Duffy independently verified that Fola's sister-in-law was the registered owner of a gray Ford Taurus. CP 306. Therefore, all of the alleged misstatements regarding what Saloy told Sanchez were not material to the finding of probable cause, and as such, Sanchez's criminal history did not amount to a material omission.

With respect to the omission that an individual named Taray David had identified Ezell as the shooter, the trial court rightly noted that the application was replete with other information tying Ezell to the offense – including that victims Demario Clark and Frank Graves Jr. were reportedly telling others that Ezell had shot at them, CP 298, 300, that another witness claimed to have seen Ezell driving a silver car near the scene of the shooting, CP 298, and that CW#2 claimed that Saloy himself stated that Ezell was with him and Fola at the time of the shooting, CP 306. See 5/27/24 RP 121, 123. Indeed, the police investigation (and the application for the wire intercept) was consistent with the prospect that Ezell was responsible for the shooting along with Saloy and Fola, as either

a principal or an accomplice. Including the omitted information from Taray David would not have negated probable cause for Saloy.

Even assuming that Franks applies to a finding of probable cause under the Privacy Act, the trial court properly denied Saloy's request for an evidentiary hearing because the alleged misstatements and omissions were not material.

2. SALOY FAILS TO ESTABLISH THAT PREACCUSATORIAL DELAY VIOLATED HIS RIGHT TO DUE PROCESS.

Saloy committed first-degree murder and first-degree attempted murder at the age of sixteen. By statute, had he been charged immediately, he would have been automatically subject to the exclusive jurisdiction of the adult court. Saloy asks this Court to reverse and dismiss his convictions, arguing that the "automatic decline" statute (which did not apply to him based on his age at the time of charging) is unconstitutional following recent decisions of the United States Supreme Court interpreting the Eighth Amendment in the context of juvenile sentences. Saloy argues that because the automatic decline statute is unconstitutional, charging delay prejudiced him by denying him the "right to have the juvenile court make a determination about whether it was appropriate to retain jurisdiction." Brf. of App. at 32.

However, in In re Boot,[14] the Washington State Supreme Court rejected arguments that the automatic decline statute violates due process and the Eighth Amendment, and Saloy has failed to establish that recent Supreme Court precedent dictates a different result.

Moreover, Saloy's characterization of the reason for the delay is belied by the record. Saloy asserts that the State delayed charging him for the sole purpose of "gaining a tactical advantage at trial." However, prior to Saloy's eighteenth birthday, the only evidence linking him to the shooting was statements that he had made to fellow gang members – who the State reasonably believed would not testify against Saloy, and even if they did, their testimony was insufficient standing alone to establish Saloy's guilt beyond a reasonable doubt. Saloy has failed to establish a due process violation based on intentional or negligent charging delay.

Due process plays a limited role in protecting against oppressive charging delay. State v. Salavea, 151 Wn.2d 133, 127, 86 P.3d 125 (2004) (citing United States v. Lovasco, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977)). Due process is not offended in the absence of intentional (or possibly negligent) delay by the State in charging a defendant until after he turns eighteen and loses the jurisdiction of the

[14] 130 Wn.2d 553, 925 P.2d 964 (1996).

juvenile court. State v. Dixon, 114 Wn.2d 857, 858-59, 865-66, 792 P.2d 137 (1990).

This Court reviews a due process claim based on preaccusatorial delay *de novo*. State v. Maynard, 183 Wn.2d 253, 259, 351 P.3d 159 (2015). A three-part test applies: 1) the defendant must show that he was actually prejudiced by the delay; 2) if he shows prejudice, the reasons for the delay are considered; and 3) the court weighs the reasons for delay and the prejudice to determine whether the prosecution violates fundamental concepts of justice. Id. (citing State v. Oppelt, 172 Wn.2d 285, 295, 257 P.3d 653 (2011)).

Saloy fails the first prong of the test, and the inquiry should end there. His argument that the automatic decline statute is unconstitutional because it allows certain juveniles to be tried in adult court without an individualized consideration of their circumstances was recently rejected by another division of this Court in State v. Houston-Sconiers, 191 Wn. App. 436, 365 P.3d 177 (2015). This Court should adopt the reasoning of Houston-Sconiers and reject Saloy's constitutional challenge to the automatic decline statute. Because the automatic decline statute mandated that Saloy would have been charged in adult court, he has failed to demonstrate prejudice due to the delay in charging. Salavea, 151 Wn.2d at 131.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." The Washington Constitution prohibits infliction of "cruel punishment." Art. I, § 14; State v. Witherspoon, 180 Wn.2d 875, 887-91, 329 P.3d 888 (2014). The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. Boot, 130 Wn.2d at 569.

RCW 13.40.030, referred to as the "automatic decline" statute, provides that juveniles who are sixteen or seventeen years old at the time they are alleged to have committed a serious violent offense (including first-degree murder and attempted first-degree murder) fall within the exclusive original jurisdiction of the adult criminal court. RCW 13.04.030(1)(e)(v)(A); RCW 9.94A.030(46)(a)(i), (ix). Our state Supreme Court has held that this statute, which confers original adult jurisdiction over certain juveniles, does not violate the Eighth Amendment or a defendant's right to due process. Boot, 130 Wn.2d at 570-72. Boot has not been overruled, and this Court remains bound by it.

Saloy argues that the analysis in Boot is undercut by the United States Supreme Court decisions in Roper v. Simmons,[15] holding that the Eighth Amendment prohibits the imposition of the death penalty on

[15] 542 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

juvenile offenders, Graham v. Florida,[16] holding that the Eighth Amendment forbids the State from imposing a life without parole sentence on a juvenile non-homicide offender, and Miller v. Alabama,[17] which held that the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without parole for juvenile offenders.[18]

However, these decisions concern only the *punishment* imposed by a court, not the *jurisdiction* of the court imposing such punishment. Thus, they do not erode Boot's holding that that the Eighth Amendment is not violated if a youthful offender is tried as an adult. 130 Wn.2d at 570. Moreover, the decisions cited by Saloy together stand for the proposition that the Eighth Amendment prohibits the imposition of the death penalty on juvenile offenders and sentencing schemes that *mandate* life in prison without the possibility of parole. As such, they do not undercut Boot's conclusion that the Eighth Amendment is not violated when a juvenile offender "receives a sentence in adult court extending beyond the offender's twenty first birthday" so long as that sentence is not death or a mandatory sentence of life without parole. 130 Wn.2d at 570.

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[16] 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2011).

[17] __ U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

[18] None of these three cases involved a due process challenge, thus they do not undercut Boot's holding that the automatic decline statute does not violate substantive due process. Houston-Sconiers, 191 Wn. App. at 443.

Thus, in order to successfully challenge the automatic decline statute under the Eighth Amendment, Saloy must demonstrate that this method of asserting jurisdiction is, in and of itself, punishment. Houston-Sconiers, 191 Wn. App. at 443. He has failed to do so. The fact that the adult criminal court takes exclusive original jurisdiction does not mean that improper punishment will be imposed. The adult criminal court is just as capable as its juvenile department of following the mandates of the constitution. Furthermore, the youthful age of the defendant is a possible mitigating factor justifying a sentence below the adult standard range, and the adult court is free to exercise its discretion to impose a mitigated sentence. State v. O'Dell, 183 Wn.2d 680, 696, 358 P.2d 359 (2015).

Because Saloy has failed to demonstrate any prejudice from the charging delay, the inquiry ends. However, in the event this Court considers the State's reasons for the delay, Saloy still fails to establish a due process violation. As outlined extensively above in section C, 1, law enforcement encountered significant difficulty during its investigation. The eyewitnesses were uncooperative, and there was minimal physical evidence.

At the time Saloy turned eighteen years old – April 15, 2010 – the *only* evidence linking him to the shooting was information provided by CW#1 and CW#2. On March 4, 2009, CW#1 told detectives that he had

recently heard Saloy state that Fola had been driving while Saloy shot Coleman. CP 305; Pretrial Ex. 1, at 23. CW#1 had no further details and was not present when the crime occurred. Pretrial Ex. 1, at 23. On September 29, 2009, police arrested CW#2, who told them that he had heard Saloy bragging about shooting Coleman. CP 306-07; Pretrial Ex. 1, at 26. CW#2 admitted that he had initially disbelieved Saloy because Saloy is a "big talker." CP 306-07. CW#2 told police that after he heard Fola admit his involvement, he changed his mind. CP 307. CW#2 stated that Saloy had not gone into great detail about the shooting. Pretrial Ex. 1, at 26. In mid-December of 2009, CW#2 told Detective Duffy that Saloy had recently shown him the location where he claimed to have disposed of the murder weapons in Lake Washington. CP 308; Pretrial Ex. 1, at 27. Detective Duffy called the Harbor Patrol to look for the weapons but they were unsuccessful in locating any firearms at that time. Id.

On January 4, 2010, Detective Duffy applied for and received approval for a wire recording using CW#2. CP 308; Pretrial Ex. 1, at 27. However, CW#2 did not follow through and later told the police he was "not on good terms" with either Fola or Saloy and did not participate further in the investigation. CP 308-9; Pretrial Ex. 1, at 27-28.

That was the sum total of evidence against Saloy at the time he turned eighteen. There was no physical evidence linking him to the crime and no eyewitnesses who identified him. The only information police had was that Saloy had bragged to two of his associates, neither of whom were present during the crime, and one of whom had initially disbelieved him and the other who provided no detail by which to substantiate Saloy's statements. The State could not have charged Saloy based solely on that information, let alone proven the case to a jury beyond a reasonable doubt.

Saloy asks this Court to conclude that his prosecution fundamentally conflicts with the concept of justice because he did not have the opportunity to argue for the retention of juvenile court jurisdiction. However, the delay in charging was due solely to the fact that Saloy committed the murder as part of a criminal gang culture that encourages street retaliation and discourages cooperation with the police, and the fact that Saloy successfully discarded all physical evidence linking him to the crime. The State's decision to delay charging until it had ensured that Saloy was responsible for the murder and amassed sufficient evidence to prove his guilt was appropriate.

3. REVERSAL BASED ON ALLEGED PROSECUTORIAL MISCONDUCT IS UNWARRANTED.

a. The Prosecutor Did Not Suggest That Defense Counsel Had Acted Unethically.

When a defendant claims prosecutorial misconduct, he bears the burden of establishing that the prosecuting attorney's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

Where the defendant objects or moves for a mistrial on the basis of prosecutorial misconduct, to establish prejudice he must show a substantial likelihood that the misconduct affected the jury's verdict. State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). In such a situation, the trial court's ruling is entitled to deference on appeal, as it "is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial." State v. Luvene, 127 Wn.2d 690, 701, 903 P.2d 960 (1995) (quoting State v. Lord, 117 Wn.2d 829, 887, 822 P.2d 177 (1991)). See also State v. Brett, 126 Wn.2d 136, 174, 892 P.2d 29 (1995) (appellate court reviews trial court rulings based on allegations of prosecutorial misconduct for abuse of discretion).

Where the defendant fails to object below, he has waived any argument that the prosecutor's conduct was improper unless the conduct is

so "flagrant and ill-intentioned" that no instruction could have cured the resulting prejudice.[19] Emery, 174 Wn.2d at 761; State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Prosecutorial statements that impugn defense counsel's integrity are improper because they interfere with a defendant's right to counsel and the right to present a defense. State v. Thorgerson,172 Wn.2d 438, 451, 258 P.3d 43 (2011); State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014).

Eyewitnesses Cleden Jimerson and Frank Graves Jr. were both incarcerated at the time of trial, and were transported to the Superior Court for testimony in this case. 7/21/14 RP 110, 125, 157-58. They had been mostly uncooperative with the investigation, and they continued to be unwilling to provide information about the shooting in court. They professed either limited or no memory of the crime. 7/21/14 RP 135-38, 163-64. The prosecutor attempted to "refresh" Jimerson's recollection with his prior statement to police,[20] but he claimed that the statement did

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[19] Saloy flatly ignores the Supreme Court's recent and unambiguous rejection of a constitutional harmless error standard of review in prosecutorial misconduct cases where the State does not make improper argument directly affecting a constitutional right. Emery, 174 Wn.2d at 756-61. The State's questioning of Jimerson and Graves Jr. was not improper argument that directly affected a constitutional right, and is clearly reviewed under the standard requiring Saloy to demonstrate that it was both improper and prejudicial.

[20] Jimerson had told the police that the car from which the shots were fired was a silver-colored Taurus. Ex. 45.

not assist his memory. 7/21/14 RP 138-39. Next, the prosecutor asked him a series of questions about telephone calls he had made to family members and friends, and probed his memory about discussing the case during those calls. 7/21/14 RP 145-46. Jimerson maintained that he had no memory of discussing the shooting with his family or friends:

> Q: Do you recall talking to friends or family members about this case from the Department of Corrections?
>
> A: No, ma'am.
>
> Q. What about around the time that Ms. Gaisford came to talk to you in the Department of Corrections? Do you remember that happening?
>
> A. Yes, ma'am.
>
> Q. And do you remember making telephone calls right after that happened?
>
> A. I don't think it was right after. But, yeah, I called my mom and those guys. I told them that lawyer came and seen me, and I don't want nothing to do with this case.
>
> Q. Okay. Why did you feel that way? Why did you not want anything to do with this case?
>
> A. Because I don't feel the need that I need to be involved with this.
>
> Q. Why is that?
>
> A. Because you guys got other people. I'm an – I'm a waste of you guys' time.

Q. And is that really the real reason that you don't remember what happened?

A. Nah. I really don't remember what happened.

Q. Is that what you told your friends and family you were going to say on the stand?

A. No, ma'am.

Q. Can you help us understand why, when a friend of yours was shot and killed, and another one shot, you would be so uninterested in coming in to testify?

A. What's the point of me testifying? I ain't got nothing to say. I don't remember what happened. I don't know. There's – it's a waste of you guys' time, and it's a waste of my time.

7/21/14 RP 146-48. Saloy did not object to this testimony. Later, on cross-examination, Saloy clarified that Jimerson had refused to be interviewed by Saloy's attorney when she attempted to speak with him in prison, telling her he wanted nothing to do with the case. 7/21/14 RP 150.

Graves Jr.'s unwillingness to cooperate was even more apparent during his testimony. He refused to be sworn and denied knowing anybody involved in the case. 7/21/14 RP 155, 159-60. When confronted with his prior statement to law enforcement, he denied remembering its substance. 7/21/14 RP 163-64. When his recorded statement was played in court, he denied recognizing either his own voice or his father's voice:

Q. And, for the record, I just played the first 31 seconds of what's been marked for identification as

State's Exhibit 39. Do you recognize your voice there, sir?

A. Nope.

Q. You don't recognize your own voice?

A. Nope.

Q. Are you saying that's not you?

A. Yep.

Q. And what about your dad's voice? Do you recognize your dad's voice?

A. Nope.

Q. Sir, do you remember talking to Ms. Gaisford, who is standing to the left of me, and another man, Mr. Edgeman, back in – on March 27th of 2013?

A. Yep, she came to see me at Stafford Creek.

Q. And do you remember telling her about coming to see the police and giving a statement?

A. Nope. I remember telling her I don't recollect this incident.

Q. Do you remember telling her that you were present when this happened?

A. I don't think so.

7/21/14 RP 166-67. Saloy did not object to these questions either.

Fourteen days later, and after the State rested its case, Saloy moved for a mistrial based on the prosecutor's questioning of Jimerson

and Graves Jr. 8/4/14 RP 9-14. Saloy characterized the prosecutor's question to both witnesses as, "Did defense counsel visit you in prison?" and argued that the only logical inference was that counsel had acted improperly and had influenced the witnesses not to cooperate. Id. Saloy asked the court to declare a mistrial, or in the alternative to instruct the jury that counsel had a duty to investigate the case and interview the witnesses, and had done nothing wrong. 8/4/14 RP 15.

The court denied Saloy's motion for a mistrial, stating that it had a hard time believing that the jury would have drawn a negative inference about counsel from the questioning. 8/4/14 RP 19. The court reserved ruling on the issue of striking the testimony or providing an instruction until the parties could obtain a transcript to determine exactly what the questioning had been. 8/4/14 RP 19-20. Later, after the parties received a transcript of the testimony, the State argued that its questions were proper and should not be stricken. 8/5/14 RP 6-7. The court agreed that there was no error, no prejudice, and refused to strike the questions or instruct the jury to disregard the testimony. 8/5/14 RP 9-10.

Saloy did not raise a timely objection to the questioning of either witness. See State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006) (citing State v. Jones, 70 Wn.2d 591, 597, 424 P.2d 665 (1967)) ("To be timely, the party must make the objection at the earliest possible

opportunity after the basis for the objection becomes apparent.") As such, he must demonstrate that the questioning was so "flagrant and ill-intentioned" that no instruction could have cured the resulting prejudice. Fisher, 165 Wn.2d at 747.

The questioning was neither improper nor prejudicial in the context of the entire record and circumstances at trial. Jimerson denied remembering anything about the shooting and denied remembering making a statement to the police. The prosecutor's questions were meant to demonstrate that the true reason for his claimed lack of memory was the fact that he did not want anything to do with the case. The prosecutor's questions elicited the fact that once Jimerson learned about the prosecution (as evidenced by defense counsel's visit to prison) he had called and told his family and friends he wanted nothing to do with the case, which supported the State's argument that his memory loss was not sincere. The questioning in no way implied that defense counsel was to blame for his lack of cooperation. With respect to Graves Jr., by asking if he recalled admitting to the defense attorney that he had earlier spoken with the police, the prosecutor was merely impeaching his unbelievable claim that he was not present at the shooting and had not provided a statement to the police.

The State's questions were not improper and did not "evince[] an enduring and resulting prejudice" incapable of being cured by an instruction. Fisher, 165 Wn.2d at 747 (internal citations omitted).

Moreover, even if this Court applies the lower standard applicable when a defendant timely objects, prejudice is shown only when there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). And in such a case, this Court gives deference to the trial court's ruling because of its superior position to effectively determine whether the defendant's right to a fair trial was prejudiced. Luvene, 127 Wn.2d at 701. Saloy has failed to establish how the questions created a substantial likelihood that the verdict was affected. The trial court properly exercised its discretion when it concluded that the State did not impugn defense counsel and denied Saloy's motion for a mistrial.

b. The State's Remark During Closing Argument Does Not Warrant Reversal.

The Fifth Amendment bars the prosecution from commenting on a defendant's failure to testify. Griffin v. California, 380 U.S. 609, 609-15, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). In order to assess whether a prosecutorial statement impermissibly comments on the defendant's silence, this Court must consider "whether the prosecutor manifestly

intended the remarks to be a comment" on the defendant's exercise of his right not to testify and whether the jury would "naturally and necessarily" interpret the statement as such. State v. Barry, 183 Wn.2d 297, 306-07, 352 P.3d 161 (2015) (internal quotations and citations omitted). The prosecutor's remark must be considered "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561.

During her closing argument, the deputy prosecutor discussed at length Saloy's statements to Sanchez and played several portions of the wire recording for the jury. She talked extensively about the details that Saloy provided about the crimes and asked the jury to consider how those details matched the physical evidence in the case. 8/6/14 RP 57-64. She asked the jury to listen to the wire recording during deliberations and to focus on "the details which [Saloy] provides in the wire confession that a person couldn't just make out of whole cloth[;] his discussion about the incident is not vague enough to be taking credit for someone else's crimes. Nor is it inconsistent enough to be simple puffery or lying." 8/6/14 RP 58.

During this portion of her argument, the prosecutor spoke about Saloy's statements that during the crime he had a .40 caliber handgun and Fola had a .38 revolver. She mentioned how Saloy told Sanchez that he switched guns with Fola because he wanted to "lay someone out." She

mentioned how Saloy told Sanchez that they wouldn't find any shell casings from the .38 because it was a revolver, but how he thought the police may have found one or two from the .40 caliber handgun Fola used. 8/6/14 RP 60-63. The prosecutor then asked the jury to compare these details – that came from Saloy's mouth – to the ballistics evidence in the case:

> Again, from the ballistics we know that there were a minimum of two guns. Right? That's corroborated by what Mr. Jimerson recalls there being two guns fired. We know that .38 class bullets were recovered from Mr. Coleman's body. Two of them. They weren't matched conclusively to the same gun. So it's possible that there was a third gun there. We can't say that one way or the other. *And since no one except for the defendant can conclusively say or has conclusively said how many people were in the car it isn't a possibility that can necessarily be ruled out.* But again that's not something that you have to decide beyond a reasonable doubt. There are three people in the car shooting, all shooting at these young men at the top of the stairs, then [sic] we have got three principals, and three accomplices. And again it doesn't matter whose bullet struck whom. If they were shooting or they were acting as accomplices, they are equally accountable for these particular crimes.

8/6/14 RP 63-64 (emphasis added).

It is improper for a prosecutor to argue that the defendant is the only person who can refute the State's evidence. State v. Ashby, 77 Wn.2d 33, 37, 459 P.2d 403 (1969). However, viewed in proper context that was not the State's argument here. The remark was made in the

context of asking the jury to consider the defendant's detailed statements to Sanchez and compare them to the physical evidence of how many guns were used. While the prosecutor did say, "no one except the defendant can conclusively say," she immediately corrected herself and finished her sentence with, "or has conclusively said how many people were in the car."[21] The prosecutor immediately continued talking about Saloy's past statements to Sanchez and to witness Domino Smith regarding the weapons involved. 8/6/14 RP 64.

In response to Saloy's motion for a mistrial, the other prosecutor, who had been listening from counsel table, noted that the remark was clearly made in reference to Saloy's recorded statements – which were the focus of the prosecutor's argument at the time. 8/6/14 RP 75. The State pointed out that there was not a significant pause; instead, the prosecutor immediately changed her wording to reflect that she was referring to what Saloy had said in the past. Id. The trial court agreed with the State that the context of the remark made clear that the comment referenced Saloy's past statements. Id. The trial court was in the best position to determine

[21] Saloy argues that the prosecutor did not correct herself, but rather stated two different things in the alternative, and that the second part of her sentence did not negate the first. Brf. of App. at 39. However, "or" is also a common word used to correct a misstatement, clarify one's meaning, and shift course during a conversation. When reading the words on paper, both interpretations are undoubtedly possible. This is precisely why this Court often defers to the trial court on the effect of allegedly improper comment; the court is able to hear the speakers tone, observe their body language, and best determine how the remark was intended and received.

how the jury would have understood the remark, and it concluded that a mistrial was unwarranted. 8/6/14 RP 75. Given the total argument, the issues in the case, and the evidence addressed in the argument, the prosecutor's remark was clearly not intended to be a comment on Saloy's rights, and the jury would not have naturally and necessarily interpreted the statement as such. It was not improper.

Even assuming the remark was improper, reversal is unwarranted. Although Saloy contends that the remark was a presumptively prejudicial "constitutional error" that the State must prove harmless beyond a reasonable doubt, he is mistaken. "Generally, improper prosecution argument, even when indirectly touching upon a constitutional right, is tested by whether the prosecution argument is so flagrant and ill-intentioned as to create incurable prejudice." State v. French, 101 Wn. App. 380, 385-86, 4 P.3d 857 (2000) (citing State v. Belgarde, 110 Wn.2d 504, 507–08, 755 P.2d 174 (1988). See also State v. Klok, 99 Wn. App. 81, 84, 992 P.2d 1039 (2000) (quoting Belgarde, 110 Wn.2d at 507)) ("improper prosecutorial remarks can be described as 'touching on' a constitutional right, and still be curable by a proper instruction.")). Only when the prosecutor directly comments on a defendant's failure to testify does it violate the Fifth Amendment and becomes subject to the stricter

standard of constitutional harmless error. Emery, 174 Wn.2d at 757 (citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)).

Therefore, when an improper prosecutorial remark only touches upon a constitutional right rather than directly commenting on it, a timely objection is required to provide the trial court the opportunity to minimize the improper comment by striking it and giving a curative instruction to the jury. French, 101 Wn. App. at 387. In such an instance, the improper comment does not require reversal unless it is so flagrant and ill-intentioned that it created incurable prejudice. Klok, 99 Wn. App. at 84.

At most, the remark at issue here only touched upon a constitutional right. It was not a direct comment on Saloy's decision not to testify, nor did it invite the jury to draw any inference from the fact that he did not. Saloy did not object at the time the remark was made and only raised the issue after the State's argument was over.[22] 8/6/14 RP 74. Saloy has not demonstrated that the remark was so flagrant and ill-intentioned to be incurable by an instruction, and his conviction must stand.

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[22] Indeed, Saloy argues that he "decided not to risk exacerbating the prejudice" by waiting until after the State's argument to object, rather than at the time the remark was made. Brf. of App. at 39. Saloy's concession that this was a tactical decision to avoid drawing the jury's attention to the argument simply lends more weight to the conclusion that – at most – the remark merely "touched upon" his right not to testify rather than directly commented on it.

Saloy cites Lindsay, supra, in support of his argument that he was not required to object at the time the remark was made. He reads too much into that case. There, at the close of the State's argument, Lindsay moved for a mistrial, arguing that the prosecutor's repeated improper remarks, made on numerous occasions throughout argument, warranted a mistrial. 180 Wn.2d at 441. In holding that the issue had been sufficiently preserved to warrant review under the ordinary prejudice standard, the court stated that waiting until the conclusion of the argument to lodge an objection to the language and overall tenor of the prosecutor's argument was "an acceptable mechanism by which to preserve challenges to prosecutorial conduct in a closing argument in lieu of repeated interruptions to the closing arguments." Lindsay, 180 Wn.2d at 441 (quoting United States v. Prantil, 764 F.2d 548, 555, n.4 (9th Cir. 1985)). Unlike the objectionable "overall tenor" of the argument in Lindsay, the misconduct alleged here was an isolated remark, and would not have necessitated repeated interruptions. Saloy was required to object at the time the remark was made.

Moreover, even if Saloy is correct that his late objection preserved the issue, because the improper comment at most merely touched upon a constitutional right, he must still demonstrate prejudice under the ordinary

standard – that there is a substantial likelihood the misconduct affected the jury's verdict. Brown, 132 Wn.2d at 561.

Saloy cannot meet that standard in this case. Eyewitness Gary Thomas identified Fola as the driver of the vehicle. 7/22/14 RP 31. The shooting occurred at approximately 8:20 p.m. 7/17/14 RP 22. Saloy told the police that he had been with Fola earlier in the evening at his friend Kenneth Woods' house, but claimed to have gone home around 7:00 p.m. 7/29/14 RP 28-30. However, Woods' mother testified that Saloy and Fola were at her house earlier in the evening, and she stated that she went to lie down and did not know who came and went until after 9:30 p.m., when she got up. 7/29/14 RP 142-43. Woods' mother also testified that Saloy and Fola were at her house during the late news that night. 7/29/14 RP 144. Saloy told Sanchez that he and Fola had left Woods' house, committed the murder, and then watched the news that night afterwards. Ex. 51, at 4-7. After the murder, Saloy engaged in an internet message conversation with victim Demario Clark where he referenced the crime in an inculpatory fashion. Ex. 99. Saloy's confession to Sanchez was recorded for the jury to hear and contained many details that were consistent with the other evidence in the case. Ex. 49, 51. Witness Domino Smith told the jury that Saloy had confessed the murder to him. 7/24/14 RP 38-47.

There is no chance the prosecutor's isolated remark influenced the verdict. The trial court gave tenable reasons for denying the mistrial motion and did not err.

4. SALOY HAS FAILED TO ESTABLISH THAT REVERSAL IS WARRANTED BASED ON THE TRIAL COURT'S EVIDENTIARY RULINGS.

a. Relevant Legal Standard.

The decision to admit evidence lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Athan, 160 Wn.2d 354, 382, 158 P.3d 27 (2007). To constitute an abuse of discretion, a trial court's decision must be manifestly unreasonable or based on untenable grounds or for untenable reasons. Id. While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, Saloy must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). He has not met this burden.

b. The Court Properly Admitted Photos, Writings, And A Video Of Saloy That Were Highly Probative Of His Motivation And Highly Probative Evidence Of The Aggravating Factor.

Saloy argues that the probative value of exhibit 98 (photos and writings) and exhibit 78 (a video of Saloy) was limited, and that it outweighed the danger of unfair prejudice. He has failed to establish that no reasonable judge would have admitted the evidence, and his argument must be rejected.

Exhibit 98 includes a group of 37 photographs that Detective Hughey collected from Saloy's MySpace website. Ex. 98, at 2-39; 7/31/14 RP 133-39. The State had culled the collected photographs from hundreds down to 37. 7/31/14 RP 107, 135. The photographs included depictions of Saloy standing next to gang graffiti, street signs reflecting the name of South End gangs, pictures of Saloy with friends flashing gang signs, memorial pictures and words in honor of Saloy's murdered fellow gang members (especially Pierre "Pete Da Sneak" LaPointe), photos of Saloy flashing derogatory signs about CD gangs, and captions that Saloy had given the photographs demonstrating his gang loyalty and sadness about his murdered friends. Ex. 98, at 2-39; 7/31/14 RP 136-37. The exhibit also included copies of handwritten musings, or rap lyrics, collected from Saloy's personal belongings. Ex. 98, at 40-50; 7/31/14 RP

138. Finally, the exhibit contained 11 photographs of Saloy's tattoos, taken by Detective Hughey. Ex. 98, at 51-61; 7/31/14 RP 138, 165-68.

Exhibit 78 is an approximately 25-second video that Detective Hughey collected from Saloy's MySpace page, depicting Saloy in front of the computer talking to the camera. The video was played for the jury, but no transcript was provided. 7/31/14 RP 169-70. In the video, Saloy discusses his loyalty to the South End, expresses his hatred of the CD, refers to his murdered friend LaPointe, calls out and mocks Demario Clark and other CD gang members, and threatens to shoot them. Ex. 78.

Prior to its introduction, the court provided a limiting instruction to the jury on the proper use and consideration of the evidence. 7/31/14 RP 114-14.

The trial court properly admitted all of the evidence because it was highly probative of Saloy's motivation to commit the crime and also highly relevant evidence of the gang aggravator. Saloy was angered and deeply saddened by the shooting death of his friend LaPointe, which he attributed to a rival gang from the CD. Ex. 51, at 4; 7/28/14 RP 26-27, 44. See 6/6/14 RP 173, 176. The photographs, captions, tattoos, and lyrics demonstrated the depth of Saloy's loyalty to his gang and the resentment he felt toward his rivals, thus providing crucial evidence of his motivation

to shoot at a group of people he believed to be rival gang members – an act that might not otherwise make sense to the average juror.

The evidence was also highly relevant to Saloy's membership in the gang, and provided insight into how the shooting benefited the reputation of the gang.[23] See 5/28/14 RP 93 (court concluded that photographs of Saloy's tattoos were highly probative of his gang membership, required to prove the aggravator); 7/31/14 RP 140-71 (Detective Hughey, a gang expert, testified regarding the meaning and significance of the evidence).

Saloy argues that the probative value of the evidence was diminished because "Detective Hughey's testimony provided [evidence of Saloy's motive and intent] without the emotionally-charged images contained in exhibit 98." Brf. of App. at 44. But the trial court specifically *prohibited* Detective Hughey from testifying as to Saloy's state of mind or speculating as to Saloy's specific motivation. See 5/27/14 RP 114; 6/6/14 177-81; 7/17/14 RP 97-99; 7/31/14 RP 10. Adopting Saloy's argument would have the effect of allowing the State to present evidence about motive in general but prohibit it from linking that specific motivation to the defendant. Such cannot be the state of the law.

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[23] Saloy contends that his membership in the gang was not contested and the evidence was therefore of minimal probative value. But Saloy did not testify or stipulate to the gang aggravator, and thus, the State was obligated to prove its case regardless of whether the defense "contested" it.

Saloy argues that the probative value of the "Casper Monologue" video was outweighed by the danger of unfair prejudice because it merely provided cumulative evidence that Saloy was a member of a South End gang and served only to elicit an emotional reaction from jurors. The trial court rejected that argument below, finding it highly relevant and its prejudicial nature minimal. 6/6/14 RP 182-86; 7/30/14 RP 4-12. In the video, the defendant is wearing a t-shirt in honor of LaPointe, he disrespects CD gang members, including Demario Clark, and threatens to shoot them. Ex. 78. As the State pointed out, "[T]here is no better evidence of what was in the defendant's head than this video that he made and the words coming out of his mouth that specifically deal with his pain and memory regarding Pierre LaPointe, and his hatred towards the Central District ...." 7/30/14 RP 10. The court's reasons for admitting the video were tenable and not an abuse of discretion.

In sum, the probative value of exhibits 98 and 78 significantly outweighed the danger of *unfair* prejudice to Saloy, and the trial court properly exercised its discretion to admit them.

c. The Court Properly Admitted Evidence That Saloy Urinated Near The Stairs Where Coleman Died.

During the wire recording, Sanchez drove Saloy to the scene of the shooting. 7/28/14 RP 62. They got out and smoked a cigarette, at which

time Saloy urinated near or on the stairs where Coleman died.[24] 7/28/14 RP 62, 81. Saloy pointed out where Coleman had fallen, how Clark had screamed and ran, how Saloy had a "green flag," and whether Fola and Ezell were "snitching." Ex. 48, 49; 7/28/14 RP 62-63. The recording of this conversation was played for the jury. 7/328/14 RP 73-80. The prosecutor paused the recording several times to ask Sanchez questions about what they were hearing, and asked him to describe Saloy's statements and to point out where Saloy had said events occurred. Id.

Saloy objected to the evidence that he had urinated on the location of the shooting,[25] arguing that the danger of unfair prejudice outweighed the probative value. 6/6/14 RP 150-51. The State responded that the act occurred while Saloy and Sanchez were discussing the details of the crime, and that it showed disrespect for the death of a rival gang member; thus the probative value of the evidence was high. 6/6/14 RP 152. The court determined that the evidence was clearly probative and engaged in an ER 403 analysis to determine whether the danger of unfair prejudice outweighed the probative value, concluding:

> I think, given the context of what's alleged here, it's [sic] probative value outweighs it's [sic] prejudicial effect and

[24] The video does not visually depict this event occurring. Ex. 48.

[25] Although there was reference to a "memorial" in the argument of the parties, the testimony was that Saloy urinated near the stairs; there was no testimony regarding a "memorial." 7/28/14 RP 62, 81.

> I'm going to allow it. And when I say that, it's the whole context of what's happening there, and all the facts that are given within it when you're listening to the tape. It adds to the description of what's happening. I think it would frankly be, if you're going to allow this portion of the tape, which has further description, it wouldn't be that easy to redact it anyway 'cause they're talking about it. But I frankly don't think it's that prejudicial or emotional. It is somewhat prejudicial, but I don't think it's unduly prejudicial. So I'm going to allow it.

6/6/14 RP 154.

Saloy speculates about the effect of the evidence on Detective Duffy and conjures images of United States Marines urinating on the bodies of dead Afghani citizens. But no images of Saloy urinating were displayed to the jury, it was unclear exactly where Saloy urinated, and there was no evidence that a memorial had been "erected" in honor of Coleman or that Saloy urinated near or on one.

While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). To prevail on appeal, Saloy must prove that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982). He has not met this burden. The evidence was highly probative for the reasons stated by the trial court, and the trial court's determination that any prejudice was minimal was tenable.

d. Error, If Any, Was Harmless, And Saloy Was Not Deprived Of A Fair Trial Based On The Cumulative Effect Of The Court's Evidentiary Decisions.

Saloy does not challenge the relevance of Detective Hughey's expert testimony on gangs. He complains only that probative value of visual and audible depictions of gang evidence was unfairly prejudicial. In the unlikely event that this Court determines that the court abused its discretion by admitting the complained-of evidence, overwhelming untainted evidence of Saloy's guilt was presented to the jury and any error was harmless.

The trial court's decisions to admit exhibits 78, 98, and the fact that Saloy urinated near the stairs where Coleman died, do not individually or collectively warrant reversal. Individual evidentiary error is grounds for reversal only if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). The improper admission of evidence constitutes harmless error when the evidence is of minor significance in reference to the evidence as a whole. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

As outlined above in Sec. 3, b, Saloy confessed to two different individuals who testified at trial. His recorded statements to Sanchez contained numerous details that were corroborated by the physical

evidence and included details that Saloy would have had no reason to include if he was fabricating his involvement (for example, the fact that he switched guns with Fola). See 8/6/14 RP 59-60. After the murder, Saloy engaged in an internet messaging exchange with victim Demario Clark, in which he made numerous inculpatory statements. Ex. 99. Untainted evidence overwhelmingly supported his conviction.

Saloy also argues that if each of the court's evidentiary decisions was not erroneous individually, the cumulative effect of the court's error deprived him of a fair trial. To seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors and show that accumulated prejudice affected the verdict. The doctrine does not apply to cases where the defendant has failed to establish multiple errors or where the errors that have occurred have "had little or no effect on the outcome at trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

For all of the reasons stated above, there was no error, and if there was, there is no chance that it deprived Saloy of a fair trial given the overwhelming evidence of Saloy's guilt.

5. SALOY'S SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT.

In her presentence report to the court, Saloy's counsel noted that Saloy was just sixteen years old at the time he committed the offense, and she informed the court of the significant difficulties and issues Saloy had confronted in his life prior to the homicide, including abuse, neglect, prior encounters with the juvenile justice system, and mental health issues. Supp. CP __ (Sub. No. 237, Sentence Recommendation/Def, filed May 5, 2016). Based on this information and the consecutive nature of the crimes, Saloy requested that the court impose a sentence at the very low end of the standard range. Id.; 9/10/14 RP 237-39. Saloy also spoke at sentencing and denied killing Coleman:

> You know, first of all I'm going to say I ain't guilty of nothing. I didn't commit this crime. There was no proof that I committed this crime. This lady lied in so much of her evidence that it's just unbelievable how this Court found me guilty of anything. And you guys sit here and act like I'm a bad guy. There's no proof that I'm a bad guy. I'm a good dude. Nobody knows me. My community knows me. The south Seattle community knows me. I've been a good dude my whole life. And it's just crazy how you guys go and do this.

9/10/14 RP 240.

After expressing frustration at the "terrible decisions" and choices that all of the "kids" involved in the case faced, Judge Cahan addressed Saloy:

> With respect to the Defendant, I've got to say I see absolutely no remorse. The fact that there were crimes, serious crimes committed after, and all the writings that were presented, it's so cemented in your brain that this is the life for you. It's disturbing. I don't think a low end is appropriate. Given the fact that the Defendant was 16 when this occurred, and the fact that Ms. Gaisford, I think, has a point, that it was amended to change it to Attempted Murder and we have a deadly weapon, so I don't think a high end is appropriate. So I'm giving a mid-range sentence. Frankly I only have so much discretion in this case, truth be told, because the deadly weapon enhancements, of course, are required. And I'm totally comfortable imposing this sentence. I don't have hesitation. It's a long time in prison, but I frankly think if you were out, there'd be other crimes committed. So I'm comfortable imposing a mid-range sentence.

9/10/14 RP 242-43.

On appeal, Saloy contends that his standard-range sentence of 712 months is the equivalent of the mandatory life without parole sentence that the Supreme Court has proscribed as violative of the Eighth Amendment when imposed on juvenile offenders. This is incorrect. The Eighth Amendment applies to an individual sentence, not to a sentence like Saloy's, under which he is punished for two separate convictions for shooting two different persons. Moreover, under the current version of the Sentencing Reform Act, Saloy's sentence includes an opportunity for release after he has served 20 years. Finally, the court did consider Saloy's youth and background in connection with the circumstances of the

offense before deciding an appropriate sentence. His sentence is not unconstitutional.

As a preliminary matter, the rule announced in Miller v. Alabama, supra, does not apply to Saloy's sentence. Miller held that a mandatory sentence of life without parole for one who was under the age of eighteen at the time of the crime violates the Eighth Amendment's prohibition on cruel and unusual punishment. 132 S. Ct. at 2460. Saloy's sentence of 712 months, the result of two separate standard-range sentences for shooting two persons and killing one of them, is admittedly (and justifiably) lengthy, but it is not a sentence of life without possibility of parole ("LWOP").

The fact that Saloy is not serving a single lengthy sentence for a single conviction, but two separate sentences for two separate convictions for crimes against two different victims, is relevant to the Eighth Amendment analysis. The Eighth Amendment applies to each individual sentence, not to the cumulative result of consecutive sentences for wholly separate crimes. See Lockyer v. Andrade, 538 U.S. 63, 74 n.1, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (rejecting, in the context of federal habeas review, dissent's argument that two consecutive sentences of 25 years to life for two separate crimes were equivalent, for Eighth Amendment purposes, to a single sentence of life without parole for a 37-year-old

defendant); Pearson v. Ramos, 237 F.3d 881, 886 (7th Cir. 2001) (sentences are treated separately, not cumulatively, for Eighth Amendment purposes); United States v. Aiello, 864 F.2d 257, 265 (2nd Cir. 1988) ("Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence."); People v. Gay, 960 N.E.2d 1272, 1279 (Ill. App. 2011) ("The eighth amendment allows the State to punish a criminal for each crime he commits, regardless of the number of convictions or the duration of sentences he has already accrued.").

This rule has been applied more recently by some courts specifically to claims that consecutive terms imposed upon a defendant for crimes committed as a juvenile violate the Eighth Amendment. See State v. Ramos, 189 Wn. App. 431, 458-59, 357 P.3d 680 (2015) review granted, 367 P.3d 1083 (2016) (defendant failed to demonstrate Eighth Amendment concern with his four separate consecutive standard-range sentences for four separate victims); State v. Kasic, 228 Ariz. 228, 265 P.3d 410 (2011) (finding that cumulative sentence of 139.75 years for juvenile non-homicide offender, based on consecutive term-of-years sentences for multiple crimes with multiple victims, did not violate Eighth Amendment); Walle v. State, 99 So.3d 967 (Fla. Dist. Ct. App. 2012) (consecutive sentences of 65 years for 18 offenses, consecutive to 27-year

sentence in separate case, did not violate Eighth Amendment when imposed on juvenile non-homicide offender); Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012) (denying habeas relief under Eighth Amendment to juvenile non-homicide offender who received separate consecutive sentences totaling 89 years for separate crimes against the same victim).

While Saloy's consecutive sentences amount to a lengthy term of years, he was not sentenced to LWOP, the sentence that Miller specifically prohibits. Under the analysis set out above, Saloy's consecutive sentences for separate crimes against separate victims do not violate the Eighth Amendment.

In any event, even if one accepts the argument that a lengthy cumulative term of years for separate crimes should be treated as LWOP for purposes of the Miller rule, Saloy's sentence under the current SRA does not run afoul of Miller. After serving 20 years of his current sentence, Saloy may petition for release. RCW 9.94A.730(1). The Indeterminate Sentence Review Board "*shall*" order his release unless it determines by a preponderance of evidence that he is likely to commit new criminal violations despite conditions that may be imposed. RCW 9.94A.730(3). Thus, Saloy's sentence includes the "meaningful opportunity for release" that the Eighth Amendment requires in the case of juvenile offenders. See Miller, at 2469 (quoting Graham v. Florida, 560

U.S. 48, 75, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010)) ("'A State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'").

Saloy does not even refer to this statute, instead asserting that "he will not be eligible for release until somewhere around his 80th birthday." Brf. of App. at 54. However, Saloy's sentence necessarily encompasses all provisions of the SRA that apply, including RCW 9.94A.730. Therefore, Saloy's sentence was constitutional *at the time it was imposed*, because it includes a meaningful opportunity for release. See In re Personal Restraint of McNeil, 181 Wn.2d 582, 334 P.3d 548 (2014) (dismissing petitions under RAP 16.4(d) because the "Miller fix" legislation provides an adequate alternative remedy, in that it provides possibility of release during petitioners' lifetimes).

And although Saloy argues that State v. Ronquillo, 190 Wn. App. 765, 361 P.3d 779 (2015) requires that he be resentenced, recently, in Montgomery v. Louisiana, the United States Supreme Court held that when a life sentence has been imposed on a juvenile in violation of the rule set forth in Miller, "a State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." __ U.S. __, 136 S. Ct. 718, 736, 193 L. Ed.

2d 599 (2016). Thus, because Saloy will be eligible for release pursuant to RCW 9.94A.730, any arguable Miller violation has been remedied by that procedure, and Ronquillo's determination that RCW 9.94A.730 does not correct a Miller error has been overruled by Montgomery v. Louisiana.

Saloy's reliance on People v. Gutierrez, 58 Cal. 4th 1354, 324 P.3d 245, 171 Cal. Rptr. 3d 421 (2014) is misplaced. California's sentencing statute for juveniles 16 or 17 years old who committed murder with "special circumstances" carried a presumption in favor of LWOP. 324 P.3d at 249. California's "Miller fix" statute did not eliminate that presumption, even upon resentencing. Id. at 265-66. By contrast, RCW 9.94A.730(3) carries a presumption of release after 20 years. Saloy's sentence is constitutional.

In short, Saloy's claim fails because it is premised on the assumption that he has been sentenced to a lifetime in prison *without* possibility of release. The provisions of RCW 9.94A.730, which mandate a presumption of release after 20 years, represent a legislative judgment that comports with both the federal and state constitutions. This Court should not disturb this balance. See State v. Campbell, 103 Wn.2d 1, 34-35, 691 P.2d 929 (1984) (rejecting facial challenge to death penalty on grounds that community values are best determined through legislative acts).

Finally, the factual premise of Saloy's argument, that the sentencing judge did not consider whether his youth diminished his culpability, is wrong. The trial court considered evidence of Saloy's age at the time of the offense, his troubled upbringing, and how those factors affected his culpability for the crime. Supp. CP __ (Sub. No. 237, Sentence Recommendation/Def, filed May 5, 2016). Despite that mitigating information, Judge Cahan still believed that the gang lifestyle was "so cemented in [Saloy's] brain that this is the life for [him]." 9/10/14 RP 242. She concluded that given Saloy's age at the time of the crime, a high-end sentence was inappropriate, but she felt "totally comfortable" imposing a mid-range sentence. 9/10/14 RP 242-43. It is therefore apparent that the trial court *did* consider whether Saloy's youth and background diminished his culpability, and what effect, if any, that should have on his sentence. Resentencing is unnecessary.

6. THE TRIAL COURT PROPERLY IMPOSED $600 IN LEGAL FINANCIAL OBLIGATIONS.

When any defendant is convicted of a felony, the trial court is required by law to impose a $100 DNA fee and a $500 Victim Penalty Assessment (VPA). RCW 43.43.7541; RCW 7.68.035. The trial court complied with these statutory requirements by imposing these mandatory legal financial obligations (LFOs) in Saloy's judgment and sentence, and

Saloy did not object. CP 688; 9/10/14 RP 246. For the first time on appeal, Saloy contends the statutes mandating imposition of the VPA and DNA fee are unconstitutional as applied to indigent defendants. He also alleges that the trial court was required to consider whether he had the present or future ability to pay before imposing the mandatory LFOs at issue. Because Saloy's claims are both unpreserved and unripe for review, this Court should decline to consider them. If this Court does reach the merits, it should reject Saloy's claims because he fails to establish that the statutes at issue are unconstitutional beyond a reasonable doubt. Additionally, his argument that the court was required to consider whether he had the present or future ability to pay LFOs must also be rejected because the court imposed only mandatory fees, for which no such consideration is required.[26]

[26] Saloy asks the court to remand with instructions to "strike" the legal financial obligations based solely on the fact that the sentencing court "noted his indigence." Brf. of App. at 63. Should this Court agree with Saloy that the sentencing court was required to consider his present and future ability to pay mandatory LFOs, the appropriate remedy would be remand for the required consideration, not to strike the obligation altogether. Saloy presents no support for the notion that he will never be able to pay anything toward his $600 obligation.

a. The Court Should Not Reach The Merits Of Saloy's Constitutional Claim Because It Is Not Ripe For Review.

Assuming that Saloy has standing to bring a constitutional challenge,[27] this Court should refuse to reach the merits because the issue is not ripe for review. Generally, "challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them." State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013). It is only when the State attempts to collect or impose punishment against an indigent person for failure to pay that constitutional principles are implicated. State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992).

[27] Generally, a person may challenge the constitutionality of a statute only if he is harmed by the provisions claimed to be unconstitutional. State v. Cates, 183 Wn.2d 531, 540, 354 P.3d 832 (2015). In the context of due process challenges based on legal financial obligations assessed against indigent individuals, a person must demonstrate "constitutional indigence" based on "the totality of the defendant's financial circumstances" to establish standing. State v. Johnson, 179 Wn.2d 534, 553, 555, 315 P.3d 1090 (2014). Here, Saloy supports his claim of indigency solely by citing to the sentencing court's pronouncement that "based on the defendant's indigency" it would waive all non-mandatory fines, fees and costs. 9/10/14 RP 246. It is not clear what the sentencing court based its statement on. Assuming the court was referring to an order appointing counsel at public expense, this establishes, at most, statutory, not constitutional, indigence. Johnson, 179 Wn.2d at 555. See also Curry, 118 Wn.2d at 915 n.2 (noting the difference in scale between costs of obtaining appellate counsel and the court costs at issue there and observing, "It is certainly within the trial court's purview to find that the defendants could not presently afford counsel but would be able to pay the minimal court costs at some future date."). Although Saloy received a lengthy prison sentence, which is relevant to a determination of ability to pay, it does not convey the "totality of the defendant's financial circumstances" as required to establish standing under Johnson. Because the relevant "constitutional considerations protect only the constitutionally indigent," Saloy has demonstrated no injury in fact and therefore lacks standing. Id.

Our supreme court adhered to this position in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), when it held that an inquiry into defendant's ability to pay is not constitutionally required before imposing a repayment obligation in a judgment and sentence, as long as the court must determine whether the defendant is able to pay before sanctions are sought for nonpayment. Id. at 239-42. The point of enforced collection or sanctions for nonpayment is the appropriate time to discern the individual's ability to pay because before that point, "it is nearly impossible to predict ability to pay[.]" Id. at 242. "If at that time defendant is unable to pay through no fault of his own, ... constitutional principles are implicated." Id. at 242.

Where nothing in the record reflects that the State has attempted to collect the VPA or DNA fee, any challenge to the order requiring payment on hardship grounds is not yet ripe for review. Lundy, 176 Wn. App. at 109. That is so in this case. Because the issue is unripe, this Court should decline to reach its merits.

b. The Alleged Errors Are Not Manifest Constitutional Errors And Should Not Be Reviewed Under RAP 2.5.

Saloy did not object to the imposition of the VPA and DNA fee at sentencing. 9/10/14 RP 246. Accordingly, RAP 2.5(a) bars consideration of his claims.

A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant's rights. McFarland, 127 Wn.2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, Saloy's constitutional claims depend on his present and future inability to pay the mandatory VPA and DNA fee. Saloy's failure to object to imposition of the DNA fee deprived the trial court of the opportunity to make a record as to his likely future ability to pay. Since there is no evidence that Saloy is constitutionally indigent, any error cannot be manifest within the meaning of RAP 2.5(a).

In State v. Blazina, our supreme court recognized that "[a] defendant who makes no objection to the imposition of discretionary [legal financial obligations (LFOs)] at sentencing is not automatically entitled to review." 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where defendants fail to object to the LFOs at sentencing, it is appropriate for appellate courts to decline review. Id. at 834. See also State v. Clark, 191 Wn. App. 369, 373, 362 P.3d 309 (2015) (recognizing Blazina's

pronouncement that "the LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity" and exercising discretion not to consider challenge to a fine for the first time on appeal). Because Saloy failed to raise the issue below, precluding development of an adequate record, this Court should decline review.

c. The Victim Penalty Assessment And DNA Fee Statutes Do Not Violate Saloy's Constitutional Rights.

Even if this Court exercises its discretion to review the unpreserved claim, it should reject Saloy's constitutional challenges to RCW 43.43.7541 and RCW 7.68.035. A statute is presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. State ex rel. Peninsula Neighborhood Ass'n v. Dep't of Transp., 142 Wn.2d 328, 335, 12 P.3d 134 (2000). If at all possible, statutes should be construed to be constitutional. State v. Farmer, 116 Wn.2d 414, 419-20, 805 P.2d 200 (1991). Saloy cannot meet this heavy burden; his claim should be rejected.

Substantive due process bars arbitrary and capricious government action regardless of the fairness of the procedures used to implement them. State v. Beaver, 184 Wn. App. 235, 243, 336 P.3d 654 (2014), aff'd, 184

Wn.2d 321 (2015). The level of review applied depends on the nature of the interest involved. Id. (citing Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 219, 143 P.3d 571 (2006). Where no fundamental right is at issue, as in this case, the rational basis standard applies. Amunrud, 158 Wn.2d at 222. Under this standard, the challenged statute need only be "rationally related to a legitimate state interest." Id. In determining whether this relationship exists, the reviewing court may "assume the existence of any necessary state of facts which it can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." Id.

The legislature created the DNA database to store DNA samples of those convicted of felonies and certain misdemeanor offenses. RCW 43.43.753. The legislature identified such databases as "important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts." Id. To fund the DNA database, the legislature enacted RCW 43.43.7541. This statute originally required courts to impose a $100 DNA collection fee with every sentence imposed for specified crimes "unless the court finds that imposing the fee would result in undue hardship on the offender." Former RCW 43.43.7541 (2002). In 2008, the legislature amended the statute to make the fee mandatory regardless of hardship: "Every sentence

... must include a fee of one hundred dollars." RCW 43.43.7541. Eighty percent of the fee goes into the "state DNA database account." Id. Expenditures from that account "may be used only for creation, operation, and maintenance of the DNA database[.]" RCW 43.43.7532.

In 1973, the legislature created a crime victims compensation account to aid innocent victims of criminal acts. State v. Humphrey, 139 Wn.2d 53, 57, 983 P.2d 1118 (1999) (citing LAWS OF 1973, 1st Ex. Sess., ch. 122, § 1). To help fund the account, the legislature added a provision in 1977 directing trial courts to impose a penalty assessment upon those found guilty of certain classes of crimes. Id. (citing LAWS OF 1977, 1st Ex. Sess., ch. 302, § 10). The Victim Penalty Assessment is thus designed to fund "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035. In addition to encouraging participation at trial, these programs work to assist victims of crime in learning about and applying for benefits, in navigating the restitution and adjudication process, and assist victims of violent crimes in the preparation and presentation of their claims to the department of labor and industries. RCW 7.68.035(4).

Saloy recognizes that requiring those convicted of felonies to pay the DNA fee and VPA serves legitimate state interests. Brf. of App. at 62.

Based on Blazina, however, he argues that imposing these mandatory LFOs upon those who cannot pay does not rationally serve those interests.

Blazina involved a claimed violation of RCW 10.01.160(3), which requires the trial court to make an individualized determination of a defendant's ability to pay before imposing *discretionary* LFOs as part of a sentence. 182 Wn.2d at 837-38. Because Blazina had not objected to imposition of the LFOs at sentencing, the court concluded that he was not automatically entitled to review. Id. at 832. In deciding to reach the merits anyway, the court noted the "national conversation" about problems associated with imposing LFOs against indigent defendants. Id. at 835-37. Saloy cites this discussion as support for his position that the mandatory fees imposed here bear no rational relationship to the statute's legitimate purpose, but the passage offers no such support. Rather, Blazina concerned a claimed violation of statute – not due process – and its holding was based on statutory construction. Accordingly, its application to a constitutional challenge to a mandatory fee is doubtful.[28]

Further, while Saloy and other indigent defendants may have no ability to make even minimal payments at the time of sentencing, that may not always be the case. There is an opportunity for employment in prison.

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[28] Post-Blazina, our supreme court has recognized Curry's holding that imposition of the mandatory VPA is constitutional. State v. Duncan, Slip Op. No. 90188-1 at 5, n.3 (April 28, 2016).

RCW 72.09.100. The legislature recognized that inmates earn money in that program, and provided for a percentage of that income to be paid toward the inmate's LFOs. RCW 72.09.111(1)(a)(iv). Saloy might also receive funds through an inheritance or gift, in which case the legislature has also provided that a portion of those funds would be paid toward LFOs. RCW 72.11.020, .030.

In the context of RCW 10.73.160, pertaining to appellate costs, our supreme court observed that it is not necessary to inquire into a defendant's finances or ability to pay before entering a recoupment order against an indigent defendant "as it is nearly impossible to predict ability to pay over a period of 10 years or longer." Blank, 131 Wn.2d at 242. The same is true with respect to the VPA and DNA fee. Because it is unknown whether the defendant will gain employment in prison or otherwise obtain funds, indigence at sentencing does not weaken the rational basis for these LFOs.

Saloy emphasizes that Washington's current LFO collection scheme can impose significant hardships upon the indigent. He points out that interest on legal financial obligations accrues from the date of judgment, and notes that nonpayment of LFOs results in negative consequences on employment, housing, and finances. Brf. of App. at 56.

However, while interest may accrue on the VPA and DNA fee in some cases, it will not accrue here because the trial court waived interest on Saloy's LFOs except restitution. CP 688. And even when interest is not waived at sentencing, it is not necessarily collected. The interest may be reduced or waived in certain circumstances; it must be waived if it accrued during the time the defendant was in total confinement or if the interest "creates a hardship for the offender or his or her immediate family." RCW 10.82.090(2).

Moreover, our supreme court rejected the claim that rational basis review requires the court to consider whether the challenged laws are unduly oppressive on individuals in Amunrud, 158 Wn.2d at 226. Instead, the only requirement is that the law bears a reasonable relationship to a legitimate state interest. The State has a legitimate interest in creating and maintaining a DNA database and in providing services to crime victims. Providing a funding mechanism for these programs is reasonably related to that interest.

The statutory framework as interpreted by the state supreme court provides the needed protection against constitutional violations. Blank makes clear that pursuant to RCW 10.73.160(4) and cases interpreting that statute, a defendant can at any time petition the court to remit costs, and no court is allowed to deprive a defendant of liberty based on a non-willful

failure to pay. Blank, at 131 Wn.2d at 242. These protections can and do protect defendants from imprisonment for non-willful failure to pay.

Saloy cites to a report that he claims establishes that "indigent defendants in Washington are regularly imprisoned because they are too poor to pay LFOs." Brf. of App. at 61 (citing Katherine A. Beckett, Alexes M. Harris, & Heather Evans, Wash. State Minority & Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State, 49-55 (2008)). This report does not say what Saloy purports. Rather, at the pages cited, the report reproduces several excerpts from interviews with defendants who recount difficulty repaying legal financial obligations, and some assert that they were jailed for failing to pay.[29] However, it cannot be determined from these anecdotes – in part because the defendants lack legal expertise and use colloquial language to describe their situations – whether defendants were incarcerated for indigence, or whether they were jailed for what a superior court judge determined was a willful failure to pay.[30]

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[29] Apparently, 50 defendants were interviewed, Beckett, et al, at 2, but only a few excerpts were used in the reports. Id. at 49-55. The report does not say how the 50 people were chosen, how the excerpts were chosen, what counties they were from, or whether the excerpted passages were representative of all the interviews. It does not appear that the report attempted to corroborate the excerpted stories by consulting individual court files.

[30] The report itself recognizes this, and notes that the anecdotes about people being arrested on warrants are "somewhat puzzling" and could be attributable to multiple factors. Id. at 51.

The interviews also seem at odds with the body of appellate decisions on the topic. There seems to be a dearth of appellate cases addressing claims that a judge wrongly jailed an indigent. This lack of decisions strongly suggests that defendants are not being incarcerated when they are truly unable to pay, because those cases could be brought if they existed. If a defendant is summoned to court because he has not paid legal financial obligations, and he asserts that he cannot pay due to indigency, and if the court is considering a jail sanction for failure to pay, the defendant has a right to counsel and a right to show that his failure to pay is not willful. If the court orders him incarcerated in spite of his indigency, his lawyer can file a direct appeal pursuant to RAP 2.2(13), and he will be entitled to counsel at public expense on appeal. If trial judges were routinely violating the constitutional rights of defendants, surely those cases would be brought to the appellate courts.

In short, Saloy blurs the distinction between people *imprisoned* for indigency as opposed to those *burdened* by legal financial obligations. See State v. Johnson, 179 Wn.2d 534, 555, 315 P.3d 1090 (2014) ("Requiring payment of the fine may have imposed a hardship on him, but not such a hardship that the constitution forbids it."). The former is strictly prohibited by the constitution; the latter is not. Existing procedures protect defendants from the former. As for the latter situation,

the degree to which it is counterproductive to burden people with post-crime debt is a legitimate policy question. How much inconvenience or hardship should a defendant be required to endure, and for how long, in an effort to recoup some portion of the costs spent on criminal defense? Those questions are the subject of at least five bills in the current legislative session.[31] They can and will be addressed in the legislative and rule-making processes.

Saloy also contends that GR 34, a rule that requires courts to waive all fees and surcharges for civil litigants who meet the rule's standard of indigence, supports his claim that trial courts must consider a criminal defendant's ability to pay before imposing mandatory LFOs. Because GR 34 addresses a different situation, and because Saloy has not established indigence under that standard, this Court should reject his argument.

By its terms, GR 34 applies to "filing fees and surcharges the payment of which is a condition precedent to a litigant's ability to secure access to judicial relief[.]" The rule's focus is on providing equal access to justice, and its purpose is to "establish a statewide, uniform approach to presentation, consideration and approval for waiver of fees and costs for low income civil litigants." Jafar v. Webb, 177 Wn.2d 520, 527-28, 303 P.3d 1042 (2013) (internal quotation omitted). The reason for the rule is

[31] See HB 1016, HB 1390, SHB 1390, E2SHB 1390, SB 5713.

that due process and equal protection principles require that indigent and non-indigent litigants have equal access to the court. Id. at 529.

In contrast to filing fees and other surcharges that may bar access to the courts for civil litigants, the LFOs at issue in criminal cases are the lawful consequence of the offender's criminal conduct and resulting conviction/adjudication. This basic distinction supplies a "rational basis" to allow waiver of court-access fees for civil litigants and not require a pre-imposition determination of a criminal respondent's ability to meet the legal financial consequences of her adjudication or conviction. There is no equal protection issue.

Moreover, in order to gain relief under GR 34, a litigant must actually establish indigence by its terms. As Saloy points out, the Blazina court urged trial courts to consider GR 34 in determining whether a person has the ability to pay LFOs. 182 Wn.2d at 838. The type of evidence that establishes indigence under that rule includes receipt of assistance from a needs-based, means-tested assistance program, household income at or below 125 percent of the federal poverty guideline, or a higher household income along with basic living expenses that render her unable to pay. GR 34(3). *Saloy has provided no such evidence.* GR 34 provides no authority for holding that the court erred in imposing mandatory LFOs.

d. RCW 10.01.160 Does Not Apply To Mandatory LFOs.

In addition to his constitutional challenges to the VPA and DNA fee, Saloy contends for the first time on appeal that his LFOs should be stricken because the trial court failed to comply with RCW 10.01.160(3) by imposing the LFOs without considering Saloy's ability to pay. Saloy failed to preserve this non-constitutional issue for review by failing to object to the VPA and DNA fee at sentencing; this Court should therefore decline to review this argument. RAP 2.5(a)(3); Blazina, 182 Wn.2d at 834 (court of appeals properly exercises its discretion to decline review of unpreserved LFO claims). His argument fails in any event, because RCW 10.01.160 does not apply to mandatory LFOs.

RCW 10.01.160 gives the court discretion to order a defendant to pay "costs," which it defines as "expenses specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program ... or pretrial supervision" if the defendant has the ability to pay them. RCW 10.01.160(2), (3). Costs are a subset of the definition of "legal financial obligations," the definition of which distinguishes among different types of costs and obligations. RCW 9.94A.030(3) (listing "court costs" separately from "statutorily imposed crime victims' compensation fees assessed pursuant to RCW 7.68.035" and "any other

financial obligation that is assessed to the offender as a result of a felony conviction"). RCW 10.01.160 lists a series of costs that may be imposed under its authority, such as warrant service costs, jury fees, costs of administering deferred prosecution or pretrial supervision, and incarceration costs. RCW 10.01.160(2). The definition omits any reference to mandatory fines or fees.

In Curry, our supreme court observed that mandatory LFOs like the VPA are not governed by RCW 10.01.160's ability-to-pay requirement: "In contrast to RCW 10.01.160, no provision is made in the [VPA] statute for indigent defendants." Id. Although Saloy argues that remark was dicta, Divisions Two and Three of this Court have repeatedly held that RCW 10.01.160 does not apply to mandatory LFOs. See, e.g., Clark, 191 Wn. App. at 374 (RCW 10.01.160's ability-to-pay inquiry required only for discretionary LFOs, not for VPA or DNA fees); Lundy, 176 Wn. App. at 102-03 ("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."); State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (VPA and DNA fee "are not discretionary costs governed by RCW 10.01.160"). This Court should adhere to the well-established conclusion that RCW 10.01.160 does not apply to mandatory LFOs.

D. CONCLUSION

For all of the above reasons, the State respectfully requests this Court to affirm Saloy's convictions and sentence.

DATED this 6th day of May, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Kathleen A. Shea, at kate@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in STATE V. D'ANGELO SALOY, Cause No. 72467-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name
Done in Seattle, Washington

05-06-16
Date