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Court of Appeals
Division I
State of Washington

NO. 73052-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH SUTTON, JR.,

Appellant.

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

The Honorable Bill Bowman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The DNA collection fee under RCW 43.43.7541 and the Victim Penalty Assessment (VPA) under RCW 7.68.035 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay.

2. The trial court failed to comply with RCW 10.01.160(3) and therefore erred in requiring the appellant to pay Legal Financial Obligations (LFOs).

Issues Pertaining to Assignments of Error

1. RCW 43.43.7541 requires trial courts impose a DNA collection fee each time a felony offender is sentenced. This ostensibly serves the State's interest in funding the collection, testing, and retention of a convicted defendant's DNA profile. RCW 7.68.035 requires trial courts to impose a VPA of \$500. The purpose is to fund victim-focused programs.

These statutes, however, require that trial courts order these LFOs even when the defendant lacks the ability to pay. Do the statutes violate substantive due process when applied to defendants who do not have the ability—or the likely future ability—to pay the fees?

2. The Supreme Court recently emphasized that “a trial court has a statutory obligation [under RCW 10.01.160(3)] to make an

individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." State v. Blazina, 182 Wn.2d 827, 830, 344 P.3d 680 (2015). The appellant, who is indigent, was sentenced to 837 months of incarceration plus substantial restitution. Should this Court remand with instructions to strike the LFOs and undertake a proper inquiry regarding his current and future ability to pay the LFOs?

B. STATEMENT OF THE CASE¹

The State charged Kenneth Sutton, Jr. with second degree murder under alternative theories of intentional and felony murder (based on assault) for the June 27, 2012 shooting death of Cloise Young outside a Federal Way bar. CP 15; RCW 9A.32.050(1)(a), (b). The State also charged Sutton with four counts of first degree assault related to four other individuals who were also shot, but survived. CP 15-17; RCW 9A.36.011(1)(a) (a person is guilty of first degree assault if he "[a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death"). The State alleged Sutton

¹ The record in this case consists of the following volumes: 1RP – 11/3 and 11/12/14; 2RP – 11/13/14; 3RP – 11/19/14; 4RP – 11/20/14; 5RP – 11/24/14; 6RP – 11/25/14; 7RP – 11/26/14; 8RP – 12/1/14; 9RP – 12/2/14; 10RP – 12/3/14; 11RP – 12/9/14; 12RP – 12/10/14; 13RP – 12/11/14; 14RP – 12/15/14; 15RP – 12/16/14; 16RP – 12/17/14; 17RP – 12/18/14; 18RP – 12/24/14 (court's verdict and oral ruling); and 19RP – 1/28/15 (sentencing). Most, but not all, of the trial volumes are consecutively paginated.

was armed with a firearm during commission of those five counts. CP 14-17; RCW 9.94A.533(3)(a). The State also charged Sutton with second degree unlawful possession of a firearm. CP 17.

Sutton waived his right to a jury, and the case was tried to the bench. CP 14. Sutton, who was shot by the decedent Young during the incident, asserted that his acts were justifiable² based on a theory he acted in self-defense and/or to prevent the commission of a felony. See 15RP 2619-95 and 16RP 2698-2770 (Sutton's testimony); 17RP 2816-54 (defense closing argument); see also 13RP 2274-76, 2299-2302 (testimony of State's witness that Young had already removed his gun from his holster shortly before the shooting began).

² RCW 9A.16.050 provides that:

Homicide is . . . justifiable when committed either:

(1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

The court found Sutton guilty on both theories of second degree murder. The court also found him guilty of the other counts and found the enhancements applied. CP 200-09 (Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d)). In doing so, the court rejected Sutton's claim of justifiable homicide. The court found Sutton's "final statement before shooting the victims . . . confirms that he was not acting out of fear. CP 205 (finding 34). The court also found that "[t]he evidence does not support the defendant's assertions that he believed he was in imminent danger of death or great bodily harm, that he believed that he was about to be injured or physically assaulted, or that he believed that anyone was going to attempt to commit a felony upon him." CP 205 (finding 35).

The court sentenced Sutton to a standard range sentence totaling 837 months of confinement, including 300 months of firearm enhancements. CP 100; see RCW 9.94A.589(1)(b) (presumptive consecutive sentences for serious violent offences).

The court imposed legal financial obligations (LFOs) totaling \$600. The court ordered Sutton to provide a DNA sample and pay the related \$100 fee under RCW 43.43.7541.³ The court also ordered Sutton to pay the \$500 VPA under RCW 7.68.035.⁴ CP 102.

³ Former RCW 43.43.7541 (2011), in effect at the time of sentencing, provides:

The court also ordered Sutton to pay restitution “to be determined” but waived all other fees and interest charges. CP 102. The court ultimately ordered Sutton to pay \$23,348.38 in restitution. Supp. CP ____ (sub no. 145, Order Setting Restitution).

The court did not engage in analysis on the record regarding Sutton’s ability to pay. 19RP 108. The judgment and sentence, however,

Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law. For a sentence imposed under chapter 9.94A RCW, the fee is payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. For all other sentences, the fee is payable by the offender in the same manner as other assessments imposed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

⁴ Under former RCW 7.68.035(1)(a) (2011):

When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor

contains “boilerplate” language stating that his ability to pay was considered in imposing LFOs. CP 102 (paragraph 4.2).

Sutton timely appeals. CP 109.

C. ARGUMENT

1. RCW 43.43.7541 AND RCW 7.68.035 ARE UNCONSTITUTIONAL AS APPLIED TO DEFENDANTS LIKE SUTTON WHO DO NOT HAVE THE ABILITY, OR LIKELY FUTURE ABILITY, TO PAY.

The mandatory \$100 DNA collection fee authorized under RCW 43.43.7541 and the mandatory \$500 VPA authorized by RCW 7.68.035 violate substantive due process when applied to defendants who do not have the present or likely future ability to pay the fines. This Court should find trial court erred in imposing such fees without first determining Sutton’s ability to pay.

- a. The record demonstrates Sutton is unable to pay.

As a preliminary matter, the record indicates that Sutton does not have the ability to pay the LFOs imposed by the court. The court entered a boilerplate finding indicating that it had considered Sutton’s ability to pay the fees imposed as part of his sentence. CP 102 (paragraph 4.2).

Under RCW 10.01.160(3), however, “[i]n determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that

payment of costs will impose.” Under RCW 10.01.160(3), therefore, the record must reflect the trial court made an “individualized inquiry” into a defendant’s current and future ability to pay. Blazina, 182 Wn.2d at 838. Within this inquiry, the court must consider important factors such as incarceration and other debts, including restitution, when determining ability to pay. Id.

Here, the record clearly indicates Sutton does not have the ability to pay. He was sentenced to 837 months of incarceration including 300 months not subject to good time credit. CP 100. He was represented by appointed counsel at trial, and the court found him indigent on appeal. Supp. CP ___ (sub no. 126, Order of Indigency). To a certain extent, the sentencing court appears to have recognized this inability to pay by waiving all non-mandatory fees and interest. CP 102. Perhaps most significantly, however, Sutton must pay over \$23,000 in restitution. Supp. CP ___ (sub no. 145, supra), an obligation that, given the other factors, will impede his ability to pay the remaining LFOs. RCW 9.94A.760(1).

- b. RCW 43.43.7541 and RCW 7.68.035 violate substantive due process.

The Washington and United States Constitutions establish that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV § 1; Const. art. I, § 3. “The due process

clause of the Fourteenth Amendment confers both procedural and substantive protections.” Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” Id. at 218-19. It requires that “deprivations of life, liberty, or property be substantively reasonable.” In other words, such deprivations are constitutionally infirm if not “supported by some legitimate justification.” Nielsen v. Washington State Dep’t of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221 (2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625-26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep’t of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54.

To survive rational basis scrutiny, the State must show its regulation is rationally related to a legitimate state interest. Id. Although the burden on the State is lighter under this standard, the standard is not meaningless. Indeed, the United States Supreme Court has cautioned that

the rational basis test “is not a toothless one.” Mathews v. DeCastro, 429 U.S. 181, 185, 97 S. Ct. 431, 50 L. Ed. 2d 389 (1976). As the Washington Supreme Court has also explained, “the court’s role is to assure that even under this deferential standard of review the challenged legislation is constitutional.” DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

Turning first to the DNA collection fee, the statute currently requires that all felony defendants pay the DNA collection fee. RCW 43.43.754. This ostensibly serves the State’s interest to fund the collection, analysis, and retention of a convicted offender’s DNA profile to help facilitate future criminal identifications. See RCW 43.43.752 through RCW 43.43.7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay it does not rationally serve that interest. Turning to RCW 7.68.035, the statute requires that all convicted defendants pay a \$500 VPA. This ostensibly serves the State’s interest in funding “comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes.” RCW 7.68.035(4). Again, while this may be a legitimate

interest, there is nothing reasonable about requiring sentencing courts to impose the VPA upon defendants regardless of whether they have the ability or likely future ability to pay.

Imposing these fees on defendants who are unable to pay does not further the State's interest in funding DNA collection or victim-focused programs. As the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." Blazina, 182 Wn.2d at 837. Hence, there is no legitimate economic reason to impose these LFOs.

Likewise, the State's interest in enhancing offender accountability is also not served by requiring a defendant to pay mandatory LFOs when he does not have the ability to pay. To foster accountability, a sentencing condition must be something that is achievable for the convicted person. If it is not, the condition actually undermines efforts to hold a defendant answerable.

Similarly, in Blazina, the Supreme Court recognized that the State's interest in deterring crime via enforced LFOs is actually undermined when LFOs are imposed on people who do not have the ability to pay. Id. This is because imposing LFOs upon a person who does not have the ability to pay actually "increase[s] the chances of recidivism." Id. at 836-37 (citing relevant studies and reports).

Likewise, the State's interest in uniform sentencing is not served by imposing mandatory LFOs on those who do not have the ability to pay. Defendants who cannot pay are subject to lengthy involvement with the criminal justice system and often end up paying considerably more than the original LFOs imposed (due to interest and collection fees), and in turn, considerably more than their wealthier counterparts. *Id.* at 836-37.

When applied to indigent defendants, not only do the so-called mandatory fees ordered under RCW 43.43.7541 and RCW 7.68.035 fail to further the State's interest, they are senseless. It is irrational to require trial courts to impose such debts upon defendants who do not have the present or future ability to pay.

c. Prior case law does not control this Court's inquiry.

Sutton anticipates the State will, nonetheless, argue the current substantive due process challenge is foreclosed by the Supreme Court's decision in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). In Curry and its offshoot, State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), the Court held that, as to mandatory LFOs, "constitutional principles will be implicated . . . only if the government seeks to enforce collection of the assessment at a time when [the defendant is] unable, though no fault of his own, to comply." *Id.* at 241 (citing Curry, 118 Wn.2d at 917, internal quotes omitted). The "constitutional principles" at issue in those cases

were different than those implicated here.

Sutton's constitutional challenge to the statute authorizing the DNA collection fee is fundamentally different from that raised in Curry. In Curry, defendants challenged the constitutionality of a mandatory LFO order on the ground that its enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they were unable to pay. 118 Wn.2d at 917. Thus, the constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate incarceration of people simply because they are poor. Id.

In contrast, Sutton asserts there is no legitimate state interest in requiring sentencing courts to impose these fees without the State first establishing a defendant's ability to pay. In other words, rather than challenging the constitutionality of a statute based on the fundamental unfairness of its ultimate enforcement potential (as was the case in Curry and Blank), Sutton challenges the statute as an unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants shown not to have the ability to pay. As such, the Curry and Blank decisions do not control.

In addition, read carefully, and considered in the light of the realities of Washington's LFO current collection scheme, those cases actually support Sutton's position. Indeed, after Blazina's recognition of

the Washington State's "broken LFO system," 182 Wn.2d at 835, the Court's decisions in Curry and Blank should be revisited in the context of the realities of Washington's present LFO scheme.

Currently, Washington's laws allow for an elaborate and aggressive collections process that may include the immediate assessment of interest, enforced collections via wage garnishment, payroll deductions, and wage assignments (which include further penalties), and potential arrest. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay). This cycle does not, for example, conform to the necessary constitutional safeguards established in Blank.

In Blank the Washington Supreme Court held that "monetary assessments which are mandatory *may* be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). The Court reasoned that fundamental fairness concerns arise only if the government seeks to collect the assessment and the

defendant is unable, though no fault of his own, to comply. *Id.* at 241 (referring to *Curry*, 118 Wn.2d at 917-18).

Blank also states, however, that in order for Washington's LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry *before*: (1) the State engages in any "enforced" collection; (2) any additional "penalty" for nonpayment is assessed; or (3) any other "sanction" for nonpayment is imposed.⁵ 131 Wn.2d at 241-42. But under the current scheme, neither the Legislature nor the courts satisfy *Blank's* directives.

Although *Blank* says prior case law suggests that such an inquiry is not required at sentencing, *id.* at 240-42, that Court was not confronted with the current collection scheme. The scheme provides for immediate enforced collections processes, penalties, and sanctions.

First, under RCW 10.82.090(1), LFOs generally accrue interest at a rate of 12 percent, an astounding level given the historically low interests rates of the last several years. *Blazina*, 182 Wn. 2d at 836 (citing

⁵ "Penalty" means: "a sum of money which the law exacts payment of by way of punishment for . . . not doing some act which is required to be done." *Black's Law Dictionary*, Sixth Edition, at 1133. "Sanction" means: "Penalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations." *Id.* at 1341. "Enforce" means: "To put into execution, to cause to take effect, to make effective; as to enforce . . . the collection of a debt or a fine." *Id.* at 528.

Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013)). This sanction has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See Harris, supra at 1776-77 (explaining that “those who make regular payments of \$50 a month toward a typical legal debt will remain in arrears 30 years later). Yet, in general, there is no requirement for the court to have conducted an inquiry into ability to pay before interest is assessed.

Washington law also permits courts to order an immediate “payroll deduction.” RCW 9.94A.760(3). This can occur immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payment, employers are authorized to deduct other fees from the employee’s earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with an additional sanction. Yet, there is no provision requiring an ability-to-pay inquiry occur before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing

examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Again, employers are permitted to charge a "processing fee." RCW 9.94A.7705. Contrary to Blank, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to the use of these enforced collection mechanisms.

Washington law also permits courts to use collection agencies or county collection services to actively collect LFOs. RCW 36.18.190. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. There is nothing in the statute that prohibits the courts from using collections services immediately after sentencing. Yet there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement. Id.

These examples demonstrate that under Washington's currently "broken" LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgment and sentence is

entered. Consequently, Blank, rather than defeating Sutton's arguments, actually supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing, when LFOs are imposed.

2. THE LFO ORDER SHOULD BE STRICKEN BECAUSE THE TRIAL COURT FAILED TO COMPLY WITH RCW 10.01.160(3).

RCW 10.01.160(3) permits the sentencing court to order an offender to pay LFOs, but only if the trial court has first considered his particular financial circumstances and concluded he has the ability.⁶ As noted above, the record shows Sutton was indigent, but the trial court imposed LFOs with no analysis of ability to pay. The judgment and sentence includes a boilerplate finding that "the defendant has the present or likely future ability to pay the legal financial obligation imposed." CP 102. Yet, the parties and the court did not discuss this finding. 19RP 28. As such, the trial court did not comply with RCW 10.01.160(3), and the LFO order should be stricken.

The Supreme Court recently emphasized that, "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." Blazina,

⁶ RCW 10.01.160(3) provides: "The court shall not order a defendant to pay costs unless [he] is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose."

182 Wn.2d at 827. There is good reason for this requirement. Imposing LFOs on indigent defendants causes significant problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Id.* at 835. Thus, a failure to consider a defendant’s ability to pay not only violates the plain language of RCW 10.01.160(3), but also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. RCW 9.94A.010.

The State may argue that the sentencing court properly imposed these costs because these are so-called “mandatory” LFOs and the authorizing statutes use the word “shall” or “must.” RCW 7.68.035; RCW 43.43.7541; State v. Lundy, 176 Wn. App. 96, 102-03, 308 P.3d 755 (2013). However, these statutes must be read in tandem with RCW 10.01.160(3), which, as explained above, requires courts to inquire about a defendant’s financial status and refrain from imposing costs on those who cannot pay. Read together, these statutes mandate imposition of the above fees upon those who can pay, and require that they not be ordered for indigent defendants. See State v. Jones, 172 Wn.2d 236, 243, 257 P.3d 616 (2011) (explaining that statutes must be read together to achieve a harmonious total statutory scheme).

When the legislature means to depart from a presumptive process, it makes the departure clear. The restitution statute, for example, not only states that restitution “shall be ordered” for injury or damage absent extraordinary circumstances, but also states that, “the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount.” RCW 9.94A.753(4) (emphasis added). This clause is absent from other LFO statutes, indicating that sentencing courts are to consider ability to pay in those contexts. See State v. Conover, ___ Wn.2d ___, 355 P.3d 1093, 1097 (2015) (the legislature’s choice of different language in different provisions indicates a different legislative intent).⁷

Although Curry indicated the VPA was mandatory notwithstanding a defendant’s inability to pay, as explained above, it was only presented with the argument that the VPA was unconstitutional. Curry, 118 Wn.2d at 917-18. In the context of that argument, the Court simply assumed that the statute required imposition of the penalty on indigent and solvent defendants alike: “The penalty is mandatory. In

⁷ The legislature did amend the DNA statute to remove consideration of “hardship” at the time the fee is imposed. Compare former RCW 43.43.7541 (2002) with former RCW 43.43.7541 (2008). But it did not add a clause precluding waiver of the fee for those who cannot pay it at all. In other words, the legislature did not explicitly exempt this statute from the requirements of RCW 10.01.160(3).

contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants.” 118 Wn.2d at 917 (citation omitted). That portion of the opinion is arguably dictum because it does not appear that petitioners argued that RCW 10.01.160(3) applies to the VPA, but simply assumed it did not. Moreover, it does not appear that the state Supreme Court has ever held that the DNA fee is exempt from the ability-to-pay inquiry.

In response, the State may argue that this issue has been waived and should not be considered for the first time on appeal. Even though defense counsel did not object to the imposition of these LFOs below, this Court has the discretion to reach this issue consistent with RAP 2.5. Blazina, 182 Wn.2d at 835. Given the trial court’s failure to inquire into Sutton’s ability to pay and given his indigent status, this Court should exercise its discretion under RAP 2.5(a) and consider the issue.

First, Blazina provides compelling policy reasons why trial courts must undertake a meaningful inquiry into an indigent defendant’s ability to pay each LFO at the time of sentencing and why, if that is not done, the problem should be addressed on direct appeal. The Supreme Court discussed in detail the manner in which erroneously imposed LFOs haunt those who cannot pay, not only affecting their ability to successfully exit the criminal justice system but also limiting their employment, housing

and financial prospects for many years beyond their original sentence. Blazina, 182 Wn.2d at 835-37. Considering these circumstances, the Supreme Court concluded that indigent defendants who are saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the State’s interest in reducing recidivism. Id.

As a matter of public policy, courts must do more to make sure improperly imposed LFOs are quickly corrected. As Blazina shows, the remission process is not an effective vehicle to alleviate the harsh realities recognized in that decision. Instead, correction upon remand is a far more reasonable approach from a public policy standpoint.

Second, there is a practical reason why appellate courts should exercise discretion and consider, on direct appeal, whether the trial court complied with RCW 10.01.160(3). As the Supreme Court recognized in Blazina, “the state cannot collect money from defendants who cannot pay.” 182 Wn.2d at 837. There is nothing reasonable about requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal. Remanding to the same sentencing judge who is already familiar with the case so he may actually make the ability-to-pay inquiry is more efficient, saving the defendant and the State from a wasted layer of administrative and judicial process.

Finally, the erroneous ability-to-pay finding entered here is representative of a systemic problem that requires a systemic response. The pre-formatted language used here, and in other courts around the state, is simply inadequate to meet the requirements of RCW 10.01.160(3). The systemic misuse of this boilerplate finding requires a systemic response. Part of this response must come from appellate courts through the immediate rejection of such boilerplate. For these reasons, this Court should exercise its discretion and consider the merits of Sutton's challenge.

In sum, RCW 10.01.160(3) requires that the trial court conduct an ability-to-pay inquiry for all LFOs. While other statutes purport to impose mandatory fees, these must be harmonized with RCW 10.01.160(3). As such, unless the statute specifically says that an LFO must be paid regardless of a defendant's financial situation, there must be an ability-to-pay inquiry. Consequently, this Court should exercise its discretion, consider the issue, and remand with instructions that the sentencing court conduct a meaningful, on-the-record inquiry into Sutton's ability to pay LFOs.

D. CONCLUSION

This Court should strike the trial court's order that Sutton pay the challenged LFOs and remand for a hearing on his ability to pay.

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Respectfully submitted,

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