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Division I
State of Washington

NO. 73532-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

LAVONDA BECK,

Appellant.

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

The Honorable Laura Middaugh, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied her right to a fair trial when the trial court made an improper comment on the evidence.

2. The trial court erred when it imposed a discretionary legal financial obligation (LFO) based solely on the mistaken belief that it was mandatory.

3. Counsel was ineffective when he failed to object to the imposition of the DNA-collection fee under RCW 9.94A.777.

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

5. The trial court failed to comply with RCW 10.01.130(3) and therefore erred in imposing Legal Financial Obligations (LFOs).

Issues Pertaining to Assignments of Error

1. When asking appellant clarifying questions during her testimony before the jury, the trial judge shook her head and made negative facial expressions as appellant tried to respond. Fearing this conveyed to the jury the message that the trial judge did not find appellant credible, defense counsel objected twice. The court "noted" his objection

but did not give any immediate instruction to the jury that it should not consider the judge's reaction or remind the jury it was the sole determiner of the defendant's credibility. Was appellant denied due process under article IV, section 16 of the Washington Constitution?

2. RCW 9.94A.777 requires the trial court determine whether a defendant who is suffering from a mental health condition has the ability to pay the DNA-collection fee before that fee may be imposed. Hence, the DNA-collection fee is discretionary, not mandatory, when applied to someone suffering from a mental health condition. There was evidence before the trial court that appellant has a mental health diagnosis. The trial court waived all fees it believed were discretionary. However, it mistakenly believed the DNA-collection fee was mandatory and imposed it. Did the trial court error in not recognizing and exercising its discretion regarding the imposition of this LFO?

3. Did appellant receive ineffective assistance of counsel when defense counsel failed to inform the trial court that the DNA-collection fee was not mandatory under RCW 9.94A.777?

4. 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 mandate that trial courts order these LFOs even when the defendant has no 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?

5. 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). Here, the trial court was informed as to appellant’s disability status, her lack of financial resources, and her dubious employment prospects. Yet, it imposed so-called “mandatory” LFOs without any consideration of her ability to pay. Should this Court remand with instructions to strike the LFOs and undertake a proper inquiry?

B. STATEMENT OF THE CASE

1. Procedural History

On August 11, 2014, the Snohomish County prosecutor charged appellant Lavonda Beck with two counts of trafficking in stolen property. CP 1-9. The information was later amended, and the prosecutor added a third count of trafficking in stolen property. CP 11-12. A jury found Beck guilty as charged. CP 53-55. She was given a first time offender waiver

and sentenced to 90 days – 45 days in jail and 45 days in the Community Center for Alternative Programs. CP 105. The trial court also imposed a \$100 DNA-collection fee and a \$500 VPA, believing these to be “mandatory” fees. CP 104. Beck appeals. CP 110-11

2. Substantive Facts

At the time of trial, Lavonda Beck was a 59-year-old woman with no criminal history. RP 80. She had, however, experienced serious setbacks in her life, suffering from bipolar disorder and the physical repercussions of a brain aneurism and brain surgery. CP 80; RP 366. She was living off of SSI disability benefits, including food stamps, and supplementing this with part-time work cleaning houses and caregiving. CP 81; RP 363-68.

Paul and Barbara Hanson are Beck’s godparents and have known Beck her entire life. RP 236. In 2007, Beck started doing some house cleaning for the Hansons. RP 81. She cleaned their house two times a month for several years. RP 238, 366. There were no allegations of theft or misconduct by Beck during that time. RP 375.

On January 6, 2013, Paul suffered a spinal infection, was hospitalized for several months, and was eventually confined to a wheelchair.¹ RP 239, 291. After he was released, he needed a caregiver.

¹ To avoid confusion, Appellant will refer to the Hansons by first names.

RP 296. Knowing Beck had worked as a caregiver previously and was good at it, he asked her to take care of him. RP 296. Paul liked Beck, and she was fond of him. RP 278, 317, 371.

In May 2013, Beck moved in with the Hansons to care for Paul. RP 327. The Hansons paid Beck \$500 dollars a month and provided room and board. RP 240. Beck was expected to bathe Paul, clean the house, take Paul to medical appointments, do laundry, grocery shop and cook. RP 241-42.

Barbara and Beck had a love-hate relationship. RP 371. Beck testified that Barbara at one time had been a close confidant and had given her jewelry as gifts. RP 365, 370, 384, 394. However, after Beck moved in, Barbara was hostile. RP 314, 370. As Paul explained, it was not a good situation having two women running the household, and they did not get along. RP 299. Beck testified that Barbara called her awful names and threatened her with a gun. RP 370.

On September 1, 2013, Barbara suffered a diabetic coma, was hospitalized, and was then sent to a rehabilitation center. RP 328. During this time, Paul and Barbara told Beck to clear Barbara's "junk" out of the house and either take it for herself or donate it. RP 265, 271, 304, 379-80. Barbara had a lot of jewelry of varying values that was stashed in various places around the house. RP 397. Beck went through closets and boxes

trying to organize items, and she openly told the Hansons' son about this work. RP 330, 379, 431-34. When the son asked Paul to have Beck stop, Paul did nothing and let Beck continue. RP 331.

In June 2014, after Paul noticed money missing from the house, the Hansons demanded Beck leave. RP 242, 303. After this, they called the police and reported that several items were missing, including jewelry. RP 221, 246.

In May of 2014, Auburn Detective Stephen Bourdage took over the case. RP 221. He searched the pawnshop database to determine whether Beck had pawned any items. RP 221. He reviewed Beck's pawning history in three Auburn pawn shops, which included the pawning of two rings, a bracelet, and state quarter collections – items that matched those reported missing. RP 223-27, 246, 249-51, RP 350-54.

At trial, the Hansons and Beck offered different versions of what happened, making the witnesses' credibility the central issue for the jury in deciding the case. RP 462, 478. Paul and Barbara said they never permitted Beck to take any jewelry as part of cleaning out Barbara's stuff and never allowed her to pawn their coin collections. RP 265-66, 308. However, the Hansons were inconsistent as to what the other spouse told Beck, indicating they may have given confusing or conflicting instructions. RP 265, 271, 304, 308.

Beck testified that she did not steal anything; instead, the Hansons gave her the items she had pawned. RP 362, 379-80, 82. Beck explained she had gathered the jewelry and waited for Barbara to return home. RP 398. The two of them then went through the jewelry and created a “keep” pile and a pile to give away. RP 398. Beck explained she only took what was in the discard pile, which included the rings and bracelet she pawned, because Barbara said she could. RP 398. Beck also testified she had pawned a ring that Barbara had given her as a birthday gift. RP 384. Finally, she said the coin collections were her own, some of the coins having been given to her by Barbara. RP 388. Barbara verified that she had in fact given Beck some coins. RP 266.

C. ARGUMENT

I. BECK WAS DENIED A FAIR TRIAL WHEN THE JUDGE MADE AN IMPORPER COMMENT ON HER CREDIBILITY.

a. Relevant Facts

During cross-examination, while Beck was testifying to the fact that Barbara gave her a ring for her birthday and she had pawned that ring, the trial judge interrupted and asked Beck to provide the year that this happened. RP 403-04. Immediately after Beck answered, the following exchange occurred:

[Prosecutor]: And so Barbara Hanson gave you that ring --

[Defense Counsel]: Excuse me, Your Honor, I'm going to object to the court's facial comments and comments in court.

[The Court]: Your objection is noted. Go ahead.

[Defense Counsel] Your Honor. I'm going to object again to any facial comments the court is making.

[The Court]: Go ahead.

RP 404-05. At this point, the prosecutor resumed questioning. RP 405.

Immediately after the jury was released, defense counsel explained that he observed the trial judge raise her hand and shake her head back and forth when asking Beck clarifying questions. RP 407. He explained that he had objected because he was concerned this non-verbal communication sent a message to the jury that the judge did not believe Beck. RP 407. The State did not contradict defense counsel's observations as to the judge's conduct. RP 407.

The trial judge said she did not recall waving her hand, but stated "you're an officer of the court and you say that, then I'm sure that that's what you saw." RP 407. The trial judge said she would instruct the jury again that they should disregard any comment they may have perceived her to make. RP 407. However, the generic instruction was not given until the trial court read the jury all the instructions. RP 444.

In an effort to make sure there was an adequate record, defense counsel filed a declaration stating the basis for his objection. CP 51-52. He was concerned that the nonverbal communication would not be adequately reflected in the record. CP 52. In his declaration, defense counsel explained that during the trial judge's questioning of Beck, the judge shook her head and put her hand up. RP 51. He further explained that the trial judge "had an inquisitive and confused look on her face." CP 51. He stated that he objected to this nonverbal cue because he believed that it was an improper comment. CP 52.

b. Legal Argument

Under the Sixth and Fourteenth Amendments, the defendant has the right to a fair trial before a jury. Under article IV, section 16 of the Washington Constitution, judges may not comment to the jury on matters of fact. State v. Dewey, 93 Wn. App. 50, 58–59, 966 P.2d 414 (1998). "The purpose of prohibiting judicial comments on the evidence is to prevent the jury from being influenced by the trial judge's opinion of the evidence submitted." State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986).

While a trial judge may question witnesses and ask clarifying questions, she must not appear that the court's attitude toward the merits of the cause is reasonably inferable from the nature or manner of the

court's statements. State v. Eisner, 95 Wn.2d 458, 463, 626 P.2d 10, 12-13 (1981). Whether a judge has expressed his or her opinion turns on whether the judge's feeling as to "the truth value of the testimony of a witness has been communicated to the jury." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Remarks need not be direct to be improper. A remark or conduct that implicitly conveys to the jury the judge's personal opinion concerning the worth of the defendant's testimony violates article IV, section 16. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). If the court's attitude is reasonably inferable, the questioning of a witness violates the defendant's constitutional right to a fair trial and reversal is required. Id. at 463-64.

Here, the trial judge implicitly conveyed her opinion when questioning Beck. The judge should have remained completely impartial in her questions and her demeanor when asking Beck questions. She did not, and at least one person in the room – defense counsel – was particularly concerned that this sent an improper message to the jury. Importantly, the prosecutor never contradicted defense counsel's observation or interpretation. Moreover, the trial judge seemed to acquiesce to defense counsel's observation of the incident. As such, the record sufficiently establishes improper nonverbal communication occurred.

The improper comment was also prejudicial. “Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.” State v. Brush, 183 Wn.2d 550, 559, 353 P.3d 213, 218 (2015). As the Washington Supreme Court has recently held, reversal is required where the State cannot meet this “high burden.” Id. at 560.

The record here does not affirmatively show that no prejudice could have resulted. Hence prejudice is presumed. And the State cannot overcome this presumption here. Credibility was crucial to determining a verdict. Beck offered one version of what happened, the Hansons gave another. As such, any judicial comment that possibly conveyed the judge’s feeling as to whether Beck was credible was highly prejudicial.

In response, the State may claim the error was cured by the court's subsequent oral instruction to the jury to disregard comments of court and counsel. However, this argument has been made before and rejected by the Supreme Court. State v. Lampshire, 74 Wn.2d at 892. The damage was done when the remark was made, it should have been corrected immediately. Instead, the trial court’s lack of any immediate response in the face of defense counsel’s timely objections actually sent the message to the jury that judge’s actions were not problematic and it did not need to

disregard the specific improper communication. Under these circumstances, the prejudice was not capable of being cured by a subsequent instruction to disregard. See, Id. (reversing under similar circumstances).

In sum, the trial judge's nonverbal conduct – whether inadvertent – implicitly conveyed to the jury the judge's feelings about Beck's credibility. The error was prejudicial because the verdict in this case turned on Beck's credibility. As such, reversal is required.

II. THE TRIAL COURT ERRED WHEN IT ORDERED BECK TO PAY A DNA-COLLECTION FEE SIMPLY BECAUSE IT MISTAKENLY BELIEVED THIS WAS A MANDATORY LFO.

The trial court erred when it failed to recognize and exercise its discretion to decline the prosecution's request that Beck pay the DNA-collection fee.

When sentencing a criminal defendant who suffers from a mental health condition, the trial court may exercise its discretion as whether to impose any LFOs except restitution and the VPA. RCW 9.94A.777. The trial court erred when it failure to recognize and exercise its discretion under RCW 9.94A.777. See, State v. Grayson, 154 Wn.2d 333, 335-36 111 P.3d 1183 (2005) (failure to exercise discretion is an abuse of discretion); State v. Flieger, 91 Wn. App. 236, 242, 955 P.2d 872 (1998) (same).

RCW 9.94A.777 provides:

- (1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.
- (2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

Under the plain language of this statute, the DNA-collection fee cannot be imposed upon a person suffering from a mental health condition without an ability-to-pay inquiry. As such, if the defendant has a mental health condition, the DNA fee essentially becomes the equivalent of other discretionary fees under RFCW 10.01.160(3). It is not mandatory.

The defense's presentence report established that Beck qualifies as a person who suffers from a mental health condition. Beck has bipolar disorder that includes anxiety attacks with psychosis, depressive episodes, and mania. CP 80 84. Because of her medical and mental health issues, Beck receives SSI disability benefits. RP 81. She had previously been hospitalized seven times for mental health issues. RP 84.

She was receiving mental health treatment and medication at the time of sentencing. RP 84.

The trial court simply did not recognize it had discretion to decline the State's proposed DNA collection fee under RCW 9.94A.777. Indeed, had it done so, it would not have ordered Beck to pay the fee, having stated at sentencing: "I'm not imposing any nonmandatory fees." RP 533. The record indicates the trial court imposed the \$100 DNA collection fee only because it was operating under the mistaken belief it was mandatory. RP 532.

Given this record, it cannot be said the trial court reasonably exercised its discretion when it imposed DNA-collection fee because it failed to understand it had any discretion. The record shows that the trial court would not have imposed that fee if it had known that it was not mandated. This Court, therefore, should vacate the DNA-collection fee order and remand.

III. BECK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBJECT TO THE IMPOSITION OF THE DNA-COLLECTION FEE UNDER RCW 9.94A.777.

Despite having established Beck's mental health status in detail in his presentencing report, defense counsel failed to object to the trial court's imposition of the DNA-collection fee under RCW 9.94A.777. The

only reasonable explanation for this was that trial counsel was unaware of the law and the fact that the DNA-collection fee is not mandatory when applied to a defendant who suffers from a mental health condition, such as Beck. As such, counsel was ineffective.

The Sixth Amendment guarantees the right to effective counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “This right exists, and is needed, in order to protect the fundamental right to a fair trial.” Id. at 684. Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting two-prong test from Strickland, 466 U.S. at 687). As shown below, both prongs are satisfied here.

“Counsel ... has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688. Counsel fails to render constitutionally required effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. Hawkman v. Parratt, 661 F.2d 1161 (8th Cir.1981). Thus, deficient performance occurs when counsel's conduct falls below an

objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

Counsel's performance was objectively unreasonable here. "Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient." In re Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 138, 144 (2015). Defense counsel unreasonably failed to understand RCW 9.94A.777 and to inform the trial court that the DNA-collection fee was a discretionary LFO. There was no legitimate tactical advantage for not citing the statute given that the trial court was already informed of – and sympathetic to – Beck's financial and health problems. RP 532-33.

Counsel's deficient performance prejudiced the outcome. Prejudice occurs if there is a reasonable probability that the result of the proceeding would have been different, had the deficient performance not occurred. Thomas, 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. That is the case here.

The trial court explicitly stated it would not impose any "nonmandatory fees." RP 533. Hence, had defense counsel informed the

trial court of its discretionary power under RCW 9.94A.777, there is a reasonable probability the outcome would have been different and the DNA-collection fee would not have been imposed. As such, this Court should find Beck has established she received ineffective assistance of counsel and should vacate the DNA-collection fee order.

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

RCW 9.94A.760 permits the trial court to impose costs “authorized by law” when sentencing an offender for a felony. RCW 43.43.7541 authorizes the collection of a \$100 DNA-collection fee. RCW 7.68.035 provides that a \$500 VPA “shall be imposed” upon anyone who has been found guilty in a Washington Superior court. However, these statutes violate substantive due process when applied to defendants, like Beck, who are not shown to have the ability or likely future ability to pay the fine. Hence, this Court should find the trial court erred in imposing these fees without first determining Beck’s ability to pay.

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process of law. U.S. Const. amends. V, XIV, § 1; Wash. 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, 1225 (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, 1135 (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 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 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 the 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 RCW 43.43.7541, the statute mandates all felony defendants pay the DNA-collection fee. This ostensibly serves the State’s interest to fund the collection, analysis, and retention of a convicted offender’s DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752-7541. This is a legitimate interest. However, the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

As for RCW 7.68.035, it mandates 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 does not further the State's interest in funding DNA collection or victim-focused programs. For as the Washington Supreme Court recently emphasized, "the state cannot collect money from defendants who cannot pay." Blazina, 344 P.3d at 684. Hence, there is no legitimate economic incentive served in imposing 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 do so. In order to foster accountability, a sentencing condition must be something that is achievable in the first place. If it is not, the condition actually undermines efforts to hold a defendant answerable.

The Supreme Court also 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.

This is because defendants who cannot pay are subject to an undeterminable length of 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 utterly pointless. It is simply irrational for the State to mandate trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue appellant's due process challenge is foreclosed by the Washington Supreme Court's rulings in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) and State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), which conclude due process was not violated by the imposition of the VPA regardless of whether there was an ability-to-pay inquiry. However, the "constitutional principles" at issue in those cases were considerably different than those implicated here. Hence, any reliance on these cases would be misplaced.

Beck's constitutional challenge to the statute authorizing the DNA-collection fee and VPA is fundamentally different from that raised in Curry. In Curry, 118 Wn.2d at 917, the 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 are unable to pay LFOs. Hence, Curry's constitutional challenge was grounded in the well-established constitutional principle that due process does not tolerate the incarceration of people simply because they are poor. Id.

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

The State's reliance on Curry and Blank would also be misplaced because when those cases are read carefully and considered in light of the realities of Washington's current LFO collection scheme, they actually support Beck's position that an ability-to-pay inquiry must occur at the time that any LFO is imposed. Indeed, after Blazina's recognition of the Washington State's "broken LFO system," 182 Wn.2d at 835, the

Washington Supreme Court's holdings in Curry and Blank must be revisited in the context of Washington's current LFO scheme.

Currently, Washington's laws set forth an elaborate and aggressive collections process which includes 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).

Washington's legislatively sanctioned debt cycle does not 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 only arise if the government seeks to enforce collection of 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).

The Washington Supreme Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times. It emphasized the following triggers for this inquiry:

- "The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment." Id. at 242.
- "[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point. Id.
- "[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." Id.

Blank thus makes clear 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.² Id.

² "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.

Given Washington's current LFO collection scheme, the only way to regularly comply with Blank's safeguards is for sentencing courts to conduct a meaningful ability-to-pay inquiry at the time the VPA or DNA-collection fee is imposed. Although Blank says that prior case law suggests that such an inquiry is not required at sentencing, the Supreme Court was not confronted with the realities of the State's current collection scheme in that case. As shown below, Washington's LFO collection scheme provides for immediate enforced collection processes, penalties, and sanctions. Consequently, Blank actually supports the requirement that sentencing courts conduct an ability-to-pay inquiry during sentencing when the VPA or DNA-collection fee is imposed.

First, under RCW 10.82.090(1), LFOs accrue interest at a compounding 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 Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013)). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. 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, 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 a “payroll deduction.” RCW 9.94A.760(3). This can be done 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 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 collections 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.

The examples set forth above show 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. If the constitutional requirements set forth in Curry and Blank are to be met, trial courts must conduct a thorough ability-to-pay inquiry at the time of sentencing when the LFOs are imposed. As such, any reliance on holdings of Curry and Blank by the State would be specious because Washington's current LFO system does not meet the constitutional safeguards mandated in those holdings.

In sum, Washington's LFO system is broken in part because the courts have not followed through with the constitutional requirement that LFOs only be imposed upon those that have the ability – or likely ability – to pay. It is not rational to impose a fee upon a person who does not have the ability to pay. Hence, when applied to defendants such as Beck who do not have the ability to pay LFOs, the mandatory imposition of the DNA-collection fee and VPA does not reasonably relate to the State interests served by those statutes. Consequently, this Court should find RCW 43.43.7541 and RCW 7.68.035 violate substantive due process and vacate the LFO order.

V. 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 individual financial circumstances and concluded he has the ability.³ As noted above, the record shows Beck was 59-years old, on disability, financially strapped, and going to have a very difficult time finding employment as a house keeper or caregiver again given the felonies on

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

her record – but the trial court imposed legal financial obligations 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.” Yet, the parties and the court did not discuss this finding at all. 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, 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. LFOs accrue interest at a rate of 12%, so even a person who manages to pay \$25 per month toward LFOs will owe the state more money 10 years after conviction than when the LFOs were originally imposed. Id. at 836. In turn, this causes background checks to reveal an “active record,” producing “serious negative consequences on employment, on housing, and on finances.” Id. at 837; All of these problems lead to increased recidivism. Blazina, 182 Wn.2d at 837. 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. See RCW 9.94A.010.

The State may argue that the court properly imposed these costs without regard to Beck's poverty, 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 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 (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, 186 Wn.2d 706, 355 P.3d 1093, 1097 (2015) (the legislature's choice of different language in different provisions indicates a different legislative intent).⁴

Although Curry states 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 mandated imposition of the penalty on indigent and solvent defendants alike: "The penalty is mandatory. In contrast to RCW 10.01.160, no provision is made in the statute to waive the penalty for indigent defendants." Id. at 917 (citation omitted). That portion of the opinion is arguable dictum because it does not appear 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 Supreme Court has ever held that the DNA fee is exempt from the ability-to-pay inquiry.

⁴ The legislature did amend the DNA statute to remove consideration of "hardship" at the time the fee is imposed. Compare RCW 43.43.7541 (2002) with 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).

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 error consistent with RAP 2.5. Id. at 681. As shown below, given the trial court's failure to conduct any semblance of an inquiry into Beck'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 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 how erroneously imposed LFOs haunt those who cannot pay, not only impacting 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, 344 P.3d at 683-85. 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 fact is “the state cannot collect money from defendants who cannot pay.” Id. at 684. 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 back 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. Unquestionably, the trial court erred in imposing discretionary LFOs without making any inquiry into Beck’s ability to pay. The Supreme Court

has held that “RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay” before a court may impose legal financial obligations. Id. at 685. This did not happen.

The pre-formatted language used here, and in the majority of 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 and remand for the trial court to follow the law. For these reasons, this Court should exercise its discretion and consider the merits of Beck’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 Beck’s ability to pay LFOs.

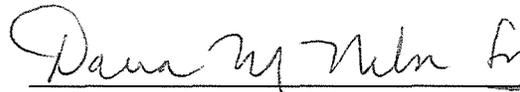
D. CONCLUSION

For reasons stated above, this Court should find appellant was denied a fair trial due to an improper judicial comment. Alternatively, this Court should strike the trial court's order that Beck pay LFOs and remand for a hearing on her ability to pay.

Dated this 9th day of December, 2015.

Respectfully submitted

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