#315291

No. 31563-1-III
(consolidated to No. 31529-1-III)

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

MICHEAL ORREN GORSKI,
Defendant/Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT
Honorable Ruth E. Reukauf, Judge

BRIEF OF APPELLANT MICHAEL GORSKI

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Cecil Toney to change his testimony.

2. The evidence was insufficient to support the conviction for second degree murder.

3. The record does not support the finding Mr. Gorski has the current or future ability to pay the imposed legal financial obligations.

4. The trial court erred when it ordered Mr. Gorski to pay a $100 DNA collection fee.

Issues Pertaining to Assignments of Error

1. Does a trial court abuse its discretion by allowing a witness to give coached testimony under the guise of ER 612, where there was no indication the witness' memory needed refreshing?

2. Is the second degree murder conviction unsupported by substantial evidence in violation of Mr. Gorski's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

3. Since the directive to pay LFOs was based on an unsupported finding of ability to pay, should the matter be remanded for the sentencing

court to make individualized inquiry into the defendant's current and future ability to pay before imposing LFOs?

4. Does the mandatory $100 DNA-collection fee authorized under RCW 43.43.7541 violate substantive due process when applied to defendants who do not have the ability or likely future ability to pay the fine?

B. STATEMENT OF THE CASE

Procedural background.

On July 11, 2011, Michael Orren Gorski was charged by information with one count of second-degree murder, acting as a principal or an accomplice in the 1997 murder of Carolyn Clift. CP 1. Co-defendant Frank Brugnone was similarly charged. Brief of Appellant Brugnone, p. 3. The causes were joined for trial. In pretrial hearings, the defendants made separate motions to sever, which were denied. 8/10/12 RP 56–69; 10/29/12 RP 103–127; 11/2/12 RP 128. Mr. Gorski's case was tried to a jury and Mr. Brugnone's case was simultaneously tried to the court. 1/17/13 RP 165.

In the State's opening statement, the jury was told:

> … that Mr. Brugnone made several statements after being advised of his constitutional rights, including that he had gone to the

> apartment of Carolyn Clift, the victim, that there was hugging, that he remained a short period of time, that she screamed, that she went down, that he saw blood, that he said, I'm out of here. You'll have an opportunity to hear additional information about the statement made by the codefendant, Frank Eugene Brugnone.

1/29/13 RP 398. Although redaction to avoid *Bruton* issues was contemplated, the parties and court eventually agreed to present the co-defendant's interview through a bifurcated proceeding. 8/10/12 RP 56–69; 10/29/12 RP 124; 11/2/12 RP 132–33; 1/24/13 RP 184–86; 1/25/13 RP 264–66, 272–74, 282; 2/4/13 RP 1065, 1133–39; 1141–42; 2/5/13 1265–74, 1281–1304; 2/6/13 RP 1485–86. The jury did not hear testimony about the contents of Mr. Brugnone's four-hour-long post-arrest statement to police. 2/6/13 RP 1489–1522; 2/11/13 RP 1828–1923.

Testimony.

At 11:19 pm on August 28, 1997, a resident of the Selah Square Apartments in Selah, Washington, called police to say she heard a scream and thought it was her neighbor, Carolyn Clift. Ms. Clift was known to local police officers; they had previously received calls about her and considered her "a little mentally challenged." 1/29/13 RP 438–40, 448–50. Responding officers arrived within minutes and entered the apartment. 1/29/13 RP 443, 450, 468–69. They found Ms. Clift lying dead on the floor. 1/29/13 RP 443–44, 453, 481.

An autopsy revealed Ms. Clift had four stab wounds through three wound entrances; one at the lower region of the left ribcage, another on the lower left chest, and one between the shoulder blades that had two wound paths from the same entrance. 1/30/13 RP 590. The wound to the back was unusual, requiring "a tremendous amount of force" to cut through the vertebrae. Dr. Selove, the forensic pathologist, stated the knife may have been pounded into the back to penetrate as far as it did. 1/30/13 RP 585, 591–94. He opined that something like a hammer may have been used and the hammer found in the apartment kitchen was of appropriate size, weight and mass to cause such a deep wound. 1/30/13 RP 660–62. He also described defensive cut wounds on the left hand and minor bruising on her face, neck, and elbow. 1/30/13 RP 606-07. The pathologist estimated the time of death was probably 11:00 pm or earlier. 1/30/13 RP 647–648.

Officers interviewed neighbors in the apartment complex. 73-year-old neighbor Carolee Appleton said she did not see anyone going in or out of the apartment on the night of the homicide. 2/1/13 RP 948, 972–733. On September 10, 1998, a year later, Ms. Appleton told an officer that a month prior to the homicide she had seen two "kids" arrive in a blue pickup truck. 2/1/13 RP 981–82. At that time Mr. Brugnone owned and drove an older blue pickup truck. 2/4/13 RP 1161; 2/6/13 RP 1313. Only

one of them, the passenger, went into Ms. Clift's apartment. 2/1/13 RP 982. She again reported she did not see a vehicle or the "kids" the night of the murder. 2/1/13 RP 985.

On September 17, 1998, Ms. Appleton gave a third statement. 2/1/13 RP 987. She again reported that she did not see anyone on the night of the homicide, and again, that she had seen a person three weeks prior to the murder: a man driving a blue pickup truck dropped his friend off at the apartment. 2/1/13 RP 987–88. She described the individual who entered the apartment at that time as late 20s to 30 years old, with a butch type haircut. 2/1/13 RP 990, 1035. When he was leaving, she heard him say to the driver of the truck, "C'mon let's get out of here." 2/7/13 RP 1562. She believed she heard the same male voice on the night of the homicide. 2/1/13 RP 992, 1035.

Fifteen years later, at trial, Ms. Appleton denied some of the content of her earlier statements and noted that she did not remember things very well. 2/1/13 RP 990–92, 996, 1012. She testified that on the afternoon of the homicide, between 5:30 and 6:30 pm, she sat with Ms. Clift and another tenant at a picnic table. 2/1/13 RP 951. A man approached the table and said, "I've come with dessert. I'm not taking her to dinner." He carried a bag wrapped around a bottle, and followed Ms.

Clift into her apartment. 2/1/13 RP 952–53. Ms. Appleton said someone driving a blue truck had dropped off the man. 2/1/13 RP 954.

Later that night, Ms. Appleton thought she heard a man knock lightly on Ms. Clift's door between 1:30 and 2:30 am; he did not enter the apartment. 2/1/13 RP 963; 997. She heard him say, "It's taking too long. Come on. Hurry." 2/1/13 RP 962–63. The man then ran back to his truck and another man came running out of the apartment with a towel shielding his face. 2/1/13 RP 998.

85-year-old apartment resident Virginia "Maxine" Jones testified that neighbor Lila Powell called her about 9:30 pm saying she heard screams. The witness did not remember telling police a different time. Ms. Jones went to Ms. Clift's apartment and called out for her. When she did not get an answer, the two went into Ms. Powell's apartment. 1/31/13 RP 846, 848, 855–56, 867. Ms. Jones saw a man run by the door, with his head down, and something shielding his face. He was wearing an unbuttoned shirt, blue jeans, and was between 5'10" and 6' tall. 1/31/13 RP 849–51. He ran into Ms. Clift's apartment, turned around, and went back out. 1/31/13 RP 861–62. Then she heard the motor of a car start. She saw a car, not a truck. She speculated there was another person in the car, but never saw anyone. 1/31/13 RP 863–64, 876.

Investigating officers collected a variety of items from inside Ms. Clift's apartment, including Marlboro cigarette butts that were located inside near the front door and a pair of eyeglasses from the living room. 1/29/13 RP 566–67. Officers did not recover a knife.

Officers contacted Mr. Gorski on September 2, 1997, and on September 4, 1997, he gave a taped interview. He also gave an un-taped interview on September 17, 1997. 1/31/13 RP 725–26. Mr. Gorski told police he had been at his former girlfriend Meghan Nunley's home until 10:30 or 11:00 pm the evening in question and then went home. At the time, he lived with Mr. Brugnone and Mr. Brugnone's wife. 1/30/13 RP 728–31; 1/31/13 RP 730; 2/1/13 RP 924.

On the evening of the murder, between 5:00 and 6:00 pm, Ms. Clift had gone to the local liquor store and purchased a bottle of whiskey. 1/30/13 RP 688, 690. She told the clerk she was excited because a boyfriend who had been in military was coming over for dinner. 1/30/13 RP 689, 701. Mr. Gorski entered and made a purchase. 1/30/13 RP 690–91. Ms. Clift and Mr. Gorski did not acknowledge one another in the store, but after they left, the clerk saw Ms. Clift talking to Mr. Gorski near his car. 1/30/13 RP 692–94.

Later that evening, between 7:00 and 7:30 pm, Ms. Clift rented two movies from a video store. 2/4/13 RP 1102–06. A witness who arrived at the Wagon Wheel bar that evening around 7:30 or 7:45 pm., also recalled seeing Ms. Clift sitting at a table with two women and a man. 2/6/13 RP 1358–59. Sometime after 9:00 pm she saw Ms. Clift slumped against a hallway wall as a different man was speaking to her in a scolding tone. 2/6/13 RP 1363–66. She did not see Ms. Clift or the man again that evening. 2/6/13 RP 1368–69.

A witness remembered seeing Ms. Clift at the Wagon Wheel bar dancing by herself, after 9:00 pm that same evening. 2/1/13 RP 887–88. She left alone, before midnight. 2/1/13 RP 889, 896. He also saw Mr. Brugnone that evening, but not with Ms. Clift. 2/1/13 RP 893. He did not remember seeing Mr. Gorski. 2/1/13 RP 894.

Meghan Nunley, a former girlfriend of Mr. Gorski, testified she saw Mr. Gorski that afternoon at the Wagon Wheel. 2/1/13 RP 923–24, 928. She invited him to her home. She left the bar sometime between 7:00 and 7:15 pm. 2/1/13 RP 939–40. Mr. Gorski arrived at her home between 8:00 and 8:30 pm. He told her he was late because he had given a woman a ride home from the liquor store. 2/1/13 RP 940–41, 944. He stayed until 10:00 or 10:30 pm. 2/1/13 RP 941.

Cecil Toney, Ms. Nunley's ex-husband, learned of the murder two days after it occurred. 1/31/13 RP 773–74, 777–79, 806; 2/1/13 RP 927–28. Ten years after the 1997 murder, Toney gave information to police regarding the unsolved homicide. In his 2007 and 2011 interviews, Toney reported that while taking a friend to the Selah Square Apartments the night before the murder, he saw Mr. Gorski and Mr. Brugnone duck down as his headlights shone on them as they stood in the parking lot between two cars. 1/31/13 RP 782–83, 800; 2/6/13 RP 1326.

On July 12, 2011, police arrested Mr. Gorski. 2/6/13 RP 1407–11, 1421. Mr. Gorski, 46-years-old at the time of the homicide, testified he was not with Mr. Brugnone on that day. 2/7/13 RP 1617, 1635. He saw Ms. Clift at the liquor store, gave her a ride home, and at her invitation, went inside her apartment. 2/7/13 RP 1591–96, 1603, 1654. They drank gin and smoked cigarettes. 2/7/13 RP 1603, 1663. As they sat on the sofa, they kissed and hugged. 2/7/13 RP 1606–08. He left her apartment between 7:30 and 7:40 pm and went to Ms. Nunley's home until 10:00 or 10:30 pm and then drove home. 2/7/13 RP 1609–10, 1613–14, 1658. He forgot his eyeglasses and cigarettes at Ms. Clift's apartment. 2/7/13 RP 1610.

Subsequent DNA testing results on the cigarette butts and eyeglasses, as well as scrapings from Ms. Clift's fingernails, were found to be consistent with the DNA profile of Michael Gorski. 1/31/13 RP 732; 2/4/13 RP 1184–85, 1190–91, 1194–96; 1201–02. The hammer found in the dish rack was also tested but contained only trace amounts of DNA, which were not matched to anyone. 2/4/13 RP 1192–93.

During trial, Toney testified his sighting of Mr. Gorski and Mr. Brugnone in the parking lot occurred on the night of the murder rather than the night before as he had earlier told police. 1/31/13 RP 800, 840–41. He stated he told police he saw them between 12:00 and 12:30 am and the transcript of his interview verifies this. 1/31/13 RP 791, 843. On cross-examination, Toney changed his earlier testimony that he saw them between 11:00 pm and midnight, and testified he actually saw them between 12:00 and 12:30 am. 1/31/13 RP 780, 800.

Defense counsel objected to the State's proposal to have the witness review a police summary of his February 22, 2007, interview with Detective Chris Gray and then be re-questioned about the timeframe. 1/31/13 RP 816– 24. Out of the presence of the jury, the State acknowledged and the court agreed Toney's testimony clearly gave the time as between 12:00 and 12:30 am. 1/31/13 RP 822. The witness had

not expressed any inability to recall the timeframe. Over objection, the court allowed the witness to look at the police summary, relying on ER 612. 1/31/13 RP 824–25. Despite the State's representation otherwise to the trial court, Det. Gray did not testify to the content of his summary and the summary was not admitted into evidence. 1/31/13 RP 717, 819–20; 2/6/13 RP 1325. After review, Toney changed his testimony. He acknowledged the summary indicated he'd told police the time frame had to be between 11:00 pm and midnight and adopted that time frame as his testimony. 1/31/13 RP 834–43.

Mr. Gorski was found guilty of second degree murder, committed while armed with a deadly weapon. CP 802–03. At sentencing the Court imposed restitution of $3,694.21, discretionary costs of $500 and mandatory costs of $550, for a total Legal Financial Obligation (LFO) of $4,744.21. CP 821. The Judgment and Sentence contained the following language:

> ¶ 2.6 Financial Ability. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant is an adult and is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 819. The Court also found Mr. Gorski had the means to pay the costs of incarceration and the costs of any medical care incurred by Yakima County on his behalf, and ordered him to pay those costs. CP 821, ¶¶ 4.D.4, 4.D.5.

The Court did not inquire into Mr. Gorski's financial resources or consider the burden payment of LFOs would impose on him. 3/8/13 RP 2018–23. The Court ordered Mr. Gorski to pay the costs and assessments within 180 days after his release at a monthly amount to be determined by the Yakima County Clerk. CP 822, ¶ 4.D.7.

This appeal followed. CP 835–36. The trial court found Mr. Gorski indigent for this appeal. (On file).

C. ARGUMENT

1. The trial court abused its discretion by allowing Cecil Toney to be coached and give altered testimony under the guise of ER 612, which prejudiced Mr. Gorski and requires a new trial.

ER 612 governs the procedure for using a writing to refresh a witness's memory. A witness may use a writing to refresh his or her memory for the purpose of testifying if the adverse party has an opportunity to review the writing. The opposing party is entitled to cross-

examine the witness from the writing and to introduce portions of it into evidence. ER 612.

The trial court must ensure that (1) the witness' memory needs refreshing, (2) opposing counsel has the right to examine the writing, and (3) the trial court is satisfied that the witness is not being coached. *State v. Little*, 57 Wn.2d 516, 521, 358 P.2d 120 (1961). The witness should first be questioned until his or her memory is exhausted and the witness indicates a need for the writing. Tegland, 5A Wash. Prac., Evidence Law and Practice § 612.3 (5th ed.) (citing at fn. 2: *U.S. v. Morlang*, 531 F.2d 183 (4th Cir. 1975) and *State v. Huelett*, 92 Wn.2d 967, 603 P.2d 1258 (1979)). A witness is not "coached" if "the witness is using the notes to aid, and not to supplant, his own memory." *Little*, 57 Wn.2d at 521. "[A]n attorney, including a prosecutor, may not 'coach' a witness, i.e., urge a witness to create testimony, under the guise of refreshing the witness' recollection under ER 612. See *State v. Delarosa–Flores*, 59 Wn. App. 514, 517, 799 P.2d 736 (1990), *rev. denied*, 116 Wn.2d 1010, 805 P.2d 814 (1991); *see also* RPC 3.4 cmt. 1 ('Fair competition in the adversary system is secured by prohibitions against ... improperly influencing witnesses.')." *State v. McCreven*, 170 Wn. App. 444, 475, 284

P.3d 793 (2012). Abuse of discretion occurs if no reasonable person would take the view adopted by the trial court. *Huelett*, 92 Wn.2d at 969.

Here, ER 612's threshold requirement that the witness' memory needed refreshing was not met. Mr. Toney testified without hesitation his sighting of Mr. Gorski and Mr. Brugnone took place between 12:00 and 12:30 am and that his prior statement to police verified this time frame. 1/31/13 RP 791, 800, 843. The State and the court acknowledged his testimony was "solid" and "firm" as to this time frame. 1/31/13 RP 822. Toney's memory was not "exhausted" and he did not indicate any need to refer to extrinsic writings. However, after being allowed to review the reports, Toney acknowledged the police summaries indicated he'd told police the time frame had to be between 11:00 pm and midnight. Toney then adopted that time frame as his testimony. 1/31/13 RP 834–43. The trial court erred and abused its discretion in permitting Toney to be coached by improperly reviewing the police summaries and to give altered testimony.

Toney's changed testimony was highly prejudicial. Dr. Selove, the forensic pathologist, estimated the time of death was probably 11:00 pm or earlier. 1/30/13 RP 647–648. The 911 call was made at 11:19 pm. 1/29/13 RP 506. Police responded within minutes, searched and cordoned

off the apartment, parking lot and neighboring streets, and found no one in the immediate area. 1/29/13 RP 438, 462, 467–69. 483–85. Toney's original testimony and interview statement that he saw them in the parking lot between 12:00 and 12:30 am was the only eyewitness testimony placing Mr. Gorski and Mr. Brugnone anywhere near the victim's apartment. The timeframe is inconsistent with her death.

Despite the State's representation otherwise to the trial court, Det. Gray did not testify to the content of his summary and the summary was not admitted into evidence. 1/31/13 RP 717, 819–20; 2/6/13 RP 1325. Thus according to the State's untainted evidence, Toney was lying about having seen the two men. The remaining evidence was not overwhelmingly tipped in the State's favor and the jury may have reached a different conclusion. Instead, the witness was improperly allowed to adjust his testimony to present a timeframe that complemented and sealed the State's case. Mr. Gorski was prejudiced by the court's error and is entitled to a new trial.

2. The evidence was insufficient to sustain the conviction for murder in the second degree as either a principal or an accomplice.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.*

Evidence in insufficient to support a conviction unless, when viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). Insufficiency of the evidence to prove all elements of a crime beyond a reasonable doubt

requires the conviction to be reversed and dismissed. *State v. Teal*, 117 Wn. App. 831, 837, 73 P.3d 402 (2003).

Mr. Brugnone was charged with murder in the second degree. To sustain a conviction for murder in the second degree, the State was required to prove beyond a reasonable doubt the defendant without premeditation intended to cause the death of another person and caused the death of such person. RCW 9A.32.050(1).

The State's evidence here cannot sustain a conviction as either a principal or an accomplice. There was no direct physical evidence establishing that Mr. Gorski committed or was a participant in the crime. The indirect evidence, even taken in a light most favorable to the State, does not place Mr. Gorski at Ms. Clift's apartment at the time of commission of the murder.

Mr. Gorski acknowledged being in Ms. Clift's apartment earlier that evening, drinking gin and smoking cigarettes, kissing and making out. 2/7/13 RP 1591–96, 1603, 1606–08, 1654, 1663. The liquor store owner had seen them beforehand, when they bought alcohol sometime between 5:00 and 6:00 pm. 1/30/13 RP 688–89, 690–94, 701.

Mr. Gorski left the apartment alone between 7:30 and 7:40 pm and went to Ms. Nunley's home until 10:00 or 10:30 pm and then drove home.

2/7/13 RP 1609–10, 1613–14, 1658. Ms. Nunley verified Mr. Gorski arrived at her house between 8:00 and 8:30 pm and stayed until 10:00 or 10:30 pm. 2/1/13 RP 940–41, 944.

Ms. Clift was seen alone between 7:00 and 7:30 pm as she rented two movies from a video store. 2/4/13 RP 1102–06. At the Wagon Wheel bar, two witnesses also saw Ms. Clift alive after Mr. Goski left her apartment. One witness saw Ms. Clift around 7:30 or 7:45 pm. and again sometime after 9:00 pm. 2/6/13 RP 1358–59, 1363–66, 1368–69. The second witness saw Ms. Clift dancing by herself, after 9:00 pm. 2/1/13 RP 887–88.

According to the evidence, Ms. Clift was seen alone and alive until sometime after 9:00 p.m. The pathologist estimated the time of death as 11:00 pm or earlier. 1/30/13 RP 647–648. The 911 call was made at 11:19 pm. 1/29/13 RP 506. Thus the murder must have occurred sometime after 9:00 pm and before 11:19 pm.

Evidence showed Mr. Gorski was at Ms. Nunley's or the Brugnone's house during this time period. 1/30/13 RP 728–31; 1/31/13 RP 730; 2/1/13 RP 924, 940–41, 944. Mr. Gorski was not seen with Ms. Clift after he left her apartment. 2/1/13 RP 894. At best, the testimony of the apartment neighbors and other witnesses established only

circumstantially that Mr. Brugnone may have been in the area in his blue pickup with an unknown passenger. In the absence of Toney's impermissibly altered testimony as argued above, the evidence does not place Mr. Goski at the crime scene.

Substantial evidence means evidence sufficient to persuade an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973). Here, the jury's verdict is not supported by substantial evidence. There was no evidence from which any rational trier of fact could conclude Mr. Gorski took any action or had any intent to, or did cause the death of Ms. Clift. Because there is no evidence to conclude Mr. Gorski participated in the homicide, the special verdict of use of a deadly weapon should also be reversed and dismissed.

3. Since the directive to pay LFO's was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Gorski 's current and future ability to pay before imposing LFOs.

a. *This court should exercise its discretion and accept review*.

Mr. Gorski did not make this argument below. However, the Washington Supreme Court has held the ability to pay legal financial

LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). In *Blazina* the Court felt compelled to accept review under RAP 2.5(a) because "[n]ational and local cries for reform of broken LFO systems demand … reach[ing] the merits … ." *Blazina*, 344 P.3d at 683. The Court reviewed the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by this Court. Indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by virtue of LFOs that are improperly imposed at the outset. As the *Blazina* Court bluntly recognized, one societal reality is "the state cannot collect money from defendants who cannot pay." *Blazina*, 344 P.3d at 684. 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 is a financially wasteful use of

administrative and judicial process. A more efficient use of state resources would result from this court's remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this Court has the immediate opportunity to expedite reform of the broken LFO system. This Court should embrace its obligation to uphold and enforce the Washington Supreme Court's decision that RCW 10.01.160(3) requires the sentencing judge to make an individualized inquiry on the record into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616, 634 (2005) rev'd in part sub nom. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis—"to stand by the thing decided"—binds the appellate court as well as the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Gorski's case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696, 701 (2011) ("Once the Washington Supreme Court has authoritatively construed a

statute, the legislation is considered to have always meant that interpretation.") (citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685. Post-*Blazina*, one would expect future trial courts to make the appropriate ability to pay inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Gorski respectfully submits that in order to ensure he and all indigent defendants are treated as the LFO statute requires, this Court should reach the unpreserved error and accept review. *Blazina*, 182 Wn.2d 827, 344 P.3d at 687 (FAIRHURST, J. (concurring in the result)).

b. *Substantive argument*.

There is insufficient evidence to support the trial court's finding that Mr. Gorski has the present and future ability to pay legal financial obligations, the costs of incarceration, and the costs of any medical care incurred by Yakima County on his behalf. Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915–16, 829

P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendnat had the ability to pay, violates the defendant's right to equal protection under Washington Constitutuion, Article 1, § 12 and United States Constitutuion, Fourteenth Amendment. *Fuller v. Oregon*, supra. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983).

RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation." RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3). 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 the court imposes LFOs. *Blazina*, 344 P.3d at 685. "This inquiry also requires the court to consider important factors, such as incarceration

and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Id*. The remedy for a trial court's failure to make this inquiry is remand for a new sentencing hearing. *Id*.

Blazina further held trial courts should look to the comment in court rule GR 34 for guidance. *Id*. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id*. (citing GR 34). For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id*.

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs."

Curry, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id*. at 915–16. The individualized inquiry must be made on the record. *Blazina*, 182 Wn.2d 827, 344 P.3d at 685.

Here, the judgment and sentence contains a biolerplate statement that the trial court has "considered" Mr. Gorski's present or future ability to pay legal financial obligations. Similar boilerplate statements found Mr. Gorski had the means to pay the costs of incarceration as well as the costs of any medical care incurred by Yakima County on his behalf. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination "as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard." *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

"Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be

sufficient for [the appellate court] to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.' " *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted).

Here, despite the boilerplate language in paragraphs 2.5, 4.D.4 and 4.D.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Gorski's financial resources and the potential burden of imposing LFOs on him. 3/8/13 RP 2018–23. Despite finding him indigent for this appeal, the Court ordered Mr. Gorski to pay the costs and assessments within 180 days after his release at a monthly amount to be determined by the Yakima County Clerk. CP 822, ¶ 4.D.7.

The boilerplate finding that Mr. Gorski has the present or future ability to pay LFOs, costs of incarceration, and any medical care incurred by Yakima County on his behalf is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Gorski 's current and future ability to pay before imposing LFOs or the other costs. *Blazina*, 344 P.3d at 685.

4. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory $100 DNA collection fee.

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; Wash. Const. art. 1, § 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)).

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. 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." *DeYounq 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.*

Here, the statute mandates all felony offenders pay the DNA-collection fee. RCW 43.43.7541[1]. This ostensibly serves the State's

[1] RCW 43.43.7541 provides:

> 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

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. But the imposition of this mandatory fee upon defendants who cannot pay the fee does not rationally serve that interest.

It is unreasonable to require sentencing courts to impose the DNA-collection fee upon all felony defendants regardless of whether they have the ability or likely future ability to pay. The blanket requirement does not further the State's interest in funding DNA collection and preservation. As the Washington Supreme Court frankly recognized, "the state cannot collect money from defendants who cannot pay." *Blazina*, 182 Wn.2d 827, 344 P.3d at 684. When applied to indigent defendants, the mandatory fee orders are pointless. It is irrational for the State to mandate that trial courts impose this debt upon defendants who cannot pay.

In response, the State may argue the $100 DNA collection-fee is such a small amount that most defendants would likely be able to pay. The problem with this argument, however, is this fee does not stand alone.

The Legislature expressly directs that the fee is "payable by the offender after payment of all other legal financial obligations included in

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fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

the sentence." RCW 43.43.7541. Thus, the fee is paid only after restitution, the victim's compensation assessment, and all other LFOs have been satisfied. As such, the statute makes this the least likely fee to be paid by an indigent defendant.

Additionally, the defendant will be saddled with a 12% rate on his unpaid DNA-collection fee, making the actual debt incurred even more onerous in ways that reach far beyond his financial situation. The imposition of mounting debt upon people who cannot pay actually works against another important State interest – reducing recidivism. See, *Blazina*, 182 Wn.2d 827, 344 P.3d at 683–84 (discussing the cascading effect of LFOs with an accompanying 12% interest rate and examining the detrimental impact to rehabilitation that comes with ordering fees that cannot be paid).

When applied to defendants who do not have the ability or likely ability to pay, the mandatory imposition of the DNA-collection fee does not rationally relate to the State's interest in funding the collection, testing, and retention of an individual defendant's DNA. Therefore, RCW 43.43.7541 violates substantive due process as applied. Based on Mr. Gorski' indigent status, the order to pay the $100 DNA collection fee should be vacated.

D. CONCLUSION

For the reasons stated, the conviction for second degree murder should be reversed and dismissed or the matter remanded for a new trial. Alternatively, the case should be remanded to make an individualized inquiry into Mr. Gorski's current and future ability to pay before imposing LFOs, costs of incarceration and costs of any medical care incurred by Yakima County on his behalf. In addition, the order to pay the $100 DNA collection fee should be vacated.

Respectfully submitted on July 23, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 23, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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