



June 1, 2018

The Honorable Charles W. Johnson, Chair
Supreme Court Rules Committee
Temple of Justice
PO Box 40929
Olympia, Washington 98504-0929
VIA U.S. MAIL AND E-MAIL

Dear Justice Johnson:

Thank you for your letter regarding Washington Defender Association's (WDA) proposed changes to RALJ 9.3 and the comments regarding our proposal. We are pleased and honored by your careful attention to this important matter that impacts the ability of many Washington citizens to appeal their cases and access justice through the court system.

This letter is a response to your request that WDA address the comment submitted by the American Civil Liberties Union Washington (ACLU), which integrates changes regarding the definition of indigency contained in E2SHB 1783. WDA strongly supports the proposed change in language that the ACLU comment recommends. If the court incorporates that change in language, the revised rule would read in part:

(2) Criminal Appeals. The party that substantially prevails on a criminal appeal shall be awarded costs on appeal unless the superior court judge determines the criminal defendant is indigent as defined in RCW 10.101.010(3)(a)-(c). Costs will be imposed against a party whose appeal is involuntarily dismissed unless that party is a criminal defendant and the superior court judge determines the criminal defendant is indigent as defined in RCW 10.101.010(3)(a)-(c). When the trial court has entered an order that a criminal defendant is indigent for purposes of appeal, that finding of indigency remains in effect unless the superior court judge determines by a preponderance of the evidence that the criminal defendant's financial circumstances have significantly improved since the last determination of indigency. The superior court judge may consider any evidence offered to determine the individual's indigency. Costs will be awarded in a case dismissed by reason of a voluntary withdrawal of an appeal only if the superior court so directs at the time the order is entered permitting the voluntary withdrawal of the appeal.

I have also attached to this letter a new version of suggested changes to RALJ 9.3 that incorporates the language in the ACLU comment. Suggested changes are underlined.

When WDA submitted our proposal in September 2017, E2SHB 1783 was not yet law. Although there was support for legislation regarding LFO reform during the 2017 legislative sessions, E2SHB 1783 did not pass until the 2018 legislative session. Because WDA submitted our

proposed changes to RALJ 9.3 when it was unclear what form legislative changes to the statutes governing LFOs might take, we modeled the language in our proposal after recent changes to RAP 14.2. Now that E2SHB 1783 has passed and is about to go into effect, we agree with the ACLU that changes to RALJ 9.3 should be consistent with the current law.

Another benefit of the proposed language is that it will be much more straightforward for a superior court reviewing a RALJ appeal to determine whether the defendant is indigent as defined in RCW 10.101.010(3)(a) – (c) than to decide whether that defendant may have a current or future ability to pay appellate costs. This will allow a defendant to better evaluate whether the superior court will impose the costs of appeal when that defendant is deciding whether to appeal a conviction or sentence.

Again, WDA hopes the court will adopt the change in language the ACLU has suggested regarding WDA's original proposal. Thank you very much for your time and consideration. Please let me know if you have additional questions.

Sincerely,

A handwritten signature in black ink that reads "Magda Baker". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Magda Baker
Misdemeanor Resource Attorney

Enclosures

1 [Suggested changes to RALJ 9.3(a) and (g)]

2 RALJ 9.3 COSTS

3 ~~(a) Party Entitled to Costs in Civil and Criminal Appeals.~~

4 **(1) Civil Appeals.** The party that substantially prevails on a civil appeal shall be awarded costs
5 on appeal. Costs will be imposed against a party whose appeal is involuntarily dismissed. Costs
6 will be awarded in a case dismissed by reason of a voluntary withdrawal of an appeal only if the
7 superior court so directs at the time the order is entered permitting the voluntary withdrawal of
8 the appeal.

9 **(2) Criminal Appeals.** The party that substantially prevails on a criminal appeal shall be
10 awarded costs on appeal unless the superior court judge determines the criminal defendant is
11 indigent as defined in RCW 10.101.010(3)(a)-(c). Costs will be imposed against a party whose
12 appeal is involuntarily dismissed unless that party is a criminal defendant and the superior court
13 judge determines the criminal defendant is indigent as defined in RCW 10.101.010(3)(a)-(c).
14 When the trial court has entered an order that a criminal defendant is indigent for purposes of
15 appeal, that finding of indigency remains in effect unless the superior court judge determines by
16 a preponderance of the evidence that the criminal defendant's financial circumstances have
17 significantly improved since the last determination of indigency. The superior court judge may
18 consider any evidence offered to determine the individual's indigency. Costs will be awarded in
19 a case dismissed by reason of a voluntary withdrawal of an appeal only if the superior court so
20 directs at the time the order is entered permitting the voluntary withdrawal of the appeal.

21 **(b) – (f)** [No changes.]

22 **(g) Reasonable Attorney Fees.** A request for reasonable attorney fees should not be made in the
23 cost bill. The request should be made as provided in rule 11.2. In a criminal case attorney fees
24 are subject to rule 9.3(a)(2).

25

26

The Supreme Court
State of Washington

CHARLES W. JOHNSON
JUSTICE
TEMPLE OF JUSTICE
POST OFFICE BOX 40929
OLYMPIA, WASHINGTON
98504-0929



(360) 357-2020
FACSIMILE (360) 357-2103
E-MAIL J_C.JOHNSON@COURTS.WA.GOV

May 23, 2018

Ms. Magda Baker
Washington Defender Association
110 Prefontaine Place S., Ste. 610
Seattle, WA 98104-2626

Dear Ms. Baker:

I am writing to you as the proponent for the proposed amendment to Rules of Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) 9.3—Costs. The Supreme Court Rules Committee is in the process of reviewing the proposed amendment and the corresponding comments submitted during the published comment period.

The committee would like your response to the published comments, specifically to the comment submitted by the American Civil Liberties Union Washington, which integrates changes regarding indigency definitions contained within E2SHB 1783, effective June 7, 2018. I have enclosed a copy of the ACLU comment. All comments the court received during the comment period are available electronically at www.courts.wa.gov/court_rules/. The committee looks forward to reviewing your response.

Very truly yours,

Charles W. Johnson, Chair
Supreme Court Rules Committee

Enclosure

SENT VIA E-MAIL

April 30, 2018

The Honorable Charles Johnson, Chair
Washington State Supreme Court Rules Committee
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov



Washington

901 Fifth Ave, Suite #630
Seattle, WA 98184
(206) 624-2134
aclu-wa.org

Jean Robinson
Board President

Kathleen Taylor
Executive Director

Emily Chiang
Legal Director

Antoinette Davis
John Midgley
Nancy Talner
Senior Staff Attorneys

Eunice Cho
Prachi Dave
Lisa Nowlin
Breanna Schuster
Staff Attorneys

Jessica Wolfe
Equal Justice Works Fellow

Re: comment in support of proposed amendments to RALJ 9.3 with suggested language regarding the definition of ability to pay

Dear Justice Johnson and Honorable Supreme Court Justices,

The ACLU of Washington (ACLU-WA) is writing this comment in support of the proposed changes to RALJ 9.3. The amendments proposed by the Washington Defender Association (WDA) will aid in protecting due process and are necessary to ensure that indigent defendants who have the right to appeal their misdemeanor convictions are protected by an ability to pay analysis before appellate costs are imposed. Without such protections, the costs associated with appeal may function to deter individuals from appealing their convictions.

The proposed changes to RALJ 9.3 relevant to this comment are as follows:

(2) Criminal Appeals. The party that substantially prevails on a criminal appeal shall be awarded costs on appeal unless the superior court judge determines the criminal defendant does not have the current or likely future ability to pay such costs. Costs will be imposed against a party whose appeal is involuntarily dismissed unless that party is a criminal defendant and the superior court judge determines the criminal defendant does not have the current or likely future ability to pay such costs. When the trial court has entered an order that a criminal defendant is indigent for purposes of appeal, that finding of indigency remains in effect unless the superior court judge determines by a preponderance of the evidence that the criminal defendant's financial circumstances have significantly improved since the last determination of indigency. The superior court judge may consider any evidence offered to determine the individual's current or future ability to pay. Costs will be awarded in a case dismissed by reason of a voluntary withdrawal of an appeal only if the superior court so

directs at the time the order is entered permitting the voluntary withdrawal of the appeal.

The proposed changes to RALJ 9.3 mirror the amendments recently made to RAP 14.2, and reflect the language of the Supreme Court's decision in *State v. Blazina*, that courts must consider current and future ability to pay before imposing monetary penalties on defendants in criminal cases. Incorporating ability to pay protections into RALJ 9.3 is essential to ensure that misdemeanor appellants are afforded ability to pay protections, which their felony counterparts receive through RAP 14.2. Additionally, it appears that courts have not encountered difficulty in implementing the ability to pay procedures in RAP 14.2.

Over the past several years, ACLU-WA has actively worked alongside partners to reform the system through which legal financial obligations (LFOs) are imposed and collected. This work has been informed by the experiences of the many individuals whose daily lives are impacted by the effects of LFOs. Every day individuals with prior convictions face jail time, the necessity of diverting already scarce resources to LFO payments in order to avoid warrants, and the inability to vacate convictions because they are indigent and cannot pay off their LFOs, a prerequisite to vacating. LFOs imposed at the appellate level serve only to exacerbate existing burdens.

Importantly, misdemeanants have only one opportunity to appeal their conviction and sentence. The decision to do so should not be hindered by the fear or concern that they will be ordered to pay more in costs if they take advantage of their right to appeal. The number of appeals filed from courts of limited jurisdiction is disproportionately low in comparison to the number of cases reaching disposition.¹ The number might be higher, however, if indigent defendants were assured that they would not be required to pay the costs of appeal. More specifically, those defendants who wish to appeal the failure of a trial court to conduct an ability to pay inquiry when imposing LFOs currently risk even more LFOs if they engage in the appellate process. This may lead to the harmful outcome of defendants being unable to enforce ability to pay cases like *State v. Blazina* in some courts of limited jurisdiction, because they are chilled from exercising their right to appeal by the risk of incurring appellate costs.

Finally, since the WDA proposed the amendments to RALJ 9.3, the Washington state legislature passed HB 1783, An Act Relating to Legal

¹ *Courts of Limited Jurisdiction Annual Caseload Reports*, COURTS.WA.GOV (April 17, 2018), <http://www.courts.wa.gov/caseload/?fa=caseload.showIndex&level=d&freq=a>.

Financial Obligations.² HB 1783 incorporates existing definitions of indigency from RCW 10.101.010(3)(a)-(c) as the standard that determines whether an individual has the ability to pay. For example, RCW 10.01.160(3) now reads as follows:

(3) The court shall not order a defendant to pay costs ~~((unless))~~ if the defendant ~~((is or will be able to pay them))~~ at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c). In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

So, when a person meets the definition of indigency under RCW 10.101.010(3)(a)-(c), they are presumed to be unable to pay for the purposes of imposition of LFOs at the trial court level. Given this development in the law, the court may consider a slight variation on the WDA's proposed changes by utilizing RCW 10.101.010(3)(a)-(c) as the definition of ability to pay in RALJ 9.3. If the variations were incorporated into the current proposal, the rule would appear as follows:

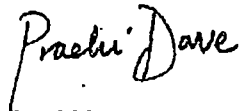
(2) Criminal Appeals. The party that substantially prevails on a criminal appeal shall be awarded costs on appeal unless the superior court judge determines the criminal defendant does not have the current or likely future ability to pay such costs is indigent as defined in RCW 10.101.010(3)(a)-(c). Costs will be imposed against a party whose appeal is involuntarily dismissed unless that party is a criminal defendant and the superior court judge determines the criminal defendant does not have the current or likely future ability to pay such costs is indigent as defined in RCW 10.101.010(3)(a)-(c). When the trial court has entered an order that a criminal defendant is indigent for purposes of appeal, that finding of indigency remains in effect unless the superior court judge determines by a preponderance of the evidence that the criminal defendant's financial circumstances have significantly improved since the last determination of indigency. The superior court judge may consider any evidence offered to determine the individual's current or future ability to pay indigency. Costs will be awarded in a case dismissed by reason of a voluntary withdrawal of an appeal only if the superior court so directs at the time the

² Engrossed 2nd Substitute H.B. 1783, 65th Leg., Reg. Sess. (Wash. 2018), available at <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/House%20Passed%20Legislature/1783-S2.PL.pdf>.

order is entered permitting the voluntary withdrawal of the appeal.

The ACLU-WA hopes that this Court will consider these comments in amending RALJ 9.3.

Sincerely,

A handwritten signature in cursive script that reads "Prachi Dave". The signature is written in black ink and is positioned above the typed name.

Prachi Dave
Staff Attorney, ACLU-WA Second Chances Project

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, April 30, 2018 3:20 PM
To: Tracy, Mary
Subject: FW: Comment on proposed amendments to RALJ 9.3
Attachments: ACLU-WA comment on proposed changes to RALJ 9.3.pdf

Forwarding

From: Prachi Dave [mailto:pdave@aclu-wa.org]
Sent: Monday, April 30, 2018 3:19 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on proposed amendments to RALJ 9.3

Good afternoon,

Attached please find the ACLU of Washington's comments on the proposed changes to RALJ 9.3.

Kind regards,

Prachi Dave.

Prachi Dave
Staff Attorney, Second Chances Project
Pronouns: she, her

American Civil Liberties Union of Washington Foundation
901 Fifth Avenue, Suite 630, Seattle, WA 98164

206.624.2184 | pdave@aclu-wa.org
www.aclu-wa.org

ACLU
Washington

This message is intended only for the people to whom it is addressed and may include confidential attorney-client/attorney-work product communication. If this message is not addressed to you, please delete it and notify me.

Tracy, Mary

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, June 1, 2018 4:54 PM
To: Tracy, Mary
Subject: FW: comment about RALJ 9.3
Attachments: letter from WDA to Supreme Court Rules Committee RALJ 9.3.pdf

Forwarding

From: Magda Baker [mailto:Magda@defensenet.org]
Sent: Friday, June 1, 2018 4:47 PM
To: Johnson, Justice Charles W. <Charles.Johnson@courts.wa.gov>
Cc: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: comment about RALJ 9.3

Dear Justice Johnson,

Please see the attached response to your letter regarding WDA's proposed changes to RALJ 9.3. I have also placed a copy in the mail.

Thank you very much for your consideration.

Sincerely,

Magda Baker

Magda Baker
Misdemeanor Resource Attorney
She/her/hers
Washington Defender Association
110 Prefontaine Pl S | Ste 610
Seattle, WA 98104
Tel: 206.623.4321, extension 106 | Fax: 206.623.5420
magda@defensenet.org



This exchange of information does not create an attorney-client relationship nor does it constitute legal advice. The Washington Defender Association (WDA) expects you will evaluate this information and independently decide how to best represent your client. The name of your client, if disclosed to the resource attorney, is considered confidential; however, for the purposes of recordkeeping, we may provide your name and general information about the type of assistance you received to other WDA staff, the WDA board, or the Washington State Office of Public Defense.