

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](mailto:supreme@courts.wa.gov)



Washington

901 Fifth Ave, Suite #630  
Seattle, WA 98104  
(206) 624-2184  
[aclu-wa.org](http://aclu-wa.org)

Jean Robinson  
*Board President*

Kathleen Taylor  
*Executive Director*

Erinly Chiang  
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Eunice Cho  
Prachi Dave  
Lisa Nowlin  
Breanne 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.<sup>1</sup> 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

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<sup>1</sup> *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.<sup>2</sup> 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

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<sup>2</sup> Engrossed 2<sup>nd</sup> Substitute H.B. 1783, 65<sup>th</sup> Leg., Reg. Sess. (Wash. 2018), available at <http://lawfilesexxt.leg.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

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**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

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**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](mailto:pdave@aclu-wa.org)  
[www.aclu-wa.org](http://www.aclu-wa.org)

**ACLU**  
Washington

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