

No. 48178-2-II

#15-9-03836-1

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

STATE OF WASHINGTON,

Respondent,

v.

ISAIAH C. WHITE,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
CLARK COUNTY

The Honorable David E. Gregerson, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in ordering appellant, Isaiah White, to pay legal financial obligations without properly considering his actual present and future ability to pay as required under RCW 10.10.160(3), and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015).
2. Appellant assigns error to the following “boilerplate” pre-printed findings on the judgment and sentence, which were unsupported by the evidence and law:

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant’s present, past 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 has the ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

That the defendant is presently indigent but is anticipated to be able to pay financial obligations in the future. RCW 9.94A.753.

That the defendant is indigent and disabled and is not anticipated to be able to pay financial obligations in the future. RCW 9.94A.753.

Other: _____

The following extraordinary circumstances exist that make restitution inappropriate. (RCW 9.94A.753): _____.

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

CP 59.

3. Reversal and remand for resentencing is required, because the sentencing court ordered appellant to pay legal financial obligations using an improper presumption of “ability to pay.”

4. This Court should not change its procedures and adopt the new pleading requirements for indigent criminal appeals crafted by Division One in State v. Sinclair, __ Wn. App. __, __ P.3d __ (2016 WL 393719).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the sentencing court err in imposing legal financial obligations on an impoverished defendant without first conducting the required inquiry into the defendant's actual future and present ability to pay as required under RCW 10.01.160(3) and Blazina, supra?
2. Did the sentencing court apply an improper presumption of ability to pay based on lack of physical disability?
3. Should this Court decline to change its procedures and adopt the new pleading requirements created by Division One in Sinclair, supra, because those new procedures are inconsistent with Supreme Court precedent, confusing and potentially onerous, will waste scarce judicial and criminal justice resources and create an improper presumption of imposition of costs against indigent appellants which runs afoul of Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), and State v. Curry, 118 Wn2d. 911, 915-16, 829 P.2d 166 (1992)?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Isaiah White was charged by second amended information in Clark County Superior Court with possession of heroin with intent to deliver (RCW 69.50.401(1)(2)(a)), with the enhancement factor that the crime was committed "within 1,000 feet of a school bus route stop (RCW 69.50.435(1)(c) and RCW 9.94A.533(6)). CP 39, 40, 44-45.

On October 16, 2015, the Honorable Judge David E. Gregerson accepted Mr. White's plea to the second amended information and ordered Mr. White to serve a standard-range sentence. CP 40, 47-48, 57, 74; RP 7-8. Mr. White appealed and this pleading follows. CP 72.

2. Facts relevant to issues on appeal

As part of the intake process in this case, Clark County conducted a “FINANCIAL SCREENING FOR APPOINTED COUNSEL,” in order to determine whether Mr. White was poor enough to meet the standards of indigency and thus was entitled to counsel at public expense. CP 2. That screening, conducted after booking, showed that Mr. White had been transient before his arrest, staying in various hotels due in part to a no-contact order against him regarding his mom. CP 3. Mr. White was unemployed at the time and had been for about three years. CP 3. He qualified for appointed counsel for trial below. CP 3. Indeed, appointed counsel moved for and was granted authorization for payment of investigator and transcription services at public expense due to White’s poverty. CP 27.

After the judge accepted Mr. White’s plea, the parties presented their joint recommendation on the sentence. RP 11-12. When the topic turned to legal financial obligations - which were not agreed - appointed counsel for Mr. White asked the sentencing court to decline to impose further financial burden on him:

In regard to legal financial obligations, my client has prior LFOs for a debt of about fifteen to \$20,000 already; he owes his mother a thousand dollars; his last job he held was in March 2015 for two months; he has no real skills as a laborer.

Also, he has the following physical problems. He has a stomach hernia, which we believe the future cost would be something like 5 - to \$6,000. He has a rotator cuff tear, which is about \$5,000 surgery. I can suggest the stomach hernia is about five to six from personal knowledge. It is too tough for him to work right now.

RP 12.

Given Mr. White's financial situation, counsel asked the court to "consider dropping the \$2,000 drug fund, the attorney fee of a thousand dollars, the fine of \$500 and the court fee of \$200." RP 12.

At that point, the judge inquired about the facts of the crime. RP 13. His concern was the quantity of drugs being possessed for sale. RP 13. The judge noted that Mr. White had admitted "to possession of the controlled substance" and that the amount possessed was "about 25 bindles." RP 13.

Judge Gregerson recognized that the sentence of 54 months was "some pretty serious time." RP 13. The judge asked White if he had anticipated ending up "like this" someday, apparently referring to facing time in custody. RP 13. White said he had gotten his GED at 17 and had been thinking "quite a bit" lately about "how things might have been different." RP 14.

After accepting the recommended length for the sentence, the judge then turned to the legal financial obligations. RP 15. The judge confirmed that Mr. White had a stomach hernia and some shoulder or rotator cuff issues. RP 15.

The following exchange then occurred:

THE COURT: All right. When was the last time you had gainful employment? When was the last time you had a paying job?

MR. WHITE: March this year.

THE COURT: How many hours a week?

MR. WHITE: Probably like 30.

THE COURT: Doing what kind of work?

MR. WHITE: Telemarketing.

THE COURT: Okay.

MR. WHITE: Like hearing aids.

RP 15.

At that point, the judge commented that this meant “there wouldn’t be any physical reason” White could not continue with such work at some point in the future. RP 15. Although the judge recognized that “[o]bviously, a criminal conviction is going to make it hard” to get work and pay off legal financial obligations, the judge concluded, “the Court’s not inclined to waive any of the legal financial obligations and will not do so.” RP 15-16.

In the section of the judgment and sentence which set forth the order for legal financial obligations, the following costs were preprinted and not stricken out: a \$500 “Victim assessment” (RCW 7.68.035), a \$200 “Criminal filing fee,” \$1,000 in “Fees for court appointed attorney (RCW 9.94A.760); defense expert and other defense costs “[t]o be set,” a “Drug enforcement Fund” fee of \$2000 (RCW 9.94A.760), a DNA collection fee of \$100 (RCW 43.43.7541), and a \$100 “Crime lab fee” (RCW 43.43.690) for which the option “suspended due to indigency” was not selected. CP 61-62. No total was entered on the document, but as ordered the amount would total \$3,900. CP 62.

Also preprinted on the judgment and sentence were clauses which ordered that payroll deduction “shall immediately issue,” that the payments shall be “commencing immediately,” and further, that:

[t]he financial obligations imposed in this judgment shall bear

interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.

CP 62-63. The order also indicated that the court would continue jurisdiction even past the statutory maximum for the offense in order to ensure collection of unpaid legal financial obligations. CP 63-64.

In the application on the motion and affidavit for an order of indigency, Mr. White did not list any assets. CP 74-76. His debts included “LFOs” from prior cases, stated to be between \$15-20,000, as well as \$1,000 he owed his mom. CP 75. His need for surgery and physical issues with his shoulder and hernia were mentioned. CP 75.

Prior to his arrest in this case, Mr. White was getting public assistance in the form of “food stamps” of about \$190 per month. CP 75.

D. ARGUMENT

1. REVERSAL AND REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE SENTENCING COURT FAILED TO PROPERLY CONSIDER APPELLANT’S ACTUAL FINANCIAL SITUATION AND TRUE ABILITY TO PAY AS REQUIRED UNDER RCW 10.01.160 AND BLAZINA

Under RCW 10.01.160(1), a trial court can order a defendant convicted of a felony to repay court costs as a part of a judgment and sentence. Another subsection of the same statute, however, prohibits a court from entering such an order without first considering the defendant’s specific financial situation. It is this subsection of the statute which is at issue in this appeal. 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.

(Emphasis added).

In this case, the sentencing court failed to make the required findings and conduct the required analysis under the statute. And Blazina makes this clear, because in Blazina, supra, our highest Court recently interpreted RCW 10.01.160(3) and held that the very kind of procedure which occurred here was in error.

Blazina involved two consolidated cases, each with an indigent defendant. 182 Wn.2d at 831-32. In one case, the sentencing court ordered a \$500 crime victim penalty assessment, a \$200 filing fee, a \$100 DNA fee, \$1,500 for assigned counsel and restitution to be determined “by later order.” Id. The other sentencing court ordered the same fees except only \$400 for appointed counsel and an additional \$2,087.87 in extradition costs. Id. The finding that the appellants had the required “ability to pay” under RCW 10.01.160(3) was made by simply “checking” a box next to preprinted, “boilerplate” language finding the defendants had the required ability to pay - and that the lower court had conducted the required analysis.

Neither defense counsel objected below. Id. On review, however, the defendants argued that the failure to comply with the requirements of RCW 10.01.160(3) on the record was error. In response, the prosecution argued, *inter alia*, that the issue was not “ripe for review” until the state tried to enforce collection of the amounts imposed at some future time. 182 Wn.2d at 833 n. 1.

Our highest Court disagreed. First, it found that RCW 10.01.160(3)

was mandatory, noting that it requires that a trial court “**shall not**” order costs without making an “individualized inquiry” into the defendant’s individual financial situation and their current and future ability to pay, and that the trial court “**shall**” take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose” in determining the amount and method for paying the costs. 182 Wn.2d at 834-35 (emphasis in original). And the Court found that, in this context, the word “shall” is imperative. Id.

Further, the Court agreed that the individualized inquiry must be done on the record. It rejected the a “boilerplate” clause, preprinted on the judgment and sentence, as sufficient to meet this requirement:

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant’s current and future ability to pay.

182 Wn.2d at 837-38. In addition, the Court gave insight into other “important factors” which a lower court must explicitly consider, “such as incarceration and a defendant’s other debts, including restitution, when determining a defendant’s ability to pay.” Id. The Court instructed lower courts faced with the question to determine “ability to pay” to consider such things as household income, federal poverty guidelines, whether the person receives federal assistance and other relevant questions, specific to that particular defendant. Id.

Blazina was decided in March of 2015. The plea and sentencing in this case occurred months later, in October of 2015.

Yet the sentencing court here did not follow Blazina. Instead, the court applied what amounted to an apparent presumption that LFOs will be imposed unless the defendant has some physical disability which would prevent him from working. There was no consideration of household income, or federal poverty guidelines or current debt, or the fact that Mr. White would be in custody and unable to work for some time. The judge did not inquire of Mr. White about how much money Mr. White had made when working, or how many debts he had or what other financial burdens he faced in order to conduct the required analysis under Blazina. And the “finding” of “ability” to pay in this case was the same kind of “check-the-box” boilerplate language preprinted on the form judgment and sentence as was condemned in Blazina.

The judge in this case simply did not engage in the kind of specific, case-by-case analysis of the defendant’s actual ability to pay required under RCW 10.01.160(3) under Blazina, before ordering an indigent defendant to shoulder \$3,900 of LFOs, payable at 12% interest from the date of sentencing. The ruling below and the boilerplate findings run directly afoul of the decision of our highest court in Blazina.

The error in this case is troubling. Blazina was a highly unusual, historic decision. In that case, the Court relied on an extremely rare method of reaching an issue, because it felt the urgency to do so in the interests of justice. 182 Wn.2d at 833-34.

More specifically, the Blazina Court recognized that “[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” 182

Wn.2d at 834. The Court chronicled widespread “problems associated with LFO’s imposed against indigent defendants,” including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems “caused by inequitable LFO systems.” Id. One of the proposed reforms the Court mentioned was a requirement “that courts must determine a person’s ability to pay before the court imposes LFOs.” Id.

The Court then noted the flaws in our own state’s LFO system and the system’s “problematic consequences.” Id. The Court was highly troubled by the fact that, in our state, LFOs accrue a whopping 12 percent interest and potential collection fees. Id. And the Court described the ever-sinking hole of criminal debt, where even someone trying to pay who can only afford \$25 a month will end up owing *more* than initially imposed even after *10 years* of making payments. Id. The Court was concerned that, as a result, indigent defendants are paying higher LFOs than wealthy defendants, because of the accumulation of interest based on inability to pay. Id.

Further, the Court noted, defendants unable to pay off LFOs are subject to longer supervision and entanglement with the courts, because courts retain jurisdiction until LFOs are completely paid off. 182 Wn.2d at 836-37. This increased involvement “inhibits reentry,” the justices noted, because active court records will show up in a records check for a job, or housing or other financial transaction. Id. The Court recognized that this and other “reentry difficulties increase the chances of recidivism.” Id.

Finally, the Blazina court pointed to the racial and other disparities

in imposition of LFOs in our state, noting that disproportionately high LFO penalties appear to be imposed in certain types of cases, or when defendants go to trial, or when they are male or Latino. Id. The Court also noted that certain counties seem to have higher LFO penalties than others. Id. The fact that the LFO system effectively ensured that people in poverty would be supervised by courts far longer than those who could pay off their LFOs right away - and the resulting social costs of that continuing contact - were also of grave concern. Id.

Blazina represented historic recognition by our highest state court that the legal financial obligation system has become an impediment to the very principles of the system it seeks to serve. It applies disproportionately to people in poverty. It ensures those people will be under the jurisdiction of the courts for far longer than people with means. That is why the Blazina Court took such an extraordinary step of granting relief even absent objection.

In fact, our highest court has reaffirmed its commitment to Blazina, supra, even extending it to apply in cases where there was no objection below. See State v. Duncan, __ Wn. 2d ___, __ P.3d __ (No. 90188-1) (April 28, 2016). In Duncan, the Supreme Court remanded to the trial court for resentencing and proper consideration of ability to pay, even though the defendant had not raised the issue below. After first noting that the imposition and collection of LFOs impacts constitutional issues, the Court rejected the idea that the issue was somehow waived or should not be addressed, stating, “[h]ad Duncan objected at trial to the LFOs sought by the state, the trial court *would have been obligated to consider* his present

and future ability to pay before imposing the LFOs.” (Emphasis added). Further, the Court referred to making the required findings for even those portions of the LFOs declared “non-discretionary.”

Duncan only reaffirms what Blazina made clear - that RCW 10.01.160 imposes an affirmative duty on a sentencing court which must be satisfied on the record with more than just a check mark saying “ability to pay” was considered.

Just like the defendants in Blazina, Mr. White is indigent. Just like those defendants, he is already subject to 12% interest, compounding right now. And just as in Blazina, here, there was no consideration of whether he has any present or future likelihood of having any hope of paying, despite the fact that he will be in prison for some time and despite the requirements of RCW 10.01.160 as noted in Blazina. The resentencing court should be ordered to consider Mr. White’s “individual financial circumstances and make an individualized inquiry into the defendant’s current and future ability to pay,” on the record as set forth in Blazina, before deciding whether it should even impose legal financial obligations.

2. THIS COURT SHOULD NOT ADOPT THE
INEFFICIENT, DUPLICATIVE NEW PLEADING
REQUIREMENTS DIVISION ONE ERRONEOUSLY
CRAFTED IN SINCLAIR

Although there is no federal constitutional right to appeal a criminal conviction, our state constitution guarantees that right. See Draper v. Washington, 372 U.S. 487, 496, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963); State v. Blank, 131 Wn.2d 230, 244-45, 930 P.2d 1213 (1997). As a result, anyone convicted of a crime in our state courts has a constitutional right to

a full, fair and meaningful appeal - and further, to appointed counsel at public expense if the person is indigent. See State v. Giles, 148 Wn.2d 448, 450-51, 60 P.3d 1208 (2003); Blank, 131 Wn.2d 244.

In general, it is unconstitutional to require someone to pay to exercise a constitutional right. See Fuller, supra. In Fuller, the U.S. Supreme Court upheld a statute which required a defendant who had been given counsel due to indigency to repay that cost if he later became able. 417 U.S. at 45. The statute did not make repayment mandatory. 417 U.S. at 45. It also required the appellate court to “take into account the defendant’s financial resources and the burden that payment would impose.” See Blank, supra, 131 Wn.2d at 235-36 (citing Fuller).

In addition, the statute at issue in Fuller provided that no payment obligation could be imposed “if there was no likelihood the defendant’s indigency would end.” 417 U.S. at 46. It also provided that no convicted person could be held in contempt for failure to pay if that failure was based on poverty. Fuller, 417 U.S. at 46.

In upholding this repayment requirement, the Fuller Court was convinced the relevant statute did not penalize those who exercised their rights but simply “provided that a convicted person who later becomes able to pay. . .may be required to do so.” 417 U.S. at 53-54. Because the legislation was “tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to to meet it without hardship,” the statute was constitutional. 417 U.S. at 53-54.

In Blank, supra, our Supreme Court examined Fuller and our state’s

own recoupment statute for appeals, RCW 10.73.160. That statute provides, in relevant part:

- (1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.
- (2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's papers may be included in costs the court may require a convicted defendant to pay.
- (3) Costs, including recoupment of fees for court-appointed counsel, shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure and in Title 9 of the rules for appeal of decisions of courts of limited jurisdiction. An award of costs shall become part of the trial court judgment and sentence.
- (4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The Blank Court examined the statute and concluded it did not violate either the mandates of Fuller or our state's constitutional right to appeal. The Blank Court was unconcerned about the prospect of indigent people being jailed or punished for being poor and unable to make payments, because of the provision allowing for "remission" of such costs if a person could not pay. 131 Wn.2d at 238-45. The Supreme Court was convinced that any trial court facing the question of whether a defendant

should be punished for failing to pay would comply with the mandates of Fuller and that “sufficient safeguards” existed to prevent a person from being punished simply for their poverty and inability to pay. Blank, 131 Wn.2d at 241-42.

As a result, the Court found that RCW 10.73.160 “contemplates the constitutionally required inquiry into ability to pay, the financial circumstances of the defendant, as well as the burden payment will place on defendant and his or her immediate family.” Id. The Court was also convinced that any future “additional penalty for failure to pay” could not be imposed by the state without the required inquiry, because “ability to pay must be considered at that point.” Id.

Blank thus upheld as constitutional an order against an indigent defendant for payment of costs of his unsuccessful appeal under RCW 10.73.160 and Rules of Procedure Title 14. 131 Wn.2d at 244-27. That statute and those rules, however grant this Court considerable discretion over not only when but even whether to order the appellant in a criminal case to pay those costs. State v. Nolan 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Nolan, our highest Court once again addressed the issue of imposition of costs on appeal in light of an indigent case. Mr. Nolan argued that, because of the constitutional rights involved, costs on appeal should not be ordered paid by an unsuccessful appellant in a criminal case who is indigent unless the appeal was wholly frivolous. 141 Wn.2d at 625-26. The Supreme Court rejected that theory but also dismissed the prosecution’s claim that costs should be awarded virtually as an automatic

step in the process. 141 Wn.2d at 627-28. Imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Indeed, the Court held, the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are technically entitled to costs under the rules. Nolan, 141 Wn.2d at 628.

RAP 14.2 also provides that, “[i]f there is no substantially prevailing party on review, the Commissioner or Clerk **will not** award costs to any party” (emphasis added). Where both parties prevail on major issues, there is actually no “substantially prevailing party” under RAP 14.2. Nolan, 141 Wn.2d 626, citing American Nursery Prods., Inc. v. Indian Wells Orchards, 115 Wn.2d 217, 234-35, 797 P.2d 477 (1990).

These cases make it clear that the issue of whether and when to impose costs on an impoverished appellant after he exercises his constitutional right to appeal are complex, involving not just the specifics of the rules but serious and difficult questions of constitutional bent.

There is now a serious question as to whether imposition of costs on appeal continues to be constitutional and whether Blank remains good law. It has become abundantly clear that imposition of costs on indigents across our state is resulting not only in improper punishment for poverty but has resulted in such extreme issues of inequity, unfairness and even racism in application that our highest Court took the unprecedented step of

addressing the issue in the interests of justice, even though it was not properly preserved. See Blazina, supra. Blazina laid bare the ugly realities of the system wrought in the wake of the assumptions of Blank; that no penalties would be imposed on indigent people until the moment of enforced collection, when a trial court would make the required inquiry. It also laid to rest any notion that there was no impact on impoverished people ordered to pay legal financial obligations or costs on appeal which become part of those obligations. See, e.g., RCW 10.82.090(1) (imposition of 12 percent interest to start the date the judgement and sentence is entered; collection and payments start immediately); RCW 10.73.160(4) (no provision for counsel to help a defendant who is indigent to seek redress or remission of the costs imposed as a result of their having exercised the constitutional right to appeal).

In Sinclair, supra, Division One of the Court of Appeals recently looked at the issue of costs on appeal when a defendant whose conviction was affirmed objected to a cost bill filed post-decision by the state. 2016 WL 393719. In Sinclair, the prosecution urged the Court to automatically impose costs on appeal against indigent defendants in *every* case and wait to see if the defendant brings a remission hearing on his own in trial court to ask for relief from imposition of such costs. 2016 WL 393719 at 2-3.

Division One properly rejected that idea and further rejected the procedure this Division has been using as a remedy. 2016 WL 393719 at 4-5. In this Division, for some time, this Court has followed the RAP Title 14 procedures about the timing of cost bill requests and pleadings, but when faced with a Blazina issue and an indigent defendant, has been

ordering appellate costs contingent upon the finding of the trial court on remand that the defendant had the required “ability to pay.” See Sinclair, supra.

For Division One, however, this was problematic. 2016 WL 393719 at 4-5. That Division felt the procedure improperly delegates to the trial court the appellate court’s duty of deciding appellate costs. 2016 WL 393719 at 5. Division One then crafted a completely new pleading requirement for its Division; that an *appellant* must set forth “[f]actors that may be relevant to an exercise of discretion” to impose appellate costs in case there is a future request by the *respondent* for such costs to be imposed. Id. Ultimately, Division One thought it there might need to be a “rule change requiring the State to include a request for costs in the brief of respondent[.]” 2016 WL 393719 at 5-6. Absent such a change, however, Division One held, an appellant should “devote a section of its opening brief” to rebutting any potential request for imposition of appellate costs, with the prosecution then given “the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill.” 2016 WL 393719 at 5-6.

This Court should not adopt the new pleading requirement created by Division One in Sinclair, because it is wrong as a matter of law and of policy on several levels. Further, the concerns expressed in Sinclair about this Court’s procedure after Blazina are easily redressed without the extreme steps mandated by Division One.

First, Sinclair runs afoul of the clear holdings of our highest state court, in Blank, supra, and Nolan, supra. RAP Title 14 provides that the

appellate court makes the decision on costs only “after the filing of a decision terminating review[.]” RAP 14.1(a). Further, the purpose of the RAPs allowing imposition of appellate costs are “designed to allocate appellate costs in a fair and equitable manner depending on the realities of the case.” State v. Stump, __ Wn.2d __, __ P.3d __ (No. 91531-8, April 28, 2016). Until there is a decision on the merits, the balance of equities cannot be done; the “substantially prevailing party” not determined. That explains why RAP 14.4, which provides the procedure for seeking costs, requires that the party seeking costs must file and serve a cost bill very shortly after a decision, i.e., “within 10 days after the filing of an appellate court decision terminating review.” RAP 14.4(a).

Thus, the determination of even whether a party is entitled to costs depends wholly on the decision on the merits. Further, as the Supreme Court recently held, the purposes of the Rules of Appellate Procedure regarding imposition of costs have the “obvious goal . . .to award costs in a fair and just manner depending on the realities of the situation.” Stump, __ Wn.2d at __ (slip opinion at 11-12).

In deciding what costs should be awarded and even whether, under the circumstances, the Court should exercise its considerable discretion and award costs at all, the Court must consider the decision on the merits by the Court. Under the procedure used by this Court and reflected in the rules, because costs are based upon information not even available until after the appeal has been decided on the merits, parties are only tasked with drafting and filing their requests for costs on appeal from a criminal case, if any, *after* they know what the Court decided it appears that they have a basis to

claim they are the “substantially prevailing party” and further, that the Court should exercise its discretion to order appellate costs. In this way scarce criminal justice resources are only expended when needed, rather than in every single case even if ultimately it will be irrelevant, as Sinclair requires.

Another very serious problem with the ruling in Sinclair is the potential scope of the requirement and its lack of clear standards, which in turn will result in further significant waste. In deciding to craft a new pleading requirement in Sinclair, Division One thought it could do the proper evaluation of ability to pay “at least as efficiently” through appellate briefing as it could be done in the trial court.

But even Division One did not seem to recognize the potential scope of its order or what it was going to require. Comparing the situation to that in RAP 18.1(b), the court said, “[t]ypically, a short paragraph or even a sentence is deemed compliant with the rule,” and that, as a result, “we are not concerned that this approach will lead to overlength briefs.” This implies that all it is requiring is a mere sentence, so that a declaration in an opening brief of continued indigence would seem enough.

However, Division One then stated that the parties should ensure they have sufficient information to present to the appellate court which would be relevant to the issue of whether costs should be imposed in the future if there is a substantially prevailing party and a proper request is made:

Both parties should be well aware during the course of appellate review of circumstances relevant to an award of appellate costs. A great deal of information about any offender is typically

revealed and documented during the trial and sentencing, including the defendant's age, family, education, employment history, criminal history, and the length of the current sentence.

2016 WL 393719 at 4-5.

And it is not only that information the court thought was needed to support its decisions regarding appellate costs, but also "current ability to pay" and indeed other factors. Indeed, the scope is unlimited, because the list in Sinclair "is not intended as an exhaustive or mandatory itemization of information that may support a decision one way or another." 2016 WL 393719 at 4. Division One concluded that parties should provide such briefing in order to assist the appellate court in the exercising its discretion "by developing fact-specific arguments from information that is available in the existing record," not only about ability to pay but also about the other factors it thought were relevant to the inquiry.

Thus, under Sinclair, counsel in criminal appeals will now be forced in Division One not only to file supplemental briefing in every case they have pending in that Division in order to comply. They will also have to exhaustively investigate the existing record as to the ability to pay at the time of the sentencing in order to ensure that they do not commit ineffective assistance in failing to object in advance to any future potential effect. This will have the further tax on scarce resources by requiring this Court to consider motions to supplement and supplemental pleadings in every criminal case pending before the Court on appeal, *even* if those cases, when decided on the merits, may not involve any need for such effort or consideration. And it will cause significant delay in new filings, as counsel would scramble to satisfy a new pleading requirement lest they be deemed

ineffective later.

Ultimately, the Sinclair Court properly declined to impose appellate costs on Sinclair, who was 66 years old, likely to die in prison and who qualified not only for an order of indigency at the trial court level but also for the purposes of appeal, concluding that, “there is no reason to believe Sinclair is or ever will be able to pay \$6,983.19 in appellate costs (let alone any interest that compounds at an annual rate of 12 percent).” It did so despite the prosecution’s claim that Sinclair had a solid work history and there was no evidence he would be unable to work in the future. Division One noted that there is a presumption of continued indigency throughout appellate review under RAP 15.2(f), which requires the appellate court to “give a party the benefits of an order of indigency throughout the review unless the *trial court* finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f) (emphasis added). Because there was no trial court order that his financial situation had improved or is likely to improve, and no realistic possibility he would be gainfully employed at his release in his 80s, the court exercised its discretion to deny the state’s request for appellate costs.

Although it reached the right result by refusing to saddle the appellant in that case with LFOs, the other portions of Sinclair, creating a novel new briefing requirement which puts appellate defense counsel in the position of assuming the client may not prevail on substantive claims.” 2016 WL 393719 at 2-6. Not only that, Division One recognized that its new procedure has “practical inefficiencies,” because it may require counsel to “include a presumptive argument against costs in every case”

even if the state does not intend to seek costs later.

It is consistent with the rules for Division One to honor and apply the presumption of indigence set forth in RAP 15.2(f). But the new requirements Division One created by engrafting RAP 18.1(b) onto this situation were improper. Notably, in Blank, our highest Court specifically rejected the same claim as that raised by Division One in Sinclair - that the briefing requirements of RAP 18.1 should apply to imposition of costs on appeal. The Blank Court declared that those “expenses which may be recouped under RCW 10.73.160 **do not fall within RAP 18.1.**” Blank, 131 Wn.2d at 250 (emphasis added).

Sinclair requires briefing not previously required, anticipatory to any issue even being raised, on an issue which may never need to be decided by the Court, in advance of the existence of the very facts which will be required for the decision to be made. Put simply, it is nonsensical and a waste of scarce resources to engraft a new pleading requirement in this fashion. This Court should decline to follow Division One’s improper decision in Sinclair.

In the alternative, the Court should follow Sinclair only to the extent that Division One honored the continuing presumption of indigency set forth in the Rules of Appellate Procedure, and should decline to impose costs on appeal on appellants who, like Mr. White, remain indigent and have no more ability to pay onerous costs for exercising their constitutional right to an appeal than they do to pay other legal financial obligations. As noted above, Mr. White was on basic public assistance and transient at the

time of the crime. He has no assets and a significant amount of previous LFO debt. This Court should deny any request for appellate costs, even if later requested, due to Mr. White's indigency.

F. CONCLUSION

The sentencing court erred in failing to comply with RCW 10.01.160(3) and Blazina. This Court should reverse and remand for resentencing. In addition, the Court should decline to follow Sinclair and refuse to create a new, inefficient briefing requirement. As Mr. White is and remains indigent, imposition of costs on appeal would be inappropriate in any case under Blazina.

DATED this 11th day of May, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Clark County Prosecutor's office, first class postage prepaid to P.O. Box 5000, Vancouver, WA. 98666-5000, and to Mr. White at DOC 893582, Larch CC., 15314 NE Dole Valley Road, Yacolt, WA. 98675.

DATED this 11th day of May, 2016.

/s/ Kathryn Russell Selk
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