

FILED

MAY 26, 2015

Court of Appeals
Division III
State of Washington

No. 32708-6-III (consolidated)
WITH No. 327604
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JAYME L. RODGERS,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Harold D. Clarke, III, Judge

BRIEF OF APPELLANT JAYME L. RODGERS

SUSAN MARIE GASCH
WSBA No. 16485
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....3

C. ARGUMENT.....10

 1. Mr. Rodgers’ convictions for drive-by shooting should be reversed and dismissed because the State was unable to establish beyond a reasonable doubt the location of any motor vehicles that may have been involved in the offenses.....10

 2. The trial court erred when it imposed mandatory minimum sentences on Mr. Rodgers’ first degree assault convictions.....13

 3. For purposes of the special scoring of multiple current serious violent offenses under RCW 9.94A.589(1)(b), where the crimes arguably have the same seriousness level and the statute is ambiguous, the rule of lenity requires the offender score calculation apply to the anticipatory offense and the 0-scoring rule apply to the completed crime as this will yield a shorter sentence.....16

 4. The trial court miscalculated the offender score.....21

5. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are improper, not crime-related or are unconstitutionally vague.....	22
6. Since the directive to pay LFOs 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. Rodgers’ current and future ability to pay before imposing LFOs.....	31
7. 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.....	38
D. CONCLUSION.....	43

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bearden v. Georgia</i> , 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).....	35
<i>Fuller v. Oregon</i> , 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974).....	34, 35
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	10
<i>Kolender v. Lawson</i> , 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).....	25, 26
<i>Malone v. United States</i> , 502 F.2d 554 (9th Cir.1974), <i>cert. denied</i> , 419 U.S. 1124, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975).....	29
<i>Mathews v. DeCastro</i> , 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976).....	39
<i>United States v. Consuelo-Gonzalez</i> , 521 F.2d 259 (9th Cir.1975).....	29
<i>United States v. Johnson</i> , 626 F.3d 1085 (9th Cir. 2010).....	27, 28
<i>United States v. Soltero</i> , 510 F.3d 858 (9th Cir.2007).....	27
<i>United States v. Vega</i> , 545 F.3d 743 (9th Cir.2008).....	27
<i>Amunrud v. Bd. of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	39
<i>Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405</i> , 129 Wn. App. 832, 120 P.3d 616, 634 (2005) rev'd in part sub nom. <i>Bellevue John Does 1-11</i> <i>v. Bellevue Sch. Dist. #405</i> , 164 Wn.2d 199, 189 P.3d 139 (2008).....	33
<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 795 P.2d 693 (1990)....	24, 25
<i>DeYoung v. Providence Med. Ctr.</i> , 136 Wn.2d 136, 960 P.2d 919 (1998).....	40
<i>In re Pers. Restraint of Goodwin</i> , 146 Wn.2d 861, 50 P.3d 618 (2002)...	13

<i>In re Pers. Restraint of Tran</i> , 154 Wn.2d 323, 111 P.3d 1168 (2005).....	14, 15
<i>Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 160 Wn. App. 250, 255 P.3d 696, 701 (2011)....	33
<i>Nielsen v. Washington State Dep't of Licensing</i> , 177 Wn. App. 45, 309 P.3d 1221 (2013).....	39, 40
<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993).....	37
<i>Seeley v. State</i> , 132 Wn. 2d 776, 940 P.2d 604 (1997).....	23
<i>State v. Alcantar-Maldonado</i> , 184 Wn. App. 215, 340 P.3d 859 (2014).....	29, 30, 31
<i>State v. Ancira</i> , 107 Wn. App. 650, 27 P.3d 1246 (2001).....	22
<i>State v. Anderson</i> , 58 Wn. App. 107, 791 P.2d 547 (1990).....	13, 16
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	22
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	10
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	22, 24, 25, 26, 28, 29
<i>State v. Baldwin</i> , 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	37, 38
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011).....	37, 38
<i>State v. Blazina</i> , __ Wn.2d __, 344 P.3d 680 (March 12, 2015).....	32, 33, 34, 35, 36, 37, 38, 41, 42
<i>State v. Breaux</i> , 167 Wn. App. 166, 273 P.3d 447 (2012).....	17, 18, 19
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006).....	37

<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	11
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	34, 36, 37
<i>State v. Franklin</i> , 172 Wn.2d 831, 263 P.3d 585 (2011).....	14
<i>State v. Gonzalez</i> , 168 Wn.2d 256, 226 P.3d 131 (2010).....	16
<i>State v. Hennings</i> , 129 Wn.2d 512, 919 P.2d 580 (1996).....	16
<i>State v. Jacobs</i> , 154 Wn.2d 596, 115 P.3d 283 (2005).....	14, 16
<i>State v. Jones</i> , 172 Wn.2d 236, 257 P.3d 616 (2011).....	14
<i>State v. Jones</i> , 118 Wn. App. 199, 76 P.3d 258 (2003).....	22, 23
<i>State v. Locklear</i> , 105 Wn. App. 555, 20 P.3d 993 (2001), aff'd on other grounds sub nom. <i>State v. Rodgers</i> , 146 Wn.2d 55 (2002).....	12
<i>State v. McChristian</i> , 158 Wn. App. 392, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011).....	15
<i>State v. Mendoza</i> , 63 Wn. App. 373, 819 P.2d 387 (1991).....	18
<i>State v. Merritt</i> , 91 Wn. App. 969, 961 P.2d 958 (1998).....	14
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972).....	11
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	29
<i>State v. Rodgers</i> , 146 Wn.2d 55, 43 P.3d 1 (2002).....	11, 12
<i>State v. Scott</i> , 151 Wn. App. 520, 213 P.3d 71 (2009).....	28
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973).....	11
<i>State v. Valencia</i> , 169 Wn.2d 782, 239 P.3d 1059 (2010).....	24, 25, 26
<i>State v. Wilbur</i> , 110 Wn.2d 16, 749 P.3d 1295 (1988).....	12

Statutes

U.S. CONST, amend. 1.....*passim*

U.S. CONST, amend. 5.....38

U.S. CONST, amend. 14.....10, 24, 25, 35, 38

CONST, art. 1 sec. 3.....10, 24, 25, 38

CONST, art. 1 sec. 12.....35

RCW 9.94A.030(45)(v).....16

RCW 9.94A.030(45)(ix).....16

RCW 9.94A.510.....18

RCW 9.94A.515.....17

RCW 9.94A.540.....15

RCW 9.94A.540(1)(b).....14, 15

RCW 9.94A.589(1)(b).....16, 17, 18, 20

RCW 9.94A.595.....18

RCW 9.94A.703(2)(c).....23

RCW 9.94A.760(1).....35

RCW 9.94A.760(2).....34

RCW 9A.28 et seq.....18

RCW 9A.36.045(1).....11

RCW 10.01.160.....37

RCW 10.01.160(1).....	35
RCW 10.01.160(2).....	35
RCW 10.01.160(3).....	33, 34, 35
RCW 43.43.752–.7541.....	40
RCW 43.43.7541.....	38, 40, 41, 42
RCW 46.20.285(4).....	29
RCW 69.50.204(c)(22).....	23

Court Rules

comment to GR 34.....	36
GR 34.....	36
RAP 2.5(a).....	32
RAP 10.1(g).....	19

Other Resources

Russell W. Galloway, Jr., <i>Basic Substantive Due Process Analysis</i> , 26 U.S.F. L.Rev. 625 (1992).....	39
---	----

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the convictions of drive-by shooting as set forth in Counts V, VI and VII of the Second Amended Information.

2. The trial court erred in imposing mandatory minimum terms on the first degree assault convictions as set forth in Counts I, III and IV of the Second Amended Information.

3. The trial court erred in using Count I (first degree assault) as the predicate serious violent offense for calculating the offender score.

4. The trial court miscalculated the offender score.

5. The trial court erred in imposing improper conditions of community custody.

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

7. The trial court erred when it ordered Mr. Rodgers to pay a \$100 DNA-collection fee.

Issues Pertaining to Assignments of Error

1. In prosecutions for drive-by shooting, was Mr. Rodgers' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed

to prove beyond a reasonable doubt a firearm was discharged “from the immediate area of a motor vehicle” that may have been involved in the offenses?

2. Do *Personal Restraint of Tran*, 154 Wn.2d 323, 111 P.3d 1168 (2005) and RCW 9.94A.540(1)(b) preclude application of mandatory minimum terms of five (5) years each on Mr. Rodgers’ first degree assault convictions?

3. Where RCW 9.94A.589(1)(b) is ambiguous and two serious violent offenses arguably have the same seriousness level, must the statute’s special offender score calculation and 0-scoring rule be applied in the manner that yields the shorter sentence?

4. Did the trial court miscalculate Mr. Rodgers’ offender score?

5. Does a sentencing court violate due process and exceed its statutory authority by imposing conditions of community custody that are improper, not crime-related or unconstitutionally vague?

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

7. 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

Around 11:00 PM on September 24, 2013, 17-year-old Leroy Bercier went to the Hillyard Grocery convenience store, 5803 North Market, Spokane, Washington, to purchase some things. RP¹ 154–55, 163, 260, 317. The Norteno Red Boyz gang claimed ownership of the Hillyard area and was unfriendly towards the Surenos, an opposing gang. Norteno members favored red clothing, while Surenos members preferred blue. RP 535, 541–42. Bercier, who denied being a Surenos gang member, was wearing blue shoes, a blue belt and a blue shirt. RP 156, 323, 326, 375, 385, 551–52, 554.

At about the same time, the defendant, Jayme Rodgers, entered the store to pre-pay for some gas. RP 260–61, 278–79. His passenger, Thomas Weatherwax, remained outside and never entered the store. RP 225, 271–72, 278–79, 282–83, 286, 381–82. Mr. Rodgers and Mr. Weatherwax were members of the Norteno Red Boyz gang and were

wearing red clothing that night. Both men had gang tattoos. RP 276–77, 385, 493, 502–03, 537–39, 550–51. Inside the store Mr. Rodgers confronted Bercier about his clothes and pulled at his belt, and may have called Bercier a “scrap”, which was a derogatory term for a Surenos gang member. RP 217, 224, 263, 385, 544. Bercier’s cousin, Joseph Bercier, entered the store and broke up the confrontation. RP 156, 222–23, 264, 552. Mr. Singh, the store’s part-owner, asked everyone to please leave. RP 257–58, 262, 264, 271–73.

Mr. Rodgers paid for the gas and filled up his car, an older gray Caprice. RP 260–61, 265–66, 270–71. John Liberty, a customer who observed the confrontation, called 9-1-1. RP 277. He saw the two men go back to their car at the gas pumps as he pulled out of the parking lot. RP 275, 279. Mr. Rodgers and Mr. Weatherwax drove out into the street and away. RP 266.

In front of the convenience store there are gas pumps, a few parking spots and a dirt lot. Two long-haul semi-trucks were parked at the end of the dirt lot. RP 230–31, 283.

¹ The trial proceedings are contained in four consecutively numbered volumes and will be cited to by page number, e.g. “RP ____”.

Louie Stromberg and Amanda Smith had arrived at the store to buy some beer. RP 227–28, 231–32. Stromberg observed that Bercier looked “scared sh**less”. Bercier told him two people were going to jump him. RP 227–229. Stromberg looked outside and saw nothing. He told Bercier he’d watch out and make sure nothing would happen to him He saw Bercier begin walking outside towards the semi-trucks, apparently headed to the apartment complex beyond. Nothing happened during the time it took for Stromberg to make his purchases and walk to his car. Bercier came running back into the store as the couple got into the car. RP 232–33.

Stromberg got out of the car and began walking around. Thirty to forty-five seconds after Bercier ran by him Stromberg saw two males come around the front of the semi-trucks into the store lot. RP 232–34. Standing beside his car, Stromberg gestured with his hands up, like, what’s going on, what are you guys doing. RP 232–33.

Stromberg testified the two men who came around the front end of the semi-trucks were thirty yards away from him. RP 247–48. He said they stopped and did not come closer. RP 235, 248.

Five seconds later Stromberg saw two muzzle flashes and his car window exploded. RP 233–35. He heard six to eight or ten shots, rapid

fire. RP 234, 250, 255. Stromberg and Smith quickly followed Bercier into the store. RP 233, 235, 250. Smith refused to leave but Stromberg just wanted to get out of there. He did not see Mr. Rodgers or Mr. Weatherwax in the area as he got in his car and left alone. RP 233, 235, 245.

Bercier said he was intoxicated that night. He remembers running back into the store. He heard the shots afterwards. Stromberg also testified Bercier was inside the store before any shots were fired. RP 160, 219–221, 225, 255.

Mr. Singh heard the gunshots. No damage was ever found on the front of the store. RP 258, 557.

Natalie Lemery, a friend of Mr. Weatherwax, lived at 5611 North Perry. RP 176–78. After the incident police located Mr. Rodger's car near her home and found a .380 Browning in the trunk. RP 357–58, 365–66, 422, 425. Officers recovered a Makarov 9 mm inside of a holster that had been placed by Lemery in her dryer. RP 182, 193, 426–28. Mr. Rodgers and Mr. Weatherwax were subsequently arrested at her residence. RP 342, 371, 376, 378–79.

Glenn Davis, a forensic scientist at the Washington State Patrol Crime Lab (WSPCL), determined that a bullet fragment recovered from Stromberg's car matched the .380. No 9 mm bullets were recovered. RP 337, 440, 449–50, 452, 454, 570.

Kristi Barr, a former forensic scientist at WSPCL, conducted DNA testing on a number of items. The Makarov holster had two (2) contributors. Mr. Weatherwax was the major contributor. Testing on the Makarov excluded Mr. Rodgers and was inconclusive as to Mr. Weatherwax. No meaningful conclusions could be made regarding the Browning. RP 464, 471–72, 474.

By Second Amended Information filed April 3, 2014, Mr. Rodgers was charged with three (3) counts of first degree assault (Counts I, III and IV), one (1) count of conspiracy to commit first degree assault regarding Count I (Count II), and three (3) counts of drive-by shooting (Counts V, VI and VII). Firearm enhancements were alleged regarding the assaults and conspiracy charges (Counts I, II, III and IV). Gang enhancements were alleged regarding the charges involving Leroy Bercier (Counts I, II and V). CP 379–81, 577.

By verdict given May 15, 2014, a jury found Mr. Rodgers guilty of all eight (8) counts. The jury answered yes to each of the special verdict

forms concerning firearm and gang enhancements. CP 580–86, 587–89, 590–93.

In July 2014, the trial court denied Mr. Rodgers and his co-defendant Mr. Weatherwax’s motion to arrest judgment. CP 609–618; RP 808–813.

Several days later Mr. Rodgers and Mr. Weatherax were sentenced. RP 814–46. RCW 9.94A.589(1)(b) provides for the special scoring of multiple current serious violent offenses. In calculating the offender score, the trial court and the State used Count I (first degree assault involving Bercier) as the predicate offense. Mr. Rodgers was assigned an offender score of four (4). He received consecutive sentences totaling 366 months on Counts I, II, III and IV. The court did not enhance Mr. Rodgers’ sentence based upon the special verdicts. Counts I, III and IV were assessed five (5) year mandatory minimum terms. The firearm enhancements on those counts added 180 months to the sentence, yielding a total term of confinement of 546 months. CP 741.

The sentencing court imposed Legal Financial Obligations (LFO) of \$800, including a \$100 DNA collection fee. CP 744. The Judgment and Sentence contained the following language:

¶ 2.7 **Legal Financial Obligations/Restitution.** 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. ...

CP 740. The court did not inquire into Mr. Rodgers' financial resources or consider the burden payment of LFOs would impose on him. RP 837–46. The court ordered Mr. Rodgers to pay \$20 per month commencing upon his release from custody. CP 745.

In the Judgment and Sentence, the court made a special finding that the use of a motor vehicle was involved in commission of the offenses of drive-by shooting (Counts V, VI and VII). CP 738.

Among the conditions of sentence, the court required Mr. Rodgers to notify his community corrections officer of “any vehicles owned or regularly driven by him”. CP 743. The court ordered Mr. Rodgers not to “wear clothing, insignia, medallions, etc. which are indicative of gang lifestyle” and not to “obtain any new or additional tattoos indicative of gang lifestyle”. CP 743. The court prohibited Mr. Rodgers from having “any association or contact with . . . gang members or their associates”. CP 743.

The court also imposed a condition of sentence prohibiting Mr. Rodgers from “us[ing] or possess[ing] [] Marijuana and/or products

containing Tetrahydrocannabi[nol] (THC).” CP 742. In boilerplate language, the court also ordered Mr. Rodgers to “(4) not consume controlled substances except pursuant to lawfully issued prescriptions” and “(5) not unlawfully possess controlled substances while on community custody.” CP 742.

This appeal followed. CP 753–54.

C. ARGUMENT

1. Mr. Rodgers’ convictions for drive-by shooting should be reversed and dismissed because the State was unable to establish beyond a reasonable doubt the location of any motor vehicles that may have been involved in the offenses.²

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,

² Assignment of Error 1.

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.* “Substantial evidence” in the context of a criminal case, 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) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

RCW 9A.36.045(1), under which Mr. Rodgers was charged and convicted, provides that “A person is guilty of drive-by shooting when he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.” (Emphasis added.)

The drive-by shooting statute is narrowly drawn and requires the State to produce evidence that the firearm was discharged from the “immediate area” of the vehicle that transported the shooter. *State v. Rodgers*, 146 Wn.2d 55, 62, 43 P.3d 1 (2002). The statute does not define

“immediate area.” See *Id.* at 61 (citing *State v. Locklear*, 105 Wn. App. 555, 557, 20 P.3d 993 (2001), *aff’d* on other grounds sub nom. *State v. Rodgers*, 146 Wn.2d 55 (2002)). “Fundamental fairness requires that a penal statute be literally and strictly construed in favor of the accused although a possible but strained interpretation in favor of the State might be found. *State v. Wilbur*, 110 Wn.2d 16, 19, 749 P.3d 1295 (1988).

In *Rodgers*, the location of a transport vehicle two blocks away from the scene of the shooting was found insufficient to establish the requisite nexus. There, Ishaq drove Locklear and Rodgers to a location about two blocks from the intended victim’s house. *Id.* at 57. Locklear and Rodgers then approached the house on foot, fired shots into it, and ran back to where Ishaq was waiting. *Id.* at 57–58. They were found guilty of drive-by shooting, but the Washington Supreme Court dismissed the convictions due to insufficient evidence. The court held that under the ordinary definition of ‘immediate,’ “[a] person discharging a firearm two blocks away from a vehicle cannot be said to be in close proximity to that vehicle.” *Id.* at 62. Since the State failed to prove a firearm had been discharged “from the immediate area of a motor vehicle,” the court remanded for dismissal of the convictions. *Id.* at 62–63.

Here the State's evidence failed to establish the location of the car at the time of the shooting. A customer saw Mr. Rodgers and Mr. Weatherwax return to their car after the encounter in the store and another eyewitness testified they drove out into the street and away. RP 266, 275, 279. In closing argument the prosecuting attorney acknowledged the two men had driven away and that the whereabouts of the car was unknown. He stated that the car was "parked ... somewhere off in the dark streets." RP 706. Because the State presented insufficient evidence as to the location of the car, it did not meet its burden of proof. Mr. Rodgers' convictions for drive-by shooting under Counts V, VI and VII must be dismissed with prejudice.

2. The trial court erred when it imposed mandatory minimum sentences on Mr. Rodgers' first degree assault convictions.³

A sentence imposed contrary to the law may be raised for the first time on appeal. *State v. Anderson*, 58 Wn. App. 107, 110, 791 P.2d 547 (1990). On appeal, a defendant may challenge a sentence imposed in excess of statutory authority because "a defendant cannot agree to punishment in excess of that which the Legislature has established." *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

³ Assignment of Error 2.

“Questions of statutory interpretation are questions of law subject to de novo review.” *State v. Franklin*, 172 Wn.2d 831, 835, 263 P.3d 585 (2011).

When interpreting the meaning and purpose of a statute, the objective of the court is to determine the intent of the legislature. *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2011) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 283 (2005)). Effect is to be given to the plain meaning of the statute when the plain meaning can be determined from the text of the statute. *Id.* The statute is to be read as a whole, with consideration given to all statutory provisions in relation to one another and with each provision given effect. *State v. Merritt*, 91 Wn. App. 969, 973, 961 P.2d 958 (1998).

A five-year mandatory minimum sentence applies to offenders convicted of first degree assault only under two conditions: where the offender “used force or means likely to result in death or intended to kill the victim.” RCW 9.94A.540(1)(b). This sentencing statute “indicates that the legislature intended to increase the punitive requirement for certain assaults that are characterized by unusually (within the world of assault) violent acts or a particularly sinister intent.” *In re Pers. Restraint of Tran*, 154 Wn.2d 323, 329–30, 111 P.3d 1168 (2005).

The mandatory minimum sentence prescribed by RCW 9.94A.540 does not automatically apply to all convictions for first-degree assault. *State v. McChristian*, 158 Wn. App. 392, 402–03, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011). Nor does it inevitably apply whenever a firearm was used. *Tran*, 154 Wn.2d at 329. The court may not impose the mandatory minimum sentence without a specific factual finding that the offender used force or means likely to result in death or intended to kill the victim. *McChristian*, 158 Wn. App. at 402–03.

Mr. Rodgers was convicted of three (3) counts of first degree assault with a firearm. No individual was hit by any bullet. The State did not establish an intent to kill. The court made no specific factual finding. It stated simply: “[F]rom my perspective ... [the] firearms ... tended to be used in more than a scare fashion. They were intended to be used to hurt somebody.” RP 838. This observation cannot reasonably be construed as a judicial finding Mr. Rodgers “used force or means likely to result in death or intended to kill the victim”. Lacking the requisite finding and any supporting evidence, the minimum terms of total confinement attached to Counts 1, III and IV pursuant to RCW 9.94A.540(1)(b) must be reversed and dismissed.

3. For purposes of the special scoring of multiple current serious violent offenses under RCW 9.94A.589(1)(b), where the crimes arguably have the same seriousness level and the statute is ambiguous, the rule of lenity requires the offender score calculation apply to the anticipatory offense and the 0-scoring rule apply to the completed crime as this will yield a shorter sentence.⁴

As stated in the preceding argument, a sentence imposed contrary to the law may be raised for the first time on appeal. *Anderson*, 58 Wn. App. at 110. If the plain words of a statute are unambiguous, the court need not inquire further. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). But if the language is ambiguous, the rule of lenity applies and requires the statute to be interpreted in the defendant's favor unless there is legislative intent to the contrary. *Jacobs*, 154 Wn.2d at 601. A statute that is inconsistent with its own terms is ambiguous. *State v. Hennings*, 129 Wn.2d 512, 522, 919 P.2d 580 (1996).

Mr. Rodgers' convictions for first degree assault and conspiracy to commit first degree assault constitute "serious violent offenses". RCW 9.94A.030(45)(v), (ix). RCW 9.94A.589(1)(b) provides in part:

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the

⁴ Assignment of Error 3.

standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

To determine the offense with the highest seriousness level, RCW 9.94A.589(1)(b) provides for "the highest seriousness level under RCW 9.94A.515." Anticipatory offenses are not specifically ranked in the seriousness level table in RCW 9.94A.515. That table only contains seriousness levels for completed offenses. First degree assault has a seriousness level XII. RCW 9.94A.515.

In *State v. Breaux*, 167 Wn. App. 166, 273 P.3d 447 (2012), which involved the anticipatory offense of attempted first degree rape and the completed offense of first degree rape, the Court analyzed the interplay between anticipatory and completed offenses for scoring purposes.

First degree rape has a seriousness level 12. From this, the State argues that in the absence of any seriousness level for attempted first degree rape, the completed crime of first degree rape applies when calculating Breaux's offender score under RCW 9.94A.589(1)(b). This reading ignores RCW 9.94A.595, which governs the procedure to calculate the standard range for anticipatory offenses,

For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and *the seriousness level of the crime*, and multiplying the range by 75 percent.

RCW 9.94A.595 (emphasis added).

Breaux, 167 Wn. App. at 176. See also *State v. Mendoza*, 63 Wn. App. 373, 377, 819 P.2d 387 (1991) (“[RCW 9.94A.595, .510] and 9A.28⁵ demonstrate that the seriousness level of anticipatory offenses charged under RCW 9A.28 [et seq.] is the seriousness level of the ‘completed crime’, and that the standard range determined on the basis of that seriousness level is to be reduced pursuant to the 75 percent formula in the statutes.”).

The *Breaux* Court determined it “need not decide whether the seriousness levels assigned to completed offenses apply to anticipatory offenses for purposes of RCW 9.94A.589(1)(b)”. *Breaux*, 167 Wn. App. at 177. The court held “[b]ecause there is no legislative intent to the contrary and RCW 9.94A.589(1)(b) is ambiguous where two or more serious violent offenses arguably have the same seriousness level, the rule

⁵ RCW 9A.28 et seq. sets forth the requirements and felony classifications for anticipatory offenses.

of lenity necessitates an interpretation that favors Breaux.” *Id.* at 168.

The court concluded “(1) the offender score calculation applies to Breaux’s attempted first degree rape and (2) the 0 scoring rule applies to his first degree rape conviction as this will yield a shorter sentence.” *Id.* at 179.

The trial court determined Mr. Rodgers’ offender score was four (4). In a later portion of this brief Mr. Rodgers will address whether four (4) is the correct offender score. Based on an offender score of four (4) and using Count I (first degree assault) as the predicate offense, the standard range is 129 to 171 months on Count I. Appendix B to co-defendant Mr. Weatherwax’s Appellant’s Brief.⁶ The court determined Count II (conspiracy to commit first degree assault) constituted the same criminal conduct at Count I. The offender score zero (0) when applied to the remaining serious violent offenses yields additional consecutive terms of 93 to 123 months on each of Counts III and IV. *Id.* Using the State’s proposed calculation of the offender score yields a maximum combined sentence attributable to the serious violent offenses of 417 months.

⁶ Pursuant to RAP 10.1(g) Mr. Rodgers adopts by reference those portions of Mr. Weatherwax’s Appellant’s Brief as noted in this brief.

If instead Count II (conspiracy to commit first degree assault) were used as the predicate offense, the standard sentencing range would be 96.75 to 128.25 months based on an offender score of four (4). *Id.* Count I would remain same criminal conduct as Count II. Counts III and IV would similarly yield consecutive terms of 93 to 123 months each. Using Mr. Rodgers' proposed calculation of the offender score yields a maximum combined sentence attributable to the serious violent offenses of 374.25 months.

For the reasons argued in co-defendant's opening brief, this Court should rule the seriousness levels assigned to completed offenses apply to anticipatory offenses for purposes of RCW 9.94A.589(1)(b). Mr. Weatherwax's Appellant's Brief at 18. Alternatively, the statute fails to address the circumstance in which two or more serious violent offenses arguably have the same seriousness level. The rule of lenity requires the court to construe a statute strictly against the State in favor of the defendant where two possible constructions are permissible. Mr. Rodgers respectfully requests this Court conclude the offender score calculation applies to Count II (conspiracy to commit first degree assault) and the 0-scoring rule applies to Count I (first degree assault) as this will yield a shorter sentence.

4. The trial court miscalculated the offender score.⁷

Based upon the preceding arguments, Mr. Rodgers asserts there was an erroneous calculation of his offender score. Mr. Rodgers had no prior criminal history. Thus he came into the sentencing proceeding with an offender score of zero (0). CP 739; RP 830.

Mr. Rodgers was being sentenced not only on the assault and conspiracy to commit assault convictions but also on the drive-by shooting convictions (Counts V, VI and VII). Count V had not been counted in the offender score since the sentencing court determined it was same criminal conduct as the assault being used as the predicate offense, Count I. CP 741. Counts VI and VII were counted in the offender score because they were same criminal conduct only to Counts III and IV respectively, and not to Count 1. Since the State failed to prove an essential element of the offenses of drive-by shooting, Counts V, VI and VII do not count in the offender score. Thus, Mr. Rodgers' correct offender score is zero (0).

An offender score of zero (0), using conspiracy to commit first degree assault (Count II) as the predicate offense, results in a reduced sentencing range. The sentence range for Count II would be 69.75 months

⁷ Assignment of Error 4.

to 92.25 months based on an offender score of zero (0). Appendix B to co-defendant Mr. Weatherwax's Appellant's Brief. Count I would remain same criminal conduct as Count II. The offender score zero (0) when applied to the remaining serious violent offenses yields additional consecutive terms of 93 to 123 months on each of Counts III and IV. This would yield a maximum combined sentence attributable to the serious violent offenses of 338.25 months.

5. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are improper, not crime-related or are unconstitutionally vague.⁸

A defendant may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court had statutory authority to impose community custody conditions is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the condition was statutorily authorized, crime-related prohibitions are reviewed for abuse of discretion. *Armendariz*, 160 Wn.2d at 110 (citing *State v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001)). But conditions that do not reasonably relate to

⁸ Assignment of Error 5.

the circumstances of the crime, the risk of reoffense, or public safety are unlawful, unless explicitly permitted by statute. *See Jones*, 118 Wn .App. at 207–08.

Marijuana. Unless waived by the court, a court shall order an offender to “refrain from possessing or consuming controlled substances *except pursuant to lawfully issued prescriptions*.” RCW 9.94A.703(2)(c) (emphasis added). Marijuana and its tetrahydrocannabinols (THC) are Schedule I controlled substances. RCW 69.50.204(c)(22); *Seeley v. State*, 132 Wn. 2d 776, 784, 940 P.2d 604 (1997).

Here, the offending condition prohibits Mr. Rodgers from “us[ing] or possess[ing] [] Marijuana and/or products containing Tetrahydrocannabi[nol] (THC).” CP 126. The exception required by the legislature, “except pursuant to lawfully issued prescriptions”, is missing. The blanket prohibition exceeds the sentencing court’s authority. The absolute prohibition also conflicts with boilerplate language purporting to recognize the legislative exception:

- [T]he defendant shall: ... (4) not consume controlled substances except pursuant to lawfully issued prescriptions;
- (5) not unlawfully possess controlled substances while on community custody.

CP 742. The offending condition must be modified to comply with the authorizing statute.

Gang-related conditions. The prohibitions against Mr. Rodgers' association or contact with "gang members or their associates" and wearing apparel or obtaining tattoos "indicative of gang lifestyle" are unconstitutionally vague and impinge on protected First Amendment rights.

The due process clauses of the federal and state constitutions require that citizens be provided with fair warning of what conduct is illegal. U.S. Const. amend. 14, Const. art. I, § 3; *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). As a result, a condition of community custody must be sufficiently definite that ordinary people understand what conduct is illegal and the condition must provide ascertainable standards to protect against arbitrary enforcement. *Bahl*, 164 Wn.2d at 753.

Vagueness challenges are sufficiently ripe for review even if the conditions of community custody do not yet apply because the defendant is still in prison, since upon his release the conditions will immediately restrict him. *Bahl*, 164 Wn.2d at 751–52. The challenge is also ripe because it is purely legal, i.e., whether the condition violates due process vagueness standards. *Id.* at 752. See also *State v. Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (pre-enforcement challenges to

community custody conditions are ripe for review when the issue raised is primarily legal, further factual development is not required, and the challenged action is final). In *Valencia*, the petitioner’s vagueness challenge to their community custody condition prohibiting possession or use of “any paraphernalia that can be used for the ingestion or processing of controlled substances” was held to be ripe for review. *Valencia*, 169 Wn.2d at 786–91. Here, Mr. Rodgers similarly challenges certain sentencing conditions as unconstitutionally vague. The issue is ripe for review and should be considered on its merits.

“[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct.” *Bahl*, 164 Wn.2d at 752. This assures that ordinary people can understand what is and is not allowed, and are protected against arbitrary enforcement of the laws. *Id.* at 752–53 (quoting *Douglass*, 115 Wn.2d at 178 (citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983))).

Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable. *Bahl*, 164 Wn.2d at 753, 193 P.3d 678. If the condition is

unconstitutionally vague, it will be manifestly unreasonable. *Valencia*, 169 Wn.2d at 793 (citing *Bahl*, 164 Wn.2d at 753).

Here, the offending prohibitions are

- not to have “any association or contact with . . . gang members or their associates
- not to “wear clothing, insignia, medallions, etc. which are indicative of gang lifestyle”
- not to “obtain any new or additional tattoos indicative of gang lifestyle”

The terms “gang members or their associates” and apparel or body art that may be “indicative of gang lifestyle” are not defined. The conditions are no more acceptable from a vagueness standpoint than the conditions found vague in *Bahl*, which prohibited the possession of or access to pornography. As in *Bahl*, the vague scope of proscribed conduct fails to provide Mr. Rodgers with fair notice of what he can and cannot do.

Moreover, the breadth of potential violations under these conditions offends the second prong of the vagueness test, rendering the conditions unconstitutionally vague. Because the conditions might potentially encompass a wide range of everyday conduct, they “ ‘do[] not provide ascertainable standards of guilt to protect against arbitrary enforcement.’ ” *Bahl*, 164 Wn.2d at 753 (quoting *Kolender*, 461 U.S. at

357, 103 S.Ct. 1855). Conditions that leave so much to the discretion of individual community corrections officers are unconstitutionally vague.

Other jurisdictions considering vagueness challenges to similar restrictions involving gang clothing have required specificity. See e.g. *United States v. Soltero*, 510 F.3d 858, 865–86 (9th Cir.2007) (condition forbidding the defendant from wearing, using, displaying or possessing apparel connoting affiliation upheld because it specifically referenced the Delhi gang and district court was entitled to presume the defendant—who had admitted to being a member of the gang—was familiar with the gang's paraphernalia); *United States v. Johnson*, 626 F.3d 1085, 1091 (9th Cir. 2010) (upholding release condition proscribing wearing clothing that “ ‘evidences affiliation’ with the Rollin' 30's gang”).

Specificity has also been required regarding association with gang members. See e.g. *United States v. Vega*, 545 F.3d 743, 749–50 (9th Cir.2008) (upholding a release condition prohibiting the defendant from associating “with any member of any criminal street gang as directed by the Probation Officer, specifically, any member of the Harpys street gang”); *Soltero*, 510 F.3d at 866–67 (upholding a condition forbidding the defendant from associating “with any known member of any criminal street gang ..., specifically, any known member of the Delhi street gang”).

Unlike in the above cases, the restrictions in Mr. Rodgers' case lack specificity and are therefore impermissibly vague.

In *United States v. Johnson*, the court concluded the restriction against association with "persons who associate with" gang members was impermissibly vague.

There is a considerable difference, however, between forbidding a defendant from associating with gang members and precluding him from associating with *persons who associate with* gang members. The latter proscription is impermissibly vague and entails a deprivation of liberty that is greater than necessary to achieve the goal of preventing Johnson from reverting to his previous criminal lifestyle. As Johnson points out, this condition sweeps too broadly because it encompasses not only those who are involved in the gang's criminal activities, but also those who may have only a social connection to an individual gang member. The provision could forbid Johnson from associating with, for example, the mother or father, sister or brother, aunt or uncle, employer, minister or friend of a Rollin' 30's gang member. It could even preclude Johnson from meeting with his probation officer.

Johnson, 626 F.3d at 1091. As in *Johnson*, the condition prohibiting Mr. Rodgers' contact with the "associates" of gang members is impermissibly vague.

Where First Amendment rights are involved, a greater degree of specificity may be demanded. *Bahl*, 164 Wn.2d at 757 (freedom of speech); see also *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (gang affiliation is protected by the First Amendment right of association). Conditions that place limitations upon fundamental rights

are permissible only if imposed sensitively. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir.1975). A defendant's freedom of association may be restricted only if reasonably necessary to accomplish the essential needs of the state and public order. *Malone v. United States*, 502 F.2d 554, 556 (9th Cir.1974), *cert. denied*, 419 U.S. 1124, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975).

Choice of wearing apparel, tattoos and friends or acquaintances involve fundamental freedoms that should not lightly be abrogated. The boilerplate constraints imposed upon Mr. Rodgers are unconstitutionally vague. Because the conditions are manifestly unreasonable, the offending conditions should be reversed. *Bahl*, 164 Wn.2d at 753

Vehicle-related provisions. The special finding at paragraph 2.1 and directive to revoke driver's license, and the condition requiring Mr. Rodgers to notify CCO of any vehicles owned or regularly driven by him must be vacated.

In Washington, a court may instruct the Department of Licensing to revoke a defendant's license upon a conviction of one of many crimes, including “[a]ny felony in the commission of which a motor vehicle is used.” RCW 46.20.285(4). In *State v. Alcantar-Maldonado*, 184 Wn.

App. 215, 340 P.3d 859 (2014), this Court considered whether the revocation applies when the defendant transports himself to and from the scene of an assault. The court determined that “Washington decisions ... require a more direct connection between the use of the vehicle and the crime. We find support in this position in several foreign [Ohio and Florida] decisions.” *Id.* at 229 (comment added).

The court concluded the requisite “direct connection” did not exist where the defendant did not use his car to assault the victim, did not use the car to transport contraband, the car was not the subject of the crime charged, and the crime did not take place inside or from his car. *Alcantar-Maldonado*, 184 Wn. App. at 230. The court vacated the portion of the sentence directing the Department of Licensing to revoke the defendant’s driver’s license. *Id.*

As argued above, the drive-by shooting convictions must be reversed and dismissed. Accordingly, the special finding under paragraph 2.1, that a motor vehicle was used in the commission of a felony, must be removed because it only pertained to the drive-by shooting convictions.

CP 738.

Further, the State did not establish that the car was used in conjunction with any of the offenses. The requisite “direct connection” did not exist where Mr. Rodgers did not use his car to assault the victim or to transport contraband, the evidence did not establish the car was involved in the assaults or drive-by shootings, and the crime did not take place inside or from his car. *Alcantar-Maldonado*, 184 Wn. App. at 230. Paragraph 2.1 and the directive to DOL to revoke Mr. Rodgers’ license (CP 749⁹) must be vacated. *Id.*

Because the State did not prove the car was used in any of the offenses, the condition that Mr. Rodgers notify the CCO of cars he owns or regularly drives is not crime related and should also be vacated.

6. Since the directive to pay LFOs 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. Rodgers’ current and future ability to pay before imposing LFOs.¹⁰

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

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

⁹ Judgment and Sentence, V, at paragraph 5.1. The box is not checked. However, the Spokane County Clerk filed (and presumably forwarded to Department of Licensing) the supporting Abstract of Court Record and Affidavit of Non-Surrender. CP 751–52.

LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, ___Wn.2d___, 344 P.3d 680, 683 (March 12, 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

¹⁰ Assignment of Error 6.

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. Rodgers' 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*, 344 P.3d at 685. Post-*Blazina*, one would expect future trial courts to make the appropriate inquiry on the record or defense attorneys to object in order to preserve the error for direct review. Mr. Rodgers 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*, 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. Rodgers has the present and future ability to pay legal financial obligations. 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 without proof the defendant has the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, 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*, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has "considered" Mr. Rodgers' present or future ability to pay legal financial obligations. CP 740. 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 paragraph 2.5 of the judgment and sentence, the record does not show the trial court took into account Mr. Rodgers' financial resources and the potential burden of imposing LFOs on him. RP 837–46. Nevertheless, the Court ordered Mr. Rodgers to pay \$20 per month commencing upon his release from custody. CP 745.

The boilerplate finding that Mr. Rodgers has the present or future ability to pay LFOs is simply not supported by the record. Therefore, the matter should be remanded for the sentencing court to make an individualized inquiry into Mr. Rodgers' current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

7. 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.¹¹

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. amend. V, XIV; Wash. Const. art. I, § 3. “The due

process clause of the Fourteenth Amendment confers both procedural and substantive protections.” *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

“Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Id.* at 218–19. It requires that “deprivations of life, liberty, or property be substantively reasonable;” in other words, such deprivations are constitutionally infirm if not “supported by some legitimate justification.” *Nielsen v. Washington State Dep't of Licensing*, 177 Wn. App. 45, 52–53, 309 P.3d 1221 (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,

¹¹ Assignment of Error 7.

185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As the Washington Supreme Court has explained, “the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional.” *DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining 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 43.43.7541¹². This ostensibly serves the State’s interest to fund the collection, analysis, and retention of a convicted offender’s DNA profile in order to help facilitate future criminal identifications. RCW 43.43.752–.7541. This is a legitimate interest. But the imposition of this mandatory fee upon defendants who cannot pay the

¹² 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 fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

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*, ___ Wn.2d ___, 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 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*, 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. Rodgers’ indigent status, the order to pay the \$100 DNA collection fee should be vacated.

D. CONCLUSION

For the reasons stated, this Court should reverse and dismiss Counts V, VI and VII, and vacate the five (5) year mandatory minimum terms imposed on Counts I, III and IV. The matter should be remanded for resentencing based on a corrected offender score, to remove offending conditions of sentence, to vacate the order to pay the \$100 DNA collection fee, and to make an individualized inquiry into Mr. Rodgers' current and future ability to pay before imposing LFOs.

Respectfully submitted on May 26, 2015.

s/Susan Marie Gasch, WSBA #16485
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 26, 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

Jayne L. Rodgers:

Jayne Lee Rodgers (#376149)
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla WA 99362

E-mail:
SCPAAppeals@spokanecounty.org
Brian O'Brien
Deputy Prosecuting Attorney
1100 West Mallon Avenue
Spokane WA 99260-2043

E-mail: nodblspk@rcabletv.com
Dennis Morgan, Attorney at Law
P. O. Box 1019
Republic WA, 99166-1019

s/Susan Marie Gasch, WSBA #16485