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Ronald R. Carpenter  
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Plaintiff/Respondent,

v.

CHAD EDWARD DUNCAN,  
Defendant/Petitioner.

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STATE OF WASHINGTON  
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*AMICI CURIAE* BRIEF OF ACLU OF WASHINGTON, CENTER FOR  
JUSTICE, COLUMBIA LEGAL SERVICES, WASHINGTON  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND  
WASHINGTON DEFENDER ASSOCIATION

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 ORIGINAL

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## I. IDENTITY AND INTEREST OF AMICUS

The ACLU of Washington (“ACLU”), Center for Justice (“CFJ”), Columbia Legal Services (“CLS”), Washington Association of Criminal Defense Lawyers (“WACDL”), and Washington Defender Association’s (“WDA”) (collectively, “Amici’s”) interests in joining as *amici curiae* in this matter are described in their Motion for Leave to Participate as Amici Curiae filed concurrently with this Brief.

## II. INTRODUCTION

This Court recently held that trial courts may not impose legal financial obligations (“LFOs”) on defendants through use of boilerplate statements that purport to find the defendant has the ability to pay. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). An individualized inquiry into ability to pay is required. *Id.* This case involves two problematic practices related to the rote imposition of LFOs beyond those at issue in *Blazina*.

First, the Court of Appeals here affirmed imposition of LFOs, including approximately \$1,762,650 in costs of incarceration, on a defendant (Duncan) who had already been found indigent and who was being sentenced to what amounted to life imprisonment. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014). But there was no evidence in the record that supported a finding that Duncan had the ability to pay the LFOs

or that his financial resources (if any) were taken into account as required by law. Rather, the Court of Appeals affirmed by creating a negative inference against defendants where the record is silent on ability to pay, effectively shifting the burden onto defendants to disprove the boilerplate findings. Under this rationale, the Court of Appeals attributed a lack of evidence regarding ability to pay to defendants purposefully not presenting such evidence as a strategic tactic, which results in waiver. The Court of Appeals' approach is contrary to the LFO statutes and this Court's decision in *Blazina* and must be reversed.

Second, the Court of Appeals ordered payment of costs of incarceration on an indigent defendant sentenced to a prison term that exceeds his expected lifespan. Duncan's ability to pay at the time of sentencing was never determined as required by RCW 9.94A.760(2). This requires vacation of the order of costs. Further, the purpose of LFOs is to hold offenders accountable for costs associated with their crimes or defray a portion of the costs of felonious behavior. The costs of incarceration imposed here serve no purpose. There is no likelihood that Duncan, an indigent defendant serving 96½ years in prison, had at the time of sentencing or will ever have the ability to pay an LFO in excess of \$1.76 million. The Court of Appeals' decision raises substantial questions regarding what protection our justice system provides indigent defendants

facing discretionary LFOs. This is of particular concern when costs of incarceration are imposed, as such daily costs quickly multiply into significant sums. It should be the rare case where an indigent defendant who has qualified for a public defense is ruled to have the ability to pay such sums at the time of sentencing. And beyond the facts of this particular case, this is an issue of paramount public importance because LFOs burden indigent defendants long after they have served their time and prevent their successful reintegration into society. See Katherine A. Beckett et al., *Wash. State Minority and Justice Comm'n, The Assessment and Consequences of Legal Financial Obligations in Washington State* 67-69 (2008), available at [http://www.courts.wa.gov/committee/pdf/2008LFO\\_report.pdf](http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf). Boilerplate imposition of costs of incarceration leads to indigent defendants facing additional, unwarranted barriers to rehabilitation.

This Court should vacate the order of costs and reverse the Court of Appeals on the LFO issue.<sup>1</sup>

### **III. STATEMENT OF THE CASE**

Duncan qualified as indigent at trial and was represented by a court-appointed attorney. CP 181. After a jury found Duncan guilty on multiple

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<sup>1</sup> This amicus brief addresses the LFO issue only, and not the search issue.

counts, the trial court imposed a sentence of 1,159 months confinement (more than 96½ years, or about 35,253 days). CP 178-79.

At sentencing, neither side introduced evidence regarding Duncan's ability to pay LFOs. Regardless, the trial court entered a boilerplate finding that Duncan had the ability to pay LFOs:

Financial Ability: The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753.

CP 179. The trial court then entered additional boilerplate findings, including a finding that "the defendant has the means to pay for the costs of incarceration, in prison at a rate of \$50.00 per day of incarceration...and orders the defendant to pay such costs...." CP 181. If Duncan serves every day of his sentence his LFOs for costs of incarceration alone will total \$1,762,650. The trial court also ordered Duncan pay for his costs of medical care while incarcerated and an additional \$2,905.54 in restitution and other LFOs. CP 181.

Duncan filed a post-sentencing motion to terminate the LFOs, arguing that no individualized determination that he had the present or future ability to pay the LFOs was made, and that his indigency and lengthy sentence indicated he could not. *See Motion to Terminate Legal*

*Financial Obligations*, attached to Respondent's Motion and Affidavit to Supplement the Record ("State's Supplement of Record") (filed Aug. 12, 2015, granted Sep. 17, 2015). The trial court ignored this argument and denied the motion based on an inapposite statute related to waiver of interest on LFOs (RCW 10.82.090). See *Order Denying Motion to Terminate Financial Obligations*, attached to State's Supplement of Record. The trial court's order did not include any findings of fact regarding Duncan's current or future ability to pay his costs of incarceration and other LFOs. *Id.*

On appeal, the State admitted there was no inquiry into Duncan's ability to pay and requested the issue "be remanded to the trial court for a sentencing hearing at which time a judge can inquire of Duncan as to his present and future ability to pay for the costs imposed." Amended Br. of Resp. at 25.

The Court of Appeals acknowledged that nothing in the record supported the LFO findings. *Duncan*, 180 Wn. App. at 248-49. Notwithstanding this lack of evidence, it affirmed the trial court's LFO ruling. *Id.*

#### IV. ARGUMENT

##### A. This Court Should Reverse Because the Court of Appeals' Opinion Conflicts with the LFO Statutes and Case Law.

The LFO statute requires that a trial 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.” RCW 10.01.160(3) (emphasis added). In *Blazina*, this Court made it clear that “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. 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.” 182 Wn.2d at 839. This mandatory requirement protects defendants from abuses of discretion. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992). Further, for LFOs related to the costs of incarceration and imposed in superior court, the trial court has a mandatory obligation to determine

that “the offender, at the time of sentencing, has the means to pay for the cost of incarceration”. RCW 9.94A.760(2) (emphasis added).<sup>2</sup>

It is undisputed that nothing in the record supports the trial court’s findings regarding Duncan’s ability to pay LFOs. *Duncan*, 180 Wn. App. at 248-49. But the Court of Appeals here affirmed despite this lack of evidence. This result conflicts with this Court’s holdings in *Blazina* and *Curry*. As those cases recognize, the trial court has an affirmative duty to inquire into a defendant’s financial resources and ability to pay before requiring repayment of LFOs. The Court should vacate the order of costs and reverse on this basis alone.

Further, the Court of Appeals’ opinion is based on a concerning, novel and sweeping theory. The Court of Appeals held it would not consider the LFO issue for the first time on appeal because “a sentencing court will seldom find that there is no likelihood that an offender will ever be able to pay LFOs and an offender has good strategic reasons for waiving the issue at the sentencing hearing”. *Duncan*, 180 Wn. App. at 247. The court generalized that many defendants intentionally “choose not to argue at the time of sentencing that they will be perpetually unemployed and indigent.” *Id.* at 250-51. The court then came to the “conclusion that

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<sup>2</sup> RCW 10.01.160 would be the only applicable statute to LFOs imposed by courts of limited jurisdiction and by superior court in municipal cases.

ability to pay LFOs is not an issue that defendants overlook – it is one that they reasonably waive.” *Id.* at 253

This rationale is troubling because it allows courts to impose discretionary LFOs, even such large amounts as the \$1.76 million in costs of incarceration here, without any factual inquiry into ability to pay. That is, the burden is shifted to the defendant to affirmatively present evidence related to inability to pay. Failure to do so is assumed to be the result of the defendant’s knowing and strategic waiver. Such a theory abrogates the trial court’s duty under the statutes to take into consideration the defendant’s ability to pay LFOs and financial resources.<sup>3</sup>

Moreover, the Court of Appeals offered no support for its statements regarding strategic waiver. The court cited *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013), in discussing defendants’ motivation not to present evidence related to LFOs. *Duncan*, 180 Wn. App. at 250. But *Lundy* says nothing at all regarding defendants’ potential waiver of LFO arguments at sentencing and instead reemphasized that a boilerplate finding of ability to pay absent any evidentiary support is clearly erroneous. 176 Wn. App. at 104-05. The *Lundy* court examined the

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<sup>3</sup> *Cf. State v. Johnson*, 100 Wn.2d 607, 617-20, 674 P.2d 145 (1983), *overruled on other grounds by State v. Bergeron*, 105 Wn.2d 1, 19, 711 P.2d 1000 (1985) (holding that a mandatory presumption regarding intent if defendant does not present evidence on the issue impermissibly shifts burden onto defendant).

record and found support for the boilerplate LFO findings. The court recognized, however, that the burden for establishing whether a defendant has present or future ability to pay LFOs is placed on the State. *Id.* at 106. In contrast, the Court of Appeals here shifted the burden regarding LFOs to the defendant and created a negative inference: a strategic waiver is imputed to the defendant if the defendant does not put forth evidence related to LFOs. This burden shifting is error that should be reversed.

Finally, the Court of Appeals applied its conclusory statements regarding strategic waiver to Duncan without ever discussing whether, in fact, Duncan engaged in such knowing and intentional acts. Rather, because the record was silent, the Court of Appeals imputed to Duncan a conclusion that he engaged in a strategic decision and knowingly waived his right to present evidence on ability to pay. Reversal of the Court of Appeals' improper analysis and conclusion is appropriate here.<sup>4</sup>

**B. This Case Illustrates the Problematic Practice of Imposing LFOs for Costs of Incarceration.**

This Court has already recognized that the imposition of LFOs on indigent defendants can result in “problematic consequences.” *See Blazina*, 182 Wn.2d at 835-37 (“These problems include increased difficulty in

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<sup>4</sup> The Court of Appeals did not offer any support for its claim that “a sentencing court will seldom find that there is no likelihood that an offender will ever be able to pay LFOs”. *Duncan*, 180 Wn. App. at 247. Indeed, other than stating this conclusion at the beginning of its opinion, the Court of Appeals offered no further discussion or analysis of the issue.

reentering society, the doubtful recoupment of money by the government, and inequities in administration.”). Here, the LFOs imposed on Duncan go beyond those at issue in *Blazina* to include costs of incarceration. The imposition of costs of incarceration raises several significant issues similar to those the Court identified in *Blazina*.

First, the trial court’s imposition of an LFO in excess of \$1.76 million on an indigent defendant without conducting any inquiry into his ability to pay violates the statutory requirement that ability to pay costs of incarceration is determined “at the time of sentencing”. RCW 9.94A.760(2). Under the plain language of the statute, only the ability to pay at the time of sentencing is relevant for costs of incarceration; a defendant’s future ability to pay is not relevant. Here, the trial court did not make the proper inquiry at the time of sentencing.

Second, even when Duncan subsequently filed a pro se motion for termination of his LFOs citing his inability to pay, the trial court still did not make the proper inquiry. Rather, the trial court denied the motion based on an inapposite statutory scheme and standard related to interest on non-restitution LFOs. *See Order Denying Motion to Terminate Financial Obligations* (applying RCW 10.82.090 standard), attached to State’s Supplement of Record. The possibility of remission of costs (based on a

different standard and at a later time), is an insufficient substitute for the inquiry required by RCW 9.94A.760(2), *Blazina* and *Curry*.

Third, the imposition of costs of incarceration on indigent defendants does not further the statutory purposes of holding offenders accountable for costs associated with their crimes or defraying a portion of the costs of felonious behavior. Laws of 1989, ch. 252, § 1. Indeed, imposing costs of incarceration on indigent defendants sentenced to life (or virtual life) sentences appears to serve no purpose whatsoever. Instead, imposing such LFOs creates a perverse disincentive for such individuals to find useful employment while incarcerated. There are few jobs in prison, and those that do exist pay very low wages. If a defendant will have those wages garnished for the rest of their life it decreases an incentive to be productive while in prison.

Fourth and finally, this case presents an example of the need for significant evidence of ability to pay before costs are imposed. Simply put, there was no evidence in the record to support a conclusion that Duncan was, at the time of sentencing, able to pay an amount even approaching his costs of incarceration, nor was there any reasonable likelihood that his indigence would end while he was incarcerated (or even potentially after the term of his incarceration). While Duncan's case is extreme, costs of incarceration are commonly imposed on defendants serving shorter

sentences. Repayment of these costs can prevent indigent defendants who have served their time from successfully reintegrating into society and keep them entangled with the justice system. *See Blazina*, 182 Wn.2d at 835-37 (discussing the negative impacts LFOs place on defendants long after their time is served). Indeed, the multiplying effect of daily costs of incarceration, plus attendant interest and additional collection fees, severely undermine indigent defendants' financial security and extend the period of active court involvement. *See id.* Accordingly, costs of incarceration should be imposed only after a searching inquiry where the burden of proof regarding ability to pay is on the State and the order is supported by specific evidence. Moreover, it should be the rare circumstance where an indigent defendant who qualifies for a public defense at trial will be found at the time of sentencing to have the ability to pay costs of incarceration.

This Court should vacate the order of costs and reiterate that costs of incarceration may be imposed only after the requisite individualized inquiry into ability to pay, including the defendant's qualification for a public defense, and the defendant is determined based on specific evidence to have the ability to pay at the time of sentencing.

## V. CONCLUSION

The creation of a negative inference against defendants who challenge their LFOs post-trial is contrary to the LFO statutes and case law.

And the imposition of millions of dollars in LFOs on an indigent defendant serving almost a hundred years in prison raises issues of significant public importance regarding whether indigent defendants are adequately protected from abuses of discretion that may prolong their involvement with the justice system and inhibit their rehabilitation. This Court should reverse the Court of Appeals and vacate the order of costs.

RESPECTFULLY SUBMITTED this 5th day of October, 2015.

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**CERTIFICATE OF  
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I, KATIE DILLON, hereby certify under penalty of perjury that on October 5, 2015, I served ACLU of Washington, Center for Justice, Columbia Legal Services, Washington Association of Criminal Defense Lawyers, and Washington Defender Association's Motion for Leave to Participate as *Amici Curiae* and *Amici Curiae* Brief of ACLU of Washington, Center for Justice, Columbia Legal Services, Washington Association of Criminal Defense Lawyers, and Washington Defender Association as follows:

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