

SUPREME COURT NO. 92616-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In re the Personal Restraint Petition Of:

EARL OWEN FLIPPO,

Petitioner.

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ON REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

The Honorable Robert Zagelow, Judge

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SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	3
1. FLIPPO’S PERSONAL RESTRAINT PETITION IS NOT TIME BARRED .....	3
a. <u>The judgment and sentence exceeded the trial court’s            authority, thereby rendering it invalid on its face</u> .....	5
b. <u>Blazina constitutes a significant change in the law under            RCW 10.73.100(6) material to Flippo’s sentence</u> .....	8
c. <u>Blazina applies retroactively on collateral review</u> .....	14
2. THE PETITION IS NOT BARRED AS SUCCESSIVE.....	15
3. OUTSIDE THE PERSONAL RESTRAINT PETITION, FLIPPO HAS NO OTHER AVAILABLE OR ADEQUATE REMEDY IN LIGHT OF WASHINGTON’S CONSTITUTIONALLY INADEQUATE LFO SYSTEM ....	16
a. <u>Washington’s elaborate and aggressive collections            process imposes significant financial burdens on indigent            persons without any consideration of ability to pay</u> .....	17
b. <u>The remissions procedures in RCW 10.01.160(4)            and RCW 10.73.160(4) do not provide an adequate            or available remedy</u> .....	21

TABLE OF CONTENTS (CONT'D)

	Page
4. FLIPPO DEMONSTRATES ACTUAL PREJUDICE AND A COMPLETE MISCARRIAGE OF JUSTICE FROM THE THOUSANDS OF DOLLARS ASSESSED AGAINST HIM FOR MERELY EXERCISING HIS CONSTITUTIONAL RIGHTS .....	25
5. APPELLATE COSTS SHOULD BE DENIED .....	289
D. <u>CONCLUSION</u> .....	29

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Flippo</u> 191 Wn. App. 405, 362 P.3d 1011 (2015).....	3, 7
<u>In re Pers. Restraint of Greening</u> 141 Wn.2d 687, 9 P.3d 206 (2000).....	12
<u>In re Pers. Restraint of Lavery</u> 154 Wn.2d 249, 111 P.3d 837 (2005).....	8, 16
<u>In re Pers. Restraint of Markel</u> 154 Wn.2d 262, 111 P.3d 249 (2005).....	16
<u>In re Pers. Restraint of Moore</u> 116 Wn.2d 30, 803 P.2d 300 (1991).....	15
<u>In re Pers. Restraint of Stockwell</u> 179 Wn.2d 588, 316 P.3d 1007 (2014).....	25
<u>In re Pers. Restraint of Stoudmire</u> 145 Wn.2d 258, 36 P.3d 1005 (2001).....	8
<u>In re Pers. Restraint of Vandervlugt</u> 120 Wn.2d 427, 842 P.2d 950 (1992).....	15
<u>In re Pers. Restraint of Carrier</u> 173 Wn.2d 791, 272 P.3d 209 (2012).....	26
<u>In re Pers. Restraint of Coats</u> 173 Wn.2d 123, 267 P.3d 324 (2011).....	5, 6, 7
<u>State v. Barklind</u> 87 Wn.2d 814, 557 P.2d 314 (1976).....	16
<u>State v. Blank</u> 131 Wn.2d 230, 930 P.2d 1213 (1997).....	9, 10, 18, 19, 20

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Blazina</u> 182 Wn.2d 827, 344 P.3d 680 (2015),.....	<i>passim</i>
<u>State v. Crook</u> 146 Wn. App. 24, 189 P.3d 811 (2008).....	10, 20
<u>State v. Curry</u> 62 Wn. App. 676, 814 P.2d 1252 (1991) <u>aff'd</u> , 118 Wn.2d 911, 829 P.2d 166 (1992).....	10, 11
<u>State v. Darden</u> 99 Wn.2d 675, 663 P.2d 1352 (1983).....	15
<u>State v. Duncan</u> 185 Wn.2d 430, 374 P.3d 83 (2016).....	13, 16, 25
<u>State v. Flippo</u> noted at 152 Wn. App. 1035, 2009 WL 3084703 (2009).....	2
<u>State v. Lundy</u> 176 Wn. App. 96, 308 P.3d 775 (2013).....	9, 10
<u>State v. Malone</u> 98 Wn. App. 342, 989 P.2d 583 (1999).....	9
<u>State v. Miller</u> 185 Wn.2d 111, 371 P.3d 528 (2016).....	8
<u>State v. Nolan</u> 141 Wn.2d 620, 8 P.3d 300 (2000).....	29
<u>State v. Shirts</u> __ Wn. App. __, __ P.3d __, No. 47740-8-II (Aug. 30, 2016).....	11, 13, 22

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Sinclair</u>	
192 Wn. App. 380, 367 P.3d 612	
<u>review denied</u> , 185 Wn.2d 1034, ___ P.3d ___ (2016) .....	14, 29
 <u>State v. Smits</u>	
152 Wn. App. 514, 216 P.3d 1097 (2009).....	9, 10, 22
 <u>State v. Wright</u>	
88 Wn. App. 683, 946 P.2d 792 (1997).....	23

FEDERAL CASES

<u>Fuller v. Oregon</u>	
417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).....	16, 18, 19, 20, 21
 <u>Grayned v. City of Rockford</u>	
408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).....	23

RULES, STATUTES AND OTHER AUTHORITITES

RAP 14.2.....	14, 29
RAP 16.4.....	16, 22
RCW 6.17.020 .....	19
RCW 9.94A.760 .....	6, 19
RCW 9.94A.7701 .....	19
RCW 9.94A.7705. ....	19
RCW 10.01.160 .....	4, 5, 6, 7, 8, 12, 13, 14, 15, 21, 22, 23, 24, 25
RCW 10.01.170 .....	22
RCW 10.73.090 .....	3, 4, 7

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 10.73.100 .....	1, 4, 8, 12, 14, 15
RCW 10.73.150 .....	24
RCW 10.73.160 .....	i, 21, 22, 24, 29
RCW 10.82.090 .....	18
RCW 36.18.190 .....	20
RCW 72.09.015 .....	20, 21
RCW 72.09.110 .....	21
RCW 72.09.111 .....	20, 21
RCW 72.11.020 .....	20

A. ISSUES

1a. Is the judgment and sentence, which relies entirely on a boilerplate ability-to-pay finding, facially invalid, thereby overcoming the one-year time limit on collateral attack?

1b. Does State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), constitute a significant change in the law material to Earl Owen Flippo's sentence under RCW 10.73.100(6), thereby overcoming the one-year time limit on collateral attack?

1c. Does Blazina apply retroactively on collateral review?

2. Does Flippo overcome the bar on successive petitions because his instant petition does not request similar relief to his prior petition and because he shows good cause based on the intervening Blazina decision?

3. In light of Washington's constitutionally inadequate legal financial obligation (LFO) systems, does this personal restraint petition present the only available and adequate avenue for relief?

4. Does Flippo demonstrate actual and substantial prejudice or a fundamental defect resulting in a complete miscarriage of justice from the thousands of dollars in LFOs imposed against him without any consideration of his financial circumstances?

5. Should appellate costs be denied?

B. STATEMENT OF THE CASE<sup>1</sup>

A jury convicted Flippo of four counts of first degree child molestation. St. App. A at 1-2. The trial court imposed an indeterminate sentence of 174 months to life. St. App. A at 7.

In the judgment and sentence, the trial court imposed \$2,619.20 in LFOs. St. App. A at 5. This consisted of \$200 in court costs, \$286.05 in witness fees, \$250 in jury demand fees, \$508.15 in sheriff fees, a \$500 victim assessment, \$775 for court appointed counsel, and \$100 biological sample fee. St. App. A at 5. The trial court did not inquire into Flippo's financial circumstances or the burden of imposing LFOs. App. 43.

Flippo appealed; his convictions were affirmed. State v. Flippo, noted at 152 Wn. App. 1035, 2009 WL 3084703, at \*9 (2009). In the mandate issued on March 16, 2010, the Court of Appeals imposed \$4,290.73 in appellate costs. St. App. B.

In July 2015, Flippo filed the instant personal restraint petition. App. 1-7. It alleged the trial court failed to make any financial inquiry before imposing LFOs and instead erroneously relied on boilerplate language. App. 2. Flippo asserted he was indigent, disabled, below the federal poverty guideline, qualified for public assistance, and no fact

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<sup>1</sup> This brief attaches one appendix containing consecutive pagination in marker in the lower right corner of each of the appendix's pages. To avoid duplication, the brief also cites the appendices to the State's supplemental brief as "St. App." whenever possible.

supported the conclusion he ever had or ever will have the ability to pay LFOs. App. 2-3. He argued he overcame the one-year time bar on collateral review because his judgment and sentence was facially invalid, Blazina constituted a significant change in the law, and because of the existence of a remissions procedure. App. 4, 10-12. He asked that the discretionary LFOs be stricken from his judgment and sentence. App. 6.

The Court of Appeals rejected all of Flippo's claims and dismissed the personal restraint petition as time barred. In re Pers. Restraint of Flippo, 191 Wn. App. 405, 409-13, 362 P.3d 1011 (2015).

Flippo moved for and was granted discretionary review. App. 19-29. After the State filed its supplemental brief, Department One appointed counsel. App. 32. As of August 25, 2016, Flippo's LFO balance was \$10,735.64, which continues to accrue and compound at a 12 percent interest rate.<sup>2</sup> App. 33.

C. ARGUMENT

1. FLIPPO'S PERSONAL RESTRAINT PETITION IS NOT TIME BARRED

RCW 10.73.090(1) states, "No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one

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<sup>2</sup> The Walla Walla Superior Court balance sheet indicates that restitution in the amount of \$4,290.73 was ordered. This is incorrect. The \$4,290.73 on the balance sheet actually consists of appellate costs. Compare App. 33 with St. App. B. No restitution was ordered in this case.

year after the judgment becomes final if the sentence is valid on its face and was rendered by a court of competent jurisdiction.” (Emphasis added.) Flippo’s judgment and sentence became final one year after the mandate issued after his unsuccessful appeal. RCW 10.73.090(1), (3)(b).

Petitioners may also overcome the one-year time limit under any of the six exceptions enumerated in RCW 10.73.100. Relevant here is RCW 10.73.100(6), which provides,

There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

Flippo’s personal restraint petition is not time barred for two reasons. First, under RCW 10.01.160(3), because the trial court did not consider Flippo’s financial status, and instead relied on boilerplate language in the judgment and sentence, its imposition of LFOs exceeded its authority, rendering the judgment and sentence facially invalid. Second, Blazina constitutes a significant change in the law under RCW 10.73.100(6).

- a. The judgment and sentence exceeded the trial court's authority, thereby rendering it invalid on its face

A judgment and sentence is invalid on its face “where a court has in fact exceeded its statutory authority in entering the judgment or sentence.” In re Pers. Restraint of Coats, 173 Wn.2d 123, 135, 267 P.3d 324 (2011); see also id. at 164 (Stephens, J., concurring) (“The touchstone of an invalid judgment and sentence is the trial court exceeding its authority.”). To determine facial validity, review is not limited “to the four corners of the judgment and sentence.” Id. at 138. Rather, it is appropriate to consider “documents that reveal some fact that shows the judgment and sentence is invalid on its face because of legal error.” Id. at 138-39. This court has relied on “charging documents, verdicts, and plea statements of defendants on plea of guilty” in finding facial invalidity. Id. at 139-40. It has not relied on “jury instructions, trial motions, and other documents that relate to whether the defendant received a fair trial.” Id. at 140.

RCW 10.01.160(3) provides that the sentencing 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.

This statute is mandatory. Blazina, 182 Wn.2d at 838. Its plain language prohibits the trial court from imposing discretionary LFOs unless it engages

in the required financial inquiries, Id. If the trial court fails to engage in the required inquiries, it lacks authority to impose discretionary LFOs.<sup>3</sup>

Boilerplate language stating the trial court engaged in the correct inquiries does not suffice: “[T]he 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.” Id.

To examine the facial validity of a judgment and sentence in this context, it is appropriate to review what occurred at sentencing to ensure that the trial court engaged in the required inquiries rather than merely inserting boilerplate into the judgment and sentence. Cf. Coats, 173 Wn.2d at 138-39 (“[W]e have only considered documents that reveal some fact that shows the judgment and sentence is invalid on its face because of legal error.”).

Flippo’s judgment and sentence contains familiar boilerplate:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. (RCW 9.94A.760) The court has considered the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s

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<sup>3</sup> Flippo recognizes that this court stated, in deciding whether to remedy LFO errors without an objection below, “Though the statute mandates that a trial judge consider the defendant’s ability to pay and, here, the trial judges erred by failing to consider, this error will not taint sentencing for similar crimes in the future.” Blazina, 182 Wn.2d at 834. But this statement is difficult, if not impossible, to square with the mandatory language of RCW 10.01.160(3), as is illustrated by this court’s reasoned discussion of RCW 10.01.160(3)’s “imperative” inquiries. Blazina, 182 Wn.2d at 837-38. There is no question that the trial court erred in imposing discretionary LFOs without considering Flippo’s finances. This error flies in the face of an unmistakably clear legislative mandate. The error therefore taints Flippo’s judgment and sentence.

financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability or likely future ability to pay the legal financial obligations ordered herein.

St. App. A at 4. However, the sentencing transcript shows that the trial court engaged in no financial inquiry before imposing these LFOs. App. 43. The court merely recited all the discretionary LFOs it was imposing. It did not consider any aspect of Flippo's financial resources or the burden that LFOs would impose, contrary to RCW 10.01.160(3)'s plain command. The trial court, by failing to make the mandatory ability-to-pay inquiry, exceeded its authority under RCW 10.01.160(3) when it imposed discretionary LFOs anyway. The sentencing transcript thus reveals legal error that renders the judgment and sentence invalid on its face.

The Court of Appeals determined the judgment and sentence facially valid, noting "[a]n error renders a judgment invalid under RCW 10.73.090 'only where a court has in fact exceeded its statutory authority in entering the judgment and sentence.'" Flippo, 191 Wn. App. at 413 (quoting Coats, 173 Wn.2d at 135). The court then stated, "The LFOs imposed upon Mr. Flippo were all authorized by statute. And he makes no claim to the contrary. His judgment and sentence shows no facial invalidity."<sup>4</sup> Id. This cursory

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<sup>4</sup> The Court of Appeals and the State fault Flippo for not including the sentencing transcript. Flippo, 191 Wn. App. at 413; Suppl. Br. of Resp't at 10 ("Nor does he provide the sentencing record for this Court's review."). But the Court of Appeals specifically directed the State to provide such documents: "Authenticated documents relevant to the

assessment blinds itself to the statutory language and the conditional authority it provides. RCW 10.01.160(3) expressly disallows a trial court to order discretionary LFOs unless the defendant can pay them. When a court does not consider the defendant's financial circumstances and ability to pay, it lacks authority to impose discretionary LFOs. Because the trial court exceeded its authority, Flippo's judgment and sentence is facially invalid and overcomes the one-year time limit on collateral attack.

b. Blazina constitutes a significant change in the law under RCW 10.73.100(6) material to Flippo's sentence

The Blazina decision qualifies as a significant change in the law under RCW 10.73.100(6). This exception "applies when an intervening appellate decision overturns a prior appellate decision that was determinative of a material issue." State v. Miller, 185 Wn.2d 111, 114, 371 P.3d 528 (2016). "One test to determine whether an [intervening case] represents a significant change in the law is whether the defendant could have argued this issue before publication of the decision." Id. at 115 (alteration in original) (internal quotation marks omitted) (quoting In re Pers. Restraint of Lavery, 154 Wn.2d 249, 258-59, 111 P.3d 837 (2005) (quoting In re Pers. Restraint of Stoudmire, 145 Wn.2d 258, 264, 36 P.3d 1005 (2001))).

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issue(s) raised in the petition must be attached to the response." App. 8. The State did not do so. Thus, the State has no basis to complain that Flippo failed to provide the sentencing record. Further, the State's brief does not discuss the issue of facial invalidity at all despite review being granted on this issue. App. 28 .

Until Blazina was decided, appellate decisions show that courts refused to consider challenges to LFOs until the State sought to enforce collection. In State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 775 (2013), Division Two held that “challenges to *orders* establishing legal financial sentencing conditions that do not limit a defendant’s liberty are not ripe for review until the State attempts to curtail a defendant’s liberty by enforcing them.” This court has also held, “[T]he relevant time [to inquire into ability to pay] is the point of collection and when sanctions are sought for nonpayment.” State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997).

This time-of-enforcement rationale has routinely applied in the remissions context. In State v. Smits, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009), the court stated that an ability-to-pay determination “is clearly somewhat ‘speculative,’ [so] the time to examine a defendant’s ability to pay is when the government seeks to collect the obligation.” Smits could not obtain relief from LFOs “until the State seeks to enforce payment and contemporaneously determines his ability to pay.” Id. at 525 (quoting State v. Malone, 98 Wn. App. 342, 347-48, 989 P.2d 583 (1999)). Division Three has held, “Inquiry into the defendant’s ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment . . . .” State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811

(2008) (citing Blank, Mahone, and State v. Curry, 62 Wn. App. 676, 681, 814 P.2d 1252 (1991), aff'd, 118 Wn.2d 911, 829 P.2d 166 (1992)).

Blazina abrogated these holdings, directing courts to consider ability to pay prior to imposing LFOs rather than wait until the time of enforcement. In Blazina, “The State argue[d] that the issue [wa]s not ripe for review because the proper time to challenge the imposition of an LFO arises when the State seeks to collect.” 182 Wn.2d at 832 n.1. This court disagreed, holding that LFO challenges were ripe for review. Id. In disagreeing, this court acknowledged the significant harms caused by LFOs, including the accrual of compounding interest: “LFOs accrue interest at a rate of 12 percent and may also accumulate collection fees when they are not paid on time.” Id. at 836. The court recognized that the current LFO system prolongs courts’ “jurisdiction over impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. at 836-37. This, in turn, has “serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. All of these reentry difficulties increase the chances of recidivism.” Id. at 837 (citations omitted). The Blazina decision thus abrogated the time-of-enforcement rationale underpinning Crook, Mahone, Smits, Curry, Blank, and Lundy, and thereby constitutes a significant change in the law.

Division Two, just yesterday, reached the same conclusion in State v. Shirts, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, No. 47740-8-II, slip op. at 4-7 (Aug. 30, 2016). The Shirts court held “Blazina calls into question the continued precedential value of Mahone,” which reasoned Mahone would not be aggrieved by outstanding LFOs until the State attempted to enforce payment. Shirts, slip op. at 5-6. The Shirts court stated, “In light of Blazina, and contrary to the court’s conclusion in Mahone, an offender can be ‘aggrieved’ even if the State does not attempt to enforce payment.” Id. at 7. Shirts illustrates how Blazina has significantly changed the law.

Flippo perhaps could have argued at sentencing that the court must make an on-the-record inquiry into his financial circumstances before imposing LFOs; but before Blazina, this argument would have been futile. The trial court would have concluded the boilerplate language in the judgment and sentence sufficed given that no appellate decision directed otherwise.<sup>5</sup> And the Court of Appeals would have affirmed this decision, holding the issue was not ripe for review until enforcement. Blazina has altered these results. Flippo “should not be faulted for having omitted

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<sup>5</sup> Indeed, in Curry this court held that no ability-to-pay findings are required, the issue is reviewed under an abuse of discretion standard, and any “additional requirement on the sentencing procedure would unnecessarily fetter the exercise of that discretion, and would further burden an already overworked court system.” Curry, 118 Wn.2d at 916. From this, every judge in the state would readily conclude that boilerplate in the judgment and sentence was amply sufficient and, further, that going beyond such boilerplate would waste judicial resources.

arguments that were essentially *unavailable* at the time, as occurred here.”  
In re Pers. Restraint of Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000).

The Court of Appeals rejected Flippo’s argument that Blazina qualified as a significant change in the law, reasoning that Blazina “only confirm[ed], and [did] not alter, what has always been required of the sentencing court under RCW 10.01.160(3)—a statute that was enacted in 1976 and has remained unchanged.” 191 Wn. App. at 410-11. There is some superficial merit to the Court of Appeals’ conclusion that, as to RCW 10.01.160(3)’s *substantive* requirements, Blazina merely confirmed them. However, the court failed to acknowledge that Blazina explicitly altered the superior court *procedure* for fulfilling the substance of the RCW 10.01.160(3) determination. Blazina gave the required procedure—on-the-record ability-to-pay determinations—and contrasted it with the typical but erroneous boilerplate procedure that most superior courts were employing. Blazina, 182 Wn.2d at 837-38. Under RCW 10.73.100(6), significant changes in the law may be “substantive or procedural” to overcome the time limit on collateral attack. The Court of Appeals reasoning here was incomplete because it did not acknowledge Blazina’s modification to the procedure by which trial courts must comply with RCW 10.01.160.

Moreover, Blazina’s impact was both procedural and substantive because it set a new standard in assessing ability to pay: “Courts should also

look to the comment in court rule GR 34 for guidance.” Blazina, 182 Wn.2d at 838. “[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person’s ability to pay LFOs.” Id. at 839. As a result of Blazina, GR 34 now functions as a substantive and procedural mechanism to ensure trial courts are complying with RCW 10.01.160(3).

Blazina also represents a significant change because it has prompted a wholesale reexamination of Washington’s “broken LFO systems.” 182 Wn.2d at 835. This court has remanded numerous cases for resentencing for proper consideration of ability to pay, see State v. Duncan, 185 Wn.2d 430, 437-38, 374 P.3d 83 (2016) (noting several remanded cases), and continues to do so. Both this court and Division Two accepted review in cases that implicate the adequacy of remissions procedures. See Cities of Richland & Kennewick v. Wakefield, No. 92594-1; Shirts, supra.

Based on the concerns identified in Blazina, the Court of Appeals has also altered its practice of rotely imposing appellate costs. See State v. Sinclair, 192 Wn. App. 380, 391, 367 P.3d 612 (“As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina . . . . It is entirely appropriate for an appellate court to be mindful of these concerns.”), review denied, 185 Wn.2d 1034, \_\_\_ P.3d \_\_\_ (2016); id. at 388-89 (discussing Division Two’s procedure to remand appellate cost ability-to-pay determinations to trial court). Division Three

issued a new general order outlining how it will exercise discretion on appellate costs.<sup>6</sup> This court has also proposed amendments to RAP 14.2 to ensure Washington's appellate courts are not unduly burdening indigent litigants with appellate costs.<sup>7</sup> Blazina has directly led to several other significant changes in the law, demonstrating that Blazina itself so qualifies.

Blazina's significant change in the law was material to the LFOs imposed on Flippo as part of his criminal sentence. RCW 10.73.100(6) (requiring significant changes in the law to be "material to the conviction, sentence, or other order entered in a criminal or civil proceeding"). The trial court would not have imposed discretionary LFOs had it followed RCW 10.01.160(3)'s command, as laid out in Blazina, and considered Flippo's ability to pay. The trial court's failure to comply with RCW 10.01.160(3) makes the significant change in the law identified in Blazina material to Flippo's sentence. Because Blazina represents a significant change in the law material to Flippo's sentence, Flippo's petition is not time barred.

c. Blazina applies retroactively on collateral review

Not only does Blazina constitute a significant change in the law, it also applies retroactively on collateral review.

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<sup>6</sup> This June 10, 2016 general order is available online at [https://www.courts.wa.gov/appellate\\_trial\\_courts/?fa=atc.genorders\\_orddisp&ordnumber=021&div=III](https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=021&div=III).

<sup>7</sup> This court's RAP 14.2 proposal is available online at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplay&ruleId=535](http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=535).

[I]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it. In other words, there is no “retroactive” effect of a court’s construction of a statute; rather, once the court has determined the meaning, *that is what the statute has meant since its enactment.*

In re Pers. Restraint of Vandervlugt, 120 Wn.2d 427, 436, 842 P.2d 950 (1992) (alterations in original) (internal quotation marks omitted) (quoting In re Pers. Restraint of Moore, 116 Wn.2d 30, 37, 803 P.2d 300 (1991) (quoting State v. Darden, 99 Wn.2d 675, 679, 663 P.2d 1352 (1983) (quoting Johnson v. Morris, 87 Wn.2d 922, 927-28, 557 P.2d 1299 (1976))))). Blazina’s interpretation of RCW 10.01.160’s requirements relates back to RCW 10.01.160’s enactment, so Flippo “is entitled to have that holding applied in his case.” Vandervlugt, 120 Wn.2d at 436. Flippo overcomes the one-year time bar on collateral attack under RCW 10.73.100(6) and Blazina should apply retroactively to confer relief.

## 2. THE PETITION IS NOT BARRED AS SUCCESSIVE

“The bar on successive petitions under RCW 10.73.140 does not apply to the state Supreme Court.” In re Pers. Restraint of Markel, 154 Wn.2d 262, 268, 111 P.3d 249 (2005). “However, where the second petition is similar to the first, ‘good cause’ must be shown.” Id.; RAP 16.4(d).

This petition is not similar to Flippo’s previous petition, which raised the trial court’s failure to give a unanimity instruction, the ineffective

assistance of counsel at sentencing, the absence of trial court findings supporting his sentence, and speedy trial issues. App. 36-39. Flippo did not raise any LFO issue. In any event, “[g]ood cause’ is shown where the petitioner demonstrates that a material intervening change in the law has occurred.” Lavery, 154 Wn.2d at 261. Blazina is a material intervening change in the law that occurred after Flippo filed his first petition. Flippo’s instant petition therefore clears the bar on successive petitions.

3. OUTSIDE THE PERSONAL RESTRAINT PETITION,  
FLIPPO HAS NO OTHER AVAILABLE OR ADEQUATE  
REMEDY IN LIGHT OF WASHINGTON’S  
CONSTITUTIONALLY INADEQUATE LFO SYSTEM

“The imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations.” Duncan, 185 Wn.2d at 436. This court, in State v. Barklind, 87 Wn.2d 814, 817, 557 P.2d 314 (1976), distilled seven requirements of a constitutional LFO system from Fuller v. Oregon, 417 U.S. 40, 44-47, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974): (1) repayment must not be mandatory; (2) repayment may be imposed only on convicted defendants; (3) repayment may only be ordered if the defendant is or will be able to pay; (4) the financial resources of the defendant must be taken into account; (5) a repayment obligation may not be imposed if it appears there is no likelihood the defendant’s indigency will end; (6) the defendant must be permitted to petition the court for remission

of the payment of costs or any unpaid portion; (7) the defendant cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

The trial court ordered LFOs without any determination of Flippo's ability to pay, without any consideration of Flippo's financial circumstances, and thus without any inquiry into the likelihood that Flippo's indigency will end. These actions violated the third, fourth, and fifth constitutional requirements, demonstrating the constitutional infirmity of Washington's LFO procedures from the moment LFOs are imposed.

However, Washington's LFO collections and remissions practices reveal at least two other serious constitutional problems. First, significant amounts of money are added onto the LFO balance and significant amounts of money are automatically collected without any inquiry into ability to pay. Second, Washington has no functional remissions process.

- a. Washington's elaborate and aggressive collections process imposes significant financial burdens on indigent persons without any consideration of ability to pay

To pass constitutional muster under Fuller, "Defendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is

imposed are not subjected to collection procedures until their indigency has ended and no 'manifest hardship' will result." 417 U.S. at 46. This court has similarly provided that the constitutionality of Washington's LFO statutes depends on conducting ability-to-pay inquires at certain times, including "when sanctions are sought for nonpayment," "if the State seeks to impose some additional penalty for failure to pay," and "before enforced collection or any sanction is imposed for nonpayment." Blank, 131 Wn.2d at 242. But Washington courts are not complying with these directives. Significant fees, costs, and collections are routinely imposed and enforced with no financial inquiry whatsoever.

First, LFOs accrue interest at a well-above-market rate of 12 percent. Blazina, 182 Wn.2d at 836. This interest accrues, compounds, and continues accruing from the date of judgment. RCW 10.82.090(1). Interest qualifies as an additional penalty or sanction because it is particularly invidious: it further burdens those who do not have the ability to pay with ever mounting debt and ensnarls them in the criminal justice system for what might be decades. See Blazina, 182 Wn.2d at 836 ("[O]n average, a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed" due to interest); App. 33 (showing the amount of interest assessed has well

surpassed what the trial court imposed in LFOs). Yet there is no requirement to inquire into ability to pay this interest before it is assessed.

Second, Washington law permits payroll deductions immediately upon sentencing. RCW 9.94A.760(3). This permits employers to deduct wages to cover LFOs and permits the imposition of other fees to be taken from earnings. RCW 9.94A.7604(4). No ability-to-pay inquiry occurs before this collection and sanction mechanism is employed.

Third, RCW 6.17.020 permits wage garnishment, which may begin immediately after entering judgment. RCW 9.94A.7701 allows wage assignment within 30 days of a defendant's failure to pay an ordered monthly sum. Employers can then charge the defendant a "processing fee" to facilitate such collections. RCW 9.94A.7705. Contrary to Fuller and Blank, however, there are no provisions requiring ability-to-pay determinations before using this enforced collection method.

Fourth, collection agencies and county collection services are authorized to collect unpaid LFOs, and may assess additional penalties or fees for such collection. RCW 36.18.190. See St. App. A at 6 (Flippo's judgment and sentence ordering that he "shall pay the costs of services to collect unpaid legal financial obligations"). But there is no preimposition requirement to consider a person's financial circumstances.

Fifth, indigent persons in the custody of the Department of Corrections (DOC) must forfeit their wages to pay LFOs without any determination of their current or future ability to pay. Division Three held that mandatory DOC deductions “for payment of LFOs are not collection actions by the State requiring inquiry into a defendant’s financial status.”<sup>8</sup> Crook, 146 Wn. App. at 27-28. The court reasoned, “[s]tatutory guidelines set forth specific formulas allowing for fluctuating amounts to be withheld, based on designated percentages and inmate account balances, assuring inmate accounts are not reduced below indigency levels. RCW 72.11.020; RCW 72.09.111(1); RCW 72.09.015(10).” Crook, 146 Wn. App. at 28.

Crook cannot be squared with Blank and Fuller. A state agency’s mandatory deduction of wages to pay LFOs is a state collection action. The mere fact that statutes provide formulas to facilitate enforced collection does not exempt the collection from qualifying as enforced collection. See RCW 72.11.020 (DOC secretary is custodian for inmate funds and may disburse money to satisfy LFOs); RCW 72.09.110 (requiring inmates to “participate in the cost of corrections”); RCW 72.09.111 (enumerating deduction schedules and formulas for varying classes of wages). And Crook’s assurance that accounts are not reduced below indigency levels is

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<sup>8</sup> Flippo’s judgment and sentence subjects him to such deductions. St. App. A at 6. His recent financial statement indicates DOC has siphoned some \$1,689.94 from him without a single inquiry into his financial circumstances. App. 33.

meaningless because “indigency” signifies having less than \$10. RCW 72.09.015(15). Notwithstanding Crook’s faulty reasoning, DOC’s wage deductions are enforced collections, yet no court inquires into financial status as is constitutionally mandated.

Washington’s LFO system is replete with examples of assessing sanctions and enforcing collections without engaging in the required financial inquiries. These practices offend the constitution yet evade judicial review. Flippo has no viable means of challenging them except through this personal restraint petition in Washington’s highest court.

- b. The remissions procedures in RCW 10.01.160(4) and RCW 10.73.160(4) do not provide an adequate or available remedy

The constitution also requires a remissions process. Fuller, 417 U.S. at 45. RCW 10.01.160(4) provides Washington’s remissions procedure:

A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant’s immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.<sup>9</sup>

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<sup>9</sup> RCW 10.01.170, inapposite here, permits the trial court to specify a time period or installments for the payment of outstanding LFOs. In addition, RCW 10.73.160(4) provides an almost identical remission procedure for appellate costs, of which \$4,290.73 was assessed against Flippo after his unsuccessful direct appeal. St. App. B.

Despite clear statutory language permitting a remission petition “at any time,” courts have routinely refused to consider such motions unless the State is actually enforcing LFOs. Shirts, slip op. at 5-7; Smits, 152 Wn. App. at 525; Mahone, 98 Wn. App. at 347-48. And the statute provides no guidance on the meaning of “manifest hardship.” The LFO remission procedures thus provide no available or adequate remedy, necessitating relief through a personal restraint petition. Cf. RAP 16.4(d) (“The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances . . .”).

Despite Blazina’s eschewal of the time-of-enforcement rationale, the remissions procedures outlined in RCW 10.01.160(4) and RCW 10.73.160(4) have only been applied by trial courts when the State begins enforcing collection. E.g., Shirts, slip op. at 3. Moreover, as discussed, not all actions that result in the forced collection of money qualify as enforced collections that trigger judicial review. When Flippo filed his petition, he could not demonstrate the State had begun collecting or attempting to collect LFOs. He could not argue he was aggrieved by the outstanding LFO balance. Id. at 4-8. The remissions process therefore provided no remedy.

But even if the remissions process were available, this “process” fails to provide an adequate remedy. Assuming a trial court were actually to consider whether “it appears to [its] satisfaction . . . that payment of the

amount due will impose manifest hardship on the defendant or the defendant's immediate family," RCW 10.01.160(4), there is no standard governing what manifest hardship means. The standard is elusive and amorphous—nowhere in Washington statutes or case law is there any definition or interpretation of "manifest hardship."

RCW 10.01.160(4) is thus too vague and standardless to provide a remedy. Statutes must provide explicit standards to avoid "resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). A statute is unconstitutional when it is "so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to its application." State v. Wright, 88 Wn. App. 683, 689, 946 P.2d 792 (1997).

The remissions statutes suffer from this infirmity. They provide no guidance for determining whether outstanding LFOs cause manifest hardship. Nothing in the statute differentiates manifest hardship from non-manifest hardship or from no hardship at all. The lack of any discernible standard to guide the trial court's discretion renders the application of RCW 10.01.160(4) and RCW 10.73.160(4) completely arbitrary, capricious, and therefore unconstitutionally vague. Because of the lack of any remission

standard, Flippo's only adequate and available remedy is relief through this petition.

In addition to the lack of any standard, the remission procedure is also inadequate because it provides no counsel. Indigent offenders are required to appear pro se at payment review hearings, even though the State is represented by a prosecutor, who wants to maximize the offender's punishment, and a county collections officer, who wants to maximize the county's revenue. See RCW 10.01.160(4) (no provision for appointment of counsel); RCW 10.73.160(4) (same); RCW 10.73.150 (same); Mahone, 98 Wn. App. at 346-47 (holding that because order denying remission not appealable, "Mahone cannot receive counsel at public expense"). Without counsel, many indigent persons would not even know to petition for remission despite experiencing significant hardship. They would also likely struggle to make coherent records supporting a manifest hardship determination. And, given that there is no guidance in Washington as to what qualifies as a manifest hardship, lawyers would need to litigate this issue, rendering actual remission an illusory remedy in the eyes of a pro se litigant. Because there is no available or adequate remissions procedure, this court should grant Flippo relief through this personal restraint petition, for which he has finally been provided the assistance of counsel.

4. FLIPPO DEMONSTRATES ACTUAL PREJUDICE AND A COMPLETE MISCARRIAGE OF JUSTICE FROM THE THOUSANDS OF DOLLARS ASSESSED AGAINST HIM FOR MERELY EXERCISING HIS CONSTITUTIONAL RIGHTS

A personal restraint petitioner must demonstrate prejudice that entitles him to relief. For constitutional error, “the petitioner must generally prove actual and substantial prejudice by a preponderance of the evidence to prevail.” In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 607, 316 P.3d 1007 (2014). For nonconstitutional error, “the petitioner must prove a fundamental defect resulting in a complete miscarriage of justice, also by a preponderance of the evidence, to prevail.” Id. The constitutional standard applies, given that LFO systems “have constitutional implications and are subject to constitutional limitations,” Duncan, 185 Wn.2d at 436, and Flippo has demonstrated significant constitutional shortcomings. But, under either the constitutional or nonconstitutional standard, Flippo is entitled to relief.

The trial court violated RCW 10.01.160(3) when it imposed discretionary LFOs without inquiring into Flippo’s financial status. This violated both constitutional and statutory law, rendering the LFO portion of Flippo’s sentence unlawful.<sup>10</sup>

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<sup>10</sup> If the court applies the nonconstitutional standard, the imposition of an unlawful sentence qualifies as a fundamental defect. In re Pers. Restraint of Carrier, 173 Wn.2d 791, 818, 272 P.3d 209 (2012).

Imposing LFOs without an ability-to-pay determination results in actual and substantial prejudice as well as a gross miscarriage of justice. Blazina detailed the multiple and significant harms LFOs impose on indigent persons. 182 Wn.2d at 835-38. Because of compounding interest, “a person who pays \$25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed.” Id. at 836. Courts, in turn, retain jurisdiction until LFOs are completely paid off. Id. at 836-37.

The court’s long-term involvement in defendants’ lives inhibits reentry: legal or background checks will show an active record in superior court for individuals who have not fully paid their LFOs. This active record can have serious negative consequences on employment, on housing, and on finances. LFO debt also impacts credit ratings, making it more difficult to find secure housing. All of these reentry difficulties increase the chances of recidivism.

Id. at 837 (citations omitted).

Flippo was prejudiced by the trial court’s failure to consider his ability to pay more than \$2,600 plus accumulated interest in LFOs. Flippo was indigent and qualified for appointed counsel in superior court, and this court has determined he still qualifies for appointed counsel. St. App. C; App. 32. He dropped out of high school and obtained his GED several years later, well into his 30s. St. App. E at 11. At the time of sentencing, “he relied upon social assistance in the form of food stamps and medical

coupons.” St. App. E at 11. He also reported significant debt leading to hardship with credit collection agencies. St. App. E at 11. In his statements of finances here and in the Court of Appeals, Flippo reported no assets or income from any source. App. 5-6, 30-31. He also reported significant health issues. App. 31. Despite his clearly limited financial resources, the trial court nonetheless imposed more than \$2,600 in discretionary LFOs. St. App. A at 5. The Court of Appeals imposed nearly \$4,300 more. St. App. B. These amounts were imposed simply because Flippo exercised his constitutional rights to trial, appeal, and counsel.

Flippo also received an indeterminate sentence of 174 months and is therefore subject to potential lifetime incarceration. St. App. A at 7. At the earliest, Flippo would exit prison in his mid 50s. Even if he could manage to pay \$50 per month as ordered in the judgment and sentence, he would never manage to come close to paying off the nearly \$11,000 (and counting) he currently owes. App. 33. Flippo shows prejudice because the LFOs imposed without any consideration of his financial circumstances relegate him to a permanent underclass of Washington citizens who will remain ever subject to the jurisdiction of criminal courts.

The State does not address these concerns but instead focuses on Flippo’s ownership of a lawn care business and employment as a taxi driver. The State asserts that “[a]s a long time business owner, the Defendant has

every ability to work and earn an income . . . .” Br. of Resp’t at 12. But while Flippo “claim[ed] to have owned his own lawn care business in the Walla Walla area for approximately ten years,” the documentation the State provides establishes the business was not particularly successful given that Flippo also received public assistance. St. App. E at 11. The excerpt of the trial transcript appended to the State’s brief indeed indicates Flippo was employed full-time for a taxi company, but it also recounts a homeless man moving from a camper in the driveway of a dilapidated house to another residence that an unnamed mission provided. St. App. D at 243-45. This mission evicted Flippo; then his brother also kicked him out. St. App. D at 244-45. In short, the transcript the State relies upon reveals just as much if not more financial hardship than financial stability.

Washington’s LFO system punishes the poor for their poverty. By unlawfully imposing LFOs without any consideration of Flippo’s ability to pay, the LFO order results in actual and substantial prejudicial and qualifies as a fundamental defect that results in a complete miscarriage of justice.

5. APPELLATE COSTS SHOULD BE DENIED<sup>11</sup>

This court has ample discretion to deny the State’s request for appellate costs if Flippo does not substantially prevail. RCW 10.73.160(3); State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000); Sinclair, 192 Wn.

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<sup>11</sup> Flippo includes this section in direct response to the State’s indication that it will seek appellate costs if it is the substantially prevailing party. Suppl. Br. of Resp’t at 13.

App. at 385, 388. Generally, however, this discretion must be exercised in the decision terminating review. RAP 14.2; Nolan, 141 Wn.2d at 626. Flippo already faces a significant amount in LFOs, which he will never be able to pay off even if he makes the \$50 monthly payments ordered in his judgment and sentence because of compounding interest. This court should not burden him further by imposing additional costs for seeking relief from his outstanding LFOs and for having the assistance of counsel. Flippo therefore asks that this court exercise discretion and deny additional appellate costs in the decision terminating review.

D. CONCLUSION

Currently, there is no constitutionally adequate remissions and collections procedure available. Therefore, Flippo's petition should be granted and this court should strike the discretionary LFOs in his judgment and sentence or remand for resentencing in accordance with Blazina.

DATED this 31<sup>st</sup> day of August, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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KEVIN A. MARCH  
WSBA No. 45397  
Office ID No. 91051  
Attorneys for Petitioner

# APPENDIX

FILED

JUL 16 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

5

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

IN RE THE PERSONAL RESTRAINT OF: )

No. 336191

Earl O. Flippo

PERSONAL RESTRAINT PETITION

(petitioner's full name)

(regarding LFOs post *Blazina*)

A. STATUS OF PETITIONER

I, EARL O. FLIPPO (AT AMCC) PO. Box 2049 Adw ay  
Heilts Washington (full name and address), apply  
for relief from restraint. I am  am not  now in custody serving a sentence upon  
conviction of a crime. (If not serving a sentence upon conviction of a crime) I am now in custody  
because of the following type of court order: \_\_\_\_\_  
(identify type of court order).

1. The court in which I was sentenced is: Walla Walla County Superior Court
2. I was convicted of the crime of: 9A 44.083
3. I was sentenced after (check one) Trial  Plea of Guilty  on  
4-21-2008 (date of sentence).
4. The Judge who imposed sentence was Hon. Robert L. Zagelow
5. My lawyer at trial court was James E. Barrett WS.BA. #4924  
Public Defender 2 main Walla Walla Wa. (name and address if known).
6. I did  did not  appeal from the decision of the trial court. (If the answer is that I  
did), I appealed to: Division III Appeal Court N 500 Cedar St  
Spokane Washington (name of court or courts to which appeal took place).
7. My lawyer on appeal was: Court Appointed Dennis Morjen

In Ritzville Washington (name and address if known; if none, write 'none').

8. The decision of the appellate court was \_\_\_\_\_ was not  published. (If it is published, and I have this information), the decision is published in \_\_\_\_\_ (volume number, Wa.App. or Wa.2d, and page number).
9. Since my conviction I have  have not \_\_\_\_\_ asked a court for some relief from my sentence other than I have already written above. (If the answer is that I have asked), the court I asked was Washington State Supreme Court (name of court or courts in which relief was sought). Temple of Justice  
Relief was denied on: 12-21-2011 / 8-7-2012 (date of decision[s]).
10. (If I have answered in question 9 that I did ask for relief), the name of my lawyer in the proceeding mentioned in my answer to question 9 was: \_\_\_\_\_  
\_\_\_\_\_  
(name and address if known; if none, write 'none').
11. If the answers to the above questions do not really tell about the proceedings, the courts, judges and attorneys in your case tell about it here: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**B. GROUNDS FOR RELIEF:**

1. I should be released from the imposition of Judgment as it pertains to the Legal Financial Obligation portion(s) only, because:
- The trial court failed to make an individualized inquiry into petitioner's ability to pay any LFOs, which warrants resentencing.
  - The trial court relied on boiler-plate language, which petitioner alleges is prejudicial, to impose Judgment on the defendant.
  - Defendant at all times alleges that he is indigent for the reasons found at number (2), and states that payment of the imposed judgment will impose a manifest hardship on the petitioner and/or his family.
2. The following facts are important when considering my case:
- Petitioner is physically/mentally disabled and does not have the future ability to be gainfully employed.
  - Petitioner's current household income falls below 125% of the federal poverty guideline.
  - Distinctions exist between petitioner's financial circumstances at time of sentence and petitioner's current financial status.

- Petitioner owes \$\_\_\_\_\_ in restitution which cannot be waived per statute. However, restitution should be considered as a financial responsibility which weighs on the petitioner's ability to pay other discretionary LFOs.
- Petitioner requests the court to also review the LFO's ordered under these additional cause numbers, as long as review does not invoke a mixed petition rule.

- Petitioner owes LFOs in several Court jurisdictions within this division which also cause a distinguishable financial hardship.
- Petitioner receives assistance from a needs based, means tested assistance program.
- Petitioner's household income is above 125% of the federal poverty guideline and the defendant has recurring basic living expenses, as defined in RCW 10.101.010(4) (d), that render him without financial ability to pay.
- Other compelling circumstances exist that demonstrate the petitioner's inability to pay any LFO.
- No fact was entered into the record which would support the conclusion that the defendant has had, or will ever have, the ability to pay the LFO imposed under this cause number(s).

Petitioner was ordered to pay LFOs as follows:

(Check those that apply and enter amounts)

<input checked="" type="checkbox"/> Victims' Penalty Assessment	\$ 500 <sup>00</sup>
<input checked="" type="checkbox"/> Court Costs	\$ 200 <sup>00</sup>
<input checked="" type="checkbox"/> DNA Fee	\$ 100 <sup>00</sup>
<input checked="" type="checkbox"/> Attorney Costs	\$ 775 <sup>00</sup>
<input type="checkbox"/> Bench Warrant Fee	\$ _____
<input type="checkbox"/> Extradition Costs	\$ _____
<input checked="" type="checkbox"/> Jury Fee	\$ 250 <sup>00</sup>
<input checked="" type="checkbox"/> Witness Costs	\$ 286 <sup>00</sup>
<input type="checkbox"/> Restitution	\$ _____
<input checked="" type="checkbox"/> Appellate Costs	\$ 4087 <sup>00</sup>
<input type="checkbox"/> Drug Offense Costs	\$ _____
<input type="checkbox"/> Investigative fees	\$ _____
<input checked="" type="checkbox"/> Other: <u>Sheriff Fees, Booking Fees</u>	\$ 508.15

- Public, needs-based government benefits are not subject to attachment, garnishment, or execution.
- Petitioner has previously filed a PRP, and may be subject to successive petition rule; petitioner claims that issues have not been previously raised, issues were not previously reviewable per statute, and could not be raised in the first petition accordingly.

3. The following reported court decisions show the error alleged to have occurred in my case:

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (March 12, 2015) (trial courts must consider a defendant's individual financial circumstances, and make an individualized inquiry into the defendant's present and future ability to pay).

Matter of Vandervlugt, 120 Wn.2d 427, 842 P.2d 950 (1992) (the decision found in Blazina should be retroactive due to the fairness factors which themselves compel retroactive application).

Bennet v. Arkansas, 485 U.S. 395, 108 S.Ct. 1204 (1988); Nelson v. Heiss, 271 F.3d 891, 895 (9<sup>th</sup> Cir. 2001) (citing Bennet) (government benefits are not subject to execution, to include court-ordered LFOs; if state procedure conflicts with federal statute then the Supremacy Clause of the United States Constitution requires that the federal statute stands).

State v. Lundy, 176 Wn.App. 96, 308 P.3d 755 (2013) (if the court intends to impose discretionary LFOs as a sentencing condition, it must consider the defendant's present or likely future ability to pay).

State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992) (establishing seven factors regarding permissible costs and fees structure).

4. The following statutes and constitutional provisions should be considered by the Court:

Petitioner failed to object to the imposition of LFOs, however the Court should consider RAP 1.2, providing broad ability to waive or alter any rule, including RAP 2.5, to serve the ends of justice by reviewing this petition.

This Court should consider RCW 10.01.160(3) and (4) before applying the one year time-bar in RCW 10.73.090, where LFO judgments are not 'final', and a defendant "may at any time petition the sentencing court for remission of the payment of costs or of any unpaid portion thereof."

Additionally, this Court should consider RCW 10.73.100(6) as there has been a significant change in the law according to the decision recently made in the Washington Supreme Court in State v. Blazina, supra. This change should overcome application of RCW 10.73.090.

When determining petitioner's claim of indigence this Court should consider Washington Court Rule GR 34 and RAP Rule 15.2. These two rules, combined with RCW 10.01.160(3), provide guidance to the Court regarding what constitutes indigence, and give rise to the petitioner's claim on review.

Where petitioner receives need-based government benefits, this Court should consider 42 U.S.C. § 407 and 38 U.S.C. § 5301 (such benefits are exempt from garnishment or other legal process).

5. This petition is the best way I know to receive the relief I am requesting, and no other option will work as well because prejudice has occurred which has caused a manifest hardship to be imposed on the petitioner contrary to State statute.

SPJ

C. STATEMENT OF FINANCES

If you cannot afford to pay the \$250 filing fee or cannot afford to pay an attorney to help you, fill out this form. If you have enough money for these, do not fill this part of the form. If currently in confinement you will need to attach a copy of your prison finance statement.

1. I do  do not  ask the court to file this without making me pay the \$250 filing fee because I am so poor and cannot pay the fee.
2. I have a spendable balance of \$ \_\_\_\_\_ in my prison or institution account.
3. I do  do not  ask the court to appoint a lawyer for me because I am so poor and cannot afford to pay a lawyer.
4. I am  am not  employed. My salary or wages amount to \$ \_\_\_\_\_ a month. My employer is \_\_\_\_\_

\_\_\_\_\_  
Name and address of employer

5. During the past 12 months I did  did not  get any money from a business, profession, or other form of self-employment. If I did, it was \_\_\_\_\_ (type of self-employment) and the total income I received was \$ \_\_\_\_\_

6. During the past 12 months I:

Did  Did Not  Receive any rent payments. If so, the total I received was \$ \_\_\_\_\_

Did  Did Not  Receive any interest. If so, the total I received was \$ \_\_\_\_\_

Did  Did Not  Receive any dividends. If so, the total I received was \$ \_\_\_\_\_

Did  Did Not  Receive any other money. If so, the total I received was \$ \_\_\_\_\_

Do  Do Not  Have any cash except as said in question 2 of Statement of Finances.

If so the total amount of cash I have is \$ \_\_\_\_\_

Do  Do Not  Have any savings or checking accounts. If so the total amount in all accounts is \$ \_\_\_\_\_

Do  Do Not  Own stocks, bonds, or notes. If so their total value is: \$ \_\_\_\_\_

7. List all real estate and other property or things of value which belong to you or in which you have an interest. Tell what each item or property is worth and how much you owe on it. Do not list household furniture and furnishings and clothing which you or your family need.

Items	Value

8. I am \_\_\_ am not  married. If I am married, my wife or husband's name and address are:

\_\_\_\_\_

\_\_\_\_\_

9. All of the persons who need me to support them are listed below:

Name & Address	Relationship	Age

10. All of the bills I owe are listed here:

Name & Address of Creditor	Amount

**D. REQUEST FOR RELIEF**

I respectfully request this Court to:

- VACATE my Legal Financial Obligations Judgment and remand for resentencing.
- VACATE my Legal Financial Obligations Judgment and dismiss the Judgment with Prejudice without resentencing.

Other: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

E. OATH OF PETITIONER

THE STATE OF WASHINGTON )  
 ) :SS:  
COUNTY OF Spokane )

After being first duly sworn, on oath, I depose and say:

That I am the petitioner, that I have read the petition, know its contents, and I believe the petition is true and correct.

Earl O. Flippo  
(Signature)

EARL O. FLIPPO  
(Print name)

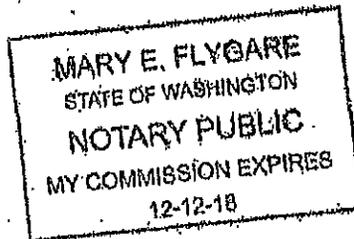
A.H.C.C. M-A-48-4

P.O. Box 2049

Airway Heights Washington 99001-2049  
(Address)

SUBSCRIBED AND SWORN to me this 10 day of July, 2015.

Mary E. Flygare  
Notary Public in and for the state of Washington,  
Residing at Airway Heights  
My commission expires: 12-12-18



Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

The Court of Appeals  
of the  
State of Washington  
Division III



500 N Cedar ST  
Spokane, WA 99201-1905

Fax (509) 456-4288  
<http://www.courts.wa.gov/courts>



August 24, 2015

James Lyle Nagle  
Office of the Pros Attorney  
240 W Alder St Ste 201  
Walla Walla, WA 99362-2807  
Email

Earl Owen Filippo  
#958101  
Airway Heights Correction Center  
PO Box 2049  
Airway Heights, WA 99001-2049

CASE # 336191  
Personal Restraint Petition of Earl Owen Filippo  
WALLA WALLA CO SUPERIOR COURT No. 071004197

Counsel and Petitioner:

A personal restraint petition was filed on July 16, 2015, and has been assigned case number 336191. A copy of the petition and any related documents are enclosed for respondent. All correspondence and filings shall refer to this appellate court case number.

The following notation ruling is entered:

**Filing fee waived. Response requested from the Walla Walla County Prosecutor.**

The response to the petition is due 60 days after the date hereof, by October 23, 2015. See RAP 16.9. Authenticated documents relevant to the issue(s) raised in the petition must be attached to the response. Respondent must file the response in duplicate (unless filed electronically) and serve a copy on petitioner. Proof of service should be filed with the response. Extensions will be granted only in extraordinary circumstances where the interest of justice so require.

Petitioner's reply is due within 30 days of service of the response. Upon filing of the reply, or after expiration of the 30 days, the matter will be referred to the Chief Judge for consideration without oral argument.

Petitioner shall keep the clerk of this Court advised of any address changes.

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:jld

COURT OF APPEALS DIVISION III  
of the State of Washington

In re Personal Restraint  
of

EARL O. FLIPPO

Petitioners

Reply to

Respondent's

Brief

FILED

OCT 27 2015



NO 33619-1-JT

## I REPLY

Petitioner, EARL O. FLIPPO, Pro Se hereby submit this  
Reply in rebuttal to Respondent's Brief regarding Petitioner  
Claim to have my LFO's dissolved under Blazina  
Please see Petitioner's PRP.

### A LEGAL Stand

Petitioner FLIPPO argues that his J+S Shows  
on its face that the Sentencing Court violated his  
due process right to not incur a money judgment,  
Imposed by the state without determining his  
ability to pay.

et.

The Plea Process clause in The 14<sup>th</sup> Amendment of The US Constitution requires that no money Judgment be imposed or sentenced without due Process of law unshrouding Prejudice

### 3. Time Bar + Successive

Petitioner Flippo claims that his PIP is not time barred because on the face of his JIS without further elaboration it plainly demonstrates that the sentencing judge imposed discretionary LFOs without giving consideration to Mr. Flippo's individual financial circumstances, and making an individualized inquiry into Flippo's present and future ability to pay. See *State v. Blazman*, 182 Wn 327 344 xpl 2015

Thus Mr. Flippo's PIP is not subject to the time bar limitation under RCW (10.73.020) as his JIS is finalized on its face, further, because the LFO portion of his JIS is still subject to challenge under RCW (10.01.603) and is therefore not final. The time limit of RCW (10.73.020) only attaches to a final judgment.

Mr. Flippo's PIP is timely and not subject to time bar under RCW 10.73.020 because the LFO portion of his JIS is not final.

Mr. Flippo also contends that Blazman constitutes a change of law rendering his PIP timely under RCW 10.73.100(6)

## C. Preserved for Review

RAP 2.5 (c) provides in relevant part that "a party may raise the following claimed errors for the first time in the appellate court: (1) lack of that court's jurisdiction, (2) failure to establish facts upon which relief can be granted, AND (3) manifest error affecting a constitutional right."

Mr. Flippo argues that the trial court's failure to properly determine his ability to pay LFOs is a manifest error affecting his constitutional right to not incur a state money judgment without due process of law. Mr. Flippo's claimed error under *Blazum* is properly before the court under RAP 2.5 (c) (3).

Mr. Flippo has the statutory right under RCW 10.01.160 to challenge his LFOs at any time rendering his claimed errors ripe for review.

Further, since the Court of Appeal cost bill for Mr. Flippo's appeal was not entered until after sentencing and after Mr. Flippo's appeal, therefor this PRP is the first meaningful opportunity for Mr. Flippo to challenge a direct appeal cost that was ordered to be paid at public expense.

## MERITS OF PRP

### ① Ability to pay

Blazina clearly says that the trial court must make the proper determination of Mr Flippo's ability to pay the LFO's imposed when sentenced. State vs. Blazina Super Case

The Respondent claims that Mr Flippo has the ability to pay because he had a lawn care business, and went to Criminal Justice class in College.

But Mr Flippo lost every thing and all asset when he was arrested. In fact Mr Flippo was on DHS Public Assistance for 5 years with his wife and 3 kids up until 2005.

Further more at sentencing the trial court enter a order finding Mr Flippo Indigent and order that his appeal be prosecuted wholly at Public expense. See exhibit 7 and 2.

However, since sentencing Mr Flippo has been charged for his cost of appeal and they added to my LFO's it over 11,000 see exhibit 3

Mr Flippo claims that prejudice is shown because he is well below 125% of the Federal poverty guideline of indigent and LFO are being collected from me and my family, which is a hardship because I lack the legal ability to pay.

In Conclusion  
This Court should find that Mr Flippo's  
PRP is timely and demand this matter back  
to trial court to make the proper determination  
as required, under Blazinas. Concerning Mr Flippo's  
ability to pay his LFO's. or up hold Sabel Orland's  
See exhibit 1, 2

Respectfully Submitted This Day 23, of October  
2015

Earl O Flippo # 958101  
Petitioner - Pro se

LAOEU

Certificate of Service

I EARL O Flippo # 958101 do hereby certify that  
on October 23, 2015 I mailed this report using personal  
legal mail to be forwarded via US Postal Service to

Court of Appeals Division  
IR, State of Washington  
N. 500 Cedar  
Spokane, Washington  
99201

Deputy Prosecuting Attorney  
Terese Chen, WSBA 31762  
P.O. Box 5889  
Pasco Washington  
99301

exhibit 7

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FILED

APR 24 2008

KATHY MARTIN  
WALLA WALLA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WALLA WALLA

THE STATE OF WASHINGTON,  
Plaintiff,  
vs.  
EARL OWEN FLIPPO,  
Defendant.

NO. 07 1 00419 7  
ORDER OF INDIGENCY

JAMES E. BARRETT  
ATTORNEY AT LAW

THIS MATTER having come on before the Court upon Defendant's Motion for an Order of Indigency, the Court having considered Defendant's Affidavit, and the Court having found that the Defendant lacks sufficient funds to prosecute an appeal and applicable law grants Defendant a right to review at public expense to the extent defined in this Order, the Court enters as follows:

1. EARL OWEN FLIPPO is entitled to counsel for review wholly at public expense.
2. \_\_\_\_\_ is appointed as counsel for review.

ORDER OF INDIGENCY

13 1/2 East Main, Suite 213  
BARRETT BUILDING  
Walla Walla, Washington 99362  
Telephone (509) 529-8110  
Fax (509) 522-3188

14

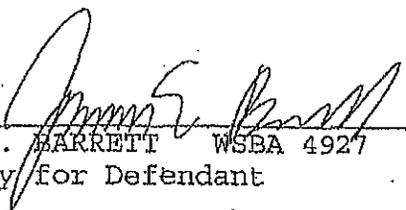
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3. EARL OWEN FLIPPO is entitled to the following at public expense:

- (a) Those portions of the verbatim report of proceedings reasonably necessary for review as follows:
- (b) A copy of the following clerk's papers: All papers designated by Defendant's counsel.
- (c) Preparation of original documents to be reproduced by the clerk as provided in rule 14.3(b).
- (d) Reproduction of briefs and other papers on review which are reproduced by the clerk of the appellate court.
- (e) The cost of transmitting the following cumbersome exhibits:
- (f) Other items:

DONE in Open Court this 24 day of April, 2008.

ROBERT L. ZAGELOW  
LS  
JUDGE ROBERT L. ZAGELOW

Presented by:  
  
JAMES E. BARRETT WSBA 4927  
Attorney for Defendant

ORDER OF INDIGENCY

exhibit a

FILED

APR 24 2008

KATHY MARTIN  
WALLA WALLA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WALLA WALLA

STATE OF WASHINGTON	)	
	)	NO. 07 1 00419 7
Plaintiff,	)	
	)	
EARL OWEN FLIPPO,	)	MOTION AND AFFIDAVIT FOR
	)	ORDER OF INDIGENCY
Defendant,	)	
	)	

COMES NOW EARL OWEN FLIPPO, Defendant by and through his attorney, JAMES E. BARRETT, and moves this Honorable Court for an Order of Indigency.

This Motion is supported by the Affidavit of Counsel for the Defendant below, and the records and files contained herein, and is brought on the grounds that Defendant is wholly unable to meet the expenses of any appellate review herein.

DATED this 24 day of April, 2008

  
\_\_\_\_\_  
JAMES E. BARRETT WSBA 4927  
Attorney for Defendant

MOTION AND AFFIDAVIT FOR ORDER OF INDIGENCY

JAMES E. BARRETT  
ATTORNEY AT LAW

13 1/2 East Main, Suite 213  
BARRETT BUILDING  
Walla Walla, Washington 99152  
Telephone (509) 529-8110  
Fax (509) 522-5188

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STATE OF WASHINGTON )  
 )  
County of Walla Walla ) ss.

I, JAMES E. BARRETT, being first duly sworn upon oath,  
depose and say:

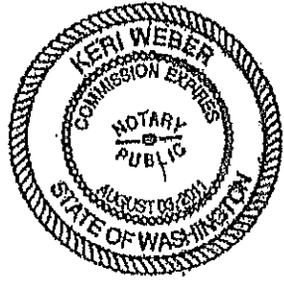
I am Counsel for EARL OWEN FLIPPO herein and I am making  
this Affidavit in support of my Motion for an Order of Indigency.

Prior to trial, my client was determined to be indigent,  
and, as a result, I was appointed counsel for trial. My client  
is still indigent and unable to pay the costs of this appeal.

DATED this 24 day of April, 2008.

James E. Barrett  
JAMES E. BARRETT WSBA 4927

SUBSCRIBED AND SWORN to before me this 24 day of  
April, 2008.



Keri Weber  
NOTARY PUBLIC in and for  
the State of Washington,  
residing at Walla Walla  
My commission expires 8/13/11

MOTION AND AFFIDAVIT FOR ORDER OF INDIGENCY

exit 3

Department of Corrections

Ack#: 2416367 - 1

Legal Financial Obligations Withdrawal Acknowledgement

Facility: AP1

For the period 10/1/2012 through 12/31/2012, Payment Dates: 10/24/2012 and 1/11/2013

Location: P01TB13L

DOC#: 958101, Flippo, Earl O

<u>County Paid</u>	<u>Cause#</u>	<u>LFO Balance</u>	<u>Withdrawals</u>	<u>Payments</u>	<u>Refunds</u>
Walla Walla County Clerk	071004197	\$9,548.05			
<i>Total Paid To: Walla Walla County Clerk</i>				\$65.55	
<b>Withdrawal Acknowledgement Summary</b>			<u>\$65.55</u>	<u>\$65.55</u>	<u>\$0.00</u>

The County Clerk maintains the official LFO payment record. For proof of receipt of money by the county, send a self addressed stamped envelope to the County Clerk. Some counties may charge copy fees for a payment history.

18

336191-III (C.O.A.)

No. 92616-6

SUPREME COURT  
OF THE STATE OF WASHINGTON

Received  
Washington State Supreme Court

D/C 18 2015

Ronald R. Carpenter  
Clerk

STATE OF WASHINGTON, Respondent,

v.

EARL FLIPPO, Petitioner,

MOTION FOR DISCRETIONARY REVIEW

EARL FLIPPO

[Name of petitioner]

AHCC/M-A48

Box 2049

ALBUQUERQUE HEIGHTS, WA

99001

[Address]

## A. IDENTITY OF PETITIONER

Earl O. Flippo asks this court to accept review of the decision designated in Part B of this motion.

## B. DECISION

The Court of Appeals, in and for Division III entered a Published OPINION on November 24, 2015 in the matter of: In re Flippo, C.O.A. # 33619-1-III, dismissing the PRP of this petitioner.

This decision restrained petitioner from review of his PRP by applying RCW 10.73.090(1). A copy of the decision and appellate court opinion is in the Appendix at pages A-

## C. ISSUES PRESENTED FOR REVIEW

1. The appellate court for Division III erred in entering the order of November 24, 2015, denying review of petitioner's PRP which alleges a violation of RCW 10.01.160(3).

#### D. STATEMENT OF THE CASE.

It is the decision of the Appellate Court that the petitioner's PRP is time-barred pursuant to RCW 10.73.090(1). (OPINION, at p. 8)

RCW 10.73.090(1) provides, in part:

"No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final...."

According to the court's decision, petitioner's reliance of RCW 10.01.160(4) as authority which allows his petition to be filed beyond the one year restraint of RCW 10.73.090, is improper because "in no way does the statute alter the finality date of his judgment and sentence...." (OPINION, at p. 7).

RCW 10.01.160(4) provides, in part:

"A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the [court] for remission of the payment of costs or of any unpaid portion thereof." (emphasis added)

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner seeks review of this decision pursuant to RAP 13.5A(1), and alleges that the decision of the Court of Appeals for Division III is in conflict with a decision of the Supreme Court as held in *State v. Blazing*, 182 Wn.2d 827, 344 P.3d 680 (2015).

As held by *Blazing*, RAP 2.5(a) gives appellate courts discretion whether to consider a defendant's LFO challenge. *Blazing*, 182 Wn.2d at 834-35.

Correctly the court acknowledges that RAP 1.2(a) does authorize the rules to be "liberally interpreted to promote justice and facilitate the decision of cases on the merits." (OPINION, at P.6)

As a matter of discretion the court decided not to look beyond the appellate rules stating "Since *Blazing* imposes no obligation for appellate courts to review LFO challenges... *Blazing* does not require review of LFO claims made initially in a personal restraint petition..." (OPINION, at P.6)

It is a material fact that although petitioner seeks relief of the court according to the decision held in *Blazing*, the merit of this petition actually is the violation of RCW 10.01.160 by the trial court and its subsequent unlawful

restraint of the petitioner, by imposing discretionary LFO's without legislative authority to do so. RCW 10.01.160(3)

The issue before this court is did the Appellate court abuse it's discretionally authority when it failed to apply the "rule of lenity," and where RCW 10.73.090 clearly conflicts with RCW 10.01.160(4).

For the purpose of review here the Court should look to the plain language or plain meaning of the statutes. *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013).

As decided in *Paysano v. Kitsap County*, 186 Wn. App. 465, 346 P.3d 784 (Wash. App. Div. 2, 2015)

If a statute is still susceptible to more than one interpretation after court conducts a plain meaning review, then the statute is ambiguous. The "rule of lenity," provides that, if a criminal statute is ambiguous, a court strictly construes it in favor of the defendant.

Clearly, RCW 10.73.090 and RCW 10.01.160(4) are in conflict when read together. According to this conflict the court should have looked to how the petitioner would be prejudiced before ruling. To bar the defendant from the due process right authorized by RCW 10.01.160(4) denying him the ability to seek relief "at any time" causes this statute to be muted.

The court is given its discretionary authority by the legislation not to overturn statutes but to be directed by them under color of law.

For this court to ignore the plain language of RCW 10.01.160(4) only worsens the unlawful restraint caused by the trial court when it too failed to abide by this very statute.

Therefore petitioner should be given review of his original petition, and this court should overturn the Appellate Court's decision to further restrain him from receiving relief.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and overturn the decision of Division III to deny review of petitioner's PRP.

Dated this 14 day of December, 2015.

Respectfully Submitted,

Earl Flippo

EARL FLIPPO

PETITIONER, PRO-SE

DECLARATION OF MAILING

I, (name) EARL FLIPPO, declare that, on the 14 day of (month) DECEMBER, 2015, I placed the foregoing (name of motion[s] and/or papers) DISCRETIONARY REVIEW MOTION

\_\_\_\_\_, or copy thereof, in the internal legal mail system of the (name of institution) ARWAY HEIGHTS CORRECTIONS Corrections Center, with appropriate postage, addressed to:

(list all addresses):

Teresa J Chen  
Attorney At Law  
P.O. Box 5889  
Pasco wa, 99302-5801

Washington State Supreme  
Court Temple of Justice  
P.O. Box 40909  
OLYMPIA wa,  
98504-0909

The Court of Appeals  
of the State of Washington Division III  
500 N Cedar St  
Spokane wa, 99201-1905

I swear in accordance with the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED this 14 day of (month) DECEMBER, 2015.

Earl Flippo  
(signature)

EARL FLIPPO  
(printed name/address)

FILED

MAY 18 2016  
WASHINGTON STATE  
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of:

EARL OWEN FLIPPO,  
Petitioner.

NO. 92616-6  
RULING GRANTING REVIEW

Earl Flippo filed a personal restraint petition in Division Three of the Court of Appeals seeking relief from discretionary legal financial obligations (LFOs) that he was ordered to pay as part of a sentence imposed for his 2008 Walla Walla County Superior Court convictions on four counts of first degree child molestation. The judgment and sentence was final on March 16, 2010, when the mandate issued disposing of his direct appeal from the convictions. The judgment and sentence includes \$2,619.20 total LFOs, including both mandatory and discretionary LFOs. The discretionary LFOs include \$775 for appointed counsel, \$286.05 in witness fees, a \$250 jury demand fee, and \$508.15 to be paid to the Walla Walla County Sheriff's Office.<sup>1</sup> The court required Mr. Flippo to pay \$50 on a monthly basis towards satisfying the LFOs commencing 60 days after his release. Mr. Flippo claimed the superior court failed to make an individualized inquiry into his current and future

<sup>1</sup> These costs were evidently imposed under RCW 9.94A.760 and RCW 70.48.390 (costs of incarceration and booking fee).

735/62

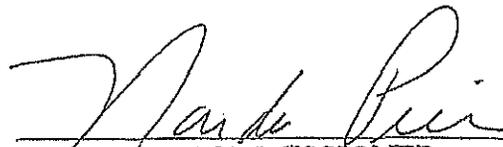
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ability to pay before the court imposed the discretionary LFOs. Further, he claimed he was found indigent for purposes of his trial and appeal, and that he continues to meet the GR 34 indigency standards. Mr. Flippo contended his personal restraint petition was not barred as untimely under RCW 10.73.090(1) because it was exempt from the one year time limit on personal restraint petitions on the following alternative bases: (1) that the time limit is inapplicable under RCW 10.73.100(6) because this court's decision in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), is a significant change in the law; (2) that the time limit does not apply under RCW 10.73.090(1) because the boilerplate finding of ability to pay renders the judgment and sentence invalid on its face; and/or (3) that the judgment and sentence imposing LFOs is not "final" for purposes of the one year time limit because defendants are allowed under RCW 10.01.160(4) to petition the sentencing court at any time for remission of the payment of LFOs. The Court of Appeals held that *Blazina* does not constitute a significant change in the law under RCW 10.73.100(6), that the boilerplate finding of his ability to pay did not render the judgment and sentence invalid on its face for purposes of the time bar exception in RCW 10.73.090(1), and that nothing in the statute that allows postconviction remission of costs changes the date a judgment and sentence becomes final for purposes of collateral attack under RCW 10.73.090. *In re Flippo*, 191 Wn. App. 405, 362 P.3d 1011 (2015). The court dismissed the petition as time barred. Mr. Flippo now seeks this court's discretionary review.

To obtain discretionary review in this court, Mr. Flippo must demonstrate that the Court of Appeals decision conflicts with a decision of this court or with another Court of Appeals decision, or that he is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid

unnecessary litigation and confusion on a common issue. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Here, the Court of Appeals noted that there are numerous now-pending personal restraint petitions challenging the imposition of LFOs more than one year after judgments became final and making claims similar to those asserted by Mr. Flippo. *Flippo*, 191 Wn. App 409 n.1. I am aware that petitions raising some of these issues are pending in other divisions of the Court of Appeals. *See, e.g., In re Pers. Restraint of Dove*, No. 47796-3-II. In these circumstances, review by this court is warranted on the basis the motion raises an issue of substantial public interest under RAP 13.4(b)(4).

The Court of Appeals denied Mr. Flippo's request for appointed counsel. *Flippo*, 191 Wn. App. at 413 n.2. Consequently, he is proceeding pro se. If this court determines it is proper, it may provide for the appointment of counsel at public expense for services related to a personal restraint petition in the appellate court. RAP 16.15(h). The acting clerk of the court is requested to place this matter on the June 28, 2016, motion calendar of a department of this court to determine if it is appropriate to appoint counsel for Mr. Flippo to address the legal issues presented.

  
COMMISSIONER

May 18, 2016

PRP of Earl Owen  
Flippo - Supreme  
Court No. 924616-6

STATEMENT OF FINANCES

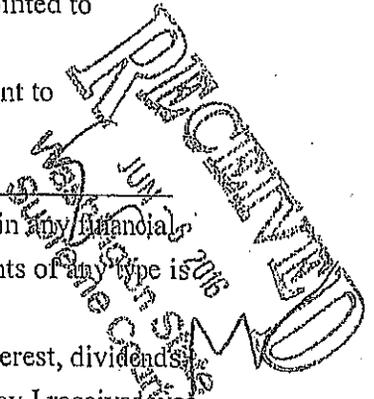
I, EARL O. FLIPPO, request that counsel be appointed to represent me in this matter.

- I am        am not  employed. My salary or wages amount to \$ 0 per month. My employer is (Name and address):  
\_\_\_\_\_
- I do        do not  have any checking or savings accounts in any financial institutions. The total amount of funds I have in any such accounts of any type is \$ 0.
- In the past 12 months, I did        did not  receive any interest, dividends, rental payments, or other money. The total amount of such money I received was \$ 0. The total amount of cash I have other than otherwise indicated above is \$ 0.
- I own or have an interest in the following real estate, stocks, bonds, notes, and other property (list any property of a present value of more than \$50, its current value and the amount, if any, currently owed against said property):

<u>Item</u>	<u>Value</u>	<u>Amount Owed</u>
(for example: an automobile, make, model, and year; the present value, \$3,000.00; still owe \$500.00).		
<u>none</u>	_____	_____
<u>N/A</u>	_____	_____
_____	_____	_____
_____	_____	_____

- I am        am not  married. My spouse is        is not        employed. His or her salary or wages amount to \$ 0 per month. He or she owns the following property not already described above:  
\_\_\_\_\_  
\_\_\_\_\_

- These following persons depend on me for support (list name, relationship to you, and address for each person):  
N/A  
\_\_\_\_\_  
\_\_\_\_\_



7. I owe the following bills (list name and address of creditors and any amount currently owed):

Appellet cost of \$ 4,299 AND L.F.O. \$ 10,699

[IF APPLICABLE - Petitioner incarcerated in a correctional facility-COMplete #10]

8. I have a spendable balance of \$ 1.67 in my prison or institutional account as of the date of this financial statement.

I declare under the penalty of perjury (pursuant to the laws of the State of Washington) that I have read this financial statement, know its contents, and I believe all of the information and statements contained therein to be true.

Dated this May day of 27, 2016

Earl O Flipper  
PETITIONER

Please bear with me I've been going to  
Northwest Cancer Center for Kemo and radiation  
for Lung cancer and adenocarcinoma Esophagus cancer  
I'm very very sick. so I've filled this out the Best I can  
Plus Appellet Cost of \$4,299 Add. to L.F.O

FILED  
JUL - 1 2016  
WASHINGTON STATE  
SUPREME COURT

# THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint of	)	NO. 92616-6
	)	
EARL OWEN FLIPPO,	)	ORDER
	)	
Petitioner,	)	C/A NO. 33619-1-III
	)	
_____	)	

Department I of the Court, composed of Chief Justice Madsen and Justices Johnson, Fairhurst (Justice Owens sat for Justice Fairhurst), Wiggins, and Gordon McCloud, considered this matter at its June 28, 2016, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's Motion for Appointment of Counsel is granted.

DATED at Olympia, Washington, this 1<sup>st</sup> day of July, 2016.

For the Court

Madsen, C.J.  
CHIEF JUSTICE

08/25/16 10:06:00

DG1310MI Case Financial History (CFHS) WALLA WALLA SUPERIOR S36  
Case: 071004197 S1 Csh: Pty: DEF 1 StID: D FLIPPEO312D5 WA  
Name: FLIPPEO, EARL OWEN NmCd: IN 76C 60389

----- A C C O U N T I N G S U M M A R Y -----

TOTAL TRUST	TOTAL AR
Current Bail:	AR ORDERED: Fine/Fee: 2,619.20
Bail Payable:	Restitution: 4,290.73
Undisbursed Fnds:	<u>TOTAL AR ORDERED: 6,909.93</u>
Other Trust:	ADJUSTMENTS: Fine/Fee:
Trust Balance:	Restitution:
Other Rev Rec:	AR ADJUSTMENTS:
Current Bond:	INTEREST: Int Accrued: 5,515.65
Bond Payable:	Int Received:
Disbur to Payees:	<u>INTEREST BALANCE: 5,515.65</u>
Bail Forfeit Rec:	RECEIVED: Fine/Fee: 1,689.94
Disp Code:	Restitution:
Last Receipt Date: 07/27/2016	<u>TOTAL AR RECEIVED: 1,689.94</u>
Cln Sts: Time Pay: N	BAIL/OTHER APPLIED:
Joint and Several Case: N	BALANCE: Fine/Fee: 3,139.18
Case Fund Investments: N	Restitution: 7,596.46
Obligor AR Rec:	<u>TOTAL AR BALANCE: 10,735.64</u>
PF Keys: AR=2 Adj=3 Rec T=4 Rec Dt=5 Disb=6 BndBail T=9 Bnd Dt=10 Bail Dt=11	

2-28-11:  
PAYMENT OF FILING  
FEE WAIVED

*Susan L. Carlson*  
Susan L. Carlson  
Supreme Court Deputy Clerk

FILED  
MAR 1 2011  
CLERK OF COURT  
85662-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

In re Personal Restraint  
Petition of: }  
Earl Owen Flippo, } PERSONAL RESTRAINT PETITION  
Petitioner. }

I. STATUS OF PETITIONER:

Comes now, petitioner Earl Owen Flippo, pro se and petitions this Court. The conditions or manner of the restraint of petitioner are in violation of the Constitution of the United States or the Constitution or laws of the State of Washington. See RAP 16.4(c),(d); RAP 16.7(a).

In State v. Jeffries, 114 Wn.2d 485-489, 789 P.2d 731 (1990) The Court held in State v. Jeffries, above, that the ends of justice standard may also be met by showing some justification other than a change in the law, for having failed to raise a critical point of argument in the prior application. "[Moreover a] material intervening change in the law [or case law] would constitute good cause to permit successive petition under RAP 16.4 (d). "(quoting Sanders v. United States, 3773 U.S. 1, 15-17, 10 L.Ed. 2d 148, 83 S.Ct. 1068(1963).

II. LEGAL HISTORY / FACTS:

Earl Owen Flippo was accused of three counts and charged by Information filed on November 30, 2007. (CP 4)

Petitioner reviewed amended information on March 4, 2008.  
(CP 42) And on March 5, 2008.

Detective Levesque of the Union Gap Police Department interviewed B.M. on August 2, 2007. The interview was taped. A transcript of the taped interview was admitted over Mr. Flippo's objection as Exhibit 3. (03/05/08 RP 180, 1.25; RP 183, II. 9-13; RP 185, II. 5-7; RP 234, II. 9-25; RP 236, II.2-3).

During trial there was improper impeachment evidence and affects a witness credibility, which is the introduction B.M.'s taped interview with Detective Levesque. (03/05/08 RP 180, 1.25; RP 183, II. 9-13; RP 185, II. 5-7; RP 234, 11.9-25; RP 236, 11.2-3).

On March 5, 2008 a Second Amended Information was filed. Counts 1,2, and 3 charged inclusive dates of December 1, 2005 to March 31, 2006 for the respective offenses. Count 4 set forth inclusive dates of June 1 to December 31, 2006.

The trial court's failure to give the jury a unanimity instruction, along with the failure of the prosecuting attorney to elect a specific act, deprived Mr. Flippo of his right to a unanimous verdict. There were multiple acts involving the single offenses charged in Counts I, II and III. Mr. Flippo filed his Notice of Appeal on April 24, 2008.  
(CP 111)

In this case, when the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected. The prosecution chose not to elect the act upon which to convict petitioner. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured.

Earl Owen Flippo is currently incarcerated in a state institution at Airway Heights Correction Center P.O. Box 2049 / M-B-27-U.

III. ARGUMENTS/ GROUNDS FOR RELIEF SOUGHT:

**1.1 The Court erred in Failing to give  
unanimity instruction**

In this case there is separate and distinct acts, which require unanimity instruction. The petitioner was deprived of his constitutionally protected rights to a unanimous jury, the jury must have been able to agree all the acts occurred, in order to convict petitioner, because several acts were said to occur between December 1, 2005 to March 31, 2006, and Count 4 set forth dates of June 1 to December 31, 2006.

In State v. Petrich, 101 Wn.2d 566, 683 P.2d 173(1984) the Supreme Court said:

When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected ....Alternatively, if the jury is instructed that all 12 jurors must agree that same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement. Petrich, above, at 572. Id. Petitioner should be remanded for re-trial with instruction requiring unanimity, as in "Petrich Instruction." Petitioner clarifying how "Petrich Instruction" should have been used in his case, should be reviewed de novo.

#### 1.2 INEFFECTIVE ASSISTANCE OF COUNSEL

The test for ineffective assistance of counsel has two parts ;(1) the defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) such conduct prejudiced the defendant, i.e., that a reasonable probability exists that but for the deficient conduct, the outcome of the proceeding would have been different. State v. Thomas, 109 Wash.2d 222, 225-26, 743 P.2d (1987); See also Strickland v. Washington, 466 U.S. 668, 687-688, 80 L. Ed. 28 674, 104 S. Ct. 2052(1984). The appropriate remedy for trial conducted with ineffective assistance of counsel is remand for a new trial with new counsel. State v. Ermert, 94 Wash.2d 840, 621 P.2d 121 (1980).

Petitioner asserts that his lawyer failed to argue the low end of his sentence. Petitioner was sentenced to 149 months and later re-sentenced to 198 months. In this case petitioner was serving the standard range, and because of circumstances where the trial court did not elect the low end or the high end on petitioner's judgment and sentence petitioner was sent back to the trial court. And given the high end of his sentence, there was no fact-finding hearing or other order to why petitioner should have not continued to serve the initial sentence of a 149 months.

#### ANALYSIS

CrR 6.1(d) requires entry of written findings of fact and conclusions of law...The purpose of CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal...See State v. Head, 136 Wn.2d; CrR 6.1(d)(**emphasis added.**) In this case, petitioner should be remanded to the trial court for a findings of fact and conclusion of law, to determine the reason for re-sentencing him from a 149 months to a 198 months, by law. CrR 6.1 (d); Head, above, at 136 Wn.2d 621-622. In this case, the Judgment and Sentence should be remanded for entry of finding and conclusions in accord with CrR 6.1(d) and a judgment based on the findings and conclusions should be entered from which either party may appeal as in the usual course of things. See State v. Head, 136 Wn.2d 625-626; See Wilks, 70 Wn.2d at 629; Russel, 68 Wn.2d at 756.

1.2(b) Furthermore, CrR 4.1 requires 14 days after the date the information or indictment is filed in the adult division for arraignment.

Petitioner was took to his arraignment at 17 days to his arraignment.

Washington State Constitution 1 § 22 requires "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have a speedy public trial by an impartial jury of the county in which offense is charged to have been committed and the right to appeal in all cases....(emphasis added.) Written findings of fact and conclusions of law should have been done on how petitioner was re-sentenced from the low end 149 months to 198 months and how petitioner was brought to his arraignment 3 days late. See CrR 4.1; Wash. 1 § 22. First defense counsel in this case should have objected to petitioner being re-sentenced from 149 months to 198 months without a findings of fact and conclusion of law, because it is a miscarriage of justice to re-sentence and his judgment and sentence not reflect how petitioner recieved 198 months. Counsel fell below and objective standard of reasonableness, and prejudiced petitioner allowing a manifest injustice to proceed without objection. Last, an arraignment is a right and counsel for petitioner did not object to the fact petitioner was took to his arraignment 3 days late. Petitioner should be remanded for new trial or re-sentencing.

Dated 23 of February 2011.

Respectfully Submitted,

Earl O. Flippo

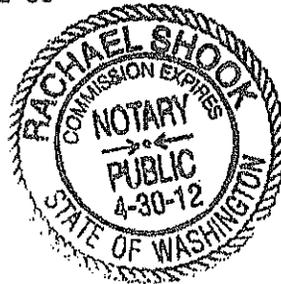
Earl Owen Flippo/DOC#958101  
Airway Heights Correction Center  
P.O. Box 2049/M-B-27-U  
Airway Heights WA 99001

Subscribed and Sworn to before me,

this 23 day of Feb, 2011

Rachael Shook

Notary Public in and for the State of  
Washington.



VERDICT

1 APRIL 21, 2008

2  
3 P R O C E E D I N G S  
45 THE COURT: Next we have Mr. Flippo. Okay, Mr. Flippo,  
6 I have your Judgment and Sentence. Anything you wish to say?7 THE DEFENDANT: Going to die in prison so go ahead and  
8 sentence me.

9 THE COURT: Mr. Barrett, anything you want to say?

10 MR. BARRETT: Obviously, we still disagree with the  
11 jury's verdict. It is the jury's verdict, but we disagree with  
12 it. I do have Motion for Arrest of Judgment and new trial and  
13 expect to get a ruling on that.

14 THE COURT: Okay.

15 MR. BARRETT: But basically, you know, you were correct  
16 in the last sentencing. You have a range to sentence to and  
17 that's what happens. But we still maintain his innocence, Your  
18 Honor.

19 THE COURT: I understand.

20 THE DEFENDANT: I have terminal lung cancer. I'm not  
21 going to live whatever you give me. A couple years left, so you  
22 are going to sentence an innocent man.23 THE COURT: I understand your position. I had a letter  
24 from one of the victims, from the mother, and the daughter. I  
25 don't know whether any of the Cruz's are here?

41

## VERDICT

1 MS. MULHERN: The mother is here, and I think she would  
2 like to address the Court.

3 THE COURT: Anything wish to say, ma'am? You must be  
4 Tabitha?

5 MS. CRUZ: Yes, Your Honor.

6 THE COURT: Come up here so I can hear you.

7 MS. CRUZ: This has affected my home life, my child's  
8 home life, and we really want this to be over with. I mean  
9 Alyssa is not the same little girl that she was before.

10 THE COURT: Okay, I understand that. Thank you.  
11 Anybody else? Yes, Ma'am, if you would come up here.

12 MS. HOMAN: I am Kandy Homan. This is Tamara Homan.  
13 We just wanted to make sure that you give him the longest amount  
14 of time possible. It's affected all the kids in ways that we  
15 won't know for years and years. He will probably be out of  
16 prison before we fully find out how it affects, has affected  
17 them completely. Life wouldn't be good enough. But I think  
18 that's it. Thank you.

19 THE COURT: Okay. Thank you. Good enough.

20 MS. MULHERN: Your Honor, this is a determinative  
21 sentence. The Court has to sentence Mr. Flipppo to the range,  
22 plus life, as the Court did on the previous sex offender we had  
23 up here for sentencing today. The jury did not return the  
24 Deadly Weapon Enhancement so the extra years that would have  
25 been added to the standard range don't apply. The Court doesn't

42

## VERDICT

1 have a whole lot of discretion in sentencing sex offenders any  
2 longer, especially with Class A felonies. I think the Court  
3 saw, and certainly the jury saw, how much these crimes affected  
4 these children, and how hard it was for them to testify. But  
5 they did the very best they could. And the jury heard and saw  
6 what they needed to hear and see, and the State believes they  
7 reached the right conclusion on this case.

8 THE COURT: Okay. I order that you pay \$200 for the  
9 filing fee. Restitution will be "to be determined." And I  
10 would tell the victims, if they need counseling, there are  
11 provisions that allow for that, and costs can be turned in. But  
12 that will be determined in the future. We have \$286.05 in  
13 witness fees. \$250 for the jury demand, \$508.15 in Sheriff's  
14 fees. \$500 victim assessment fund, and 775 for your attorney.

15 Let's see, biological sample, do we -- none countable.  
16 So I'm going to include that. When you add it all up it comes  
17 up to \$2,619.20, payable at \$50 a month beginning 60 days after  
18 your release. You will be on community custody for a period of  
19 Life. Also signed a separate appendix F, additional conditions  
20 of parole, or probation, as well as Appendix 5.5, which is the  
21 sex offender regulations, registration requirements.

22 In terms of time, Counts 1, 2, 3, and 4 are all the  
23 same. They all have the minimum of 149 to 198 months. All of  
24 them carry a maximum of up to life. The minimum will be 149 and  
25 maximum will be, or could be, Life.

43

## VERDICT

1           So with that I've signed everything. So you need to  
2 come down here and get fingerprinted.

3           This is to tell you you have the right to appeal.  
4 Unless you file a notice of appeal within 30 days you will have  
5 irrevocably waived that right. And if you don't have attorney  
6 to do it, the Clerk will do it on your behalf. If you don't  
7 have the funds, the State of Washington will advance the funds  
8 for you.

9           SERGEANT HALL: He has credit for 107 days.

10          THE COURT: Credit for 107 days. Don't want to short  
11 change you on the 107.

12          THE DEFENDANT: I have been incarcerated since December  
13 22, but, hey, it goes with the dirty courts.

14                I could spit on you too, and call you names, but it  
15 would do no good. You know what you have to answer to.

16          THE COURT: Okay.

17

18                       P R O C E E D I N G S   C O N C L U D E D

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44

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**August 31, 2016 - 3:49 PM**

**Confirmation of Filing**

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**Appellate Court Case Number:** 92616-6  
**Appellate Court Case Title:** Personal Restraint Petition of Earl Owen Flippo

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**Comments:**

Copy sent to Petitioner: Airway Heights Corrections Center PO Box 2049 Airway Heights WA 99001

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