

**FILED**  
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CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

SUPREME COURT NO. 02557-7  
COURT OF APPEALS NO. 46013-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

**RICKY LYNN TATRO, JR.,**

Petitioner.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

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**PETITION FOR REVIEW**

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A. IDENTITY OF PETITIONER

Petitioner Ricky Lynn Tatro, Jr., asks this Court to review the decision of the Court of Appeals referred to in Section B.

B. COURT OF APPEALS'S DECISION

Petitioner seeks review of the Court of Appeals's Ruling Affirming Judgment and Sentence in *State v. Ricky Lynn Tatro, Jr.*, COA No. 46013-1-II, filed August 25, 2015 (Appendix A) and its Order Denying Motion to Modify filed November 2, 2015 (Appendix B).

C. ISSUE PRESENTED FOR REVIEW

Whether this Court should accept review of the Court of Appeals's refusal to consider Mr. Tatro's challenge to discretionary legal financial obligations (LFOs) imposed against him when he objected to the LFOs for the first time on appeal?

D. STATEMENT OF THE CASE

Mr. Tatro waived his right to a jury trial. CP 3; RP 2/3/14 at 14. After hearing the evidence, the court found Mr. Tatro guilty of Theft of a Motor Vehicle as charged. CP 1-2; RP 2/12/14 at 103. The court sentenced Mr. Tatro to 50 months. CP 8-9; RP 2/24/14 at 20. The court also imposed a \$900 discretionary appointed counsel fee. CP 10. In imposing the fee, the court gave no consideration on the record to Mr. Tatro's present and future

ability to pay costs. At section 2.4 of the Judgment and Sentence, someone put a check before a pre-printed paragraph which reads:

Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160).

CP 9.

But there was no discussion or inquiry into Mr. Tatro's financial situation or his ability to pay discretionary LFOs. RP 2/24/14 at 14-23. Mr. Tatro did not object to the court imposing the discretionary LFO. RP 2/24/14 at 14-23.

Mr. Tatro appealed all portions of his Judgment and Sentence. CP 15. On appeal, he challenged for the first time the imposition of the discretionary LFO without the trial court first making an individualized determination he had the present and future ability to pay it. See Appellant's Brief at 4-7.

E. REASON WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(3) and (4), a petition for review will be accepted by the Supreme Court if it presents a significant question of law under the Constitution of the State of Washington or of the United States or if it involves an issue of substantial public interest that should be determined by the Supreme Court.

**1. This court should accept review.**

Mr. Tatro made no LFO argument to the trial court. However, this Court has held the ability to pay LFOs may be raised for the first time on appeal by discretionary review. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 683 (2015). In *Blazina* this Court felt compelled to accept review under RAP 2.5(a) because “[n]ational and local cries for reform of broken LFO systems demand ... reach[ing] the merits...” *Blazina*, 344 P.3d at 683. This Court reviewed the pervasive nature of trial courts’ failures to consider each defendant’s ability to pay with the unfair disparities and penalties that indigent defendants experience based upon this failure.

Public policy favors direct review by appellate courts. Indigent defendants saddled with wrongly imposed LFOs have many “reentry difficulties” that ultimately work against the state’s interest in accomplishing rehabilitation and reducing recidivism. *Blazina*, 344 P.3d at 684. Availability of a statutory remission process down the road does little to alleviate the harsh realities incurred by LFOs improperly imposed at the outset. As this court in *Blazina* bluntly recognized, one societal reality is “the state cannot collect money from defendants who cannot pay.” *Blazina*, 344 P.3d at 684. Requiring defendants who never could pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal is a financially wasteful use

of administrative and judicial process. A more efficient use of state resources would result from a remand back to the sentencing judge who is already familiar with the case to make the ability to pay inquiry.

As a final matter of public policy, this court has the immediate opportunity to expedite reform of the broken LFO system. This court can specify that appellate courts should embrace its obligation to uphold and enforce this court's decision that RCW 10.01.160(3) requires the sentencing judge to inquire on the record into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685; see also *Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 129 Wn. App. 832, 867-68, 120 P.3d 616 (2005), *rev'd in part sub nom. Bellevue John Does 1-11 v. Bellevue Sch. Dist. #405*, 164 Wn.2d 199, 189 P.3d 139 (2008) (The principle of stare decisis - "to stand by the thing decided" - binds the appellate court and the trial court to follow Supreme Court decisions). This requirement applies to the sentencing court in Mr. Tatro's case regardless of his failure to object. See, *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 259-60, 255 P.3d 696 (2011) ("Once the Washington Supreme Court has authoritatively construed a statute, the legislation is considered to have always meant that interpretation.") (Citations omitted).

The sentencing court's signature on a judgment and sentence with boilerplate language stating that it engaged in the required inquiry is wholly inadequate to meet the requirement. *Blazina*, 344 P.3d at 685. Mr. Tatro's sentencing occurred on February 24, 2014, before this Court's *Blazina* opinion was issued on March 12, 2015. Post-*Blazina*, one would expect future trial courts to make the ability to pay inquiry on the record or defense attorneys to object to preserve the error for direct review. Mr. Tatro respectfully submits that to ensure he and all indigent defendants are treated as the LFO statute requires, this court should reach the unpreserved error and accept review. *Blazina*, 344 P.3d at 687 (Fairhurst, J. (concurring in the result)).

2. **As applied to Mr. Tatro, there is insufficient evidence to support the trial court's boilerplate finding he has the present and future ability to pay legal financial obligations.**

Courts may require an indigent defendant to reimburse the state for costs only if the defendant has the financial ability to do so. *Fuller v. Oregon*, 417 U.S. 40, 47–48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); *State v. Curry*, 118 Wn.2d 911, 915–16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). Imposing costs under a scheme that does not meet with these requirements, or imposing a penalty for a failure to pay absent proof that the defendant could pay, violates the defendant's right to

equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon, supra*. It further violates equal protection by imposing extra punishment on a defendant due to his or her poverty. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

RCW 10.01.160(1) authorizes a superior court to “require a defendant to pay costs.” These costs “shall be limited to expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). In addition, “[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. *Blazina*, 344 P.3d at 685. “This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Id.* The remedy for a trial court’s failure to make this inquiry is remand for a new sentencing hearing. *Id.*

*Blazina* further held trial courts should look to the comment in court rule GR 34 for guidance. *Id.* This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. *Id.* (citing GR

34). Under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (citing comment to GR 34 listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain non-exhaustive, if someone meets the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs. *Id.*

While the ability to pay is a necessary threshold to the imposition of costs, a court need not make formal specific findings of ability to pay: "[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs." *Curry*, 118 Wn.2d at 916. However, *Curry* recognized that both RCW 10.01.160 and the federal constitution "direct [a court] to consider ability to pay." *Id.* at 915–16. The individualized inquiry must be made on the record. *Blazina*, 344 P.3d at 685.

Here, the judgment and sentence contains a boilerplate statement that the trial court has "considered" Mr. Tatro's present and future ability to pay legal financial obligations. A finding must have support in the record. A trial court's findings of fact must be supported by substantial evidence.

*State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” *State v. Bertrand*, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although *Baldwin* does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’” *Bertrand*, 165 Wn. App. 393, 267 P.3d at 517, citing *Baldwin*, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). Here, despite the boilerplate language in the judgment and sentence, the record does not show the trial court considered Mr. Tatro’s financial resources and the potential burden of imposing LFOs on him. RP 2/24/14 at 14-23.

Despite finding him indigent for this appeal, the trial court failed to “conduct on the record an individualized inquiry into [Mr. Tatro’s] current and future ability to pay in light of such nonexclusive factors as the circumstances of [his] incarceration and [his] other debts, including

nondiscretionary legal financial obligations, and the factors for determining indigency status under GR 34” as required by *Blazina*. Washington Supreme Court orders dated August 5, 2015, pp. 1–2, in *State v. Mickle* (90650-5/31629-7-III) and *State v. Bolton* (90550-9/31572-6-III) (granting Petitions for Review and remanding cases to the superior court “to reconsider the imposition of the discretionary legal financial obligations consistent with the requirements” of *Blazina*.).

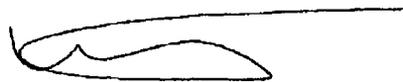
The boilerplate finding that Mr. Tatro has the present and future ability to pay LFOs is not supported by the record. The matter should be accepted for review and ultimately remanded for the sentencing court to inquire into Mr. Tatro’s current and future ability to pay before imposing LFOs. *Blazina*, 344 P.3d at 685.

Also, in denying Mr. Tatro’s appeal of the imposition of LFOs, the Court of Appeals relied on its earlier ruling in *State v. Lyle*, 188 Wn. App. 848, 355 P.3d 327 (2015). In *Lyle*, the court held “this court will not consider challenges to LFOs” under *Blazina*, 182 Wn.2d 827, “unless the defendant challenged the LFOs in the trial court.” *Lyle* is set before this Court on January 5, 2016, for consideration of his Petition for Review (No. 92079-6).

F. CONCLUSION

This Court should accept review of Mr. Tatro's Petition for Review.

Respectfully submitted this 2<sup>nd</sup> day of December 2015.



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LISA E. TABBUT/WSBA #21344  
Attorney for Ricky Lynn Tatro, Jr.

**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled this Petition for Review with (1) the Washington State Supreme Court via the Court of Appeals's Division Two efile; and (2) the Grays Harbor Prosecutor's Office, Ksvoboda@co.grays-harbor.wa.us; (3) Ricky Lynn Tatro, Jr./DOC#815387, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 2, 2015, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Ricky Lynn Tatro, Jr.

# APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

FILED  
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DIVISION II  
2015 AUG 25 PM 2:26  
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STATE OF WASHINGTON,  
Respondent,  
v.  
RICKY LYNN TATRO, JR.,  
Appellant.

No. 46013-1-II

RULING AFFIRMING  
JUDGMENT AND SENTENCE

Ricky Tatro appeals from the sentence imposed following his conviction for theft of a motor vehicle, arguing that the trial court erred in imposing legal financial obligations LFO's against him without making an inquiry into whether he had the current or likely future ability to pay them. This court considered his appeal as a motion on the merits to affirm under RAP 18.14. Finding that this court declines to consider his challenge to the LFO's made for the first time on appeal, this court affirms Tatro's judgment and sentence.

At sentencing, the State recommended the following mandatory LFO's: \$500 victim assessment, \$200 court costs and \$100 DNA collection fee. CP 10. It also recommended the following discretionary LFO's: \$900 for Tatro's court-appointed attorney. CP 10. Tatro did not object to the State's recommendations.

Tatro's judgment and sentence contains the following preprinted finding:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the

defendant's financial resources and the likelihood that the defendant's status will change.

Clerk's Papers (CP) at 9. On February 24, 2014, the trial court imposed the LFO's recommended by the State. RP Feb. 24, 2014 at 20.

Tatro argues for the first time on appeal that the trial court erred in imposing the LFO's without having made any inquiry into his current or likely future ability to pay them. On March 12, 2015, the Washington State Supreme Court decided *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) (*Blazina II*), and held that before imposing LFO's, the trial court must make an individualized inquiry into the defendant's current and likely future ability to pay those LFO's. *Blazina II* also rejected the prior holdings that a challenge to LFO's was not ripe until the State sought to collect the LFO's. 182 Wn.2d at 833 n.1.

On July 10, 2015, this court decided *State v. Lyle*, 2015 WL 4156773, which held that for LFO's imposed after May 21, 2013, when this court decided *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), *remanded by Blazina II*, this court will not consider challenges to LFO's under *Blazina II* unless the defendant challenged the LFO's in the trial court. 2015 WL 4156773 at ¶ 10.

Because he did not challenge the LFO's at sentencing, under *Lyle*, this court declines to consider Tatro's challenges to his LFO's made for the first time on appeal.

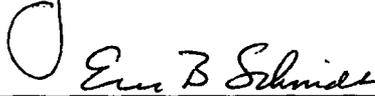
Because Tatro's appeal is clearly controlled by settled law, it is clearly without merit under RAP 18.14(e)(1). Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and Tatro's judgment and sentence are affirmed. He is hereby notified that failure to move to modify this ruling

46013-1-II

terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985).

DATED this 25<sup>th</sup> day of August, 2015.



Eric B. Schmidt  
Court Commissioner

cc: Lisa E. Tabbut  
Gerald R. Fuller  
Hon. F. Mark McCauley  
Ricky L. Tatro, Jr.

# APPENDIX B

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,  
Respondent,

v.

RICKY LYNN TATRO, JR.,  
Appellant.

No. 46013-1-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated August 25, 2015, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

**SO ORDERED.**

DATED this 2<sup>nd</sup> day of November, 2015.

PANEL: Jj. Bjorgen, Lee, Melnick

FOR THE COURT:

*Bjorgen, A.C.J.*  
ACTING CHIEF JUDGE

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**December 02, 2015 - 2:32 PM**

**Transmittal Letter**

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Case Name: State v. Ricky Lynn Tatro

Court of Appeals Case Number: 46013-1

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**The document being Filed is:**

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Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: \_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

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**Comments:**

court-appointed indigent appellant - no filing fee required

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