Supreme Court No. 101247-1
(COA No. 82900-9-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES TATUM,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Charles Tatum asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Tatum appealed the trial court's order requiring him to pay $2,600 in fines. In a published decision, the Court of Appeals affirmed. A copy of the Court of Appeals decision, *State v. Tatum*, ___ Wn. App. 2d ___, 514 P.3d 763 (2022), is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution forbid the government from imposing "excessive fines." A payment is a fine if it is at least partially punitive, and it is excessive if it is grossly disproportional to the offense. A person's ability to pay is the paramount factor when weighing proportionality. Here, Mr. Tatum cannot pay the $2,600 in legal financial obligations the trial court imposed. The Court of

Appeals decision affirming this grossly disproportional penalty conflicts with binding precedent holding that this constitutional protection applies so long as the payment is at least partially punitive. Trial courts need this Court's guidance on this important constitutional issue of broad import.[1] RAP 13.4(b).

2. In addition, the question of whether article I, section 14 is more protective against the imposition of excessive fines than the Eighth Amendment is a significant constitutional question that requires this Court's determination. RAP 13.4(b).

D. STATEMENT OF THE CASE

Mr. Tatum pleaded guilty to five separate charges, and the court sentenced him. CP 109-32. In his first appeal, the Court of Appeals reversed and ordered a new sentencing

[1] This issue has been raised in two other cases currently pending in this Court: Petition for Review, *State v. Clement*, No. 100858-9 (Wash. Apr. 21, 2022); Petition for Review, *State v. Widmer*, No. 100857-1 (Wash. Apr. 21, 2022). Both cases are scheduled for this Court's October 13, 2022 en banc conference.

hearing in light of *State v. Blake*.[2] *State v. Tatum*, No. 80795-1-I, 2021 WL 1734770 (Wash. Ct. App. May 3, 2021) (unpublished).[3]

At Mr. Tatum's new sentencing hearing, the court imposed a $500 victim penalty assessment for each of the five cases and a $100 DNA fee. RP 33; CP 24-39. The court ordered Mr. Tatum to pay $10 per month beginning 90 days after his release from confinement. RP 35. The Court of Appeals affirmed the fines. *Tatum*, 514 P.3d at 767-68.

E. ARGUMENT

The Court of Appeals's refusal to apply the excessive fines clause to mandatory penalties violates the constitutional prohibition against disproportional punishment and reinforces the disparate impact of legal debt on low-income communities and communities of color.

The Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution forbid

[2] 197 Wn.2d 170, 481 P.3d 521 (2021).

[3] The Court of Appeals also reversed to strike nonrestitution interest and supervision fees.

the government from imposing "excessive fines." U.S. Const. amend. VIII; Const. art. I, § 14. The purpose of the excessive fines clause is to "limit the government's power to punish," and it limits the government's ability to require payments "as *punishment* for some offense." *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (emphasis in original, citations omitted).

The analysis under the excessive fines clause is a two-part test. First, the court must determine whether the payment is punishment. *United States v. Bajakajian*, 524 U.S. 321, 328-29, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Second, the court must evaluate whether the fine is grossly disproportional to the offense. *Id*. at 334; *City of Seattle v. Long*, 198 Wn.2d 136, 163, 493 P.3d 94 (2021).

The Court of Appeals wrongly declined to apply the excessive fines clause to the mandatory victim penalty assessment and DNA fee. *Tatum*, 514 P.3d at 767-68. It did so by relying on cases that were decided before the United States

Supreme Court and this Court made clear the excessive fines clause applies so long as the payment is "at least partially punitive." *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019); *Long*, 198 Wn.2d at 163. The Court of Appeals decision erodes this important constitutional protection and conflicts with decisions by this Court and the Court of Appeals, and it warrants this Court's review. RAP 13.4(b)(1)-(4).

1. The victim penalty assessment and DNA fee are punishment.

In Washington, all persons found guilty of a crime must pay a victim penalty assessment. RCW 7.68.035(1)(a). Persons must also pay a fee when the government collects their DNA. RCW 43.43.7541. The plain language of the statutes makes clear these fines are punishment.

"If a statute's meaning is plain on its face, courts must follow that plain meaning." *Long*, 198 Wn.2d at 148 (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). In *Long*, a person challenged the costs

associated with the city's impoundment of his truck. *Id.* at 163. This Court examined the municipal code's plain language, which states: "Vehicles in violation of this section are subject to impound . . . in addition to *any other penalty* provided for by law." *Id.* at 164 (emphasis in original, quoting SMC 11.72.440(E)). This Court held the plain language indicated the impoundment costs were partially punitive and, therefore, subject to the excessive fines clause. *Id.*

The plain language of the victim penalty assessment statute mirrors the municipal code in *Long* and demonstrates it is partially punitive. The statute reads, when a person is found guilty of a crime, "there shall be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to *any other penalty or fine* imposed by law." RCW 7.68.035(1)(a) (emphasis added). Like the municipal code in *Long*, the statute plainly characterizes the victim *penalty* assessment as a penalty. It serves in part to punish, and it is subject to the excessive fines clause.

The DNA fee is also partially punitive because it is imposed as punishment for a conviction. RCW 43.43.7541 (the DNA fee is assessed as part of the sentence imposed for a crime). The Court of Appeals's conclusion that it cannot be punitive because it is "monetary" is wrong. *Tatum*, 514 P.3d at 768. Indeed, all legal financial obligations are monetary. And the excessive fines clause is specifically concerned with the impact of monetary punishment, "whether in cash or in kind." *Austin*, 509 U.S. at 609-10. That the fee is related to money does not change the fact that it is are partially punitive.

In addition, the DNA fee and the victim penalty assessment have the hallmark characteristics of a punitive fine: they are payable to the government, and they are punishment for an offense. *See Bajakajian*, 524 U.S. at 327-28; *State v. Kinneman*, 155 Wn.2d 272, 278, 119 P.3d 350 (2005) ("Punishment includes both imprisonment and other criminal sanctions," such as statutory penalties.). The fee and assessment are not solely remedial. They are imposed as part of a person's

sentence, and they fund the criminal legal system. They are at least partially punitive, and they trigger the protections of the excessive fines clause.

The Court of Appeals avoided the issue of whether these payments are subject to the excessive fines clause and broadly held the victim penalty assessment and DNA fee are constitutional. *Tatum*, 514 P.3d at 767-68. In reaching its conclusion, it relied on cases that did not involve a claim under the excessive fines clause. For the victim penalty assessment, the Court of Appeals relied on *State v. Curry*, 118 Wn.2d 911, 814 P.2d 16 (1992), which held the statute to be constitutional without further elaboration. *See Tatum*, 514 P.3d at 767 ("*Curry*'s reasoning is vague; it does not state precisely what constitutional arguments it took into account." (citing 118 Wn.2d at 913-17). For the DNA fees, the Court of Appeals relied on two Court of Appeals cases: *State v. Brewster*, 152 Wn. App. 856, 218 P.3d 249 (2009), and *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163 (2016). Both cases involved

statutory issues, and they concluded the fee is "monetary" without considering whether it serves in part to punish. *See Tatum*, 514 P.3d at 768 (citing *Brewster*, 152 Wn. App. at 860; *Mathers*, 193 Wn. App. at 920).

None of the cases the Court of Appeals relied on addressed the victim penalty assessment or the DNA collection fee in the context of the excessive fines clause. In addition, these cases were decided before the United States and this Court held the excessive fines clause applies so long as the payment is "at least partially punitive." *Timbs*, 139 S. Ct. at 659; *Long*, 198 Wn.2d at 163. The Court of Appeals failed to contemplate how binding precedent affects the court's assessment of these mandatory fines.

The plain language of the statutes makes clear the victim penalty assessment and DNA fees are at least partially punitive. Under both *Timbs* and *Long*, they are subject to the constraints of the excessive fines clause.

2. Because Mr. Tatum cannot pay, the fines are unconstitutionally excessive.

The Court of Appeals did not examine whether the victim penalty assessment and the DNA fees were grossly disproportional to the offense. But, because a person's ability to pay is the paramount concern, the mandatory fines violate the constitutional prohibition against excessive fines.

"'The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality.'" *Long*, 198 Wn.2d at 166 (quoting *Bajakajian*, 524 U.S. at 334). A fine is excessive if it is "grossly disproportional to the gravity of a defendant's offense." *Id.*

The court may consider several factors to determine whether a fine is grossly disproportional, including "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." *Id.* at 167 (citations omitted).

In *Long*, this Court examined the "weight of history," the present day impact of fines on the homelessness crisis, and the government's reliance on fines to fund its operations to conclude the excessive fines clause requires the court to consider a person's ability to pay before imposing a fine. *Id.* at 171. This is because "excessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances." *Id*. Therefore, "an individual's ability to pay can outweigh all other factors." *Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d, 709, 723, 497 P.3d 871 (2021), *review denied* 199 Wn.2d 1003 (2022).

A person's ability to pay is the most important factor because fines have a disparate impact on low-income communities and communities of color, and they reinforce systemic inequities. Historically, the government imposed fines "to subjugate newly freed slaves and maintain the prewar racial hierarchy." *Timbs*, 139 S. Ct. at 688; *Long*, 198 Wn.2d at 172. Today, fines continue to impact communities of color

disproportionately. Katherine Beckett & Alexis Harris, State Minority & Justice Comm'n, *The Assessment And Consequences of Legal Financial Obligations In Washington State*, 30 (2008) (2008 LFO Report). Mandatory fees devastate a person's reentry and their ability to access housing, employment, or financial stability. *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015). The widespread imposition of legal fines has a disparate impact on poor communities and communities of color and exacerbates all inequities. *See generally, Targeted Fines and Fees Against Communities of Color: Civil Rights & Constitutional Implications*, U.S. Comm'n on Civil Rights (2017).[4]

In addition, a punishment must be proportional to the offense and serve legitimate goals. *See Timbs*, 139 S. Ct. at 688 (noting the Magna Carta required that fines must "'be

[4] Available at: https://www.usccr.gov/files/pubs/2017/Statutory_Enforcement_Report2017.pdf

proportioned to the wrong'" (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989))). A punishment "lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

The excessive fines clause is particularly concerned with fines that are "employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue.'" *Timbs*, 139 S. Ct. at 689 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991)). When fines are used to fund government operations, courts have a financial incentive to impose fines without a legitimate penological purpose, and "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin*, 501 U.S. at 979 n.9. As this Court recognized, "'offender-funded justice' comprises much of the funding for criminal justice across the

country." *Long*, 198, Wn.2d at 172. This is also true in Washington. Cynthia Delostrinos, Michelle Bellmer, & Joel McAllister, State Minority & Justice Comm'n, *The Price of Justice: Legal Financial Obligations in Washington State*, 5 (2021) (2021 LFO Report)[5] (explaining how Washington courts "rely primarily upon county and municipal governments for funding"); 57 (breakdown of distribution of victim penalty assessment funds to county and court).

Mr. Tatum cannot pay $2,600 in fines. In addition, the victim penalty assessment and DNA fees are not proportioned to any offense: they are mandatory fines imposed on all criminal defendants, regardless of the offense or the extent of harm. These fines are also government revenue: the DNA fees fund State and local agencies, RCW 43.43.7532; .7541, and the

[5] Available at: https://www.courts.wa.gov/subsite/mjc/docs/MJC_LFO_Price_of_Justice_Report_Final.pdf

victim penalty assessment funds government programs. RCW 7.68.035(4). These mandatory fines are grossly disproportional.

3. Article I, section 14 of the Washington Constitution provides greater protection than the Eighth Amendment against excessive fines.

In *Long*, this Court did not address whether the Washington Constitution provides greater protection against excessive fines, noting that the parties did not offer a *Gunwall*[6] analysis. 198 Wn.2d at 159. In this case, Mr. Tatum provided the *Gunwall* analysis this Court found lacking in *Long*, but the Court of Appeals still declined to decide this issue. *Tatum*, 514 P.3d at 768 (citing *Long*, 198 Wn.2d at 159). This Court should take the opportunity to consider the *Gunwall* factors and hold that article I, section 14 is more protective than the Eighth Amendment.

Washington courts' "interpretation of article I, section 14 'is not constrained by the Supreme Court's interpretation of the [Eighth Amendment].'" *State v. Gregory*, 192 Wn.2d 1, 15, 427

[6] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

P.3d 621 (2018) (quoting *State v. Bartholomew*, 101 Wn.2d 631, 639, 683 P.2d 179 (1984)). This Court has recognized that article I, section 14 generally provides "greater protection than the Eighth Amendment." *State v. Roberts*, 42 Wn.2d 471, 506, 14 P.3d 713 (2000); *Long*, 198 Wn.2d at 158-59.

A *Gunwall* analysis is an "interpretive tool." *Long*, 198 Wn.2d at 159. Under *Gunwall*, the court weighs six factors to determine whether it should rely on independent state constitutional grounds instead of federal case law interpreting the parallel provision in the United States Constitution: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." 106 Wn.2d at 58. These factors are "neutral" and "nonexclusive." *Id.* at 61.

The first and second factors are concerned with the text. But the fact that the state and federal constitutional texts have the same language does not mean they require identical interpretation. *See Gunwall*, 106 Wn.2d at 61 (similarities in

text does not conclude the analysis); *see also State v. Blake*, 197 Wn.2d 170, 181 n.9, 481 P.3d 521 (2021) (Washington courts' interpretation of Washington's due process clause is not constrained by the United States Supreme Court's interpretation of the federal due process clause, despite identical language).

Under the third factor, Washington lacks significant constitutional history interpreting the prohibition against excessive fines. But the fourth *Gunwall* factor—preexisting state law—supports an independent state constitutional analysis. Under this factor, we examine how Washington's law, including judicial decisions and statutory law, has evolved. *State v. Bassett*, 192 Wn.2d 67, 80-81, 428 P.3d 343 (2018); *see State v. Reece*, 110 Wn.2d 766, 779, 757 P.2d 947 (1998) ("The court should be free to consider current values and conditions as one factor in interpreting the state constitution.").

This Court revived the excessive fines clause after the United States Supreme Court "largely ignored the excessive fines clause for two centuries." *Long*, 198 Wn.2d at 161. And it

did more than pay "lip service" to the constitutional protection—this Court explicitly held courts must consider the person's ability to pay in the disproportionality analysis. *Id.* at 173. The Court of Appeals then held a person's ability to pay is the paramount consideration when weighing disproportionality, and this Court declined to review that decision. *Jacobo Hernandez*, 19 Wn. App. 2d at 723-24.

Washington law also requires this individualized inquiry into a person's ability to pay in other contexts before a court can impose fines. *Blazina*, 182 Wn.2d at 836. This inquiry requires courts to examine many "important factors," such as incarceration and other debts. *Id.* at 838. Courts must also consider the comment to court rule GR 34, listing information that proves indigence, for guidance in their inquiry. *Id*. Other important factors in this analysis include the person's assets and other financial resources, income, employment history, living expenses, and other debts. *State v. Ramirez*, 191 Wn.2d 732, 744, 426 P.3d 714 (2018).

The Washington Legislature has also enacted laws that require consideration of a person's ability to pay. In response to the 2008 LFO Report, the legislature amended the statutes to limit the imposition of fines and interest accrual on people who are indigent at the time of sentencing. H.B. 1783, Laws of 2018, ch. 269, § 1, 6. It also required the courts to consider the person's ability to pay before finding the person in contempt based on failure to pay. *Id*. at § 8, 13, 15. This year, the legislature amended the restitution statute to allow the court to decline restitution and interest in certain circumstances if the person cannot pay. H.B. 1412, Laws of 2022, ch. 260, § 3. Washington law weighs in favor of interpreting article I, section 14 more broadly than the Eighth Amendment.

The fifth factor—structural differences—always supports an independent state constitutional analysis. *Bassett*, 192 Wn.2d at 82. The federal constitution is a grant of power from the states, and the state constitution limits the federal government's

power. *State v. Foster*, 135 Wn.2d 441, 458, 957 P.2d 712 (1998).

The sixth *Gunwall* factor also supports an independent state constitutional analysis because the enduring consequences of legal debt on people in Washington is a particular state and local concern. In 2008, the Washington State Minority and Justice Commission issued a report on Washington's LFO system and the impact of legal debt on low-income communities. 2008 LFO Report at 43. The 2008 LFO Report found that "most people with felony convictions are poor prior to their convictions," and legal debt poses a significant barrier to reentry when the person is released from incarceration. *Id.* at 62. Legal debt subjects people who are poor to extended court involvement and additional fines, sanctions, or even arrest and imprisonment. *Id*. In 2021, the Washington State Minority and Justice Commission issued another report to build on the 2008 LFO Report about how legal financial obligations are imposed

and enforced and the disproportionate impact on communities of color. 2021 LFO Report at 10.[7]

Washington's particular concern over the harsh effect of financial debt on low-income communities and communities of color is reflected in decisions by this Court. In *Blazina*, this Court acknowledged the "problematic consequences" of legal debt in Washington and specifically noted statewide disparities based on race and geographic location. 182 Wn.2d at 836-37. This Court also recognized that legal fines contribute to Washington's homelessness crisis and exacerbate inequalities caused by "volatile housing markets, uncertain social safety nets, colonialism, slavery, and discriminative housing practices." *Long*, 198 Wn.2d at 172. Concerns about the impact of legal debt on people who are poor are also reflected in the

[7] Available at: https://www.courts.wa.gov/subsite/mjc/docs/MJC_LFO_Price_of_Justice_Report_Final.pdf

Washington Legislature's decision making. *See* H.B. 1783, Laws of 2018, ch. 269; H.B. 1412, Laws of 2022, ch. 260.

Washington has a particular concern with the impact of legal debt on low-income communities, which is reflected in decisions by the courts and actions by the legislature. A careful review of the *Gunwall* factors demonstrates article I, section 14 is more protective than the Eighth Amendment's prohibition against disproportional punishment.

F. CONCLUSION

Based on the preceding, Mr. Tatum respectfully requests this Court to grant review pursuant to RAP 13.4 (b).

I certify this brief contains 3,475 words and complies with RAP 18.17.

Respectfully submitted this 2nd day of September 2022.

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES GENE TATUM, III, Appellant.	No. 82900-9-I (consolidated with No. 82901-7, No. 82902-5, No. 82903-3, & No. 82904-1) DIVISION ONE PUBLISHED OPINION

SMITH, A.C.J. — Charles Tatum brings his second appeal following this court's earlier remand of his case for resentencing. He challenges for the first time the imposition of two mandatory legal financial obligations (LFOs), the Victim Penalty Assessment (VPA) and the DNA[1] collection fee, contending that they are unconstitutionally excessive under both the federal and state constitutions.

We disagree. Our state Supreme Court has previously determined that the VPA is constitutional, and this court has established that the DNA fee is constitutional. We therefore affirm.

FACTS

This is Tatum's second appeal following his guilty plea to five separate criminal cases in 2019. In his first appeal we reversed and remanded for the trial court to vacate his drug possession in light of State v. Blake, 197 Wn.2d 170, 481

[1] Deoxyribonucleic acid.

P.3d 521 (2021), recalculate his offender score accordingly, and strike his nonrestitution interest and Department of Corrections (DOC) supervision fees. State v. Tatum, No. 80795-1-I, slip op. at 1 (Wash. Ct. App. May 3, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/807951.pdf. On remand, the trial court resentenced Tatum in all five cause numbers.

Because Tatum is indigent, the court imposed only mandatory LFOs at his original sentencing. It did the same at resentencing. It imposed a $500 VPA in each of his five cause numbers and a single $100 DNA collection fee.

Tatum did not contest these LFOs in his original appeal. He does so now.

ANALYSIS

Tatum contends that the imposition of $2,600 in LFOs constitutes excessive fines in violation of the Eighth Amendment to the United States Constitution and our state constitution's corresponding provision in article I, section 14. The State disagrees, but also asserts that this court need not address Tatum's substantive claim because, first, he did not make it during his prior appeal and, second, he invited whatever error may exist. We conclude that no invited error exists and the Washington State Supreme Court and this court have already determined that these fees are not excessive.

Reviewability Under RAP 2.5(c)(1)

As a threshold question, we address whether, as the state urges, RAP 2.5 does not allow for review.

When a case returns to an appellate court after remand, "[t]he general rule is that a defendant is prohibited from raising issues [in the] second appeal that

were or could have been raised [in] the first appeal." State v. Mandanas, 163 Wn. App. 712, 716, 262 P.3d 522 (2011). RAP 2.5(c) creates an exception to this rule. It allows that "[i]f a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in [the] earlier review." RAP 2.5(c).

But RAP 2.5(c)(1) "does not revive automatically every issue or decision which was not raised in an earlier appeal. Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question." State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 519 (1993). That sort of re-review presumptively occurs when "the appellate court . . . remands for an entirely new sentencing proceeding." See State v. Toney, 149 Wn. App. 787, 792, 205 P.3d 944 (2009). However, resentencing alone does not necessarily constitute re-review. In Barberio, for instance, the Supreme Court determined that no re-review had occurred when the trial court specifically stated in its oral ruling that it was not considering anew issues it had ruled on in the defendant's first sentencing. 121 Wn.2d at 51-52.

Here, we previously remanded for resentencing on each of Tatum's five causes. Tatum, slip op. at 6. Both VPA and DNA LFOs were readdressed on the record during his resentencing hearing. The court was provided with and reviewed a number of new materials through that process, including sentencing memoranda, letters from Tatum and those in his life, certifications of his good behavior while in the custody of DOC, video interviews with Tatum's children,

other subsequent personal history, information about other changes to his offender score calculation, and statements from Tatum's loved ones. The court considered that new information and then gave a lengthy colloquy from the bench addressing it, but nonetheless confirmed to Tatum that it "does not change your sentence."

Tatum's resentencing hearing was not limited to a narrow review of only those issues previously remanded, but was a comprehensive reconsideration of the sentences in his cases. That process indicates the sort of independent re-review contemplated by Toney rather than the explicit denial of reconsideration present in Barberio. We exercise our discretion under RAP 2.5(c)(1) and choose to review Tatum's claim.

Invited Error

The State next contends that the invited error doctrine bars Tatum from benefiting from an error he provoked below. We conclude the doctrine does not apply here. Tatum did not take the sort of affirmative action required to invite error and, as explained further below, there was no error to invite.

The invited error doctrine "precludes a criminal defendant from seeking appellate review of an error [they] helped create, even when the alleged error involves constitutional rights." State v. Carson, 179 Wn. App. 961, 973, 320 P.3d 185 (2014). So, for instance, where a defendant requests an erroneous jury instruction, they may not then appeal that instruction. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). But only an error resulting from an affirmative, knowing, and voluntary act is invited. State v. Mercado, 181 Wn. App. 624, 630,

326 P.3d 154 (2014). We distinguish between a mere failure to object to an error and the sort of action that affirmatively assents to it; only the latter invites error. See, e.g. State v. Momah, 167 Wn.2d 140, 154-55, 217 P.3d 321 (2009). The State bears the burden to prove error was invited. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Here, the State contends that Tatum, by agreeing before his original sentencing to recommendations imposing the appealed mandatory LFOs, invited any error that might exist. It argues that only if he had submitted a separate recommendation would he have not invited any potential error. The State provides as an independent ground for invitation defense counsel's request at his first sentencing hearing that only mandatory LFOs be imposed.

But this appeal arises out of Tatum's resentencing, not his original sentencing. The State, by focusing exclusively on that original proceeding, has not met its burden. Moreover, the record does not indicate that Tatum addressed imposition of the LFOs at issue during any part of his resentencing. His sentencing memorandum did not discuss LFOs, instead making an argument for an exceptional downward sentence. And at his resentencing hearing, defense counsel only requested that the court "waive any non mandatory fees and fines." Tatum's treatment of the issue in front of the trial court was more akin to failure to object to a potential error than affirmative invitation of one.

We therefore conclude that Tatum did not invite any error that may exist. But, as is explained below, we do not find error.

Excessive Fines

The core question in this appeal is whether either the VPA or DNA LFOs are excessive fines under the United States or Washington constitutions and unconstitutional when applied to indigent defendants. Our state Supreme Court has determined that the VPA fee is constitutional, and we cannot reconsider the issue. Precedent from this court establishes the same of the DNA fee.

Both our federal and state constitutions deny the government the power to issue excessive fines. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); WASH. CONST. art. 1 § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."). The federal amendment is applicable to the states by incorporation through the Fourteenth Amendment's due process clause. Timbs v. Indiana, 139 S. Ct. 682, 686, 203 L. Ed. 2d 11 (2019). For a fine to be unconstitutional under these clauses its purpose must be punitive—that is, it must be imposed as a punishment—and it must excessive. City of Seattle v. Long, 198 Wn.2d 136, 162-63, 493 P.3d 94 (2021).

We first address the VPA fees. RCW 7.68.035(1)(a) mandates that "[w]hen any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." State v. Curry addressed challenges to the constitutionality of this statute and held that "the victim penalty assessment is neither unconstitutional on its face nor as applied to indigent defendants." 118

Wn.2d 911, 829 P.2d 166, 169 (1992). Curry's reasoning is vague; it does not state precisely what constitutional arguments it took into account. 118 Wn.2d at 166-69. The court of appeals case it affirmed was similarly imprecise, referencing only "constitutional considerations." State v. Curry, 62 Wn. App. 676, 677, 814 P.2d 1252 (1991). Nonetheless, the Supreme Court's concern was the constitutionality of the statute in light of indigent defendants' potential inability to pay. Curry, 118 Wn.2d at 168-69. We are bound in the face of this holding from our state Supreme Court to conclude that the VPA is constitutional as applied to Tatum. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (Supreme Court's decision on issue of state law binds all lower courts until that court reconsiders).[2]

[2] The State argues that the constitutionality of VPA fees was also addressed in two court of appeals decisions: State v. Humphrey, 91 Wn. App. 677, 959 P.2d 681 (1998) and In re Pers. Restraint of Metcalf, 92 Wn. App. 165, 963 P.2d 911 (1998). Metcalf concerned due process, ex post facto, double jeopardy, bill of attainder, and excessive fines challenges against provisions in chapter 72.09 RCW, concerning the Department of Corrections' ability to impose deductions on prisoners for costs of incarceration; it did not directly concern VPA fees. 92 Wn. App. at 170-71. In a passing reference to VPA fees, however, it characterized Humphrey as concluding that they are not punitive. Metcalf, 92 Wn. App. at 180.

The court of appeals decision in Humphrey ruled in the context of an ex post facto challenge, not an excessive fines challenge. 91 Wn. App. at 683, rev'd on other grounds by State v. Humphrey, 139 Wn.2d 53, 63, 983 P.2d 1118 (1999). But ex post facto analysis is guided by the multi-factor Mendoza-Martinez test, originating in the due process context and used to determine whether a statute is punitive on balance. Smith v. Doe, 538 U.S. 84, 97, 123 S. Ct. 1140, 155 L. Ed. 2d 264 (2003); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) (individual factors may be punitive while statute generally is not). In contrast, a statute only survives an excessive fines challenge if wholly remedial, without *any* punitive characteristics. Long, 198 Wn.2d at 161. The two tests are therefore different; a statue not found punitive under Mendoza-Martinez may still run afoul of the excessive fines

We turn next to the DNA collection fee. RCW 43.43.7541 mandates that "[e]very sentence imposed for [certain specified crimes] must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction." This court has previously found the DNA collection fee constitutional because its purpose is monetary, rather than punitive. State v. Brewster, 152 Wn. App. 856, 861, 218 P.3d 249 (2009); see also State v. Mathers, 193 Wn. App. 913, 920, 376 P.3d 1163 (2016). We decline to depart from our own precedent.[3] The fee continues to serve the purposes of funding collection of samples and maintaining operation of DNA databases, enabling use of DNA in criminal investigations, excluding those subject to investigation or prosecution, detecting recidivist acts, and facilitating identification of missing persons and unidentified human remains. See Brewster, 152 Wn. App. at 860 (listing purposes of the DNA fee).

Finally, we decline to conclude, as Tatum urges us to, that our state constitution provides greater protection than the federal constitution in this area. Our Supreme Court in State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986), articulated six nonexclusive criteria for courts to consider when asked to

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clause. Austin v. United States, 509 U.S. 602, 610 n.6, 113 S. Ct., 125 L. Ed. 488 (1993).

The State's reliance on Metcalf and Humphrey is therefore misplaced.

[3] This case is not the first time we have recently rejected a request to reconsider Brewster and Mathers. See State v. Clement, No. 82476-7-I, slip op. at 3-4 (Wash. Ct. App. March 21, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/824767.pdf. We cite to Clement not as precedent but as reference to our more recent treatment of the issue. See GR 14.1(c) ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.").

find that state constitutional provisions are broader than their federal equivalents: (1) the language of the state constitution; (2) differences between parallel provisions of the state and federal constitutions; (3) state constitution and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. Gunwall analysis is not talismanic, but rather an interpretive tool meant to guide counsel and the courts. See Long, 198 Wn.2d at 159 ("When a party urges a different or more protective interpretation under our state constitution for the first time, we expect supportive briefing, particularly when the language of that provision is identical to the United States constitutional provision."). Our state Supreme Court recently declined the opportunity to decide whether our state constitution extends greater protections in this area than does the federal constitution. Long, 198 Wn.2d at 159.

The relevant provisions of the federal and state constitutions are nearly identical save in their third clauses: treatment of excessive punishment. Compare U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.") with WASH. CONST. art. 1 § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."). As a result, it is well established that our state excessive punishment clause is more protective than the federal excessive punishment clause. See, e.g. State v. Fain, 94 Wn.2d 387, 393, 617 P.2d 720 (1980) (life sentence for habitual offender guilty only of three minor crimes excessive punishment under state constitution). The court in Fain came

to this conclusion through reference to the text of our punishment clause, which excludes the word "unusual," and reference to discussions at the time of the provision's drafting indicating that the exclusion was deliberate. Fain, 94 Wn.2d at 393.

In contrast, the excessive fines clauses in the two constitutions are identical in their wording, and we have not been provided any historical information indicating an intent by our constitution's framers to deviate from the protections of the federal amendment as to that particular right.

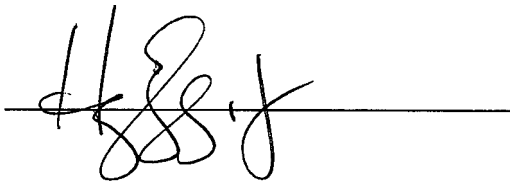
Instead, Tatum's treatment of the issue largely boils down to two arguments: (1) the general difference between the goals and powers of the federal government and our state government mandates stronger protections; and (2) our state evinces widespread concern for the impact of fines and fees on indigent defendants, a state of affairs that urges greater constitutional protections. The first argument holds true for any right under the Washington constitution, and we see no reason it is particularly present here. See State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 934, 941 (2003) (difference in structures will always favor independent analysis). Tatum's second point is well taken—the impact of fees and fines has appropriately received increasing scrutiny from both our Supreme Court and our legislature, and will likely receive more in the future. But we cannot conclude that a provision of our state constitution is more protective than its federal equivalent simply because it relates to a live policy debate, regardless of that debate's merit. And particularly in light of the recent decision in Long—in which the court explicitly addressed similar concerns by

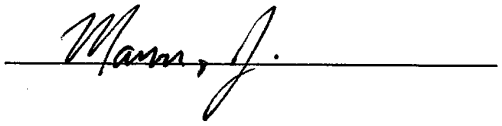
reference to the federal constitution and declined to consider our state constitution—it is not appropriate for this court to interpret article I, section 14 as extending its protections farther than the Eighth Amendment's.

Finding no error, we affirm.

Smith, A.C.J.

WE CONCUR:





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