Supreme Court No. 102137-2
(COA No. 56978-7-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARNETT WILLIAMS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Garnett Williams, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review pursuant to RAP 13.3 and RAP 13.4.

B. ISSUES PRESENTED FOR REVIEW

1. The sentencing court wrongly bound itself to the previous court's sentencing decision in denying Mr. Williams's request for an exceptional sentence. The sentencing judge cited to his personal relationship with the previous sentencing judge as a reason to not conduct his own analysis of Mr. Williams's mitigating evidence. This Court should accept review because the Court of Appeals' opinion conflicts with this Court's decision in *State v. Grayson,* 154 Wn.2d 333, 111 P.3d 1183 (2005), which requires a sentencing court meaningfully consider mitigating evidence, and

prohibits sentencing a person based on non-adjudicative facts. This decision also conflicts with recent Court of Appeals' decisions clarifying that a person is entitled to a de novo sentencing hearing at a *Blake*[1] resentencing. RAP 13.4(b)(1)-(2).

2. Recent changes to the restitution statutes allow a trial court to consider a person's ability to pay before ordering restitution owed to a state agency. These statutes were effective January 1, 2023, and apply prospectively to Mr. Williams, who has been found indigent, but was still ordered to pay $28,000 and interest to DSHS, a state agency. Restitution ordered without consideration of a person's ability to pay also violate the Excessive Fines Clause.

[1] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

The Court of Appeals refused to consider Mr. Williams's challenge to the court's restitution order, claiming he failed to meet the RAP 2.5(a) criteria of review. This Court should accept review because like in *Blazina,* this change in legislation and constitutional claim reflects "[n]ational and local cries for reform of broken LFO systems." *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015).

C. STATEMENT OF THE CASE

In 2010 Garnett Williams was sentenced to 330[2] months in prison after he was convicted at a bench trial for first-degree assault with a firearm enhancement and unlawful possession of a firearm. CP

[2] The Judgment and Sentence stated a total of 318 months confinement, but the court imposed 270 months on count I, and an additional 60 months for the firearm enhancement, which totals 330 months. CP 33. Mr. Williams did not contest the correct calculation should have been 330 months.

30-33. In 2022, Mr. Williams was entitled to a new sentencing hearing because the court included a prior conviction for possession of a controlled substance in his offender score that was invalidated after *State v. Blake*. CP 56.

Prison took a great toll on Mr. Williams, who was sentenced to serve over 27 years in prison at age 44. RP 18. He lost many loved ones during the ten years he has been incarcerated, and struggled to cope with depression and addiction to controlled substances. RP 18.

Mr. Williams asked the court to consider the evidence demonstrating his efforts at rehabilitation, including the numerous certificates he earned through the limited programming available to him in prison. RP 15.

Mr. Williams also informed the court about the reality of his 20-plus-year sentence as a middle aged Black man with medical conditions. At age 44, the State's requested sentence would imprison him until he was approximately 57 years old. RP 21. He reminded the court that the "average life expectancy for African American men in this country is only 60 something years old." RP 21. Mr. Williams's hereditary medical conditions of high blood pressure and cholesterol put him at even greater risk and reduced his life expectancy. RP 21.

Mr. Williams took responsibility for the role he played in his conviction for first-degree assault, and apologized to the victims. RP 17. He also discussed the compelling mitigating circumstances that warranted an exceptional sentence, which Mr. Williams asked the

court to impose, or alternatively, a low end sentence. RP 14.

The victims in Mr. Williams's case played a major role in the assault. RP 23. They were trespassing and doing drugs in his father's apartment. RP 18. When he confronted them, they recruited the victim, John Hall, to confront Mr. Williams and he had to defend himself. RP 19. Mr. Hall was a convicted murderer, had "a reputation in the community for being a bully," and was over six feet tall and 300 pounds. RP 23. Mr. Williams deeply regretted his impetuous decision to shoot Mr. Hall. RP 19. But in this case, "the victim was pretty much the aggressor." RP 23.

Mr. Williams argued to the court that these facts established by a preponderance of the evidence the victim is an aggressor, initiator, a willing participant, or "provoker of the incident" and therefore supported

an exceptional sentence under RCW 9.94A.535(1)(a). RP 19, 22.

The State narrowly construed the scope of the resentencing and asked the court to "deny *Blake* relief in this matter beyond the vacating of the defendant's *Blake* related conviction." RP 5.

The State argued the "finding of facts or conclusions of law" from the bench trial did not support Mr. Williams's request for a mitigated sentence. RP 10.

The sentencing judge referred to the previous trial court's finding of fact from the bench trial. RP 24. These findings of fact from made no reference to the sentencing issue before the court. CP 76-80. Instead they established the necessary facts for conviction, including that Mr. Williams was the person who shot Mr. Hall. *Id.*

The sentencing judge nevertheless declared himself bound by these inapposite findings: "I can't go back and make my own independent evaluation, make my own findings and conclusions by reviewing the trial record. I'm bound by the findings and conclusions that were done at the time of trial." RP 24.

The sentencing judge also noted the previous judge, Judge Larkin, was a former "law partner of mine." RP 24. The sentencing judge noted Judge Larkin "was involved in drug court" and "believed in rehabilitation and drug treatment and the ability of people to turn their lives around." RP 24. The sentencing judge did not have any evidence Judge Larkin was in any way lenient towards Mr. Williams in imposing a high end sentence, or that Judge Larkin considered the mitigating factors in sentencing Mr. Williams.

The trial court refused to consider Mr. Williams's request for an exceptional sentence, informing him he should have argued it "at the time of the sentencing" so that court could have determined whether Mr. Williams showed he met the criteria for an exceptional sentence. RP 25. But since the previous sentencing court "didn't make those findings," this sentencing judge refused to consider Mr. Williams's request. Instead, the sentencing judge purported to correct Judge Larkin's sentence by increasing it from 318 to 330 months. CP 71.

On appeal Mr. Williams argued the sentencing court failed to consider his request for an exceptional sentence and improperly denied his request based on the court's personal relationship to the previous sentencing judge. Op. at 4-5. The Court of Appeals affirmed, ignoring the sentencing judge's statements

about his personal relationship to the previous sentencing court. Op. at 4-5. The Court of Appeal also found the court's strict adherence to the finding of facts from the bench trial did not mean the sentencing judge failed to exercise discretion. Op. at 4-5.

D. ARGUMENT

1. The Court of Appeals opinion conflicts with the requirement that sentencing courts meaningfully consider a person's request for an exceptional sentence at a de novo resentencing hearing after *State v. Blake*.

A *Blake* resentencing "shall be de novo, with the parties free to advance any and all factual and legal argument." *State v. Edwards*, 23 Wn. App. 2d 118, 122, 514 P.3d 692 (2022). "When a trial court is called on to make a discretionary sentencing decision, the court must meaningfully consider the request in accordance with the applicable law." *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). This includes

meaningfully considering mitigating evidence. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

A court's consideration of evidence at sentencing should be limited to "adjudicative evidence" in an "adversarial context" in which the parties have "the opportunity to scrutinize, test, contradict, discredit, and correct" the evidence relied on by the court. *Grayson*, 154 Wn.2d at 339.

Where a sentencing court does not exercise or misapprehends its discretion, a person is entitled to a new sentencing hearing. *Id.*; *McFarland*, 18 Wn. App. 2d at 531. Similarly, where a court misunderstands the scope of its discretion, a person is entitled to a new sentencing hearing. *McFarland*, 189 Wn.2d at 56.

A person is entitled to "actual consideration" of the evidence because a court must exercise "meaningful discretion" in deciding the appropriate

sentence. *Grayson*, 154 Wn.2d at 335-36. In *Grayson,* the court's primary reason for denying the defendant's request for an alternative sentence was its belief the program was underfunded, which was not part of the record at sentencing. 154 Wn.2d at 336-42. Based on this, the court categorically refused to consider a statutorily authorized sentencing alternative. *Id.* The sentencing court's failure to exercise its discretion was reversible error. *Id.*

Mr. Williams urged the sentencing court to consider the facts underlying his conviction that supported a mitigated sentence because the victim was an initiator, willing participant, aggressor, or provoker of the incident. RP 14. Mr. Williams informed the court about the trespass and illicit activity in his father's apartment that led to Mr. Williams's altercation with the ultimate victim, the drug dealer Hall. Mr. Hall was

a convicted murderer and known bully. RP 23. Mr. Williams feared him. RP 23.

Mr. Williams explained that Mr. Hall was "recruited" to find and confront Mr. Williams because Mr. Williams stood up to the trespassers in his father's apartment. "We got into a really big argument, and things got so overheated and out of control that I felt threatened, and I made a very impetuous decision and a very serious and terrible mistake." RP 18-19.

The sentencing court refused to consider the facts and relevant criteria as to whether Mr. Hall was an "initiator, willing participant, aggressor, or provoker of the incident." CP 57. Instead, the court looked only to the trial court's findings of fact and conclusions of law from the bench trial. RP 24. These findings from the bench trial established the facts necessary for conviction. CP 76-80. They state Mr. Hall was shot

three times and that he and witness Dametra Bolar identified Mr. Williams as the person with the gun who shot him. CP 77. The court also found both Mr. Hall and Mr. Williams had a "verbal exchange" before Mr. Williams shot Mr. Hall. CP 77. The findings also establish that Mr. Williams acted with intent. CP 77.

These findings say nothing about the nature of the verbal exchange or the events leading up to the assault. CP 76-80. In short, these findings establish Mr. Williams committed the offense. They do not address the statutory mitigating factor Mr. Williams asked the sentencing court to consider. *See* CP 76-80. But the sentencing judge nevertheless declared himself bound by these findings. RP 24.

This sentencing judge also cited to his relationship with the previous sentencing judge, who was his former "law partner" and who the judge

believed was "known for being a very lenient person" RP 24. This is not the kind of information that Mr. Williams could dispute because it was based on the judge's personal experiences and perceptions. It was not "adjudicative evidence" and was an improper basis for maintaining the previous court's sentence. *Grayson,* 154 Wn.2d at 336-42.

The sentencing court mistakenly believed Mr. Williams could only present his request for an exceptional sentence at the original sentencing hearing. RP 24-25. The order from the sentencing hearing further reflects the court misunderstood this resentencing to be only a review of the previous sentence imposed, as the court entered an "Order Correcting Judgment and Adjusting Sentence Pursuant to Blake." CP 68.

This Court should accept review because the Court of Appeals opinion simply ignored the sentencing court's refusal to consider Mr. Williams's request for an exceptional sentence at a de novo resentencing hearing, contrary to *Grayson* and *Edwards*.

2. This Court should require the sentencing court to consider Mr. Williams's ability to pay over $28,000 in restitution to DSHS.

This Court should accept review to decide whether the sentencing court must consider Mr. Williams's ability to pay over $28,000 in restitution to DSHS under a statute in effect at the time of his appeal, or because it violates the Excessive Fines Clause.

a. Recent changes to the LFO statutes apply prospectively to Mr. Williams, who is now entitled to consideration of his ability to pay restitution and interest to a state agency.

The legislature recently amended RCW 9.94A.750(3)(b) and RCW 3.66.120(2) to allow a court

to decline ordering restitution and interest to a state agency if the person does not have the ability to pay. Laws of 2022, ch. 260, § 3. A "state agency" includes "every state office, department, division, bureau, board, commission, or other state agency." RCW 42.56.010(1).

In Mr. Williams's case, the court maintained the original restitution order and interest entered in 2010. CP 31-32. This order required he pay $28,000 in restitution to "DSHS file #210590." CP 31. "DSHS" is the Department of Social and Health Service, a state agency. Mr. Williams is indigent. CP 79-77.

The court waived Mr. Williams's other discretionary fines and fees. CP 71. He is also entitled to the court's consideration of whether he is "required to pay, or may [be] relieve[d] . . . of the requirement to pay, full or partial restitution and accrued interest on

restitution" to a state agency. Laws of 2022, ch. 260, § 3(b).

This law was effective January 1, 2023, and applies prospectively to Mr. Williams because his case is not yet final. *State v. Ramirez*, 191 Wn.2d 732, 747-48, 426 P.3d 714 (2018). Though Mr. Williams did not raise this issue below, this Court should reach the merits of the claim because "[n]ational and local cries for reform of broken LFO systems demand" courts exercise discretion to decide cases on their merits under RAP 2.5(a). *Blazina*, 182 Wn.2d at 835.

b. The restitution order violates the excessive fines clause because Mr. Williams is unable to pay.

Like the Eighth Amendment, article I, section 14 of the Washington Constitution prohibits the imposition of "excessive fines." Const. art. I, § 14; *see* U.S. Const. amend. VIII. Because "the United States

Constitution establishes a floor below which state courts cannot go to protect individual rights," article I, section 14 must be at least as protective as the Eighth Amendment. *State v. Sieyes,* 168 Wn.2d 276, 292, 225 P.3d 995 (2010). Thus, recent cases enforcing the Eighth Amendment prohibition against excessive fines dictate the minimum requirements of the state constitution. *See City of Seattle v. Long,* 198 Wn.2d 136, 158-77, 493 P.3d 94 (2021); *Jacobo Hernandez v. City of Kent,* 19 Wn. App. 2d 709, 497 P.3d 871 (2021).

In *Long,* this Court reversed the imposition of a $547 fine as unconstitutionally excessive. *Long,* 198 Wn.2d at 173. Mr. Long had illegally parked his truck for more than 72 hours, and the city impounded the truck and assessed a $946 "charge" for the impoundment. *Id.* at 143. A magistrate reduced the charge to $547 and waived the $44 ticket for illegal

parking. *Id.* Despite the reduction and waiver, the Supreme Court held the remaining fine was unconstitutional. *Id.* at 173.

In reaching this holding, the Court established a multifactor test for evaluating whether a fine is "grossly disproportionate" and therefore unconstitutionally excessive. *Id.* at 173. A court must consider: (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, (4) the extent of the harm caused, and (5) the person's ability to pay the fine. *Id.*

Applying the test to Mr. Long, this Court noted that a parking infraction is "not particularly egregious," the infraction was not related to other criminal activity, the other penalties were minimal, and the harm to the city was negligible. *Id.* at 173-74.

Most importantly, Mr. Long "had little ability to pay $547.12." *Id.* at 174. He had a monthly income of $400-700 dollars, lived in his truck, and had $50 in savings. *Id.* It was "difficult to conceive how Long would be able to save money for an apartment and lift himself out of homelessness while paying the fine and affording the expenses of daily life." *Id.* at 175.

This Court concluded that the fine was unconstitutionally excessive. *Id.* at 176. Allowing that a "reasonable" fine might pass constitutional muster, it reversed the imposition of a $547 fine and remanded for further proceedings. *Id.*

The Court of Appeals applied *Long* in *Jacobo Hernandez*, 19 Wn. App. 2d at 720. Kent police arrested Mr. Jacobo Hernandez after he delivered methamphetamine to a buyer in his car, and he was later convicted and sentenced in federal court. *Id.* at

721. The city of Kent then initiated forfeiture proceedings to seize the vehicle Mr. Jacobo Hernandez had used to deliver drugs. *Id.* Mr. Jacobo Hernandez claimed that without the car, which was valued at $3,000-$4,000, he had $50 to his name. *Id.* He acknowledged that the forfeiture was authorized by statute, but he argued it violated the excessive fines clause. *Id.*

After considering criteria unique to the forfeiture context, this Court addressed proportionality under the *Long* factors. *Id*. This Court concluded that "an individual's financial circumstances *can* make a forfeiture grossly disproportionate, even when all other factors support a finding otherwise." *Id.* at 724 (emphasis in original). The Court found that all factors other than ability to pay weighed *against* a conclusion that the forfeiture was disproportionate and

unconstitutionally excessive. *Id.* But Mr. Jacobo Hernandez's indigence trumped all other factors. *Id.* The court held the forfeiture violated the prohibition on excessive fines. *Id*. at 726.

The Court of Appeals held restitution is partially punitive and therefore subject to the constraints of the Excessive Fines Clause. *State v. Ramos,* 24 Wn. App. 2d 204, 226, 520 P.3d 65 (2022), *review denied,* 200 Wn.2d 1033, 525 P.3d 152 (2023) (citing *State v. Kinneman*, 155 Wn.2d 272, 279, 119 P.3d 350 (2005)). But it refused to weigh proportionality and concluded restitution can never be grossly disproportional where it is based on demonstrated losses. *Id.* This decision is wrongly decided because the principles of the Excessive Fines Clause and *Long* require consideration of specific factors, including a person's ability to pay. 198 Wn.2d at 171.

Consideration of a person's ability to pay is central to the constitutional prohibition against oppressive fines. It is also necessary to change the unjust impact legal fines and fees on people of color and the poor. Historically, the government imposed fines "to subjugate newly freed slaves and maintain the prewar racial hierarchy." *Timbs v. Indiana*, ___ U.S. ___, 203 L. Ed. 2d 11, 139 S. Ct. 682, 688 (2019); *see Long*, 198 Wn.2d at 172.

Moreover, financial penalties devastate a defendant's reentry and ability to access housing, employment, or financial stability. *Blazina*, 182 Wn.2d at 837.

Mr. Williams is indigent, and the court waived all non-discretionary fines and fees. CP 72. Mr. Williams is serving a lengthy prison term and will face great challenges to finding employment and stability once

released from prison at age 60. *See, e.g.,* Brett C. Burkhardt, *Criminal Punishment, Labor Market Outcomes, and Economic Inequality: Devah Pager's Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*, 34 Law & Soc. Inquiry 1039, 1041 (2009) (ex-offenders face major challenges in reentering the formal economy).

Mr. Williams's poverty and inability to pay the restitution and interest that has ballooned during his lengthy prison term should outweigh all other factors in this Court's analysis under article I, section 14. *Jacobo Hernandez*, 19 Wn. App. 2d at 723-24. This Court should accept review and find it violates article I, section 14 to impose disproportional financial penalties on poor people through restitution and interest.

Finally, the Court of Appeals erred in finding this is not subject to RAP 2.5(b)(3) review and conflicts with *Ramos*, which held a court may consider such challenges under RAP 2.5(a)(3)). 24 Wn. App. 2d at 212-15.

E. CONCLUSION

Based on the foregoing, petitioner Garnett Williams respectfully requests that review be granted pursuant to RAP 13.4(b)(1)-(3).

In compliance with RAP 18.17, this petition contains 3,406 words.

DATED this 28th day of June, 2023.

Respectfully submitted,

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APPENDIX

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Filed
Washington State
Court of Appeals
Division Two

May 31, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GARNETT LYNN WILLIAMS, Appellant.	No. 56978-7-II UNPUBLISHED OPINION

LEE, J. — Garnett L. Williams appeals his sentence imposed following a resentencing hearing. Williams argues that the superior court failed to consider his request for an exceptional sentence below the standard sentencing range. For the first time on appeal, Williams also challenges the restitution order. We affirm.

FACTS

In 2008, Williams was found guilty of first degree assault and first degree unlawful possession of a firearm following a bench trial. The trial court entered written findings of fact finding that Williams shot John Hall three times. After a brief verbal exchange between Williams and Hall, Hall turned and walked away. While Hall was walking away, Williams shot him twice in the back and once in the wrist while he was lying on the ground trying to shield his face.

Williams' criminal history included three first degree robbery convictions, two second degree robbery convictions, and an unlawful possession of a controlled substance (UPCS) conviction. The trial court sentenced Williams to 360 months' confinement.

In January 2009, the trial court entered an order setting restitution in the amount of $28,000 to be paid to the Department of Social and Health Services for medical services provided to Hall for his injuries.

Williams appealed his sentence, and this court reversed his sentence and remanded for resentencing because Williams' offender score contained two robbery convictions that had been reversed and, ultimately, dismissed. *State v. Williams*, noted at 152 Wn. App. 1033, 2009 WL 3089066, at *3.

In 2010, Williams was resentenced with a corrected offender score. The superior court imposed 318 months' confinement.

In 2022, we granted Williams personal restraint petition based on *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). *In re Pers. Restraint of Williams*, No. 56508-1-II, slip op. at 1 (Wash. Ct. App. Jan. 25, 2022) (unpublished).[1] We remanded for resentencing because the State conceded that Williams was entitled to be resentenced with the UPCS conviction removed from his offender score. *Id.*

On resentencing, Williams filed a pro se brief and requested that the superior court impose an exceptional sentence downward based on the victim provoking the incident. RCW 9.94A.535(1)(a). At the resentencing hearing, Williams renewed his request for the superior court to impose an exceptional sentence downward based on Williams' claim that the victim provoked the incident. The superior court determined that there were no facts that would support imposing an exceptional sentence below the standard range:

> Well, I just reviewed the findings of fact, conclusions of law from the bench trial, and Judge Larkin, who used to be actually a law partner of mine, he's now deceased, is certainly one who was known for being a very lenient person. He was involved

[1] https://www.courts.wa.gov/opinions/pdf/D2%2056508-1-II%20Unpublished%20Opinion.pdf

> in drug court. He believed in rehabilitation and drug treatment and the ability of people to turn their lives around. He was always a very positive individual, but he also sentenced you to 270 months in this case, and I think that was reflected in the facts of the case, and I can't undo the facts. I can't go back and make my own independent evaluation, make my own findings and conclusions by reviewing the trial record. I'm bound by the findings and conclusions that were done at the time of the trial, and based upon that, I don't find a basis to grant an exceptional sentence downward.
>
> That certainly could have been argued at the time of the sentencing, and most appropriately that's when it would have been argued, and the Court could have made a finding that for some reason the victim in the case was the initial aggressor and was a subsequent or substantial partner or participant in the offense at hand that led to the shooting.

Verbatim Rep. of Proc. (VRP) at 24-25.

The superior court removed the unlawful possession of a controlled substance conviction but added a recent conviction which resulted in Williams' offender score remaining the same. The superior court also corrected an error in the previous judgment and sentence which incorrectly calculated the total time of confinement. The superior court then imposed a total of 330 months' confinement.

Williams appeals.

ANALYSIS

Williams argues that the superior court erred by refusing to consider his request for an exceptional sentence. Williams also challenges the 2009 restitution order.

A. EXCEPTIONAL SENTENCE REQUEST

Generally, a sentence within the standard sentencing range may not be appealed. RCW 9.94A.585(1). However, "this rule does not preclude a defendant from challenging on appeal the underlying legal determinations by which the sentencing court reaches its decision." *State v. McFarland*, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017).

When a defendant requests an exceptional sentence below the standard sentencing range, the defendant is entitled to have that request actually considered. *Id.* "A trial court errs when 'it refuses categorically to impose an exceptional sentence below the standard range under any circumstances' or when it operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" *Id.* (alteration in original) (quoting *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998); *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333, 166 P.3d 677 (2007)).

Here, Williams requested an exceptional sentence below the standard sentencing range based on RCW 9.94A.535(1)(a), which provides that it is a mitigating factor if "[t]o a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." Williams challenges the superior court's rejection of his request for an exceptional sentence below the standard sentencing range based on his claim that the victim provoked the incident. Williams' challenge fails.

First, the superior court did not categorically refuse to impose an exceptional sentence below the standard range. The superior court reviewed all the findings of fact that were entered following Williams' bench trial and determined that the facts of the case did not support finding a mitigating factor.

Second, nothing in the record indicates that the superior court operated under the mistaken belief that it did not have the discretion to impose the exceptional sentence below the standard sentencing range. Instead, the record shows that the superior court understood that it did have the discretion to impose an exceptional sentence below the standard range by taking the time to review the findings of fact to determine whether they supported finding the mitigating circumstance.

Further, the superior court did not rule that it could not impose an exceptional sentence below the standard sentencing range; rather, the superior court clearly ruled that the facts of the case did not support the alleged mitigating circumstance or imposing an exceptional sentence below the standard sentencing range.[2]

The superior court considered Williams' request and determined that it was not supported by the facts that were proven at trial. Thus, the superior court did not err.

B. 2009 RESTITUTION ORDER

Williams also challenges the 2009 restitution order. Williams raises the challenge for the first time in this appeal.

Under RAP 2.5(a), this court may decline to consider an issue raised for the first time on appeal. Here, Williams had previously objected to other legal financial obligations that were imposed by the superior court, but Williams did not object to the restitution order. Further, Williams does not offer any exception to RAP 2.5(a) under which we may review this issue. *See State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371 (2002) (when an appellant fails to provide argument or authority, "[w]e are not required to construct an argument on behalf of appellants"). Therefore, we decline to consider Williams' challenge to the restitution order.[3]

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[2] Williams also asserts that the superior court denied his request for an exceptional sentence because of his relationship with the former sentencing judge. However, the record belies this assertion. Although the superior court made a passing reference to the former sentencing judge, the ruling clearly establishes that the superior court denied the request for an exceptional sentence because it was not supported by the facts.

[3] We note that even if we reach the merits, Williams' constitutional argument that the imposed restitution violates the excessive fines clause fails.

Williams argues that the restitution order violates the excessive fines clause because he is unable to pay. Although restitution is partially punitive and implicates the excessive fines clause, when the restitution amount is based on direct losses suffered by the victim the restitution award

CONCLUSION

The superior court did not fail to consider Williams' request for an exceptional sentence below the standard sentencing range, and we do not review Williams' challenge to the 2009 restitution order raised for the first time in this appeal. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Cruser, A.C.J.

Veljacic, J.

"is inherently proportional to the crime that caused the losses because the amount is linked to the culpability of the defendant and the extent of harm the defendant cause." *State v. Ramos*, 24 Wn. App. 2d 204, 230, 520 P.3d 65 (2022), *review denied*, 200 Wn.2d 1033 (2023). "A defendant's inability to compensate the victim for the losses he caused will not render the restitution amount grossly disproportional." *Id.* Because the amount of restitution was based on the amount that was paid for Hall's medical expenses, it does not violate the excessive fines clause. Also, Williams' argument that restitution was improper under the changes to RCW 3.66.120 fails because Title 3 RCW applies to courts of limited jurisdiction and not to the superior court.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 56978-7-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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MARIA ANA ARRANZA RILEY, Paralegal Date: June 28, 2023
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