Supreme Court No. 102378-2
(COA No. 56984-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JAMES ELLIS,
Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

James Ellis petitions for review of the Court of Appeals's June 13, 2023, published opinion, *State v. Ellis*, __ Wn. App. 2d __, 530 P.3d 1048 (2023). The court denied reconsideration on August 15, 2023. RAP 13.4(b)(1)-(4).

B. ISSUES PRESENTED FOR REVIEW

1. The trial court misunderstood its discretion at sentencing when it told Mr. Ellis it could not consider his youth. The Court of Appeals's opinion holding "the trial court was not required to consider Ellis's youth" conflicts with this Court's many opinions holding that sentencing courts must meaningfully consider mitigating evidence. The court's refusal to do so here constituted a failure to exercise its discretion. The opinion also conflicts with published Court of Appeals cases clarifying that a person is entitled to a de novo sentencing hearing at a *Blake*[1] resentencing. This Court should accept

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

review to address this conflict with other cases on this important issue of substantial public interest. RAP 13.4(b)(1), (2), (4).

2. Monetary sanctions are subject to the Excessive Fines Clause if they are punishment and are disproportional. The Court of Appeals concluded Mr. Ellis's restitution, imposed as part of the sentence following his conviction of a crime, was not subject to the Excessive Fines Clause because it ruled restitution is not punishment. The holding that restitution is not punitive conflicts with this Court's opinions in *State v. Kinneman*[2] and *Harris v. Charles*[3] and the Court of Appeals's published opinion in *State v. Ramos*[4]. This Court should accept review to address the Court of Appeals's disregard of this Court's precedent and to resolve the split between divisions one

[2] *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005).

[3] *Harris v. Charles*, 171 Wn.2d 455, 467, 256 P.3d 328 (2011).

[4] *State v. Ramos*, 24 Wn. App. 2d 204, 226, 520 P.3d 65 (2022), *rev. denied*, 200 Wn.2d 1033 (2023).

and two on this important constitutional issue. RAP 13.4(b)(1)-(3).

3. The Court of Appeals also concluded that, even if the restitution was punitive, it could not be grossly disproportional because it was related to actual loss, even though Mr. Ellis is unable to pay. This Court's opinion in *City of Seattle v. Long*[5] and the published Court of Appeals's opinion in *Jacobo Hernandez v. City of Kent*[6] recognize that article I, section 14 requires courts to consider a person's ability to pay as part of the proportionality analysis and that this factor may outweigh the others. By holding restitution corresponding to actual loss cannot be excessive, the Court of Appeals rendered consideration of ability to pay meaningless, in conflict with these cases. This Court should accept review to resolve the

[5] *City of Seattle v. Long*, 198 Wn.2d 136, 158-77, 493 P.3d 94 (2021).

[6] *Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d 709, 718-25, 497 P.3d 871 (2021), *cert. denied*, 143 S. Ct. 99 (2022).

conflict and address this issue of important substantial public interest. RAP 13.4(b)(1)-(4).

C. STATEMENT OF THE CASE

In 2009, the trial court sentenced James Ellis to 25 years' imprisonment on his conviction for felony murder in the second degree and a firearm enhancement. CP 22-23. Mr. Ellis was 18 years old at the time of the incident. CP 6.

The court determined Mr. Ellis's offender score was four, resulting in a standard range of 165-265 months. CP 20. The court included in Mr. Ellis's offender score a prior conviction for unlawful possession of a controlled substance. CP 20. The court imposed a standard range sentence of 240 months, plus 60 months for the firearm enhancement, for a total sentence of 300 months. CP 22-23. The court included as part of the sentence $7,097.32 in restitution. CP 20, 35.

In 2021, the parties returned to court for a new sentencing hearing following *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). The court began by immediately

narrowing the scope of the hearing, informing Mr. Ellis he was there only "because of the decision in *State vs. Blake* and how it might impact your sentencing." RP 4.

Mr. Ellis explained he wanted the court to consider the mitigating circumstances of his youth at the hearing. Mr. Ellis told the court, "I would like to just bring awareness of my youthfulness … within this matter … And hopefully you can take into consideration that." RP 5.

The court interrupted Mr. Ellis to tell him he could not raise the issue of his youth. RP 5-6. The court responded, "I'll just tell you before we get started, *that's a different issue than the one we're talking about today*." RP 5-6 (emphasis added).

After telling Mr. Ellis his youth was "a different issue" than what the court would consider at his resentencing, the court heard from the prosecutor and defense attorney. RP 6-7. The parties agreed Mr. Ellis's correct score was a three and that the resulting standard range was 154-254 months or 214-314 months with the firearm enhancement. RP 6-7; CP 39. The

prosecution asked the court to impose the same sentence of 300 months, despite the corrected offender score and standard range. RP 6. Defense counsel asked the court to reduce the sentence to 289 months to account for the 11 months lower range. RP 6-7. Counsel made that recommendation *after* the court told Mr. Ellis he could not raise the mitigating circumstance of his youth. RP 4-7.

When given the opportunity to speak, Mr. Ellis apologized for his crime and discussed the programs and education benefiting him during the 14 years he had been incarcerated. RP 8-9. He again asked the court to consider his youth. RP 8-9. Mr. Ellis explained, "I have been able to grow into a better individual than what I was when I was a kid, young." RP 9. He told the court, "I'm definitely asking for my youthfulness to be a consideration." RP 9.

The court again told Mr. Ellis it would not consider his youth, responding, "The other issue is something that you have the ability to address in a different format than what we are

doing today, Mr. Ellis." RP 9. The court imposed a mid-range sentence of 229 months, plus 60 months for the firearm enhancement, for a total sentence of 289 months. RP 9; CP 40. The court also maintained restitution in the amount of $7,097.32. CP 35, 40.

D. ARGUMENT

1. The court misunderstood its discretion and denied Mr. Ellis a fair sentencing when it wrongly believed it could not consider Mr. Ellis's arguments that his youth mitigated his conduct.

This Court should grant review. Mr. Ellis was entitled to a full resentencing following the reduction in his offender score, but the trial court refused to consider the mitigating aspects of his youth or any other relevant information apart from the change in score. The opinion affirming this ruling conflicts with opinions of this Court and the Court of Appeals, and implicates the right to fair sentencing proceedings, which is an issue of substantial public interest.

a. Mr. Ellis was entitled to a full resentencing and to have the court consider his arguments about the mitigating circumstances of his youth.

When a court imposes a sentence based on an incorrect offender score, the sentence is unauthorized by statute and is unlawful. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 867-68, 50 P.3d 618 (2002). The court "has the power and duty to correct the erroneous sentence" in such circumstances. *Id.* at 869 (internal quotations omitted).

Once an erroneous sentence is vacated, it "no longer exists as a final judgment on the merits," and the court at a resentencing hearing must independently determine the appropriate sentence. *State v. Harrison*, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003). Such resentencings are de novo. *State v. Dunbar*, __ Wn. App. 2d __, 532 P.3d 652, 656 (2023); *State v. Edwards*, 23 Wn. App. 2d 118, 122, 514 P.3d 692 (2022).

At sentencing, the court must consider any relevant evidence or argument presented. "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). Where a court does not exercise or misapprehends its discretion, a person is entitled to a new sentencing hearing. *Id.*; *State v. McFarland*, 18 Wn. App. 2d 528, 531, 492 P.3d 829 (2021). 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.

The "outright refusal of a trial court to consider sentencing argument is error." *State v. Mutch*, 171 Wn.2d 646, 654 n.1, 254 P.3d 803 (2011). So too is a court's belief it lacks the discretion to consider an argument. *State v. Mulholland*, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007).

b. The court misunderstood its discretion at resentencing when it told Mr. Ellis it could not consider his arguments on youth and directed him to raise the "different issue" of his youth in "a different format."

Mr. Ellis appeared before the court for a new sentencing hearing following the change in his offender score. The trial court misunderstood the scope of the hearing and did not exercise its discretion to determine the appropriate sentence in the first instance. Instead, the court believed it was limited to the impact of *Blake* and that the issue of Mr. Ellis's youth at the time of the crime was "a different issue" he would have to address "in a different format." RP 4, 9.

The court unlawfully limited the scope of its discretion by determining Mr. Ellis's sentencing hearing was only to consider "the decision in State vs. Blake and how it might impact [his] sentence" and by ruling the potential mitigation of Mr. Ellis's youth was "a different issue" he had to address "in a different format." RP 4, 6, 9. The court's conclusion that it could consider only "the decision in State vs. Blake," not the

"different issue" of Mr. Ellis's youth was incorrect and artificially limited the court's authority. RP 4-6.

The court impermissibly prevented Mr. Ellis from presenting evidence and argument about the mitigating circumstances of his youth. RP 4-9. Mr. Ellis told the court, "I would like to just bring awareness of my youthfulness" and asked the court to "take into consideration that." RP 5. He explained that in the 14 years since he committed the crime, "I have been able to grow into a better individual than what I was when I was a kid, young," and discussed the programs and education from which he was able to benefit while in prison. RP 8-9

He said to the judge, "Your Honor, all I'm just asking within you is to use your discretion in taking my youthfulness into consideration." RP 8. He discussed the "toxic environment" in which he grew up and apologized for his crime. RP 8. He concluded by saying, "I'm definitely asking for my youthfulness to be a consideration." RP 9.

The court rebuffed Mr. Ellis and narrowly limited the scope of the hearing. It told him his youth was "a different issue than the one we're talking about today." RP 6. The court explained to Mr. Ellis he would have to raise his youth "in a different format than what we are doing today." RP 9. The court did so based on its erroneous belief it was limited to considering "the decision in State vs. Blake and how it might impact your sentencing." RP 4.

Mr. Ellis was entitled to raise any relevant issues, including his youth, and to request any lawful sentence. Thus, the court improperly failed to exercise its discretion when it told Mr. Ellis it would not consider evidence or argument concerning the mitigating circumstances of his youth at the time of the crime.

c. The Court of Appeals improperly excused the trial court's abuse of discretion, in conflict with opinions holding courts must meaningfully consider evidence at de novo sentencing hearings after *Blake*.

The Court of Appeals agreed that the inclusion of a void conviction in Mr. Ellis's offender score rendered the score

incorrect and the resulting sentencing unlawful, entitling him to a full resentencing. Slip op. at 4. It also recognized that the trial court did not consider his youth, despite Mr. Ellis's request that it do so. Slip op. at 4. But the appellate court nevertheless concluded, "The trial court was not required to consider Ellis's youth when sentencing him" because Mr. Ellis was 18 years old at the time of his offense. Slip op. at 4. The court's opinion conflicts with the multiple cases addressing sentencings discussed above. The opinion's misunderstanding over the scope of available mitigating evidence also presents a constitutional issue of substantial public interest. This Court should accept review.

State v. O'Dell clarified that when a person raises the issue of their youth, as Mr. Ellis did here, courts may consider youth as relevant to the appropriate sentence even if the person is 18 or older. 183 Wn.2d 680, 694-96, 358 P.3d 359 (2015). Developments in neuroscience have helped the legal community understand that "the parts of the brain involved in

behavior control continue to develop well into a person's 20s," *Id.* at 691-92, and that the "bright line" courts previously drew at age 18 was completely arbitrary. *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 308, 482 P.3d 276 (2021).

Mr. Ellis was well within his rights to ask the court to consider the mitigating circumstances of his youth. But the court told him it would not consider the issue. The court's refusal to consider mitigating evidence conflicts with this Court's cases that require courts to consider mitigating evidence at sentencing. *Grayson*, 154 Wn.2d at 342; *McFarland*, 189 Wn.2d at 56.

The Court of Appeals's conclusion that the court's error in refusing to consider youth was harmless because Mr. Elis "received the sentencing his defense counsel requested" is patently incorrect. Slip op. at 5. Counsel requested a particular sentence only *after* the court informed Mr. Ellis his youth was "a different issue" that the court would not consider. *Compare* RP 4-6 (court telling Mr. Ellis it would not consider his youth),

with RP 6-7 (defense's later request for 289 month sentence). The court then repeated its erroneous belief, again telling Mr. Ellis he would have to raise the "different issue" of his youth in "a different format." RP 9.

The Court of Appeals's opinion also conflicts with the published opinion in *State v. Dunbar*, 532 P.3d 652. *Dunbar* held resentencings following *Blake* "should be de novo" and that judges must "exercise independent discretion" not merely defer to the prior judge's sentencing decision. *Id.* at 656.

Mr. Dunbar, like Mr. Ellis, returned to court for resentencing following *Blake*. *Dunbar*, 532 P.3d at 654. Unlike Mr. Ellis, Mr. Dunbar's standard range on the convictions did not change because his scores remained in the mid-20s, well above a 9. *Id.* The resentencing court would not consider Mr. Dunbar's evidence of rehabilitation. *Id.* at 654-55.

The Court of Appeals held Mr. Dunbar was denied his right to a de novo resentencing hearing and reversed. *Id.* at 658. It ruled resentencing judges "should be able to take new

matters into account" including evidence of rehabilitation, and that courts must "entertain any relevant evidence" impacting sentencing. *Id.* at 656. Indeed, sentencing courts must "consider any matters relevant to sentencing, even those that may not have been raised at the first sentencing hearing" because it is a de novo sentencing. *Id.* at 658.

Contrary to *Dunbar*, the court here did not conduct a de novo sentencing proceeding. The court failed to exercise its independent discretion to determine the appropriate sentence when it told Mr. Ellis he could not consider his arguments about youth. This Court should accept review to address to address this important issue of substantial public interest and resolve the conflict with opinions of this Court and the Court of Appeals.

2. The Court of Appeals's opinion holding that restitution is not punitive conflicts with opinions of this Court and the Court of Appeals.

This Court should grant review of the restitution issue as well. The Court of Appeals rejected Mr. Ellis's challenge that

his restitution violated the Excessive Fines Clause by ruling restitution is not punitive. This holding conflicts with opinions of this Court and the Court of Appeals, and raises an issue of substantial public interest.

a. Article I, section 14 prohibits excessive fines.

Article I, section 14 of the Washington Constitution and the Eighth Amendment prohibit the imposition of "excessive fines." Article I, section 14 provides, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." Const. art. I, § 14. The Eighth Amendment similarly states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. These constitutional prohibitions against excessive fines "guard[] against abuses of government's punitive or criminal law-enforcement authority" and offer protection "fundamental to our scheme of ordered liberty." *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 686, 203 L. Ed. 2d 11 (2019).

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, and cases interpreting the federal constitution apply equally to Washington's constitution. *State v. Sieyes,* 168 Wn.2d 276, 292, 225 P.3d 995 (2010).

b. This Court has already held restitution is punitive.

A monetary sanction is a "fine" subject to the Excessive Fines Clause if it is a sanction or penalty that is "at least partially punitive." *Timbs*, 139 S. Ct. at 689; *City of Seattle v. Long*, 198 Wn.2d 136, 163, 493 P.3d 94 (2021).

In *State v. Kinneman*, this Court held categorically that "restitution is punishment." 155 Wn.2d 272, 281, 119 P.3d 350 (2005); *see id.* at 280 n.9 (collecting cases recognizing restitution is punishment). Because restitution "is both punitive and compensatory" and is part of a person's sentence, it qualifies as punishment. *Id.* at 280-81.

The dual nature of restitution as punitive and compensatory renders restitution "at least partially punitive" and therefore subject to the Excessive Fines Clause. *Timbs*, 139 S. Ct. at 689. The Court of Appeals followed *Kinneman* and recognized restitution is punitive and subject to excessive fines analyses in *State v. Ramos*, 24 Wn. App. 2d 204, 224-25, 520 P.3d 65 (2022), *rev. denied*, 200 Wn.2d 1033 (2023).

Both this Court and the Court of Appeals have held that restitution is categorically punitive.

c. The Court of Appeals contradicted this Court's opinion in *Kinneman* and wrongly held restitution is not punitive.

Despite this Court's precedent, the Court of Appeals disregarded *Kinneman* and departed from *Ramos* to hold "the restitution the court ordered was not punitive" and so "the excessive fines clause does not apply." Slip op. at 9. The Court of Appeals did so by rejecting the categorical analysis of *Kinneman* and ruling that a court must analyze each individual restitution order to determine if it is punitive in that particular

case. Slip op. at 9. Because it determined Mr. Ellis's restitution was to reimburse the crime victim compensation program, it ruled it was not punitive. Slip op. at 8-9. The Court of Appeals's piecemeal approach contradicts this Court's holdings.

First, nothing in *Kinneman* supports an individualized approach. The Court reviewed restitution as category of fines and concluded it is punitive. *Kinneman*, 155 Wn.2d at 279-81. It did not endorse considering the individual restitution imposed in each separate case.

Second, this categorical approach is supported by this Court's opinion in *Harris v. Charles*, 171 Wn.2d 455, 256 P.3d 328 (2011). In *Harris*, the Court considered whether the denial of credit for electronic home monitoring time violated the Double Jeopardy Clause. 171 Wn.2d at 467. The Court ruled that "to determine whether a governmnent action is punitive … [w]e first look to the express or implied intent of the governmnent sanction." *Id.* The Court looked at the action–

denial of time credit–categorically, not on a case-by-case basis. *Id.* at 467-69. Because the rule governing time credit "is not punitive in its intent," the Court determined it was not punishment and therefor double jeopardy did not apply. *Id.* at 470.

That *Kinneman* addressed the right to a jury trial under the Sixth Amendment argument and *Harris* addressed the prohibition against double jeopardy under the Fifth Amendment does not change the punitive nature of restitution, contrary to the Court of Appeals's conclusion. Slip op. at 9. The nature of restitution is not distinct across the different constitutional rights. Restitution is categorically punitive for all constitutional purposes.

This Court has already held restitution is at least partially punitive. *Kinneman*, 155 Wn.2d at 279; *Ramos*, 24 Wn. App. 2d at 226 ("*Kinneman* determined that the legislature intended restitution to be partially punitive."). It has rejected an individualized analysis in favor of a review of the legislative

intent. *Harris*, 171 Wn.2d at 467-70. The Court of Appeals rejected both of these approaches, contrary to this Court's cases. This Court should accept review.

3. The Court of Appeals's opinion holding that restitution related to victim losses cannot be disproportional, even when a person does not have the ability to pay, is contrary to the Excessive Fines Clause and prior opinions of this Court and the Court of Appeals.

Although the Court of Appeals held Mr. Ellis's restitution was not punitive and that the Excessive Fines Clause did not apply, it alternatively rejected Mr. Ellis's challenge by deciding that the restitution was not excessive, even if it was punitive. Slip op. at 10-11. To do so, the court ruled an inability to pay cannot render a fine disproportional when the amount is related to actual loss. Slip op. at 10. This Court should grant review because the opinion contradicts article I, section 14 and opinions of this Court and the Court of Appeals and presents a constitutional issue of substantial public interest.

a. *Long* established courts must consider ability to pay when determining whether a fine is excessive.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *Long*, 198 Wn.2d at 166 (quoting *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)). "[E]xcessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances." *Id.* at 171. Whether a particular fine is excessive will vary from person to person. *Id.*

In *Long*, this Court reversed the imposition of a $547 fine as unconstitutionally excessive. 198 Wn.2d at 173. Mr. Long had illegally parked his truck, and the city impounded it 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, this 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. *Long*, 198 Wn.2d at 173. Courts 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.* at 167-73.

In analyzing these factors, the Court recognized that 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. The Court concluded that the fine was unconstitutionally excessive. *Id.* at 176.

Applying *Long*, the Court of Appeals addressed proportionality and the ability to pay factor in *Jacobo*

Hernandez v. City of Kent, 19 Wn. App. 2d 709, 722-24, 497 P.3d 871 (2021), *cert. denied*, 143 S. Ct. 99 (2022). The court concluded "an individual's financial circumstances can make a forfeiture grossly disproportionate, even when all other factors support a finding otherwise." *Id.* at 724. The court found 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.

Consideration of a person's ability to pay is critical to the proportionality inquiry because it gives meaning to the constitutional prohibition against oppressive fines. It also protects poor people and people of color from arbitrary and disproportionate financial penalties that exacerbate every systemic inequity. *See Timbs*, 139 S. Ct. at 688-89; *Long*, 198 Wn.2d at 172.

b. The Court of Appeals disregarded *Long* and wrongly held restitution related to victim loss cannot be excessive, even when a person is unable to pay.

The Court of Appeals held that Mr. Ellis's restitution was not constitutionally excessive because the amount "was the amount paid by the crime victim compensation fund, which necessarily related to victim losses." Slip op. at 10. It ruled that restitution based on actual loss "is inherently proportional" and that a person's inability to pay cannot render such fines disproportional. Slip op. at 10 (quoting *Ramos*, 24 Wn. App. 2d at 230). This conclusion contradicts this Court's opinion in *Long* and its recognition of ability to pay as a necessary consideration in the proportionality analysis. *Long*, 198 Wn.2d at 174-76; *Jacobo Hernandez*, 19 Wn. App. 2d at 878-80.

That the restitution amount ordered may equal the costs incurred does not exempt the court from considering ability to pay when weighing proportionality. Courts must always base restitution on documented costs. RCW 9.94A.753(3)(a) (restitution must be "based on easily ascertainable damages");

State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008). While demonstrated costs may be relevant to the fourth factor—extent of harm caused—that alone is not conclusive. A fine may be grossly disproportional even if it is equal to demonstrated costs. *E.g. Long*, 198 Wn.2d at 171. In fact, the payment at issue in *Long* was *less than* the actual costs incurred, but this Court still held it was grossly disproportional. *Id.* at 143 n.1.

Mr. Ellis is unable to pay restitution. He is indigent, and he was only 18 years old when he committed his offenses. The trial court sentenced Mr. Ellis to a confinement for almost 25 years. CP 40. Mr. Ellis has minimal education and job training, and his work experience is limited to employment within prison, primarily kitchen work. CP 44. Ordering him to pay $7,097.32 in restitution deprives him of his livelihood and his ability to successfully reenter society upon release.

As a convicted felon, Mr. Ellis will face great challenges to finding employment and stability once he is released from

his lengthy term of incarceration. *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). The restitution ordered leaves Mr. Ellis with little if any hope for successful reentry when he is released from incarceration.

Many people with criminal convictions live on limited incomes and most fall below the federal poverty line. Katherine Beckett & Alexis Harris, State Minority & Justice Comm'n, *The Assessment and Consequences of Legal Financial Obligations in Washington State*, 3 (2008). Legal debt limits their income and impacts their credit ratings, which impedes their ability to obtain stable housing and employment. *Id.* It also can impact their eligibility for public benefits. *Id.* at 4.

Legal debt therefore exacerbates the already existing difficulties associated with reentry. In Mr. Ellis's case, this

could impact him for the rest of his life. This is grossly disproportional.

The Court of Appeals disregarded this Court's holding that the disproportionality analysis under article I, section 14 requires consideration of a person's ability to pay. The holding that restitution reflecting victim loss cannot be disproportional conflicts with opinions of this Court and the Court of Appeals. Disregarding a person's inability to pay also frustrates poor people's efforts to reform their lives and presents an issue of substantial public interest. This Court should accept review.

E. CONCLUSION

For all these reasons, this Court should accept review. RAP 13.4(b).

Counsel certifies this brief complies with RAP 18.17 and the word processing software calculates the number of words in this document, exclusive of words exempted by the rule, as 4,703 words.

DATED this 13th day of September, 2023.

Respectfully submitted,

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APPENDIX A

June 13, 2023, published opinion

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES LARON ELLIS, Appellant.	No. 56984-1-II PUBLISHED OPINION

MAXA, J. – James Ellis appeals his sentence following a resentencing pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Ellis's sentence related to his conviction in 2009 following a guilty plea to second degree murder with a firearm sentencing enhancement. The conviction arose from an incident in which Ellis shot and killed a person in the course of an attempted robbery. Ellis was 18 years old at the time of the offense.

At the resentencing hearing, the trial court declined Ellis's request to consider the mitigating qualities of his youth at the time of the offense. But the court imposed the sentence Ellis's defense counsel recommended. The trial court did not alter the provisions in the original judgment and sentence imposing several legal financial obligations (LFOs), restitution, and interest on the restitution amount.

Ellis argues that the trial court erred in failing to consider the mitigating qualities of youth when imposing his sentence; that imposition of restitution, interest on restitution, and the

crime victim penalty assessment (VPA) violated the excessive fines clause in the United States and Washington constitutions; and the trial court improperly imposed certain LFOs.

We hold that (1) the trial court was not required to consider Ellis's youth at resentencing, and any error relating to the trial court's suggestion that it did not have discretion to consider Ellis's youth was harmless because the court imposed the sentence that Ellis requested; (2) imposition of restitution does not violate the excessive fines clause; (3) a recently enacted statutory provision gives the trial court discretion to waive interest on restitution, so on remand the court must consider whether to waive interest based on the statutory factors; (4) a newly enacted statutory provision precludes imposing the VPA on an indigent offender, so on remand the trial court must determine whether Ellis is indigent and reconsider imposition of the VPA based on that determination; and (5) on remand the trial court must strike the DNA collection fee and community custody supervision fees based on newly enacted statutory provisions and reconsider whether to impose the criminal filing fee and attorney fees.

Accordingly, we affirm in part and reverse in part the trial court's sentence, and remand for the trial court to strike the DNA collection fee and community custody supervision fees from the judgment and sentence and to reconsider the imposition of interest on restitution, the VPA, the criminal filing fee, and attorney fees.

FACTS

In March 2008, Ellis shot and killed a person in the course of an attempted robbery. Ellis was 18 years old at the time of his offense. The State charged Ellis with first degree murder, second degree murder, second degree assault, and unlawful possession of a firearm.

Ellis pled guilty to second degree murder. In January 2009, the trial court sentenced him to 240 months in confinement and an additional 60 months for a firearm sentencing

enhancement. The sentence was based on an offender score of 4, which included a prior conviction for unlawful possession of a controlled substance. The trial court ordered Ellis to pay the $500 VPA, a $200 criminal filing fee, $1,500 in attorney fees, a $100 DNA collection fee, and community custody supervision fees. The judgment and sentence stated that interest would accrue on unpaid amounts. The trial court also ordered Ellis to pay restitution in the amount of $7,097.32. The restitution order stated, "CVC[1] $7,097.32." Clerk's Papers (CP) at 36.

In July 2021, Ellis was resentenced after one point was removed from his offender score based on *Blake*, which lowered the standard range sentence. At the resentencing hearing, Ellis stated, "I would like to just bring awareness of my youthfulness. . . . And hopefully you can take into consideration that." Report of Proceedings (RP) at 5. The court noted, "That certainly is an issue that the courts have acknowledged is something that should be taken into account in certain circumstances." RP at 6. But the court stated that youthfulness is "a different issue than the one we're talking about today." RP at 6.

The State recommended that Ellis's sentence remain at 300 months because that sentence was within the standard range with his lower offender score. Ellis did not advocate for an exceptional sentence below the standard range. Instead, he asked the trial court to lower his sentence to 289 months, proportional to the new sentencing range.

Before the trial court imposed a sentence, Ellis again asked the trial court to consider his youth. The court responded that this issue "is something that you have the ability to address in a different format than what we are doing today." RP at 9.

The trial court entered an order correcting the 2009 judgment and sentence, changing Ellis's total confinement from 300 months to 289 months, the adjustment Ellis recommended.

[1] "CVC" refers to the crime victim compensation fund.

The order stated that all other terms and conditions of the 2009 judgment and sentence would remain in full force. Ellis appeals his sentence.

ANALYSIS

A. SCOPE OF RESENTENCING

Ellis argues that he is entitled to be resentenced because the trial court declined to consider his youth when imposing his sentence. We disagree.[2]

In general, a defendant cannot appeal a standard range sentence. RCW 9.94A.585(1); *In re Pers. Restraint of Marshall*, 10 Wn. App. 2d 626, 635, 455 P.3d 1163 (2019). But this rule does not prohibit defendants from appealing the process by which the trial court imposed its sentence. *Id.*

The trial court was not required to consider Ellis's youth when sentencing him. In *State v. Houston-Sconiers*, the Supreme Court held that the Eighth Amendment requires courts to consider the mitigating qualities of youth when sentencing juvenile offenders. 188 Wn.2d 1, 18, 391 P.3d 409 (2017). But Ellis was 18 at the time of his offense, so *Houston-Sconiers* is inapplicable. *See State v. Nevarez*, 24 Wn. App. 2d 56, 61-62, 519 P.3d 252 (2022), *rev. denied*, 1 Wn.3d 1005 (2023).

Ellis suggests the Supreme Court's decision in *State v. Monschke*, 197 Wn.2d 305, 482 P.3d 276 (2021), extended the holding in *Houston-Sconiers* to young adult offenders. In *Monschke*, the Supreme Court in a split decision held that the mandatory imposition of life without parole sentences was unconstitutional for offenders who were 18 to 20 years old as well as for juvenile offenders. 197 Wn.2d at 326, 329. But this court rejected the argument that the

[2] Initially, Ellis argues at length that he was entitled to a full resentencing. However, the record reflects that Ellis received a full resentencing hearing.

lead opinion in *Monschke* supports extending the holding in *Houston-Sconiers* to the sentencing of an 18-year-old, *Nevarez*, 24 Wn. App. 2d at 60-62, and the Supreme Court has denied review of that case. 1 Wn.3d 1005 (2023).

Ellis also argues that the trial court failed to recognize that it had the discretion to consider his youth under *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). In *O'Dell*, the Supreme Court held that trial courts are allowed, but not obligated, to consider youth as a mitigating factor in favor of an exceptional sentence below the standard range when sentencing adult defendants. *Id.* at 696. Here, Ellis does not argue that the sentencing court failed to recognize its discretion to impose an exceptional sentence. At the sentencing hearing, Ellis argued for a sentence within the standard range, which the trial court granted. Therefore, the court was not required to consider the mitigating qualities of youth under *O'Dell*. *See Nevarez*, 24 Wn. App. 2d at 61-62.

The trial court certainly had the discretion to consider Ellis's youth when considering his sentence within the standard range. But even if the court erred in failing to recognize that it had such discretion, any error was harmless because Ellis received the sentence his defense counsel requested. And Ellis does not assert an ineffective assistance of counsel claim.

We hold that Ellis is not entitled to be resentenced even though the trial court declined to consider Ellis's youth at resentencing.

B. EXCESSIVE FINES CLAUSE CHALLENGES

Ellis argues that imposition of $7,097.32 in restitution, interest on restitution, and the VPA violates the excessive fines clause. We disagree with regard to restitution, but we remand for the trial court to address restitution interest and the VPA based on newly enacted statutory provisions.

1. Legal Principles

The Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution prohibit excessive fines. *City of Seattle v. Long*, 198 Wn.2d 136, 158, 493 P.3d 94 (2021). The excessive fines clause limits the state's ability to impose monetary sanctions as punishment for an offense. *Id.* at 159. A monetary sanction violates the excessive fines clause if (1) the sanction is punishment, and (2) the sanction is constitutionally excessive. *Id.* at 163.

A sanction is punishment under the excessive fines clause if it is at least "partially punitive." *Id.* A sanction is constitutionally excessive if it is grossly disproportional to the gravity of the defendant's offense. *Id.* at 166. To determine whether a sanction is disproportional, we 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, and (4) the extent of the harm caused. *Id.* at 173. In addition, we also must consider a fifth factor: an offender's ability to pay the fine. *Id.* at 168-73. We review excessive fines challenges de novo. *Id.* at 163.

2. Failure to Raise Claims in Trial Court

Initially, the State argues that we should decline to consider Ellis' excessive fines claims because they were raised for the first time on appeal. We disagree.

RAP 2.5(a)(3) states that a party is allowed to raise a "manifest error affecting a constitutional right" for the first time on appeal. To determine the applicability of RAP 2.5(a)(3), we inquire whether (1) the error is truly of a constitutional magnitude, and (2) the error is manifest. *State v. Grott*, 195 Wn.2d 256, 267, 458 P.3d 750 (2020).

Here, Ellis's excessive fines claims are of constitutional magnitude. And if we were to accept Ellis's arguments, the error would be manifest. Therefore, we will exercise our discretion and address Ellis's excessive fine claims.

3. Restitution

Ellis argues that the trial court violated the excessive fines clause when it imposed $7,097.32 in restitution. We disagree.

a. Restitution Statute

RCW 9.94A.753(5) states, "Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property" absent extraordinary circumstances. Under RCW 9.94A.753(3)(a), restitution "shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." In addition, "[t]he amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime." RCW 9.94A.753(3)(a). The legislature has found "a compelling state interest[ ] in compensating the victims of crime." RCW 7.68.300.

Former RCW 9.94A.750(4) (2018) states that "the court may not reduce the total amount of restitution ordered because the offender may lack the ability to pay the total amount." And former RCW 9.94A.750(1) states that "[t]he court should take into consideration . . . the offender's present, past, and future ability to pay" only when setting the offender's minimum monthly payment toward restitution.

In 2022, the legislature added a subsection to RCW 9.94A.753(3), effective January 1, 2023. LAWS OF 2022, ch. 260, § 3. The new subsection provides that the trial court "may determine that the offender is not required to pay, or may relieve the offender of the requirement

to pay, full or partial restitution and accrued interest on restitution where the entity to whom restitution is owed is an insurer or state agency, *except for restitution owed to the department of labor and industries under chapter 7.68 RCW*, if the court finds that the offender does not have the current or likely future ability to pay." RCW 9.94A.753(3)(b) (emphasis added).

The restitution order here related to amounts incurred by "CVC," CP at 36, which refers to the crime victim compensation program established in chapter 7.68 RCW. The CVC is a self-insurance program operated by the Department of Labor and Industries, so the trial court here would not be allowed to rescind the restitution order under RCW 9.94A.753(3)(b). However, RCW 7.68.120(5) states, "Any requirement for payment due and owing the department by a convicted person under this chapter may be waived, modified downward or otherwise adjusted by the department in the interest of justice, the well-being of the victim, and the rehabilitation of the individual."

b. Punishment

The first question is whether the restitution imposed here constitutes "punishment." *Long*, 198 Wn.2d at 163. We conclude that because the specific restitution ordered here was solely compensatory, it was not punishment for purposes of the excessive fines clause.

The Supreme Court has stated in a different context that restitution is both compensatory and punitive. *State v. Kinneman*, 155 Wn.2d 272, 279-80, 119 P.3d 350 (2005). Restitution is compensatory because it is connected to a victim's losses. *Id.* at 280. But the court stated that restitution also is punitive because RCW 9.94A.753(3) allows the trial court to order restitution in an amount that is double a victim's loss, which necessarily exceeds what is necessary to compensate a victim. *Id.*

Division One of this court in *State v. Ramos* relied on *Kinneman* to conclude that restitution is partially punitive for Eighth Amendment purposes. 24 Wn. App. 2d 204, 226, 520 P.3d 65 (2022), *rev. denied*, 200 Wn.2d 1033 (2023). And the court cited *Harris v. Charles*, 151 Wn. App. 929, 940, 214 P.3d 962 (2009), *aff'd*, 171 Wn.2d 455, 256 P.3d 328 (2011), for the proposition that a court must look to the legislature's intent in determining whether restitution is punishment, not to the restitution ordered in a particular case. *Ramos*, 24 Wn. App. at 226.

However, *Kinneman* did not address whether restitution was punitive for purposes of the excessive fines clause. That case involved whether the defendant was entitled to a jury determination of the facts essential to restitution. 155 Wn.2d at 277. And *Harris* involved the definition of "punishment" for purposes of double jeopardy, not for purposes of the excessive fines clause. 151 Wn. App. at 940. Therefore, those cases are not directly controlling. And no case other than *Ramos* has held that a restitution order that involves only compensation of a crime victim constitutes punishment.

We conclude that, unlike Division One stated in *Ramos*, the proper inquiry is whether the restitution ordered *in a particular case* is punitive. Here, the restitution the trial court ordered was solely compensatory, reimbursing the CVC for amounts paid to the victim of Ellis's crime. The court in *Kinneman* stated that restitution could be punitive because the trial court has statutory authority to order restitution in an amount that is double a victim's loss. 155 Wn.2d at 280. But the trial court here did not double the amount needed to compensate CVC. Therefore, under the facts of this case, the restitution the court ordered was not punitive.

We hold that because the restitution imposed on Ellis was not punitive, the excessive fines clause does not apply.

c. Constitutionally Excessive

Even if the restitution the trial court ordered was punitive, the second question is whether the restitution imposed here was constitutionally excessive. *Long*, 198 Wn.2d at 163. We conclude that the restitution imposed here was not excessive.

In *Ramos*, the court concluded that restitution orders based on the victim's actual losses necessarily are not excessive, even if the offender is unable to pay. 24 Wn. App. 2d at 230. The court relied on a Ninth Circuit case, *United States v. Dubose*, which held that proportionality is built into the restitution order when the amount of restitution is tied to the victim's loss, and the offender's ability to pay does not change the outcome. 146 F.3d 1141, 1145 (9th Cir. 1998). The court in *Ramos* stated,

> We agree with the reasoning of *Dubose* and hold that a restitution award based on a victim's actual losses 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 caused. A defendant's inability to compensate the victim for the losses he caused will not render the restitution amount grossly disproportional.

24 Wn. App. 2d at 230.

We agree with *Ramos* regarding this issue. Here, the amount of restitution was the amount paid by the crime victim compensation fund, which necessarily related to victim losses.

Further, application of the five-factor test articulated in *Long* supports the conclusion that the restitution imposed was not constitutionally excessive. First, the nature and extent of the crime was second degree murder, a significant crime. Second, the murder was related to other illegal activities – Ellis committed the murder during the course of an attempted burglary with an illegally possessed firearm. Third, second degree murder carries a maximum sentencing term of life and a maximum fine of $50,000. Fourth, the trial court ordered restitution in the amount that

the crime victim compensation program paid to compensate the victim's family, which represented only a portion of the actual financial harm that resulted from Ellis's offense.

Regarding the fifth factor, Ellis claims that he is indigent and that he is unable to pay the restitution amount. However, that amount is not so high that it would be inconceivable that Ellis would be able to pay that amount at some point after being released from prison. And RCW 7.68.120(5) allows the Department of Labor and Industries to waive, modify downward, or otherwise adjust the amount of restitution "in the interest of justice, the well-being of the victim, and the rehabilitation of the individual." This means that there is a statutory mechanism through which Ellis's restitution amount may be reduced or eliminated.

We hold based on our de novo review of the specific facts of this case, the restitution imposed on Ellis was not constitutionally excessive. Therefore, the excessive fines clause does not apply.

4. Restitution Interest

Ellis argues that the statutory imposition of interest on the restitution amount violates the excessive fines clause. However, this issue has been resolved by the recent enactment of a new statutory provision regarding restitution interest.

In 2022, the legislature added a subsection to RCW 10.82.090 effective January 1, 2023. LAWS OF 2022, ch. 260, § 12. The new subsection states,

> *The court may elect not to impose interest on any restitution the court orders.* Before determining not to impose interest on restitution, the court shall inquire into and consider the following factors: (a) Whether the offender is indigent as defined in RCW 10.101.010(3) or general rule 34; (b) the offender's available funds, as defined in RCW 10.101.010(2), and other liabilities including child support and other legal financial obligations; (c) whether the offender is homeless; and (d) whether the offender is mentally ill, as defined in RCW 71.24.025. The court shall also consider the victim's input, if any, as it relates to any financial hardship caused to the victim if interest is not imposed. The court may also consider any other information that the court believes, in the interest of justice, relates to not imposing

> interest on restitution. After consideration of these factors, the court may waive the imposition of restitution interest.

RCW 10.82.090(2) (emphasis added).[3]

Although this amendment did not take effect until after Ellis's resentencing, it applies to Ellis because this case is on direct appeal. *See State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018). Therefore, we remand for the trial court to address whether to impose interest on the restitution amount under the factors identified in RCW 10.82.090(2).

5. Imposition of the VPA

Ellis argues that imposition of the VPA violates the excessive fines clause. However, this issue has been resolved by enactment of a new statutory provision regarding the VPA.

In the 2023 session, the legislature passed Engrossed Substitute House Bill 1169. LAWS OF 2023, ch. 449. ESHB 1169 added a subsection to RCW 7.68.035 that prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). LAWS OF 2023, ch. 449, §1; RCW 7.68.035(4). The amended statute also requires trial courts to waive any VPA imposed prior to the effective date of the amendment if the offender is indigent, on the offender's motion. LAWS OF 2023, ch. 449, § 1; RCW 7.68.035(5)(b). This amendment will take effect on July 1, 2023. LAWS OF 2023, ch. 449.

Although this amendment will take effect after Ellis's resentencing, it applies to Ellis because this case is on direct appeal. *See Ramirez*, 191 Wn.2d at 748-49. However, there has been no finding that Ellis is indigent and the State refuses to concede this issue. Therefore, we

[3] The reference to RCW 10.101.010(3) will be changed to RCW 10.01.160(3) effective July 1, 2023. LAWS OF 2023, ch. 449, § 13.

remand for the trial court to determine whether Ellis is indigent under RCW 10.01.160(3) and to reconsider the imposition of the VPA based on that determination.[4]

C. IMPOSITION OF LFOS

Ellis argues that the trial court erred at resentencing by not removing the following LFOs: the DNA collection fee, community custody supervision fees, the criminal filing fee, $1,500 in attorney fees.

RCW 43.43.7541 currently provides that the DNA collection fee is mandatory unless the offender's DNA previously had been collected as the result of a prior conviction. However, the legislature has eliminated this provision, effective July 1, 2023. LAWS OF 2023, ch. 449, § 4. On remand, the trial court should strike the DNA collection fee.[5]

Effective July 2022, RCW 9.94A.703(2) no longer authorizes the imposition of community custody supervision fees. LAWS OF 2022, ch. 29, § 7. Although this amendment took effect after Ellis's resentencing, it applies to cases pending on appeal. *State v. Wemhoff*, 24 Wn. App. 2d 198, 200-02, 519 P.3d 297 (2022). Therefore, the community custody supervision fees must be stricken. *Id.* at 202.

RCW 36.18.020(2)(h) now prohibits imposition of the criminal filing fee on a defendant who is indigent as defined in RCW 10.01.160(3). However, there has been no finding that Ellis is indigent and the State refuses to concede this issue. Therefore, we remand for the trial court to determine whether Ellis is indigent and to reconsider the imposition of the criminal filing fee based on that determination.

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[4] Although the amendment to RCW 7.68.035 has not yet taken effect, it will be in force by the time this appeal is mandated.

[5] Although the amendment to RCW 43.43.7541 has not yet taken effect, it will be in force by the time this appeal is mandated.

Under former RCW 10.01.160(1) (2018), a trial court may require a defendant to pay "costs." Court-appointed attorney fees constitute costs under former RCW 10.01.160(1). *In re Pers. Restraint of Dove*, 196 Wn. App. 148, 155, 381 P.3d 1280 (2016). However, costs cannot be imposed on an indigent defendant. Former RCW 10.01.160(3). Again, there has been no finding that Ellis is indigent, and the State refuses to concede this issue. Therefore, we remand for the trial court to determine whether Ellis is indigent and to reconsider the imposition of attorney fees based on that determination.

Accordingly, we remand for the trial court to strike the imposition of the DNA collection fee and community custody supervision fees. We also remand for the court to reconsider imposition of the criminal filing fee and attorney fees.

CONCLUSION

We affirm in part and reverse in part the trial court's sentence, and remand for the trial court to strike the DNA collection fee and community custody supervision fees from the judgment and sentence and to reconsider imposition of interest on restitution, the VPA, the criminal filing fee, and attorney fees.

MAXA, J.

We concur:

GLASGOW, C.J.

VELJACIC, J.

APPENDIX B

August 15, 2023, Order Denying Motion for Reconsideration

Filed
Washington State
Court of Appeals
Division Two

August 15, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, vs. JAMES LARON ELLIS, Appellant.	No. 56984-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant James Ellis moves for reconsideration of the court's June 13, 2023 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Glasgow, Veljacic

FOR THE COURT:

MAXA, J.

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. 56984-1-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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Date: September 13, 2023

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