SUPREME COURT NO. 93420-7

NO. 72637-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMMIE LEWIS,

Petitioner.

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

The Honorable William Downing, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Tommie Lewis, was the appellant below.

B. COURT OF APPEALS DECISION

Lewis seeks review of the published decision in State v. Lewis, filed by Division One of the Court of Appeals on June 27, 2016.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Did Division One err when it concluded petitioner's claim RCW 43.43.7541's mandatory DNA fee violates substantive due process was not ripe for review?

2. Did Division One err when it concluded petitioner failed to demonstrate manifest error subject to review under RAP 2.5(a)(3)?

3. Does RCW 43.43.7541 violate substantive due process when applied to defendants who have not been found to have the likely ability to pay its mandatory DNA fee?

4. Given Washington's current legal financial obligation (LFO) enforcement scheme, do this Court's holdings in State v. Curry[2] and State v. Blank[3] require trial courts conduct an ability-to-pay inquiry at the time LFOs are imposed in order to satisfy constitutional due process?

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[1] A copy of the slip opinion is attached as Appendix A.

[2] 118 Wn.2d 911, 829 P.2d 166 (1992).

[3] 131 Wn.2d 230, 930 P.2d 1213 (1997).

D. REASONS TO ACCEPT REVIEW

Review is warranted under RAP 13.4(b)(1), because Division One's conclusion Lewis' substantive due process challenge was not ripe for review conflicts with this Court's decision in State v. Blazina, 182 Wn.2d 827, 832 n.1, 344 P.3d 680 (2015) (clarified that a challenge to the trial court's authority to issue an LFO order is ripe for review regardless of whether the defendant faces incarceration for nonpayment).

Review is warranted under RAP 13.4(b)(2), because Division One's decision in Lewis conflicts with Division Two's unpublished decision in State v. Graham, __ Wn. App. __, 2016 WL 3598554, which held the exact same substantive due process challenge raised by Lewis was ripe for review, citing Blazina for support.[4]

Review is warranted under RAP 13.4(b)(3), because Lewis' substantive due process challenge raises a significant question of law under U.S. Const. amends. V, XIV, § 1 and Wash. Const. art. I, § 3. It also raises the question of whether this Court's due process analysis in Blank and Curry is to be applied broadly by the Court of Appeals as a barrier to judicial consideration of other types of due process challenges to LFO statutes. Additionally in this context, review is warranted under RAP

[4] Division Two rejected Graham's substantive due process challenge on other grounds. Currently, there is a motion for reconsideration pending. Should that be denied, a petition for review will be forth coming.

13.4(b)(1) because this case raises the question of whether those decisions -- when considered in the context of Washington's current LFO collection scheme – require trial courts to consider a defendants likely ability to pay before imposing mandatory LFOs, and therefore Lewis is in conflict..

Finally, review is warranted under RAP 13.4(b)(4) because Lewis' substantive due process challenge raises an issue this Court recognizes as one of substantial public interest. See Blazina, 182 Wn.2d at 835 (noting there are "[n]ational and local cries for reform of broken LFO systems"). An LFO order imposes an immediate debt upon a defendant subjecting him to a myriad of penalties arising from enforced collection efforts.

The societal hardships created by the erroneous imposition of LFOs cannot be understated. A study by the Washington State Minority and Justice Commission concludes that for many people, erroneously imposed LFOs result in a horrible chain of events:

> ...reducing income and worsening credit ratings, both of which make it more difficult to secure stable housing, hindering efforts to obtain employment, education, and occupational training, reducing eligibility for federal benefits, creating incentives to avoid work and/or hide from the authorities; ensnarling some in the criminal justice system; and making it more difficult to secure a certificate of discharge, which in turn prevents people from restoring their civil rights and applying to seal one's criminal record.

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at

4-5 (2008)[5]; see also, Blazina, 182 Wn.2d at 682-84 (acknowledging these hardships). These realities amply demonstrate that the judicial review of Washington laws authorizing the mandatory imposition of LFO debt is an issue of substantial public interest.

It is particularly important that Lewis' constitutional challenge to RCW 43.43.7541 be determined by this Court. As Division One's decision demonstrates, it is reluctant to address the merits of constitutional challenges to LFO statutes, and buttresses this reluctance by citing this Court's decisions in Blazina, Blank, and Curry. Appendix A. This Court should grant review to provide indigent defendant meaningful substantive review of constitutional challenges to Washington's LFO statutes.

E. RELEVANT FACTS

Lewis is indigent. RP 99-100. The trial court waived all discretionary fees and costs, but it imposed the Victim Penalty Assessment and a DNA as mandated by law. CP 94-98.

On appeal Lewis asserted the Legislative mandate that trial courts impose a DNA fee on all defendants violates substantive due process when applied to those lacking the likely ability to pay. Lewis recognized the statutory mandate appears to serve the State's interest to fund the collection, analysis, and retention of a convicted offender's DNA profile --

[5] See: http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf

but asserts this interest is not served when the LFO is imposed on persons lacking the ability pay. It is irrational to fund a database by imposing fees on someone who cannot pay. Brief of Appellant (BOA) at 4-8.

In response, the State claimed the issue was not ripe, was not subject to review under RAP 2.5, and was previously settled by this Court in Curry and Blank. Brief of Respondent (BOR) at 5-18. Division One agreed, holding the issue was not ripe for review and was not reviewable as a manifest constitutional error. Appendix A at 4-5 (citing State v. Shelton, __ Wn. App. __, __ P.3d __ (2016)).[6]

F. ARGUMENT IN SUPPORT OF REVIEW

1. REVIEW IS WARRANTED TO SETTLE WHETHER A CONSTITUTIONAL CHALLENGE TO THE LFO STATUTE IS RIPE FOR REVIEW REGARDLESS OF WHETHER IMPRISONMENT IS AT STAKE FOR NON-PAYMENT.

The Court of Appeals held Lewis' constitutional challenge to RCW 43.43.7541 was not ripe for review. Appendix A at 4. A similar argument was made in Blazina, however, and was categorically rejected by this Court. Blazina, 182 Wn.2d at 832, n.1.

A claim is fit for judicial determination if the issues raised are primarily legal, do not require further factual development, and the

[6] In Lewis' case, Division One did not fully analyze the issue in the decision but instead incorporated its recent ruling in State v. Shelton. Appendix A at 4-5. Because Shelton provides the substance of Division's decision here, petitioner has attached a copy of the Shelton decision as Appendix B and will cite to it as is appropriate.

challenged action is final. State v. Bahl, 164 Wn.2d 739, 751, 193 P.3d 678 (2008). Additionally, when considering ripeness, reviewing courts must take into account the hardship to the parties of withholding court consideration. Id. Division One correctly decided the issue raised by Lewis is primarily legal and the challenged action is final. Appendix B at 10. However, it incorrectly concluded that Lewis' constitutional claim requires further factual development. Id.

In reaching it ripeness holding, Division One essentially reasons that until Lewis is facing imprisonment for willful nonpayment, he cannot challenge RCW 43.43.7541 as an unconstitutional regulatory act by the State. Appendix B at 9. It relies on this Court's decision in Curry. Id. However, while Curry does state that the constitutional principles raised there were only implicated if the defendant faced imprisonment due to his indigence, (Curry, at 917-18), this holding does not apply here.

Curry and Lewis raised completely different constitutional challenges. In Curry, the defendants challenged the constitutionality of a mandatory LFO order on the ground that its future enforcement might operate unconstitutionally by permitting defendants to be imprisoned merely because they are unable to pay LFOs. 118 Wn.2d at 917. This is not the same due process issue raised by Lewis.

Rather than challenging the constitutionality of the LFO statute based on the fundamental unfairness of its future enforcement potential (as was the case in Curry and Blank), Lewis asserts RCW 43.43.7541 does not rationally serve any legitimate State interest. In other words, while Curry asked this Court to consider whether the speculative future operation of a statute would be unconstitutional, Lewis asks it to consider whether the statute -- as it operates at this moment -- is unconstitutional. These are two completely different due process challenges. Hence, Division One's attempt to apply Curry as a barrier to review of Lewis' constitutional challenge is fundamentally flawed.

Once Lewis' particular due process challenge is properly recognized, it becomes apparent that no further factual development is necessary for review. The trial court imposed the DNA fee pursuant to RCW 43.43.7541. It never made a legitimate finding Lewis has the ability – or likely future ability – to pay LFOs. As was the case in Blazina, the facts necessary to decide this issue (the statutory language and the sentencing record) are fully developed. Either the sentencing court applied a statute that is unconstitutional as applied to those who are not shown to have the ability to pay the mandatory DNA fee, or it did not. No further factual development is necessary.

This Court should accept review and clarify that Curry does not create a ripeness barrier to other types of constitutional challenges to LFO statutes. Instead, Blazina's holding on ripeness controls.

2. REVIEW IS WARRANTED TO CLARIFY THAT SUBSTANTIVE DUE PROCESS CHALLENGES ASSERTING THE MANDATORY LFO STATUTE SERVES NO RATIONAL STATE INTEREST IS SUBJECT TO REVIEW UNDER RAP 2.5(a)(3).

Division One wrongly concluded Lewis' substantive due process challenge "is not an error of constitutional magnitude subject to review under RAP 2.5(a)(3)." Appendix A at 4. This Court should grant review under RAP 13.4(b)(3) and clarify that this type of constitutional challenge to mandatory LFO statutes are reviewable under RAP 2.5(a)(3).

Under RAP 2.5(a)(3), generally the appellate court "may refuse to review any claim of error which was not raised in the trial court." However, there are exceptions. One exception is that "a party may raise ... manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3). This exception recognizes that "[c]onstitutional errors are treated specially because they often result in serious injustice...." State v. Lamar, 180 Wn.2d 576, 582, 327 P.3d 46, 49 (2014) (citation omitted).

Lewis raises a manifest constitutional error. BOA at 4-8. An error is "manifest" under RAP 2.5(a)(3), if it is a constitutional error that actually had practical and identifiable consequences on trial or sentencing.

Id. at 583. Lewis asserts it is a violation of substantive due process under both the state and federal constitutions for the Legislature to mandate that trial courts impose a DNA fee upon those not shown to have the ability -- or likely future ability -- to pay. Thus, Lewis raises a constitutional error.

Moreover, this error has a practical and identifiable consequence of Lewis' sentence. Indeed, the fee was mandatorily imposed upon him pursuant to the challenged statute. Contrary to Division One's holding, this case meets the review criteria under RAP 2.5(a)(3). This Court should grant review to clarify RAP 2.5(a)(3) should not be applied as a barrier to review of constitutional challenges to LFO statutes. RAP 13.4(b)(3).

3. REVIEW IS WARRANTED BECAUSE WHETHER RCW 43.43.7541 IS UNCONSTITUTIONAL IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THIS COURT.

Unless this Court issues a decision explicitly declaring RCW 43.43.7541 unconstitutional, trial courts will continue on a daily basis to mandatorily impose the DNA fee on destitute defendants, which serves only to exacerbate their indigence and the resulting costs to society. The public has a substantial interest in avoiding these costs, and therefore review is warranted under RAP 13.4(b)(4).

Both the Washington and United States Constitutions mandate that no person may be deprived of life, liberty, or property without due process

of law. U.S. Const. amends. V, XIV, § 1; Wash. Const. art. I, § 3. "The due process clause of the Fourteenth Amendment confers both procedural and substantive protections." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 216, 143 P.3d 571 (2006) (citation omitted).

"Substantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures." Id. at 218–19. It requires that "deprivations of life, liberty, or property be substantively reasonable;" in other words, such deprivations are constitutionally infirm if not "supported by some legitimate justification." Nielsen v. Washington State Dep't of Licensing, 177 Wn. App. 45, 52-53, 309 P.3d 1221(2013) (citing Russell W. Galloway, Jr., Basic Substantive Due Process Analysis, 26 U.S.F. L.Rev. 625, 625–26 (1992)).

The level of review applied to a substantive due process challenge depends on the nature of the right affected. Johnson v. Washington Dep't of Fish & Wildlife, 175 Wn. App. 765, 775, 305 P.3d 1130 (2013). Where a fundamental right is not at issue, as is the case here, the rational basis standard applies. Nielsen, 177 Wn. App. at 53-54. To survive rational basis scrutiny, the regulation must be rationally related to a legitimate state interest. Id.

Although the rational basis standard is a deferential one, it is not meaningless. Indeed, the United States Supreme Court has cautioned the rational basis test "is not a toothless one." Mathews v. DeCastro, 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). As this Court has explained, "the court's role is to assure that even under this deferential standard of review the challenged legislation is constitutional." DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (determining that statute at issue did not survive rational basis scrutiny); Nielsen, 177 Wn. App. at 61 (same). Statutes that do not rationally relate to a legitimate State interest must be struck down as unconstitutional under the substantive due process clause. Id.

RCW 43.43.7541 mandates all felony defendants pay the DNA fee. On its face, this mandate appears to rationally serve the State's interest in funding the collection, analysis, and retention of a convicted offender's DNA profile. RCW 43.43.752-7541. However, as applied to defendants who lack the likely ability to pay, the mandatory imposition of this fee does not rationally serve this interest or any legitimate state interest.

First, the imposing the fee on indigent persons does not rationally serve a legitimate financial interest. As this Court recently emphasized, "the state cannot collect money from defendants who cannot pay." Blazina, 182 Wn.2d at 837. When applied to such defendants, DNA fees

are utterly pointless. There is simply no reasonable way to effectively fund the DNA database by requiring imposition of fees on people who cannot pay them..[7]

Second, as this Court recognizes, the State's interest in deterring crime via enforced LFOs is not rationally served. Id. This interest is instead undermined because imposing LFOs on indigent persons inhibits re-entry and "increase[s] the chances of recidivism." Id. at 836-37.

Third, the State's interest in uniform sentencing is not rationally served by imposing mandatory LFOs on persons lacking the ability to pay. This is because defendants who cannot pay are subject to lengthier involvement with the justice system and often pay considerably more LFO debt than defendants who can pay off the fees quickly. Id. at 836-37.

Finally, the State's interest in enhancing offender accountability is not served. In order to foster accountability, a sentencing condition must

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[7] The government acknowledged the fiscal futility of imposing a mandatory DNA fee imposed upon indigent persons when in 2009, the Legislature made the DNA collection fee mandatory rather than discretionary, despite recognition it would do little to help fund the database:

> This bill will...require all felony offenders to pay the full amount of the $100 fee, no longer allowing the court to reduce the fee for findings of undue hardship. However, the collection rate is expected to be very low for these cases, so it is assumed there will be no significant change to revenue for felony matters.

Washington State Office of Financial Management, Multiple Agency Fiscal Note Summary, 2.S.H.B. 2713 (3/ 28/2008).

be something that is achievable. If it is not, the condition actually undermines efforts to hold a defendant accountable

There is no rational basis for imposing mandatory DNA-collection fees on defendants who cannot pay. As such, RCW 43.43.7541 violates substantive due process as applied to these individuals. This Court should grant review to decide this significant public issue and to put an end to the DNA fee being ordered on a daily basis without regard ability to pay. RAP 13.4(b)(4).

4. REVIEW IS WARRANTED BECAUSE THE DECISION IN LEWIS CONFLICTS WITH THIS COURT'S DECISIONS IN CURRY AND BLANK,

Division One held that substantive due process challenges like Lewis' are foreclosed by this Court's ruling in Curry. Appendix B at 9. However, when Curry and its progeny Blank are considered in light of the realities of Washington's LFO current collection scheme, they actually support Lewis' position that an ability-to-pay inquiry must occur at the time the DNA-collection fee is imposed. Division One's holding, however, results in just the opposite – rote imposition of mandatory LFOs without concern for ability to pay. This Court should grant review to clarify that Curry and Blank in the context of the modern day LFO collection scheme, require sentencing court to conduct an ability-to-pay inquiry before imposing any LFOs, including the DNA fee.

Currently, Washington's laws provide for an elaborate and aggressive collections process that includes the immediate assessment of interest, enforced collections methods through a variety of different entities, and the authorization of numerous additional sanctions and penalties. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al., Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay). Importantly, this cycle does not conform to the necessary constitutional safeguards established by this Court in Curry and Blank.

In Blank, this Court held that "monetary assessments which are mandatory may be imposed against defendants without a per se constitutional violation." Blank, 131 Wn.2d at 240 (emphasis added). It reasoned that fundamental fairness concerns only arise if the government seeks to enforce collection of the assessment and the defendant is unable, though no fault of his own, to comply. Id. at 241 (referring to Curry, 118 Wn.2d at 917-18).

This Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an

ability-to-pay inquiry at certain key times. It emphasized the following triggers for such an inquiry:

* "The relevant time [to conduct an ability-to-pay inquiry] is the point of collection and when sanctions are sought for nonpayment." Id. at 242.

* "[I]f the State seeks to impose some additional penalty for failure to pay...ability to pay must be considered at that point. Id.

* "[B]efore enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." Id.

Blank thus makes clear that in order for Washington's LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry (1) before "enforced" collection; (2) prior to any additional "penalty" for nonpayment; and (3) before any other "sanction" for nonpayment is imposed. Id. Unfortunately, neither the Legislature nor the trial courts are currently complying with Blank's directives.

Given Washington's current LFO collection scheme, the only way to effectively comply with Blank's due process requirements is for sentencing courts to conduct a meaningful ability-to-pay inquiry at the time LFOs are imposed. Although Blank says that prior case law "suggests" that such an inquiry is not required at sentencing, this Court simply was not confronted with the realities of the State's current collection scheme in that case.

Today, Washington's LFO system consists of a complicated patchwork of enforced collection procedures and a myriad of penalties and sanctions before which there is no inability-to-pay inquiry. The reality is that onerous and relentless enforced collection procedures, sanctions, and penalties may begin long before an indigent person is faced with imprisonment for failure to pay.

First, under RCW 10.82.090(1), LFOs accrue interest at a rate of 12 percent – an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This mechanism of enforcement has been identified as particularly invidious because it further burdens people who do not have the ability to pay with mounting debt and ensnarls them in the criminal justice system for what might be decades. See Blazina, 182 at 836 (citation omitted) (explaining that on average, a person who pays $25 per month toward their LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed.). Yet, there is no requirement for the courts to conduct an inquiry into ability to pay before interest is assessed upon unpaid mandatory LFOs.

Washington law also authorizes an annual fee of up to $100 to go to the court clerk for any unpaid account. RCW 36.18.016 (29). There is no ability to pay inquiry before this additional sanction is imposed.

Washington law also permits courts to use private collections agencies or county collection services to actively enforce collection of LFOs. RCW 19.16.500; 36.18.190. There is nothing in the statutes that prohibits the courts from using collections services immediately after sentencing. Any penalties or additional fees these agencies decide to assess are paid by the defendant. Id. In fact, the statutes authorizes that when accounts are assigned to such agencies, the court clerks may impose a transfer fee equal to "the full amount of the debt up to one hundred dollars per account." RCW 19.16.500. This means the DNA fee can be doubled by a clerk's decision to transfer a defendant's account to a collection service. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement to collect mandatory LFOs. Id.

Washington law also permits courts to order "payroll deduction." RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payments, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced

collection process with additional sanctions. Yet, there is no provision requiring an ability-to-pay inquiry occur before this collection mechanism is used.

Additionally, Washington law permits garnishment of wages and wage assignments to effectuate payment of outstanding LFOs. RCW 6.17.020; RCW 9.94A.7701; see also, Harris, supra, at 1778 (providing examples of wage garnishment as an enforcement mechanism used in Washington). As for garnishment, this enforced collection mechanism may begin immediately after the judgment is entered. RCW 6.17.020. Wage assignment is a collection mechanism that may be used within 30 days of a defendant's failure to pay the monthly sum ordered. RCW 9.94A.7701. Employers are permitted to charge an additional "processing fee" when this enforced collection method is used. RCW 9.94A.7705. Again, however, there are no provisions requiring courts to conduct an ability-to-pay inquiry prior to wage garnishment and assignments.

These examples show that under Washington's current LFO system, there are many instances where the Legislature provides for "enforced collection" and/or additional sanctions or penalties without first requiring an ability-to-pay inquiry. Some of these collection mechanisms may be used immediately after the judgment is entered. Hence, if the constitutional requirements set forth in Curry and Blank are to be met

under the current LFO collection scheme, trial courts must conduct an ability-to-pay inquiry when any LFOs are imposed.

When Curry and Blank are appropriately considered within the context of Washington's current LFO collection scheme, they actually support the proposition that an ability-to-pay inquiry must occur at the time the trial court imposes the DNA-collection fee. Unfortunately, just the opposite will happen if Division One's decision in Lewis' case stands. As such, this Court should grant review and determine whether the decision in Lewis conflicts with this Court's holding in Blank and Curry, when considered in the context of Washington's current LFO collections scheme. RAP 13.4(b)(1).

G. CONCLUSION

For the reasons stated, this Court should grant review.

Dated this 27th day of July, 2016.

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Appendix A

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

STATE OF WASHINGTON, Respondent, v. TOMMIE BERNARD LEWIS, Appellant.	)	No. 72637-4-I PUBLISHED OPINION FILED: June 27, 2016

SCHINDLER, J. — Tommie Bernard Lewis claims the mandatory deoxyribonucleic acid (DNA) fee statute violates equal protection. Lewis asserts there is no rational basis to require a repeat felony offender to pay the mandatory DNA fee. Lewis also claims the court abused its discretion in ordering him to submit another DNA sample. We hold the DNA fee statute that requires imposition of a fee for every felony sentence is rationally related to the legitimate legislative objective to fund the creation and ongoing operation and maintenance of the DNA database. We also conclude the court did not abuse its discretion by requiring Lewis to submit a DNA sample, and affirm the judgment and sentence.

FACTS

Tommie Bernard Lewis and Wendy Hynd were involved in a romantic relationship and have a child together. On April 4, 2014, Swedish Hospital Emergency

Room medical personnel called 911 to report the domestic violence assault of Hynd. The 911 report states:

> COMMON CHILD FATHER PUNCHED COMPL [HYND] IN HEAD AND STRANGLED HER, NO WEAPONS. UNK[NOWN] WHERE SUSP[ECT] IS NOW. COMP HAS BEEN TREATED AT EVERETT HOSP.

Seattle Police Department Officer Morgan Irwin responded to the 911 call and contacted Hynd. Hynd told Officer Irwin that Lewis hit her "multiple times in the face and the back of the head with his fists . . . until she 'passed out'." Hynd said Lewis then "came back [and] used his hands to strangle [her] until she 'passed out' again." Officer Irwin took photographs of the "visible bruising and swelling to [her] face and neck."

On April 9, Seattle Police Department Detective Daljit Gill called Hynd to obtain her consent to obtain medical records and take a written statement. Detective Gill asked Hynd if "what she had told Officer Irwin about the strangling and getting punched in the head was the truth." Hynd said yes. However, Hynd refused to sign a medial release form, give a written statement, or testify at trial. " 'I didn't [die] and I just want this all to go away so I can move on with my life and forget about what happened. I don't want to go to court and I don't want to give a statement'."

Approximately three and a half hours later, Hynd called Detective Gill "sobbing." During the recorded call, Hynd said that when Detective Gill "called her earlier," Lewis was present and "look[ed] at her like he was going to hit her again." Hynd told Detective Gill that she " 'said all that so [Lewis] wouldn't hit me.' "

On April 10, the State charged Lewis with assault in the second degree domestic violence and tampering with a witness. The State alleged that on April 4, 2014, Lewis assaulted Hynd by strangulation and attempted to induce her "to withhold any

testimony" and to "absent . . . herself" from the criminal investigation or any official proceeding.

Lewis pleaded not guilty at arraignment. The court entered a domestic violence no-contact order. On July 16, the State filed an amended information to add two counts of domestic violence misdemeanor violation of the no-contact order.

Lewis waived his right to a jury trial. The State called a number of witnesses at trial. Hynd did not testify. The court admitted into evidence a number of recorded telephone calls Lewis made from the jail.

The court found Lewis not guilty of assault in the second degree because the State did not prove strangulation beyond a reasonable doubt.

> In her report of what had brought her to the hospital, Ms. Hynd said that besides being punched, she had also been choked. The charge in this case of assault in the second degree is premised upon an allegation that she was assaulted by strangulation. The medical evidence, however, standing alone, is insufficient to establish the essential element that her neck was compressed with the result that her blood flow or breathing were obstructed or that it was compressed with such an intent.

The court found Lewis guilty beyond a reasonable doubt of witness tampering and two counts of misdemeanor violation of a court order. The court found Lewis "repeatedly demonstrated a very strong concern" about whether Hynd "was cooperating with the authorities and whether she intended to appear when the case came on for trial." The court pointed to the evidence that Lewis told his father, "If you talk to her, tell her the best thing is just don't pop up." The court found the recorded jail calls showed Lewis "made direct contact with Ms. Hynd" and "was knowingly and willfully violating the terms of the April 22 court order."

With an offender score of 5, the court imposed a 17-month sentence. "Appendix B" to the judgment and sentence lists prior felony convictions of violation of the Uniform Controlled Substances Act, chapter 69.50 RCW, in 1995, 2000, and 2004.

The court ordered Lewis to provide a biological sample for DNA identification analysis and DNA testing. The court ordered Lewis to pay the mandatory victim penalty assessment of $500 and the mandatory DNA fee of $100. Lewis did not object. The court waived imposition of all discretionary fees, costs, and interest on the mandatory obligation of $600.

ANALYSIS

For the first time on appeal, Lewis claims that as applied to an indigent defendant, imposition of the mandatory DNA fee under RCW 43.43.7541 violates substantive due process. Lewis also claims that as applied to a repeat felony offender, the DNA fee statute violates equal protection.[1] The State contends the substantive due process and equal protection constitutional challenges to the DNA fee statute are not ripe for review or manifest constitutional error under RAP 2.5(a)(3).

In State v. Shelton, 72848-2-I, slip op. at 1 (Wash. Ct. App. June 20, 2016), we considered the same as-applied substantive due process challenge to the DNA fee statute. We held that until the State attempts to enforce collection of the DNA fee or impose sanctions for failure to pay, the claim is not ripe for judicial review and is not an error of constitutional magnitude subject to review under RAP 2.5(a)(3). Shelton, slip op. at 11-12.

[1] The legislature amended the DNA fee statute, RCW 43.43.7541, in 2015 to add the language, "This fee shall not be imposed on juvenile offenders if the state has previously collected the juvenile offender's DNA as a result of a prior conviction." Laws of 2015, ch. 265, § 31. Because the remainder of the statute did not change and the amendment does not affect our analysis, unless otherwise noted, we refer to the current version of RCW 43.43.7541 throughout the opinion.

We adhere to our decision in Shelton as to Lewis's as-applied substantive due process challenge to the DNA fee statute. But we reach a different conclusion on his equal protection challenge to the statute. Because the equal protection challenge to the DNA fee statute is ripe for review and meets the requirements of RAP 2.5(a)(3), we reach the merits of that claim. State v. Cates, 183 Wn.2d 531, 538-39, 354 P.3d 832 (2015); State v. Lamar, 180 Wn.2d 576, 582-83, 327 P.3d 46 (2014).[2]

The Fourteenth Amendment to the United States Constitution and article I, section 12 of the Washington Constitution guarantee that "persons similarly situated with respect to the legitimate purpose of the law must receive like treatment." State v. Manussier, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992); State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987). Our Supreme Court has held the right to equal protection guaranteed under the Fourteenth Amendment and by the privileges and immunities clause of the Washington Constitution are "substantially identical and considered by this court as one issue." State v. Smith, 117 Wn.2d 263, 281, 814 P.2d 652 (1991).

In analyzing an equal protection claim, we "must first determine the standard of review against which to test the challenged legislation." Seeley v. State, 132 Wn.2d 776, 791, 940 P.2d 604 (1997). Lewis correctly concedes the rational relationship test applies to his challenge to the mandatory DNA fee statute.

Under the rational basis test, the challenged law must rationally relate to a legitimate state interest. State v. Shawn P., 122 Wn.2d 553, 561, 859 P.2d 1220

[2] We reject the State's argument that Lewis does not have standing. A criminal defendant "always has standing to challenge his or her sentence on grounds of illegality." State v. Bahl, 164 Wn.2d 739, 750, 193 P.3d 678 (2008).

(1993). The rational basis test is "highly deferential to the legislature." In re Det. of Thorell, 149 Wn.2d 724, 749, 72 P.3d 708 (2003). The rational basis test requires only that the means employed by the statute be rationally related to legitimate state goals, and not that the means be the best way of achieving that goal. Shawn P., 122 Wn.2d at 563. We "assume the existence of any necessary state of facts [we] can reasonably conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest." Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 222, 143 P.3d 571 (2006).

A statute is presumed constitutional. Shawn P., 122 Wn.2d at 561. The party challenging the statute must show the legislative classification is "purely arbitrary." Thorell, 149 Wn.2d at 749. We will uphold the legislation unless the classification " 'rests on grounds wholly irrelevant to the achievement of a legitimate state objective.' " State v. Heiskell, 129 Wn.2d 113, 123-24, 916 P.2d 366 (1996)[3] (quoting Westerman v. Cary, 125 Wn.2d 277, 294-95, 892 P.2d 1067 (1994)); Seeley, 132 Wn.2d at 795. The party challenging the legislation " 'must show, beyond a reasonable doubt, that no state of facts exists or can be conceived sufficient to justify the challenged classification.' " Seeley, 132 Wn.2d at 795-96 (quoting State v. Smith, 93 Wn.2d 329, 337, 610 P.2d 869 (1980)).

We review questions of statutory interpretation de novo. State v. Conover, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). When interpreting a statute, our fundamental objective is to determine and give effect to the intent of the legislature. State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012). To determine the plain meaning of

[3] Internal quotation marks omitted.

a statute, we look to the text as well as " 'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.' " State v. Bruch, 182 Wn.2d 854, 860, 346 P.3d 724 (2015) (quoting State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). Statutes must be read together to achieve a harmonious statutory scheme that maintains the integrity of the respective statutes. State v. Jones, 172 Wn.2d 236, 243, 257 P.3d 616 (2011).

Lewis contends the DNA fee statute violates equal protection as applied to a repeat felony offender. On its face, the statute does not draw such a distinction. But Lewis asserts that after an offender's DNA is "collected, tested, and entered into the database," imposition of another DNA fee on a repeat felony offender is not rationally related to the legislative purpose of the statute. The plain and unambiguous language of the DNA fee statute does not support the premise that the purpose of the fee is only for collection, analysis, and testing of an offender's DNA.

The legislature has repeatedly found the DNA database is an important tool for the investigation and prosecution of criminal cases, the exclusion of individuals subject to investigation or prosecution, the detection of recidivist acts, and the identification and location of missing and unidentified persons. Shelton, slip op. at 5.

In 2002, the legislature amended the DNA identification and database statute to require every person convicted of a felony offense to submit a DNA sample for DNA identification analysis. LAWS OF 2002, ch. 289, § 2. RCW 43.43.754(1) states, "A biological sample must be collected for purposes of DNA identification analysis from: (a) Every adult or juvenile individual convicted of a felony."

The legislature also adopted a new section that required the court to impose a $100 DNA fee "for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship." LAWS OF 2002, ch. 289, § 4.[4] The new section stated:

> Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after the effective date of this act, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit fees collected to the state treasurer for deposit in the state DNA data base account created under section 5 of this act.

LAWS OF 2002, ch. 289, § 4.

In 2008, the legislature amended the DNA fee statute to delete the language "for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender." LAWS OF 2008, ch. 97, § 3. As amended, the plain and unambiguous language of former RCW 43.43.7541 (2008) states, "Every sentence imposed under chapter 9.94A RCW, for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars."[5] RCW 43.43.7541 requires the clerk of the court to transmit 80 percent of the fee "to the state treasurer for deposit in the state DNA database account" and 20 percent "to the agency

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[4] The imposition and recovery of court costs and fees was unknown at common law and is therefore entirely statutory. State v. Smits, 152 Wn. App. 514, 519, 216 P.3d 1097 (2009); State v. Cawyer, 182 Wn. App. 610, 619, 330 P.3d 219 (2014).

[5] In 2011, the legislature amended RCW 43.43.7541 to state, in pertinent part, that the DNA fee is "payable by the offender in the same manner as other assessments imposed." LAWS OF 2011, ch. 125, § 1.

responsible for collection of a biological sample." Former RCW 43.43.7541 (2008) states:

> **DNA identification system—Collection of biological samples—Fee.** Every sentence imposed under chapter 9.94A RCW, for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

The DNA database account statute, RCW 43.43.7532, states expenditures from the account "may be used only for creation, operation, and maintenance of the DNA database under RCW 43.43.754."[6] RCW 43.43.7532 states, in pertinent part:

> The state DNA database account is created in the custody of the state treasurer. All receipts under RCW 43.43.7541 must be deposited into the account. Expenditures from the account may be used only for creation, operation, and maintenance of the DNA database under RCW 43.43.754. Only the chief of the Washington state patrol or the chief's designee may authorize expenditures from the account.

The plain and unambiguous language of the DNA fee statute establishes that the primary purpose of the DNA fee is to fund not only the creation of the DNA database, but the ongoing operation and maintenance of the state DNA database. Accord State v. Thornton, 188 Wn. App. 371, 374-75, 353 P.3d 642 (2015) (RCW 43.43.7541 "furthers the purpose of funding for the state DNA database and agencies that collect samples"); State v. Brewster, 152 Wn. App. 856, 860, 218 P.3d 249 (2009) ("The DNA collection fee serves to fund the collection of samples and the maintenance and operation of DNA databases.").

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[6] Emphasis added.

We hold that because there is a rational basis to impose the fee for every felony sentence for the cost of collection as well as to fund the ongoing cost to operate and maintain the DNA database, the DNA fee statute does not violate equal protection. See State v. Johnson, No. 32834-1-III (consol. with No. 32846-5-III), 2016 WL 3124893, at *2 (Wash. Ct. App. June 2, 2016) (rejecting equal protection claim that the mandatory DNA fee statute, RCW 43.43.7541, results in a disparate impact on repeat offenders); State v. Olivas, 122 Wn.2d 73, 94-95, 856 P.2d 1076 (1993) (holding there is a rational relationship between the interest of the state under RCW 43.43.754 to investigate and prosecute sex offenses and violent offenses and "the application of the statute to this class of persons").

Order to Submit DNA Sample

Lewis also claims the trial court erred by ordering him to submit another DNA sample. RCW 43.43.7541 requires every sentence imposed for a crime specified in RCW 43.43.754 include a $100 DNA fee. However, the court has the discretion not to require a felony offender to submit a subsequent DNA sample. RCW 43.43.754(2) provides, "If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, a subsequent submission is not required to be submitted."

The only evidence Lewis cites to support his claim that he has already submitted a DNA sample is Appendix B to the judgment and sentence that lists his criminal history from 1995 until 2004 for violation of the Uniform Controlled Substances Act. Nothing in the record shows that Lewis actually submitted a DNA sample or that the Washington State Patrol Crime Laboratory already has a DNA sample for a qualifying offense.

Because Lewis makes no showing that RCW 43.43.754(2) applies, the record does not support his argument that the court erred by ordering him to submit a DNA sample for testing. See Thornton, 188 Wn. App. at 374.

We affirm the judgment and sentence.

Schindler, J.

WE CONCUR:

Leach, J.

Dwyer, J.

Appendix B

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

STATE OF WASHINGTON, Respondent,	)	No. 72848-2-I
v.	)	PUBLISHED OPINION
MICHAEL SHELTON, Appellant.	)	FILED: June 20, 2016

SCHINDLER, J. — For the first time on appeal, Michael Shelton contends that as applied to an indigent defendant, the statute that requires imposition of a mandatory deoxyribonucleic acid (DNA) fee violates substantive due process. Shelton also challenges the requirement to obtain a mental health evaluation. Because the substantive due process challenge to the DNA fee statute is not ripe for review and is not manifest constitutional error under RAP 2.5(a)(3), we affirm imposition of the DNA fee but remand to determine whether the statutory requirements to order a mental health evaluation are met.

On October 23, 2014, the State filed an amended information charging Shelton with assault in the second degree while armed with a deadly weapon. The State alleged Shelton used a bottle to assault the victim, inflicting substantial bodily harm. A jury

statute in the specific context" is unconstitutional. City of Redmond v. Moore, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004).

The United States Constitution guarantees federal and state government will not deprive an individual of "life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV, § 1. Article I, section 3 of the Washington Constitution guarantees "[n]o person shall be deprived of life, liberty, or property, without due process of law." In analyzing a substantive due process challenge, our Supreme Court has held the Washington due process clause does not afford broader protection than the Fourteenth Amendment. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009); Amunrud, 158 Wn.2d at 216 n.2; In re Pers. Restraint of Dyer, 143 Wn.2d 384, 393-94, 20 P.3d 907 (2001).

Substantive due process protects against arbitrary and capricious government action. Amunrud, 158 Wn.2d at 218-19. State interference with a fundamental right is subject to strict scrutiny. Amunrud, 158 Wn.2d at 220. Shelton concedes that because his challenge to the DNA statute does not affect a fundamental right, a rational basis standard of review applies. Under that deferential standard, "the challenged law must be rationally related to a legitimate state interest." Amunrud, 158 Wn.2d at 222.

DNA Fee Statute

In 1989, the legislature enacted a statute to use DNA identification as a tool for the investigation and prosecution of sex offenses and violent felony crimes. LAWS OF 1989, ch. 350. The legislature found the "accuracy of [DNA] identification . . . is superior to that of any presently existing technique" and recognized the "importance of this scientific breakthrough in providing a reliable and accurate tool for the investigation and prosecution of sex offenses as defined in RCW 9.94A.030(26) and violent offenses as

defined in RCW 9.94A.030(29)." LAWS OF 1989, ch. 350, § 1. The statute required every person convicted of a felony sex offense or violent offense to provide a blood sample for DNA "identification analysis and prosecution of a sex offense or a violent offense." LAWS OF 1989, ch. 350, § 4.

In 2002, the legislature amended the DNA statute to establish a DNA database that would contain DNA samples for all convicted felony offenders. LAWS OF 2002, ch. 289, §§ 1, 2. In addition to the importance of using the DNA database for the investigation and prosecution of criminal cases, the legislature found the DNA database is also an important tool for the exclusion of individuals subject to investigation or prosecution, the detection of recidivist acts, and the identification and location of missing and unidentified persons. LAWS OF 2002, ch. 289, § 1.

RCW 43.43.753 states, in pertinent part:

> **Findings—DNA identification system—DNA database—DNA data bank.** The legislature finds that recent developments in molecular biology and genetics have important applications for forensic science. It has been scientifically established that there is a unique pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of the human body. The process for identifying this pattern is called "DNA identification."
>
> The legislature further finds that DNA databases are important tools in criminal investigations, in the exclusion of individuals who are the subject of investigations or prosecutions, and in detecting recidivist acts. It is the policy of this state to assist federal, state, and local criminal justice and law enforcement agencies in both the identification and detection of individuals in criminal investigations and the identification and location of missing and unidentified persons. Therefore, it is in the best interest of the state to establish a DNA database and DNA data bank containing DNA samples submitted by persons convicted of felony offenses and other crimes as specified in RCW 43.43.754. DNA samples necessary for the identification of missing persons and unidentified human remains shall also be included in the DNA database.

The legislature required every person convicted of a felony offense to submit a DNA sample for DNA identification analysis. LAWS OF 2002, ch. 289, § 2. Former RCW 43.43.754(1) (2002) states, in pertinent part:

> Every adult or juvenile individual convicted of a felony, stalking under RCW 9A.46.110, harassment under RCW 9A.46.020, communicating with a minor for immoral purposes under RCW 9.68A.090, or adjudicated guilty of an equivalent juvenile offense must have a biological sample collected for purposes of DNA identification analysis.

The legislature adopted a new section that required the court to impose a $100 DNA fee for collection of a DNA sample "unless the court finds that imposing the fee would result in undue hardship on the offender." LAWS OF 2002, ch. 289, § 4.[2] The new section states:

> NEW SECTION. **Sec. 4.** A new section is added to chapter 43.43 RCW to read as follows:
>
> Every sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after the effective date of this act, must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit fees collected to the state treasurer for deposit in the state DNA data base account created under section 5 of this act.

LAWS OF 2002, ch. 289.

In 2008, the legislature amended the DNA fee statute to make the DNA fee mandatory without regard to hardship. LAWS OF 2008, ch. 97, § 3. The legislature deleted the language "for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on

[2] The imposition and recovery of court costs and fees was unknown at common law and is therefore entirely statutory. State v. Smits, 152 Wn. App. 514, 519, 216 P.3d 1097 (2009); State v. Cawyer, 182 Wn. App. 610, 619, 330 P.3d 219 (2014).

the offender." LAWS OF 2008, ch. 97, § 3. As amended, the plain and unambiguous language of RCW 43.43.7541 states, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." Former RCW 43.43.7541 (2008) states:

> **DNA identification system—Collection of biological samples—Fee.** Every sentence imposed under chapter 9.94A RCW, for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030, payable by the offender after payment of all other legal financial obligations included in the sentence has been completed. The clerk of the court shall transmit eighty percent of the fee collected to the state treasurer for deposit in the state DNA database account created under RCW 43.43.7532, and shall transmit twenty percent of the fee collected to the agency responsible for collection of a biological sample from the offender as required under RCW 43.43.754.

The statute states that 80 percent of the fee is dedicated to the DNA database account under RCW 43.43.7532. RCW 43.43.7541. RCW 43.43.7532 establishes a state DNA database account to use "only for creation, operation, and maintenance of the DNA database under RCW 43.43.754."[3]

Ripeness and RAP 2.5(a)(3)

For the first time on appeal, Shelton contends there is no rational basis to require imposition of the mandatory DNA fee at sentencing on an indigent defendant. Shelton concedes the mandatory DNA fee serves the legitimate purpose of funding the DNA database. Shelton claims that absent a determination at sentencing that he has "the ability or likely future ability to pay," the DNA fee statute violates substantive due process. The State asserts the as-applied substantive due process challenge to the DNA fee statute is not ripe for review and is not a manifest constitutional error subject to review

[3] In 2011, the legislature amended RCW 43.43.7541 to add that for "all other sentences," the DNA fee is "payable by the offender in the same manner as other assessments imposed." LAWS OF 2011, ch. 125, § 1.

under RAP 2.5(a)(3). We agree with the State.

A preenforcement constitutional challenge to the mandatory DNA fee statute is ripe for review on the merits if the issue raised is primarily legal, does not require further factual development, and the challenged action is final. State v. Cates, 183 Wn.2d 531, 534, 354 P.3d 832 (2015); State v. Sanchez Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010). The court must also consider the risk of hardship to the parties "if we decline to address the merits of his challenge at this time." Cates, 183 Wn.2d at 534-35.

The due process clause protects an indigent offender from incarceration based solely on inability to pay court ordered fees. U.S. CONST. amends. V, XIV, § 1; Bearden v. Georgia, 461 U.S. 660, 664, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); State v. Nason, 168 Wn.2d 936, 945, 233 P.3d 848 (2010).

In Fuller v. Oregon, 417 U.S. 40, 44-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), the Supreme Court upheld an Oregon statute that included procedural and substantive safeguards designed to protect the rights of indigent defendants while authorizing reimbursement from offenders who had the ability to repay court costs.

In Bearden, the Court held that revocation of probation based on the failure of an indigent offender to pay fines violated due process. Bearden, 461 U.S. at 672-73. The Court held the "sentencing court must inquire into the reasons for the failure to pay." Bearden, 461 U.S. at 672. The sentencing court cannot deprive an offender "of his . . . freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." Bearden, 461 U.S. at 672-73. However, the Court held that if the offender "willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection." Bearden,

461 U.S. at 668.

In State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992), our Supreme Court addressed a constitutional challenge to the imposition of the mandatory victim penalty assessment. The court rejected the argument that "the statute could operate to imprison [defendants] unconstitutionally in the future if they are unable to pay the penalty." Curry, 118 Wn.2d at 917-18. Even though the statute contained no provision to waive the victim penalty assessment for an indigent defendant, the court held sufficient safeguards prevented incarceration for failure to pay the mandatory victim penalty assessment because the statute required a show cause hearing, the court had the discretion to treat a nonwillful violation more leniently, and incarceration would result only if the failure to pay was willful. Curry, 118 Wn.2d at 917-18.[4]

The court concluded constitutional principles are implicated only when the State seeks to enforce collection of the mandatory assessment and noted "imposition of the penalty assessment, standing alone, is not enough to raise constitutional concerns." Curry, 118 Wn.2d at 917 & n.3.

> "It is at the point of enforced collection . . . , where an indigent may be faced with the alternatives of payment or imprisonment, that he may assert a constitutional objection on the ground of his indigency."

Curry, 118 Wn.2d at 917[5] (quoting State v. Curry, 62 Wn. App. 676, 681, 814 P.2d 1252

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[4] If an offender violates a condition of the judgment and sentence, the court may issue a summons for a show cause hearing. See RCW 9.94B.040(3)(b). If the court finds the violation is not willful, the court may modify the order. RCW 9.94B.040(3)(d); see also RCW 9.94A.6333. RCW 9.94A.6333 provides, in pertinent part:

> (1) If an offender violates any condition or requirement of a sentence, and the offender is not being supervised by the department, the court may modify its order of judgment and sentence and impose further punishment in accordance with this section.
>
> . . . .
>
> [(2)](d) If the court finds that the violation was not willful, the court may modify its previous order regarding payment of legal financial obligations.

[5] Internal quotation marks omitted, alteration in original.

(1991)).

Here, Shelton's as-applied substantive due process challenge is primarily legal and the challenged action is final. See Cates, 183 Wn.2d at 534. But his constitutional challenge requires further factual development, and the potential risk of hardship does not justify review before the relevant facts are fully developed. See Cates, 183 Wn.2d at 535.

A constitutional challenge to the DNA fee statute is not ripe for review until the State attempts to enforce collection of the fee. "[T]he relevant question is whether the defendant is indigent at the time the State attempts to sanction the defendant for failure to pay." Sanchez Valencia, 169 Wn.2d at 789;[6] see also State v. Lundy, 176 Wn. App. 96, 108, 308 P.3d 755 (2013); State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013). Because the State has not sought to enforce collection of the DNA fee or impose sanctions for failure to pay the DNA fee, Shelton's as-applied substantive due process challenge to the DNA fee statute is not ripe for review. See Lundy, 176 Wn. App. at 108 (constitutional challenge to imposition of mandatory victim penalty assessment and DNA fee not ripe for review "until the State attempts to curtail a defendant's liberty interest by enforcing them"); see also State v. Ziegenfuss, 118 Wn. App. 110, 112, 74 P.3d 1205 (2003) (Because the defendant has not yet failed to pay nor been incarcerated or otherwise sanctioned for failure to pay, "her due process rights have not been violated and her argument is not yet ripe for review.").

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), does not support Shelton's argument that his constitutional challenge to the DNA fee statute is ripe for review. The court in Blazina did not address imposition of mandatory fees. The court held RCW

[6] Emphasis omitted.

10.01.160(3) requires the sentencing court to make an individualized inquiry into the defendant's ability to pay discretionary legal financial obligations. Blazina, 182 Wn.2d at 837-38. RCW 10.01.160(3) provides:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

But unlike discretionary legal financial obligations, the legislature unequivocally requires imposition of the mandatory DNA fee and the mandatory victim penalty assessment at sentencing without regard to finding the ability to pay.[7]

> [T]he legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing [mandatory legal financial] obligations. For victim restitution, victim assessments, [and] DNA fees, . . . the legislature has directed expressly that a defendant's ability to pay should not be taken into account. See, e.g., State v. Kuster, 175 Wn. App. 420, 306 P.3d 1022 (2013).

Lundy, 176 Wn. App. at 102; see also State v. Thompson, 153 Wn. App. 325, 338, 223 P.3d 1165 (2009) (DNA fee required irrespective of defendant's ability to pay); Kuster, 175 Wn. App. at 425 (court need not consider "the offender's past, present, or future ability to pay" mandatory victim penalty assessment and DNA fee).

We hold that because imposition of the mandatory DNA fee does not implicate constitutional principles until the State seeks to enforce collection of the DNA fee or impose a sanction for failure to pay, the as-applied substantive due process challenge to

[7] The judgment and sentence clearly reflects the distinction between mandatory and discretionary financial obligations.

RCW 43.43.7541 is not ripe for review.[8]

The as-applied substantive due process challenge to the mandatory DNA fee statute is also not a manifest error subject to review under RAP 2.5(a)(3).[9] To review the merits of the constitutional challenge to the DNA fee statute for the first time on appeal, Shelton must show the error is manifest and implicates a constitutional interest. RAP 2.5(a)(3); State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Manifest error requires " 'a showing of actual prejudice.' " State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice means "the claimed error had practical and identifiable consequences." State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014); O'Hara, 167 Wn.2d at 99. Whether the error is identifiable and the defendant can raise a claim for the first time on appeal turns on whether the record is sufficient to determine the merits of the claim. O'Hara, 167 Wn.2d at 99; Kirkman, 159 Wn.2d at 935. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Until the State seeks to enforce collection of the DNA fee or impose a sanction for failure to pay, Shelton cannot show his as-applied substantive due process claim is

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[8] The State also asserts Shelton does not have standing. A criminal defendant "always has standing to challenge his or her sentence on grounds of illegality." State v. Bahl, 164 Wn.2d 739, 750, 193 P.3d 678 (2008). However, a defendant does not have standing to challenge a statute on constitutional grounds unless the defendant can show harm. Cates, 183 Wn.2d at 540. Because Shelton cannot show harm until the State seeks to enforce collection of the DNA fee, he does not have standing.

[9] RAP 2.5(a)(3) provides, in pertinent part:

> **Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . manifest error affecting a constitutional right.

manifest constitutional error under RAP 2.5(a)(3). We also note the record contains no information about future ability to pay the mandatory $100 DNA fee. See State v. Stoddard, 192 Wn. App. 222, 228-29, 366 P.3d 474 (2016).

Mental Health Evaluation

Shelton contends the court erred in ordering him to obtain a mental health evaluation as a condition of community custody.

The plain and unambiguous language of former RCW 9.94B.080 (2008)[10] states the court may order a mental health evaluation only if the court finds Shelton "is a mentally ill person as defined in RCW 71.24.025" and mental illness likely "influenced the offense." Former RCW 9.94B.080 states:

> The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.[11]

Although the court found "mental health issues contributed to this offense" and "[t]reatment is reasonably related to the circumstances of this crime and reasonably necessary to benefit the defendant and the community," the court did not find Shelton "is a mentally ill person as defined in RCW 71.24.025." Former RCW 9.94B.080. The State concedes the court did not comply with the statutory requirements to order a mental

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[10] LAWS OF 2008, ch. 231, § 53.

[11] (Emphasis added.) In 2015, the legislature amended RCW 9.94B.080 to state consideration of a presentence report is no longer mandatory. LAWS OF 2015, ch. 80, § 1 ("An order requiring mental status evaluation or treatment may be based on a presentence report.").

health evaluation. We accept the concession as well taken, and remand to determine whether to order a mental health evaluation according to the requirements set forth in former RCW 9.94B.080.

Statement of Additional Grounds

Shelton makes a number of arguments in the statement of additional grounds including whether the State violated his right to a fair trial by failing to timely provide complete discovery. At our request, the State filed a response to the statement of additional grounds. The State concedes an inadvertent discovery violation occurred in failing to deliver certain discovery to Shelton until the day before trial but argues Shelton cannot show prejudice. We agree. A continuance is an appropriate remedy for noncompliance with the discovery rule. State v. Krenik, 156 Wn. App. 314, 321, 231 P.3d 252 (2010). Where the defense does not move for a continuance, the defendant cannot establish actual prejudice. Krenik, 156 Wn. App. at 321. Here, the court agreed to continue the trial but Shelton refused to do so. We reject the remainder of the arguments in the statement of additional grounds as without merit.

We affirm imposition of the mandatory DNA fee but remand to determine whether the statutory requirements to order a mental health evaluation are met.

Schindler, J.

WE CONCUR:

Leach, J.

Dwyer, J.

NIELSEN, BROMAN & KOCH, PLLC

July 27, 2016 - 4:55 PM

Transmittal Letter

Document Uploaded: 726374-Petition for Review.pdf

Case Name: State v. Tommie Lewis
Court of Appeals Case Number: 72637-4

Party Respresented: Appellant
Is this a Personal Restraint Petition? ○ Yes ◉ No

Trial Court County: King - Superior Court # 14-1-02341-0

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ◉ Petition for Review (PRV)
- ○ Other: _____

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Attached is a copy of the Transmittal Letter and document named 726374-Petition for Review.pdf that Jamilah A Baker from Nielsen, Broman & Koch, PLLC electronically filed with the Court of Appeals, Division One in case number 72637-4.

The Court of Appeals, Division I will treat the attached transmittal letter as proof of service on you.