NO. 72965-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS OLSON,

Petitioner.

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

The Honorable Gene Middaugh, Judge

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# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Thomas Lee Olson, was the appellant below.

B. COURT OF APPEALS DECISION

Olson requests review of the decision issued by Division One of the Court of Appeal in State v. Olson entered on August 15, 2016.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it held a defendant must produce affirmative evidence of improper motivation in order to establish the government acted in bad faith when it destroyed potentially useful evidence after it received a timely discovery request from the defense?

2. Did the Court of Appeals err when it concluded petitioner's claim that RCW 43.43.7541's mandatory DNA fee and RCW 7.68.035's mandatory Victim Penalty Assessment (VPA) violate substantive due process was not ripe for review?

3. Do RCW 43.43.7541 and RCW 7.68.035 violate substantive due process when applied to defendants who have not been found to have the likely ability to pay their mandatory fees?

D. REASONS TO ACCEPT REVIEW

Regarding the destruction of evidence issue, review is warranted under 13.4(b)(1) and (3). Due process of law under both the Fourteenth

[1] This decision is attached as Appendix A.

Amendment and article 1, section 3 of the Washington State Constitution provide that criminal defendants be given a meaningful opportunity to present a complete defense. As part of this, the government has a duty to preserve evidence for use by the defense. State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517, 521 (1994).

In Wittenbarger, this Court recognized that where the government destroys evidence that is potentially useful to the defense and there is a showing of bad faith, dismissal is required. The question raised herein is whether the defendant must produce "affirmative evidence" of improper motives when demonstrating bad faith or whether it is sufficient that he show circumstances that strongly support an inference of bad faith. Division One reads Wittenbarger as requiring the former. As explained below, however, it appears that Division One has misread Wittenbarger's holding as adopting a higher standard than this Court actually requires. The decision in Olson's case therefore conflicts with this Court's previous decision regarding a significant constitutional issue.

Regarding the LFO issue, review is warranted under RAP 13.4(b)(1), (2), and (4). First, Division One's conclusion that Olson's 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) (clarifying 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). Second, Division One's decision in Olson 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 Olson was ripe for review. Finally, Olson 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").

E. RELEVANT FACTS

On January 22, 2014, Bellevue Police Department (BPD) received several 911 calls from multiple eyewitnesses regarding a traffic incident ending in a crash. 2RP 67. When police arrived, one officer saw Olson in the driver seat of the parked truck with the door open and another saw him standing outside the truck. 2RP 68; 6RP 69. Olson appeared confused and dazed, and police escorted him out of traffic. 2RP 71, 97. Officers observed a needle in Olson's pocket. 2RP 98. He was arrested. 2RP 75.

Olson admitted to smoking heroin, but told police he was not driving. 6RP 43-44, 46, 81. Officers did not see anyone else get out of the truck. 6RP 79, 8. However, Olson explained he was in the passenger seat while a friend was driving. 6RP 44. They were following another friend who was traveling in front of them. 6RP 44. When the front car

suddenly swerved, the driver of the vehicle Olson was in reacted, lost control, and crashed. 6RP 44. At the bottom of the hill, the first car stopped. 6RP 44. The driver of the truck got out, jumped in the first car, and they left the scene. 6RP 44. Olson said he was just waiting for his friend to return. 6RP 44.

On January 29, 2014, the King County prosecutor charged Olson with one count of felony driving under the influence and one count of driving with a suspended license.[2] CP 1-7.

On January 30, 2014, Olson's counsel filed a discovery request that specifically asked for all "audio recordings... that relate to the circumstances surrounding the arrest." CP 277-282. This included a request for 911 recordings. CP 48, 277-282. The State never obtained these recordings and the tapes were destroyed after 90 days as per standard protocol of the North East King County Regional Public Safety Communication Agency (NORCOM). 2RP 23, 26; CP 48.

Olson moved to have the case dismissed, arguing that he was prejudiced by government mismanagement of his case and denied due process. Defense counsel explained he had made a timely discovery request for the 911 recordings because they contained spontaneous witness statements, which were potentially useful for impeachment purposes.

[2] He was later charged with possession of a controlled substance. CP 18-19.

Moreover, the CAD report indicated at least one caller had observed multiple cars involved. As defense Counsel explained, this was potentially significant defense evidence because it could support Olson's statement that another car was involved and that the driver left in that car. CP 47-54; 2RP 23-29, 32-33.

The State responded by arguing there was no bad faith on its part because: the State never had the 911 recordings in its possession; the recordings were merely destroyed per standard protocol; they were not needed by the defense; and the CAD reports were good enough for Olson to make his point. 2RP 31-32.

The trial court denied Olson's motion to dismiss, finding the 911 calls were potentially useful for impeachment purposes but were not destroyed in bad faith. 2RP 34. A jury found Olson guilty as charged.[3] CP 193-96.

On appeal, Olson argued he was denied due process when the government destroyed the 911 tapes after having received a timely discovery request from Olson. Specifically, he argued that the case law does not require that he directly prove that the government's destruction was improperly motivated. Instead, bad faith could be inferred from a

[3] Olson was sentenced to 41 months incarceration and 12 months community custody. CP 261. The trial court also imposed a $100 DNA-collection fee and a $500 VPA. CP 260.

showing (1) that the government knew of both the defense's discovery request and its own purge policy, and (2) it let its purge policy run so as to cause the evidence to be destroyed without any reasonable explanation for doing so. Brief of Appellant (BOA) at 7-11; Reply Brief of Appellant (RBOA) at 1-5.

In response, the State offered no meaningful explanation for its failure to comply with discovery requests. Appendix A at 9. It claimed that unless Olson could produce evidence showing an improper motive, the most that the appellate court could find was mere negligence on the State's part. Brief or Respondent (BOR at 11-12). It also argued the error was harmless. BOR 13-14.

The Court of Appeals concluded that this Court's decision in Wittenbarger stands for the proposition that a defendant must produce evidence affirmatively showing that the destruction of evidence was improperly motivated. Appendix A at 8. It held that "While the facts may invite an inference of bad faith, they do not constitute affirmative evidence of improper motivation required by our case law." Appendix A at 9.

F. ARGUMENT IN SUPPORT OF REVIEW

1. REVIEW SHOULD BE GRANTED TO CLARIFY THE PROPER STANDARD FOR DETERMINING WHETHER THE GOVERNMENT HAS ACTED IN BAD FAITH WHEN IT DESTROYS POTENTIALLY USEFUL EVIDENCE.

The issue here is whether a defendant who asserts his right to due process was violated by the government's destruction of potentially useful evidence has to produce "affirmative evidence" that the government was improperly motivated, or whether it is sufficient to show circumstances from which bad faith may be inferred.

"Under both the state and federal constitutions, due process in criminal prosecutions requires fundamental fairness and a meaningful opportunity to present a complete defense." State v. Burden, 104 Wn. App. 507, 511, 17 P.3d 1211, 1214 (2001). Due process imposes certain duties on law enforcement and investigatory agencies to insure that every criminal trial is a "'search for truth, not an adversary game'". State v. Wright, 87 Wn.2d 783, 786, 557 P.2d 1, 4 (1976) (quoting United States v. Perry, 471 F.2d 1057, 1063 (D.C.Cir.1972). This includes a responsibility to preserve material evidence. CrR 4.7.

Where the government fails to preserve evidence that has an indeterminate exculpatory value but is known to be "potentially useful" to a defendant, failure to preserve the evidence constitutes a due process

violation if the defendant demonstrates bad faith on the part of the government. Burden, 104 Wn. App. at 512. A showing of bad faith turns on whether the government knew of the potential value of the evidence when it failed to preserve it and thus allowed its destruction. State v. Groth, 163 Wn. App. 548, 558, 261 P.3d 183(2011) (citing Arizona v. Youngblood, 488 U.S. 51, 56, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)).

The "improper motivation" standard at issue stems from this Court's decision in Wittenbarger. In that case, the defendants challenged a State policy allowing for the destruction of inspection, repair, and maintenance records from DataMaster breath testing machines that were used to obtain DWI convictions.[4] The defendants contended that the detailed inspection and maintenance records, which were previously kept but were no longer generated by the State under its new policy, were necessary to their defense. Wittenbarger, 124 Wn.2d at 473-74. The defendants argued the new procedures themselves constituted a pattern of bad faith designed by the State to systematically deny DWI defendants access to potentially useful evidence. They alleged the State no longer kept certain records because defense attorneys had successfully used them to challenge DWI prosecutions in the past. Id. at 477.

[4] Division One also cites Groth as setting forth the "improperly motivated" standard (Appendix A at 8). However, Groth merely cites Wittenbarger without any further independent analysis, so it is really Wittenbarger's holding that is at issue here.

This Court was unconvinced, finding no systemic bad faith. In so holding, it first noted that the State had followed its own policy for preserving evidence. Id. at 477. It then concluded the policy had been adopted by the State toxicologist in good faith, with the State providing "logical and valid reasons for changes in its record keeping policies." Id. at 478. This Court next rejected the defendant's argument that the fact that the State had ceased to keep the same records it had kept in the past demonstrated bad faith. Id. Specifically, the Supreme Court explained: "The defendants have failed to convince us the State's reduction in the amount of data retained from the results of the various tests performed on a DataMaster during a QAP inspection was improperly motivated." Id.

Division One took Wittenbarger's holding to mean that a defendant cannot show bad faith unless he produces affirmative evidence showing the government's actions were improperly motivated. Appendix A at 8-9. Division One suggests this is so even when the defendant is able to show other circumstances raising a strong inference of bad faith. Id.

However, there is nothing in Wittenbarger that suggests that this Court was invoking a higher standard of proof and intended to require affirmative evidence of the government's improper motivation in all such cases. Instead, Wittenbarger appears to stand for the proposition that where the defendant asserts that the government has engaged in systemic

bad faith by adopting a policy that results in its failure to preserve evidence potentially helpful to a defendant, it is incumbent upon that defendant to affirmatively prove that the adoption of these policies was improperly motivated. Hence, Division One conflicts with Wittenbarger.

Unlike in Wittenbarger, Olson has not argued there was systemic bad faith in the adoption of the NORCOM's purge policy. Indeed, had the prosecutor properly responded to the defendant's discovery request the 911 recordings would have been preserved in plenty of time. Here, the problem arose when the government did not act promptly to preserve the evidence it had when it received Olson's discovery request.

The circumstances of this case raise a strong inference of bad faith. The government set up a purge policy with a certain window of time for preserving the evidence. It is obviously aware of this limited time period given that it set up the purge policy and that the use of 911 recordings is commonplace in its criminal prosecutions.[5] Defense counsel made a proper discovery request two and a half months prior to the purge date. Yet, the prosecutor did nothing to preserve the evidence. Most

[5]Interestingly, the "Participant Records Request Form" – which is used only by a participating government agency – expressly sets forth NORCOM's purge policy See, http://www.norcom.org/docs/misc/participant%20form.pdf (accessed 9-5-16). However, the public records request form does not inform the general public about the purge policy. http://www.norcom.org/docs/misc/PDR%20form.pdf (accessed 9-5-16).

importantly, the State has yet to offer a reasonable explanation for why it failed to preserve the evidence after receiving the discovery request.

While Division conceded circumstances "may invite an inference of bad faith, it concluded that under Wittenbarger, Olson was required to produce "affirmative evidence" showing improper motivation and thus his due process challenge failed.[6] Appendix A at 8-9. As discussed above, this appears to be misreading of Wittenbarger.

In sum, Olson asks this Court to accept review and clarify what is required of a defendant when showing the government's bad faith in destroying evidence it knows to be potentially useful to the defendant. Specifically, this case raises the question of whether this Court intended Wittenbarger's improper motivation standard apply only to cases in which the defendant alleges systemic bad faith in the adoption of government policies for evidence retention / destruction. In other words, there needs to

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[6] The Court of Appeals also stated that any error would have been harmless. Appendix A at 9-12. However, its harmless error analysis was flawed. Where there is a constitutional error, appellate courts must presume prejudice and place the burden on the State to prove that the error was harmless beyond a reasonable doubt. State v. Stephens, 93 Wn.2d 186, 191, 607 P.2d 304 (1980). Division One explained that any due process violation was harmless because it was unclear how many witnesses actually called 911 or what they stated. It was therefore "purely speculative" that the 911 calls had the potential of revealing evidence that could be used to impeach the witnesses. Appendix A, 10-11. However, had the Court of Appeals properly placed the burden to show harmlessness on the State, there is no doubt it would have had to conclude that it was "purely speculative" that the 911 tapes contained nothing of value to impeach the State witnesses. This is because the tapes were destroyed and the parties can only speculate as to what the recordings did or did not contain. Given this, the State could not show that its destruction of this evidence was harmless.

be clarity as to whether a defendant may – even after Wittenbarger – show bad faith by showing that the government knew that certain evidence was potentially useful to the defense, allowed it to be destroyed anyway, and offered no reasonable explanation for why it was destroyed. This is an important constitutional question that needs to be settled by this Court.

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

The Court of Appeals held Olson's constitutional challenge to RCW 43.43.7541 and 7.68.035 was not ripe for review. Appendix A at 6-7. 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 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 Olson is primarily legal and the challenged action is final. Appendix A at 10. However, it incorrectly concluded that Olson's constitutional claim requires further factual development. Id.

In reaching its ripeness holding, Division One essentially reasons that until Olson is facing imprisonment for willful nonpayment, he cannot challenge RCW 43.43.7541 and RCW 7.68.035 as an unconstitutional regulatory act by the State.[7] Appendix B at 9. It relies on this Court's decision in State v. Curry, 118 Wn.2d 911, 829 P.2d 166 (1992). Id. 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), that holding does not apply here.

Curry and Olson 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 Olson.

Rather than challenging the constitutionality of the LFO statutes based on the fundamental unfairness of its future enforcement potential, Olson asserts RCW 43.43.7541 and RCW 7.68.035 do not rationally serve any legitimate State interest when applied to those who cannot pay. In other words, while Curry asked this Court to consider whether the

[7] In Olson's case, Division One did not fully analyze the LFO issue in its decision but instead incorporated its recent ruling in State v. Shelton. Appendix A at 14-16. Because Shelton provides the substance of Division One's decision here, petitioner has attached a copy of the Shelton decision as Appendix B and will cite to it as is appropriate.

speculative future operation of a statute would be unconstitutional, Olson asks the court to consider whether the statutes – as they operate at this moment – are unconstitutional. These are two completely different due process challenges. Hence, Division One's attempt to apply Curry as a barrier to review of Olson's constitutional challenge is fundamentally flawed.

Once Olson's 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 imposed the VPA pursuant to RCW 7.68.035. The trial court never made a legitimate finding Olson 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 statutes that are unconstitutional as applied to those who are not shown to have the ability to pay, 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.

3. REVIEW IS WARRANTED BECAUSE WHETHER RCW 43.43.7541 AND RCW 7.68.035 ARE 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 and RCW 7.68.035 unconstitutional as applied, trial courts will continue on a daily basis to mandatorily impose the DNA fee and VPA on destitute defendants, which serves only to exacerbate their indigence and the resulting costs to society.

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.

RCW 7.68.035 mandates that all convicted defendants pay a $500 VPA. On its face, this serves the State's interest in funding "comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4). Again, however, while this may be a legitimate interest, there is nothing reasonable about funding a victim's services program by imposing fees on those who do not have the ability – or likely future ability – to pay.

First, imposing these fees 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, the fees are utterly pointless. There is no way to effectively fund victim services by imposing fees the defendant cannot ever pay. Likewise, there is simply no reasonable way to effectively fund the DNA database by requiring

imposition of fees on people who cannot pay them.[8]

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

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[8] The government acknowledged the fiscal futility of imposing a mandatory DNA fee 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).

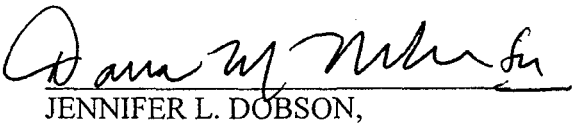
In sum, there is no rational basis for imposing mandatory DNA-collection fees or VPAs on defendants who cannot pay. As such, RCW 43.43.7541 and RCW 7.68.035 violate substantive due process as applied to these individuals. This Court should grant review to decide this significant public issue and to put an end to these fees being ordered on a daily basis without regard to a defendant's ability to pay. RAP 13.4(b)(4).

G. CONCLUSION

For the reasons stated, this Court should grant review.

Dated this 12th day of September, 2016.

Respectfully submitted
NIELSEN, BROMAN & KOCH



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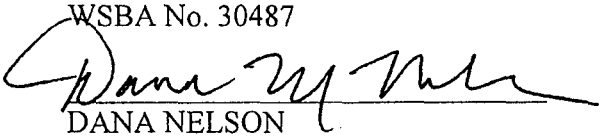

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# APPENDIX A

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON



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| STATE OF WASHINGTON,<br><br>Appellant,<br><br>v.<br><br>THOMAS LEE OLSON,<br><br>Respondent. | No. 72965-9-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: August 15, 2016 |

APPELWICK, J. — Olson appeals his conviction and sentence for felony driving under the influence, driving while license suspended/revoked, and possession of a controlled substance. He asserts that his due process rights were violated when the State failed to prevent 911 call recordings from being automatically destroyed after he requested that they be preserved. He maintains that this behavior constituted governmental misconduct warranting reversal under CrR 8.3(b). For the first time on appeal, he contends that as applied to an indigent defendant, the statutes that require imposition of a mandatory deoxyribonucleic acid (DNA) fee and a victim penalty assessment (VPA) fee at sentencing violate substantive due process. We affirm.

## FACTS

On January 22, 2014, Officer Daniel Finan and Lieutenant Daniel Young responded to a report of a single vehicle traffic accident near the intersection of Lakemont Boulevard Southeast and Newport Way Southeast in Bellevue.

A witness, Marianne Jones, was at the scene. Jones had been driving northbound on Lakemont Boulevard behind the truck. Jones noticed the truck swerve into the opposite lane of traffic, and she called 911. Jones continued

following the truck. She could see that there was one person in the truck—the driver. She observed the truck swerve into a concrete barrier over a grass embankment, swerve again across oncoming traffic, drive up onto a sidewalk, and knock down a lamp post. She noticed that parts of the truck were falling off onto the road. She saw the truck stop before it reached the intersection. Jones saw the driver get out of the truck and begin picking up pieces of the truck that had fallen onto the road.

Joel Lessing also called 911 that day after witnessing the accident. Lessing was parked near the intersection when he saw a blue truck drive across all lanes of traffic, strike a guardrail, and grind to a halt before reaching the intersection. After the truck stopped, Lessing proceeded through the intersection toward the truck, rolled down his window, and asked the driver if he was okay.

When Lieutenant Young arrived, he saw someone sitting in the driver's seat of a heavily damaged pickup truck. When Officer Finan arrived on the scene, he observed a damaged blue pickup truck with its driver's side airbag deployed. A male individual was standing outside the driver's side door of the truck. Jones pointed toward the individual and told Officer Finan that he had been driving the truck. Officer Finan and Lieutenant Young approached the vehicle. The male individual identified himself as Thomas Olson. During the course of their contact with Olson, Officer Finan and Lieutenant Young saw drug paraphernalia in Olson's

sweatshirt. Olson admitted to smoking heroin about an hour earlier. Olson was arrested and read his Miranda[1] rights.

Olson told Officer Finan that a friend of his had been driving the truck and that Olson had been riding in the passenger seat. He said they had been following behind a friend driving another vehicle. Olson said the other car was driving erratically and caused the truck to crash. Olson stated that once the truck crashed, he and the driver of the truck got out, the driver got into the other friend's car, and those two drove away to get a tow truck for the truck. Olson told Lieutenant Young that he was waiting for the other driver to come back. Lieutenant Young remained on the scene for an hour and a half, and no one ever returned with a tow truck.

On January 29, 2014, the State charged Olson with felony driving while under the influence of or affected by intoxicating liquor or any drug (DUI) and driving while license suspended/revoked in the first degree. On January 30, 2014, an attorney appeared on behalf of Olson and entered a request for discovery. Among other things, Olson's attorney requested that the State preserve all physical evidence relating to the alleged offense, including, but not limited to 911 recordings until final disposition of the case or until further order of the court.

The Bellevue Police Department contracts with the North East King County Regional Public Safety Communication Agency (NORCOM), a company that handles dispatch and 911 calls. 911 NORCOM, http://www.norcom.org (last visited July 28, 2016). Pursuant to NORCOM's policy, the calls are retained for 90 days

[1] Miranda v. Arizona, 384 U.S. 436, 467-68, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

unless a preservation request is made. The State never provided the recordings to Olson, and the recordings were destroyed.

On September 19, 2014, the State amended the charges to include violation of the Uniformed Controlled Substances Act.[2] A jury found Olson guilty as charged. At sentencing, the court imposed $600 in LFOs—a $100 DNA fee and a $500 VPA fee. Olson appeals.

DISCUSSION

Olson argues that this court should reverse, because his due process rights were violated when the 911 recordings were destroyed. He asserts that the State's failure to preserve the 911 recordings constituted "government mismanagement" of the case warranting reversal under CrR 8.3(b). For the first time on appeal, he claims that RCW 43.43.7541 and RCW 7.68.035—the statutes mandating the imposition of the $600 in LFOs—are unconstitutional as applied to defendants who do not have the ability or likely future ability to pay LFOs. And, he maintains that the LFO order should be stricken, because the trial court failed to comply with RCW 10.01.160(3) by not making an individualized inquiry into his ability to pay.

I. Due Process Violation

Olson argues that his right to due process was violated, because the State failed to preserve the 911 recording evidence after defense counsel made a proper discovery request.

[2] RCW 69.50.4013.

The government's failure to preserve evidence significant to the defense may violate a defendant's due process rights. State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). Whether destruction of evidence constitutes a due process violation depends on the nature of the evidence and the motivation of law enforcement. State v. Groth, 163 Wn. App. 548, 557, 261 P.3d 183 (2011). If the State has failed to preserve "material exculpatory evidence," criminal charges must be dismissed. Wittenbarger, 124 Wn.2d at 475. In order to be considered "material exculpatory evidence," the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Id. at 475.

By contrast, the State's failure to preserve evidence that is merely "potentially useful" does not violate due process unless the defendant can show bad faith on the part of the State. State v. Burden, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001). "Potentially useful" evidence is " 'evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.' " Groth, 163 Wn. App. at 557 (quoting Arizona v. Youngblood, 488 U.S. 51, 57, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). The presence or absence of bad faith must necessarily turn on the State's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed. Id. at 558. Thus, a defendant must show the destruction was improperly motivated. Id. at 559.

Here, neither the State nor the defense heard the tapes and neither knew of any exculpatory value. Olson concedes that the 911 recordings were only potentially useful to the defense. The disagreement between the parties stems from what constitutes a sufficient showing of bad faith and whether Olson has satisfied his burden. Specifically, the State claims that Olson has no evidence of improper motivation and that without that evidence, he cannot prove bad faith. By contrast, Olson asserts that he need not show improper motivation in order to show bad faith and that the State's reliance on Wittenbarger and Groth to support this proposition is misplaced.

In Wittenbarger, defendants moved to suppress evidence of a chemical breath analysis test based on the fact that the State failed to preserve maintenance and repair records for the breath test machines. 124 Wn.2d at 472. By not preserving the evidence, the State was adhering to new procedures and record keeping policies,[3] which did not require the preservation of the records. Id. at 477-78. Defendants argued that unlike a typical preservation of evidence case, the procedures themselves constituted a pattern of bad faith designed by the State to systematically deny defendants access to useful evidence. Id. at 477, 472. The defendants alleged that the State opted to no longer keep the records, because

[3] By statute, the State Toxicologist has the delegated authority to approve breath testing procedures and protocols. Wittenbarger, 124 Wn.2d at 472. The toxicologist drafted revised protocols and procedures for breath testing to reflect a switch to updated breath-testing technology. Id. Under the new quality assurance protocol, the State's record keeping policies changed. Id. at 473. Specifically, data from the inspections was no longer recorded and instead of recording information such as initial voltage values, adjusted voltage values, and calibration factors, the technicians merely indicated that the required tests were performed with satisfactory results by checking a box on the inspection forms. Id.

defense attorneys had used them successfully to challenge prosecutions in the past. Id. at 477.

The Wittenbarger court noted that the fact that the State was aware that defense counsel had found the old records useful did not lead it to conclude that the State acted in bad faith when it made the policy changes regarding record retention. Id. And, the court noted that the new procedures represented a good faith effort on the part of the State to verify that the machines were working and accurate. Id. at 478. It ultimately concluded that the defendants failed to convince it that the State's reduction in the amount of data retained from the results of the tests performed on the machine was improperly motivated. Id. Consequently, it declined to make a finding of bad faith. Id.

In Groth, Groth was convicted in 2009 for a murder that occurred in 1975. 163 Wn. App. at 551. In 1987, while the investigation was still pending, a sergeant ordered destruction of all of the physical evidence[4] from the crime scene except the murder weapon and crime scene photographs. Id. at 554. Groth argued that the destruction of the evidence constituted a violation of his due process rights. Id. at 556-57. The Groth court noted that it was unclear why the evidence was destroyed. Id. at 559. It ultimately concluded that there was no indication that the sheriff's office knew of any exculpatory aspect of the evidence or that the

[4] A substantial amount of physical evidence was destroyed: plaster casts of footwear impressions, blood samples found at the crime scene, samples of the victim's clothing, blood, hair and fingernail scrapings from the autopsy, another suspect's boots and clothing from the night of the murder, any laboratory analyses, and the crime laboratory analyst's notes, reports, and conclusions concerning the forensic testing. Groth, 163 Wn. App. at 557-58, 553.

evidence's destruction in 1987 was improperly motivated. Id. It stated that to the extent any conclusions could be drawn from the record, it appeared that the sheriff's office negligently destroyed evidence of which any exculpatory value was not apparent. Id. It noted that the standard of bad faith required under Youngblood and Wittenbarger was, consequently, not met. Id.

Olson asserts that here, unlike in Wittenbarger, there is no allegation of systemic bias or an improperly motivated policy.[5] And, Olson argues that unlike in Groth, the government here had notice at the time the evidence was destroyed that the evidence was useful to the defense. Olson is correct. Neither case is dispositive in determining whether, factually, Olson has adequately shown bad faith exists here.

However, Wittenbarger stands for the proposition that a defendant must show that the destruction of the evidence was improperly motivated. See Wittenbarger, 124 Wn.2d at 478. And, the Groth court clearly announced that a showing of improper motivation is required. 163 Wn. App. at 559. Olson fails to support his argument that—although these cases are factually distinguishable—the general rule announced in these cases is inapplicable here. Thus, Olson must show that the destruction of the 911 recordings was improperly motivated in order to support the presence of bad faith. Id.

[5] We note that Olson is not alleging that the State has a policy of not responding to discovery requests, resulting in the automatic destruction of evidence.

We impute NORCOM's destruction of the 911 recordings to the State. The destruction of evidence here is serious given the State's obligation under CrR 4.7. We are troubled by the State's failure to comply with Olson's discovery request. The State should have complied with the discovery request, and it provides no meaningful explanation for its failure to do so. But, the question before us is whether the automatic destruction of potentially useful evidence, after a request for preservation, rises to the level of bad faith. While the facts may invite an inference of bad faith, they do not constitute affirmative evidence of improper motivation required by our case law.

Moreover, on these facts, any error in allowing the destruction of the evidence is harmless. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (stating that it is well established that a constitutional error may be so insignificant as to be harmless); Youngblood, 488 U.S. at 59 (Stevens, J., concurring) (considering whether the defendant was prejudiced by lost evidence). An error of constitutional magnitude is harmless when the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wn.2d at 425. Constitutional errors are presumed to be prejudicial and the State bears the burden of proving that the error was harmless. Id.

Olson's theory of the case at trial was that he was not the individual who was actually driving the truck, that someone else had driven the truck, and that the other person left the scene in another car. Olson asserts that any error here was

not harmless, because having access to the 911 recordings would have bolstered the defense's theory so as to establish reasonable doubt.

It is unclear from the computer-aided dispatch (CAD) log how many witnesses actually called 911 on the day of the incident. Below, Olson argued that as many as seven people called 911 to report the incident. The CAD log includes a list of seven "call persons." The list includes Jones, Cecily Novak, and five calls identified by telephone service providers that are not identified by number or name—one from Verizon, two from AT&T, and two from T-Mobile. In other places, the CAD lists incoming phone calls from callers by name, some by partial name, and some by telephone service provider. By name, it lists receiving calls from Clarissa Schaaf and Jones. It also identifies a call from "Joel"[6] and it lists an accompanying phone number. It is unclear from the CAD whether the "call persons" identified only by service providers were all separate callers. Either way, at least four separate callers were identified from the CAD log—Schaaf, Jones, Novak, and Lessing. At least three of the witnesses who called 911 testified at trial: Jones, Lessing, and Schaaf. The State did not list Novak as a witness.

Lessing spoke with the driver of the truck on the day of the incident, and he identified Olson as the driver at trial. Lessing testified that he saw no one else in the car and did not see anyone else at the scene. Jones also identified Olson. She testified that she could see there was only one person in the truck while it was moving and that she saw only one person get out of the truck. Schaaf testified that

[6] Joel's last name is Lessing.

she saw a light pole fall and saw a truck backing away from it. She testified that she saw the truck continue moving down the hill toward her. But, she testified that she was unable to see who was driving the vehicle or whether there were multiple people in the vehicle.

Still, Olson argues that the 911 calls had the potential of revealing that the eyewitness drivers were distracted. He asserts the recordings would have allowed him to impeach the eyewitnesses. This is purely speculative. He claims that if either of the witnesses was distracted for even 30 seconds, it would have supported his theory of the case that in the chaos, the actual driver left. But, the unavailability of the 911 recordings did not preclude Olson from presenting his theory of the case. He cross-examined the witnesses about their potential distractions. Olson's attorney highlighted that Jones was traveling with her children and was worried about their safety and the safety of a pedestrian. Olson's attorney highlighted that Lessing was on the phone with 911 while driving and that he never actually identified Olson from a lineup, and that he was not concentrating on what the driver looked like the day of the incident. On direct examination, Schaaf testified that it all happened very fast and that she was not paying attention. And, she stated that her young daughter was in the car at the time. Olson declined to cross-examine Schaaf. The jury had the opportunity to observe the witnesses' demeanor, weigh their answers, and judge their credibility.

And, during closing argument Olson's counsel reiterated that Jones was distracted. Counsel also argued that the State's eyewitnesses were generally

concerned with the safety of their passengers, other people on the scene, and that they had to navigate the intersection and pay attention during the critical moments. Counsel noted that the distractions meant that the witnesses did not have the ability to observe everything that occurred that day.

We conclude that any reasonable jury would have reached the same result even with the 911 recordings available. Therefore, we reject Olson's claim that the due process violation entitles him to reversal.

II. CrR 8.3(b)

Also related to the State's failure to preserve the 911 recording evidence, Olson argues that the trial court erred when it did not dismiss the case due to "government mismanagement" of the case under CrR 8.3(b). CrR 8.3(b) states that the court may dismiss any criminal prosecution due to arbitrary action or governmental misconduct where there has been prejudice to the rights of the accused which materially affects the accused's right to a fair trial. This court reviews a trial court's denial of dismissal under CrR 8.3(b) for abuse of discretion. State v. Oppelt, 172 Wn.2d 285, 297, 257 P.3d 653 (2011).

Two things must be shown before a court can require dismissal of charges under CrR 8.3(b). State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). First, a defendant must show arbitrary action or governmental misconduct. Id. Governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. Id. at 239-40. Yet, Washington courts have clearly maintained that dismissal is an extraordinary remedy to which the court should

resort in only truly egregious cases of mismanagement or misconduct. State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). The second necessary element a defendant must show is prejudice affecting the defendant's right to a fair trial. Id.

An analysis under CrR 8.3(b) may well support a conclusion of governmental misconduct. But, because the same governmental conduct as viewed above through the lens of a constitutional violation is harmless, we conclude that Olson cannot establish prejudice sufficient to justify dismissal under this rule. Wilson, 149 Wn.2d at 9. Consequently, we hold that the trial court did not abuse its discretion when it denied Olson's CrR 8.3(b) motion to dismiss.

III. LFOs

At sentencing, the trial court imposed $600 in mandatory LFOs—a $500 VPA fee and a $100 DNA fee. RCW 43.43.7541 and RCW 7.68.035[7] establish that the court's imposition of the DNA and VPA fees are mandatory. Specifically, RCW 7.68.035(1)(a) states that when a person is found guilty of having committed a crime, there "shall be imposed by the court upon such convicted person a penalty assessment." And, RCW 43.43.7541 states that "every sentence imposed . . . must include a fee of one hundred dollars."

For the first time on appeal, Olson argues that as applied to an indigent defendant, imposition of the mandatory VPA fee under RCW 7.68.035 and the mandatory DNA fee under RCW 43.43.7541 violates substantive due process.

[7] The legislature amended both of these statutes in 2015. See LAWS OF 2015, ch. 265 § 31; LAWS OF 2015, ch. 265 § 8. Because the salient portion of these statutes did not change and because the amendments do not affect this court's analysis, we refer to the current version of these statutes in this opinion.

The Washington Supreme Court considered and rejected a constitutional challenge to the imposition of the mandatory VPA fee under RCW 7.68.035(1) in State v. Curry, 118 Wn.2d 911, 917, 829 P.2d 166 (1992). The Curry court held that, generally, constitutional principles are implicated only when the State seeks to enforce collection of the mandatory assessment. Id. The court noted that imposition of the penalty assessment, standing alone, is not enough to raise constitutional concerns. Id. at 917 n.3.

And, we recently considered the ripeness of a defendant's as-applied substantive due process challenge to the imposition of the mandatory DNA fee in State v. Shelton, No. 72848-2-I, 2016 WL 3461164, at *1 (Wash. Ct. App. June 20, 2016). The Shelton court considered the same as-applied substantive due process challenge to the mandatory DNA fee statute. Id. at *2. 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).[8] Shelton, 2016 WL 3461164, at *6.

[8] Olson argues that the Washington Supreme Court already rejected the proposition that a challenge to the imposition of the DNA and VPA fees is not ripe until the State attempts to collect in State v. Blazina, 182 Wn.2d 827, 832, n.1, 344 P.3d 680 (2015). In Blazina, the court concluded that the defendant's challenge to the trial court's entry of an LFO order under RCW 10.01.160(3) was ripe for review at the time the order was imposed. 182 Wn.2d at 832 n.1. But, as recently noted by this court in Shelton, Blazina is distinguishable. 2016 WL 3461164, at *6. The Blazina court did not address the imposition of mandatory fees. Rather, it held only that RCW 10.01.160(3) requires the sentencing court to make an individualized inquiry into the defendant's ability to pay discretionary LFOs. 182 Wn.2d at 830. And, unlike discretionary LFOs, the legislature unequivocally requires—notwithstanding RCW 10.01.160(3)—imposition of the mandatory DNA

Olson argues that Curry is distinguishable. He argues that, unlike in Curry, rather than challenging the constitutionality of the LFO statutes based on the fundamental unfairness of their ultimate enforcement potential (incarceration), he is challenging the, "unconstitutional exercise of the State's regulatory power that is irrational when applied to defendants who have not been shown to have the ability to pay."

But, even if Curry is distinguishable in this regard, this court's recent pronouncement in Shelton is clear: an as-applied substantive due process challenge to the DNA fee statute is not ripe for review until the State attempts to enforce collection of the fee. Shelton, 2016 WL 3461164, at *6. And, there is nothing in Shelton's reasoning that limits its application to only the mandatory DNA fee statute as opposed to also the mandatory VPA fee statute.

Still, Olson argues that his claim is ripe for review, because Washington's LFO scheme provides for immediate enforced collection processes, penalties, and sanctions through wage garnishment, payroll deduction, and the accrual of interest at the time of the entry of judgment. In other words, he implies that his claim is ripe, because the State may begin enforcing collection right away. But, Olson does not identify any evidence in his case indicating that the State has employed these or any enforcement mechanisms to collect the mandatory LFOs. In fact, the record shows that the trial court waived interest as to the $600 of LFOs in Olson's case.

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fee and the mandatory VPA at sentencing without regard to the ability to pay. See RCW 43.43.7541; RCW 7.68.035; Shelton, 2016 WL 3461164, at *6.

We adhere to the decisions in Curry and Shelton and hold that Olson's as-applied substantive due process challenges to the mandatory DNA fee and VPA fee are not ripe for review and that they do not constitute manifest constitutional error warranting review for the first time on appeal.

We affirm.

WE CONCUR:

# 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

convicted Shelton as charged of assault in the second degree while armed with a deadly weapon.

The court imposed a sentence of 15 months confinement and 18 months of community custody. The court ordered Shelton to have no contact with the victim, submit a DNA sample, and obtain a substance abuse evaluation and mental health evaluation within 30 days of his release.

The court ordered Shelton to pay the mandatory victim penalty assessment in the amount of $500 and the mandatory DNA fee in the amount of $100. The court waived the imposition of all discretionary financial obligations and interest on the mandatory $600 obligation. The judgment and sentence states, in pertinent part:

> **IV. ORDER**
>
> IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.
>
> . . . .
>
> **4.1 RESTITUTION, VICTIM ASSESSMENT, AND DNA FEE:**
>
> . . . .
>
> [X] Restitution is not ordered.
>
> **Defendant shall pay Victim Penalty Assessment** in the amount of **$500** (RCW 7.68.035 - mandatory).
> **Defendant shall pay DNA collection fee** in the amount of **$100** (RCW 43.43.7541 - mandatory).
>
> **4.2 OTHER FINANCIAL OBLIGATIONS:** . . .
>
> (a) [ ] $ _____, Court costs (RCW 9.94A.030, RCW 10.01.160); [X] Court costs are waived;
>
> (b) [ ] $ _____, Recoupment for attorney's fees to King County Public Defense Programs (RCW 9.94A.030); [X] Recoupment is waived;
>
> . . . .

(e) [ ] $ _____, $100 State Crime Laboratory Fee (RCW 43.43.690); [X] Laboratory fee waived;

(f) [ ] $ _____, Incarceration costs (RCW 9.94A.760(2)); [X] Incarceration costs waived;

. . . .

4.3 **PAYMENT SCHEDULE:** The **TOTAL FINANCIAL OBLIGATION** set in this order is $600.
Restitution may be added in the future. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:
. . . [X] On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations . . . for crimes committed on or after 7/1/2000 . . . until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.
[X] Court Clerk's trust fees are waived.
[X] Interest is waived except with respect to restitution.

Substantive Due Process

Shelton contends that as applied to an indigent defendant, the DNA fee statute, RCW 43.43.7541, violates substantive due process.[1]

A statute is presumed constitutional and a party bears the heavy burden of establishing a statute unconstitutional beyond a reasonable doubt. Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). An as-applied challenge to the constitutional validity of a statute is characterized by the "allegation that application of the

[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.

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

## September 12, 2016 - 2:19 PM

**Transmittal Letter**

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Court of Appeals Case Number: 72965-9

Party Respresented:

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**Comments:**

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