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Court of Appeals
Division I
State of Washington

SUPREME COURT NO. 93770-2

NO. 73564-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TYLER,

Petitioner.

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

The Honorable Thomas J. Wynne, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Robert Lee Tyler, was the appellant below.

B. COURT OF APPEALS DECISION

Tyler requests review of the published decision issued by Division One of the Court of Appeal in State v. Tyler, 195 Wn. App. 385, __ P.3d __ (2016), which was entered on August 15, 2016.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it concluded Musacchio v. United States, 136 S. Ct. 709, 716, 193 L. Ed. 2d 639 (2016) (holding federal common law does not require the government to prove as an essential element of a federal crime those elements not charged even when the jury is instructed on such elements) abrogated this Court's application of Washington's common law in State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (holding that if the State fails to object to an unnecessary element included in the to-convict instruction that element becomes the law of the case and is an essential element that must be proven beyond a reasonable doubt)?

[1] This decision is attached as Appendix A. Additionally, Division One's denial of appellant's Motion to Reconsider (dealing with appellate cost bills), which was entered on October 3, is attached as Appendix B.

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. Did the Court of Appeals err when it concluded that petitioner failed to demonstrate a manifest error subject to review under RAP 2.5(a)(3)?

D. REASONS TO ACCEPT REVIEW

This Court should grant review under RAP 13.4(b)(1) because Division One's decision directly conflicts with this Court's holding in State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

Review should also be granted under RAP 13(4)(b)(2). Division One's decision in Tyler conflicts with its previous decision in State v. Hayes, 164 Wn. App. 459, 478, 262 P.3d 538 (2011) (reversing where the State failed to sufficiently prove an alternative means that was not charged but was included in the to-convict instruction). Additionally, Division One's adoption of Musacchio's holding conflicts with a decision from Division Two, declining to apply Musacchio where the State did not raise the matter and where this Court has not yet adopted the reasoning in Musacchio.

State v. Makekau, 194 Wn. App. 407, 415, n.2, 378 P.3d 577, 582 (2016).

As to the LFO issues, review is warranted under RAP 13.4(b)(1), because Division One's conclusion that Tyler'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).

Review is warranted under RAP 13.4(b)(2), because Division One's decision in Tyler conflicts with Division Two's unpublished decision in State v. Graham, 194 Wn. App. 1044, (2016), 2016 WL 3598554, which held the exact same substantive due process challenge raised by Tyler was ripe for review, citing Blazina for support.[2]

E. RELEVANT FACTS

On January 10, 2014, at approximately 2:30 in the morning, Deputy Sheriff Scott Stitch was patrolling Forest Service Road 2070 near Darrington, Washington. RP 35-36. He saw a White Honda Accord on a jack and a Ford Ranger pick-up truck about twenty feet

[2] Division Two rejected Graham's substantive due process challenge on other grounds. However, that decision is currently under petition to this Court.

away. RP 37.

Upon reaching the scene, Stitch observed two men outside the truck and a man and woman inside the truck cab. RP 38-39. He later determined that Robert Tyler was in the driver seat of the pick-up truck. RP 40. Rebekah Nicholson was the woman inside the truck with him. RP 40, 57-58. Anthony Coleman and Tyson Whitt were outside the car. RP 38, 40, 102.

Stitch never saw Tyler near the Honda or outside his truck. RP 60, 63. However, he observed what appeared to be the parts stripped form the Honda Accord in Tyler's truck and arrested him. RP 42, 43, 45, 54.

Eventually, police determined the Honda Accord had been reported stolen. RP 17. Nicholson soon told police that Whitt stole the vehicle, not Tyler. RP 58. Separately, Tyler told police that he was doing a favor for Whitt's parents when he followed Whitt to the Forest Service Road. RP 81. He admitted that he deduced from the circumstances that the Honda Accord Whitt was driving was stolen. RP 82, 84.

On May 14, 2014, the Snohomish County prosecutor charged appellant Robert Tyler with one count of Possession of a Stolen Motor Vehicle. CP 80-81. The to-convict instructions

specifically listed as alternatives means that defendant received, retained, possessed, concealed, or disposed of a stolen vehicle. CP 27. The State did not object. RP 134.

A jury found, by general verdict, Tyler guilty as charged. CP19. With an offender score of zero, Tyler was sentenced to 45 days confinement. CP 7. The trial court also imposed a $100 DNA-collection fee and a $500 VPA as "mandatory" fees. CP 16. Tyler appealed. CP 1-4.

On appeal, Tyler first asserted the State was required to prove appellant "disposed of" a stolen motor vehicle because that element, although not included in the information, became the law of the case after it was included in the to-convict instruction and the State failed to object. He relied upon Hickman, 135 Wn.2d at 102 and Hayes, 164 Wn. App. at 478. He argued that because the evidence was insufficient to show Tyler "disposed of" the stolen car, the verdict had to be reversed. Brief of Appellant (BOA) at 5-9 and Reply Brief of Appellant (RBOA) at 1-7.

Division One asked for supplemental briefing as to whether the U.S. Supreme Court's decision in Musacchio was applicable. Tyler answered that it was not applicable because at the heart of both the Hickman and Hayes decisions was Washington's common

law law-of-the-case doctrine and Washington's independent state constitutional law regarding unanimous verdicts in alternative means cases. He explained that Musacchio's application of federal common law did not operate to overturn this Court's prior jurisprudence regarding the law of the case. Supplemental Brief of Appellant (SBOA) at 1-5.

Division One disagreed, reading Musacchio solely as a federal due process case that superseded Washington's prior case law regarding the law-of-the-case doctrine and abrogated the holdings in Hayes and Hickman. Appendix A at 9-15. It held there was sufficient evidence as to the elements charged, which did not include the "disposed of" element, and affirmed. Appendix A at 15-16.

Regarding the LFOs, Tyler asserted on appeal that the Legislative mandate that trial courts impose a DNA fee and VPA on all defendants violates substantive due process when applied to those lacking the likely ability to pay. He argued it is irrational to attempt to effectively fund a DNA database or victim's services by imposing fees on someone who cannot pay. Brief of Appellant (BOA) at 9-29. Division One did not reach the substance of the challenge, holding instead that the issue was not ripe for review

and was not reviewable as a manifest constitutional error. Appendix A at 19, n. 11. (citing State v. Shelton, 194 Wn. App. 660, 378 P.3d 230 (2016)).

F. ARGUMENT IN SUPPORT OF REVIEW

1. GUIDANCE FROM THIS COURT IS NEEDED TO DETERMINE WHETHER MUSACCHIO HAS ABROGATED THIS COURT'S PRIOR DECISION IN HICKMAN AND ITS PROGENY.

Under our federal system, states possess primary authority for defining and enforcing criminal law. United States v. Lopez, 514 U.S. 549, 551, n. 3, 115 S. Ct. 1624, 1631, 131 L. Ed. 2d 626 (1995). U.S. Supreme Court holdings addressing matters of federal law beyond federal constitutional matters do not control how states define or interpret their own laws, and they do not override state common law. York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 303, 178 P.3d 995, 999 (2008); Erie R.R. v. Tompkins, 304 U.S. 64, 78-79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); State v. Sieyes, 168 Wn.2d 276, 292, 225 P.3d 995, 1003 (2010). Unfortunately, Division One failed to take these fundamental principles into account when it concluded Musacchio abrogates Hickman and Hayes.

The issue presented in Musacchio was whether the

Government was required to prove beyond a reasonable doubt uncharged elements of a federal crime that were nonetheless included in the jury instructions without objection. It ultimately held that the Government was not required to do so. However, as explained below, this holding does not override Washington case law concluding otherwise.

Musacchio addressed three issues. First, it reiterated that federal due process requires only that appellate courts undertake the following inquiry:

> The reviewing court considers only the "legal" question "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

136 S.Ct. at 715 (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)) (emphasis added). Second, it established how "the essential elements" of federal crimes are to be determined (i.e. only the charged elements, not additional elements that are included instructions, are essential elements). Id. Third, it explained that the law-of-the-case doctrine under federal common law did not operate to make added elements in jury instructions essential elements of a federal crime. Id. at 716.

Division One erroneously concludes that because Musacchio applied the federal due process sufficiency standard, the entire Musacchio decision is binding on Washington courts. Tyler accepts that federal due process requires that reviewing courts determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[3] However, petitioner respectfully disagrees that the rest of Musacchio's holding regarding what constitutes "essential elements" is applicable to overturn Hickman and its progeny.

The germane question raised by this case is whether the U.S. Supreme Court's determination of what constitutes the "essential elements" is binding. The answer to this is no. Washington law establishes what constitutes the essential elements for state crimes. Lopez, 514 U.S. 549, 551, n. 3.

This Court has held that when uncharged elements are included in the to-convict instruction they become the law of the case and are essential elements that must be proved beyond a reasonable doubt. Hickman, 135 Wn.2d at 101-02. The law-of-the-

[3] While the U.S. Supreme Court's application of the U.S. Constitution establishes a floor below which state courts cannot go, although they may provide greater protections (Sieyes, 168 Wn.2d at 292), Tyler recognizes that Washington applies the same sufficiency standard as articulated by the U.S. Supreme Court in Jackson. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

case doctrine derives from common law. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844, 848 (2005). In Washington, this doctrine is an established common law doctrine "with roots reaching back to the earliest days of statehood." Hickman, 135 Wn.2d at 101-02 (citing Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896)).

The law-of-the-case doctrine is multifaceted. Joan Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U. Pa. L. Rev. 595, 602 (1987). One common facet of this doctrine is the rule that an appellate court will not depart from a ruling it made in a prior appeal in the same case. Id. A rarer facet is the rule that in certain circumstances the appellate court limits its own review of an issue based on a matter decided in the trial court in the same case. Id.

This Court has embraced the fact that this doctrine is multifaceted. Lutheran Day Care v. Snohomish Cty., 119 Wn.2d 91, 113, 829 P.2d 746, 756 (1992). It recognizes as one facet the "rule that the instructions given to the jury by the trial court, if not objected to, shall be treated as the properly applicable law." Id. (citing 15 L. Orland & K. Tegland, Wash.Prac., Judgments § 380, at 55-56 (4th ed. 1986)). In other words, under Washington common

law, jury instructions not objected to become the law of the case and define the essential elements that must be sufficiently proven. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995).

In Musacchio, the U.S. Supreme Court applied federal common law and rejected the rarer facet of this doctrine, which is embraced by Washington. 136 S.Ct. at 715-16. It held that in federal, courts the law-of-the-case doctrine does not bear on the courts assessment of a sufficiency challenge when a jury convicts a defendant after being instructed on elements of the charged crime plus an additional element. Id. at 716. In other words, it held that federal common law does not recognize additional elements that make their way into the to-convict instruction as becoming the law of the case. However, contrary to Division One's decision, Musacchio's holding does not undermine Washington's common law, which has been consistently applied by Washington courts to reach just the opposite conclusion.

In sum, Division One fails to recognize that, while Musacchio's reiteration of the appropriate inquiry for determining the sufficiency of evidence (which derives from federal constitutional law) is binding on Washington Courts, Musacchio's delineation of how the essential elements of federal crimes are to

be determined (which is an articulation of federal common law) is not binding. Hence, Division One's decision wrongly concludes that Musacchio has abrogated Washington's law-of-the-case decisions. Consequently, this Court should grant review in order to clarify that its decision in Hickman and its progeny remain good law.

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 Tyler's constitutional challenge to RCW 43.43.7541 and 7.68.035 was not ripe for review. Appendix A at 8-9. 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 Tyler is primarily legal and the challenged action is final. Appendix B at 10. However, it

incorrectly concluded that Tyler's constitutional claim requires further factual development. Id.

In reaching its ripeness holding, Division One essentially reasons that until Tyler 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. 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. 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 Tyler 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 Tyler.

Rather than challenging the constitutionality of the LFO statutes based on the fundamental unfairness of its future enforcement potential, Tyler 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 speculative future operation of a statute would be unconstitutional, Tyler asks it 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 Tyler's constitutional challenge is fundamentally flawed.

Once Tyler'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. It never made a legitimate finding Tyler 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 the LFOs, 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. As such, this Court should accept review.

3. REVIEW IS WARRANTED TO CLARIFY THAT SUBSTANTIVE DUE PROCESS CHALLENGES ASSERTING THESE MANDATORY LFO STATUTES SERVE NO RATIONAL STATE INTEREST IS SUBJECT TO REVIEW UNDER RAP 2.5(a)(3).

Division One wrongly concluded Tyler's 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 to clarify that this type of constitutional challenge to mandatory LFO statutes is 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).

Tyler 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. Tyler 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 and VPA upon those not shown to have the ability – or likely future ability – to pay. Thus, Tyler raises a constitutional error.

Moreover, this error has a practical and identifiable consequence on Tyler's sentence. The fees were mandatorily imposed upon him pursuant to the challenged statute. As shown in detail in appellant's prior briefing, the statutes under which these fess were imposed violate substantive due process. Yet, Tyler has been charged with these LFOs as a condition of his sentence. Thus, the trial court's application of these unconstitutional statutes to impose LFOs on Tyler had a practical and identifiable consequence to his sentence.

Consequently, this Court should grant review under RAP 13.4(b)(3) to clarify that RAP 2.5(a)(3) is not a barrier to review of a substantive due process challenge to the LFO statutes.

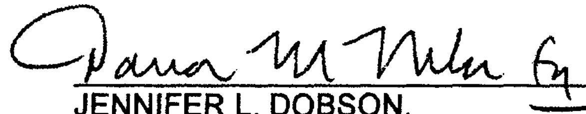
G. CONCLUSION

For the reasons stated, this Court should grant review.

Dated this 25th day of October, 2016.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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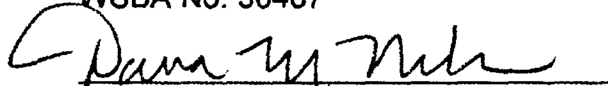

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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent,	DIVISION ONE
v.	No. 73564-1-I
ROBERT LEE TYLER, Appellant.	PUBLISHED OPINION
	FILED: August 15, 2016

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

DWYER, J. — The strictures of the Fourteenth Amendment, enacted in 1868, have applied to the state of Washington since its admittance into the Union on November 11, 1889. The standard of proof guaranteed by the Fourteenth Amendment's due process clause provides the sole basis upon which Washington courts review criminal convictions for evidentiary sufficiency. Recently, the United States Supreme Court clarified this federal constitutional standard as it applies to assessing the government's proof of "additional elements" set forth in a to-convict instruction—those that are not essential elements of the charged crime. The Court instructs that these "additional elements" are to be disregarded and that the evidentiary sufficiency of the government's proof must be assessed solely against the essential elements of the charged crime.

In this case, Robert Tyler was charged with possession of a stolen vehicle. The trial court's to-convict instruction unnecessarily included definitional terms

that are not essential elements of that crime. Tyler contends on appeal that the to-convict instruction thereby created alternative means of committing the offense and that (given Washington's requirement of jury unanimity) the charges against him must be dismissed with prejudice unless the State proved each of the "false alternative means" beyond a reasonable doubt.

The United States Supreme Court is the paramount authority on the federal constitution. Given that Court's explication on the interplay between the due process clause's reasonable doubt requirement and trial court-created "additional elements" of crimes, it is apparent that prior Washington case authority on this subject no longer properly states the law. Instead, as the United States Supreme Court and the Fourteenth Amendment's due process clause command, the government's proof must be assessed against the essential elements of the charged crime, not against "additional elements" or "false alternative means" created by a trial judge and inserted into a to-convict instruction. Pursuant to this understanding, the State adduced sufficient evidence to support Tyler's conviction and that conviction was reached by a unanimous jury. Accordingly, we affirm.

I

Bruce Champagne found that his car, a white Honda Accord sedan, was stolen from his driveway. Around 2:30 a.m. the following early winter morning, Deputy Sheriff Scott Stich was patrolling near a service road surrounded by deep forest near Darrington, Washington. About one-half mile up a gravel roadway, the deputy encountered two vehicles parked 20 feet apart, a white Honda sedan

and a pick-up truck. The deputy saw that the sedan was lifted up on a jack such that its driver's side wheels were in the air.

Upon approaching the pick-up truck, the deputy found four people located thusly: Robert Tyler and Rebekah Nicholson were inside the truck's passenger cabin; Tyson Whitt was partially covered by a tarp in the bed of the pick-up; and Anthony Coleman was standing outside of the truck.

The deputy, from outside the truck, spoke with Tyler, who was inside the passenger cabin. Tyler stated that he owned the truck and produced a corresponding bill of sale. Looking inside the truck's passenger cabin, the deputy observed what appeared to be parts stripped from a car (a disconnected car stereo and disconnected speakers). Upon an inquiry by the deputy, Tyler stated that he did not know anything about the items, neither how they happened to be in his truck nor to whom they belonged. Tyler further stated that he was there helping a friend, but did not specify who he was helping or where the friend was located. Additionally, when asked who owned the Honda, Tyler stated that he did not know.

Upon inspection of the sedan, the deputy observed that it appeared as if it was being stripped of parts. The bolts on the suspended wheels were partially loosened. Looking inside the sedan's passenger cabin, the deputy noticed that it was missing its stereo and front door speakers. In the sedan's ignition, the deputy found a key with a Chrysler manufacturer's logo thereon and noted that the key had been "shaved," a modification commonly associated with vehicle theft.

The deputy then conducted a computer search of the sedan's license plate number. He learned that the sedan had been reported stolen. He then contacted Champagne, the vehicle's owner. During their discussion, the deputy determined that the brand of car stereo that Champagne said had been in his sedan matched that of the disconnected car stereo now located in the passenger cabin of Tyler's truck.

The deputy again spoke with Tyler. When Tyler failed to give the deputy direct answers regarding the items in his truck's cabin, the deputy arrested him.

During a subsequent interrogation, Tyler explained that he had followed Whitt to the service road as a favor to Whitt's parents. Tyler also said that he saw Whitt taking parts out of the sedan. From this, Tyler reasoned that the sedan Whitt was driving had been stolen.[1] Tyler reiterated, however, that he himself did not steal the vehicle.

Tyler was charged with one count of possession of a stolen vehicle.[2]

The trial court's to-convict instruction read, in part, as follows:

> To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the 10th day of January, 2014, the defendant knowingly received, retained, possessed, concealed, disposed of a stolen motor vehicle.

Jury Instruction 4.

[1] Whitt was subsequently arrested, charged, and convicted of stealing the sedan.

[2] "A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068(1) (alteration in original).

The jury found Tyler guilty. He was sentenced to 45 days of confinement. The court also imposed the mandatory $100 DNA fee and $500 victim penalty assessment.

II

A

The due process clause of the Fourteenth Amendment mandates that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. In a criminal prosecution, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In Re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On an appeal from a criminal conviction, due process further guarantees a defendant the right to challenge the sufficiency of the evidence proffered by the government. Jackson v. Virginia, 443 U.S. 307, 314-16, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Washington's constitution has never been interpreted to include a proof beyond a reasonable doubt guarantee. Instead, prior to Winship, "[t]he requirement of proof beyond a reasonable doubt ha[d] . . . only common law and statutory origins." State v. Odom, 83 Wn.2d 541, 546, 520 P.2d 152 (1974); see former RCW 9A.04.100(1) (1975) ("No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt."); REM. & BAL. CODE § 2308 (1910) ("Every person charged

with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt.").[3]

Washington courts apply the federal constitutional standard for appellate review of the evidentiary sufficiency of the government's proof in a criminal case. This is best evidenced by our Supreme Court's alteration of its evidentiary sufficiency analysis in State v. Green, 91 Wn.2d 431, 588 P.2d 1370 (1979) (Green I), as reconsidered in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) (Green II).

In Green I, the court reviewed a challenge to the sufficiency of the evidence of the element of kidnapping necessary to support a conviction for aggravated murder in the first degree. 91 Wn.2d at 442-43. In assessing the sufficiency of the evidence, the court applied the then-prevailing "substantial evidence" test, limiting its review "to a determination of whether the State has produced *substantial* evidence tending to establish circumstances from which a jury could reasonably infer the fact to be proved." Green I, 91 Wn.2d at 442. The court concluded that there existed "substantial evidence from which the jury could infer appellant killed while in the course of or in furtherance of the statutorily defined offense of kidnapping." Green I, 91 Wn.2d at 444.

Soon after the filing of the Green I decision, the United States Supreme Court issued its opinion in Jackson.

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[3] See also State v. Donckers, 200 Wash. 45, 50, 93 P.2d 355 (1939) ("'It is sufficient if the evidence produce moral certainty, to the exclusion of every reasonable doubt.'" (quoting 8 RULING CASE LAW Criminal Law § 222, at 227 (1915))).

Prior to Jackson, the applicable federal standard was the then-prevailing "no evidence" criterion of Thompson v. City of Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960), which held that "a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm." Jackson, 443 U.S. at 314.

In Jackson, the Court's task was to decide whether the Fourteenth Amendment due process standard recognized in Winship "constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." Jackson, 443 U.S. at 313-14.

The Court held that "an essential of the due process guaranteed by the Fourteenth Amendment" is that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson, 443 U.S. at 316. The Court emphasized that the inquiry on an evidentiary sufficiency review "must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson, 443 U.S. at 318. This inquiry, "imping[ing] upon [the fact-finder's] discretion only to the extent necessary to guarantee the fundamental protection of due process of law," focuses on "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319.

Where sufficient evidence does not support a conviction, the judgment of guilt must be vacated, as such a conviction "cannot constitutionally stand." Jackson, 443 U.S. at 318.

In response to Jackson, our Supreme Court granted reconsideration of Green I. In its reconsidered opinion, the court felt compelled to abandon the "substantial evidence" standard previously applied by Washington courts. Green II, 94 Wn.2d at 221. Instead, following Jackson, the court acknowledged the applicability of the federal constitutional standard, holding that the proper inquiry in an evidentiary sufficiency review "is whether, after viewing the evidence most favorable to the State, *any rational trier of fact* could have found the essential elements of kidnapping *beyond a reasonable doubt*." Green II, 94 Wn.2d at 221-22 (citing Jackson, 443 U.S. at 319).

In every such case since Green II, our Supreme Court has applied only the federal constitutional standard announced in Jackson when reviewing whether a conviction is supported by sufficient evidence. See, e.g., State v. Condon, 182 Wn.2d 307, 314, 343 P.3d 357 (2015); State v. Bencivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999); State v. Luvene, 127 Wn.2d 690, 712, 903 P.2d 960 (1995).

Thus, on appellate review of a criminal conviction, Washington's *sole* evidentiary sufficiency standard is that which the Fourteenth Amendment requires.

B

Flowing from the principles discussed in Jackson, earlier this year the United States Supreme Court decided Musacchio v. United States, 577 U.S. ___, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016), which clarified the proper elements against which a court assesses a conviction's evidentiary sufficiency pursuant to the Fourteenth Amendment.

The Supreme Court had granted review to determine whether "the sufficiency of the evidence in a criminal case should be measured against the elements described in the jury instructions where those instructions, without objection, require the Government to prove more elements than do the statute and indictment." Musacchio, 136 S. Ct. at 714. Musacchio's trial judge erroneously added an element to the to-convict instruction that was not part of the charged crime and the jury returned a guilty verdict. Musacchio, 136 S. Ct. at 714.

The Supreme Court held that, "when a jury instruction sets forth all the elements of the charged crime but incorrectly adds one more element, a sufficiency challenge should be assessed against the elements of the *charged crime*, not against the erroneously heightened command in the jury instruction." Musacchio, 136 S. Ct. at 715 (emphasis added). In reaching its holding, the Court explained that, "[a] reviewing court's limited determination on sufficiency review thus does not rest on how the jury was instructed." Musacchio, 136 S. Ct. at 715. Rather, "[s]ufficiency review essentially addresses whether 'the government's case was so lacking that it should not have even been submitted to

the jury.'" Musacchio, 136 S. Ct. at 715 (quoting Burks v. United States, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)). Citing to Jackson, the Court reaffirmed that "[a]ll that a defendant is entitled to on a sufficiency challenge is for the court to make a 'legal' determination whether the evidence was strong enough to reach a jury at all." Musacchio, 136 S. Ct. at 715 (citing Jackson, 443 U.S. at 319).

The law-of-the-case doctrine does not apply to change this result, the Court held, because an evidentiary sufficiency challenge is not properly influenced by how the jury was instructed. Musacchio, 136 S. Ct. at 715. Indeed, the law-of-the-case doctrine "does not bear on how to assess a sufficiency challenge when a jury convicts a defendant after being instructed—without an objection by the Government—on all charged elements of a crime plus an additional element." Musacchio, 136 S. Ct. at 716.

Rather, a reviewing court conducting an evidentiary sufficiency inquiry must consider "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Musacchio, 136 S. Ct. at 715 (quoting Jackson, 443 U.S. at 319). "The Government's failure to introduce evidence of an additional element does not implicate the principles that sufficiency review protects." Musacchio, 136 S. Ct. at 715.

C

Tyler asserts that Musacchio is inapplicable to the issues herein. This is so, he contends, because Washington's law-of-the-case doctrine requires the

reviewing court to assess the evidentiary sufficiency of the government's proof against the elements set forth in the to-convict instruction, notwithstanding that one or more of the elements set out are not essential elements of the charged crime. For this proposition, Tyler relies on State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998), and State v. Hayes, 164 Wn. App. 459, 262 P.3d 538 (2011). Both decisions support his point of view. Neither now correctly states the law.

1

In Hickman, our Supreme Court considered whether it should assess the evidentiary sufficiency of the prosecution's proof against an additional element (therein venue) because the trial court's to-convict instruction mistakenly included venue as an element, even though venue was not an essential element of the charged crime of insurance fraud. 135 Wn.2d at 101-03. The court resorted to Washington's law-of-the-case doctrine for the proposition that not-objected-to jury instructions become the law of the case and that the prosecution "assumes the burden of proving otherwise unnecessary elements of the offense." Hickman, 135 Wn.2d at 101-02. Then, in setting out the applicable standard of review, the court quoted the federal constitutional standard articulated in Jackson and applied in Green II. Hickman, 135 Wn.2d at 103.

Combining these premises, the court then analyzed whether the prosecution adduced sufficient evidence of the additional element of venue to support the insurance fraud conviction. Hickman, 135 Wn.2d at 104-06. Finding

that it had not done so, the court reversed the conviction and ordered that the charge be dismissed with prejudice.[4] Hickman, 135 Wn.2d at 105-06.

In light of Musacchio, Hickman's evidentiary sufficiency analysis no longer properly states the law, nor does its analytical pairing of the federal due process appellate evidentiary sufficiency test with the law-of-the-case doctrine. Indeed, the reasoning and result in Hickman are directly at odds with the Fourteenth Amendment's evidentiary sufficiency standard, as articulated in Musacchio.[5] Because Washington courts apply the federal constitutional standard for evidentiary sufficiency review, decisions of the United States Supreme Court are the paramount authority on the standard's proper application. N. Pac. Ry. Co. v. Longmire, 104 Wash. 121, 125, 176 P. 150 (1918). "The United States Supreme Court is, of course, the ultimate authority concerning interpretation of the federal constitution." State v. Hess, 12 Wn. App. 787, 792, 532 P.2d 1173, aff'd, 86 Wn.2d 51, 541 P.2d 1222 (1975); accord S.S. v. Alexander, 143 Wn. App. 75, 92, 177 P.3d 724 (2008) (United States Supreme Court is the ultimate authority concerning the interpretation of federal law). Accordingly, Musacchio supersedes all inconsistent interpretations by the courts of this state.[6]

[4] "The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence." State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Our state constitutional double jeopardy clause, Wash. Const., art. I, § 9, "is interpreted in the same manner as the federal provision." State v. Pascal, 108 Wn.2d 125, 131 n.1, 736 P.2d 1065 (1987).

[5] Our Supreme Court was not alone in having decisional authority superseded in this manner. See, e.g., United States v. Musacchio, 590 F. Appx. 359, 361 (5th Cir. 2014); United States v. Romero, 136 F.3d 1268, 1271-72 (10th Cir. 1998) (applying the Jackson standard to additional elements per the law-of-the-case doctrine).

[6] When the Washington Supreme Court has announced a rule of state law, that pronouncement will be altered only when the rule announced is shown to be both incorrect and harmful. In re Determination of Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). This test

2

In Hayes, we extended the rule in Hickman to purported alternative means of committing an offense that were erroneously included in a to-convict instruction. Hayes addressed the same issue as is now before us—whether, in a prosecution for possession of a stolen vehicle, the evidentiary sufficiency of the state's proof is properly assessed against the elements set out in a to-convict instruction when the to-convict instruction erroneously included a five-item definitional list that collectively defines an element (possession) but do not, as to each term, constitute separate elements of the charged crime.[7] 164 Wn. App. at 480-81. We then applied the analytical construct set forth in Hickman. Compare Hayes, 164 Wn. App at 480-81, with Hickman, 135 Wn.2d at 102.

Pursuant to Hickman's coupled application of the federal due process evidentiary standard of review and the law-of-the-case doctrine, we assessed the sufficiency of the evidence against the to-convict instruction's definitional list, treating each definitional term as an alternative means that the prosecution was required to prove. Hayes, 164 Wn. App. at 481. We emphasized that we were treating the definitional terms as alternative means, "not because they necessarily are alternative means, but because they were listed in the to-convict instruction[]."[8] Hayes, 164 Wn. App. at 481. Finding that the State failed to meet its burden of proving that the defendant had "disposed of" the vehicle, we

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does not apply to a state Supreme Court pronouncement of federal law that is at odds with a ruling of the United States Supreme Court.

[7] The same mistake was made by the trial court herein. The list of terms is set forth and discussed in section III, infra.

[8] We use the term "false alternative means" to describe this circumstance.

reversed the conviction and dismissed the charge. Hayes, 164 Wn. App. at 481. As with Hickman, our analysis in Hayes no longer properly states the law.

The cases upon which Tyler relies for his Fourteenth Amendment evidentiary sufficiency claim have been superseded by the United States Supreme Court's decision in Musacchio. Accordingly, we reject Tyler's assertion that Musacchio is inapplicable to the issues herein.

D

In light of Musacchio, then, Washington courts have previously misinterpreted the scope of the Fourteenth Amendment's due process protections pertaining to evidentiary sufficiency review. Our courts have erroneously reviewed the State's proof for evidentiary sufficiency measured against additional elements or means set out in a to-convict instruction when those additional elements or means were not provided for in the charged crime.

Musacchio makes it clear that a reviewing court is to disregard "additional elements" and "false alternative means" set out in a to-convict instruction and, instead, must evaluate the sufficiency of the evidence based on the essential elements of the charged crime as enacted by the legislature.[9]

This framework is in accordance with the understanding that it is the legislature, and not the trial court, that possesses the constitutional authority to create a crime. See, e.g., State v. Feilen, 70 Wash. 65, 70, 126 P. 75 (1912)

[9] This does not change Washington's evidentiary sufficiency analysis when the charged crime actually sets forth alternative means by which it may be committed. See, e.g., State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012) ("When a defendant challenges the sufficiency of the evidence in an alternative means case, appellate review focuses on whether 'sufficient evidence supports each alternative means.'" (quoting State v. Kintz, 169 Wn.2d 537, 552, 238 P.3d 470 (2010))).

(legislature has "'the inherent power to prohibit and punish any act as a crime'" (internal quotation marks omitted) (quoting State v. Woodward, 69 S.E. 385, 387 (1910))); State v. Danis, 64 Wn. App. 814, 820, 826 P.2d 1096 (1992) ("The Legislature has extremely broad, almost plenary authority to define crimes."). The guarantee of the Fourteenth Amendment applies only to actual crimes, duly enacted. It does not apply to crimes created by mistake in an erroneous jury instruction.

III

Tyler was charged pursuant to RCW 9A.56.068, which reads, "(1) A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle. (2) Possession of a stolen motor vehicle is a class B felony." (Alteration in original.)

The trial court's to-convict instruction reads as follows:

> To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 10th day of January, 2014, the defendant knowingly **received, retained, possessed, concealed, disposed of** a stolen motor vehicle;
>
> (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
>
> (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
>
> (4) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Jury Instruction 4 (emphasis added).

In Hayes, we stated that the five-item definitional list included in the to-convict instruction obligated the State to prove each of the items as alternative means. 164 Wn. App. at 481. Importantly, however, we noted that the means set forth therein were not "necessarily" alternative means. Hayes, 164 Wn. App. at 481. Rather, we understood that the crime of possession of a stolen vehicle is, in actuality, a single means crime.[10]

Recent authority supports this view. In State v. Sandholm, 184 Wn.2d 726, 364 P.3d 87 (2015), and State v. Owens, 180 Wn.2d 90, 323 P.3d 1030 (2014), our Supreme Court explicated on the concept of alternative means. "[T]he alternative means doctrine does not apply to mere definitional instructions; a statutory definition does not create a 'means within a means.'" Owens, 180 Wn.2d at 96 (quoting State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007)).

The language of the statute is clear. "A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068(1) (alteration in original). Thus, the single means of committing the offense is to "possess" a stolen vehicle.

"Possession" is defined by use of the definition of "possessing stolen property," which reads,

> "Possessing stolen property" means knowingly to receive, retain, possess, conceal, *or* dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

[10] Although our evidentiary sufficiency analysis in Hayes is no longer sound, our underlying interpretation of RCW 9A.56.068(1) remains sound.

RCW 9A.56.140(1) (emphasis added).

Indeed, our Supreme Court recently ruled that the language of RCW 9A.56.140(1) is merely definitional and does not set forth essential elements of the offense of possession of a stolen vehicle. State v. Porter, No. 92060-5, 2016 WL 3910995, at *3 (Wash. July 14, 2016). Thus, the definitional alternatives set forth in RCW 9A.56.140(1) are not alternative means of committing the crime established in RCW 9A.56.068(1). Rather, they are merely definitional alternatives.

Herein, ample evidence was adduced at trial that Tyler "possessed" a stolen vehicle, per RCW 9A.56.068(1), as defined by RCW 9A.56.140(1). Indeed, no party contests this.

IV

Tyler next claims that, due to the wording of the to-convict instruction, the jury may not have been unanimous in its verdict. We disagree.

In Washington, a criminal defendant is entitled to a unanimous jury verdict. WASH. CONST. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980) (citing State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963)). Tyler was charged with one count of possession of a stolen vehicle under RCW 9A.56.068(1). Properly understood, this statute creates a single means crime. A unanimous jury convicted Tyler as charged. Accordingly, the jury's verdict as to the single means crime of possession of a stolen vehicle was necessarily unanimous as to the means by which it was committed.

V

One final note. In his attempt to divorce his claim for relief from the guarantees of the federal constitution, Tyler completely undercuts his argument that the proper form of appellate relief is dismissal with prejudice.

When the State does not present a constitutionally sufficient quantum of evidence to support a conviction (as measured by the Fourteenth Amendment's due process clause), the Fifth Amendment's double jeopardy clause bars retrial. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

When the quantum of evidence specified by the Fourteenth Amendment *is* presented, however, retrial is not constitutionally barred. Indeed, this state of affairs describes the vast majority of reversals arising from trial court error in criminal cases.

In his attempt to tie his law-of-the-case argument to Washington's common law, Tyler necessarily condemns to failure his quest for dismissal with prejudice. We say this because, at common law, a reversal based on the prosecution's failure to prove the crime beyond a reasonable doubt resulted in the grant of a new trial—not dismissal with prejudice. This rule is articulated in two ancient cases.

> The law presumes the innocence of the appellant until his guilt is established beyond a reasonable doubt. We do not feel that we are invading the province of the jury in holding the evidence before us insufficient to warrant a conviction. . . .
>
> The judgment of the superior court is reversed, and the cause is remanded for a new trial.

State v. Pienick, 46 Wash. 522, 529, 90 P. 645 (1907).

> While we are [loath] to disturb the verdict of a jury on the ground of insufficiency of the evidence to justify the verdict, yet where the evidence as disclosed by the record is palpably insufficient to warrant the verdict, as we deem it to be in this case, it is our duty to say so and to award a new trial.

State v. Payne, 6 Wash. 563, 574, 34 P. 317 (1893).

Thus, were Tyler to be presenting a common law insufficiency of the evidence claim, the best result he could obtain would be a new trial.

But a new trial would be a futile endeavor. Upon a retrial, a proper to-convict instruction would surely be given. And both parties agree that the evidence already presented was sufficient to sustain a guilty verdict, as measured against the essential elements of the charged offense.

When a new trial would invariably result in an identical decision, it can safely be said either that the appellant has established no prejudice or that the claimed error was harmless. This, at best, would be the fate of Tyler's revised contention that he is entitled to relief based on Washington's common law (a contention that we do not deem to be established on its merits).[11]

[11] Tyler also assigns constitutional and statutory error to the trial court's imposition of mandatory assessments at his sentencing. The assessment of a mandatory assessment at sentencing, standing alone, is not enough to raise constitutional concerns. State v. Curry, 118 Wn.2d 911, 917 n.3, 829 P.2d 166 (1992) (rejecting as premature a challenge to the imposition of a victim penalty assessment); State v. Shelton, No. 72848-2-I, 2016 WL 3461164, at *6 (Wash. Ct. App. June 20, 2016) (rejecting as not ripe a challenge to an assessment of a DNA fee). Rather, "'[i]t 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 (emphasis added) (alteration in original) (internal quotation marks omitted) (quoting State v. Curry, 62 Wn. App. 676, 681-82, 814 P.2d 1252 (1991)); Shelton, 2016 WL 3461164, at *5.

Tyler also contends that the sentencing court erred by assessing mandatory legal financial obligations without considering, pursuant to RCW 10.01.130(3), his ability to pay. However, RCW 10.01.130(3) only requires an inquiry into a defendant's ability to pay *discretionary* legal financial obligations. Shelton, 2016 WL 3461164, at *6 (citing State v. Blazina, 182 Wn.2d 827, 837-38, 344 P.3d 680 (2015)). The assessments herein are mandatory. Shelton, 2016 WL 3461164, at *6 (pursuant to RCW 43.43.7541, the DNA fee is mandatory); Curry, 118 Wn.2d at 917 (pursuant to RCW 7.68.035(1), the victim penalty assessment is

No 73564-1-I/20

Affirmed.

We concur:

mandatory). The legislature unequivocally requires imposition of these assessments at sentencing "without regard to finding the ability to pay." Shelton, 2016 WL 3461164, at *6.

Tyler has not established an entitlement to appellate relief.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

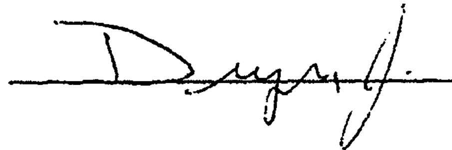
THE STATE OF WASHINGTON, Respondent, v. ROBERT LEE TYLER, Appellant.	)	DIVISION ONE No. 73564-1-I ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION

The appellant, Robert Tyler, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Done this 3RD day of October, 2016.

For the Court:



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Court of Appeals Case Number: 73564-1

Party Respresented:
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Trial Court County: Snohomish - Superior Court # ____

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- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
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- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
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Comments:

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Case Name: Robert Tyler
Court of Appeals Case Number: 73564-1

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Trial Court County: Snohomish - Superior Court # ____

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