SUPREME COURT NO. 93887-3

NO. 47581-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WYATT SEWARD,

Petitioner.

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

The Honorable Gary R. Tuber, Judge
The Honorable Anne Hirsch, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Wyatt Seward was the appellant below.

B. COURT OF APPEALS DECISION

Seward requests review of the published decision issued by Division Two of the Court of Appeal in State v. Seward, __Wn.App. __, __ P.3d.__ 2016 WL 6441387, entered on November 1, 2016, and attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Do RCW 43.43.7541, RCW 7.68.035 and RCW 36.18.020(2)(h) violate substantive due process when applied to defendants who have not been found to have the likely ability to pay mandatory fees?

2. Given Washington's current legal financial obligation (LFO) enforcement scheme, do this Court's holdings in State v. Curry[1] and State v. Blank[2] require that in order to satisfy constitutional due process, trial courts must conduct an ability-to-pay inquiry at the time statutorily mandated LFOs are imposed?

3. Is the criminal filing fee, which is authorized under RCW 36.18.020(2)(h), a mandatory fee?

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[1] 118 Wn.2d 911, 829 P.2d 166 (1992).

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

D. REASONS TO ACCEPT REVIEW

Review is warranted under RAP 13.4(b)(3), because Seward's substantive due process challenge raises a significant question of law under U.S. Const. amends. V, XIV, § 1 and Wash. Const. art. I, § 3. .

Review is warranted under RAP 13.4(b)(4) because Seward's substantive due process challenge raises an issue this Court recognizes as one of substantial public interest. See, State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015) (noting there are "[n]ational and local cries for reform of broken LFO systems"). An LFO order imposes an immediate debt upon a defendant subjecting him to a myriad of penalties arising from enforced collection efforts. The societal hardships created by the erroneous imposition of LFOs cannot be understated.

A study by the Washington State Minority and Justice Commission concludes that for many people, erroneously imposed LFOs result in a horrible chain of events:

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

The Assessment and Consequences of Legal Financial Obligations in Washington State, Washington State Minority and Justice Commission at 4-5 (2008)[3]; see also, Blazina, 182 Wn.2d at 682-84 (acknowledging these hardships). These realities amply demonstrate that the judicial review of Washington laws authorizing the mandatory imposition of LFO debt is an issue of substantial public interest.

The issue of whether RCW 36.18.020(2)(h) is a mandatory fee has never been definitively decided by this Court and is an issue of substantial public importance that also warrants review. RAP 13.4 (b)(4).

E. RELEVANT FACTS

Seward, who is indigent, pleaded guilty to second degree assault. The court imposed a 120 month exceptional (CP 28) and ordered Seward to pay the following LFOs: (1) $200 criminal filing fee; (2) $500 victim's assessment (VPA) fee; and (3) $100 DNA collection fee. CP 20-21. The court did not conduct an inquiry on Seward's ability to pay those financial obligations. The court also ordered Seward pay restitution in the amount of $28,563.84. CP 41-42.

On appeal, Seward argued the Legislative mandate that trial courts impose a DNA, VPA and filing fees on all defendants violates substantive due process when applied to those lacking the likely ability to pay. It is

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

irrational to attempt to effectively fund a DNA database, victim's services compensate court clerks for their official services by imposing fees on someone who cannot pay. Brief of Appellant (BOA) at 3-12; Supplemental Brief of Appellant (SBA) at 2-5. In his Supplemental Brief Seward argued the filing fee authorized under RCW 36.18.020(2)(h) was discretionary and the court erred by failing to conduct an inquiry into Seward's ability to pay the fee. SBA 5-8.

In its published decision, the Division Two majority rejected Seward's due process argument. It reviewed Seward's due process challenge under the rational bases test. Appendix at 4 (citing, Nielsen v. Dep't of Licensing, 177 Wn.App. 45, 53, 309 P.3d 1221 (2013)). The majority held that the mandatory imposition of the DNA, VPA and filing fees without an inquiry into the ability to pay is rationally related to legitimate state interests in two ways.

First, it reasoned the state has a legitimate interest in creating funding sources and the imposition of the fees on all offenders creates that source, even though some offenders will be unable to pay the fees. Appendix at 5. Second, it reasoned imposing the fees on indigent offenders at the time of sentencing is also rationally related to creating funding sources because "the defendant's indigency may not always exist." Id. The majority concluded, therefore, "it is not unreasonable to

believe that imposing these fees and assessments on all indigent offenders would result in some funding for these purposes." Appendix at 5-6.

Chief Judge Bjorgen dissented. Judge Bjorgen did not disagree that Seward's due process challenge is analyzed under the rational basis test, which requires a rational relationship between the challenged law and a legitimate state interest. Appendix at 9 (citing, Amunrud v. Bd. of Appeals, 158 Wn.2d 208, 222, 143 P.3d 571 (2006). Judge Bjorgen also agreed with the majority that the purpose of mandatory LFO's is to raise money to help fund elements of the criminal justice system and that is a legitimate state interest. Id. However, he reasoned "requiring monetary payments from those who cannot and will not be able to pay them does nothing to serve that purpose." Appendix at 9. Judge Bjorgen looked to this Court's decision in Blazina and concluded that without the same individualized determination of the ability to pay mandatory fees as is required for discretionary fees the imposition of mandatory fees has no rational relationship to the purpose for the fees. Id.

> Without the individualized determination required by *Blazina* for discretionary LFOs, mandatory LFOs will be imposed in many instances on those who have no hope of ever paying them. In those instances, the levy of mandatory LFOs has no relation to its purpose. In those instances, the only consequence of mandatory LFOs is to harness those assessed them to a growing debt that they realistically have no ability to pay, keeping them in

> the orbit of the criminal justice system and within the gravity of temptations to reoffend that our system is designed to still. Levying mandatory LFOs against those who cannot pay them thus increases the system costs they were designed to relieve. In those instances, the assessment of mandatory LFOs not only fails wholly to serve its purpose, but actively contradicts that purpose. The self-contradiction in such a system crosses into an arbitrariness that not even the rational basis test can tolerate.

Appendix at 10 (Bjorgen, C.J. dissent).

F. ARGUMENT IN SUPPORT OF REVIEW

1. REVIEW IS WARRANTED BECAUSE WHETHER RCW 43.43.754, RCW 7.68.035 AND RCW 36.18.020(2)(h) ARE UNCONSTITUTIONAL IS A SIGNIFICANT ISSUE OF LAW UNDER THE CONSTITUTION AND IS OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THIS COURT.[4]

Unless this Court issues a decision explicitly declaring RCW 43.43.7541, RCW 7.68.035 and RCW 36.18.020(2)(h) unconstitutional as applied, trial courts will continue on a daily basis to mandatorily impose the fees authorized by these statutes on destitute defendants, which serves only to exacerbate their indigence and the resulting costs to society. The public has a substantial interest in avoiding these costs, and therefore review is warranted under RAP 13.4 (b)(4).

[4] Counsel believes that requests to this Court to review substantially the same issue are pending in Cause No.'s 93420-7, 93712-5, 93603-0,93629-3, 93770-2 and 93487-8.

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 at 216 (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. at 52-53 (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.

Under RCW 36.18.020(2)(h) convicted defendants can be ordered to pay a $200 filing fee. Presumably the purpose of this fee is to reimburse the state for costs associated with filing a case. While this too may be a legitimate interest, there is nothing reasonable about defraying the state's cost to file a criminal case against the defendant by imposing fees on those same defendants who do not have the 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 indigent defendants, the fees are not only pointless, but as Judge Bjorgen explains "increases the system costs they were designed to relieve." Appendix at 10. There is no way to effectively fund victim services, the DNA database or the costs of filing a criminal case by imposing fees a defendant cannot ever pay.[5]

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[5] 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

Second, as this Court recognizes, the State's interest in deterring crime via enforced LFOs is not rationally served. Blazina, 182 Wn.2d at 837. 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.

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.

Judge Bjorgen's dissent succinctly identifies how the imposition of mandatory LFO's on defendants who do not have the ability to pay undermines the criminal justice system: "[T]he only consequence of mandatory LFOs is to harness those assessed them to a growing debt that

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> 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).

they realistically have no ability to pay, keeping them in the orbit of the criminal justice system and within the gravity of temptations to reoffend that our system is designed to still." Appendix at 10.

In sum, there is no rational basis for imposing mandatory DNA-collection, VPA, or filing fees on defendants who cannot pay. As such, RCW 43.43.7541, RCW 7.68.035 and violate substantive due process as applied to these individuals.

The majority in Seward also rejected Seward's argument that RCW 10.01.160(3) requires the court consider a defendant's ability to pay before imposing mandatory LFO's. Appendix at 7. This Court's decisions in Curry and its progeny Blank, however, support Seward's position that an ability-to-pay inquiry must occur at the time the mandatory fees are imposed in light of the realities of Washington's current LFO collection scheme.

Currently, Washington's laws provide for an elaborate and aggressive collections process that includes: the immediate assessment of interest; enforced collections methods through a variety of different entities; and the authorization of numerous additional sanctions and penalties. It is a vicious cycle of penalties and sanctions that has devastating effects on the persons involved in the process and, often, their families. See, Alexes Harris et al., Drawing Blood from Stones: Legal

Debt and Social Inequality in the Contemporary United States, 115 Am. J. Soc. 1753, (2010) (reviewing the LFO cycle in Washington and its damaging impact on those who do not have the ability to pay). Importantly, this cycle does not conform to the necessary constitutional safeguards established by this Court in Curry and Blank.

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

This Court also noted, however, that the constitutionality of Washington's LFO statutes was dependent on trial courts conducting an ability-to-pay inquiry at certain key times. Blank thus makes clear that in order for Washington's LFO system to pass constitutional muster, the courts must conduct an ability-to-pay inquiry: (1) before "enforced" collection; (2) prior to any additional "penalty" for nonpayment; and (3) before any other "sanction" for nonpayment is imposed." Blank, 131 Wn.2d at 242. Unfortunately, neither the Legislature nor the trial courts are currently complying with Blank's directives.

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

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

Under RCW 10.82.090(1), LFOs accrue interest at a rate of 12 percent – an astounding level given the historically low interests rates of the last several years. Blazina, 182 Wn. 2d at 836 (citing Travis Stearns, Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 Seattle J. Soc. Just. 963, 967 (2013). Interest on LFOs accrues from the date of judgment. RCW 10.82.090. This mechanism of enforcement has been identified as particularly invidious because it further burdens people who do not have the ability to pay with

mounting debt and ensnarls them in the criminal justice system for what might be decades. See Blazina, 182 at 836 (citation omitted) (explaining that on average, a person who pays $25 per month toward their LFOs will owe the State more 10 years after conviction than they did when the LFOs were initially assessed.). There is no requirement for the courts to conduct an inquiry into ability to pay before interest is assessed upon unpaid mandatory LFOs.

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

Washington law permits courts to use private collection agencies or county collection services to actively enforce collection of LFOs. RCW 19.16.500; 36.18.190. There is nothing in the statutes that prohibits the courts from using collection services immediately after sentencing. The defendant pays any penalties or additional fees these agencies assess. Id. And, when accounts are assigned to such agencies, the court clerks may impose a transfer fee equal to "the full amount of the debt up to one hundred dollars per account." RCW 19.16.500. Yet, there is no requirement that an ability-to-pay inquiry occur before court clerks utilize this mechanism of enforcement to collect mandatory LFOs. Id.

Washington law also permits courts to order "payroll deduction." RCW 9.94A.760(3). This can be done immediately upon sentencing. RCW 9.94A.760(3). Beyond the actual deduction to cover the outstanding LFO payments, employers are authorized to deduct other fees from the employee's earnings. RCW 9.94A.7604(4). This constitutes an enforced collection process with additional sanctions and too there is no provision requiring an ability-to-pay inquiry before this collection mechanism is used.

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

This Court should grant review to decide these important and significant due process and public issues and to put an end to these fees without regard to a defendant's ability to pay. RAP 13.4 (b)(3) and (4).

2. REVIEW IS WARRANTED BECAUSE WHETHER RCW 36.18.020(2)(h) IS A MANDATORY FEE IS OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DECIDED BY THIS COURT.

In his Supplemental Brief of Appellant. Seward argued the criminal filing fee authorized in RCW 36.18.020(2)(h) is not mandatory and the trial court erred by imposing that fee with conducted an ability to pay inquiry before imposing the fee. SBA 5-8. The Seward court refused to address the issue finding that it was newly raised. Appendix at 2, n. 7. If this Court accepts review it should address this issue as well because without a definitive holding by this Court on whether RCW 36.18.020(2)(h) is a mandatory or discretionary fee the issue will continue to surface in future cases.

In Lundy, the Division Two indicated that the $200 criminal filing fee is mandatory, not discretionary. State v. Lundy, 176 Wn.App. 96, 102-103, 308 P.3d 755 (2013). The Lundy court provided no rationale or analysis of the statutory language supporting its conclusion that the fee is mandatory. See Id.; see also State v. Stoddard, 192 Wn.App. 222, 225, 366 P.3d 474 (2016) (Division Three's mere citation to Lundy for proposition that filing fee must be imposed regardless of indigency without statutory analysis). The Lundy court was wrong.

The language of RCW 36.18.020 (2)(h), which provides authority to impose a filing fee, differs from other statutes authorizing mandatory fees. For instance, the victim penalty assessment statute provides, "When any person is found guilty in any superior court of having committed a crime . . . there shall be imposed by the court upon such convicted person a penalty assessment." RCW 7.68.035 (emphasis added). The same is true of the DNA collection fee statutes, which provides, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars." RCW 43.43.7541 (emphasis added).

The language in RCW 36.18.020 (2)(h), however, is not the same. It provides that, upon conviction, "an adult defendant in a criminal case shall be liable for a fee of two hundred dollars." (Emphasis added.) In contrast to the DNA collection and VPA statutes—both of which demonstrate that the legislature knows how to unambiguously mandate the imposition of a legal financial obligation—RCW 36.18.020(2)(h) does not mandate the imposition or inclusion of a $200 criminal filing fee. Although RCW 36.18.020(2) states that "[c]lerks of superior courts shall collect" the fee, the statute's language does not indicate that the fee cannot be waived by a judge. Liability for a fee and being required to pay a fee are different. "Liability" encompasses a broad range of possibilities, from making a person "obligated" in law to pay to imposing a "future possible

or probable happening that may not occur." BLACK'S LAW DICTIONARY 915 (6th ed. 1990). Thus, "liable" can mean a situation that *might* give rise to legal liability. At best, the statutory language is ambiguous as to whether it is mandatory. Under the rule of lenity, the statutory language must be interpreted in Seward's favor. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

Indeed, this Court recently appeared skeptical that the $200 filing fee was mandatory, noting it has only "been treated as mandatory by the Court of Appeals." State v. Duncan, 185 Wn.2d 430, 437, n.3, 734 P.3d 83, (2016).[6] This Court should accept review of this issue and hold that the criminal filing fee is a discretionary LFO.

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[6] This Court noted:

> We recognize that the legislature has designated some of these fees as mandatory. E.g., RCW 7.68.035 (victim assessment); RCW 43.43.7541 (DNA (deoxyribonucleic acid) collection fee); RCW 10.82.090(2)(d) (effectively making the principal on restitution mandatory). Others have been treated as mandatory by the Court of Appeals. State v. Lundy, 176 Wn.App. 96, 102, 308 P.3d 755 (2013) (holding that the filing fee imposed by RCW 36.18.020 (2)(h) is mandatory and courts have no discretion to consider the offender's ability to pay). While we have not had occasion to consider the constitutionality of all of these statutes, we have found that the victim penalty assessment statute was not unconstitutional on its face or as applied to the defendants in the case because there were sufficient safeguards to prevent the defendants from being sanctioned for nonwillful failure to pay. See Curry, 118 Wn.2d at 917, 829 P.2d 166.

Duncan, 185 Wn.2d at 437, n.3,

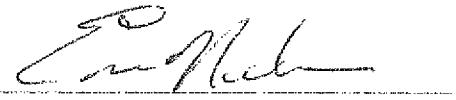
G. CONCLUSION

For the reasons stated, this Court should grant review.

Dated this 22 day of November, 2016.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WYATT TAYLOR SEWARD, Appellant.	No. 47581-2-II PUBLISHED OPINION

JOHANSON, J. — Wyatt Taylor Seward appeals the imposition of legal financial obligations (LFOs) following his guilty plea conviction for second degree assault. He argues that (1) the imposition of mandatory LFOs under RCW 43.43.7541 (deoxyribonucleic acid (DNA) collection fee), RCW 7.68.035 (victim penalty assessment (VPA)), and RCW 36.18.020(2)(h) (filing fee) without first considering his current or likely future ability to pay violated his substantive due process rights, (2) the LFO collection process does not comply with the constitutional safeguards established in *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997), and (3) RCW 10.01.160(3) applies to the DNA collection fee, the VPA, and the filing fee even though

they are mandatory. He also requests that we not impose appellate costs.[1] We reject Seward's arguments and affirm the LFOs, but we exercise our discretion to not impose appellate costs.

FACTS

On March 6, 2015, Seward pleaded guilty to a second degree assault charge. During the plea colloquy, Seward's counsel requested that the trial court delay the sentencing hearing until May 1 because Seward, who had a wife and two children and was currently employed, needed to "get his affairs in order." Report of Proceedings (RP) (Mar. 6, 2015) at 12.

At the May 1 sentencing hearing, the State requested that the trial court impose the $500 VPA, the $100 DNA collection fee, and $200 in "court costs." RP (May 1, 2015) at 9. The State did not ask the trial court to impose any other LFOs.

The trial court imposed a 120-month sentence. It also ordered Seward to pay a total of $800 in mandatory LFOs: (1) a $200 criminal filing fee under RCW 36.18.020(2)(h),[2] (2) a $500

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[1] Although Seward did not make this request in his original briefing, he has moved for permission to include this issue. We grant this motion and consider whether to impose appellate costs below.

Seward also argues in his supplemental brief that the filing fee was a discretionary fee subject to RCW 10.01.160(3). Seward did not raise this issue in his original briefing. Seward has not moved for permission to raise this additional issue. Accordingly, we do not address this newly-raised issue.

[2] RCW 36.18.020(2)(h) provides,

> Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case *shall be liable for* a fee of two hundred dollars.

(Emphasis added.) The legislature amended RCW 36.18.020(2)(h) in 2015, changing the phrase "a defendant in a criminal case" to "an adult defendant in a criminal case." LAWS OF 2015, ch. 265 § 28. Because this amendment does not affect this case, we cite to the current version of the statute.

VPA under RCW 7.68.035,[3] and (3) a $100 DNA collection fee under RCW 43.43.7541.[4] The trial court later imposed $28,563.84 in restitution. There is nothing in the record showing that Seward objected to any LFOs. Nor is there anything in the record showing that the trial court considered Seward's current or potential future ability to pay any LFOs. Seward appeals his LFOs.

ANALYSIS

I. DUE PROCESS

Seward argues that the imposition of mandatory LFOs under RCW 43.43.7541, RCW 7.68.035, and RCW 36.18.020(2)(h), without first establishing that he had or will have the ability to pay, violated his substantive due process rights because there is no rational basis for imposing costs against those who cannot pay. We disagree.[5]

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[3] RCW 7.68.035(1)(a) provides,

> When any person is found guilty in any superior court of having committed a crime, except as provided in subsection (2) of this section, there *shall* be imposed by the court upon such convicted person a penalty assessment. The assessment shall be in addition to any other penalty or fine imposed by law and shall be five hundred dollars for each case or cause of action that includes one or more convictions of a felony or gross misdemeanor and two hundred fifty dollars for any case or cause of action that includes convictions of only one or more misdemeanors.

(Emphasis added.) The legislature amended RCW 7.68.035 in 2015. LAWS OF 2015, ch. 265 § 8. Because this amendment is not relevant to the issues in this case, we cite to the current version of the statute.

[4] RCW 43.43.7541 provides in part,

> Every sentence imposed 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 and other applicable law.

(Emphasis added.) The legislature amended RCW 43.43.7541 in 2015. LAWS OF 2015, ch. 265 § 31. Because this amendment is not relevant to the issues in this case, we cite to the current version of the statute.

[5] We exercise our discretion under RAP 2.5 to address this issue. *See State v. Blazina*, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015) ("RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right.").

A. LEGAL PRINCIPLES

Statutes are presumed constitutional, and it is Seward's burden to establish that a due process violation occurred. *State v. McCuistion*, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012); *Blank*, 131 Wn.2d at 235. We review alleged due process violations de novo. *State v. Mullen*, 171 Wn.2d 881, 893, 259 P.3d 158 (2011).

The Fifth and Fourteenth Amendments to the United States Constitution and article I, section 3 of the Washington Constitution mandate that no person may be deprived of life, liberty, or property without due process of law. Where, as here, the interests at stake are not fundamental rights,[6] we apply the most lenient and highly deferential review standard—the rational basis standard. *Nielsen v. Dep't of Licensing*, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013).

Under rational basis review, we determine whether a rational relationship exists only between the challenged law and a legitimate state interest. *Nielsen*, 177 Wn.2d at 53. In applying this standard, we may "'assume the existence of any necessary state of facts which [we] can reasonable conceive in determining whether a rational relationship exists between the challenged law and a legitimate state interest.'" *Nielsen*, 177 Wn.2d at 53 (alteration in original) (quoting *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006)). Unlike when we apply strict scrutiny, narrow tailoring is not required under a rational basis review. *See Nielsen*, 177 Wn.2d at 53.

[6] The parties agree that no fundamental right is at issue.

B. Rational Basis

Seward acknowledges that (1) the DNA collection fee serves the legitimate state interest of funding the collection, analysis, and retention of convicted offenders' DNA profiles to facilitate future criminal identifications, (2) the VPA serves the legitimate state interest of funding comprehensive programs to encourage and facilitate testimony by victims and witnesses of crimes, and (3) the filing fee serves the legitimate state interest in compensating the court clerks for their official services. But Seward argues that imposing the fees on offenders without first determining whether the offenders have the current or potential future ability to pay does not rationally serve these interests. He argues it is unlikely the fees will be collected if the offender does not have the ability to pay, and imposing and attempting to collect fees and assessments from those who cannot pay is harmful to the offenders, creates no legitimate economic incentive, and serves no legitimate purpose.

We hold that the DNA collection fee, the VPA, and the filing fee are rationally related to the legitimate state interests described above in two ways. First, imposing these fees and the assessment on all felony offenders without first considering their ability to pay is rationally related to legitimate state interests because even though some offenders may be unable to pay, some will. So the imposition of these fees and assessments on all offenders creates funding sources for these purposes.

Second, imposing these fees and the assessment on offenders who may be indigent at the time of sentencing is also rationally related to funding these purposes because the defendant's indigency may not always exist. We can conceive of situations in which an offender who is indigent at the time of sentencing will be able to pay the fees and assessments in the future. So it

is not unreasonable to believe that imposing these fees and assessments on all indigent offenders would result in some funding for these purposes. Accordingly, Seward fails to show that there is no rational relationship between imposing these mandatory fees and assessments against all offenders, and his due process argument fails.[7]

II. COMPLIANCE WITH *BLANK*'S CONSTITUTIONAL SAFEGUARDS

Seward next argues that the current LFO schemes do not meet the "necessary constitutional safeguards established in *Blank*." Br. of Appellant at 10. He argues that *Blank* established that the constitutionality of Washington's LFO statutes depended on the trial court conducting an ability to pay inquiry at certain key points. First is when collection has begun and sanctions are sought for nonpayment. Second is when the State seeks to impose an additional penalty for failure to pay. And third is before enforced collection or any sanction is imposed for nonpayment. He contends that under the current collection schemes, payment, interest, and penalties can commence immediately after sentencing, so the court must conduct the ability to pay analysis at sentencing.

In *Blank*, our Supreme Court held that "before enforced collection or any sanction is imposed for nonpayment, there must be an inquiry into ability to pay." 131 Wn.2d at 242. *Blank* does not, however, require that the inquiry into ability to pay take place before the LFOs are imposed in a judgment and sentence. Although Seward asserts that enforced collections and sanctions immediately follow the entry of the judgment and sentence, nothing in the record

[7] Although previous cases, *State v. Curry*, 118 Wn.2d 911, 917-18, 829 P.2d 166 (1992), and *State v. Mathers*, 193 Wn. App. 913, 918-21, 376 P.3d 1163 (2016), *review denied*, No. 93262-0 (Wash. Sept. 28, 2016), address and reject similar due process arguments, neither of these cases address the exact argument Seward presents—whether imposing mandatory fees or assessments on defendants before determining whether they have the current or likely future ability to pay these fees rationally serves the State's legitimate interests.

supports this argument.[8] Because the record does not support Seward's assertions, this argument fails.

III. Application of RCW 10.01.160(3)

Seward further argues that the trial court erred in failing to comply with RCW 10.01.160(3)'s requirement that the court consider the offender's ability to pay before imposing the LFOs. He contends that although the DNA collection fee, the VPA, and the filing fee statutes purport to impose mandatory fees and assessments, "these [statutes] must be harmonized with RCW 10.01.160(3)." Br. of Appellant at 19. We disagree.

We have rejected this identical argument insofar as it relates to the DNA collection fee and the VPA in *State v. Mathers*, 193 Wn. App. 913, 918-21, 376 P.3d 1163 (2016), *review denied*, No. 93262-0 (Wash. Sept. 28, 2016). Furthermore, although *Mathers* does not address the filing fee, we hold that the same analysis applies with equal force. Thus, for the reasons stated in *Mathers*, this argument fails.

IV. Appellate Costs

Finally, in his supplemental brief, Seward argues that if the State requests appellate costs, we should deny the request. He notes that (1) he was appointed counsel because of his indigency, (2) he received a 120-month sentence, (3) "it is reasonable to presume he remains indigent throughout this review," (4) he owes more than $28,000 in restitution, and (5) imposing additional obligation of appellate costs will unjustly increase his financial burden. Suppl. Br. of Appellant at 10. The State responds that there is no basis to waive appellate costs.

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[8] For instance, there is no notation on the judgment and sentence showing that Seward was required to start paying his LFOs.

In light of Seward's current indigent status, our presumption under RAP 15.2(f) that he remains indigent "throughout the review" unless the trial court finds that his financial condition has improved, and the fact that he will have significant debt due to the restitution award upon his release, we exercise our discretion and waive appellate costs. RCW 10.73.160(1).[9]

We affirm the imposition of the mandatory LFOs and waive appellate costs.

Johanson, J.
JOHANSON, J.

I concur:

J
LEE, J.

[9] The legislature amended RCW 10.73.160(1) in 2015. LAWS OF 2015, ch. 265, § 22. This amendment removed references to juvenile offenders and is not relevant to our analysis. Accordingly, we cite to the current version of the statute.

BJORGEN, C.J. (dissenting) — I part with the majority opinion in its analysis of the substantive due process challenge to mandatory legal financial obligations (LFOs). Therefore, I dissent.

The majority rightly centers its substantive due process analysis on the highly deferential rational basis test.[10] The basic demand of the test is a rational relationship between the challenged law and a legitimate state interest. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 571 (2006). In making this determination, we may assume the existence of any necessary state of facts which can reasonably be conceived. *Id.*

The central purpose of mandatory LFOs is to raise money to help fund certain elements of the criminal justice system, without doubt a legitimate state interest. Imposing these obligations on those with ability to pay plainly serves that interest. On the other hand, requiring monetary payments from those who cannot and will not be able to pay them does nothing to serve that purpose. Without a *Blazina*-like[11] individualized determination of ability to pay, these mandatory assessments generate obligations having no reasonable relationship to their purpose.

The majority analysis would salvage a reasonable relationship through a type of dragnet rationale: because these assessments would be imposed on some who can pay, their imposition on those who cannot serves the purpose of raising money. In a temporal variant of the same approach, the majority analysis also argues that imposing these obligations on those who cannot pay serves the same purpose, because they may be able to pay at some point in the future.

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[10] The notion of substantive due process appears in different guises in the case law. In this appeal it centers on whether the rational basis test is met.

[11] *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The rational basis test does allow us to posit any reasonably conceivable state of facts in finding the needed rational relationship. Thus, we posit that some, perhaps even many, who are assessed mandatory LFOs can and will pay, which plainly serves the purpose of raising money. Similarly, we may guess that some who lack the ability to pay now may find that ability on some hoped for day in the future.

However, a license to engage in a *gedankenexperiment* to discover ways in which a measure could serve a purpose is not a license to impose that measure in ways that do nothing to serve the purpose and which, in fact, work against that purpose. Without the individualized determination required by *Blazina* for discretionary LFOs, mandatory LFOs will be imposed in many instances on those who have no hope of ever paying them. In those instances, the levy of mandatory LFOs has no relation to its purpose. In those instances, the only consequence of mandatory LFOs is to harness those assessed them to a growing debt that they realistically have no ability to pay, keeping them in the orbit of the criminal justice system and within the gravity of temptations to reoffend that our system is designed to still. Levying mandatory LFOs against those who cannot pay them thus increases the system costs they were designed to relieve. In those instances, the assessment of mandatory LFOs not only fails wholly to serve its purpose, but actively contradicts that purpose. The self-contradiction in such a system crosses into an arbitrariness that not even the rational basis test can tolerate.

The rational basis test, of course, does not demand the same tailored relationship between means and purpose typically required in strict scrutiny. As noted, a rational relationship between the challenged law and a legitimate state interest is all the rational basis test requires. *Amunrud*, 158 Wn.2d at 222. Further, under the rational basis test a law may address only part of the

societal problem it is directed against. *See Ry. Express Agency v. People of State of New York*, 336 U.S. 106, 110, 69 S. Ct. 463, 93 L. Ed. 533 (1949).

The majority's dragnet rationales, though, are something entirely different. These rationales attempt to save a law that contradicts its purpose in some instances by pointing out that the law will serve its purpose in others or by hypothesizing that the contradiction may someday cease. This contradiction between purpose and effect in some instances is not effaced by its absence in others. Nor is the contradiction relieved by the doubtful hope that it may some day pass away. These uses of the imagination are far removed from positing different ways in which a law may serve its purpose, which is the sort of speculation invited by the rational basis standard.

Although rational basis review is highly deferential, courts have invalidated legislation under it where the purported rationale for challenged legislation is too attenuated or irrational in light of the legislation's effect. In *Turner v. Fouche*, the United States Supreme Court considered an equal protection challenge to a Georgia statute limiting school board membership to freeholders, those owning some real property. 396 U.S. 346, 361-62, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970). In the face of the parties' dispute over the proper standard of review, the court noted that the "freeholder requirement must fall even when measured by the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective." *Id.* at 362. The court reasoned:

> Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold. Whatever objectives Georgia seeks to

> obtain by its "freeholder" requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal.

Id. at 364 (internal footnotes omitted).

Although *Turner* dealt with an equal protection challenge, the essence of the rational basis standard is unchanged. The speculation that offended that standard in *Turner* is different from that entertained by the majority here in its specifics but not in its nature. The majority's approach lacks that rudimentary fit that *Turner* required under rational basis review. Perhaps more to the point, if the hypothesizing of the majority approach is sufficient to relieve the contradictions in assessing mandatory LFOs with no consideration of ability to pay, then the rational basis test must tolerate the irrationality of clearly antagonistic purpose and effect. That irrationality itself contradicts the core of the rational basis test.

For these reasons, I would conclude that the assessment of mandatory LFOs with no inquiry into ability to pay fails the rational basis test.

Bjorgen, C.J.
BJORGEN, C.J.

NIELSEN, BROMAN & KOCH, PLLC

November 22, 2016 - 1:54 PM

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