NO. 100857-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY ALEXANDER WIDMER,

Petitioner.

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# STATE'S RESPONSE TO PETITION FOR REVIEW

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## A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

## B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Widmer, No. 82744-8 (2021 Unpublished).

## C. STATEMENT OF THE CASE

The State charged Widmer with three counts of felony harassment for threatening to kill three different individuals at his apartment complex, including a 13-year-old child. CP 35-38. After accepting a plea bargain from the State, Widmer eventually pled guilty to an amended information charging three counts of gross misdemeanor harassment. CP 70-72; RP 70.

The parties' joint sentencing recommendation included the mandatory $500 Victim Penalty Assessment (VPA).[1] CP

[1] Proceeds from the VPA are placed "into a fund maintained exclusively for the support of comprehensive programs to encourage and facilitate testimony by the victims…and witnesses to crimes." RCW 7.68.035(4).

93-94. Defense counsel asked the court "to follow the agreed recommendation." RP 83. Consistent with this agreement, the sentencing court waived all discretionary legal-financial obligations (LFOs) but imposed "the mandatory victim penalty assessment." RP 84. Widmer did not object to the VPA at sentencing.

Widmer argued for the first time on appeal that imposing the VPA on an indigent defendant violated the excessive fines clauses of the state and federal constitutions. Brief of App. at 5-9. This Court affirmed in an unpublished opinion. Widmer, No. 82744-8.

## D. ARGUMENT

RAP 13.4 governs review by the Washington Supreme Court "of a Court of Appeals decision terminating review…" It states in relevant part that "[a] petition for review will be accepted by the Supreme Court only":

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b); RAP 13.5A.

Widmer argues review is warranted in this case under RAP 13.4. Widmer's petition does not specify which subsection of the rule he is relying upon. Brief of Pet. at 1, 37.

### 1. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE UNDERLYING CONSTITUTIONAL ISSUES BECAUSE ANY ERROR WAS INVITED.

The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create, even when the alleged error involves constitutional rights. State v. Carson, 179 Wn. App. 961, 973, 320 P.3d 185 (2014). "The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim

that very action as error on appeal…" In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014).

"In determining whether the invited error doctrine applies, [this Court has] considered whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it." Coggin, 182 Wn.2d at 119. Appellate courts strictly enforce the invited error doctrine without regard to whether the error was intentional. State v. Ortiz-Triana, 193 Wn. App. 769, 777, 373 P.3d 335 (2016). This Court has previously found the doctrine applicable when "defendants were sentenced pursuant to plea bargains and later challenged their sentences on appeal." In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 312-13, 979 P.2d 417 (1999).

In this case, Widmer made a knowing, intelligent and voluntary plea bargain. CP 72. As part of his plea contract, he agreed the trial court should impose the VPA. CP 93; RP 83. At sentencing, Widmer asked the court to follow the agreed recommendation. RP 83. Widmer thus both affirmatively

assented to the error and materially contributed to it. State v. Cooper, 63 Wn. App. 8, 14, 816 P.2d 734 (1991).

Moreover, Widmer benefitted from the bargain. See Coggin, 182 Wn.2d at 119. In return for his plea and agreed sentencing recommendation, the State reduced the charges against him from felony harassment to gross misdemeanor harassment. Had Widmer contested the VPA, the State would have been unlikely to offer a misdemeanor resolution. Because Widmer elected to accept the VPA in return for a significant benefit, any error was invited.[2]

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[2] Division One recently addressed the invited error doctrine in State v. Tatum, __ Wn. App. 2d __, __ P.3d __, No. 8200-9 (August 8, 2022), where it held that "Tatum's treatment of the issue in front of the trial court was more akin to failure to object to a potential error than affirmative invitation of one." Tatum is distinguishable because the defendant in that case was being *re-sentenced*, and the court's reasoning was a direct result of that procedural posture. While Tatum had agreed to the imposition of the $500 VPA at his original sentence, this invitation to error was vitiated upon re-sentencing *de novo*, where counsel merely failed to object. Id. at *2 ("But this appeal arises out of Tatum's resentencing, not his original sentencing. The State, by focusing exclusively on that original proceeding, has not met its burden").

It is "well established policy" in Washington that courts should avoid addressing constitutional issues if the case can be resolved on other grounds. State v. Speaks, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992); Community Telecable of Seattle, Inc. v. City of Seattle, Dept. of Executive Admin., 164 Wn.2d 35, 41, 186 P.3d 1032 (2008). Because this case falls under the invited error doctrine, the court would not reach Widmer's substantive argument. His petition is thus a poor vehicle to address the underlying constitutional issues asserted.

**2. REVIEW IS NOT WARRANTED BECAUSE THIS COURT HAS ALREADY FOUND THE VPA CONSTITUTIONAL, EVEN WHEN IMPOSED ON INDIGENT DEFENDANTS.**

The Court of Appeals relied heavily on this Court's decision in State v. Curry, 118 Wn.2d 911, 829 P.2d 166, 168 (1992). Like Widmer, the defendants in Curry challenged the imposition of the mandatory victim penalty assessment. Id. This Court found the operative statute constitutional because "there are sufficient safeguards…to prevent imprisonment of indigent defendants…no defendant will be incarcerated for [their]

inability to pay…unless the violation is willful." Id. at 169. The Court cited this aspect of Curry with approval in State v. Duncan, 185 Wn.2d 430, 436, n.3, 374 P.3d 83 (2016).

This Court will reject a prior holding only upon "a clear showing that an established rule is incorrect and harmful." State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). This Court does not overrule precedent merely because it might have made a different decision as matter of first impression. Id. "Instead, the question is whether the prior decision is so problematic that it *must* be rejected…" Id. (emphasis original). Widmer has not shown that Curry is incorrect and harmful.

Widmer's petition cites this Court's more recent decision in State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015), which allowed a pre-collection challenge to LFO's. However, Widmer largely glosses over the fact that Blazina analyzed *discretionary* LFO's. Id. at 834. All three divisions of the Court of Appeals have repeatedly, and correctly, concluded that Blazina's analysis does not apply to *mandatory* LFO's like the

VPA. State v. Mathers, 193 Wn. App. 913, 921, 376 P.3d 1163 (2016); State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016); State v. Shelton, 194 Wn. App. 660, 673, 378 P.3d 230 (2016).

Timbs v. Indiana, __ U.S. __, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019), does not compel a different result. Timbs involved the civil forfeiture of a legitimately purchased vehicle worth $42,000, which was "more than four times the maximum….fine." Id. But Timbs simply held that the Eighth Amendment's Excessive Fines clause "is…incorporated by the Due Process Clause of the Fourteenth Amendment." Id. at 686. It did not even hold that Indiana's action was unconstitutional. Id. at 687 ("The Indiana Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action…"). Rather, the Court simply determined that the Eighth Amendment provided the appropriate analytical framework upon remand. See id. at 689-91 ("The State of Indiana…argues

that the Clause does not apply to its use of civil *in rem* forfeitures…").

The State does not dispute that it is bound by the Eighth Amendment. Nothing in Timbs, however, suggests a $500 mandatory fee is unconstitutionally oppressive, even for an indigent person. This is especially true where, as in Washington, the fee does not accrue interest and failing to pay due to indigence cannot result in any penalty. RCW 10.82.090.

This Court's decision in City of Seattle v. Long, 198 Wn.2d 136, 493 P.3d 94 (2021), also does not compel review.[3] The plaintiff in Long lived out of his truck, which was impounded for being illegally parked on city property. Id. at 143. The municipal court upheld an approximately $550 fine

[3] Widmer's petition asserts that "[i]n deciding to limit Long to impoundment fees, the Court of Appeals misapprehends this Court's holding." Brief of Pet. at 19. But the Court of Appeals' opinion did not cite Long, and certainly did not purport to limit it. Rather, it simply acknowledged that Curry was directly controlling precedent on this specific issue. Widmer, No. 82744-8.

and required Long to pay $50 per month. Id. at 143. Long challenged the impound fees as unconstitutionally excessive. Id. at 161.[4] This Court concluded that "the impoundment of Long's truck was partially punitive and constitutes a fine." Id. at 166. It then concluded the fine was unconstitutional as applied to Long because he was indigent and the parking offense was *de minimis*. Id. at 173.

Long is highly distinguishable. Unlike Widmer, Long was "subject to additional penalties in the form of late charges and collection efforts." Id. at 173-74. The impoundment also impacted Long's shelter and ability to work, prompting the Court's statement that "[t]he excessive fines clause prohibits the extraction of payment as punishment for some offenses that would deprive a person of his or her livelihood." Id. at 176-77.

[4] The Court also considered challenges under the Homestead Act and article I, section 7, which are not relevant to Widmer's petition. Long, 198 Wn.2d at 145.

Imposing the VPA does not deprive Widmer of shelter or the ability to work.

Finally, nothing *required* the city to call a tow truck – impounding Long's vehicle was a discretionary act taken by the city. See SMC 11.30.060 ("A vehicle…**may** be impounded…") (emphasis added). Requiring courts to assess a person's ability to pay discretionary fines is consistent with Blazina, *supra*, which the State does not challenge.

The constitutionality of the VPA is settled law. Curry, 829 P.2d at 168. None of the cases cited by Widmer suggest a mandatory fee is unconstitutional when interest does not accrue, there is no penalty for failing to pay due to indigence, and it does not affect the defendant's shelter or livelihood. Review is not necessary.

## E. CONCLUSION

The State respectfully requests that Widmer's petition for review be denied.

This document contains 1,847 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 23 day of August, 2022.

Respectfully submitted,

DANIEL T. SATTERBERG
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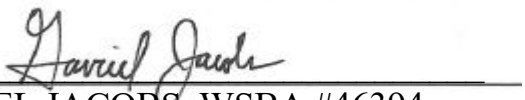
By: 
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