Supreme Court No. 100858-9
(COA No. 82476-7-1)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JACOB CLEMENT,

Petitioner.

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

PETITION FOR REVIEW

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Jacob Clement asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.[1]

B. COURT OF APPEALS DECISION

Mr. Clement seeks review of the Court of Appeals decision dated March 21, 2022, which is attached.

C. ISSUES PRESENTED FOR REVIEW

Does the imposition of mandatory fines and fees without regard to the ability to pay violate the excessive fines clause of the Eighth Amendment and article I, section 14?

D. STATEMENT OF THE CASE

Unable to post his bail, Mr. Clement spent a year in jail before he pled guilty to second-degree robbery for

[1] Although unrelated to this case, similar issues have been petitioned to this Court in *State v. Widmer*, COA No. 82744-8-I, which was also filed today.

stealing $20, of which $16.25 was recovered. CP 15. The court imposed a sentence of nine months in jail, along with the mandatory penalty assessment and the DNA collection fee, for a total of $600 in legal financial obligations. CP 7-8.

The court did not make detailed findings about Mr. Clement's indigency other than to waive all fines and fees it did not believe were required. CP 7-8. Mr. Clement detailed his poverty in his appeal paperwork, demonstrating he has no income and relies on disability payments to survive. CP 43. He also has no assets of value. CP 44. Like here, appointed counsel represented him in the superior court.

The Court of Appeals determined it could not decide whether the legal financial obligations imposed by the trial court violated the excessive fines clause

and affirmed the trial court's sentence. App. 11. Mr. Clement now petitions this Court for review.

E. ARGUMENT

Legal debt is punishment. Fines and fees that do not account for a person's ability to pay act as a barrier to reentry and have a lasting impact on the poor. Because fines and fees are disproportionately imposed against persons of color, they also perpetuate the persistent and systemic injustices of the legal system. To reconcile this opinion with the United States Supreme Court's requirement of proportionality and this Court's requirement that financial obligations should only be imposed when a person has the ability to pay them, this Court should grant review.

1. State and federal law conflict with the Court of Appeals decision.

Article I, section 14 of the Washington Constitution prohibits the imposition of "excessive

fines." Const. art. I, § 14; *City of Seattle v. Long*, 198 Wn.2d 136, 158, 493 P.3d 94 (2021). The Eighth Amendment also prohibits "excessive fines." U.S. Const. amend. VIII. This prohibition is incorporated against the States under the Fourteenth Amendment. U.S. Const. amend. XIV; *Timbs v. Indiana,* ___ U.S. ___, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019).

The federal and state excessive fines clause limits the government's power to require payments as punishment for an offense. *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)). A fine is excessive if it is "grossly disproportional to the gravity of the defendant's offense." *Long*, 198 Wn.2d at 162 (quoting

United States v. Bajakajian, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)).

a. The victim penalty assessment and DNA collection fee are punitive.

If a statutory fee or fine has any purpose not solely remedial, it is punishment within the meaning of the Eighth Amendment and article I, section 14. *Bajakajian*, 524 U.S. at 332; *Long*, 198 Wn.2d at 163-64 (citing *Tellevik v. 6717 100th Street S.W.*, 83 Wn. App. 366, 376-77, 921 P.2d 1088 (1996)).

The penalty assessment and the DNA collection fee are not solely remedial. Instead, they are payments to the government that operate to punish the offender, regardless of their crime or ability to pay. As such, they may only be imposed when they comply with the Eighth Amendment and article I, section 14.

The penalty assessment is paid to the government and used to fund "comprehensive

programs to encourage and facilitate" testimony. *State v. Conway*, 8 Wn. App. 2d 538, 555, 438 P.3d 1235, 1244 (2019). It is a penalty imposed in every case, regardless of whether there was a victim. RCW 7.68.035. It is not remedial.

This Court can also find the statute's plain language shows that the penalty assessment is punitive. The statute requires the assessment to be imposed "in addition to any other penalty or fine." RCW 7.68.035. This language is almost identical to the municipal code language reviewed by this Court in *Long*, where this Court determined that the plain language stating the impoundment fees were "in addition to any other penalty" persuaded this Court the impoundment fee was a penalty. 198 Wn.2d at 164. Like *Long*, the plain language shows one purpose of the statute is to punish offenders. *Id*.

The purpose of the DNA fee is to fund the creation of the state DNA database and maintain it. *State v. Lewis*, 194 Wn. App. 709, 719–20, 379 P.3d 129 (2016). The DNA fee is imposed in almost every case, regardless of ability to pay. RCW 43.43.7541. Likewise, it is not remedial.

As with the impoundment fee in *Long*, this Court should find the penalty assessment and DNA collection fee are partially punitive. *Long*, 198 Wn.2d at 163. A remedial action is one brought to obtain compensation or indemnity. *Bajakajian*, 524 U.S. at 329 (citing *Black's Law Dictionary*, 1293 (6th ed. 1990)). And even where a fee may serve a remedial purpose, it is still subject to the excessive fines clause if it serves "in part to punish." *Austin*, 509 U.S. at 610. The purpose of both the penalty assessment and DNA fee or not to obtain compensation or indemnity. This Court should

apply the same analysis it did in *Long* and hold the penalty assessment and DNA collection fee are punitive.

b. The Court of Appeals' decision conflicts with Timbs v. Indiana.

The Court of Appeals does not address the United States Supreme Court's requirement that where a fine is grossly disproportionate to the crime committed, it runs afoul of the excessive fines clause. *See Timbs*, 139 S. Ct. at 687. In *Long*, however, this Court recognized it was bound by *Timbs*, acknowledging, "the central tenant of the excessive fines clause is to protect individuals against fines so oppressive as to deprive them of their livelihood." 198 Wn.2d at 171 (citing *Timbs*, 139 S. Ct. at 688).

In *Timbs*, the United States Supreme Court held that where forfeitures are partially punitive, they violate the Eighth Amendment excessive fines clause.

139 S. Ct. at 689. The Court acknowledged the toll excessive fines have on persons unable to pay them. *Id*. at 687. The Court further recognized that economic sanctions must "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." *Id*. at 688 (citing *Browning-Ferris Industries of Vt., Inc.*, 492 U.S. at 271).

Nor will this Court ignore the historical realities of fines, which were used "to subjugate newly freed slaves and maintain the prewar racial hierarchy." *Timbs*, 139 S. Ct. at 688; *see also, Long*, 198 Wn.2d at 136. Increasingly, fines are employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money." *Harmelin v. Michigan*, 501 U.S. 957, 979, n. 9, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Scalia, J.).

If a fine has any punitive characteristics, it must be considered a punishment for the purpose of the excessive fines clause. *Timbs*, 139 S. Ct. at 689; *Austin*, 509 U.S. at 621. Where the court imposes a fine to finance a state operation, "it makes sense to scrutinize governmental action more closely." *Timbs*, 139 S. Ct. at 689 (quoting *Harmelin*, 501 U.S. at 979, n. 9).

The Court of Appeals did not address why *Timbs* does not control. This Court should grant review to clarify that *Timbs* requires lower courts to apply the excessive fines clause whenever a legal financial obligation is at least partially punitive.

c. The Court of Appeals' decision conflicts with City of Seattle v. Long.

Unlike the Court of Appeals, this Court in *Long* applied *Timbs'* analysis, finding impoundment charges partially punitive when a vehicle is towed for a parking infraction. 198 Wn.2d at 173. In considering whether a

fine is grossly disproportionate, this Court looks to several factors, including "a person's ability to pay the fine." *Id*. (citing *State v. Grocery Manufacturers Ass'n*, 195 Wn.2d 442, 476, 461 P.3d 334 (2020); *Colorado Dep't of Labor & Emp't v. Dami Hosp., LLC*, 442 P.3d 94, 101 (Colo. 2019)).

In *Long*, this Court recognized that for a sanction to trigger the excessive fines clause, it must be a "fine," and it must be "excessive." 198 Wn.2d at 162. Even though the fines imposed for the impoundment were remedial and intended to recoup costs associated with the storage of the impounded vehicle, this Court found they were also partially punitive. *Id*. at 164.

Here, the imposition of the penalty assessment and DNA collection fee are not remedial. The penalty assessment is imposed regardless of whether the crime has a victim and is intended to facilitate witness

services. RCW 7.68.035. The purpose of the DNA fee is to create and maintain a DNA database, again unrelated to remediation. RCW 43.43.7541.

Finally, *Long* recognizes that the United States Supreme Court's decisions bind it on federal constitutional law questions. 198 Wn.2d at 166 (citing *United States. State v. Vance*, 168 Wn.2d 754, 762 n.7, 230 P.3d 1055 (2010) (citing *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008); *Tricon, Inc. v. King County*, 60 Wn.2d 392, 394, 374 P.2d 174 (1962)). As with impoundment fees, this Court should anchor its decision with respect to the legal financial obligations imposed here in *Timbs*, *Austin*, and *Bajakajian*. *Id*. Under their precedent, the fines and fees imposed here were partially punitive.

This Court should grant review to clarify that partially punitive fees may only be imposed after a

court conducts a proportionality review or determines the offender has the ability to pay.

2. This case is an excellent vehicle for providing guidance for when courts may impose legal financial obligations.

The Court of Appeals held that neither the Eighth Amendment nor article I, section 14 required it to examine whether mandatory fines are unconstitutional. App. 11. This Court should grant review to address whether the Eighth Amendment requires a proportionality review and, because the state constitution provides greater protection, whether mandatory fines and fees may ever be imposed when a person lacks the ability to pay them.

a. The excessive fines clause of the Eighth Amendment requires a proportionality review.

A fine is excessive under the Eighth Amendment if it is "grossly disproportional." *Bajakajian*, 524 U.S. at 339-40; *Long*, 198 Wn.2d at 166. To determine

whether a fine is grossly disproportional, courts examine several factors, including the nature and extent of the crime; whether the violation was related to other illegal activities; the other penalties that may be imposed; the extent of the harm caused; and, most critically, the person's ability to pay. *Long*, 198 Wn.2d at 174.

Applying this test, this Court found the impoundment of a person's truck in which they were living and an assessment of $547.12 were excessive fines predominantly because of the person's inability to pay. *Long*, 198 Wn.2d at 174-75. Likewise, this Court should find Mr. Clements' fine was excessive under the excessive fines clause. Mr. Clement stole $20, of which the police recovered $16.25. CP 3. While not minimizing the seriousness of this offense, Mr. Clement committed this crime out of desperation and

because of his poverty. *Id*. Imposing a mandatory fine he cannot pay is arbitrary and creates enormous disproportionality. Because these fines and fees are always imposed, this Court can find they have a significant disproportionate effect.

Long also provides guidance for when a fine is excessive. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Long*, 198 Wn.2d at 110-11 (quoting *Bajakajian*, 524 U.S. at 334 (citing *Austin*, 509 U.S. at 622-23; *Alexander v. United States*, 509 U.S. 544, 559, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993). A fine violates the excessive fines clause if it is grossly disproportional to the gravity of a defendant's offense. *Id*. (citing *Bajakajian*, 524 U.S. at 336).

This Court analyzed whether a fine is excessive in *Long*, focusing on proportionality. 198 Wn.2d at 168. This Court determined the "weight of history and the reasoning of the Supreme Court demonstrate that excessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances." *Id.* at 171. The "widespread use of fines" to fund the criminal legal system was critical to this analysis. *Id.* This Court made clear punitive fines should not be sought or imposed as "a source of revenue." *Grocery Mfrs. Ass'n*, 195 Wn.2d at 476 (quoting *Timbs*, 139 S. Ct. at 689).

Courts look at a person's ability to pay before assessing legal financial obligations with almost every other legal financial obligation. *State v. Ramirez*, 191 Wn.2d 732, 735, 426 P.3d 714 (2018). This Court consistently recognizes the harm caused when fines

and fees are imposed on people who cannot pay them. *State v. Blazina*, 182 Wn.2d 827, 836, 344 P.3d 680 (2015); *City of Richland v. Wakefield*, 186 Wn.2d 596, 607, 380 P.3d 459 (2016).

And yet, without considering the ability to pay, almost every person convicted of a crime in superior court is assessed $500, with an additional $100 imposed if they are a first-time offender. This fee can have a devastating effect on reentry. *Blazina*, 182 Wn.2d at 837. The long-term involvement of the court in debt collection inhibits reentry, as legal or background checks will show an active record for individuals who have not paid their legal financial obligations. *Id*. This active record can negatively affect employment, housing, and finances. *Id*.

Legal financial obligations overwhelming affect the poor. Cynthia Delostrinos, Michelle Bellmer,

Michelle & Joel McAllister, State Minority & Justice Comm'n, *The Price of Justice: Legal Financial Obligations in Washington State*, 10 (2022).[2] Legal debt affects credit ratings, making it more difficult to find secure housing. Katherine Beckett & Alexis Harris, State Minority & Justice Comm'n, *The Assessment And Consequences of Legal Financial Obligations In Washington State*, 43 (2008).[3] These reentry difficulties increase the chances of recidivism. *Id.* at 68. These challenges persist for most persons convicted of crimes in Washington long after they have paid any other penalties because of their conviction, as only a small percentage of persons are ever able to repay their assessed debt. *Id.* at 21.

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[2] https://www.courts.wa.gov/subsite/mjc/docs/MJC_LFO_Price_of_Justice_Report_Final.pdf

[3] https://media.spokesman.com/documents/2009/05/study_LFOimpact.pdf

This Court will "pay more than 'lip service' to the excessive fines clause and instead hew to its history." *Long*, 198 Wn.2d at 173. When considering whether a fine is constitutionally excessive, a court must also consider a person's ability to pay. *Id*. (citing *Dami Hosp., LLC*, 442 P.3d at 101). Limiting *Long* to impoundment fees misapprehends this Court's holding and interpretation of federal law.

b. Article I, section 14 prohibits imposing fines against persons who cannot pay them.

It is "well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution." *State v. Simpson*, 95 Wn.2d 170, 177, 622 P.2d 1199 (1980). "When both the federal and Washington constitutions are alleged, it is appropriate to examine

the state constitutional claim first." *State v. Young*, 123 Wn.2d 173, 178, 867 P.2d 593 (1994).

This Court articulated standards to decide when an independent or different interpretation of a state constitutional guarantee is warranted in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). This Court examines six "nonexclusive" criteria: (1) the text of the state constitutional provision; (2) the differences in the texts of the parallel state and federal provisions; (3) state constitutional history; (4) pre-existing state law; (5) structural differences between the two constitutions; and (6) matters of particular state interest and local concern. *Id.* at 61-62.

i. Similarities in language do not require an identical analysis.

Even though the two provisions are identical, they do not have to be interpreted the same way. Justice Robert F. Utter, *Freedom and Diversity in a*

Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 514-16 (1983-1984); *State v. Blake*, 197 Wn.2d 170, 181 n. 9, 481 P.3d 521 (2021). This axiom is particularly important to remember "whenever the United States Supreme Court's decisions dilute or underenforce important individual rights and protections." *State v. Mole*, 149 Ohio St. 3d 215, 221, 74 N.E.3d 368 (2016); *see State v. Gregory*, 192 Wn.2d 1, 42-43, 427 P.3d 621 (2018) (Johnson, J., concurring).

ii. History and pre-existing state law support an independent review.

The third and fourth factors support independently interpreting article I, section 14's prohibition against excessive fines and holding that a fine is excessive if the person lacks the ability to pay. Washington lacks significant decisional history

interpreting its excessive fines prohibition. But there is substantial history interpreting article I, section 14's prohibition against cruel punishment independently from the Eighth Amendment's guarantee. *See Gregory*, 192 Wn.2d at 15-17. This analysis supports an independent interpretation of the related and adjacent guarantee in article I, section 14.

Furthermore, given the dearth of United States Supreme Court precedent interpreting the federal guarantee, Washington courts have been left to interpret it and give it life. *See Long*, 198 Wn.2d at 161 ("The Supreme Court largely ignored the excessive fines clause for two centuries."). Then, this Court "revised the test for the Excessive Fines Clause, expressly requiring courts to consider the defendant's ability to pay when conducting an excessive fine analysis." *Jacobo Hernandez v. City of Kent*, 19 Wn.

App. 2d 709, 717, 497 P.3d 871 (2021). And although *Long* correctly interprets the Eighth Amendment, were the United States Supreme Court to disagree, this Court would not be required to "follow, blindly, the lead of the United States Supreme Court" when interpreting article I, section 14. *State v. Jackson*, 102 Wn.2d 432, 438, 688 P.2d 136 (1984).

iii. The structure of the Washington constitution and local concerns support an independent analysis.

The fifth factor, differences in structure between the state and federal constitutions, always supports an independent analysis because the federal constitution is a grant of power from the people, while the state constitution represents a limitation on the State. *State v. Bassett*, 192 Wn.2d 67, 82, 428 P.3d 343 (2018).

As for the sixth factor, state and local concern, this factor also favors independent interpretation.

Criminal law is a matter of local concern generally delegated to the states. *Bond v. United States*, 572 U.S. 844, 848, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014). There is no need for national uniformity in how an excessive fines prohibition is interpreted or applied.

The enduring consequences of legal debt on people in Washington is a paramount local concern. This year, the Washington State Minority and Justice Commission issued another report on the impact of legal debt imposed by Washington courts on low-income communities. Delostrinos, at 68; *see also* Deborah Espinoza et al., Minority & Justice Comm'n, *The Cost of Justice: Reform Priorities of People with Court Fines and Fees* (2021).[4] The report found that "80-90 percent of defendants in Washington are

[4] https://www.courts.wa.gov/subsite/mjc/docs/LwC_Cost_of_Justice_Report_Final.pdf

indigent and thus do not have the ability to pay." Delostrinos at 5. When released from incarceration, legal debt is a significant barrier to reentry. Legal debt subjects poor people to extended court involvement and additional fines, sanctions, or arrest. Beckett and Harris, at 62. It acts as a significant barrier to reentry. *Id*.

These concerns are reflected in decisions of this Court, which acknowledges the "problematic consequences" of legal debt in Washington and specifically noted statewide disparities based on race and geographic location. *Blazina*, 182 Wn.2d at 836-37. This Court also recognized that legal fines contribute to homelessness and exacerbates inequalities caused by "volatile housing markets, uncertain social safety nets, colonialism, slavery, and discriminative housing practices." *Long*, 198 Wn.2d at 172.

Concerns about the impact of legal debt on poor people are also reflected in recent legislation. In this session, the legislature addressed restitution interest accrual, for the first time limiting when interest may be imposed. Laws of 2022, ch. 260, § 3. This action follows other reforms the legislature passed in 2018, when it amended the statutes to limit the imposition of fines and interest accrual on indigent people at sentencing. Laws of 2018, ch. 269.

Washington has a particular concern with the impact of legal debt on low-income communities, which is reflected in decisions by the courts and actions by the legislature.

iv. The state constitution prohibits the imposition of fines and fees when a person lacks the ability to pay them.

The *Gunwall* factors support a holding that article I, section 14 prohibits fines and fees from being

imposed when a person cannot pay them. Under this analysis, the superior court must first determine whether a person has the ability to pay a fine. *Ramirez*, 191 Wn.2d at 735. If a person is indigent, it will generally mean they lack the ability to pay. *Id*. at 743-46. Where a person cannot pay a fine, the superior court should not impose the fine. This Court should grant review to hold that article I, section 14 prohibits the imposition of fines a person cannot pay.

This analysis is consistent with the decisions of other state courts "strongly suggest that considering ability to pay is constitutionally required." *Long*, 198 Wn.2d at 170. Colorado recently held that history and precedent constitute "persuasive evidence that a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment." *Dami Hosp.*, LLC, 442 P.3d at 101. In Oregon, "[w]hen

assessing the severity of a defendant's forfeiture, courts consider the amount of the forfeiture and the effect of the forfeiture on the defendant." *Oregon v. Goodenow*, 251 Or. App. 139, 153, 282 P.3d 8 (2012). Pennsylvania holds that "the excessive fines analysis . . . requires . . . a thorough examination of every property owner's circumstances." *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836, 871 (Pa. 2014). This analysis supports adopting a similar analysis here.

3. Addressing when to impose legal financial obligations is an important issue.

Assessing fines on people who cannot pay has devastating effects on the poor. *Blazina*, 182 Wn.2d at 837. The long-term involvement of the court in debt collection inhibits reentry, as legal or background checks will show an active record in superior court for individuals who have not paid their legal financial obligations. *Id*. This active record can negatively affect

employment, housing, and finances. *Id*. Imposing legal financial obligations on persons who cannot pay them may also increase recidivism. Beckett & Harris, at 43.

The racial disproportionality of blanket imposition of fines is also concerning. In 2015, the United States Department of Justice issued a report on excessive fines imposed in Ferguson, Missouri. Civil Rights Div., U.S. Dep't of Justice, *Investigation of the Ferguson Police Department*, 4-5 (Mar. 2015).[5] The report concluded that "Ferguson's law enforcement practices [were] shaped on the City's focus on revenue rather than by public safety needs." *Id*. at 2. In releasing the report, Attorney General Eric Holder stated that its findings were "not confined to any one city, state, or geographic region. They implicate

[5] http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf

questions about fairness and trust that are national in scope." U.S. Dep't of Justice, Press Release, *Attorney General Holder Delivers Update on Investigation in Ferguson, Missouri* (Mar. 4, 2015).[6]

The Ferguson Report began a national conversation on how financial punishment is unfairly wielded, often against poor people of color, to fund the government. Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 Ohio St. L.J. 65, 74 (2020) (citing Matthew Menendez, *Fines and Fees Justice Center Launches New Clearinghouse Featuring Brennan Center Work*, Brennan Ctr. for Just. (Jan. 8, 2019)). It exposed the underbelly of a justice system not often discussed: it revealed that punishment went hand-in-hand with

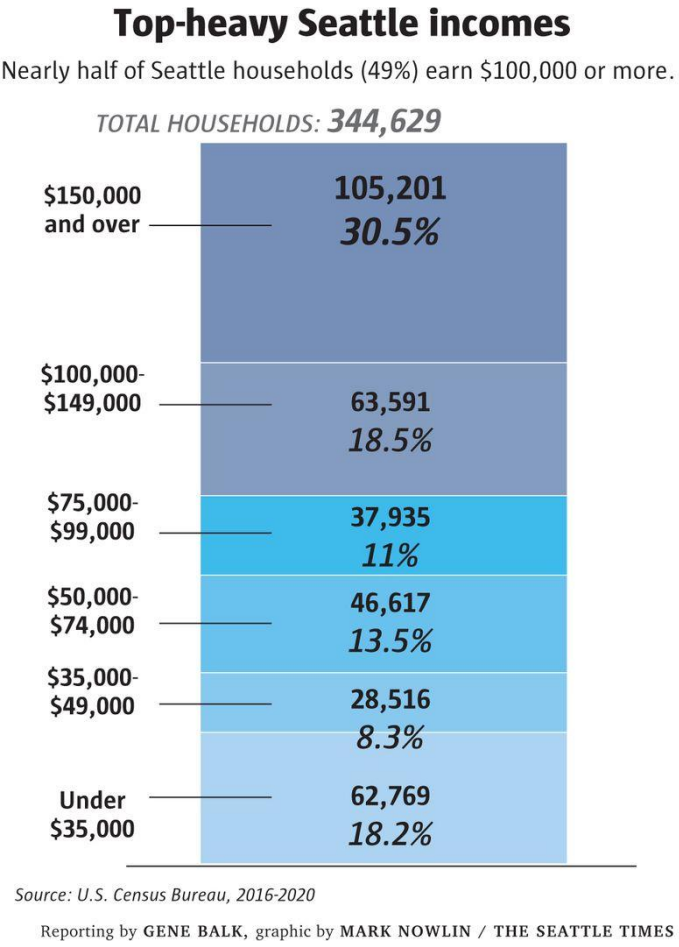
[6] http://www.justice.gov/opa/speech/attorney-general-holder-delivers-update-investigations-ferguson-missouri

revenue generation and detailed how such a system can corrupt the administration of justice for the first time on the national stage. *Id.*

Restricting the imposition of legal financial obligations to those who have the ability to pay is also fair. In *United States v. Hantzis,* the Ninth Circuit held that the criminal fine did not violate the excessive fines clause because the defendant had the ability to pay. 403 F. App'x 170, 172 (9th Cir. 2010). The court concluded this because "there was evidence that [the defendant] was very wealthy, and as he refused to submit a financial affidavit, there was no evidence that a fine would deprive him of his livelihood" (internal brackets and quotation marks omitted)). *Id.*

Whether a fine is excessive is relative to the person's income. A $600 fine might cause only a slight inconvenience for someone in Seattle's median of

$102,500 per year. Gene Balk, *Seattle's Median Household Income Soars Past $100,000—but Wealth Doesn't Reach All*, Seattle Times (Oct. 4, 2020).[7]



[7] https://www.seattletimes.com/seattle-news/data/seattles-median-income-soars-past-100000-but-wealth-doesnt-reach-all/

Gene Balk, *$100K-Plus Households Are Now the Majority In Most Seattle Neighborhoods*, Seattle Times (March 31, 2022).[8] It can be ruinous to a poor person with no ability to pay like Mr. Clement. See Alec Schierenbeck, *Pay the Same Fine for Speeding*, New York Times (Mar. 15, 2018).[9] Requiring a proportionality analysis creates a more just legal system.

4. The Court of Appeals' decision makes clear it requires guidance from this Court.

Relying on its caselaw, the Court of Appeals held it could not review the imposition of the mandatory fees and fines in Mr. Clement's case without guidance from this Court, because *Long* does not address

[8] https://www.seattletimes.com/seattle-news/data/100k-plus-households-are-now-the-majority-in-most-seattle-neighborhoods/

[9] https://www.nytimes.com/2018/03/15/opinion/flat-fines-wealthy-poor.html

whether the penalty assessment and DNA collection fee are not at least partially punitive. App. 3 (citing *State v. Brewster*, 152 Wn. App. 856, 861, 218 P.3d 249 (2009)); App. 4 (citing *State v. Mathers*, 193 Wn. App. 913, 920, 376 P.3d 1163 (2016)). The Court of Appeals also relied on a comment in *State v. Humphrey*, where this Court held that a rise in the penalty assessment was not a penalty for ex post facto purposes. App. 4-5 (citing *State v. Humphrey*, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999)).

The Court of Appeals attempted to distinguish this Court's recent opinion in *Long*, reasoning that because this Court's examination of excessive fines was limited to the impoundment fee for parking violations, it did not apply to other mandatory fees like the penalty assessment and the DNA collection fee. App. 5 (citing *Long*, 198 Wn.2d at 163). Yet despite the

conclusion that *Long* is limited to impoundment fees, the Court of Appeals held otherwise in *Jacobo Hernandez*, where it found a vehicle forfeiture violated the excessive fines clause. 19 Wn. App.2d at 711.

The Court of Appeals' analysis in this case is wrong. The Court of Appeals' decision conflicts with *Long*. Further, the lower court feels it cannot act without direction. App. 11. This Court should clarify that the mandatory imposition of legal financial obligation falls within the excessive fines clause and article I, section 14. *Long*, 198 Wn.2d at 163. And because the penalty assessment and DNA fee are indiscriminately imposed, they are grossly disproportionate.

The Court of Appeals wrote that while not unmoved by the disproportionate impact of mandatory fines and fees, it could not act to correct the injustices

inherent to these fees without direction from this Court. App. 11. "Too often in the legal profession, we feel bound by tradition and the way things have 'always' been. We must remember that even the most venerable precedent must be struck down when it is incorrect and harmful." Wash. St. Supreme Court, *Open Letter from the Wash. St. Supreme Court to the Members of the Jud. and the Legal Cmty* (June 4, 2020). To provide this direction, this Court should grant review.

F. CONCLUSION

Based on the preceding, Mr. Clement requests that review be granted pursuant to RAP 13.4(b).

This petition is 4,757 words long and complies with RAP 18.17.

DATED this 20th day of April 2022.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29335)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JACOB TIMOTHY CLEMENT, Appellant.	)	No. 82476-7-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — Jacob T. Clement challenges the imposition of the mandatory DNA[1] collection fee and Crime Victim Assessment (CVA) at sentencing without an inquiry into his individual ability to pay. Clement argues imposition of these mandatory fees violates our state constitution's excessive fines clause, however he fails to engage with binding precedent which holds that both the DNA collection fee and CVA are non-punitive, such that the excessive fines clause does not apply. In light of that established authority, we affirm.

FACTS

Jacob Clement was charged with robbery in the first degree arising out of an incident wherein he held a knife to a man's throat to obtain 20 dollars. After spending approximately a year in jail as the case was pending, Clement entered a guilty plea to an amended charge of robbery in the second degree. The agreed

[1] Deoxyribonucleic acid.

recommendation of the parties, pursuant to the plea agreement, was a sentence of six months of incarceration, payment of restitution in an amount to be determined[2], a condition of no contact with the victim and the mandatory $500 crime victim assessment and $100 DNA collection fees. The court imposed a jail term of six months' confinement (with credit for time served) and the other conditions proposed under the joint recommendation. Only the two mandatory fees were imposed.

Clement timely appealed.

ANALYSIS

I. Mandatory Legal Financial Obligations (LFOs)

Clement argues that the imposition of both the $500 Crime Victim Assessment (CVA) and $100 DNA collection fee as mandatory fees violates article I, section 14 of our state constitution, specifically that the court erred in imposing them at sentencing without consideration of Clement's individual ability to pay.[3]

Both the DNA collection fee and CVA are mandatory and do not require the sentencing court to consider an individual's ability to pay. State v. Seward, 196 Wn. App. 579, 587, 384 P.3d 620 (2016); State v. Mathers, 193 Wn. App. 913, 917

[2] The deputy prosecutor later confirmed at sentencing that the State was not seeking restitution.

[3] The State argues that this is invited error given that the issue arises from a plea agreement. However, the plea agreement signed by Clement only referenced fees in the boilerplate language and noted that they were mandatory. They were expressly listed on the statement of defendant on plea of guilty, but following the preprinted language stating "The prosecuting attorney will make the following recommendation to the judge." While the State is correct that we will strictly enforce the doctrine of invited error, case law is clear that there must be some affirmative act by the appellant for the doctrine to apply. Here, the failure to object to fees properly described in the plea agreement and judgment and sentence as mandatory, does not trigger rejection of Clement's challenge as invited error. See State v. Weaver, 198 Wn.2d 459, 465, 496 P.3d 1183 (2021).

n.1, 928–29, 376 P.3d 1163 (2016). These fees must be imposed "irrespective of a defendant's ability to pay." State v. Lundy, 176 Wn. App. 96, 103, 308 P.3d 755 (2013). As of June 7, 2018, non-restitution legal financial obligations do not accrue interest. RCW 10.82.090. Additionally, the DNA fee is not to be imposed if a sample has already been collected from an individual because of a prior conviction. State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

As Clement's challenge is grounded in our state's excessive fines clause, we must begin by determining whether either the DNA collection fee or CVA are punitive before proceeding to the full constitutional analysis. City of Seattle v. Long, 198 Wn.2d 136, 163, 493 P.3d 94 (2021) (the first step in an excessive fines inquiry is whether the state action constitutes punishment).

A. DNA Collection Fee

RCW 43.43.7541, which authorizes the DNA collection fee, states in relevant part:

> Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction. The fee is a court-ordered legal financial obligation as defined in RCW 9.94A.030 and other applicable law.

The State accurately cites to State v. Brewster which expressly held "[t]he DNA collection fee is not punitive." 152 Wn. App. 856, 861, 218 P.3d 249 (2009). In regard to the intent of the legislature in enacting the DNA fee, this court concluded that:

> The DNA collection fee serves to fund the collection of samples and the maintenance and operation of DNA databases. The legislature has repeatedly found that DNA databases are important tools in

> criminal investigations, in the exclusion of individuals who are the subject of investigation or prosecution, and in detecting recidivist acts. The databases also facilitate the identification of missing persons and unidentified human remains. These are no punitive purposes.

Id. at 860.

The Brewster court went on to reject the claim that the DNA fee statute was so punitive as to negate legislature's regulatory intent. Id. at 860–61. Division II of this court recently reiterated that the DNA fee (and CVA) are not punitive. State v. Mathers, 193 Wn. App. 913, 920, 376 P.3d 1163 (2016). By following our precedent, we similarly conclude that the DNA fee is non punitive.

B. Crime Victim Assessment

The CVA[4] is derived from RCW 7.68.035, which states in relevant portion:

> (1)(a) 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.[5]

We begin by acknowledging our court's opinion in Mathers which clearly provided "[t]he [CVA] fee is also not punitive in nature." 193 Wn. App. at 920. This is supported by our Supreme Court's analysis in State v. Humphrey. 139 Wn.2d 53, 983 P.2d 1118 (1999). In Humphrey, the Supreme Court clarified that the

[4] Trial courts, and different panels of this court, alternately refer to the mandatory fee imposed pursuant to RCW 7.68.035 as the "crime victim assessment," CVA, or "victim penalty assessment," VPA.

[5] The CVA imposed in Clement's case was in the amount of $500 because the crime of conviction, robbery in the second degree, is a Class B felony. RCW 9A.56.210.

amendment increasing the CVA from $100 to $500 established a new liability, not a penalty. Id. at 62. Its comment in Humphrey that the CVA does not "constitute punishment for the purposes of ex post facto determination" indicates the assessment is properly characterized as non-punitive in our constitutional review as to the excessive fines clause. Id. at 62, n.1.

While Clement suggests in passing that any case law declaring either of these fees to be non-punitive should be disregarded because it predates the holding in Long, he fails to offer argument as to how this court could disregard binding legal precedent. "A Washington Supreme Court decision is binding on all lower courts in the state." Mathers, 193 Wn. App. at 923 (citing 1000 Va. Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 146 P.3d 423 (2006)). In Long, the Supreme Court expressly found that the impoundment fee for violating a parking law was partially punitive, which allowed the court to proceed with consideration of the excessive fines challenge. 198 Wn.2d at 163. However, the body of case law that has examined both the CVA and DNA collection fees has not found either to be partially punitive[6], which is a critical distinction in the context of excessive fines clause analysis.

[6] Uniform collection of the CVA in every criminal conviction is for the purpose of funding "support of comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." RCW 7.68.035(4).

The DNA collection fee is to recover the cost of collecting and analyzing DNA samples for entry into the state DNA database. Under the plain language of the DNA collection fee statute, it is not to be imposed where the state has previously collected a DNA sample from the same individual. RCW 43.43.7541.

II. Excessive Fines

Though Clement attempts to argue that our State's excessive fine clause is more protective than its federal counterpart in the Eighth Amendment to the United States Constitution, he fails to provide sufficient analysis to persuade us. Both clauses use nearly identical language; the federal constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" and the Washington State Constitution states, "Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." U.S. CONST. amend. VIII; WASH. CONST. art. I, § 14. Additionally, our state's highest court recently held that, in the absence of Gunwall[7] analysis from the parties, the language in our state constitution as to excessive fines is identical to that contained in the federal constitution. See Long, 198 Wn.2d at 159 ("Absent support for an independent analysis, we view article I, section 14 [of the Washington State Constitution] and the Eighth Amendment as coextensive for the purposes of excessive fines."). The Due Process Clause of the Fourteenth Amendment to the United States Constitution makes the Eighth Amendment applicable to the states. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433–34, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001).

Clement undertakes a cursory Gunwall analysis in his opening brief; setting out the test and simply asserting that our state clause is more protective. However, he offers no authority as to why we should depart from the determination in Long

[7] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

in light of the identical language in both constitutions. 198 Wn.2d at 159. The Supreme Court made clear in Long:

> When a party urges a different or more protective interpretation under our state constitution for the first time, we expect supportive briefing, particularly when the language of that provision is identical to the United States constitutional provision.

Id. Despite this directive, Clement focuses his argument on how article I, section 14 generally has been more protective than the Eighth Amendment, by offering analysis as to the cruel punishment clause, rather than the excessive fines clause. See State v. Roberts, 142 Wn.2d 471, 506, 14 P.3d 713 (2000) ("Washington State Constitution's cruel punishment clause often provides greater protection than the Eighth Amendment."). However, the language in the cruel punishment clauses of the federal and state constitutions is notably different, unlike the nearly identical language used as to excessive fines. Clement only provides us with conclusory statements as to the Gunwall test upon which he bases his claim of greater state protection. We decline his invitation to undertake such inquiry after he has failed to engage in the proper analysis specific to his claim. See State v. Dhaliwal, 150 Wn.2d 559, 575, 79 P.3d 432 (2003) (Supreme Court declining to reach whether state constitution provides greater protection than Sixth Amendment to the United States Constitution because the appellant failed to provide analysis applicable to Gunwall factors).

"The excessive fines clause 'limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.'" Long, 198 Wn.2d at 159 (internal quotation marks omitted) (quoting Austin v. United States, 509 U.S. 602, 609–10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993)).

Therefore, a qualifying "fine" for excessive fines purposes is a payment to a sovereign as punishment for an offense. Id. It is self-evident that to trigger the Eighth Amendment's excessive fines clause, a sanction must be a "fine" and it must be "excessive." Id. at 162. This is because the concept of the excessive fines clause is to limit a sovereign's power to "extract" payments as a form of punishment. Id. 162–63. As previously explained, the first step in considering a challenge under the excessive fines clause is to determine whether the state action constitutes "punishment" or, said another way, is punitive. Id. at 163. If the action in question is even partially punitive, it also falls within the purview of the excessive fines clause. Id. The second step is to then inquire as to whether the fine at issue is constitutionally excessive. Id. We engage in this sort of constitutional question de novo. State v. McCuiston, 174 Wn.2d 369, 387, 275 P.3d 1092 (2012). Statutes are presumed constitutional, and the challenger bears the burden to prove otherwise. Id.

Here, as the State points out, Clement fails to establish that either the CVA or DNA fee are punitive in light of our state's precedent. As such, neither constitutes a fine for purposes of excessive fines clause analysis. While the State identified precedent in its briefing declaring that both the DNA fee and the CVA are not punitive, Clement's only response was to note that the cited cases were issued before the decision in Long. When a constitutional challenge of this nature is raised, appellants should be prepared to acknowledge precedent and provide argument as to why it is distinguishable or should be overturned. See State v. Otton, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) ("The question is not whether

we would make the same decision if the issue presented were a matter of first impression. Instead, the question is whether the prior decision is so problematic that it must be rejected, despite the many benefits of adhering to precedent.").

In the absence of persuasive argument or authority as to his claim that, despite the Supreme Court's holding in Long, the state excessive fines clause is more protective than the federal clause, or in support of his suggestion that we should depart from case law expressly holding that the two mandatory fines are not punitive, we end our inquiry into Clement's challenge here. See Mathers, 193 Wn. App. at 920; Humphrey. 139 Wn.2d at 62; Brewster, 152 Wn. App. at 861. We follow our established precedent holding that the CVA and DNA fee are non-punitive and, as such, do not constitute penalties for purposes of the excessive fines clause.[8]

III. Racial Disproportionality

Finally, Clement also avers that "fines and fees continue to disproportionately affect communities of color." In his briefing, however, Clement frames this argument by incorporating it into his excessive fines challenge, in particular that the racially disproportionate impact should require an inquiry into

[8] Clement also argues that the imposition of the DNA collection fee and CVA have a disproportional impact based on an individual's ability to pay. We consider this portion of his argument as urging consideration of the instrumentality and proportionality factors set out in Tellevik v. Real Prop. Known as 6717 100th St. S.W. Located in Pierce County, 83 Wn. App. 366, 921 P.2d 1088 (1996). While these factors predate Long's clarification of the test for excessive fines analysis in Washington, Long incorporates review of instrumentality and proportionality factors. Under either posture, we would still be required to first evaluate the punitive nature of the challenged assessment. Long, 198 Wn.2d at 159; see also State ex rel. Wash. State Pub. Disclosure Comm'n v. Food Democracy Action!, 5 Wn. App. 2d 542, 552–53, 427 P.3d 699 (2018). As such, Clement's failure to establish that either the DNA collection fee or CVA are punitive similarly prevents us from reviewing the proportionality factors.

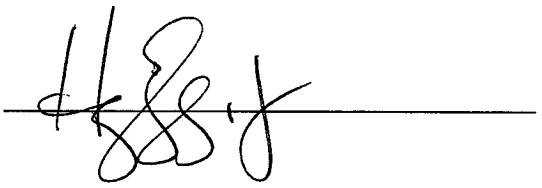
individual ability to pay. Because this argument is captured within his broader excessive fines challenge, the initial determination as to the non-punitive nature of each assessment similarly prevents us from moving forward with additional analysis.

Clement provides a number of secondary sources in support of his assertion that lack of individualized inquiry as to ability to pay disproportionally impacts communities of color. See Daniel S. Harawa, How Much Is Too Much? A Test to Protect Against Excessive Fines, 81 Ohio St. L. J. 65 (2020); CRIMINAL JUSTICE POLICY PROGRAM, RACIAL DISPARITIES IN THE MASS. CRIMINAL SYS., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM (2016). However, much of this data relates to disproportionate police contacts and uses of force experienced by historically marginalized communities. This is true, too, of disproportionate representation of people of color in our jails and state prison system, compared to overall community demographics. See KOREMATSU CTR. FOR LAW AND EQUITY, RACE AND WASHINGTON'S CRIMINAL JUSTICE SYSTEM: 2021 REPORT TO THE WASHINGTON SUPREME COURT (2021). This suggests that the uniform imposition of mandatory fees at the time of conviction is a downstream symptom of systemic bias in the criminal legal system, as opposed to instances where the disproportionality is predicated on variable discretion as to the imposition of the fees. See State v. Gregory, 192 Wn.2d 1, 22, 427 P.3d 621 (2018).

Clement cites to other publications calling on the judicial and legal community to work together on racial justice and other recent directives. We are not unmoved by such calls to action, but are compelled to remind Clement that the

role of an intermediate appellate court such as this one is limited to applying the law as it exists to the record before us. "An intermediate appellate court does not have the option of disregarding a higher state court's decision that has not been overruled, no matter how old the precedent may be." State v. Winborne, 4. Wn. App. 2d 147, 175, 420 P.3d 707 (2018).

In the absence of any authority which would allow us to consider either assessment as punitive for purposes of engaging in excessive fines clause analysis, we affirm.



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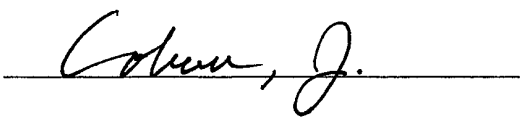

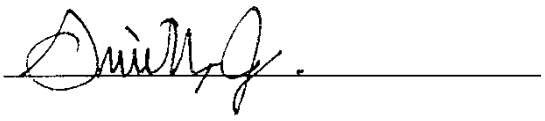

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☒ respondent Ian Ith, DPA
[ian.ith@kingcounty.gov]
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☐ petitioner

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MARIA ANA ARRANZA RILEY, Paralegal Date: April 20, 2022
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