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SUPREME COURT  
STATE OF WASHINGTON  
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Supreme Court No. 101608-5  
(COA No. 83052-0-I)

THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BLAISE PASCLA,

Petitioner.

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

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PETITION FOR REVIEW

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TABLE OF CONTENTS

**A. IDENTITY OF PETITIONER ..... 1**

**B. COURT OF APPEALS DECISION ..... 1**

**C. ISSUES PRESENTED FOR REVIEW ..... 1**

**D. STATEMENT OF THE CASE ..... 3**

**E. ARGUMENT ..... 7**

**1. The Court of Appeals’s refusal to apply the Excessive Fines Clause to the restitution and interest violates the constitutional prohibition against disproportionate punishment..... 7**

        a. This Court should review Mr. Pascla’s excessive fines argument under RAP 2.5(a). ..... 9

        b. The restitution and interest is unconstitutionally excessive.....14

**2. A statutory amendment to the restitution statute applies to Mr. Pascla’s case.....17**

**3. The Court of Appeals’s decision affirming the restitution amount conflicts with decisions by this Court and the Court of Appeals requiring the State to prove a causal connection with sufficiently reliable evidence.....18**

**F. CONCLUSION .....23**

TABLE OF AUTHORITIES

**United States Supreme Court Cases**

*Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) ..... 7

*Timbs v. Indiana*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019) ..... 8

*United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) ..... 7, 8

**Washington Supreme Court Cases**

*City of Seattle v. Long*, 198 Wn.2d 136, 493 P.3d 94 (2021) .....passim

*State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) .....10, 16

*State v. Deskins*, 180 Wn.2d 68, 322 P.3d 780 (2014) .....19, 22

*State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016) .....10

*State v. Griffith*, 164 Wn.2d 960, 195 P.3d 506 (2008) .....18

*State v. Kalebaugh*, 183 Wn.2d 578, 355 P.3d 253 (2015) .....13

*State v. Kinneman*, 155 Wn.2d 272, 119 P.3d 350 (2005) .....14

*State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009) .....18

*State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009) .....10

*State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) .....17

**Washington Court of Appeals Cases**

*Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d 709, 497 P.3d 871 (2021) .....15, 17  
*State v. Dedonado*, 99 Wn. App. 251, 991 P.2d 1216 (2000) .....passim  
*State v. Ramos*, \_\_\_ Wn. App. 2d. \_\_\_, 520 P.3d 65 (2022) ...10, 11, 14

**Constitutional Provisions**

Const. art. I, § 14 .....7, 9  
U.S. Const. amend. VIII.....7, 9

**Statutes**

RCW 10.82.090 .....16  
RCW 9.94A.753 .....18

**Legislative Materials**

Laws of 2022, ch. 260.....17

**Rules**

RAP 13.4 .....13  
RAP 12.1 ..... 9  
RAP 2.5 .....8, 10, 13

**Other Authorities**

Cynthia Delostrinos, Michelle Belmer, & Joel McAllister, State Minority & Justice Comm’n, *The Price of Justice: Legal Financial Obligations in Washington State* (2022) .....13

Deborah Espinosa, Anna B. Bosch, & Carmen Pacheco-Jones,  
Living with Conviction, *The Cost of Justice: Reform  
Priorities of People with Court Fines and Fees* (2021) .....12

Katherine Beckett & Alexes Harris, State Minority & Justice  
Comm'n, *The Assessment and Consequences of Legal  
Financial Obligations in Washington State* (2008) .....13

## **A. IDENTITY OF PETITIONER**

Blaise Pascla asks this Court to accept review of the Court of Appeals decision under RAP 13.3 and RAP 13.4.

## **B. COURT OF APPEALS DECISION**

Mr. Pascla appealed the trial court's order requiring him to pay \$26,000 in restitution and interest. The Court of Appeals affirmed. *State v. Pascla*, No. 83052-0-I, 2022 WL 17581807 (Wash. Ct. App. Dec. 12, 2022).

## **C. ISSUES PRESENTED FOR REVIEW**

1. The Eighth Amendment and article I, section 14 forbid the government from imposing "excessive fines." A payment is a fine if it is at least partially punitive, and it is excessive if it is grossly disproportional to the offense. When weighing proportionality, the court must consider a person's ability to pay. The Court of Appeals decision refusing to consider the merits of Mr. Pascla's claim and affirming the restitution order based on speculation about Mr. Pascla's future ability to pay conflicts with decisions by this Court and the

Court of Appeals, and it is an important constitutional issue of broad import requiring this Court's guidance.<sup>1</sup> RAP 13.4(b).

2. A statutory amendment applies prospectively to cases pending on direct appeal. The Washington Legislature amended the restitution statute to allow the court to decline restitution and interest to certain payees. Whether this amendment applies to Mr. Pascla's case is an important issue of broad import requiring this Court's guidance. RAP 13.4(b).

3. The State has the burden to prove both the amount of restitution as well as a causal connection between the offense and the amount of restitution. Here, the State did not submit any documentation for over \$2,500 of the restitution amount. And even though there was no evidence of a shoulder injury after the incident, the State alleged the officer's shoulder injury requiring surgery nearly a year later was causally connected to the

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<sup>1</sup> The issue regarding whether restitution and interest is grossly disproportional punishment under the Excessive Fines Clause is currently pending in this Court. Petition for Review, *State v. Ramos*, No. 101512-7 (Wash. Dec. 1, 2022).

assault. The Court of Appeals decision affirming restitution conflicts with binding precedent requiring the State to prove the amount and a causal connection. RAP 13.4(b).

#### **D. STATEMENT OF THE CASE**

Mr. Pascla is indigent—he has no assets, income, or financial resources. CP 362, 367-69. In 2020, he was seen driving erratically and colliding with several parked cars. CP 3. As Officer Travesss Forbush arrested him, Mr. Pascla struck him in the head with a fist. CP 4.

Immediately after arresting Mr. Pascla, Officer Forbush went to the hospital and received stitches for a two-centimeter cut on his face. CP 84. He said he had “mild discomfort” and “mild associated pain” from getting hit in the head, but he “denied other injuries” or pain. CP 81, 85. Officer Forbush had no musculoskeletal pain, and he had full range and strength of his arms and legs. CP 83-84.



Mr. Pascla pleaded guilty to third degree assault and driving under the influence, and the court sentenced him to 43 months' confinement. CP 12-28, 59-69.

The State requested over \$26,000 in restitution for medical and disability payments, payable to a company called Gallagher Bassett.<sup>2</sup> CP 106, 120.

The restitution request included Officer Forbush's medical payments for treatment on the date of the incident. *See* CP 138-39 (medical fees from 3/14/20). But the vast majority of the medical payments were related to a shoulder surgery Officer Forbush had ten months after the assault and other costs accrued over a year later. *See* CP 175-88 (costs related to surgery on 1/22/21), 195-97 (medical fees from 4/13/21). It also included payment of disability benefits after the surgery. CP 106, 206-13 (disability payments from January 2021-May

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<sup>2</sup> The Court of Appeals notes it appears Gallagher Bassett is the claims administrator for the City of Bellevue's workers' compensation program. *Pascla*, 2022 WL 17581807 at \*1 n.1. The City of Bellevue is Officer Forbush's employer.

2021). The State submitted an affidavit from Officer Forbush where, for the first time, he claimed his shoulder was sore after the incident, eventually requiring surgery. CP 119.

Mr. Pascla objected to the requested restitution amount. CP 71-76. First, he argued the amount was not supported by sufficient evidence because the State did not provide supporting documentation for the entire amount requested. CP 72.

Second, Mr. Pascla argued the State did not prove a causal connection between the offense and the restitution amount. He acknowledged Officer Forbush was injured during the assault and was treated at the hospital. CP 71. But neither the medical professionals nor Officer Forbush identified a shoulder injury at that time. CP 83-84. He argued Officer Forbush “is not a medical doctor” and his affidavit conflicted with the medical records after the assault. RP 71.

Mr. Pascla argued Officer Forbush’s plain assertion that his shoulder injury was caused by the assault was insufficient to establish a nexus. CP 77. Indeed, the shoulder injury could have

been caused by “something else.” RP 71. Without any evidence of how or when Officer Forbush injured his shoulder, the State failed to prove a causal connection to the surgery that occurred nearly a year after the assault or the later disability payments. CP 175-213.

At the restitution hearing, the court agreed that Officer Forbush reported no shoulder pain on the day of the incident. RP 70 (“MR. BEATTIE: I don’t see any reference to the shoulder in the – in the medical reports. THE COURT: No, there is none.”). However, the court concluded “the medical records don’t contradict [Officer Forbush’s] affidavit” and stated “the fact that he didn’t have serious pain in the ER to me is of little moment because injuries frequently take their time to come to the fore, especially if they’re a soft tissue injury.” RP 70, 74. The court provided no basis for this diagnosis.

The trial court ordered restitution in the amount of \$26,000. CP 214. The Court of Appeals affirmed. *Pascla*, 2022 WL 17581807 at \*1.

## E. ARGUMENT

### 1. The Court of Appeals's refusal to apply the Excessive Fines Clause to the restitution and interest violates the constitutional prohibition against disproportionate punishment.

The Eighth Amendment to the United States Constitution and article I, section 14 of the Washington Constitution forbid the government from imposing “excessive fines.” U.S. Const. amend. VIII; Const. art. I, § 14. The purpose of the Excessive Fines Clause is to limit the government’s power to require payments “as *punishment* for some offense.” *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) (emphasis in original, citations omitted).

The analysis under the Excessive Fines Clause is a two-part test. First, the trial court must determine whether the payment is punishment. *United States v. Bajakajian*, 524 U.S. 321, 328-29, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). The Excessive Fines Clause applies to payments that are “at least partially punitive.” *Timbs v. Indiana*, \_\_\_ U.S. \_\_\_, 139 S. Ct.

682, 689, 203 L. Ed. 2d 11 (2019); *City of Seattle v. Long*, 198 Wn.2d 136, 163, 493 P.3d 94 (2021).

Second, the trial court must evaluate whether the fine is grossly disproportional to the offense. *Bajakajian*, 524 U.S. at 334; *Long*, 198 Wn.2d at 163. It considers five factors to determine whether a fine is grossly disproportional: (1) the nature and extent of the crime, (2) whether it was related to other illegal activities, (3) the other penalties that may be imposed, (4) the extent of the harm, and (5) the person's current ability to pay. *Id.* at 167, 173.

Mr. Pascla challenges the restitution order under the Excessive Fines Clause. The Court of Appeals, sua sponte, declined to consider the issue, concluding any error is not manifest. *Pascla*, 2022 WL 17581807 at \*5.

This issue warrants review because it is manifest error affecting Mr. Pascla's right to be free from disproportionate punishment. RAP 2.5(a)(3). In addition, a legislative amendment applies prospectively to Mr. Pascla's claim. And

because Mr. Pascla cannot pay, the restitution and interest is grossly disproportional punishment. This Court should grant review to address the unconstitutional nature of imposing restitution without regard to a person's ability to pay.

*a. This Court should review Mr. Pascla's excessive fines argument under RAP 2.5(a).*

The Excessive Fines Clause protects a person from disproportionate punishment. U.S. Const. amend. VIII; Const. art. I, § 14. But the Court of Appeals eroded this important constitutional protection when it declined to consider Mr. Pascla's excessive fines challenge to the restitution order. *Pascla*, 2022 WL 17581807 at \*5. The State never argued Mr. Pascla could not raise this argument for the first time on appeal. The Court of Appeals requested supplemental briefing on another issue related to Mr. Pascla's excessive fines claim, but it never requested additional briefing on whether his claim was reviewable for the first time on appeal. *See* RAP 12.1.

Mr. Pascla's excessive fines challenge to restitution and interest is "manifest error affecting a constitutional right." RAP

2.5(a)(3). The issue here satisfies RAP 2.5(a) because (1) it is of constitutional dimension and (2) the error is manifest. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

First, this issue implicates Mr. Pascla’s constitutional right to not face disproportionate punishment. Second, this error is “manifest” because the trial court ordered an amount that Mr. Pascla cannot pay, and the error is exacerbated as the debt accumulates interest. The Court of Appeals has specifically held an excessive fines challenge can be raised for the first time on appeal. *State v. Ramos*, \_\_\_ Wn. App. 2d. \_\_\_, 520 P.3d 65, 71-72 (2022). More broadly, the issue of imposing fines on those who cannot pay is so important that this Court has held it can be raised for the first time on appeal. *See State v. Duncan*, 185 Wn.2d 430, 437, 374 P.3d 83 (2016); *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015).

Here, the Court of Appeals acknowledged Mr. Pascla was indigent at sentencing, but nonetheless concluded any error was not manifest because there was no evidence in the record

that he had no future ability to pay. *Pascla*, 2022 WL 17581807 at \*5. But the analysis under the Excessive Fines Clause focuses on the person’s ability to pay *at the time of sentencing*. See *Long*, 198 Wn.2d at 174-75. Indeed, in *Ramos*—which also involved an excessive fines challenge to restitution and interest—the Court of Appeals held the error was manifest based on the defendant’s circumstances at the time the restitution was imposed. 520 P.3d at 72 (Mr. Ramos had “no assets, income, or financial resources,” was incarcerated, with “no current ability to pay restitution and accrued interest.”).

This Court has held the Excessive Fines Clause requires consideration of a person’s ability to pay at the time of sentencing. *Long*, 198 Wn.2d at 173, 174-75 (examining the person’s monthly income, assets, expenses, and circumstances at the time the fine was imposed). In *Long*, this Court considered Mr. Long’s job as a general tradesman and how the impoundment prevented him from working. *Id.* at 174-75. Despite Mr. Long’s skillset and ability to work as a skilled



laborer—demonstrating his potential to earn money—this Court found the fine was unconstitutionally excessive. *Id.* at 175.

The proportionality analysis does not speculate about a person’s potential or future ability to earn money and pay legal debts. In addition, allowing courts to impose financial penalties based on speculation about a person’s potential ability to earn money fails to acknowledge the systemic and institutional barriers to reentry, financial stability, and housing security that all persons convicted of a crime must face. *See* Deborah Espinosa, Anna B. Bosch, & Carmen Pacheco-Jones, Living with Conviction, *The Cost of Justice: Reform Priorities of People with Court Fines and Fees*, 26-28 (2021);<sup>3</sup> Katherine Beckett & Alexis Harris, State Minority & Justice Comm’n, *The Assessment and Consequences of Legal Financial*

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<sup>3</sup> Available at:  
[https://www.courts.wa.gov/subsite/mjc/docs/LwC\\_Cost\\_of\\_Justice\\_Report\\_Final.pdf](https://www.courts.wa.gov/subsite/mjc/docs/LwC_Cost_of_Justice_Report_Final.pdf)

*Obligations in Washington State*, 38-49, 62 (2008).<sup>4</sup> Such a standard would also further entrench existing disparities impacting people of color. *See Long*, 198 Wn.2d at 168-73; Cynthia Delostrinos, Michelle Belmer, & Joel McAllister, State Minority & Justice Comm’n, *The Price of Justice: Legal Financial Obligations in Washington State*, 5 (2022).<sup>5</sup>

Mr. Pascla had no ability to pay restitution at the time of his sentencing, and this Court should review Mr. Pascla’s claim and remedy the constitutional error “that result[ed] in serious injustice.” *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). The Court of Appeals applied the wrong standard, and its decision conflicts with decisions by this Court and the Court of Appeals. This issue is manifest constitutional error and warrants this Court’s review. RAP 2.5(a)(3), 13.4(b)(1)-(4).

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<sup>4</sup> Available at:  
[https://media.spokesman.com/documents/2009/05/study\\_LFOimpact.pdf](https://media.spokesman.com/documents/2009/05/study_LFOimpact.pdf)

<sup>5</sup> Available at:  
[https://www.courts.wa.gov/subsite/mjc/docs/MJC\\_LFO\\_Price\\_of\\_Justice\\_Report\\_Final.pdf](https://www.courts.wa.gov/subsite/mjc/docs/MJC_LFO_Price_of_Justice_Report_Final.pdf)

*b. The restitution and interest is unconstitutionally excessive.*

Restitution is partially punitive, and it is therefore subject to the Excessive Fines Clause. *State v. Kinneman*, 155 Wn.2d 272, 279, 119 P.3d 350 (2005); *Ramos*, 520 P.3d at 78. Because the principal restitution is partially punitive, the interest accrued on restitution is also partially punitive, and it is also subject to the Excessive Fines Clause. *See Kinneman*, 155 Wn.2d at 279; *Long*, 198 Wn.2d at 164; *see also Ramos*, 520 P.3d at 82 (Chung, J., dissenting in part).

Because restitution and interest are both partially punitive, the court must weigh proportionality: “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principal of proportionality.” *Long*, 198 Wn.2d at 166 (quoting *Bajakajian*, 524 U.S. at 334). This requires the court to weigh five factors that focus on the specific offense and the individual person. *Id.* at 167, 173.

The first four factors<sup>6</sup> in the disproportionality analysis are focused on the offense for which punishment is ordered. *Id.* at 167. The fifth factor—ability to pay—is focused on the individual person’s circumstances at the time the penalty is imposed. *Id.* at 171.

Consideration of a person’s ability to pay is critical to weighing disproportionality because it gives meaning to the constitutional prohibition against oppressive fines. If a person has no ability to pay, a fine can be ruinous. *Id.* In light of the history and purpose of the Excessive Fines Clause, the impact of legal debt, and holdings by this Court and the Court of Appeals, a person’s ability to pay can outweigh all other factors. *See id.* at 159-60, 168-73; *Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d 709, 723-24, 497 P.3d 871 (2021), *review denied*, 504 P.3d 828 (2022).

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<sup>6</sup> These four factors are: (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed, and (4) the extent of the harm caused. *Long*, 198 Wn.2d at 167.

A proper analysis demonstrates the restitution and interest is grossly disproportional to the offense. Here, Mr. Pascla drove while intoxicated and punched Officer Forbush. He pleaded guilty to driving under the influence and assault in the third degree, and the court sentenced him to a term of confinement. CP 12-28, 59-69. The entire amount of restitution was related only to the assault, so it must be proportional to that offense. *See Long*, 198 Wn.2d at 166. Although Officer Forbush was hurt, his injuries were minimal; and he was treated at the hospital and received stitches for a small cut. CP 84.

In addition, restitution accrues interest at the astonishing rate of 12 percent. RCW 10.82.090(1); *Blazina*, 182 Wn.2d at 836. The interest has no connection to the offense. Rather, it is punishment for being poor: accumulating interest is a moving target that requires a poor person to pay exponentially more than a person with means for the exact same offense and for the exact same harm. The nature and extent of Mr. Pascla's offense do not justify such a large fine or interest.

Moreover, Mr. Pascla cannot pay \$26,000 in restitution and the 12 percent accumulating interest. “[A]n individual’s ability to pay can outweigh all other factors.” *Jacobo Hernandez*, 19 Wn. App. 2d at 723. The restitution and interest is grossly disproportional.

**2. A statutory amendment to the restitution statute applies to Mr. Pascla’s case.**

The 2022 legislature amended the restitution statute to allow a court to decline restitution and interest to certain payees if the person “does not have the current or likely future ability to pay.” Laws of 2022, ch. 260, § 3. A person does not have the ability to pay if they are indigent. *Id.* The amendment went into effect January 1, 2023. *Id.* at § 26.

Statutory amendments apply prospectively to pending cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747-48, 426 P.3d 714 (2018). This amendment applies to Mr. Pascla’s case because it is pending on direct appeal and not yet final.

But the Court of Appeals declined to consider whether the amendment applies to Mr. Pascla’s case because it was not

yet in effect. *Pascla*, 2022 WL 17581807 at \*1 n.2. The amendment is now in effect. It applies to Mr. Pascla's appeal.

**3. The Court of Appeals's decision affirming the restitution amount conflicts with decisions by this Court and the Court of Appeals requiring the State to prove a causal connection with sufficiently reliable evidence.**

The legislature requires that restitution "shall be based on easily ascertainable damages." RCW 9.94A.753(3). The State bears the burden to prove the amount of restitution and a causal connection between the offense and the amount of restitution requested. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008).

The State must provide "substantial credible evidence" to support restitution. *Id.* A list of expenditures alone is insufficient. *State v. Dedonado*, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000). The information must bear "some minimal indicium of reliability *beyond mere allegation.*" *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009) (citations omitted, emphasis in original). In addition, the evidence must

“not subject the trier of fact to mere speculation or conjecture.”

*State v. Deskins*, 180 Wn.2d 68, 82-83, 322 P.3d 780 (2014).

Here, Officer Forbush went to the hospital immediately after the incident, where he received treatment for a small cut on his forehead. CP 84. Aside from the cut, he had no other pain or soreness. CP 81, 85.

Sometime after the assault, Officer Forbush apparently began experiencing pain in his shoulder. He had surgery nearly a year later. When it was time to request restitution, he claimed for the first time his shoulder injury was caused by the incident. CP 119.

The State presented a list of expenditures and broadly alleged all of Officer Forbush’s medical and disability payments were causally related to the assault. This conflicts with the Court of Appeals decision in *Dedonado* stating that “[a] causal connection is not established simply because a victim or insurer submits proof of expenditures for replacing



property stolen or damaged by the person convicted.” 99 Wn. App. at 257.

In *Dedonado*, the defendant pleaded guilty to several offenses, including stealing a van and stealing electronics from a store. *Id.* at 253. While stealing the van, the defendant damaged the ignition. *Id.* At the restitution hearing, the State submitted a request for the total damage to the van: “In addition to damage obviously related to a damaged ignition switch, the preliminary estimate included items such as “DOME LAMP BULBS,” “FILL ALL FLUIDS,” “ALIGN FRONT SUSPENSION,” and “REMOVE/REPLACE R LIFTGATE GRILLE.” *Id.* at 255. It also submitted a request from the store owner for the cost of a replacement generator. *Id.* at 253.

The Court of Appeals reversed, holding that a list of expenditures is insufficient to establish a causal connection. *Id.* at 257. For the car expenses, it stated, “it is not possible to determine from the documentation provided by the State whether all the repairs to the van were related to the damaged

ignition switch.” *Id.* at 257. As for the replacement generator, it stated it was “not possible to determine from the documentation” whether the new generator was a “proper replacement.” *Id.* “Such expenditures may be for items of substantially greater or lesser value than the actual loss.” *Id.*

*Dedonado* is precisely on point, and the Court of Appeals wrongly concluded *Dedonado* is inapposite. *Pascla*, 2022 WL 17581807 at \*4. Here, Mr. Pascla does not deny that Officer Forbush was injured as a result of the assault, and there is a causal connection for the medical payments related to his treatment for a small cut. But, like in *Dedonado*, based on the list of expenditures, it is not possible to determine if his later shoulder injury was caused the assault. *See Dedonado*, 99 Wn. App. at 257.

The Court of Appeals concluded Officer Forbush sought treatment for his shoulder sometime after the altercation with Mr. Pascla and this was sufficient to establish a nexus. *Pascla*, 2022 WL 17581807 at \*3. But Officer Forbush’s shoulder

injury could have been caused by countless other reasons in his professional or personal life having nothing at all to do with the incident with Mr. Pascla. The fact that a person developed an injury sometime after an assault, absent any other evidence connecting that injury to the assault, is insufficient.

There was no reliable evidence that Officer Forbush's shoulder injury was caused by the assault. The Court of Appeals's conclusion that there was a causal connection requires "speculation and conjecture." *Deskings*, 180 Wn.2d at 83. This conflicts with this Court's holding in *Deskings*, 180 Wn.2d at 83. This also conflicts with the Court of Appeals's holding in *Dedonado*, 99 Wn. App. 57, 991 P.2d 1216 (2000). This Court should grant review and provide guidance to lower courts on the nexus requirements for restitution.

## **F. CONCLUSION**

Based on the preceding, Mr. Ramos respectfully requests this Court to grant review pursuant to RAP 13.4(b).

I certify this brief contains 3,631 words and complies with RAP 18.17.

Respectfully submitted this 5th day of January 2023.



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APPENDIX

**Table of Contents**

Court of Appeals Opinion ..... APP 1

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

THE STATE OF WASHINGTON,

Respondent,

v.

BLAISE MANISHIMWE PASCLA,

Appellant.

No. 83052-0-I

DIVISION ONE

UNPUBLISHED OPINION

BIRK, J. — Blaise Pascla pleaded guilty to third degree assault following a physical altercation with a Bellevue (City) police officer. On appeal, Pascla challenges the trial court's order imposing \$26,000.00 in restitution for claims paid on behalf of the City for the officer's medical expenses and disability benefits. We affirm.

I

On March 14, 2020, Travess Forbush was one of two City police officers working off duty as security at a construction site. Both officers were in uniform and driving unmarked patrol vehicles equipped with lights and sirens. The officers observed a black Honda Civic approach the construction zone at a high rate of speed, lose control, collide with a parked car, and speed off. Forbush activated his lights and sirens and pursued the Honda. The Honda did not stop and instead collided with a second parked car, causing the Honda's hood to flip up and obstruct the windshield. The Honda turned into a cul-de-sac, and the driver, later identified

as Blaise Pascla, exited the car. Forbush approached Pascla, who resisted Forbush's attempts to take him into custody and began punching Forbush in the face and head. It was apparent that Pascla was intoxicated or under the influence of drugs. With the assistance of a bystander, who came out of his house after hearing the commotion outside, Forbush was able to control and handcuff Pascla. Forbush suffered multiple lacerations to his face and was treated at Overlake Hospital Medical Center, where he received stitches. According to a medical record from Forbush's hospital visit, Forbush "denied other injuries."

The State charged Pascla with (1) assault in the second degree, (2) felony driving under the influence (DUI), (3) attempting to elude a pursuing police vehicle, and (4) hit and run. Pascla pleaded guilty to felony DUI and assault in the third degree under RCW 9A.36.031(1)(g) (assault on a law enforcement officer performing official duties) after the State agreed to amend the information to include only those charges. As part of the plea agreement, Pascla agreed to "pay restitution in full to the victim(s) on charged counts."

In January 2021, the trial court sentenced Pascla to a total term of 43 months' confinement consistent with the parties' agreed sentencing recommendation. The court also ordered Pascla to pay restitution, but it reserved on the restitution amount.

In June 2021, the State requested Pascla pay restitution to Gallagher Bassett (Gallagher)<sup>1,2</sup> in the amount of \$26,895.87, consisting of \$20,435.72 for claims paid on behalf of the City for Forbush’s medical expenses, and \$6,460.15 for disability benefits paid to Forbush. It does not appear the State’s June 2021 request was filed with the court at the time but, instead, was made via a memorandum delivered to Pascla’s counsel as part of ongoing negotiations regarding the restitution amount.

On July 27, 2021, Pascla filed an objection to the amount of the restitution request in advance of a July 29, 2021 restitution hearing. He argued that the documentation the State had provided with its restitution request was “insufficient . . . to establish a link between the offense to which Mr. Pascla pl[ead]ed guilty and the requested restitution amount.”

On the morning of the restitution hearing, the State filed its own memorandum. In support, the State submitted documentation, described in more detail below, showing payments by Gallagher for Forbush’s treatment beginning in

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<sup>1</sup> Pascla describes Gallagher as “Officer Forbush’s insurance provider,” but the record does not identify Gallagher as such. The record suggests the City is self-insured for its workers’ compensation program with Gallagher serving as its claims administrator. The City is identified as the “payer” or “insurer” in the documentation provided for several payments, and a victim loss statement submitted to the court identified Gallagher as “TPA,” presumably short for “third party administrator.”

<sup>2</sup> Pascla argues for the first time in his reply brief that Engrossed Substitute House Bill 1412, 67th Legislature, Regular Session (Wash. 2022) (HB 1412), applies to him. HB 1412 authorizes a court to relieve an offender of the requirement to pay restitution to “an insurer or state agency” if the court finds that the offender does not have the current or likely future ability to pay. See LAWS OF 2022, ch. 260, § 3(3)(b). Because HB 1412 does not take effect until January 1, 2023, see LAWS OF 2022, ch. 260, § 26, we do not consider whether it applies to Pascla.



April 2020 related to a shoulder injury, including an eventual shoulder surgery in January 2021.

The State also filed a copy of Forbush's supplemental report from the day after his altercation with Pascla and a new affidavit dated the day Pascla had filed his objection, July 27, 2021, in which Forbush testified:

Pascla was involved in two hit and run collisions and resisted arrest when I contacted him . . . .

Pascla attempted to pull away from me, struggled with me as we fell into the driver seat, struck me several times with a closed fist and when I pulled him from the vehicle resisted my verbal commands and attempts to push him to the ground. I told him to get on the ground and I grabbed his left shoulder with my left hand and his hair with my right hand and swung him to the ground. He landed on his stomach, and I fell onto his back wrapping my legs around his legs to prevent him from getting up and escaping. I was trying to grab his arms which he had under his chest. With the help of a private citizen and other officers I was able to control and handcuff Pascla.

I was treated at Overlake Hospital for the lacerations and soreness to my jaw. At that time, I also noticed a soreness in my right shoulder, but the amount of pain did not require medical treatment at the time. As time passed, I noticed that the range of motion of my right arm was restricted, and certain movements caused pain.

I was seen by a doctor for the shoulder pain and initially she prescribed physical therapy and an MRI.<sup>[3]</sup> I attended physical therapy as directed but I did not schedule the MRI as I thought maybe the therapy would remedy the symptoms. Certain motions and actions continued to cause pain in my right shoulder, so I consulted with an orthopedic surgeon and had the MRI completed. The surgeon and radiologist identified a SLAP<sup>[4]</sup> tear and a second tear in my labral that resulted in a cyst that would continue to grow without surgery.

Prior to the physical altercation with Pascla I had no pain in my shoulder or restricted movement.

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<sup>3</sup> Magnetic resonance imaging.

<sup>4</sup> The record does not reflect what "SLAP" stands for.

In reply, Pascla argued Forbush’s new affidavit “contradict[ed] what [he] reported to medical providers close in time to the incident,” when “[t]here was no description of any shoulder pain or shoulder injury.” Pascla requested that the court deny restitution “regarding any shoulder injury and repair.”

At the restitution hearing, the trial court found there had been “a showing by a preponderance [of the evidence] that there’s a sufficient nexus between the shoulder pain and the injuries suffered that needed medical care.” It explained, “The reason I believe there’s a nexus is because the fact that he didn’t have serious pain in the [emergency room] is of little moment because injuries frequently take their time to come to the fore,” and Forbush indicated that “prior to the physical . . . altercation, he had no pain in his shoulder or restricted movement.” The court acknowledged the State had requested slightly more than \$26,000.00, then ruled that it would “enter an order for \$26,000 even.” Consistent with this ruling, the trial court entered an order directing Pascla to pay restitution in the amount of \$26,000.00.

Pascla appeals.

## II

Pascla argues that because the State did not satisfy its burden to prove the restitution amount, the trial court erred by ordering Pascla to pay \$26,000.00 in restitution. We disagree.

Under RCW 9.94A.753(5), the trial court is directed to impose restitution “whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.” Restitution “shall be based on easily

ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury” and “shall not exceed double the offender’s gain or the victim’s loss from the commission of the crime.” RCW 9.94A.753(3). “[T]here must be a causal connection between a victim’s losses and the defendant’s offense.” State v. Romish, 7 Wn. App. 2d 510, 515, 434 P.3d 546 (2019). Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. Id.

“If a defendant challenges the restitution amount sought by the State, the State must prove causation and damages by a preponderance of the evidence.” Id. The rules of evidence do not apply at a restitution hearing, State v. Pollard, 66 Wn. App. 779, 784, 834 P.2d 51 (1992), but the evidence must be reasonably reliable so that the trier of fact is not subjected to mere speculation or conjecture. State v. Fambrough, 66 Wn. App. 223, 225, 831 P.2d 789 (1992). In determining whether a causal connection exists, the court looks not to the name of the crime to which the defendant entered a plea, but to the underlying facts of the charged offense. State v. Griffith, 164 Wn.2d 960, 966, 195 P.3d 506 (2008).

We review a trial court’s factual findings with regard to a causal connection for substantial evidence. Griffith, 164 Wn.2d at 965. “Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the matter asserted.” State v. Lemus, 103 Wn. App. 94, 99, 11 P.3d 326 (2000). Once a causal connection is established, the sentencing court has “broad discretion to order restitution amounts.” Romish, 7 Wn. App. 2d 515; see also State v. Kinneman, 155 Wn.2d 272, 282, 119 P.3d 350 (2005) (“RCW 9.94A.753 allows

the judge considerable discretion in determining restitution.”). “We review a challenge to the amount of a restitution order for abuse of discretion.” State v. We, 138 Wn. App. 716, 727, 158 P.3d 1238 (2007).

Here, substantial evidence supports the trial court’s finding that Forbush’s injuries,<sup>5</sup> including his shoulder injury, were causally connected to his altercation with Pascla. The record shows Forbush was involved in a physical struggle with Pascla during which Pascla resisted Forbush’s attempts to detain him and punched Forbush multiple times. Forbush attested that at one point, he “swung” Pascla to the ground after Pascla tried to push him backward. Gallagher submitted documentation showing treatment for a persistent shoulder strain beginning in April 2020, which was resistant to conservative therapy over several months of ongoing care and ultimately led to surgery. The documentation reflects payments to Franciscan Medical Group and Surprise Lake Medical Clinic for outpatient treatment on April 23, 2020, related to a shoulder strain. The documentation shows payments for a shoulder X-ray in early May 2020 followed by physical therapy in May and June. The documentation shows payments for additional shoulder imaging in September 2020, an outpatient visit with Proliance Surgeons in October and December 2021, shoulder surgery on January 22, 2021, temporary

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<sup>5</sup> Pascla does not dispute that if Pascla’s offense and Forbush’s injuries are causally connected, then so are Pascla’s offense and the payments Gallagher made on the City’s behalf related to those injuries. Cf. State v. Ewing, 102 Wn. App. 349, 350, 7 P.3d 835 (2000) (sentencing court may order offender to pay restitution to insurer that suffers a loss as a result of the offense); State v. Davison, 116 Wn.2d 917, 919, 921, 809 P.2d 1374 (1991) (city that paid assault victim during the time he was unable to work as a firefighter was a victim for restitution purposes).

total disability benefits for approximately three weeks after the surgery, and temporary partial disability benefits for a period thereafter. Much of the documentation identifies an injury date of March 14, 2020, the date of Pascla's assault of Forbush, indicating that Gallagher attributed the payments to the altercation. Consistent with the foregoing documentation, Forbush's July 2021 affidavit described soreness in his shoulder when he went to the emergency room on the date of Pascla's assault, treatment by a doctor followed by physical therapy and additional imaging after his pain persisted, and an eventual consultation with an orthopedic surgeon. And, Forbush attested that he had no pain in his shoulder before his altercation with Pascla.

The foregoing evidence of the nature of the underlying altercation and the onset and timing of Forbush's shoulder pain and treatment was sufficient to persuade a rational, fair-minded person that the altercation caused Forbush's shoulder injury.<sup>6</sup>

Pascla disagrees and relies on State v. Dedonado, 99 Wn. App. 251, 991 P.2d 1216 (2000), for the proposition that "Forbush's blank assertion alone is insufficient to demonstrate a nexus between the assault and the costs related to his shoulder injury." In Dedonado, we observed that "[a] causal connection is not established simply because a victim or insurer submits proof of expenditures for

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<sup>6</sup> The State relies, additionally, on a July 26, 2021 declaration from a Gallagher representative and the documentation attached thereto. For reasons that are not apparent from the record, the State did not file this declaration until August 13, 2021, *after* the trial court entered its restitution order. Because the declaration was not before the trial court at the restitution hearing, we disregard it and instead consider only the materials presented to the trial court at the time of the hearing.

replacing property stolen or damaged by the person convicted.” 99 Wn. App. at 257. There, the State sought restitution in the amount of \$10,968.60 for a new, replacement generator following burglary of an electronics shop. Id. at 253. But there was no explanation for either how the generator was damaged in the burglary or whether the replacement was an appropriate substitute for the allegedly damaged one. Id. at 256-57. In contrast, the evidence here consists of more than just a list of expenditures, and plausibly connects the physical altercation with Forbush’s subsequent shoulder injury and treatment. There is evidence Forbush bodily swung Pascla to the ground in the effort to arrest him, Forbush did not have shoulder pain before the altercation, and Forbush began treatment for shoulder pain not long after the altercation. Dedonado is not analogous, and Pascla does not establish the trial court erred by finding a causal connection between his offense and Forbush’s shoulder injury.

Pascla also does not establish that, once the trial court found a causal connection supported by substantial evidence, the trial court abused its discretion by ordering restitution in the even amount of \$26,000.00. Relying again on Dedonado, Pascla contends that “[a] list of expenditures alone is not sufficient to prove the amount of restitution.”

But Dedonado is inapposite because it analyzed only whether a causal connection existed between the offense and the claimed damages. See Dedonado, 99 Wn. App. at 257 (“The State did not meet its burden of proving the restitution amounts here . . . because the documentation it provided *did not establish a causal connection* between Dedonado’s actions and the damages.”

(emphasis added)). Where, as here, “the *fact* of damage is established[,] the *amount* need not be shown with mathematical certainty.” State v. Mark, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984). To this end, the State submitted Gallagher’s payment list showing that it paid a total of \$26,895.87 on the City’s behalf for expenses related to Forbush’s injuries. Pascla points out that Gallagher did not provide any *additional* documentation with regard to five payments in its list totaling more than \$2,500.00. Those particular payments are not directly linked to the altercation, but they represent additional medical and disability payments associated with the same course of treatment and in the same time frame as other payments that are directly linked to the altercation. The documentation provided showed a series of claims paid beginning shortly after the assault and continuing until a short time after Forbush’s surgery, and that was supported by Forbush’s testimony regarding the timing of his treatment. This afforded the trial court a reasonable basis to estimate the amount of the loss, including the payments that were not themselves directly linked but plainly part of the same series of claim payments, and the trial court did not err by rounding downwards to \$26,000.00. See State v. Velezmoro, 196 Wn. App. 552, 564, 384 P.3d 613 (2016) (in restitution context, “[e]vidence is sufficient if it affords a reasonable basis to estimate the loss”).

### III

Pascla next argues that because he lacks the ability to pay it, \$26,000.00 in restitution is an unconstitutionally excessive fine. Pascla did not raise this

argument below, and the record is inadequate to determine Pascla's ability to pay restitution. Thus, we decline to reach the merits of Pascla's argument.

Under RAP 2.5(a), we “may refuse to review any claim of error which was not raised in the trial court.” A party may raise a claimed error for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). But “[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Here, it is undisputed that Pascla was indigent at sentencing. However, the record does not show he will be unable to pay restitution in the future. Although Pascla asserts on appeal that he has no future ability to pay, he points to no evidence in the record to support that assertion, and he concedes that his projections as to the number of years it may take to fully pay restitution are hypothetical. Furthermore, the record reflects that Pascla has training as a painter and a carpenter, that he can maintain employment in these trades when he is sober, that he will still be relatively young when his term of confinement ends, and that he will receive support from his family at that time. The record before us does not permit review of the question whether Pascla will lack a future ability to pay restitution. This forecloses a finding of manifest constitutional error as required to justify review of an issue raised for the first time on appeal. See State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009) (manifest error inquiry is focused on “whether the error is so obvious on the record that the error warrants appellate review”); cf. State v. Ramos, No. 82818-5-I, slip op. at 7 (Wash. Ct. App. Nov. 7,



2022) (reviewing excessive fines claim raised for first time on appeal where defendant was homeless at the time of his underlying offense, had been incarcerated since, and where, based on the record, it was “reasonable to assume . . . that [the defendant] has no current ability to pay restitution and accrued interest and, when released in five years, will have a limited ability to do so”), <https://www.courts.wa.gov/opinions/pdf/828185.pdf>.

We affirm.

*Birk, J.*

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WE CONCUR:

*Cohen, J.*

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*H. E. J.*

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83052-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: January 5, 2023

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