Supreme Court No. 101868-1
Court of Appeals Nos. 386546 & 386554
(Consolidated Cases)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAIME RAFAEL RIVERA,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Jaime Rivera, petitioner here and appellant below, asks this Court to review the split opinion of the Court of Appeals in *State v. Rivera* (No. 38654-6-III & No. 38655-4-III, filed March 16, 2023), attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Article I, section 14 prohibits the government from imposing "excessive fines," and it requires courts consider a person's ability to pay when determining whether a fine is proportionate or excessive. Mr. Rivera is indigent. Does the imposition of the $500 VPA violate the excessive fines clause? RAP 13.4(b)(1),(3),(4).

C. STATEMENT OF THE CASE

Jaime Rivera was resentenced pursuant to *State v. Blake* in 2021.[1] CP 40. At this resentencing, the State agreed three of Mr. Rivera's prior convictions must be vacated, and the court imposed a new sentence based on the correct offender score. CP 40. Mr. Rivera was indigent. RP 23. The judgment and sentence maintained the discretionary criminal filing fee, supervision fees, victim penalty, and DNA fee. CP 30-31, 40-41; 9-10 (COA 386554).

Mr. Rivera challenged these fees on appeal. Appx. 1. He argued the court erred in ordering discretionary fees because he was indigent, and that the victim penalty assessment was an excessive fine under Article I, section 14. Appx. p. 5. The State conceded the

[1] 197 Wn.2d 170, 481 P.3d 521 (2021).

discretionary fees should be stricken, and the Court of Appeals remanded for those fees to be removed from Mr. Rivera's judgment and sentence. Appx. p.3.

In a split opinion, two judges upheld the constitutionality of the $500 victim penalty assessment. Appx, p. 4. The dissenting judge would declare the penalty assessment unconstitutional as applied to Mr. Rivera, citing his dissenting opinion in *State v. Rowley,* 38281-8-III (Wash. Ct. App. Jan 19. 2023) (Fearing, J. dissenting), *petition for review pending,* No. 1017189.

D. ARGUMENT

The crime victim penalty assessment violates article I, section 14, and the Eighth Amendment.

This Court should grant review because the $500 VPA assessment—a penalty imposed on every person convicted of a felony regardless of their ability to pay—violates the excessive fines clause of the Washington

Constitution and this Court's case law prohibiting excessive fines. RAP 13.4(b)(1), (3), (4).

a. Article I, section 14 prohibits excessive fines and *Long* established factors courts must consider in determining whether a fine is excessive.

Like the Eighth Amendment, article I, section 14 of the Washington Constitution prohibits the imposition of "excessive fines." Const. art. I, § 14; *see* U.S. Const. amend. VIII. Because "the United States Constitution establishes a floor below which state courts cannot go to protect individual rights," article I, section 14 must be at least as protective as the Eighth Amendment. *State v. Sieyes,* 168 Wn.2d 276, 292, 225 P.3d 995 (2010).

Thus, recent cases enforcing the Eighth Amendment prohibition against excessive fines dictate the minimum requirements of the state constitution. *See City of Seattle v. Long,* 198 Wn.2d 136, 158-77, 493

P.3d 94 (2021); *Jacobo Hernandez v. City of Kent,* 19 Wn. App. 2d 709, 497 P.3d 871 (2021).

In *Long,* this Court reversed the imposition of a $547 fine as unconstitutionally excessive. *Long,* 198 Wn.2d at 173. Mr. Long had illegally parked his truck for more than 72 hours, and the city impounded the truck and assessed a $946 "charge" for the impoundment. *Id.* at 143. A magistrate reduced the charge to $547 and waived the $44 ticket for illegal parking. *Id.* Despite the reduction and waiver, the Supreme Court held the remaining fine was unconstitutional. *Id.* at 173.

This Court applied a multifactor test for evaluating whether a fine is "grossly disproportionate" and therefore unconstitutionally excessive. *Id.* at 173. A court must consider: (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 for the violation, (4) the extent of the harm caused, and (5) the person's ability to pay the fine. *Id.*

Applying the test to Mr. Long, this Court noted that a parking infraction is "not particularly egregious," the infraction was not related to other criminal activity, the other penalties were minimal, and the harm to the city was negligible. *Id.* at 173-74. Most importantly, Mr. Long "had little ability to pay $547.12." *Id.* at 174. He had a monthly income of $400-700 dollars, lived in his truck, and had $50 in savings. *Id.* It was "difficult to conceive how Long would be able to save money for an apartment and lift himself out of homelessness while paying the fine and affording the expenses of daily life." *Id.* at 175.

This Court concluded that the fine was unconstitutionally excessive. *Id.* at 176. Allowing that a

"reasonable" fine might pass constitutional muster, it reversed the imposition of a $547 fine and remanded for further proceedings. *Id.*

The Court of Appeals applied *Long* in *Jacobo Hernandez*, 19 Wn. App. 2d at 720. There, Kent police arrested Mr. Jacobo Hernandez after he delivered methamphetamine to a buyer in his car, and he was later convicted and sentenced in federal court. *Id.* at 721. The city of Kent then initiated forfeiture proceedings to seize the vehicle Mr. Jacobo Hernandez used to deliver drugs. *Id.* Mr. Jacobo Hernandez claimed that without the car, which was valued at $3,000-$4,000, he had $50 to his name. *Id.* He acknowledged that the forfeiture was authorized by statute, but he argued it violated the excessive fines clause. *Id.*

After considering criteria unique to the forfeiture context, the Court of Appeals addressed proportionality under the *Long* factors. *Id.* The court concluded that "an individual's financial circumstances *can* make a forfeiture grossly disproportionate, even when all other factors support a finding otherwise." *Id.* at 724 (emphasis in original). The court found that all factors other than ability to pay weighed *against* a conclusion that the forfeiture was disproportionate and unconstitutionally excessive. *Id.* But Mr. Jacobo Hernandez's indigence trumped all other factors. *Id.* The court held the forfeiture violated the prohibition on excessive fines. *Id.* at 726.

Rather than apply the appropriate test to determine the constitutionality of the victim penalty assessment, two judges in Mr. Rivera's case wrongly believed they were "bound" by *State v. Curry,* 118

Wn.2d 911, 918, 829 P.2d 166 (1992). Appx. p. 6. The dissenting judge correctly recognized *Curry* "did not directly address the excessive fines clause" and did not control. *Rowley,* 38281-8-III, at 6 (Fearing, J. dissenting). The Dissent recognized that "in addition to the lack of an explicit holding, the ruling conflicts with recent Washington Supreme Court rulings." *Id.* Further, *Curry* thwarts this Court's "current practice and policy of freeing indigent offenders from the shackles of legal financial obligations." *Id.* at 6. And it "conflicts with the stark and pronounced language of the excessive fines clause." *Id.* at 6-7.

The VPA is a "penalty assessment" that is only imposed as a result of a criminal conviction. RCW 7.68.035. A mandatory fine imposed as a result of a criminal conviction is punitive, and *Long* and *Jacobo Hernandez* apply.

b. Like the fines in *Long* and *Jacobo Hernandez*, the fine imposed on Mr. Rivera is unconstitutionally excessive.

The imposition of a $500 VPA upon Mr. Rivera is unconstitutionally excessive under *Long* and *Jacobo Hernandez.*

While Mr. Rivera's crimes certainly caused harm to the victims, this harm is specifically accounted for in the court's restitution order. CP 31. The restitution was minimal, and is an accurate reflection of the limited monetary harm of his offenses. CP 31. Mr. Rivera's crimes were not related to other illegal activities. Rather they were the result of untreated chemical dependency. RP 18. Thus, the first factors in the proportionality analysis should be considered neutral.

But even if some of the above factors weigh against a finding of excessiveness, Mr. Rivera's

inability to pay demonstrates that the imposition of the VPA upon him was unconstitutionally excessive. *See Jacobo Hernandez,* 19 Wn. App.2d at 724–25.

The trial court found Mr. Rivera indigent for purposes of waiving all other LFOs, and for purposes of appeal. RP 21–23; CP 95. Mr. Rivera is serving a lengthy prison term and will face great challenges to finding employment and stability once released from prison. *See, e.g.,* Brett C. Burkhardt, *Criminal Punishment, Labor Market Outcomes, and Economic Inequality: Devah Pager's Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*, 34 Law & Soc. Inquiry 1039, 1041 (2009) (ex-offenders face major challenges in reentering the formal economy).

Thus, the imposition of the $500 VPA upon Mr. Rivera is disproportionate and excessive in violation of article I, section 14. This Court should grant review

because the two-judge decision is contrary to the Constitution and this Court's case law. RAP 13.4(b)(1),(3),(4).

E. CONCLUSION

This Court should accept review because the victim penalty fee which violates article I, § 14, the Eighth Amendment, and is inconsistent with this Court's decision in *Long*. RAP 13.4(b)(1), (3), (4).

In compliance with RAP 18.17, this document contains 1,475 words.

DATED this 6th day of April 2023.

Respectfully submitted,

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APPENDIX

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CASE # 386546
State of Washington v. Jaime Rafael Rivera
YAKIMA COUNTY SUPERIOR COURT No. 1710170939

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

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FILED

MARCH 16, 2023

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	
	)	No. 38654-6-III
Respondent,	)	(Consolidated with
	)	No. 38655-4-III)
v.	)	
	)	
JAIME RAFAEL RIVERA,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

STAAB, J. — Jaime Rivera pleaded guilty to various offenses in 2018 under two separate superior court cause numbers. At sentencing the court found Rivera indigent and waived some legal financial obligations (LFOs) while imposing others including the victim penalty assessment, in both cases. In 2021, Rivera was resentenced, in both cases, pursuant to *Blake*.[1] The court again found Rivera indigent and maintained the previously imposed LFOs, in both cases. On appeal, Rivera challenges the imposition of the LFOs. In addition to arguing that the fees and assessments should not have been imposed, Rivera contends for the first time on appeal that the victim penalty assessment violates the constitutional prohibition against excessive fines.

[1] *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021).

We accept the State's concession on several LFOs, but deny Rivera's constitutional challenge and uphold the imposition of the victim penalty assessment in both of his cases.

BACKGROUND

In 2018, Jaime Rivera pleaded guilty to first degree kidnapping, two separate counts of first degree robbery, first degree burglary, and second degree unlawful possession of a firearm. The sentencing court found that Rivera was indigent in both of his cases and waived discretionary LFOs but imposed mandatory fees including the criminal filing fee, victim penalty assessment, community custody supervision fee, and the DNA[2] fee.

In 2021, Rivera was resentenced pursuant to *Blake*. *Id.* At resentencing, the State agreed that some of Rivera's prior convictions needed to be vacated, and the court resentenced him based on a corrected offender score. In both cases, the sentencing court maintained the previously imposed criminal filing fee, supervision fee, victim penalty assessment, and DNA fee.

Rivera appeals the imposition of the fees and assessments, in both of his cases.

[2] Deoxyribonucleic Acid.

ANALYSIS

Rivera argues that the discretionary LFOs imposed on him, including the criminal filing fee, DNA fee, and DOC[3] supervision fee, should be struck because he was found to be indigent. The State concedes that these LFOs should be struck and agrees to enter an order amending Rivera's judgment and sentence documents to remove these fees. We agree.

On remand, the court should strike the criminal filing fee (RCW 36.18.020(h)), and the DNA fee (RCW 43.43.7541). The DOC supervision fees should also be struck. *State v. Wemhoff*, 24 Wn. App. 2d 198, 519 P.3d 297 (2022) (LAWS OF 2022, ch. 29 applies to all cases on direct appeal as of July 1, 2022.).

Rivera contends that the $500 victim penalty assessment imposed on him is unconstitutional under article I, section 14 of the Washington State Constitution which prohibits excessive fines. The State argues that because Rivera did not object to the imposition of the victim penalty assessment at the trial court level, he is precluded from raising the issue on appeal. Alternatively, the State contends that if we do reach the issue of the constitutionality of the victim penalty assessment imposed on Rivera, it was nevertheless constitutional. We find that Rivera is not precluded from raising the issue on appeal but that the victim penalty assessment is not punitive and is therefore not

[3] Department of Corrections

subject to constitutional challenges under the excessive fines clause. Further, even if the victim penalty assessment is considered punitive, the victim penalty assessment imposed on Rivera was nevertheless constitutional.

The threshold question is whether Rivera can raise the issue of the constitutionality of the victim penalty assessment imposed on him for the first time on appeal. RAP 2.5(a) states that a party may raise, for the first time on appeal, a "manifest error affecting a constitutional right." To meet RAP 2.5(a) an appellant must demonstrate "(1) the error is manifest, and (2) the error is truly of constitutional dimension." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In other words, the appellant must "'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights.'" *Id.* (quoting *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). In analyzing whether a constitutional error is manifest, "[w]e look to the asserted claim and assess whether, if correct, it implicates a constitutional interest." *Id.*

Here, Rivera contends that the issue is manifest because the trial court ordered him to pay an amount that he cannot pay. Further, Rivera argues that the error is of a constitutional magnitude because it affects his constitutional right to not face disproportionate punishment in the form of an excessive fine. The issue, if Rivera is correct, is of constitutional magnitude and it is manifest in that it potentially requires him

to pay an excessive fine. Consequently, we will address the issue of whether the victim penalty assessment imposed on Rivera was unconstitutional. RAP 2.5(a).

Turning to the merits of the issue, Rivera contends that the victim penalty assessment is a "fine" and therefore punitive because it is described as a "penalty assessment" and is only imposed as a result of a criminal conviction. RCW 7.68.035. Rivera states, without citation to authority, that a mandatory fine imposed as a result of a criminal conviction is punitive. We disagree and hold that the victim penalty assessment is not punitive and is not excessive.

"The excessive fines clause 'limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense.'" *City of Seattle v. Long*, 198 Wn.2d 136, 159, 493 P.3d 94 (2021) (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)). Consequently, a qualifying "fine" is a payment to a sovereign as punishment for an offense. *Id.* Therefore, to trigger the excessive fines clause, a sanction must be a "fine" and it must be "excessive." *Id.* at 162.

Under RCW 7.68.035, a superior court must include a victim penalty assessment in a criminal judgment regardless of a defendant's financial status. *State v. Seward*, 196 Wn. App. 579, 587, 384 P.3d 620 (2016); *State v. Mathers*, 193 Wn. App. 913, 917 n.1, 928-29, 376 P.3d 1163 (2016). For purposes of the excessive fines clause, Washington courts have held that this assessment is neither punitive nor excessive.

In *State v. Humphrey*, 139 Wn.2d 53, 62, 983 P.2d 1118 (1999), the Supreme Court recognized that the victim penalty assessment established a new liability, not a penalty. The Court went on to note that the victim penalty assessment does not "constitute punishment for the purposes of ex post facto determination." *Id.* at 62 n.1. In *Mathers*, 193 Wn. App. at 920, this court considered a constitutional challenge to the victim penalty assessment. Following the reasoning in *Humphrey*, the court held that "the [victim penalty assessment] fee is [ ] not punitive in nature." *Id*.

In *State v. Curry*, 118 Wn.2d 911, 918, 829 P.2d 166 (1992), the Supreme Court held that "the victim penalty assessment is neither unconstitutional on its face nor as applied to indigent defendants." In *State v. Tatum*, our court acknowledged that while *Curry's* reasoning is vague, we are bound by its holding when applying the victim penalty assessment to indigent defendants. 23 Wn. App. 2d 123, 130, 514 P.3d 763 (2022).

More recently, in an unpublished decision, Division One cited *Humphrey* in support of its holding that the victim penalty assessment did not violate the excessive fines clause because it was non-punitive. *State v. Clement*, No. 82476-7-I, slip op. at 2-3 (Wash. Ct. App. Mar. 21, 2022) (unpublished), https://www.courts.wa.gov/opinions /pdf/824767.pdf.

In addition to our conclusion that the victim penalty assessment is not punitive, Rivera has failed to demonstrate that the assessment is excessive. In determining whether

a fine is excessive, courts focus on a defendant's ability to pay. *Long*, 198 Wn.2d at 162. This determination is made at the time the government attempts to collect the fine, not when the fine is imposed. *Curry*, 118 Wn.2d at 917-18.

Division One and Division Three have both recognized that the excessive fines prohibition is not implicated until and unless the government attempts to enforce the collection of the fine at a time when the defendant is unable to pay. *State v. Widmer*, No. 82744-8-I (Wash. Ct. App. Mar. 21, 2022) (unpublished), https://www.courts.wa.gov /opinions/pdf/827448.pdf; *State v. Rowley*, 38281-8-III, slip op. at 1-2 (Jan. 19, 2023) https://www.courts.wa.gov/opinions/pdf/382818_unp.pdf. Here, Rivera has not demonstrated that the State has made any attempt to collect the assessment.

Rivera acknowledges both *Clement* and *Widmer* but urges us to depart from their reasoning because they are unpublished and they are "wrongly decided." Br. of Appellant at 16. In *Rowley* we declined to depart from these two cases and we do so in this case as well. Instead we hold that the victim penalty assessment is not punitive and is therefore not subject to constitutional challenge under the excessive fines clause and even if it were considered a fine, Rivera has failed to show it is excessive. In sum, we conclude that the victim penalty assessment is neither punitive nor excessive in the record before us. Consequently, we reject Rivera's contention that the $500 victim penalty assessment imposed on him violated the excessive fines clause.

We remand with instructions to strike the criminal filing fee, the DNA fee, and DOC supervision fee from both cases.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

I CONCUR:

Lawrence-Berrey, A.C.J.

No. 38654-6-III (consolidated with No. 38655-4-III)

FEARING, J. (concur in part and dissent in part): I concur in the majority's ruling that strikes the criminal filing fee, DNA fee, and Department of Corrections supervision fee from Jaime Rivera's judgment and sentence.

I dissent in the majority's ruling affirming the $500 victim penalty assessment imposed on Jaime Rivera. The State concedes to the indigency of Rivera. I would declare the penalty assessment unconstitutional as applied to Rivera as explained in my dissenting opinion in *State v. Rowley*, 38281-8-III, slip op. at 1 (Wash. Ct. App. Jan. 19, 2023) (unpublished), https://www.courts.wa.gov/opinions/pdf/382818_unp.pdf.

I concur in part and dissent in part:

Fearing, J.

Fearing, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

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. 38654-6-III**, 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: April 6, 2023

WASHINGTON APPELLATE PROJECT

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