Supreme Court No. 101876-2
(COA No. 83720-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES GRIEPSMA, JR.,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

James Griepsma 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. Griepsma appealed the trial court's imposition of the victim penalty assessment. In a published decision, the Court of Appeals affirmed. *State v. Griepsma*, ___ Wn. App. 2d ___, 525 P.3d 623 (2023).

C. ISSUE PRESENTED FOR REVIEW

The United States Constitution and the Washington Constitution prohibit the government from imposing "excessive fines." A court-ordered payment is a fine if it is at least partially punitive. The plain language of the victim penalty assessment statute makes clear it is partially punitive. The Court of Appeals decision affirming this financial penalty without applying the analysis required by the Excessive Fines Clause conflicts with decisions by this Court and the United States Supreme Court,

and it is an important constitutional issue of broad import requiring this Court's guidance.[1] RAP 13.4(b).

D. STATEMENT OF THE CASE

In 2019, Mr. Griepsma boarded a bus holding a box of items from the food bank. CP 4. Unfortunately, some eggs in the box had broken and began to leak. CP 4. After he refused to get off the bus, he was convicted of several offenses. CP 4, 48-59. The trial court sentenced him and ordered him to pay a $500 victim penalty assessment. CP 53.

After Mr. Griepsma's first appeal, the Court of Appeals remanded for a new sentencing hearing because the State failed to prove his offender score. *State v. Griepsma*, 17 Wn. App. 2d 606, 621, 490 P.3d 239 (2021). At the new sentencing hearing in 2022, the court again imposed the $500 victim penalty

[1] This issue is currently pending in this Court and is currently scheduled for this Court's consideration on its June 6, 2023 motion calendar. Petition for Review, *State v. Rowley*, No. 101718-9 (Wash. Feb. 14, 2023).

assessment. CP 94; RP 1/10/22 at 10. The Court of Appeals affirmed this fine. *Griepsma*, 525 P.3d at 623.

E. ARGUMENT

1. The Court of Appeals's refusal to apply the Excessive Fines Clause to the victim penalty assessment violates the constitutional prohibition against disproportional 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 punish," including the government's ability to require a person to make monetary 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 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). Second, the court

must evaluate whether the fine is grossly disproportional to the offense. *Id*. at 334; *City of Seattle v. Long*, 198 Wn.2d 136, 163, 493 P.3d 94 (2021).

The Court of Appeals wrongly declined to apply the Excessive Fines Clause to the mandatory victim penalty assessment. *Griepsma*, 525 P.3d at 623. It did so by relying on cases that were decided before the United States Supreme Court and this Court made clear the Excessive Fines Clause applies so long as the payment is "at least partially punitive." *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019); *Long*, 198 Wn.2d at 163. The Court of Appeals decision erodes this important constitutional protection and conflicts with decisions by this Court and the Court of Appeals, and it warrants this Court's review. RAP 13.4(b)(1)-(4).

a. The victim penalty assessment is partially punitive.

In Washington, all persons convicted of a crime must pay a victim penalty assessment. RCW 7.68.035(1)(a). The plain language of the statute makes clear this fine is punishment.

"If a statute's meaning is plain on its face, courts must follow that plain meaning." *Long*, 198 Wn.2d at 148 (citing *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). In *Long*, a person challenged the costs associated with the city's impoundment of his truck. *Id*. at 163. This Court examined the municipal code's plain language, which states: "Vehicles in violation of this section are subject to impound . . . in addition to *any other penalty* provided for by law." *Id.* at 164 (emphasis in original, quoting SMC 11.72.440(E)). This Court held the plain language indicated the impoundment costs were partially punitive and, therefore, they were subject to the Excessive Fines Clause. *Id.*

The plain language of the victim penalty assessment statute mirrors the language in the municipal code in *Long* and demonstrates it is partially punitive. The victim penalty assessment statute reads: when a person is found guilty of a crime, "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." RCW 7.68.035(1)(a) (emphasis added). Like the municipal code in *Long*, the statute plainly characterizes the victim *penalty* assessment as a penalty. *See State v. Rowley*, No. 38281-8-III, 2023 WL 312890 at *8-9 (Wash. Ct. App. Jan. 19, 2023) (unpublished)[2] (Fearing, J., dissenting) (citing *Bajakajian* and *Long*); *see also State v. Rivera*, No. 38654-6-III, 2023 WL 2531748 at *3 (Wash. Ct. App. Mar. 16, 2023) (unpublished)[3] (Fearing, J., concurring in part and dissenting in part). The victim penalty assessment serves in part to punish, and it is subject to the Excessive Fines Clause.

In addition to the plain language, the victim penalty assessment has the hallmark characteristics of a punitive fine: it is payable to the government, and it is punishment for an offense. *See Bajakajian*, 524 U.S. at 327-28; *State v. Kinneman*, 155 Wn.2d 272, 278, 119 P.3d 350 (2005) ("Punishment

[2] Cited pursuant to GR 14.1(a).
[3] Cited pursuant to GR 14.1(a).

includes both imprisonment and other criminal sanctions," such as statutory penalties.). The victim penalty assessment is not solely remedial; it is imposed as a blanket fine as part of a person's sentence, and it funds the criminal legal system. *Rowley*, 2023 WL 312890 at *8 (Fearing, J., dissenting). It is at least partially punitive, and it triggers the protections of the Excessive Fines Clause.

The Court of Appeals avoided the issue of whether this payment is subject to the Excessive Fines Clause and broadly held the victim penalty assessment is constitutional. *Griepsma*, 525 P.3d at 623. In reaching its conclusion, the Court of Appeals relied on *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992) and *State v. Tatum*, 23 Wn. App. 2d 123, 514 P.3d 763 (2022). *Id*.

But *Curry* did not involve a claim under the Excessive Fines Clause, which the Court of Appeals acknowledged in *Tatum*. *Tatum*, 23 Wn. App. 2d at 130 ("*Curry*'s reasoning is vague; it does not state precisely what constitutional arguments

it took into account." (citing *Curry*, 118 Wn.2d at 913-17)). One judge on a different division of the Court of Appeals has also recognized this: "*Curry* did not directly address the excessive fines clause." *Rowley*, 2023 WL 312890 at *5 (Fearing, J., dissenting); *see Rivera*, 2023 WL 2531748 at *3 (Fearing, J., concurring in part and dissenting in part).

Although decisions from this Court are binding, *Curry* simply did not address the excessive fines issue. The Court of Appeals's *stare decisis* concerns are misplaced. As this Court has recognized, "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *In re Pers. Restraint of Swagerty*, 186 Wn.2d 801, 810 n.1, 383 P.3d 454 (2016) (quoting *Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925)). Contrary to the concurring opinion in this case, the Court of Appeals was not being "asked to disregard a directly controlling decision of our Supreme Court because, the appellant's counsel believes, a

new, different, and better argument is being advanced than was advanced by those poor, timid, uninspired attorneys who lost the previous cases." *Griepsma*, 525 P.3d at 623 (Dwyer, J., concurring). And even so, Mr. Griepsma's argument is a valid and sound basis for departure. *See State v. Blake*, 197 Wn.2d 170, 177 n.4, 481 P.3d 521 (2021) (notwithstanding previous precedent upholding the drug possession statute, due process issue was a matter of "first impression").

In addition, *Curry* was decided long before the United States and this Court held the Excessive Fines Clause applies to all payments that are "at least partially punitive." *Timbs*, 139 S. Ct. at 659; *Long*, 198 Wn.2d at 163. Indeed, "the ruling [in *Curry*] conflicts with recent Washington Supreme Court rulings." *Rowley*, 2023 WL 312890 at *5 (Fearing, J., dissenting). "*Curry* also thwarts the Washington Supreme Court's current practice and policy of freeing indigent offenders from the shackles of legal financial obligations" and "conflicts

with the stark and pronounced language of the excessive fines clause." *Id.*

The plain language of the statute makes clear the victim penalty assessment is at least partially punitive. The Court of Appeals failed to contemplate how binding precedent on excessive fines jurisprudence affects its assessment of this mandatory fine. Instead, it chose to follow precedent that did not address the issue. Under both *Timbs* and *Long*, the victim penalty assessment is subject to the constraints of the Excessive Fines Clause.

b. The victim penalty assessment is unconstitutionally excessive.

The Court of Appeals concluded its analysis without examining whether the victim penalty assessment is grossly disproportional to the offense. But proportionality requires consideration of the offense and the person's ability to pay. Because the victim penalty assessment has no connection to the offense and because Mr. Griepsma cannot pay, it violates the constitutional prohibition against excessive fines.

"'The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality.'" *Long*, 198 Wn.2d at 166 (quoting *Bajakajian*, 524 U.S. at 334). A fine is excessive if it is "grossly disproportional to the gravity of a defendant's offense." *Id*.

The court considers several factors to determine whether a fine is grossly disproportional, including "(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, and (4) the extent of the harm caused." *Id*. at 167 (citations omitted).

In *Long*, this Court added a fifth requirement: the person's ability to pay. *Id.* at 171. This is because "excessiveness concerns more than just an offense itself; it also includes consideration of an offender's circumstances." *Id*. This Court examined the "weight of history" and the present day impact of fines on the homelessness crisis to conclude the excessive fines analysis requires a "thorough examination" of

the person's circumstances. *Id*. "[A]n individual's ability to pay can outweigh all other factors." *Jacobo Hernandez v. City of Kent*, 19 Wn. App. 2d, 709, 723, 497 P.3d 871 (2021), *review denied* 199 Wn.2d 1003 (2022).

In addition, punishment must be proportional to the offense and serve legitimate goals. *See Timbs*, 139 S. Ct. at 688 (noting the Magna Carta required that fines must "'be proportioned to the wrong'" (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989))). Punishment "lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham v. Florida*, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

The Excessive Fines Clause is particularly concerned with fines that are "employed 'in a measure out of accord with the penal goals of retribution and deterrence,' for 'fines are a source of revenue.'" *Timbs*, 139 S. Ct. at 689 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979 n.9, 111 S. Ct. 2680,

115 L. Ed. 2d 836 (1991)). When fines are used to fund government operations, courts have a financial incentive to impose fines without a legitimate penological purpose; "it makes sense to scrutinize governmental action more closely when the State stands to benefit." *Harmelin*, 501 U.S. at 979 n.9. As this Court recognized, "'offender-funded justice' comprises much of the funding for criminal justice across the country." *Long*, 198, Wn.2d at 172. This is also true in Washington State. Cynthia Delostrinos, Michelle Bellmer, & Joel McAllister, State Minority & Justice Comm'n, The Price of Justice: Legal Financial Obligations in Washington State, 5 (2021) (Washington courts "rely primarily upon county and municipal governments for funding"), 57 (distribution of victim penalty assessment funds to counties and courts).

The victim penalty assessment is not proportioned to any offense: it is a mandatory fine imposed on all criminal defendants, regardless of the offense or the extent of harm. *See Rowley*, 2023 WL 312890 at *12. This fine is also government

revenue and funds government programs. RCW 7.68.035(4). Moreover, Mr. Griepsma cannot pay. The victim penalty assessment is grossly disproportional.

2. This Court should grant review on this important constitutional issue of broad import.

This issue is a significant question of law under both the Washington Constitution and the United States Constitution, and it is an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(3)-(4).

Legal fines impact numerous Washingtonians, have a disparate impact on low-income communities and communities of color, and reinforce systemic inequities. *See Timbs*, 139 S. Ct. at 688; *Long*, 198 Wn.2d at 172; Katherine Beckett & Alexis Harris, State Minority & Justice Comm'n, The Assessment And Consequences of Legal Financial Obligations In Washington State, 30 (2008). They devastate a person's reentry and their ability to access housing, employment, or financial stability. *State v. Blazina*, 182 Wn.2d 827, 837, 344 P.3d 680 (2015); *Rowley*, 2023 WL 312890 at *6 (Fearing, J.,

dissenting) (discussing the impact of financial punishments, including collection fees, continued court involvement, and the additional barriers on a person's ability to restore civil rights, access housing, or gain employment).

This Court's guidance is necessary to direct lower courts on how to exercise their authority to impose mandatory fines such as the victim penalty assessment to comport with the constitutional right to be free from excessive fines. Dissenting and concurring opinions by the Court of Appeals also demonstrate the need for a conclusive opinion from this Court. *Compare Rowley*, 2023 WL 312890 at *2-12 (Fearing, J., dissenting) *and Rivera*, 2023 WL 2531748 at *3 (Fearing, J., concurring in part and dissenting in part), *with Griepsma*, 525 P.3d at 623 (Dwyer, J., concurring). This Court should grant review.

F. CONCLUSION

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

I certify this brief contains 2,472 words and complies with RAP 18.17.

Respectfully submitted this 7th day of April 2023.

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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. JAMES DAVID GRIEPSMA, JR., Appellant.	No. 83720-6-I PUBLISHED OPINION

BOWMAN, J. — James David Griepsma Jr. challenges imposition of the mandatory $500 victim penalty assessment (VPA) as unconstitutional under the excessive fines clauses of the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington State Constitution. We affirm.

FACTS

On March 25, 2019, a jury convicted Griepsma of six counts of third degree felony assault of a law enforcement officer and one count of third degree malicious mischief, a gross misdemeanor. The trial court imposed concurrent midrange sentences of 55 months for each of the assault convictions and a concurrent 364-day sentence for the misdemeanor, but it did not order community custody. The court also imposed the mandatory $500 VPA.

Griepsma appealed. We affirmed Griepsma's convictions but remanded for resentencing to recalculate his offender score and to impose statutorily

mandated community custody.[1] On remand, the trial court imposed the same sentence but also imposed community custody.[2]

Griepsma appeals imposition of the mandatory $500 VPA.

ANALYSIS

Griepsma argues that the VPA "violates the excessive fines clause[s] because it is disproportional punishment." We disagree.

Both our federal and state constitutions deny the government the power to issue excessive fines. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); WASH. CONST. art. I, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."). The Eighth Amendment is applicable to the states by incorporation through the Fourteenth Amendment's due process clause. Timbs v. Indiana, __ U.S. __, 139 S. Ct. 682, 686, 203 L. Ed. 2d 11 (2019); U.S. CONST. amend. XIV. For a fine to be unconstitutional, it must be at least partially punitive and it must be excessive. City of Seattle v. Long, 198 Wn.2d 136, 162-63, 493 P.3d 94 (2021).

The VPA statute mandates imposition of the assessment. RCW 7.68.035(1)(a) provides:

> When any person is found guilty in any superior court of having committed a crime . . . , there shall be imposed by the court upon such convicted person a penalty assessment. The assessment

[1] State v. Griepsma, 17 Wn. App. 2d 606, 624, 490 P.3d 239, review denied, 198 Wn.2d 1016, 495 P.3d 844 (2021).

[2] The parties later filed a stipulated motion to amend the judgment and sentence to set "a fixed term of community custody of [five] months" for each assault conviction and to strike the discretionary supervision fees due to Griepsma's indigency. The court granted the motion.

> 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.

In State v. Curry, 118 Wn.2d 911, 918, 829 P.2d 166 (1992), our Supreme Court held that the VPA "is neither unconstitutional on its face nor as applied to indigent defendants." Recently, in State v. Tatum, 23 Wn. App. 2d 123, 130-31, 514 P.3d 763, review denied, 200 Wn.2d 1021, 520 P.3d 977 (2022), we rejected an excessive fines challenge to the VPA, explaining that we are bound by our Supreme Court's decision in Curry. And we reached the same conclusion three months later in State v. Ramos, __ Wn. App. 2d __, 520 P.3d 65, 79 (2022) ("As this court explained in Tatum, we are bound by [Curry's] holding here.").

Griepsma argues the VPA is partially punitive and we should not rely on Tatum or Curry. According to Griepsma, Tatum "avoided the issue of whether the [VPA] is punitive," and Curry "did not address a challenge under the excessive fines clause[s]." But in Tatum, we recognized that the reasoning in Curry is "vague" and "does not state precisely what constitutional arguments it took into account." 23 Wn. App. 2d at 130. Still, we explained that the Supreme Court's concern in Curry was "the constitutionality of the [VPA] statute in light of indigent defendants' potential inability to pay." Id. So, we are bound by the holding in Curry. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) ("once [our Supreme Court] has decided an issue of state law, that interpretation is binding on all lower courts").

Finally, Griepsma contends we should not follow Curry because our Supreme Court would likely reach a different result now. He argues this is so

because recent United States and Washington Supreme Court cases make clear that the VPA is at least partially punitive. In support of his argument, Griepsma points to Timbs, 139 S. Ct. at 686-91 (holding that the Eighth Amendment is an incorporated protection applicable to the states through the Fourteenth Amendment and that civil in rem forfeitures are fines for purposes of the Eighth Amendment when they are at least partially punitive), and Long, 198 Wn.2d at 162-63 (holding that the impoundment of a vehicle and associated costs amount to fines subject to an excessive fines clause analysis). But neither case addresses whether the VPA is subject to an excessive fines clause analysis. And our Supreme Court denied review of Tatum after Timbs and Long were issued. Tatum, 200 Wn.2d at 1021. Regardless, it is the province of the Supreme Court to decide whether to reject its prior holdings. See State v. Jones, 159 Wn.2d 231, 239 n.7, 149 P.3d 636 (2006) (it is the Supreme Court's prerogative alone to reject a prior holding).

We affirm the trial court's imposition of the mandatory $500 VPA.

Bremmer, J.

WE CONCUR:

Birk, J.

Dwyer, J.

State v. James Griepsma Jr., No. 83720-6-I

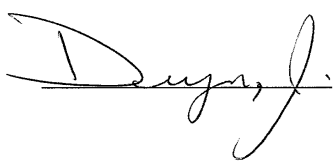
DWYER, J. (concurring) — Once again we are asked to disregard a directly controlling decision of our Supreme Court because, the appellant's counsel believes, a new, different, and better argument is being advanced than was advanced by those poor, timid, uninspired attorneys who lost the previous cases.

My view on this entreaty is borrowed from a fine jurist, writing for a talented panel, several years ago.

> Repeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989). . . . If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to come up with a novel argument.

Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago, 567 F.3d 856, 857-58 (7th Cir. 2009) (Easterbrook, C.J., authoring; Bauer, J. and Posner, J., concurring), rev'd on other grounds sub nom. McDonald v. City of Chicago, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

If I could have said it better, I would have.



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